

Partisan Administration

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INTRODUCTION

Elena Kagan’s foundational 2001 article describes a new model of presidential control over administrative agencies, which she calls “presidential administration.”¹ Kagan’s article and the scholarship that it inspired has transformed our understanding of contemporary presidents’ governance of the administrative state. This literature documents the ways in which presidents assert control over agency rulemaking,² enforcement actions,³ and public statements to the point of meddling with the language of agencies’ scientific reports;⁴ exposes presidents selectively associating themselves with agencies’ actions;⁵ and reveals presidents embedding appointees deeper into agency bureaucracies.⁶

In the past twenty years, “presidential administration” has become a shorthand for the president’s relationship to administrative agencies—so much so that the term now obscures the particular focus and limits of the model Kagan

¹ Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001).

² See, e.g., Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 *Yale J. Reg.* 549, 579-86 (2018) (examining, for instance, President Obama’s support for the Clean Power Plan rulemaking, and President Trump’s efforts to revoke it); Kathryn A. Watts, *Controlling Presidential Control*, 114 *Mich. L. Rev.* 683, 711-716 (2016) (documenting both Bush and Obama administration control mechanism over an EPA ozone regulation); Nina A. Mendelson, *Disclosing ‘Political’ Oversight of Agency Decision Making*, 108 *Mich. L. Rev.* 1127, 1149-54(2010) (documenting the frequently undisclosed presidential influence on rulemakings).

³ See, e.g., Kate Andrias, *The President’s Enforcement Power*, 88 *N.Y.U. L. Rev.* 1031, 1054-69 (2013) (documenting presidents’ largely informal means of influencing enforcement); Mashaw & Berke, *supra* note __ at, 563-68 (examining Presidents Obama and Trumps use of enforcement power over immigration); Bijal Shah, *Executive (Agency) Control*, 72 *Stan. L. Rev.* 641, 689-97 (2000) (documenting executive branch agency litigation as, in some cases, a tool of presidential control over independent agencies).

⁴ Thomas O. McGarity, Wendy E. Wagner, *Deregulation Using Stealth “Science” Strategies*, 68 *Duke L.J.* 1719, 1740 (2019) (documenting report revision among many other tools for political oversight of agency science).

⁵ Kagan, *supra* note __, at 2282, 2299-2302; Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 *J. Const. Law* 638, 640 (2010) (describing President Obama’s announcing regulatory directions).

⁶ David E. Lewis, *The Politics of Presidential Appointments* (2010); Nina A. Mendelson, *Agency Burrowing: Entrenching Politics and Personnel before a New President Arrives*, 78 *N.Y.U. L. Rev.* 557, 563-64 (2003).

developed. First, the framework of presidential administration has a specific object of interest: presidents' tools for asserting control over national policy setting by administrative agencies. Second and closely related, as a model for understanding the president's relationship to agencies, presidential administration maintains an odd detachment from elections and the way in which elections influence the president's use of agencies. Indeed, the model leaves the president's interest in elections to a broad presumption: The president seeks to exert control over national policy created and implemented by administrative agencies, we are to presume, in part because the president believes those policy achievements will help his or her reelection prospects and those of his or her co-partisans. This presumption may be correct as far as it goes. But national policy is neither the exclusive means by which presidents seek to have an impact on their election prospects, nor does it exhaust presidents' engagement with the administrative state. For all the success of presidential administration as a description of current arrangements, it fails to notice (or even inquire about) the tools of administrative governance presidents use to influence their own election prospects outside of setting national-level policies.

This Article examines a strata of presidential uses of administrative agencies in which the president seeks to advance his or her election prospects in ways that do not purport to make national policy changes (or have only pretextual connections to such policy changes). These uses fall into three pathways: targeting federal spending and grants to particular states of high electoral interest, devoting federal resources for campaign purposes, and attempting to influence election administration. These share the characteristics of having direct, readily identifiable electoral consequences (or perceived consequences). They all involve the president's power over the administrative state, whether that power is over budget execution, the work of subordinate officials to support election campaigns, or the use of executive branch resources to influence certification and counting of election returns. And in these pathways, presidents use administrative power to their electoral benefit but without mediating that electoral motive through national policy achievements. As a result, these aspects of presidential governance fall outside of the recognition of presidential administration. This Article calls this class of presidential use of administration *partisan administration*. This label is imperfect. It might be taken to imply that presidential administration does not involve a partisan motive, which is incorrect. Some might prefer the term *non-policy, electorally driven administration* but for ease I use partisan administration.

Regardless of the nomenclature, bringing these presidential uses of administration into the conversation about the scope and landscape of presidential governance is important for several reasons. First, our model of the president's relationship with administration is not complete if it only focusses on how the president acts to influence national policy setting by agencies. Second, attention to these strata of presidential use of administrative power suggests that presidents respond to polarization in a way Kagan did not address. Kagan argues that presidential administration is a pragmatic response to party polarization and

division in Congress. Because presidents have a difficult time achieving their policy agendas through legislation, they turn to do so through administrative agencies.⁷ Social science shows that the politics of the electorate are not only polarized but also increasingly defined by group identity.⁸ If presidents understand those features of the electorate, then they might not believe national policy achievements to be the only or the most effective expenditure of their efforts (at least for election purposes), and seek out more direct ways to reach the electorates that matter most to them. That is, they may engage in partisan administration. Third and most urgently, the president's actions with direct electoral implications and at most a thin policy veneer pose a distinctive risk to democratic process and the appearance of fairness. They are rightly regarded as a pathology of democratic politics.⁹ The framework of presidential administration, however, does not have the resources to identify their distinctive threat. Presidential administration frames the debate about the propriety of the president's action as a matter of statutory and constitutional authorization—the president's actions can only be more or less strained readings of statutory and constitutional sources. But merely asking whether the action has statutory or constitutional grounding does not help to identify any action as particularly worrisome from the perspective of democratic or anti-corruption principles.

The first pathway of partisan administration the Article identifies is the president's control over budget execution and the distribution of federal grants. Our Electoral College system, combined with predictable distributions of party affiliations across the states, makes a few states more important to presidential elections.¹⁰ Political scientists have shown that while voters do hold the president accountable for the performance of government as a whole, they also evaluate presidents based on “how their policies affect voters' local geographic constituencies.”¹¹ The intense interest that presidential candidates have in particular battleground states does not simply vanish once they enter the White House. Following where the money goes, political scientists document that presidents direct a disproportionate share of federal spending and grants to particular geographic constituencies, including to swing-states and core co-partisan states, and make those financial impacts felt in the lead up to presidential elections. This evidence reveals the president to be more “parochial” or “particularist” than

⁷ Kagan, *supra* note ___, at 2229.

⁸ See Christopher H. Achen & Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (2016).

⁹ Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *Yale L.J.* 400, 401 (2015).

¹⁰ See, e.g., Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *U.C.L.A. Law Rev.* 1217 (2006); Douglas Kriner & Andrew Reeves, *The Particularistic President: Executive Branch Politics and Political Inequality* 11 (2015).

¹¹ Kriner & Reeves, *supra* note ___, at 23.

the president's national election suggests. Those exercises in "presidential pork"¹² spending fall wholly outside the model of presidential administration.

Second, presidents have used federal executive branch resources for campaign purposes. For executive branch officials other than the president, engaging in political activities, such as campaigning or endorsing a candidate while in their official capacity or in a federal building, is a violation of the Hatch Act.¹³ In the most extreme contexts, presidential administrations have set up offices inside the White House or other cabinet departments to coordinate with their campaigns and to use the resources of government, including visits from cabinet-level officials, to further their reelection campaign. Presidents have also tolerated repeated Hatch Act violations from their senior staff and cabinet. In these cases, the violations of the Hatch Act and its norms are clearly an aspect of the president's considered strategy for using administrative power. Though it makes sense to think of these as ways the president uses administrative agencies, Kagan's model of presidential administration does not notice them.

Third, presidents have strong electoral reasons to influence the machinery of elections. Presidents do take some policy positions on election administration—prioritizing, for instance, access to the polls or election security—which constitute a particularly interesting aspect of presidential administration. But presidents also engage election administration in ways that do not announce national policy but are consistent with their electoral interests. This set of actions has the clearest danger of entrenching their place in government.

Before proceeding further, it is important to address three matters. The first is President Trump. On the one hand, the Article identifies distinctive pathways of presidential influence over agencies, pathways which pre-date President Trump and have been overlooked by the literature on presidential administration. The paper thus attends to more general dynamics of presidential power. On the other hand, some of the most extreme instances of these uses of presidential power occurred during the Trump Administration. The Article thus is—and is not—about President Trump. Second, by isolating ways in which the president uses administration for electoral gain outside of national policy change, I do not mean to suggest that partisan administration is the only omission from the model of presidential administration. The model gives short shrift to enforcement decisions,¹⁴ the president's procurement powers,¹⁵ and obfuscates its more general challenge to the ideal of administration under law.¹⁶ Third, the Article locates a blind spot of

¹² John Hudak, *Presidential Pork: White House Influence over the Distribution of Federal Grants* (2014)

¹³ 5 U.S.C. §§ 7321-7326.

¹⁴ See, e.g., Andrias, *supra* note __; Shah, *supra* note __.

¹⁵ See Daniel P. Gitterman, *Calling the Shots* (2017).

¹⁶ See Ashraf Ahmed, Lev Menand, & Noah Rosenblum, *The Tragedy of Presidential Administration* (in draft).

presidential administration as a descriptive theory—that it fails to register how presidents use administration to advance their election prospects in ways that have little or no connection to national policy. But that blind spot has larger implications. It has left legal scholars in a weak position to confront distinctive presidential threats to principles of democratic self-government and anti-corruption. In this respect, the trans-substantive character of presidential administration as a model of presidential governance is not an asset.

