

## Heading Toward the Finish Line: The Obama Presidency and American Politics

by Bert A. Rockman

*As the presidency of Barack Obama nears its end and attention has begun shifting to the ambitions of a multitude of aspirants for their party's nomination, this article explores two main issues: Why are expectations for what presidents can (and say they will) accomplish so far out of balance with what is achievable? And what are the implications of continuing deadlock in the American political system for the de facto balance of power among its political institutions, particularly regarding presidential unilateralism and the importance of the courts in deciding controversial political issues? The article examines President Obama's evolution over various points in his presidency from making some efforts to reduce the partisan discord in Congress and the country to concluding there was virtually no possibility for that ambition to succeed. Consequently, over time Obama became less willing to bargain with the opposition Republicans, especially as their status turned out to be more powerful over the course of his presidency. Instead, he became more reliant for the most part on his party's base and on exercising the controversial discretionary powers of the presidency.*

*Die Präsidentschaft Obamas geht langsam dem Ende zu und die Aufmerksamkeit richtet sich allmählich auf die Vielzahl von Präsidentschaftsanwärtern und deren Bemühungen um eine Nominierung innerhalb ihrer Partei. Vor diesem Hintergrund geht der Beitrag zwei Fragen nach: Warum sind die Erwartungen an das, was die Präsidenten erfüllen können (und was sie sich vornehmen) so weit von dem entfernt, was realistischer Weise erreicht werden kann? Und: Welche Folgen verbinden sich mit der andauernden Blockade des US-amerikanischen politischen Systems für das de facto Machtgleichgewicht zwischen den politischen Einrichtungen, vor allem mit Blick auf den präsidentiellen Unilateralismus und die Bedeutung der Gerichte bei umstrittenen politischen Entscheidungen? Zur Beantwortung verweist der Autor auf eine Reihe evolutorischer Prozesse im Verlauf der Präsidentschaft, nicht zuletzt die gescheiterten Bemühungen Obamas, die parteipolitischen Blockaden im Kongress wie im ganzen Land zu mindern. In der Folge war der Präsident immer weniger bereit, mit der Opposition zu verhandeln, zumal deren Position immer stärker wurde. Stattdessen konzentrierte sich Obama auf seine Parteibasis und die Nutzung seines umstrittenen Ermessenspielraums.*

## I. Introduction

“I suppose it can truthfully be said that Hope is the only universal liar who never loses his reputation for veracity”<sup>1</sup>

The presidency of *Barack Obama* is nearing its terminus. Some important parts of his legacy remain to be determined during the time remaining in his administration. And some of these will be beyond his administration’s control. From the public’s standpoint, *Obama* has been both up and down throughout his tenure, although it is not surprising to note that approval from his own party’s identifiers has been great and that disapproval from the opposition party identifiers has been even greater. Unfortunately for *Obama*’s agenda, his public approval was at its perigee before each of his two midterm elections during which Republicans gained ascendancy in at least one and then in both chambers of Congress after which (perhaps *because* of which) his public approval recalibrated upward.

*Obama*’s presidency has had both substantial achievements as well as substantial frustrations. Similarly, his supporters have sometimes been more frustrated than gratified by his record, while his opponents have been more or less constantly resistant to his initiatives. That would not be surprising given the current conditions of American politics and the powerful partisan divide that exists – a divide that is rooted in deep ideological, geographic, and experiential differences but also in the politics of strategic maneuvering among the political leadership stratum.

As other recent presidents, *Obama* came to office emphasizing a transformational presidency filled with hope and change.<sup>2</sup> After all, few political leaders anywhere but especially in the U.S. are apt to get very far by emphasizing incremental adjustments even if that is more often than not what results. Some of the conditions that *Obama* has faced are those that most U.S. presidents with active agendas confront. Other conditions, however, have made it even more difficult for an active agenda to be ratified and implemented. As with many presidents before him, and facing a divided or opposition Congress that is implacably hostile to nearly all of his agenda, he has chosen to pursue a unilateral pathway – more so as his administration is in its closing stages. He also has refused to negotiate with the opposition party during a number of crises that he has labeled

<sup>1</sup> Robert Green Ingersoll, Noted 19<sup>th</sup> Century American Rationalist, Lawyer, and Attorney General of the State of Illinois

<sup>2</sup> Rockman, B.A.: The *Obama* Presidency: Hope, Change, and Reality, in: Social Science Quarterly, 93/5 (2012), 1065-1080.

“manufactured” as when it threatened to shut down the government by not passing a budget, when for the second time it threatened to hold the government’s debt obligations captive to achieving its agenda, and when it threatened to not pass a budget for the Homeland Security Administration held hostage unless *Obama* walked back his executive order allowing a three year prohibition against deportation of certain classes of undocumented immigrants. He has proven himself to be an adept negotiator by refusing to concede ground when a compromise would achieve only losses for his agenda with no concomitant gains. His willingness to call the opposition’s bluff, however, made their antagonism toward him even stronger.

This article is about *Obama*’s presidency. But necessarily, it is even more fundamentally about the conditions of governance in the current American political system, a set of conditions described by two sage observers of American politics as “It’s Even Worse Than It Looks”.<sup>3</sup> Consequently, in the first half of this article I summarize the set of conditions that affect governance in contemporary Washington and that resulted in great advantages for the politically intense segments of the population and for big money political donors. In the second part, I assess how *Obama* has coped with these conditions and where he has succeeded and failed.

## II. Hope Springs Eternal

As of July 2015, nearly a year and a half, from the date that the American electorate will choose a new president, there are now twenty announced candidates, fifteen Republicans and five Democrats (although one is formally an Independent and self-described Socialist). Attention, as it often does, has already begun to drift away from the current president to the masses of aspirants vying for the job. They, as with *Obama* and others prior to him, have emphasized their credentials as strong and principled leaders who will bring forth great changes and provide hope for a better day. None of them, of course, are likely to be able to do any such thing.

In fact, in the lengthy and very expensive run-up to the nomination and the election, the skills of politics and the ability to respond, at least rhetorically, to particular segments of the respective party bases will be crucial. Enthusiasms account for a great deal in determining who supplies financial resources and the

<sup>3</sup> Mann, T.E. / N.J. Ornstein: *It’s Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, New York, 2012.

motivation to go to the ballot box or attend a party caucus. The current – and now longstanding – polarization of American party politics means that it is at least as important, if not more so, for candidates to cater to the enthusiasts in their parties and to mobilize their respective political bases than it is to appeal to the median voter as reflected in the classic dominant two party model of *Anthony Downs*.<sup>4</sup> The political skills that might be useful in governance are de-emphasized while the rhetoric of passion, utopian (or dystopian) remakes of the world are at the forefront. Bombast helps to draw attention to oneself in a crowded field. And bombast typically reflects a total eclipse of both rationality and reality. In a tradition seemingly begun by *Ronald Reagan*, some candidates, in fact, have recently begun to quote lines from cinematic heroes that make promises or threats than can be delivered only by screenwriters but virtually never in the real and very complicated world.<sup>5</sup> Doing so apparently adds a dose of swagger to a candidate's otherwise thin credentials. The line between reality and fantasy has become startlingly thin.

Candidates vastly overpromise what it is that they can conceivably accomplish particularly in a system that under the best of circumstances is not designed to govern very proficiently or even perhaps at all. Politicians most everywhere do this to a degree but the gap between aspirational language and governing capabilities seems especially stark in the United States. The undisciplined rattling of the tongue is in great disproportion to the actual power to do. A recent study of American presidents notably has found that presidents who have been voted into office by wide margins have spoken little of their mandate to govern whereas those whose elections have been narrow have used the language of mandates to justify their actions more frequently.<sup>6</sup>

No government, much less any single leader, possesses anywhere near the power to produce the sort of stable prosperity that is the centerpiece of political rhetoric. In the U.S. hope for transformational outcomes is frequently placed in the idea of

<sup>4</sup> *Downs, A.*: An Economic Theory of Democracy, New York, 1957.

<sup>5</sup> *Ronald Reagan* referenced a *Clint Eastwood* cinematic line in his showdown with the air traffic controllers who threatened to strike. *Reagan* uttered the line challenging the air controllers union to “make my day” implying that if they did so, they would be doomed – or, in this case, dismissed. Senator *Marco Rubio* of Florida, regarded as a potential top tier aspirant for the Republican nomination, speaking to a group of like-minds laid out a threat to the Islamic State (IS) with the following words of the Irish actor, *Liam Neeson*, in one of the versions of a formulaic film called *Taken* “I (we) will find you and I (we) will kill you.” Described that way, it certainly sounds easy. Unfortunately, it's not. But it is a great applause line to the unthinking.

<sup>6</sup> *Azari, J.*: Delivering the People's Message: The Changing Politics of the Presidential Mandate, Ithaca, New York, 2014.

individual leadership, the presumption being that strong and skilled leaders can overcome the realities that politics as well as any rational understanding of the limits of policy place on that aspiration. Despite these realities, *Bill Clinton*, as a presidential candidate, noted that he was the man from Hope. (Hope, Arkansas, was the town in which he was raised.) *Barack Obama* talked about bringing forth hope and change. *John F. Kennedy* went beyond the rational in claiming that America would bear any burden and pay any price to secure freedom. It sounded mellifluous and inspirational but was fundamentally insane.

Understandably, politicians at the pinnacle of leadership are rarely apt to say that many things are outside of their control or of the government's control. Nor are they likely to say that continuity is to be valued. That would be realistic but not particularly inspirational. To be paid attention and invested with the aspirations of the politically mobilized as well as the less clearly articulated hopes of the mass public, candidates vying for best-in-show raise expectations that far more often than not diminish their credibility and standing once in office should they attain office. In most cases, a president's level of popular support will never be higher than the day they enter office. A recent study documents this vast gap between public expectations and performance in office.<sup>7</sup> In an often quoted statement, a former long term Governor of the state of New York, the late *Mario Cuomo*, noted that political campaigns are done in poetry but governing is done in prose. To put it more literally, one is focused on great ends and objectives; the other on the specific mechanisms and means by which some modest portion of those objectives might reasonably be achieved.

### III. Barriers to Governance

So far, I have focused on the implausible nature of politicians' efforts to gain support from their base and the vast gap between what they say and what, even under the best of circumstances, they can do. Whether politicians or their campaign managers understand it or not, what most accounts for whether they can be successful – admittedly a word in need of definition -- has to do with circumstances that are largely out of their control. Two students of the 2012 presidential campaign in the U.S. systematically discount many of the factors commonly attributed to the campaigns of the two candidates and their parties and, instead, contend that the improving economy was the most important factor in favor of

<sup>7</sup> *Waterman, R., C.L. Silva, / H.C. Jenkins-Smith: The Presidential Expectations Gap: Public Attitudes Concerning the Presidency, Ann Arbor, MI, 2013.*

the incumbent president (*Obama*).<sup>8</sup> In 2008, of course, the economic crisis appeared to play the decisive role in elevating *Barack Obama* to the presidency and harming the prospects of the nominee of the incumbent party.

Several other elements, however, also come into play beyond the stubbornness of complex realities to be tamed by political rhetoric. These include the institutional characteristics of the American political system, the frozen nature of party alignments and the ideological gulf between the parties, the quasi-democratic method of selecting candidates for party nomination to office, and the lack of clarity in political outcomes at the national level in the U.S. These elements, in regard to their consequences, are, in fact, inter-related.

### 1. American Governing Institutions

The American system of checks and balances, of separated institutions elected separately, and ultimate, if unintended, subservience to a set of non-elected judges is a system that was designed by skeptics of power and of human nature. The founding of the American state occurred during the period of the European enlightenment, and while some of its founders were deeply influenced by the enlightenment, those who played the most important role in designing U.S. governing institutions were skeptics of human nature. By design, they created a government of limited authority influenced only moderately by popular sovereignty and with strong constraints on its capacity to be cohesive. It is essentially a pre-modern relic with imperfect adaptations to address both matters of popular sovereignty in the form of electoral outcomes and the instrumentation necessary to achieve administrative capability. The late Harvard political scientist, *Samuel P. Huntington*, noted many decades ago that while a modern society had evolved in the U.S., its political institutions remained distinctly pre-modern.<sup>9</sup>

A consequence of this divided authority is that presidents have much less power to affect matters than is commonly believed at least in the extravagant rhetoric of the aspirants to the office. However, they are usually held accountable for that which is beyond the realm of the possible. In other words, all U.S. presidents in modern times are faced with heavy expectations and, with but rare exceptions, exceedingly limited resources.<sup>10</sup> Consequently, they are often driven to expand

<sup>8</sup> *Sides, J./L. Vavreck*: The Gamble: Choice and Change in the 2012 Presidential Election, Princeton, NJ, 2013.

<sup>9</sup> *Huntington, S.P.*: Political Modernization: America vs. Europe, in: *World Politics*, 18 (1966), 378-414.

<sup>10</sup> *Neustadt, R.E.*: Presidential Power, New York, 1960; *Howell, W.G.*: Thinking About the Presidency: The Primacy of Power, Princeton, New Jersey, 2013.

their authority unilaterally.<sup>11</sup> So, one concern is whether presidents strive to break through the institutional barriers to do by fiat what they are otherwise constrained to do by the multiple veto system. A second concern is whether in the absence of political capacity the courts end up often handling the most difficult political decisions and come themselves to be seen as part of the great political divide.

One generalization that is abundantly clear is that it is extremely rare for presidents to have sufficient leeway to get done what they wish to get done. Whether or not they should have that discretion is truly a matter of political philosophy and, probably more realistically, who it is that happens to be president in relation to an observer's political preferences. However, the difficulty of moving agendas, even under conditions of unified government, is limited unless a president has huge and politically cohesive majorities in both chambers, but especially in the Senate. The arcane rules of the Senate require 3/5 of the body (60 members) to close debate, a process known as cloture. Debate in the Senate need not be germane to the actual business at hand. Thus it is possible for those who choose to hold the floor to talk endlessly about any subject or set of subjects in some inchoate fashion. For the vast proportion of the Senate's history, cloture motions were rarely invoked and when continuous debate was actually carried out, it was often on regional grounds. In fact, the inability of the Senate to operate on the will of the majority led to the judiciary rather than the elected political institutions being at the center of the lengthy train of events at least until 1964 that eventually resulted in the elimination of government sponsored apartheid in the southern states. And in the late 1990s, as a convenience to its members, the Senate no longer required an actual "filibuster" – the term given to a continuous commentary on the Senate floor – and instead allowed cloture motions to be made prior to an actual vote for the bill on the floor.<sup>12</sup> If the extraordinary majority required for the cloture motion failed, the bill would not be brought to the floor. So, subsequently, it became common to say that a bill had failed in the Senate even though it had a majority because it lacked the super-majority required for cloture.

<sup>11</sup> *Moe, T.M.*: The Politicized Presidency, in Chubb, J.E./P.E. Peterson (eds.): *New Directions in American Politics*, Washington, 1985; *Howell, W.G.*: *Power Without Persuasion: The Politics of Direct Presidential Action*, Princeton, NJ, 2003; *Rudalevige, A.*: *The New Imperial Presidency: Renewing Presidential Power after Watergate*, Ann Arbor, MI, 2005.

<sup>12</sup> *Koger, G.*: *Filibustering: A Political History of Obstruction in the House and Senate*, Chicago, 2010.

The institutions designed to ensure that no one could hold the ultimate power to govern made bargaining and compromise necessary, but over time the power to impede and the vast chasm of political division may also have significantly increased the gap between expectations about leadership and what it can plausibly deliver.

## 2. The Intensity of Party Polarization

In most party systems dominated by two major parties, there has been a tendency for the vote share of the two largest parties to decline. The costs of entry into the political marketplace in the U.S. are very steep, however, and although there is currently one independent governor and three senators who can be so characterized, each of the senators has attached themselves to either the Republican conference (one) or the Democratic caucus (two). While confidence in the two main parties has declined and the proportion of nominal party identifiers has declined, the two parties remain very much at the center of American politics even as each, but especially the Republicans, have drifted farther to their respective wings.<sup>13</sup> In one sense, the parties do remain composed of diverse constituencies but not ones that overlap across the parties. The Republicans traditionally have had a business wing and that has changed only in nuance – the Republicans’ dominance tends to be in older established industries, including the manufacturing and extractive industries and often among small businesses and relatively less in high technology industries, such as Silicon Valley, and the financial industry. They usually favor lower taxes, less government regulation in their affairs, and smaller government at least in the abstract. Especially since the *Reagan* era, however, cultural conservatives and religious fundamentalists also have become a key Republican constituency – one that is deeply intense and mobilized. Overlapped with this constituency is a largely nativist one, similar to such movements that have developed in France, Britain, Australia, Denmark and other developed countries. Of course, there are also other elements that emphasize a so-called “muscular” foreign policy and are more widely spread across the Republican constituencies.