The Article is organized as follows. Part I provides an explanation of Kagan’s focus on national-level policy as the primary ground for presidents’ growing assertions of power. It also illustrates that the model of presidential administration gives little direct attention to how elections might play into presidential motivation or use of administration. Part II turns to the first of the three pathways—how presidents disproportionately reward particular constituencies with federal funding and grants. Part III looks at the uses of federal resources for campaign purposes—uses that are generally prohibited by the Hatch Act. Part IV examines the president’s influence on the machinery of elections, with particular attention to the Trump Administration’s handling of the Census and the November 2020 election. Part V responds to some objections and sketches some starting points for reform.

I. THE INFERENCE FROM POLARIZATION TO PRESIDENTIAL ADMINISTRATION

Political polarization and divided government play critical roles in Kagan’s account of the rise of presidential administration. They also help to explain her focus—and the focus of the model of presidential administration—on presidents’ efforts to establish national policies through administrative agencies, as opposed to other modes of engagement with agencies.

Kagan identifies a combination of several dynamics in U.S. politics as giving rise to and motivating presidential administration. First, for the president, “the possibility of significant legislative accomplishments . . . has grown dim in the era of divided government with high polarization between congressional parties.”¹⁷ At the time Kagan wrote through the present, the American electorate has become more politically polarized. One succinct measure of that increased polarization is the approval ratings of presidents among voters of the opposite party. Whereas President Eisenhower had a 56% approval rating among Democrats and President Kennedy had a 58% approval rating among Republicans at the end of their first terms, Presidents Clinton and Obama had only 23% and 22% approval rating among Republicans, and President Trump had an 8% approval rating among

¹⁷ Kagan, *supra* note __, at 2311.

Democrats.¹⁸ Only 8% of voters reported “voting for a different presidential candidate in 2008,” the lowest percentage in successive elections since this tracking began in 1956.¹⁹ Split-ticket voting also dropped—today, “Republicans vote consistently for Republicans, and Democrats today vote consistently for Democrats.”²⁰

Not surprisingly, the same polarization is reflected in the major political parties. For much of the twentieth century, “shared party affiliation . . . [did] not necessarily mean shared policy preferences.”²¹ In contrast, today, “parties are more ideologically coherent than the parties of the twentieth century.”²² Political science measures of the ideological distance between the political parties “has doubled”²³ with the Republican party more “homogenously conservative” and the Democratic Party “more homogenously liberal.”²⁴ As a result, there is no longer an ideological overlap between congressional Republicans and Democrats.²⁵ Not surprisingly, measures of party loyalty among voters is increasing, and campaigns are accordingly “focusing on turning out their core supporters.”²⁶

Voting in Congress reflects this increasing division. Recent work by James Curry and Frances Lee documents this increasing polarization between the parties and cohesion within them. Curry and Lee measure the percentage of roll-call votes in which at least 90 percent of Republicans voted against at least 90 percent of Democrats, revealing that over half of roll-call votes in recent congresses reflect that level of party conflict, whereas that percentage was near zero in the 1970s.²⁷ Curry and Lee also find greater party cohesion. From the 1950s to the present, majority party Senators and Representatives have increasingly voted with their party—from about 60 percent in the ‘50s, ‘60s, and ‘70s to close to 90 percent in the 1990s.²⁸ At the same time, polarization between the parties has also had an impact on the process for passing legislation. In the 1970s and 1980s, almost all legislation originated in congressional committees before action was taken on the floor.²⁹ More recently, only a bit more than half of legislation went through the

¹⁸ Carroll Doherty, Key Takeaways on Americans’ Growing Partisan Divide Over Political Values, Pew Research Center (Oct. 4, 2017) <https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/>

¹⁹ Michael S. Kang, Hyperpartisan Gerrmandering (SSRN draft at 31).

²⁰ Kang, *supra* note __, at 31.

²¹ Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2333 (2006).

²² James M. Curry & Frances E. Lee, The Limits of Party: Congress and Lawmaking in a Polarized Era 2 (2020); see also Pildes & Levinson, *supra* note __, at 2333.

²³ Kang, *supra* note __ at 33.

²⁴ Curry & Lee, *supra* note __, at 2.

²⁵ Kang, *supra* note __, at 33.

²⁶ Richard M. Skinner, George W. Bush and the Partisan Presidency, 123 Pol. Sci. Q. 605 (2009).

²⁷ Curry & Lee, *supra* note __, at 3.

²⁸ Curry and Lee, *supra* note __, 4-5.

²⁹ *Id.* at 7-8.

committee process.³⁰ While the difficulties of passing legislation in our bicameral system, in combination with the filibuster rule in the Senate, have tempered the power of congressional majorities to enact their agendas with greater frequency than in the past,³¹ party polarization plays a more prominent role in its dynamics.

The American public and Congress have not only become more divided, but neither party has dominated over time. Divided government (in the sense of government where at least one house of Congress has a majority from a party different from the President) has been the norm. From 1969 through 2000, the federal government was “divided twenty-six of thirty-two years, or 81% of the time.”³² From 2000 to 2020, the federal government has been divided for 14 of 20 years (or 63% of the time).³³

Kagan credits these dynamics—divided and more polarized parties in Congress—as making it relatively difficult for presidents to achieve national-level policy change solely through legislation.³⁴ At the same time, these increasing levels of division have not lessened the general assumption that presidents are held accountable for the functioning of government as a whole,³⁵ or general scrutiny and expectations for the president’s accomplishments.³⁶ Presidents, Kagan writes, face ever increasing expectations of their performance from the public; the president is the one person who the public and the media can readily identify as “responsible for governance.”³⁷ The continuing demands of the media news cycle only compound pressure on the President to continually demonstrate his or her performance.³⁸

Faced with those expectations, and the realities of divided government, “[p]residents . . . have strong incentives to develop and expand their powers in whatever ways they can.”³⁹ As Kagan puts it, “[t]he more demands on the President for policy leadership increase and the less he can meet those demands through legislation, the greater his incentive to tap the alternative source of supply deriving

³⁰ *Id.* at 8.

³¹ *Id.* at 15-16.

³² Pildes & Levinson, *supra* note __, at 2331 (using Sundquist, *Constitutional Reform and Effective Government* at 93).

³³ In particular, Congress was: divided in 2001 (Clinton; Republican House & Senate); 2001-02 (Bush; Democratic Senate, with Jeffords, Republican House); 2007-09 (Bush; Democratic House & Senate); 2011-15 (Obama; Republican House, Democratic Senate); 2015-17 (Obama; Republican House & Republican Senate); 2019-2000 (Trump; Democratic House & Republican Senate).

³⁴ Kagan, *supra* note __, at 2329.

³⁵ David E. Lewis, *Presidents and the Politics of Agency Design* 4; see also Kagan, *supra* note __, at __; Terry Moe.

³⁶ See Kagan, *supra* note __, at 2310.

³⁷ *Id.* at 2310

³⁸ *Id.*

³⁹ Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 *Presidential Stud. Q.* 850, 8559 (1999); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *Harv. L. Rev.* 1, 76 (2017).

from his position as the head of the federal bureaucracy.”⁴⁰ Notice—and this is the critical point—that the problem for which presidential administration is the (innovative and logical) solution is the need for the president to manifest his or her policy leadership, and, in particular, the kind of policy leadership which has become difficult for presidents to demonstrate in enacting legislation.

To be highly explicit, from the proposition that it is more difficult for presidents to attain policy victories through legislation, Kagan draws the inference that presidents turn to administrative bureaucracy as a way to impact national policy. Kagan’s inference appears to be a valid one. As Kagan and others have documented, presidents have asserted more control over administration as a means to create national policy that they could not obtain through legislation.⁴¹ But this is not the only plausible inference that can be drawn about presidential motivation in general or the president’s motivation in using administration in particular. In light of polarization, presidents might adopt a realist posture which views national policy as only one, and perhaps not the best way, of reaching the constituencies that most matter to their reelection. They might adopt a “reward ‘em” view that the most concrete way they can influence their election prospects is by targeting benefits to particular states or communities within them. Or they might realize that in many swing-state elections, the margins are so thin they can be a product of the stringency and enforcement of election rules.

In short, within the model of presidential administration, the focus on a particular class of presidential actions—achieving national policy change through administrative agencies—is a product of the model’s own origin story. If the problem for the president is being thwarted in his ideal legislative agenda, with its national policy impact, then presidential administration makes sense as a solution. But the problem for presidents is not simply division and gridlock in Congress, which may be worse in contemporary times but are hardly new. The problem for presidents is finding pathways to secure reelection and election of co-partisans. With an electorate that shows increasing levels of party loyalty and polarization, some of those efforts might well run through achieving national policy changes, but not all do.

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In the next three parts of the Article, I illustrate three different pathways of presidential control over administration that do not feature in the model of

⁴⁰ Kagan, *supra* note __, at 2312. Moreover, as Daryl Levinson writes, “because individual presidents can consume a greater share of the power of their institutions than individual members of Congress, we should expect them to be willing to invest more in institutional aggrandizement.” Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915, 959 (2005).

⁴¹ President Obama’s actions on immigration are a case in point. He was frustrated with progress on legislation in Congress, and then turned to support DACA and DAPA.

presidential administration. In all three pathways, presidents act in ways that directly promote their own or co-partisans' election prospects but do so without announcing or embracing a national policy change. This is politics without policies.

II. THE PORK BARREL PRESIDENT⁴²

Kagan's description of presidential administration neglects the president's influence over federal spending and grants. Part of the reason for this omission ties back to how the model understands presidential motivation. If the president is seeking to make an impact similar in kind to legislation, then the next best alternative is rulemaking. Because rulemaking is of the most enduring and legislative-style policy tools, presidents have devoted considerable energies to supervising it, as Kagan predicts.

Funding is also critical to agencies and their capacities to implement national policy. Subsequent scholarship on how the president influences agency spending in the execution of the federal budget has helped to supplement Kagan's account of the tools presidents use to control agencies. In an important article, Eloise Pasachoff shows that the president's control over the execution of the budget is an important means for influencing agencies.⁴³ The Office of Management and Budget (OMB) retains authority to "apportion" the funds Congress has appropriated. That apportionment authority allows OMB "to impose conditions on agency spending or to demand changes in agency practices."⁴⁴ Under this authority, OMB officials can require an agency to spend its funds on particular activities, in a particular period of time, or only after it has taken a course of action.⁴⁵ OMB also has authority to oversee agencies' requests to transfer or reprogram funds.⁴⁶ In addition, OMB officials continually supervise how agencies spend their funds, including revising criteria for grants.⁴⁷

Jody Freeman and Sharon Jacobs's recent work illustrates that presidents can deprive agencies of essential resources and staff in ways that fundamentally impede the agencies' ability to act.⁴⁸ For instance, they show that the president can delay or simply ignore agency staffing requests, or impound, withhold, or redirect

⁴² See Hudak, *supra* note ____.

⁴³ Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Direction*, 125 *Yale L.J.* 2182 (2016).

⁴⁴ Allen Schick, *The Federal Budget: Politics, Policy, Process* 277 (3rd ed. 2007); see also Pasachoff, *supra* note ___, at 2229.

⁴⁵ See Pasachoff, *supra* note ___, at 2228-29 (describing use of apportionment footnotes to achieve these ends).

⁴⁶ *Id.* at 2231.

⁴⁷ *Id.* at 2235.

⁴⁸ Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 *Harv. L. Rev.* ____ (forthcoming 2021).

funds for programs.⁴⁹ This “structural deregulation” reveals another darker side of presidents’ power over agencies than Kagan recognized.⁵⁰

Presidents not only have influence over agency spending, they also can affect the level of spending and grants which particular states receive and the timing of when they receive those funds. OMB officials exercise some of this control directly, but much of this happens at the hands of political appointees within agencies—or in conversation between those appointees and OMB. In his study of the distribution of federal grants, John Hudak finds that political appointees have means to control the criteria for federal grants which can have significant distributional impacts. They also can be involved in the final decisions about grant allocations. In both capacities, Hudak’s interviews show political appointees’ involvement skewed grants, at least at the margin, toward political sensitive regions.⁵¹

The field of distributive politics—studying how politicians allocate money to different constituencies at different times—had historically focused on the legislature.⁵² In the past decade, political scientists have recognized that the discretion federal agency officials have over the distribution of appropriated funds and other government expenditures puts the president “at the center of distributive politics.”⁵³ This literature calls into question the assumption that the president, as the sole representative elected by a national constituency, works as a counterbalance to the geographically distributed impulses of members of Congress. Presidents “systematically use their leverage over policies from base closings to budgets to target federal benefits to battleground states in search of votes; to reward their core partisan base; and to help members of their party in Congress.”⁵⁴ Indeed, what sets presidents apart from members of Congress is not their efforts to target particular constituencies that have electoral benefits, but the success of presidents in doing so.⁵⁵

For the president, targeting benefits to particular constituencies is a function both of geography and timing in the election cycle. In a series of studies, political scientists have identified two dynamics in federal grants and spending. Presidents disproportionately reward co-partisan states—as indicated by the margin of victory of the president in the prior election, and the party affiliation of the state’s Senators and Representatives. With regard to federal grant dollars, presidents also

⁴⁹ Freeman & Jacobs, *supra* note __, at 22 (SSRN draft).

⁵⁰ Freeman & Jacobs, *supra* note __.

⁵¹ Hudak, *supra* note __, at 164-69.

⁵² Anthony M. Bertilli & Christian R. Grose, *Secretaries of Pork? A New Theory of Distributive Public Policy*, 71 *J. of Pol.* 926; see also Christopher R. Berry, Barry C. Burden, & William G. Howell, *The President and the Distribution of Federal Spending*, 104 *Am. Pol. Sci. Rev.* 783, 785 (2012).

⁵³ Berry, Burden & Howell, *supra* note __, at 785; Gordon, 2011: 717; Hudak, *supra* note __.

⁵⁴ Douglas Kriner & Andrew Reeves, *The Particularistic President: Executive Branch Politics and Political Inequality* 11 (2015).

⁵⁵ *Id.* at 11.

disproportionately reward “swing” or “battleground” states.⁵⁶ In both cases, the idea is that presidents perceive voters to be influenced not merely by national policy or how the government runs generally, but the impact it has on their local area, as amplified by local news reporting.⁵⁷ Presidents have reasons to reward core states—that is, states in which they are very popular and have strong representation in Congress from their party.⁵⁸ To begin with, rewarding core states helps to ensure those states do not slide into the swing state category, as solidly Republican Indiana did during President Obama’s 2008 election.⁵⁹ Directing funds to the states and districts of co-partisan members of Congress rewards them for support; moreover, political fates are often linked, so rewarding co-partisans also shores up support for the president and his or her agenda.⁶⁰ The idea that swing states are special to presidents is intuitive. Throughout presidential campaigns, presidents lavish attention on the voters in swing states; the thought that voters in those states are particularly significant to a first-term president’s reelection hardly takes a giant leap of imagination.

A. *Presidents Reagan through Obama*

The evidence of presidents rewarding co-partisan states is strong. In an initial study of federal spending over an 18-year period (1982-2000), with extensive controls, Valentino Larcinese, Leonio Rizzo, and Cecilla Testa find no evidence that presidents target swing states, but do show that spending in a state is correlated with the share of the presidential vote the president captured, increasing \$97-164 per capita for each standard deviation in the share of the presidential vote.⁶¹ The Larcinese study also finds that having a majority of House Representatives from the party of the president also correlates with greater benefits.⁶² In an even more comprehensive follow-up study of all sources of federal spending in congressional districts and counties over a 24-year period (1987-2007 inclusive), Christopher Berry, Barry Burden, and William Howell find similar results. Like the Larcinese study, they find that federal spending is correlated with the president’s vote margin, which runs counter to the idea that presidents target swing states.⁶³ Further, districts with Representatives who are of the same party as the president receive 4% more federal spending, and such Representatives elected in close races receive 7-9% more federal spending.⁶⁴ These authors suggest that this effect results from both ex ante influences the federal budget design and the president’s opportunities to redirect federal outlays through reprogramming funds or use of contingent accounts

⁵⁶ Kriner & Reeves, *supra* note __, at 42.

⁵⁷ *Id.* (noting that presidents perceive political impacts as local).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Berry, Burden & Howell, *supra* note __, at 787.

⁶¹ Valentino Larcinese et al., *Allocating the U.S. Federal Budget to the States: The Impact of the President*, 68 *J. Pol.* 447, 452 (2006).

⁶² Larcinese, et al, *supra* note __, at 453.

⁶³ Berry et al., *supra* note __, at 792.

⁶⁴ Berry, et al, at 791.

for disasters in ex post budget execution.⁶⁵ Similar dynamics arise with regard to co-partisan Senators. A study by Christenson et al., shows that between 2008-14, states with two Senators who share the same party as the president receive 2.8% per capita increase in federal grant spending compared to similar states with no co-partisan Senators.⁶⁶

A study by Douglas Kriner and Andrew Reeves provides further evidence not only of presidents rewarding co-partisan states but also rewarding swing states with a disproportionate share of federal grants, and all the more so during election years.⁶⁷ Kriner and Reeve define “core states” as those highly populated with presidential co-partisans.⁶⁸ As to the distribution of federal grant spending between 1984 and 2008, they find that counties in swing states and core states receive a disproportionate share—5% and 7% more—than the average counties not located in swing or core states.⁶⁹ If funds were directed to swing states for electoral purposes, one would expect that there were be an even greater flow of funds during election years. Confirming this dynamic, they find that “during election years counties in swing states receive twice as much additional federal grant funding as they do in non-election years,”⁷⁰ so that swing state election year grants rival those of core states.⁷¹

In another analysis of federal grant spending, John Hudak finds an even larger swing state effect. Between 1996 and 2008, Hudak shows that swing states received over 7% more grants than did other states (including co-partisan states).⁷² Hudak also finds an election cycle effect in which swing states receive 10% more in grant funding in the two years prior to an election than in the two years following one.⁷³

Studies have also documented politically salient jurisdictions receiving special treatment. One particularly compelling study examined a scandal arising from a PowerPoint presentation in which a White House official in the George W. Bush Administration identified for political appointees to the General Service Administration a subset of congressional districts as “defense” or “targets.” Sandy Gordon finds that vendors in those districts identified in the presentation as “defense” districts “enjoyed unusually generous contract obligations relative to unmentioned districts.”⁷⁴

⁶⁵ Id. at 786, 797.

⁶⁶ Dino P. Christenson, Douglas L. Kriner, and Andrew Reeves, All the President’s Senators: Presidential Copartisan and the Allocation of Grants, 42 Leg. Studs. Q. 269, 279 (2016).

⁶⁷ Kriner & Reeves, supra note __ at 130-40.

⁶⁸ Id. at 42.

⁶⁹ Id. at 130.

⁷⁰ Id. at 136.

⁷¹ Id. at 137. Core states receipt of grants has little variance from election to non-election years.

⁷² Hudak, supra note __, at 50.

⁷³ Id. at 50. Nzelibé provides some examples of Presidents Bush and Clinton targeting swing states with subsidies. Nzelibé, supra note __, at 1240.

⁷⁴ Sanford S. Gordon, Politicizing Agency Spending Authority: Lessons from a Bush-era Scandal, 105 Am. Pol. Sci. Rev. 717 (2011).