<sup>13</sup> *James, F.*: Political Scientist: Republicans Most Conservative They Have Been in 100 Years, in: It’s All Politics: Political News from NPR, <http://www.npr.org/sections/itsallpolitics/2012/04/01>; In *Frank James’s* interview with *Keith Poole*, one of a tandem of political scientists with *Howard Rosenthal*, who created a computer algorithm to estimate ideological distance in congressional members’ voting historically, *Poole* asserts that “starting with the 1976 election in the House the Republican caucus has steadily moved to the right .... The Senate caucuses have also moved to the right. Republicans are now farther to the right than they’ve been in 100 years.”



The Republican constituency has a markedly pale hue. Its modal voter is a white male from a small town or rural area.

The Democrats key constituencies are labor unions, people on the lesser end of the economic rewards system, people of color, especially African Americans, intellectuals, urbanites, those who are secular, and women, especially single women in the labor market. The modal Democratic voter is apt to be urban and overall either less or more educated than the typical Republican voter but overall also less well-off. The Democratic constituency tends to be more secular and to draw heavily from minority populations, often, ironically, doing best from among the most educated of them. Such cleavages are not dissimilar to those in Europe, although they may be spread over more parties.

Over time, these diverse world views have hardened along party lines for several decades. There is no overlap whatsoever in Congress between the parties where once there were more conservative Democrats and more liberal (progressive) Republicans who did overlap. Party alignments have frozen and perspectives as well as interests have hardened. The parties, for example, have provided clearer cues to move their mass public constituencies to make decisions based on their party identifications.<sup>14</sup> Similarly, experimental evidence indicates that controlling for other identities, party identification provides the strongest barrier against cooperation and empathy.<sup>15</sup>

What does all of this imply? Certainly it means that there is little room for trans-party coalitions and the ability to achieve blocking coalitions is especially strong in the Senate. Notably, cloture votes in the Senate increased dramatically during the *Clinton* administration, went up further during the *George W. Bush* administration, and hit dramatic new highs during the *Obama* administration where practically every vote required a cloture motion and where a failed vote did not mean that the motion lacked a majority but rather that it lacked the necessary 60 vote super-majority.<sup>16</sup> Despite the big gains made by Democrats in 2008, they

<sup>14</sup> Druckman, J., E. Peterson/R. Slothuus: How Elite Partisan Polarization Affects Public Opinion Polarization, in: *American Political Science Review*, 107 (2013), 57-79.

<sup>15</sup> Iyengar, S./S.J. Westwood: Fear and Loathing Across Party Lines: New Evidence on Group Polarization., in: *American Journal of Political Science*, forthcoming.

<sup>16</sup> Between 1917 and 1970, there were a total of 49 cloture votes. Between 1971 and 1980, the figure almost doubled to 91. During the *Reagan* years (1981-1989) there were 112 cloture votes. During the *George H.W. Bush* presidency (1989-1993), the figure was 72, actually a per annum increase over the *Reagan* years. During the *Clinton* administration (1993-2001), the number of cloture votes rose to 207 which increased substantially during the *George W. Bush* presidency (2001-2009) to 276. Only part way through 2015, the number under *Obama* is the most by far, 417, although now that the Republicans are

actually only had this 60 vote majority for about 9 months in *Obama's* first two years between the time Senator *Arlen Specter* changed parties from Republican to Democrat and the death of Senator *Ted Kennedy* in August of 2009 and the surprise election of a Republican successor in January 2010. In this highly intensified political climate and with most members of the House and even the Senate worried more about who could challenge them from within their own party for being insufficiently pure than their fear of competition from the other party, it would be very difficult to achieve political compromises. Compromises are typically based on generating sufficient side payments to gain support or finding an equilibrium point where each side thought it had nothing more to gain. It is entirely plausible that substantive policy accommodation had now largely become irrelevant, and that the game was mainly about political positioning on behalf of each party's base and, to some extent, the ability of the respective congressional leaders to find some space between party ideologues tilting at windmills and a strategy that might potentially cut party losses. The driving forces of partisanship ironically have made congressional party leaders at once more powerful than they had been since the dawn of the 20<sup>th</sup> century and yet more contingent upon bringing along the growing numbers of their most radical members.

In sum, a system designed to foster bargaining has instead produced a system in virtually perfect deadlock – a situation that entices presidents to move unilaterally and often leaves crucial decisions to the courts. In his careful analysis, *A Preface to Democratic Theory* (1956), the American political scientist, Robert Dahl, argued that the success of the American political system was ultimately more a function of the pragmatism of U.S. political elites (perhaps even then a somewhat Panglossian view) than of the architecture of U.S. political institutions.<sup>17</sup> It is, however, possible that what was once thought to be an accommodationist political culture simply had to do with the extent to which sharply different political perspectives and interests were spread across the parties rather than clearly articulated by them. And it may also be influenced by how candidates get chosen to stand for office within the parties – a process that has moved from established political leaders to the political attentives and ideological enthusiasts within the parties.

back in the Senate majority, it may be that Democrats might use the filibuster to protect the White House from using the veto, [www.senate.gov/pagelayout/reference/cloture](http://www.senate.gov/pagelayout/reference/cloture).

<sup>17</sup> *Dahl, R.A.: A Preface to Democratic Theory, Chicago, 1956.*

### 3. Candidate Selection

Traditionally, candidates for public office were selected to be a party's nominees directly or indirectly through party elites who were often interested in having the candidate win office so that patronage opportunities for the party could be enhanced. As nomination processes opened up, especially from the 1970s onward through primary elections and state political conventions, greater emphasis was placed on adherence to political ideology. Primary elections and other devices to "democratize" candidate selection typically produce low turnouts dominated by intense partisans. This has happened in both parties. The Republicans have had an array of candidates, especially in senatorial primaries in 2010 and 2012, who upset long time politicians but then proved to be either too radical or simply sufficiently bizarre that they became untenable in the general election which might otherwise have been won by Republicans. In a few instances, the candidate defeated in the primary ran anyway in the general election and won.<sup>18</sup> However, the current Republican House Conference has a significant minority composed of members who were endorsed by the activist right wing faction known as the "Tea Party". Moreover, Republican candidates who do not carefully nurture their "right" flank may well become vulnerable to intra-party competition. The Republican House Majority Leader, *Eric Cantor*, was defeated in his party primary in 2014 by an obscure economics professor. *Cantor* was regarded as a staunch conservative but apparently insufficiently so by the party enthusiasts who are a disproportionate share of primary electorates. However, party activists may also push nominees to the presidency so far to the right or left in order to obtain their party's nomination that they become vulnerable in the general election.

The days of the closed door processes are now long gone and to imply that a candidate is in the good graces of any set of elites probably tarnishes that candidate far more than it embellishes the candidate's credentials. Political intensity and huge amounts of money have helped foster a political class that is more ideologically charged and more beholden to those with seemingly unlimited reserves of cash. To be regarded as an insider or deal-cutter is dangerous to one's political health. Standing on principles, whatever they may be and however conveniently tailored to a candidate's needs, resonates especially with the party

<sup>18</sup> In 2006, for instance, Senator *Joseph Lieberman*, the Democrats' nominee for Vice-President in 2000, was defeated in the Democratic primary by an anti-war candidate. Lieberman then ran as an independent and won re-election. In 2010, Senator *Lisa Murkowski* lost the Republican primary to a Tea Party backed candidate, but then ran a write-in campaign and was re-elected.

enthusiasts. *Hibbing* and *Thiess-Morse*<sup>19</sup> note that Americans think there is too much partisanship yet also hold deal making in low regard. The two attitudes are in monumental contradiction to one another. The party enthusiasts, however, are typically uninterested in deal making and more interested in bold stands. This is the challenging political environment in which *Barack Obama* has been president.

#### 4. Unclear Political Outcomes

There are few moments in the course of U.S. electoral history in which the political tides have been markedly unidirectional. And those moments have become even more rare. The *Obama* election in 2008 with enhanced Democratic majorities in both chambers of Congress was one of those moments but it was short-lived. Briefly it had a super majority in the Senate. In fact, since 1969 and taking the end of the current president's term and the end of the current Congress into account, some form of divided government will have existed for 35 of the 48 years between 1969 and 2017, and for only approximately 9 months did the party that held the presidency also hold a super-majority in the Senate.<sup>20</sup>

While some presidential elections have been abundantly decisive, the net results often have not been. While *Richard Nixon* in 1972 and *Ronald Reagan* in 1984 won massively in their re-elections, *Nixon* failed to bring in a Congress of his party and *Reagan* was still unable to gain a majority in the House of Representatives. While *George H. W. Bush* won by a significant, though less than landslide, margin in 1988, the Democrats retained control of both chambers of Congress. And while *Bill Clinton* won re-election by a reasonable margin in 1996 (though not with a majority), he still had to face a Congress controlled by Republicans. Only *Barack Obama's* 2008 victory (significant but of less than landslide proportions) brought with it a favorable political composition in Congress, one that would prove to be short-lived when the Democrats suffered overwhelming defeat in the 2010 midterm congressional elections. All other presidential elections of the last four plus decades were by thin margins and the election of 2000 was fundamentally decided in a highly divisive vote by the U.S. Supreme Court that fell exactly upon the party lines of the presidents who nominated the justices.

<sup>19</sup> *Hibbing, J.E. Thiess-Morse: Stealth Democracy: Americans' Beliefs About How Government Should Work*, Cambridge, UK, 2002.

<sup>20</sup> During the 107<sup>th</sup> Congress, the composition of the Senate was evenly split, but as the presiding officer of the Senate, the sitting Vice-President, *Richard Cheney*, put the Republicans in the majority until a Republican senator from Vermont became an independent. That gave the Democrats a 50-49-1 majority which held up until the 2002 election during which the Republicans gained seats.

The upshot of this fractionated politics is that governing resources are scarce. The U.S. system requires fluidity for agreements to be reached. But there are few lubricants available as the lines of political cleavage now lie nearly exclusively along the party axis. It is not surprising ultimately to see presidents justify initiatives or ignore enforcing prior laws based on what they deem to be their executive powers. When presidents are imperiled, they may decide to become imperial.

### III. The *Obama* Presidency

Turning to *Barack Obama's* presidency, its phases have largely corresponded to the state of his political resources. It is well worth noting also that one resource that has been absent now for many years is trust in government to do the right thing. Although there are some modest oscillations in trust, the trend line since the mid-1960s is quite clear. It has fallen dramatically and partially recovered only for intervals. The loss of confidence makes the selling of new initiatives a risky undertaking. It also made the necessity of providing liquidity in the financial system and the salvaging of American industries during the darkest days of the Great Recession of 2008-09 appear to be a purely corrupted collusion between the government and those institutions that many people thought were responsible for the disastrous downturn in the economy.

#### 1. Phase One – The Dawn of the *Obama* Presidency and Disillusion

*Barack Obama* came to the White House during a time of serious economic crisis. Although he didn't plan on this, it was clear that his most immediate priority was to stem the worldwide financial crisis, rescue near bankrupt but iconic industries, and provide stimulus to the economy. Reform of the financial system would come later and although legislation was passed and signed to provide increased regulation of the financial sector, much of the law remained vague and therefore would be determined in implementation. Where vagueness exists, however, well-heeled interests fill the void and bureaucratic drift often ensues.<sup>21</sup>

In retrospect, *Obama's* rescue of the banks prevented a freeze in liquidity since the banks were reluctant to trade in "assets" of unknown origin – exactly the sort that they had packaged together. This action which was hardly a popular one

<sup>21</sup> Kwak, J.: Complexity, Capacity, and Capture, in: Carpenter, D./Moss, D. (eds.): *Cultural Capture and the Financial Crisis*, New York, 2013; Laugesen, M.J.: Policy Complexity and Professional Capture in Federal Rulemaking, Paper presented at annual meeting of the American Political Science Association, 2013.

prevented the Great Recession from turning into a Great Depression in the United States. But it was unpopular among so-called “Main Street” (as distinct from Wall Street) Republicans who were laissez-faire purists and it was also unpopular on the left wing of the Democratic Party where the dominant thought was that the people who should be rescued were those whose properties were now worth less than their mortgaged value. During the transition after the election, the incoming *Obama* administration, especially its nominee for Treasury Secretary, Tim Geithner, worked closely with the *Bush* administration’s outgoing Treasury Secretary, *Hank Paulson*. *Geithner* was the outgoing president of the New York Federal Reserve while *Paulson* had previously been an executive with Goldman Sachs, the prince of Wall Street investment banks. The appearances of this collusion between two bankers did not sit well with those imbued with more populist impulses. While the bank rescue actually began under the *Bush* administration, it was the *Obama* administration that formalized the rescue and in some cases bought into the financial institutions and appointed its managers. This level of intervention did not sit well with the congressional Republicans who saw in it the specter of socialism and government control of the economy.

Similarly, in order to prevent both General Motors (GM), once (and now again) the largest automobile manufacturer in the world and Chrysler (now a part of Fiat), the *Obama* administration bought into the industry and changed management teams and helped bring about new labor agreements with the United Auto-workers Union (UAW). Both GM and Chrysler were rescued and became viable entities. The other auto manufacturer, Ford Motors, was on sound financial footing and had the largest international presence of the three major manufacturers.

The deep intervention of the federal government in the financial and manufacturing sectors was reminiscent of the early period of the *Franklin Roosevelt* administration as the government took active measures to combat the effects stemming from the worldwide Great Depression. For many Republicans, however, these efforts confirmed that *Obama* was genuinely a socialist bent on having the government run the economy. Interestingly, in restructuring labor agreements in the automobile industry that would have new workers come in at half the prevailing wage structure, it could more realistically be said that the rescue was of the industry rather than its workers. Some socialist!

Early on, the administration working especially with the Speaker of the House of Representatives, *Nancy Pelosi*, the effective leader of the then House Democratic majority, put together a stimulus package of \$750 billion that it submitted to Congress. The package broke down into several components: (1) a classic public

works spending bill; (2) tax cuts that would find their way into pay checks (thus ironically becoming less noticeable); (3) help for distressed state and local governments, especially in fortifying essential public safety (police and fire) services and also education in order to prevent massive layoffs; and (4) investments in green energies. The stimulus bill's significant tax cut component was, among other things, designed to free up consumer spending but also to get Republican political support for the legislation. That, however, was to no avail. There were zero Republican votes for the stimulus package in the House and only three in the Senate – one of whom switched to the Democratic Party only a month later providing it with a super-majority.

Republicans hammered all of these efforts as being too much government intrusion in the economy and also too much spending as the federal deficit ballooned to about a trillion and a half dollars as a function of the recession's cyclical effects, past expenditure commitments to the wars in Iraq and Afghanistan, the large tax cuts from the prior administration, and the stimulus package. Since the Republicans were adamantly resistant to tax increases and against reductions in defense spending, their focus was on the stimulus package.

Although a larger stimulus package might well have brought down unemployment rates faster, the stimulus along with the rescues of the financial and automobile manufacturing sectors largely prevented an economic calamity.<sup>22</sup> However, even though the recession was officially over about midway through 2009, the economy was slow to recover. The bleeding stopped but the patient was still not in rapid recovery. In essence, *Obama* failed, as most leaders do, to get credit for what he *prevented* which was a worsening of the economic crisis. The visible signs of recovery were still faint. Perhaps a more vigorous and short term stimulus package would have spurred a more rapid recovery but there was no political possibility of that. *Obama's* economic policy was successful but not noticeable, and that, of course, helped lead to a profound political defeat in the 2010 mid-term elections.

*Obama* came to Washington promising to set aside the deep partisan conflicts that roiled Washington. *George W. Bush* said much the same. Yet, both *Bush* and *Obama* were themselves the most polarizing presidents of recent times. The political environment would ultimately lead each president to cater to his political base. But the stimulus package which the *Obama* administration designed to help generate Republican support (a third of the package consisted of tax cuts)

<sup>22</sup> Graham, J.D.: *Obama on the Homefront: Triumphs and Setbacks*, Bloomington, IN, forthcoming.

was the first of several encounters that would lead *Obama* away from trying to find points at which the administration and the opposition could negotiate differences. The ideological and constituency differences between the parties were simply too profound. Thus, a political scientist writing in *The New York Times* observed quite correctly that in the political environment that has evolved in the U.S., the reality of a “partisan presidency” is inevitable and has little to do with whether or not a president has the opposition leaders or members over for drinks or whether he is good at socializing with them.<sup>23</sup> This assessment is now the conventional wisdom among political scientists but it has not necessarily penetrated to popular commentary. To be blunt, the political landscape is not susceptible to either inspirational speeches (the so-called “bully pulpit”) and threats or the softer side of emphasizing social courtesies or building personal relationships.<sup>24</sup>

Indeed, further evidence of the futility of *Obama*’s effort to bring at least some Republicans along with him was exhibited in the signature legislative achievement of his administration, his health care reform proposal known as the Affordable Care Act. Not a single Republican in either chamber voted for the legislation despite the fact that many key elements of the bill originated at the American Heritage Foundation, a Republican allied think tank, in the late 1980s. *Newt Gingrich*, then the Republican floor leader in the House, supported the idea of an individual mandate to purchase insurance. It fit well with the Republican narrative of requiring individuals to take responsibility. *Obama* indicated early on that he would have preferred a single payer system around which the Medicare model, dating back to 1965, was created but reality dictated that a completely new system of health care insurance for the general population was politically unfeasible and he needed the support or at least absence of opposition from existing stakeholders in the convoluted system of American health care.<sup>25</sup> *Obama* tried to find support from within the Republican membership of the Senate Finance Committee and appeared willing to deal but no deal was ever forthcoming. In fact, he waited until after Senator *Kennedy*’s death in August of 2009 at which point the Democrats briefly lost their super-majority until the Democratic Governor of Massachusetts made a temporary appointment to fill the seat

<sup>23</sup> Nyhan, B.: Our Unrealistic Hopes for Presidents, in: *The New York Times*, Sunday Review, 14 (2014), 3.