Even more recently, studies find that President Obama engaged in targeting of financial benefits to both swing states, particularly Ohio, as well as co-partisan states. In 2012, President Obama's reelection prospects appeared to hinge on Ohio; a win for President Obama in Ohio would effectively doom Mitt Romney's chances. President Obama directed disproportionate funding to Ohio in several different ways. He directed more than \$125 million in clean-energy grants to companies in the state, practically four times the national state average.⁷⁵ Indeed, President Obama touted the outsized grant spending in Ohio during his 2012 reelection bid, celebrating that "[Ohio] received more funds than just about anybody in order to build on that clean energy economy . . . That's what we're going to keep on doing for the rest of 2010 and 2011 and 2012, until we've got this country working again."⁷⁶ The Obama Administration also directed more than \$400 million in transportation grant funding to Ohio in 2010, the fourth highest grant total for any state, surpassing the totals secured by states with much larger populations.⁷⁷ President Obama celebrated these contributions.⁷⁸ Ohio also received a disproportionate number of federal grants from the Obama Administration. For the fiscal year that ended in September 2012, months before the November election, Ohio received 10,232 grants, which is 21% more than it had received in 2009.⁷⁹ In contrast, in 2012, Texas, a clearly red state at the time, received 39% fewer grants than Ohio.⁸⁰

At least through 2012, these studies provide strong evidence that presidents were successful in sending the message to their subordinates with control over federal spending, generally, and federal grants, in particular, to disproportionately reward their core co-partisans as well as to direct more grants, especially in the lead-up to the election, to swing states. Given the careful controls in these studies, it is difficult to find a principled reason other than partisan considerations to explain these discrepancies.

B. *President Trump*

To date, trends in spending and grants in the Trump Administration have not received the kind of systematic attention that earlier administrations have received. At least in the context of federal transportation funding, under a program called BUILD, it appears that a greater percentage of federal dollars flowed to red states in the Trump Administration than in the Obama Administration. Whereas Texas was awarded roughly 50% of the BUILD grants it applied for under the

⁷⁵ Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 *Bost. U. L. Rev.* at 754.

⁷⁶ *Id.*

⁷⁷ *Id.* at 755.

⁷⁸ *Id.* at 755.

⁷⁹ Brian M. Faughan and John Hudak, "[Presidential Pandering: How Elections Determine the Exercise of Executive Power in the U.S. and Colombia](#)," *Brookings Institution Series: Issues in Governance Studies*, No. 53 (2012).

⁸⁰ *Id.*

Obama Administration, it received 96% of the BUILD grants it applied for under the Trump Administration.⁸¹ South Carolina, likewise, received less than 15% of the grants it requested under the Obama Administration, but it received 100% of the grants it asked for under the Trump Administration. In addition, the Trump Administration severely cut urban BUILD awards in blue states that Hilary Clinton won: California's urban grants went from \$388 million to \$48 million and Washington state's urban grants went from \$30 million to \$0 under the Trump Administration. The same pattern occurred in Connecticut, Massachusetts, New York, and Illinois, all of which voted for Hilary Clinton in 2016. While further statistical evaluation is needed, it appears that the Trump Administration also found ways to strategically reward co-partisan states.

In short, across presidential administrations from President Reagan through President Trump, budget execution is a pathway and tool of partisan administration.

V. ELECTIONEERER-IN-CHIEF

Presidents understand the advantages of the office for campaigning. Living in the White House, holding press conferences and elaborate events there, controlling the White House webpage, social media accounts and press office, travelling on Air Force One, among the many other trappings of the office, all amplify the current president's message and stature.⁸² The presidency is a platform. And it is a platform that is largely supported with federal appropriations.

At the same time, there is a clear need to draw a line between the president's official capacities and the president as a campaigner. For executive branch employees below the president and vice president, that line is drawn in large part by the Hatch Act.⁸³ The Act prohibits executive branch employees, with the exception of the president and the vice president, from engaging in many forms of political activity, including campaigning and endorsing candidates, while acting within their official capacity.⁸⁴ No employee covered by the Hatch Act can use their official authority to obstruct or shape election results;⁸⁵ they also cannot engage in any political activity while on duty, in a federal office or building, wearing a uniform, or using a federal owned or leased car.⁸⁶ The Hatch Act has a heavy burden. It is on the front lines of policing the impartial execution of law, guarding the appearance of impartiality, protecting against undue pressure on government employees to make contributions to campaigns, and ensuring that

⁸¹ David Lightman and Ben Wieder, "Trump states and rural areas grab bigger chunk of transportation grant funds," *McClatchy*, June 21, 2019. <https://www.mcclatchydc.com/news/politics-government/congress/article231720058.html>

⁸² Thanks to Brian Feinstein.

⁸³ Act of Aug. 2, 1939, ch. 410, Stat. 1147 (now codified at 5 U.S.C. §§ 7321-7326).

⁸⁴ 5 U.S.C.A. § 7323 (2008).

⁸⁵ *Id.*

⁸⁶ § 733.104(c).

political affiliation does not interfere with how federal programs are administered or how federal employees are promoted.⁸⁷

Using administrative officials and agencies to promote and coordinate with a president's campaign is one of the most glaring uses of administration for electoral gain. Presidential administrations since Nixon fall on a spectrum from highly coordinated and extensive integration of campaign functions into administrative activities, on the one extreme, to isolated, ad hoc remarks of endorsement, on the other.

A. Presidents Nixon through George H.W. Bush

The Nixon Administration stands in a class of its own for the scope of violations of the Hatch Act and for generally blurring the lines between government work and work for the president's reelection.

As will be familiar to many, the Senate Watergate Committee concluded that nearly every member of President Nixon's cabinet inner circle embraced the "conception as to how the Federal Bureaucracy could be put to work for the President's reelection."⁸⁸ That effort to use administrative power to aid Nixon's reelection efforts revolved in part around a plan, the so called "Responsiveness Plan," conceived by special assistant to the President Frank Malek and approved by White House Chief of Staff H.R. Haldeman. The plan "emphasized the need to make reelection support the top priority" for senior officials in the executive branch;⁸⁹ "discussed which key states, counties, and voting blocs are considered key and should be targeted"⁹⁰ by the heads of each executive department; and requested cabinet officers and agency heads to "educate loyal appointees (including Regional Directors) as to priorities and expectations, thus forming a political network in each Department."⁹¹ Virtually all cabinet officers and the heads of key agencies reviewed and approved the plan. According to a memo circulated in the White House during the implementation of the plan, cabinet officers and agency heads appeared to "have been quite receptive and should be real assets to the program."⁹² The Senate Watergate Committee concluded that there were "numerous indications" that actions implementing the Responsiveness Plan "violated the Hatch Act."⁹³

Among the indictments of high-level Nixon Administration officials, Attorney General John Mitchell particularly highlights the blurring between

⁸⁷ U.S. OFF. OF SPECIAL COUNS., *Hatch Act Overview*, <https://osc.gov/Services/Pages/HatchAct.aspx>

⁸⁸ Senate Watergate Committee, *Final Report of the Select Committee on Presidential Campaign Activities* 367 (1973).

⁸⁹ Senate Watergate Committee, *supra* note ___, at 378.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Senate Watergate Committee, *supra* note ___, at 379.

⁹³ *Id.* at 1211.

official and campaign duties. While he was serving as Attorney General, Mitchell “personally controlled a secret Republican fund used to gather information about Democrats.”⁹⁴ Mitchell “doubled”⁹⁵ as attorney general and President Nixon’s campaign manager for a portion of his 1972 reelection bid. He was ultimately indicted on counts of conspiracy, obstruction of justice, and perjury.⁹⁶

The Ford, Carter, H.W. Bush, and Reagan Administrations avoided the coordinated violations of the Hatch Act of the Nixon Administration, though some still pushed boundaries in their own ways. President Ford rarely budged from the White House for the months prior to the November election. This “Rose Garden Strategy” was widely criticized as an attempt to wield the powers and advantages of incumbency to benefit himself electorally.⁹⁷ While there were not significant Hatch Act violations in the Carter Administration, the Department of Justice investigated President Carter for illegally soliciting campaign contributions at a 1979 White House meeting, which led to Democratic contributions of “\$100,000 and \$25,000 by two businessmen on the day of the luncheon.”⁹⁸ The Department of Justice ultimately stopped the investigation because the meetings took place in the White House Family Dining Room, a piece of federal property that DOJ concluded could be used for purposes outside of official duties. The Reagan and G.H.W Bush Administration avoided high-profile cabinet level breaches of the Hatch Act connected to their reelection campaigns.

B. Presidents Clinton through Obama

The Clinton Administration included several high-profile scandals about misuse of federal resources, including by the President himself. Both President Clinton and Vice-President Gore came under criticism for using the prerequisites of incumbency to attract donors.⁹⁹ A House Oversight and Reform Committee investigation found that President Clinton had endorsed plans to grant high-level DNC donors lavish perks ahead of the 1996 campaign, including “Lincoln Bedroom overnights, White House coffees, Air Force One trips and Kennedy

⁹⁴ Carl Bernstein and Bob Woodward, Mitchell Controlled Secret GOP Fund, Wash. Post (September 29, 1972), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/092972-1.htm>

⁹⁵ Senate Watergate Committee, *Final Report of the Select Committee on Presidential Campaign Activities* (1973), 1205.

⁹⁶ Anthony Ripley, Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate; Haldeman, Ehrlichman, Mitchell on List, New York Times (March 2, 1974), <https://www.nytimes.com/1974/03/02/archives/federal-grand-jury-indicts-7-nixon-aides-on-charges-of-conspiracy.html>

⁹⁷ Annie Karni, Why Trump Can’t Get Enough of the Rose Garden, New York Times (May 19, 2019), <https://www.nytimes.com/2019/05/19/us/politics/trump-rose-garden.html>

⁹⁸ Alison Mitchell, Fund Raising: Politics Were Separate Universe for White House Officials, New York Times (March 5, 1997), <https://archive.nytimes.com/www.nytimes.com/library/politics/0305fundraising.html>

⁹⁹ Alison Mitchell, Gore Says He Did Nothing Illegal in Soliciting from White House, New York Times (March 4, 1997), <https://www.nytimes.com/1997/03/04/us/gore-says-he-did-nothing-illegal-in-soliciting-from-white-house.html>

Center tickets.”¹⁰⁰ Vice President Gore was widely criticized for soliciting campaign contributions on dozens of occasions by telephone from his White House office.¹⁰¹ Clinton Administration officials also appeared to arrange access to federal regulators and the President. For instance, Alexis Herman, who served as White House Director of Public Liaison from 1993 until her nomination as Labor Secretary in 1997, invited a “federal bank regulator to meet with Clinton and some of the nation’s most powerful bankers at a coffee meeting sponsored by the Democratic Party.”¹⁰²

In the George W. Bush Administration, the scope, scale, and coordination of efforts to use government resources and personnel increased. In 2011, the Office of Special Counsel (OSC), issued a report concluding that Bush Administration officials routinely violated the Hatch Act during the 2006 midterm elections. Among its principal conclusions, the OSC found White House Office of Political Affairs (OPA) employees engaged in a comprehensive and coordinated efforts to elect Republicans during the 2006 election cycle: “OPA was essentially an extension of the RNC in the White House,”¹⁰³ in which “many OPA employees believed that [the election] effort was part of their official job duties,” and accordingly, “Treasury funds were unlawfully used to finance efforts to pursue Republican victories at the polls in 2006.”¹⁰⁴ The investigation found that OPA officials worked with the RNC to develop “target lists” of vulnerable Republican office holders, and then coordinated high-level agency appointees to attend events with targeted Republican candidates “in order to attract positive media attention to their campaigns.”¹⁰⁵ In addition, RNC Desk Coordinators worked inside the White House to help coordinate the travel of high-level appointees to both political and official events in company with Republican candidates.”¹⁰⁶ The OSC investigation also revealed that OPA systematically tracked “electoral priorities and its efforts of deploying high-level agency political appointees to events with Republican candidates” in the waning weeks of the election cycle (the “final push”¹⁰⁷).

Eleven executive departments in President Bush’s Cabinet were implicated in OSC’s findings. The OSC concluded that four Cabinet officers engaging in activity that likely violated the Hatch Act.¹⁰⁸ While the OSC report uncovered a

¹⁰⁰ U.S. House Committee on Government Reform and Oversight, *Investigation of Political Fundraising Improprieties and Possible Violation of Law* (November 1998), 8.

¹⁰¹ <https://www.washingtonpost.com/wp-srv/politics/special/campfin/intro5.htm>

¹⁰² Christopher Drew, Nominee for Labor Post Is in Jeopardy Over Political Activities, *New York Times* (February 1, 1997), <https://archive.nytimes.com/www.nytimes.com/library/politics/020197herman-fundraising.html>

¹⁰³ U.S. Office of Special Counsel, *Investigation of Political Activities by White House and Federal Agency Officials during the 2006 Midterm Elections* (January 2011), 44

¹⁰⁴ *Id.* at 44.

¹⁰⁵ *Id.* at 44.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. Office of Special Counsel, *Investigation of Political Activities by White House and Federal Agency Officials during the 2006 Midterm Elections* 64 (January 2011).

¹⁰⁸ They were: Interior Secretary Dirk Kempthorne, Veterans Affairs Secretary James Nicholson, Energy Secretary Samuel Bodman, and acting Transportation Secretary Maria Cino.

“systematic misuse of federal resources” that indisputably contravened the Hatch Act, the report conceded that “such practices are not unique to the Bush II administration.”¹⁰⁹

The Obama Administration lacked the coordinated efforts to use White House or agency staff in connection with elections but did include several high-profile incidents. An OSC investigation concluded that HHS Secretary Kathleen Sebelius violated the Hatch Act twice in an official speech in extemporaneous remarks urging President Obama’s reelection along with the election of a North Carolina Democratic gubernatorial candidate.¹¹⁰ OSC also found that HUD Secretary Julián Castro violated the Hatch Act when he stated that Hillary Clinton was the most experienced candidate and that he was supportive of her, even though he had qualified his remarks by saying that he was “taking off my HUD hat for a second and just speaking individually.”¹¹¹ President Obama declined to move forward with disciplinary actions in these case. President Obama’s Secretary of Labor Hilda Solis allegedly solicited money for President Obama’s reelection when still in office, and her successor in the Obama Administration, Tom Perez, campaigned to be DNC chairman when still in office as Secretary, but the OSC did not file a report in either case.

C. *President Trump*

The Trump Administration’s issues with the Hatch Act and norms of separation between government work and campaigning can be categorized in three groups of increasing severity.

First, in the first three years of the Trump Administration, senior advisors and members of the Cabinet were either found to have violated the Hatch Act or to have acted in ways that came very close to it in speeches and remarks. An OSC investigation found that Kellyanne Conway, then senior advisor to President Trump, repeatedly violated the Hatch Act in interviews and with her use of Twitter, frequently “us[ing] her official authority in an attempt to influence the presidential election” and that “[t]he sheer number of occurrences underscores the egregious nature of her violations.”¹¹² OSC also found that Sonny Perdue, Secretary of the U.S. Department of Agriculture, violated the Hatch Act when he advocated for Trump’s reelection on an official trip to North Carolina.¹¹³ There were also credible

¹⁰⁹ Id. at 103.

¹¹⁰ U.S. Office of Special Counsel letter to President Obama regarding HHS Secretary Sebelius 3 (September 2012).

¹¹¹ U.S. Office of Special Counsel letter to President Obama regarding HUD Secretary Julián Castro 3 (July 2016).

¹¹² U.S. Office of Special Counsel, Report of Prohibited Activity Under the Hatch Act OSC File Nos. HA-19-0631 & HA-19-3395 (Kellyanne Conway), May 30, 2019, pp. 1-17, [https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20\(HA-19-0631%20&%20HA-19-3395\).pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20(HA-19-0631%20&%20HA-19-3395).pdf)

¹¹³ Letter from U.S. Office of Special Counsel to Deputy Director of Citizens for Responsibility and Ethics in Washington Donald K. Sherman, October 8, 2020, <https://www.citizensforethics.org/wp>

and repeated allegations that Ivanka Trump,¹¹⁴ the Director of White House Office of Trade and Manufacturing Peter Navarro,¹¹⁵ and the White House Chief of Staff Mark Meadows¹¹⁶ made endorsements of President Trump's reelection in interviews and/or on Twitter.

Second, President Trump hosting the Republican National Convention at the White House is as overt a use of government resources and imprimatur for campaign purposes imaginable (even if not technically a violation of the Hatch Act because it exempts the president from coverage).¹¹⁷ In addition to the staging of the event at the White House, several aspects of the convention raised Hatch Act concerns. Acting Homeland Security Secretary Chad Wolf performed a naturalization ceremony at the White House, which was taped and played during the RNC.¹¹⁸ Given that the naturalization ceremony could only be conducted by the Acting Secretary in his official capacity, and that it was taped and broadcast as part of the scheduled events at the RNC, it is hard to imagine the taping and broadcast of the ceremony had any other purpose than supporting the election prospects of the Republican Party and President Trump.¹¹⁹ The taped appearance of Secretary of State Mike Pompeo, speaking from Jerusalem, also raised similar questions.¹²⁰

Third, as detailed in the next Part, the scope of President Trump's efforts to challenge and ultimately reverse the outcome of the November 2020 election have not fully come to light. But there are numerous reports that President Trump and his staff, including White House Chief of Staff Mark Meadows, were involved in phone calls and meetings with state election officials to influence their reporting of election results. Using the authority of the federal government to influence state election reporting or to disrupt the workings of the Electoral College would

¹¹⁴ See, e.g., Citizens for Responsibility and Ethics in Washington, "Ivanka Trump violated the Hatch Act eight times in just over 48 hours," Linnaea Honl-Stuenkel, October 13, 2020, <https://www.citizensforethics.org/reportsinvestigations/crew-investigations/ivanka-trump-violated-the-hatch-act-eight-times-in-just-over-48-hours/>.

¹¹⁵ Letter from Citizens for Responsibility and Ethics in Washington to the U.S. Office of Special Counsel and Peter Navarro, October 20, 2020, <https://www.citizensforethics.org/wp-content/uploads/2020/10/Navarro-Hatch-Act-10-20-2020-FINAL.pdf>

¹¹⁶ Politico, "Meadows dismissed Hatch Act concerns at RNC: 'Nobody outside of the Beltway really cares,'" Matthew Choi, August 26, 2020, <https://www.politico.com/news/2020/08/26/mark-meadows-hatch-act-rnc-402194>. ⁵² Letter from U.S. Office of Special Counsel to Executive Director of Citizens for Responsibility and Ethics in Washington Noah Bookbinder, September 18, 2019, <https://www.citizensforethics.org/wp-content/uploads/legacy/2019/09/Ltr-to-CREW-re-Patton.pdf>

¹¹⁷ See, e.g., Brian Slodysko, *Watchdog Groups Say Convention Appearances Broke Hatch Act*, ASSOC.'D PRESS (Aug. 27, 2020), <https://apnews.com/a6ea0162c2ea6242cb9c8284c451560f>.

¹¹⁸ Michael D. Shear, *Naturalization Ceremony at R.N.C. Stands at Odds with Trump's Stance on Immigration*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/us/politics/trump-convention-white-house.html>.

¹¹⁹ Congressman Bennie Thompson, Chairman of the Committee on Homeland Security, filed a complaint with the Office of Special Counsel, alleging that Secretary Wolf's action violated the Hatch Act. See Bennie G. Thompson, Complaint to the Office of Special Counsel (Aug. 26, 2020), <https://homeland.house.gov/imo/media/doc/Hatch%20Act%20OSC%20Letter.pdf>.

¹²⁰ [cite]

constitute the most severe violation of norms against using executive branch resources for campaign purposes.