<sup>24</sup> Edwards, G.C.: *On Deaf Ears: The Limits of the Bully Pulpit*, New Haven, CT, 2009.

<sup>25</sup> Rockman, B.A.: Administrative Capacity and the U.S. Health Care Reform – Deeper Still ‘in the Web of Politics’, paper presented at the Transatlantic Policy Consortium Conference, 2013.



before a special election was to be held early in the new year for the remainder of *Kennedy's* term.

The ACA was a very controversial piece of legislation designed to provide near universal coverage, provide incentives for people to enter the insurance market if they were not otherwise covered by their employer, provide incentives and sanctions to arrest the rate of health care costs, to create tax liability on extravagant forms of health insurance plans, increase taxes on certain medical supplies and services that would benefit from increased sales, and commit employers with 50 or more employees to offer health insurance to their full time workers. It made insurance portable and eliminated insurers' denials or cancellations due to pre-existing conditions. Despite this – or perhaps because of it – the reform taken as a whole was not particularly popular although support and opposition cleaved along predictable party lines.

Some have noted that *Obama* paid a big political price in the massive loss of congressional seats in 2010 for pushing the health care law as a legislative priority.<sup>26</sup> It is hard to separate the health care legislation from other issues that *Obama* was associated with and the fact that low turnout elections such as those in 2010 and 2014 favor the highly mobilized who are usually mobilized because of their anger. Notably by 2010, the U.S. was still running big deficits, economic growth was still modest, and while lenders were being bailed out those in debt were being squeezed. Furthermore, the *Obama* agenda sought to control carbon admissions through a cap and trade scheme that had once been favored by Republicans – yet another indication of *Obama's* efforts to placate at least some Republicans. This was not popular in fossil fuel regions of the U.S. and Republicans quickly pounced on that vulnerability. Added to this, where mobilization counts Republicans tend to hold the advantage. Democrats, especially as labor unions have weakened, have a less mobilized base and those who were easily mobilized were often disappointed with the scope and pace of *Obama's* transformational promises. Although Democrats lost across the board, they especially lost their more moderate wing as Republicans swept the southern and plains states.

Undoubtedly, both the secular-religious divide and the integrationist-nativist divide played a role. *Obama* was popular among the seculars and the integrators and deeply unpopular among the intensely religious and nativists. At one point

<sup>26</sup> *Edwards, G.C.*: *Overreach: Leadership in the Obama Presidency*, Princeton, NJ, 2012; *Graham*, op. cit.

about 45% of Republican identifiers believed that *Obama* was actually not born in the United States.<sup>27</sup>

While the health care law would gain in approval once its benefits came into play, it was affected both by the courts and by the nature of the federal system in the U.S. The states in the U.S. have a high degree of autonomy granted by the 10<sup>th</sup> Amendment to the U.S. Constitution, “the so-called “doctrine of residual powers” which essentially states that all powers not granted to the federal government are thereby reserved for the states.

In 2012 a divided Supreme Court ruled in favor of the individual mandate under the government’s taxing powers, and later in 2015 it overrode the literal language covering eligibility for federal subsidies and referenced its decision on the legislative intent. Both of those decisions, one by a 5-4 vote, the other by a 6-3 vote, upheld the law. Another aspect of the law, however, which had to do with penalties for states that failed to accept the federal government’s generous terms for expanding Medicaid – a joint federal-state program initially designed for low income people. The federal government would pay all of the costs of the Medicaid expansion for people whose income levels were above the existing criteria and slowly ratchet its subsidy down to 90% of the costs by 2020. That was the carrot. The stick was that the failure of a state to expand its Medicaid program would result in the loss of all of its Medicaid funds. The Supreme Court ruled 7-2 that this was a step too far in impinging on the autonomy of the states under the 10<sup>th</sup> Amendment. Consequently, about half of the states have signed on for the Medicaid expansion and about half have not. Those that did not were governed by Republican governors and Republican legislatures. So, the aspiration of the ACA to fully cover more of the lower income but not impoverished population was limited by the courts and by the particular character of American federalism.

Leading up to the 2010 elections, *Obama*’s major legislative achievements were the bail out of the financial institutions and the Financial Reform Act to increase federal regulation of them, the stimulus bill, and the rescue of the automotive industry, and, of course, the Affordable Care Act. Many of these enactments were convoluted. None were highly popular. The economy was only slowly perking up and the unemployment rate remained very high. The elections appeared to devastate *Obama*’s agenda for the next biennial leading up to his own re-election bid.

<sup>27</sup> Condon, S.: Poll: One in Four Americans Think *Obama* Was Not Born in U.S., in: CBS News, 2011.

In a last gasp, however, after the elections but before the new *Congress* was seated, *Obama* and the Republicans were able to hatch some deals. In return for not raising taxes on the wealthy, *Obama* was able to get an extension of unemployment benefits. After much assessment from the highest ranking military officers as to the effect of having gay and lesbian soldiers openly serve in the military, the administration and congressional Democrats were able to move legislation to that effect.

All in all, by the standards of American government, *Obama* had an impactful first two years despite the consistent opposition from the Republicans.

## 2. Phase Two – Moving Toward Re-election

With the new and radicalized Congress in session, *Obama*'s party still had the Senate but had lost six seats and their super-majority and therefore could do little to cut off Republican efforts to stall nominations or require cloture votes on virtually all matters. The loss of 64 seats in the House put the Republicans back in the majority by a substantial margin.

*Obama* met with the Republican House conference, made some jokes about his party's defeat, and uttered some routine platitudes about finding avenues for cooperation. The Republicans were having none of that and their numbers were also fortified by ideological intensity. Many of the new members on the Republican side came to office with Tea Party endorsements representing an energized ideologically intense segment of the party that, in fact, became a problem for the new House Speaker, *John Boehner*, who had great difficulties holding his cantankerous party mates together. Those given the Tea Party imprimatur were even more numerous proportionately in state legislatures.

It was clear early on that the new House majority was going to try to exercise its leverage. During the summer of 2011, it became clear the House Republicans especially wanted a showdown over government spending holding debt limit financing for the government's past obligations hostage. The debt limit financing bill is normally routine, although Republicans, when in the minority, often used the vote to express their dislike for government spending. It was all theater and also meaningless since the debt limit financing was not to finance future obligations but ones that already had come due. While Republicans offered their symbolic resistance to deficits only when Democrats were in the White House and they were in the minority, this time was different. Now, they were in the majority in the House and the president was a Democrat.

The deadline to raise the debt limit came and went. But there was enough financial flexibility that the Treasury could avoid running short of funding to pay off the obligations until early August. The Speaker of the House was having trouble holding his members together – a number of whom were willing to go to the brink and beyond to force *Obama* into deep spending reductions. *Obama* eventually tried to make a deal to increase taxes on the well-off and to cut some expenditures including some re-basing of entitlement programs. The taxing part was reasonably popular (as much as raising taxes can be) with Democrats in Congress. Altering the major social entitlement programs was not so popular with them. In the end, *Boehner* and *Obama* went back and forth trying to reach a grand deal that would buy longer term peace on the debt ceiling. But neither could sell their proposals to their respective constituencies. The Republicans faltered on taxes but wanted deep expenditure cuts whereas the Democrats wanted tax increases but avoidance of social program cuts which, aside from defense, was where the big money was.