In varying degrees, presidents use administrative power as a campaign resource and tool, not merely to implement policy. These uses need to be part of our understanding of the president's relationship to administrative agencies.

III. VOTE COUNTER-IN-CHIEF

Presidents have a variety of means of control over election administration. While the federal executive branch has statutory powers over a wide range of election functions, the literature on presidential administration had largely overlooked election administration as part of the president's powers. Lisa Marshall Manheim's recent article, *Presidential Control of Elections*,¹²¹ goes a long way to filling that gap. As she explains, the president has traditional means of influence over executive agencies, including the Department of Justice, which enforces federal election legislation, such as the Voting Rights Act, the Department of Homeland Security, which has responsibility for protecting election infrastructure, and the Department of Commerce, which runs the Census.¹²² The president also can augment or thwart independent agencies, such as the Election Assistance Commission and the Federal Election Commission, by not filling vacancies so they lack a quorum.¹²³

Some of the president's actions to influence the administration of election laws clearly involve the articulation or implementation of national policy. For instance, presidents have made enforcement of the Voting Rights Act's provisions which protect access to the polls a priority. And presidents have also articulated policies of enhanced policing of election-related fraud.¹²⁴ Both positions have more direct implications than most positions of national policy, and as a result, merit the special consideration that Manheim provides. Because they are articulated positions of national policy, they still fall within the general model of presidential administration.

But presidents also use their power of election administration in ways that do not involve any articulated policy, or act in ways that have only a pretextual connection to a national policy. At least from the perspective of the neutral function of election processes, these are some of the most worrisome aspects of partisan administration.

¹²¹ Lisa Marshall Manheim, *Presidential Control of Elections*, 74 *Vand. L. Rev.* 385, 413 (2021).

¹²² *Id.* at 400-402; 419.

¹²³ *Id.* at 427-29.

¹²⁴ See Manheim, *supra* note ___, at 413.

A. *Presidents George W. Bush and Obama*

While serious allegations of partisan motivation in election administration were made in both the G.W. Bush and Obama Administrations, investigations did not vindicate those allegations. During the Bush Administration, the opinion of lawyers in the Voting Section of the Civil Rights Division of DOJ that the 2003 Texas redistricting plan, which favored Republicans, violated the Voting Rights Act was reported to be overruled by political appointees; career lawyers in the same office were reported to be overruled by politically appointed lawyers in approving a Georgia voter ID law.¹²⁵

In the Obama Administration, several similar allegations prompted inspector general inquiries. An inspector general's investigation of an allegation of political influence in the Voting Section of DOJ's Civil Rights Division during the Obama Administration did not find evidence of "improper" political influence, but did express some concerns about enforcement in a few cases.¹²⁶ Similarly, a long-running investigation of whether the IRS had engaged in politically motivated enforcement and monitoring of organizations applying for tax-exempt status vindicated the Obama White House's claim that apparent targeting did not follow from political influence but improper enforcement criteria.¹²⁷

B. *President Trump*

From his very first days in office, President Trump showed a particularly keen interest in the machinery of elections. That concern has manifested in actions that could be viewed as embodying a national policy. For instance, in the Trump Administration, DOJ prosecutors took an aggressive stance in prosecution of alleged voter fraud by non-citizens.¹²⁸ President Trump and his Administration also took a range of actions that are much harder to classify as serving any national policy goal, or whose justification as been found to be pretextual.

1. *The 2020 Census and Pretext.* The Trump Administration made repeated efforts to include a citizenship question on the 2020 Decennial Census. President Trump's then-Secretary of Commerce, Wilbur Ross, announced in March 2018 that the Census Bureau planned to restore a question on citizenship status to the 2020 census.¹²⁹ In a memorandum to his Under Secretary for Economic Affairs, Ross argued that the reinstatement would provide valuable information about

¹²⁵ Editorial, *Fixing the Game*, New York Times (December 5, 2005), <https://www.nytimes.com/2005/12/05/opinion/fixing-the-game.html?searchResultPosition=1>

¹²⁶ Off. of the Inspector Gen., U.S. Dept' of Just., *A Review of the Operation of the Voting Section of the Civil Rights Division* 251 (2013).

¹²⁷ Treasury Inspector Gen. for Tax Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* 5-10 (2013).

¹²⁸ Manheim, *supra* note __, at 416.

¹²⁹ U.S. Dep't of Com., *U.S. Department of Commerce Announces Reinstatement of Citizenship Question to the 2020 Decennial Census* (Mar. 26, 2018), <https://www.commerce.gov/news/press-releases/2018/03/us-department-commerce-announces-reinstatement-citizenship-question-2020>.

citizens of voting age populations necessary for enforcing Section 2 of the Voting Rights Act.¹³⁰ Led by New York State, seventeen states, the District of Columbia, six cities, and a mayoral group challenged the reinstatement. The group alleged that the citizenship question would “fatally undermine the accuracy of the population count and cause tremendous harm to Plaintiffs and their residents,”¹³¹ by depressing response rates among residents who were not born in the U.S. The challengers won in district court.

In *Department of Commerce v. New York*, the Supreme Court agreed with the district court that the Secretary’s justification regarding enforcement of the VRA was “pretextual” and “contrived”—that is, false.¹³² Secretary Ross, the Supreme Court suggested, wanted to include the citizenship question; the justification was “incongruent with what the record reveal[ed] about the agency’s priorities and decisionmaking process.”¹³³ The Supreme Court’s conclusion that that the Secretary’s publicly stated motive, the only one the Secretary proffered,¹³⁴ is pretextual and contrived provides an unusually clear basis for concluding that the Secretary’s motive must not have been one that it is easy to expressly state.

2. *The 2020 Election.* President Trump’s level of interest in the mechanics of the 2020 election could not be missed and persists to the present day. Many of President Trump’s statements about the reliability of state election processes could be attributed to his private position as a candidate. But a wide array of other actions cannot be distinguished from his official capacity.

The full scope of President Trump’s actions following the November 3, 2020 election, have yet to be uncovered—but in what has been reported, there appears to be a repeated use of the office of the presidency in an effort to influence both state vote counting and their processing by the Electoral College. Following his election loss on November 3, President Trump had numerous meetings at the White House with Republican leaders from across the country that are difficult to view merely as the President acting in his private capacity. On Friday, November 20, 2020, President Trump met with Michigan state legislators, including the Michigan Senate Majority Leader and House Speaker.¹³⁵ The meeting took place three days before the Michigan Board of State Canvassers was set to certify Joe

¹³⁰ Memorandum from Secretary Wilbur Ross on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf.

¹³¹ Complaint at 1, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 1:18-cv-02921).

¹³² *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

¹³³ *Id.* at 2575.

¹³⁴ *Id.* at 2575.

¹³⁵ Anita Kumar and Gabby Orr, Inside Trump’s Pressure Campaign to Overturn the Election, *Politico* (December 21, 2020), <https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486>

Biden’s victory,¹³⁶ and it came as President Trump and his allies were mounting a campaign to pressure “friendly state legislatures to appoint electors” to decide the election in his favor.¹³⁷ Despite the timing of the meeting, White House Press Secretary Kayleigh McEnany described the meeting as routine, asserting that it was “not an advocacy meeting” and that the discussion in the White House involved “no one from the campaign.”¹³⁸

On Thursday, December 10, 2020, President Trump hosted twelve Republican state attorney generals, including Arizona Attorney General Mark Brnovich, in the Cabinet Room of the White House. The meeting took place two days after Texas Attorney General Ken Paxton, who was also in attendance, filed a lawsuit against Michigan, Wisconsin, Pennsylvania, and Georgia for what he described as “unconstitutional changes to 2020 election laws” in those states.¹³⁹ All but one of the state attorney generals at the December 10 meeting publicly supported Paxton’s lawsuit, which was later rejected by the Supreme Court for not having “demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.”¹⁴⁰ White House officials maintained that the meeting was held “to advance the shared federal-state partnership.”¹⁴¹

After weeks of unsuccessful lawsuits, President Trump worked with congressional Republicans to challenge the Electoral College vote certification set to take place on January 6, 2021, in Congress. On Monday, December 21, 2020, President Trump met with dozens¹⁴² of House Republicans, as well as his legal team and Vice President Pence, in the White House. Those in attendance reviewed the procedural tactics they would employ to try to obstruct the Electoral College certification process in Congress. Specifically, participants in the meeting, such as White House Chief of Staff Mark Meadows and Representative Jody Hice (R-GA), tweeted that the meeting took place in order to “fight back against mounting

¹³⁶ Dan Mangan, Michigan Certifies Biden Election Win, Days after Trump Leans on State’s GOP Lawmakers, CNBC (November 23, 2020), <https://www.cnbc.com/2020/11/23/michigan-certifies-biden-win-rejecting-trump-fraud-claims.html>

¹³⁷ Ed White, David Eggert and Zeke Miller, Trump Summons Michigan GOP Leaders for Extraordinary Meeting, AP News (November 19, 2020), <https://apnews.com/article/trump-invites-michigan-gop-white-house-6ab95edd3373ecc9607381175d6f3328>

¹³⁸ Video, McEnany says Trump’s meeting with Michigan lawmakers not an ‘advocacy meeting,’ Wash. Post (November 20, 2020), https://www.washingtonpost.com/video/politics/mcenany-says-trumps-meeting-with-michigan-lawmakers-not-an-advocacy-meeting/2020/11/20/5551f3ed-e513-43c2-9885-d1185ba275c1_video.html

¹³⁹ Press Release, AG Paxton Sues Battleground States for Unconstitutional Changes to 2020 Election Laws, Ken Paxton, Attorney General of Texas (December 8, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-sues-battleground-states-unconstitutional-changes-2020-election-laws>

¹⁴⁰ Texas v. Pennsylvania, 592 U.S. __ (Order No. 155, Dec. 11, 2020)