On the very last day before the Treasury's reserves would be exhausted to meet its past obligations, a minimalist deal was reached. At the end, Speaker *Boehner* was caught on television as he walked from the caucus room where he had met with his members onto the elevator and let out an enormous sigh that was likely composed of equal parts relief and exhaustion. A committee of 12 appointed by each party's leaders in each chamber of Congress was delegated to come up with a package to avoid further crisis. As with other past efforts, this one also failed to find common ground and this assured that there would be further crises down the line. The committee, however, had a default option that would be exercised if it failed to reach an agreement. The default was that there would be a substantial across the board cut in all discretionary funding up to \$850 billion over four years – a process known as sequestration. This would affect nearly all expenditures subject to annual appropriations. There was also a more extravagant commitment to cut \$1.5 trillion dollars in non-mandated spending over a ten year period. The Democrats thought that by including defense expenditures among these cuts the Republicans would be encouraged to reach a deal. But that, as matters turned out, was not the case; spending cuts and tax reductions were of even higher priority for the Republicans. Much later, once Republicans gained control of both chambers, they sought an indirect exemption in 2015 of the sequestration rules for defense appropriations.

*Obama* appeared to come away from this experience with the view that regardless of what he did or did not do, Republicans would be implacably opposed to

him. From this point on, he was in little mood to negotiate across party lines unless a clear outcome was in sight and he made it clear that he would no longer negotiate under duress. If the Republicans now had the power to impede his administration's goals, he also had the power along with the then Democratic majority in the Senate to impede theirs. Not surprisingly, the 112<sup>th</sup> and 113<sup>th</sup> Congresses (those elected in 2010 and 2012) were among the least legislatively productive in modern times.

In the rhythm of modern American presidential administrations, presidents begin rolling into electioneering mode no later than the fourth year of their first term. The Democrats' focus was on re-electing *Obama* and holding their majority in the Senate. They managed to do both of those things and even gained a handful of seats in the House but not the majority. So renewed, *Obama* and Senate Democrats were in little mood to accept things as they were and more inclined to find ways to advance their common agenda.

### 3. Phase Three – Renewal and Frustration

The elections of 2012 basically resulted in a stand-off. Strictly speaking, the Democrats did well, retaining the presidency, adding modestly to their Senate majority, and even gaining a modest number of House seats. But clearly this result was insufficient for the President to effectively pursue his agenda through Congress.

What were the lessons that *Obama* learned from dealing with a deeply recalcitrant Republican majority in the House and the now routine delays and vetoes, allowed under Senate rules, from the Republican minority (tactics that Democrats also used when they were in the Senate minority during most of the presidency of *George W. Bush*)? One lesson was that there would be little effort to bring Republicans along as contrasted with the earlier days of the administration. Above all, *Obama* refused to participate in negotiations or seek deals when Republicans tried to paint him into a corner. He, in turn, by so doing forced his opposition into a corner and to take the blame for government shutdowns and risking debt limit forfeiture. Another lesson that *Obama* learned after a cloture vote in the Senate failed on a modest gun control measure in the aftermath of the massacre of 20 school children and 6 teachers and school personnel in December of 2012 was to circumvent Congress to the extent possible.<sup>28</sup> There were, of

<sup>28</sup> The cloture vote in question was 54-46 for invoking cloture, see: [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_114\\_1.htm](http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_114_1.htm)

course, limits to that strategy. One of those limitations was that executive discretion is to some extent hemmed in by existing statutory law although existing judicial interpretations gave considerable leeway to the executive to interpret the law. Another is that a future president might reverse course. A third is that such decisions might become a cause for litigation and thereby limit for this president and potentially future presidents their capacity to govern through executive means.

The *Obama* administration also faced a huge backlog in its nominations to executive office and also to the judiciary as a consequence of lengthy delays stemming from Republican opposition in the Senate requiring cloture votes, thereby super majorities, to bring nominations to the floor. As a consequence, the Democratic majority through creative interpretation of the Senate rules passed a restriction on cloture votes for nominees that require Senate confirmation to executive posts, requiring only simple majorities rather than extraordinary majorities to bring nominations to the floor. The Republican minority fought this change on the grounds that the Senate was not a strictly majoritarian body but the Democratic leader, *Harry Reid*, controlled the agenda and the majority and the *Obama* administration had been sufficiently frustrated by refusals to bring votes to the floor that it strongly encouraged *Reid's* tactic, known in Washington as "the nuclear option". The "nuclear option" had previously been considered in 2005 by the *Bush* administration and the then Republican leader, Senator *William Frist*, as the Democratic Senate minority blocked ten of *Bush's* nominations to the circuit courts of appeals. The resolution was that the nuclear option would not be invoked and most but not all of the blocked nominations would come to the floor.

As the Republicans' ability to veto executive appointments (ones that serve at the pleasure of the president and are thus of limited duration), they doubled down on nominations to the judiciary. Consequently, the Senate Democratic leadership at the urging, of the White House extended the majority rule to federal judicial nominations as well except for those to the Supreme Court. The Republicans were angry at this interpretation of the rules achieved through the majority leader's control of the floor. Later after the 2014 elections and in the new Congress where the Republicans had now achieved majority control of the Senate, the Republican floor leader vowed that no nominations to the appellate courts by the *Obama* administration would be considered by the new Republican major-

ity.<sup>29</sup> This is not entirely new. Late term nominations have always been controversial mainly because the presidential administration hopes to seal in its preferences while the opposition seeks to ensure that they may be in a position to fill the vacancies.

Because federal court appointments are for life tenure, these positions have profound implications as many political decisions cannot be resolved through the ostensible political processes. As a result, in the hyper-politicized climate of the U.S., appointments to the federal appellate courts have become predictably controversial and none as much as the U.S. Supreme Court with its current tight balance of five justices nominated by Republican presidents and four by Democratic presidents. Where once judicial nominees were given fairly perfunctory hearings in the Senate and rarely asked about their judicial philosophy, especially regarding matters of great political concern to the incumbent administration, they are now carefully vetted both by the presidential administration and the Senate, especially the committee that conducts hearings on nominees before they come to the floor. Prior to the *Reagan* administration (1981-89), the presidential administration was given great deference in its nominations. That ended, however, once presidential administrations began to select nominees for their responsiveness to presidential concerns. Now, Senate votes in the Judiciary Committee and on the floor regarding such nominations are often arrayed along party lines.

Beyond the issue of confirmation of nominees, however, the dilatory tactics of Republicans in the Senate were often to preserve existing balances so that when a Republican president came to office, the balances could be tilted in favor of Republican nominees. The Republicans' rationale for failing to allow *Obama's* nominees to advance to the floor was to insist that the District of Columbia Circuit Court of Appeals which often deals with regulatory procedures of federal agencies be limited to the eight judges sitting on the court because the courts' docket was insufficient to require the full complement of eleven. Put simply, the Republicans did not want three additional appointees coming from the *Obama* administration. This ultimately is what led the then Democratic leadership in the Senate to require judicial nominees, other than to the Supreme Court, to be subject to a simple majority vote.

The obstruction tactics also had applied to federal agencies that the Republicans did not like including agencies that require staggered terms of its decision-

<sup>29</sup> *McCarter, J.*: Mitch McConnell: No More Federal Circuit Judge Confirmations, 5 June 2015, in: [www.dailykos.com/story/2015/06/05/1390](http://www.dailykos.com/story/2015/06/05/1390)

making commissions and balances of no more than a margin of one along party lines. The National Labor Relations Board (NLRB), for example, certifies labor union elections to organize workplaces. It came into existence during the Franklin Roosevelt administration. There are normally five commissioners on the NLRB. However, as members' terms ended, the Senate refused to act on *Obama's* nominations, thereby affecting the legal standing of NLRB rulings. *Obama's* attempt to fill these positions through recess appointments when the Senate was not in session was countered by litigation that resulted in a unanimous ruling by the Supreme Court that *Obama* had exceeded his powers.

Beyond the nomination controversies and, in the face of executive-legislative branch friction, it was clear that the courts would come to play a very significant role in the fate of the *Obama* administration and for the future. The stakes of who gets to nominate and confirm whom have never been higher as judicial decisions so often reflect the deep partisan divisions in the overtly political world.

Within the first full year after *Obama's* re-election, he was again confronted with the Republicans' unwillingness to provide funds for the government unless the administration caved on its health care law, some provisions of which already had gone into effect. Again, the Republican House leader, *John Boehner*, found himself herding cats. The government was without formal funding for almost three weeks and all non-essential functions were in abeyance. The President decided he would not negotiate the conditions for a re-opening but would force *Boehner* to deal with his fractious membership. In the meantime, Congress in general and Republicans in particular were taking most of the heat for the government closure. In fact, the Republicans began to lose focus as to what exactly it was that they were bargaining for, if anything. One exasperated Republican House member, *Marlin Stutzman* of Indiana, asserted that the party would have to get something out of this situation though he was not sure exactly what it was.<sup>30</sup> *Obama* refused to deal and ultimately *Boehner* acted to stop the bleeding within his own party.