¹⁴¹ Andrew Solender, Trump to Meet with Ten State Attorneys General Backing Case To Overturn Election, Forbes (December 9, 2020), <https://www.forbes.com/sites/andrewsolender/2020/12/09/trump-to-meet-with-ten-state-attorneys-general-backing-case-to-overturn-election/?sh=1cb8f2013fe1>

¹⁴² Melanie Zanona, House Republicans Meet with Trump to Discuss Overturning Election Results, Politico (December 21, 2020), <https://www.politico.com/news/2020/12/21/trump-house-overturn-election-449787>

evidence voter fraud”¹⁴³ and “lead an objection to Georgia’s electors on Jan 6.”¹⁴⁴ Ultimately, 147 congressional Republicans, including eight Senators and 138 Representatives, joined the plan—first catalyzed in the White House on December 21, 2020—to overturn the results of the election on January 6, 2021.¹⁴⁵

On January 2, 2021, in a widely reported incident, President Trump called Georgia Secretary of State Brad Raffensberger, pressing the Secretary to recount the state’s ballots to “find 11,780 votes.”¹⁴⁶ Those on the call included White House Chief of Staff Mark Meadows, prominent GOP lawyers, and allies of President Trump. During the conversation, President Trump suggested, in what has been widely characterized as a veiled threat, that Raffensberger and his office’s chief lawyer would be held criminally liable if they did not carry out his demands. “That’s a criminal offense,” President Trump asserted in response to Raffensberger’s continued refusal to “support” President Trump’s claims of voter fraud. “That’s a big risk to you and to Ryan, your lawyer,” the President Trump concluded.¹⁴⁷

According to *The New York Times*, the call between President Trump and Raffensberger came directly from the White House, following “18 other calls by the White House switchboard to the office during the past two months.”¹⁴⁸ The day after the call, President Trump confirmed what was subsequently reported, when he tweeted, “I spoke to Secretary of State Brad Raffensberger yesterday about Fulton County and voter fraud in Georgia. He was unwilling, or unable, to answer

¹⁴³ Mark Meadows, Several Members of Congress Just Finished a Meeting in the Oval Office with President @realDonaldTrump, preparing to fight back against mounting evidence of voter fraud, Twitter (December 21, 2020),

https://twitter.com/MarkMeadows/status/1341157317451124745?ref_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwterm%5E1341157317451124745%7Ctwgr%5E%7Ctwcon%5Es1_%2F%2Fembedly.forbes.com%2Fwidgets%2Fmedia.html%3Ftype%3Dtext%2Fhtmlkey%3D3ce26dc7e3454db5820ba084d28b4935schema%3Dtwitterurl%3Dhttps3A%2F%2Ftwitter.com%2FMarkMeadows%2Fstatus%2F1341157317451124745image%3D

¹⁴⁴ Rep. Jody Hice, Big meeting today with @realDonaldTrump, @VP, the President's legal team, @freedomcaucus and other Members of Congress, Twitter (December 21, 2020), <https://twitter.com/CongressmanHice/status/1341180474975268870>

¹⁴⁵ Karen Yourish, Larry Buchanan and Denise Lu, The 147 Republicans Who Voted to Overturn Election Results, *New York Times* (January 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>. See also Michael Balsamo & Zeke Miller, *Trump Aide Banned From Justice After Trying to Get Case Info*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/heidi-stirrup-banned-justice-department-7624560e990ec55383a2a3e421c3a52e> (reporting that Trump administration official installed at DOJ to oversee election fraud causes had been dismissed).

¹⁴⁶ Amy Gardner, ‘I just want to find 11,780 votes’: In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor, *Wash. Post* (January 3, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html

¹⁴⁷ *Id.*

¹⁴⁸ Michael D. Shear and Stephanie Saul, Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election, *New York Times* (January 3, 2021, updated May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>

questions such as ‘ballots under table’ scam, ballot destruction, out of ‘state voters’, dead voters, and more. He has no clue!”¹⁴⁹

In the last weeks of his term, President Trump also pressured senior officials at the Department of Justice, including then-acting Attorney General Jeffrey Rosen, to publicly affirm his unsubstantiated claims of voter fraud and challenge the election in the Supreme Court.¹⁵⁰ President Trump met resistance from senior DOJ officials in carrying out his plans, which reportedly would have included special counsels to investigate Dominion Voting Systems, increased court filings, and public news conferences that would display how “federal fraud investigations cast the results in doubt.”¹⁵¹ Facing this resistance, on December 31, 2020, President Trump began working with the then-acting head of the civil division, Jeffrey Clark, to replace Rosen, who repeatedly rebuffed President Trump’s requests for the Justice Department to directly intervene and reverse the President’s loss in Georgia. Clark promised President Trump that he would exercise the Justice Department’s power to try to overturn the election results in battleground states.¹⁵² Ultimately, the plan to fire Rosen and elevate Clark failed when senior DOJ officials learned of the plot and threatened to resign en masse.¹⁵³

President Trump was, however, successful in prompting the resignation of the U.S. Attorney for the Northern District of Georgia, Byung J. Pak, who President Trump had appointed. U.S. Attorney Pak resigned unexpectedly on January 4, 2021. In an email to coworkers, Pak maintained that his resignation was a result of “unforeseen circumstances.”¹⁵⁴ *The Wall Street Journal* reported that Pak was forced to step down following a call with a senior DOJ official who, following instructions from the White House, informed Pak that President Trump “was furious there was no investigation related to election fraud and that the president wanted to fire” him.¹⁵⁵ After Pak resigned, President Trump personally informed Bobby Christine, Savannah’s U.S. Attorney, that he would replace Pak, a highly unusual step that flouted “longstanding protocol that discourages a president from directly contacting Justice Department officials.”¹⁵⁶

¹⁴⁹ <https://www.thetrumparchive.com/?searchbox=%22unwilling%22>

¹⁵⁰ Jess Bravin and Sadie Gurman, Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results, *Wall Street Journal* (January 23, 2021), <https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369>

¹⁵¹ Katie Benner and Charlie Savage, Jeffrey Clark was Considered Unassuming. Then He Plotted with Trump, *New York Times* (January 24, 2021), <https://www.nytimes.com/2021/01/24/us/politics/jeffrey-clark-trump-election.html>

¹⁵² *Id.*

¹⁵³ Jess Bravin and Sadie Gurman, Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results, *Wall Street Journal* (January 23, 2021), <https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369>

¹⁵⁴ Aruna Viswanatha, Sadie Gurman and Cameron McWhirter, White House Forced Georgia U.S. Attorney to Resign, *Wall Street Journal* (January 9, 2021), https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840?mod=article_inline.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

President Trump’s firing of Cris Krebs, Director of the Cybersecurity and Infrastructure Security Agency, on November 20, 2020, via Twitter, raised similar concerns about the groups of his actions. Krebs had publicly defined the integrity of the 2020 election. In his tweet firing Krebs, President Trump cited Krebs’ “inaccurate” statements that refuted President Trump’s unproven claims of election fraud as principal reasons for the dismissal. Specifically, President Trump faulted Krebs for his failure to address the election’s “massive improprieties and fraud.”¹⁵⁷ Described by the *Wall Street Journal* as the “public face of federal election security efforts,”¹⁵⁸ Krebs’ ousting appears to make clear President Trump’s willingness to use his office to punish those who contradicted his claims about the 2020 election.

* * *

The discussion of this Part and the prior two aims to show that presidents do not merely turn to agencies to direct national policy, but also to obtain targeted benefits for their campaigns and the campaigns of their co-partisans. Those benefits can be directing funding and grants, helping to trumpet a candidate with voters or coordinating with a formal campaign. And in the case of President Trump, efforts focused on how the election administration could produce an outcome to the November 2020 election he desired. Collectively and individually, these pathways of partisan administration are part of how presidents use administrative authority. Partisan administration, not just presidential administration, is a feature of presidential governance.

IV. OBJECTIONS AND REFORM

A. *Objections: Motive, “National Policy”, and Legality*

There are several objections to the suggestion that partisan administration can be distinguished from presidential administration.

1. *All presidential action aims at electoral benefit.* One objection to isolating these pathways of partisan administration is that we should presume that all presidents’ actions generally have the goal of promoting their reelections or the election of other co-partisans. As a result, the objection goes, there is nothing distinctive about the ends of partisan administration.

By way of response, it must be conceded that the actions identified here as partisan administration and those studied as part of presidential administration do generally share the aim of promoting a president’s reelection. But that shared aim does not mean there is nothing distinctive about partisan administration. What distinguishes acts of partisan administration is that they are not directed at national

¹⁵⁷ <https://www.trumparchive.com/?searchbox=%22krebs%22>

¹⁵⁸ Dustin Volz, Trump Fires Top Cybersecurity Official Who Defended Integrity of Election, *Wall Street Journal* (November 17, 2020), <https://www.wsj.com/articles/trump-fires-chris-krebs-top-cybersecurity-official-in-department-of-homeland-security-11605659868>

policy change—and at most, they have a pretextual connection to such changes. For presidential administration, the paradigmatic presidential action is influence on a significant agency rulemaking, like the EPA’s Clean Power Plan. For partisan administration, in contrast, the paradigmatic presidential action is the direction of funds, use of staff time, creation of subunits in the executive branch, convening meetings, and making of calls—all of which are hard to observe.

2. *Presidential non-policy activities.* This reply raises another objection: Doesn’t every presidential action, or at least every (lawful) presidential use of administrative power, have a national policy goal or element? This objection is also a serious one. If true, then the pathways of partisan administration identified above are merely instances of presidential administration. Perhaps they would help to fill out that model, but they would not add anything distinctive.

To understand this objection, it first must be conceded that at a high level of abstraction, it would be hard to deny that one could associate a national policy with many presidential actions. Directing funds and grants to the upper Midwest might be justified as helping those hit hardest by technological developments; restricting the base for apportionment of the House could be seen as reinforcing a view of who counts for representation, and so on. In a general and thin sense, it is possible to treat virtually all presidential actions as involving some policy. But that should not stop us from seeing differences, even if they are at the margins or matters of degree, between different uses of administrative power.