However, almost immediately after the shutdown episode came another struggle over the debt ceiling. Republicans sought to put it on a short leash; *Obama* refused to consider that deal and insisted that he would not be a party to episodic "manufactured crises". Ultimately, *Obama* stood firm and got a longer term deal on authorizing the debt ceiling.

<sup>30</sup> Stutzman's exact words were "we have to get something out of this. And I'm not even sure what it is." *James, F.*: NPR News, 31 December 2013, in: [www.cpp.org/news/npr-story/2013.year.pol](http://www.cpp.org/news/npr-story/2013.year.pol)



What became clear from these episodes is that *Obama* adapted his posture from seeking agreements across party lines to achieve positive direction, as he understood that, to utilizing his capabilities under the political system to thwart the ambition of what he now understood to be his implacable foes. This momentum accelerated yet further after the Democrats took another beating in the 2014 midterm elections and his party lost control of the Senate as well as losing yet more seats in the House. In this changed environment, *Obama* would now go on the offensive utilizing the tools he and his lawyers, at least in their minds, thought they possessed.

#### 4. Final Phase -- Charging toward the End

Although President *Obama*, as had his predecessors, engaged in significant unilateral actions earlier in his administration, by the time Republicans had seized control of both chambers of Congress he became more aggressive and overt in utilizing executive means to take the initiative. Earlier the White House had instructed the Justice Department to not enforce provisions of the Defense of Marriage Act (DOMA) enacted in the mid-1990s that prohibited federal recognition of same sex marriages. The White House had also given orders to curtail blanket deportations of undocumented immigrants. Republicans opposed both of these exercises of executive discretion but had few means to do much about it. The gay and lesbian population had become increasingly pro-*Obama* and the Latino population had also become a major source of Democratic Party support (resulting in 71% voting support for *Obama* in 2012). However, *Obama* himself was careful not to get too far out in front on controversial cultural and immigration issues and, in fact, his administration deported far more undocumented immigrants than had its predecessor.

But with virtually nothing to lose that wasn't already lost and with his legacy at stake, *Obama*'s ventures into executive unilateralism picked up steam and generated more political controversy. Perhaps the most controversial of these efforts was the executive order he issued to prohibit the deportation of certain sets of undocumented immigrants for a three year period thereby bringing it into the next presidential administration. The issue is currently tied up in the courts but does not look hopeful for the administration.

In the absence of legislative action on carbon and methane concentrations in the atmosphere, the Environmental Protection Agency (EPA) was directed by the *Obama* White House to issue new regulations regarding limitations on carbon emissions into the atmosphere, especially in order to meet international agree-

ments about atmospheric carbon reductions. These have proved, not unexpectedly, to be highly contested by affected interests whose concerns have been embraced by the Republican Party. Similarly, the EPA issued new regulations on non-sourced water pollution that also have been countered by affected interests. The resolution of each of these issues remains in the courts. But it is clear that the hostility toward the EPA and any enhanced role for it is currently reflected in a near solid phalanx of Republican congressional opposition and some Democrats. This turn of events is especially ironic inasmuch as the EPA came into being under a Republican president (*Richard Nixon*).

Even earlier than the 2014 midterm elections, a correspondent for The New York Times, *Carl Hulse*, observed that "... Congress has become more a graveyard than ever" [even on matters in which there seems to be general agreement such as raising the minimum wage] and, therefore, to get anything done, according to *Obama's* supporters, requires presidential action but such actions are limited in scope and are more readily reversible than legislation. *Hulse* concluded "But for Mr. *Obama*, who began his presidency with a gauzy vision of a post-partisan brand of politics that proved to be unrealistic, leading through executive order is not what he had in mind."<sup>31</sup>

Ironically, the aspirations of two sets of people are almost inevitably doomed by the current and foreseeable constellation of political forces in Washington – a president's partisans and foes who want "their" president or his opponents to succeed or fail in accordance with their agendas and a more indifferent mass public which generally thinks that politicians fight too much.<sup>32</sup>

In this toxic political climate, the political class has become increasingly likely to carry on their conflicts in the courts. And indeed, it may be said that by contrast with what the overt political organs have managed to achieve, the courts have played an enormous role in deciding key political issues through interpretations often reflecting political preference but rationalized in the language of legal philosophy which conveniently changes from time-to-time depending upon the case and its context. So, in recent years, the U.S. Supreme Court has upended a series of legislative antecedents to provide some financial regulation of the U.S. elections system. It also upended a critical section of the 1965 Voting Rights Act. In addition, it found the aforementioned Defense of Marriage Act to be

<sup>31</sup> *Hulse, C.*: Executive Order May Be Only Option, But It Comes With Limits. The New York Times, 29 January 2014, A1, A13.

<sup>32</sup> Hibbing and Thiess-Morse, *ibid*.

unconstitutional, the right to marriage to be constitutional, two key provisions of one of the central *Obama* legacies, the health care reform, to be constitutional and one key provision to not be. In all of these cases, the Court was divided and often, though not always, split along partisan lines. Although the courts do not set agendas, they often become the instrument through which the outcomes are decided – an interesting but virtually inevitable outcome of a political system that cannot resolve its most central issues. Inevitably, the courts, and especially the Supreme Court, will likely be seen more or less in the same harsh terms as are the political system and its political class. In the end, it would not be wildly extravagant to say that the Court has left a larger legacy than has the *Obama* Presidency.

There are some final matters worth pointing to regarding the legacy of the *Obama* presidency.

One is *Obama's* foreign policy which he aptly summarized as “don’t do stupid stuff”, though he apparently used a stronger noun in place of “stuff”.<sup>33</sup> It has been a source of criticism, including by his former Secretary of State and possible next president, *Hillary Clinton*. Fundamentally, *Obama's* message was to think small and to avoid errors of commission. If you don’t know what you are doing, don’t do it. For the most part *Obama* has especially tried to avoid getting sucked into ventures whose endgame he had yet to figure out. The contrast with his predecessor’s buoyancy and perhaps misplaced self-confidence about, among other things, democratizing the Middle East, could not be sharper. Of course, no political leader is entirely consistent. Events, circumstances, and political pressures arise that are action-forcing. But *Obama* has generally been more reluctant to force confrontations requiring substantial military intervention. He has been subject to withering criticism for a “feckless foreign policy” as his 2008 general election rival for the presidency (Senator *John McCain*) put it. If *Obama* has been short on aspirations his more forceful critics have been short on specifying means to substantiate how they would proceed to fulfill their grander ambitions. Big talk without any means for implementing it or for considering possible adverse outcomes is simply vaporous. *Obama* himself came into office uttering ideals but he has conducted a foreign policy firmly based on realism and the properly cautious notion that actions must be justified not by wishful thinking but by careful consideration of what can go wrong.

<sup>33</sup> Allen, M.: Don’t Do Stupid Sh— (Stuff), in: Politico, 1 June 2014, <http://www.politico.com/story/2014/06/dont-do-stupid-shit-president-Obama-white-house-107293.html>.

That does not mean, however, that *Obama* has been a status quo president with respect to foreign policy. He has made clear his impatience with the continuing lack of progress with regard to the Israeli-Palestinian dispute, a lack of progress further exacerbated by the currently volatile situation in the Middle East. It is equally clear that he is the first U.S. president since *George Bush* the elder who has confronted the Israeli leadership though with less success for its recalcitrance to make progress. The *Obama* administration also sought to make at least three foreign policy legacies – one was a nuclear arms treaty with Iran that might plausibly (or wishfully) begin to alter U.S.-Iran relations and help stabilize the indigenous power rivalries in the Middle East. A second has been the restoration of diplomatic relations with Cuba which have been absent since the year *Obama* was born. A third has been a deeper U.S. engagement in the Pacific in part to mollify states looking for a balance of power to the aspirations of China's emerging dominant role in the western Pacific.

There has been considerable skepticism in Congress, especially but not exclusively among Republicans, over what the Iran accord would look like. The vast majority of Senate Republicans have been highly pro-active in expressing their doubts about what sort of deal the *Obama* administration might reach with Iran, having gone so far as to send a public letter to the Iranian authorities that the Senate retains the last word on whether an agreement is acceptable. In actual fact, the administration has not handled the agreement as a treaty which does require Senate confirmation but as an executive agreement which allows the President to veto a likely Senate resolution of disapproval. Even putting that aside, however, the carrot in this deal requires removal of sanctions which does in turn require congressional action, and skeptics of an agreement also include some Democrats. *Robert Putnam's* earlier work on two-level games is abundant on both the Iranian and the U.S. sides as whether any agreement arrived at by the negotiators can be credible.<sup>34</sup>

The move after the 2014 midterm election to seek a diplomatic *rapprochement* with Cuba also cleaved along similar lines. But it also included the opposition of the former senior Democratic member of the Senate Foreign Relations Committee, *Robert Menendez*, of Cuban heritage. *Menendez* was conveniently indicted on corruption charges and stepped down from his leadership role on the Foreign Relations Committee. As with Iran, *Obama* was looking to the future in Cuba

<sup>34</sup> *Putnam, R.D.*: Diplomacy and Domestic Politics: The Logic of Two-Level Games, in: International Organization, 42 (1988), 427-460.

and the possibility that opening up, which he deemed to be of far greater importance to Cuba than to the U.S., could be enhanced by re-establishing diplomatic relations. Similar to the Iranian case, other matters, including appropriations for establishing an embassy, nomination for an ambassadorial post, and the relief of longstanding U.S. sanctions will require some measure of cooperation with Congress. An interesting intramural battle shapes up among Republicans as to whether its business interests or its foreign policy hawks will win out.

East Asia and Southeast Asia are less clear as foreign policy focal points for the *Obama* administration other than that it vaguely wants to position itself as a counterweight to the emerging economic and potential military giant, China. The *Obama* administration, however, has not been clear as to exactly how it wants to do this especially since it does not want to threaten China and may want to temper potentially volatile clashes on the East and South China Seas. It may by casting its shadow want to temper emerging – or re-emerging – nationalisms, especially in Japan. So far, it is not very clear what *Obama's* Pacific strategy is other than keeping open Asian markets and reassuring those Asian countries that are concerned about Chinese dominance of the region. And it is deeply unclear as to precisely what follows from any such assurances.

The Middle East is even more of a morass than it was when *Obama* entered office. Now the Israeli-Palestinian matter has become secondary to the administration although the contempt that *Obama* and the Israeli Prime Minister, Benjamin Netanyahu, have for one another is very real. Netanyahu virtually campaigned for *Mitt Romney* in 2012, has expressed time and again his hostility toward the *Obama* administration's efforts, along with those of Britain, France, Germany, Russia, and China, to reach a nuclear development deal with Iran, has ignored efforts by the *Obama* administration to halt settlements in the West Bank, and at the behest of the House Republican leadership accepted an invitation to speak before Congress criticizing the nuclear negotiations with Iran – a speech that was boycotted by many Democrats, including their House leader, *Nancy Pelosi*. But with the current turmoil in the Middle East and the growing capabilities of terrorist groups, the immediate focus has been on weakening the Islamic state (IS).

Whatever *Obama's* legacy on international affairs is likely to be will in part depend upon who the president will be in 2017 and what, especially the composition of the Senate looks like after that election. Great powers are typically not inclined to avoid “doing stupid stuff” which is, after all, a generally conservative foreign policy by temperament. A thoughtful conservative columnist for The

New York Times, *David Brooks*, who, despite political differences, has previously indicated his high regard for *Obama's* intellect and tendencies to carefully review alternatives, noted in a column his appreciation for those who speak “only after paying minute attention to the way things really are, and whose proposals are grounded in the low stability of the truth.”<sup>35</sup> *Obama's* contrast with the bravado and utopian ideals of his predecessor are clear. The argument that the *Obama* administrations lacks a clear strategy in international matters has some validity to it. Whether one thinks that to be a good thing or a bad thing likely depends on what the observer values.

An interesting transformation has occurred in *Obama* during the latter stages of his administration. As the first U.S. president of mixed race, he had been careful to avoid flare-ups revolving around race, especially after an early incident during a press conference when he characterized a police officer's arrest of Harvard Professor *Henry Gates* for entering his own home in Cambridge as “stupid”. The police officer asked *Gates*, who is black, for his identity and when *Gates* refused telling the officer he was entering his own home he was placed under arrest. *Obama* later apologized for his characterization of the officer's action and invited both *Gates* and the police officer for a much publicized beer on the White House grounds. *Obama* thereafter was careful to not revive racial stereotypes. But as his administration wore on, *Obama* began to assert his empathy for the stereotyping that black people, especially younger black males, endure.

A number of incidents, however, began to gnaw at *Obama*. These included several incidents of mass shootings in the aftermath of which he repeatedly called, however vaguely, for measures of further control over the sales of guns. But, of course, *Obama* and gun control supporters were outgunned, so to speak, by the gun rights lobby. Similarly, the growing divide in terms of economic inequality and continuing racial tensions involved in deadly encounters between police and young black males were highlighted by *Obama*, not necessarily, however, to his advantage until the mass murder of a black church group in Charleston, South Carolina by a young white man with an affinity for racist symbols and of expressed deep racial prejudices.

While there was little that was likely to be done about such matters, *Obama* spoke to these issues with considerable force and passion. But not a great deal from the standpoint of government policy could be done largely because Congress was usually besieged by advocates for the gun lobby who were unenthused

<sup>35</sup> *Brooks, D.*: The Case for Low Ideals, in: The New York Times, 17 October 2014, A27.

about any increased regulation of what they felt was a constitutionally ordained right to bear arms.

Some of the problems with which *Obama* has been concerned may not have immediately known solutions, for example, the growing economic inequality which may be a function as much of technological change and a global economy than of the policies of governments. And while there has been considerable progress in healing racial divisions, race is at the heart of political cleavages in the United States and also opposition to the welfare state.<sup>36</sup> Finally, even with more strict control over the sales of guns, the types of guns for sale, and who may be permitted to have them, given the number of guns in circulation any such regulations are apt to have some, but limited, effect.

#### IV. Concluding Thoughts

Supposing that *Obama* failed to arouse the intense opposition that he did and, thus, had a freer hand, it is still worth noting that policies are not necessarily equivalent to solutions and solutions to one problem may beget other problems. But the U.S. political system hasn't yet made it to that realization. Instead, vacuous promises are abundant, divisiveness is prominent, political outcomes are unclear, and a system designed in the 18<sup>th</sup> century has accrued lots of cobwebs. It is remarkable that *Obama* was able to accomplish a number of signature achievements, most of which occurred during the time his party held political majorities. Since then he has articulated issues he thinks the country needs to address and to develop through executive means alternative pathways, although contentious and limited, to move beyond a recalcitrant Congress. Then there is the immense power wielded by the courts in determining matters of public policy under the guise of constitutional law. The power of the courts is apt to grow larger and the traditional legitimacy accorded them is equally likely to become narrower as judicial nominations are vetted with respect, however coded or nuanced, to the political philosophies of the potential jurists.

So, there are essentially two separate questions here. One has to do with *Obama's* legacy. The other has to do with the governing capabilities of the U.S. The first is relatively easy. *Obama's* legacy will, in significant part, depend upon who succeeds him and whether the issues he has articulated will remain at the forefront. It will also significantly depend on the composition of the Congress

<sup>36</sup> *Gilens, M.*: Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy, Chicago, 1999.

and the courts. When *Jimmy Carter* was President, he had solar panels installed at the White House. When *Ronald Reagan* succeeded him, he removed them. In that vignette lies the story of all that is transient in regard to policy legacies.

The more profound issue is how can the American political system function? A recent and empirically rigorous article by two prominent political scientists, *Martin Gilens* at Princeton and *Ben Page* at Northwestern (2014), indicate that the political system is dominated by well positioned interests that function in a political environment driven by the desperate need for money.<sup>37</sup> Essentially, the mechanisms of democracy are significantly limited in their ability to translate public preferences into policy outcomes. Earlier, the columnist, *David Brooks* (2013), observed that the dispersal of authority and the multiplicity of veto points serves mainly to grant power to groups seeking rents from government.<sup>38</sup> As Woodrow Wilson had contended more than a century earlier, the central problem of American government – and therefore with the limits on *Obama's* achievements – have to do with the absence of unified authority. Of course, unified authority in the absence of a political elite capable of negotiating and bargaining may wind up being worse than the conditions it was meant to replace. If so, that will be another in a long line of situations in which more was promised than plausibly could be delivered.

<sup>37</sup> *Gilens, M./B. L. Page*: Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, in: *Perspectives on Politics*, 12 (2014), 564-581.

<sup>38</sup> *Brooks, D.*: Strengthen the Presidency, in: *The New York Times*, 13 December 2013, A33.