At one end of the spectrum are actions which have a stated and express national policy goal. Kagan’s examples of presidential administration fit in this category. Kagan examines use of presidential review of regulatory policy, exercised through OIRA over significant regulations;¹⁵⁹ presidential directives on substantive regulatory policy, ranging from orders to the Department of Education to collect and distribute more information on hate crimes in schools to ordering the adoption of new standards for the safety of imported food;¹⁶⁰ and appropriation of regulatory action, ranging from announcing new regulations on welfare reform and pollution standards for new cars to national litigation strategies against tobacco companies.¹⁶¹ Carrying forward this inquiry to the G.W. Bush and Obama Administrations, Kathryn Watts notes that both Presidents Bush and Obama had back-door influence over FDA’s consideration of the Plan B emergency contraception device, the EPA’s ozone standards, and the FCC’s positions on net neutrality.¹⁶² Both the Bush and Obama Administrations also exerted express influence on EPA’s ozone standards;¹⁶³ and President Obama sought to directly

¹⁵⁹ Kagan, *supra* note __, at 2287.

¹⁶⁰ *Id.* at 2290-96.

¹⁶¹ *Id.* at 2301-02.

¹⁶² Watts, *supra* note __, at 714-16.

¹⁶³ *Id.* at 716-18

influence the FCC's net neutrality rulemaking.¹⁶⁴ National policy change is the object of interest within the model of presidential administration.

At the other end of the spectrum is the use of White House resources to run the president's campaign or to coordinate with the campaign to maximize media exposure incident to official travel. Officials participating in offices devoted to coordination understood their roles themselves to be acting to directly benefit a reelection campaign. It is difficult to associate a national policy with these actions unless we say "reelect President X" is such a policy. Many (perhaps all) of the actions discussed in Part III on the violation of norms of the Hatch Act fall into this category—their national policy content is thin to none. So too with presidential actions regarding the machinery of elections and election processes discussed in Part IV. While there may be some actions which could be justified as making elections more secure, accurate, or accessible, the presidential actions highlighted above are hard to view as advancing a policy other than the election of a particular president.

The spending decisions discussed in Part III are a closer case. Some conceivable national policies might overlap, at times, with the disproportionate spending patterns that political scientists have identified. "Help Our Nation's Struggling Rust Belt" or "Help Our Nation's Most Rural States," etc., could correspond with one or another president's set of expenditures. But outside of a few instances like President Obama's efforts to funnel grant funds to Ohio, presidents do not publicly announce policies targeting funds to swing states or to core co-partisan states. They rely on more informal channels. Especially when viewed across multiple presidential administrations, it would be hard to conceive of a national policy that fit the marginal increases and decreases in these expenditures. As such, these spending deviations stand apart from the garden-variety changes in national policy which are the focus of presidential administration.

3. *Legality.* Finally, it might be objected that what distinguishes acts of presidential and partisan administration is their legality—that is, presidential administration describes lawful uses whereas partisan administration describes unlawful uses of presidential power. The legality line is not that simple. Kagan describes what she defends as the lawful use of presidential power to influence administration. A robust scholarly literature, however, takes issue with Kagan's claims that the president's statutory powers authorize the full scope of actions that

¹⁶⁴ Id. at 716-18

Kagan defends,¹⁶⁵ with some support in the judiciary.¹⁶⁶ Just as important, if a president were to direct an agency to take an action that violated a statute on matter of national policy, we would still say it was an instance of presidential administration. As a descriptive model, presidential administration includes unlawful administration. The same holds true for partisan administration. Some of the actions that fall within the pathways of partisan administration are clearly unlawful, such as violations of the Hatch Act. But others are not, such as presidential actions that do not violate the Hatch Act because the president is exempt from its coverage. The lawfulness is not what distinguishes instances of presidential administration from partisan administration.

On each of these dimensions, partisan administration describes a distinctive presidential form of administrative power that—one that the model of presidential administration does not recognize.

B. Democracy and Lines of Reform

Partisan administration poses a problem for democratic processes that presidential administration does not. Presidential administration has the potential to augment accountability of government agencies and to increase their coordination—whether or not that potential is always achieved.¹⁶⁷ In contrast, there are no public virtues of partisan administration. It results in some states getting a disproportionate share of federal spending for no reason other than the way they play into a president’s electoral calculations. It involves the use of government resources to assist in the reelection of a sitting president and his co-partisans. It involves influencing the way election laws are enforced to achieve those same ends.

Partisan administration thus describes a closely connected set of pathologies of democratic politics in which presidents act to entrench themselves and their co-partisans in office. Partisan administration thus directly targets a core democratic

¹⁶⁵ Compare, e.g., Peter L. Strauss, *Overseer*, or “The Decider: The President in Administrative Law,” 75 *Geo. Wash. L. Rev.* 696 (2007) (challenging); Kathryn E. Kovacs, *Supersecretary in Chief*, 94 *S. Cal. L. Rev.* 61 (2020) (critiquing); Bijal Shah, *Faithful Execution All the Way Down* (in draft, documenting and critiquing), Kevin M. Stack, *The President’s Statute Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263 (2006) (critiquing); Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 *Colo. L. Rev.* 1232 (2011) (evaluating in light of assertions of constitutional power) *with* Nina A. Mendelson, *Another Word on the President’s Statutory Authority Over Agency Action*, 79 *Fordham L. Rev.* 2455 (2011) (defending); Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 *Admin. L. Rev.* 43 (2017) (defending).

¹⁶⁶ See Shah, *supra* note __ (exposing judicial decisions striking down presidentially motivated assertions of power by agencies).

¹⁶⁷ See, e.g., Lisa S. Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 *Mich. L. Rev.* 47 (2006); see also sources cited in *supra* note [166].

values.¹⁶⁸ To be sure, many national policies have distributional benefits to different constituencies within the political parties. And some policies, with Social Security being the most obvious example,¹⁶⁹ may induce long-term support for the politicians and parties which pledge to support them. But there still is a distinctive wrong in *personal entrenchment* in the sense of using government power for a particular president (or his chosen successor) to retain a hold on power. Even if (as far as we know in recent times) presidents have not been successful in entrenching themselves, the use of government for the aim of personal entrenchment undermines confidence in elections, basic principles of democratic accountability and fair play.

This points toward an agenda for reform, which, at a broad level, would have three elements. First, in many cases, these pathways of partisan administration are not readily accessible to the public in a timely way. Patterns that only come to light in long-term statistical studies or investigations by inspectors general, congressional committees, and investigative journalists impede the public's capacity to hold presidents to account. Accordingly, evidence of partisan administration underlines the need for increased transparency concerning budget execution, staffing, and engagement on election administration. As Pasachoff notes, the scope of meetings that OMB officials have with agencies throughout budget execution and changes in agency priorities in response to OMB input are not disclosed.¹⁷⁰ And as Hudak notes, OMB has control over the order in which approved grant proposals are funded, which influences the timing and likelihood of funding,¹⁷¹ without transparency as to how it uses this power. Greater transparency in OMB's influence on agency administration of their funds and on federal grants would facilitate review of discrepancies by NGOs and others in a position to observe deviations and subtle redirections of funds.

Second, the Hatch Act has been insufficient to guard against presidents' misuse of government power to support their campaigns. The direction of reform taken by the proposed Protecting Our Democracy Act¹⁷² is a promising start. The bill would allow the Office of Special Counsel (OSC) to impose employment sanctions on senior officials even when the President does not take action on the matter.¹⁷³ With that enhanced enforcement power, a president who fails to enforce the Hatch Act against his or her senior officials cannot insulate them from Hatch Act liability. That makes it more costly for an administration to adopt a policy of tolerating (or even encouraging) Hatch Act violations among senior staff and high-level political appointees. In addition, the bill provides useful clarification that the

¹⁶⁸ For discussion of this norm, see Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017); Nelson Tebbe, *Government Nonendorsement*, 98 Minn. L. Rev. 648 (2013).

¹⁶⁹ Levinson & Sachs, *supra* note __, at 403 (describing Social Security as a form of functional entrenchment).

¹⁷⁰ Pasachoff, *supra* note __, at 2251-52.

¹⁷¹ Hudak, *supra* note __, at 173.

¹⁷² H.R. 8363, 116th Cong., 2d Sess. (Sept. 23, 2020).

¹⁷³ *Id.* at § 1002(a)(2) (2020).

Act extends to every senior appointed official working in the Executive Office of the President, any White House office, or the Office of the Vice President.¹⁷⁴

Third, the investigation and disclosure of abuses in the pathways of partisan administration highlight the importance of the offices of inspectors general throughout the executive branch. In 2020, President Trump fired inspectors general for the State Department, Health and Human Services, the Department of Transportation, the Department of Defense, and the U.S. Intelligence Community. Establishing for-cause removal protections for inspectors general, as the Protecting Our Democracy Act proposes,¹⁷⁵ would go a long way toward giving these officials the political insulation they need.

CONCLUSION

Polarization and division in Congress may explain presidential administration—the ways contemporary presidents have asserted control over administrative agencies to make an impact on national policy and to demonstrate their leadership. But polarization has also shaped the electorate in ways that make them less attentive to policy changes. In response, presidents have found more direct ways to improve their election prospects than mediating through administrative policy changes. These pathways of partisan administration exist alongside presidential administration. But because partisan administration directly challenges basic principles of fair play, government nonpartisanship, and democratic accountability, it deserves attention and concern. Without attention to these pathways, and reforms addressed to them, we may soon arrive at a day, if we have not already, when partisan administration crowds out presidential administration.

¹⁷⁴ Id. at § 1002(b).

¹⁷⁵ Id. at § 702.