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## THE ART OF RACIAL DISSENT: AFRICAN AMERICAN POLITICAL DISCOURSE IN THE AGE OF OBAMA

KAREEM U. CRAYTON\*

When one refers to the art of dissent as it is often practiced in the judicial process, the point of the enterprise is to frame an alternative position that counters or competes with the majority's controlling viewpoint.<sup>1</sup> The dissenter on a multi-member court is the one who registers disagreement with a decision taken by his colleagues, offering an explanation of what he finds wrong with the choices or the reasoning behind the holding of the prevailing group.<sup>2</sup> In this capacity, the dissent serves to memorialize the nature and scope of the differences in the conversation among fellows on the court at a particular moment in time.

A more fully developed (and, indeed, a more celebrated) approach to dissent also explicitly or implicitly pursues a future-oriented goal as well.<sup>3</sup> Beyond the effort to mark the present discord, the forward-looking dissent lays a foundation for a possible revival of an idea whose time may not yet have arrived. This form of the dissent develops a competing vision of what might have been accomplished by the present court to shift the doctrine (arguably) in a more desirable direction. Ideally, the most lasting form of a dissent presages the ultimate place where the court's policy will eventually move over time—though perhaps with a different set of members.<sup>4</sup> Just as

\* Associate Professor, University of North Carolina at Chapel Hill School of Law. I am exceedingly grateful to Terry Smith, Alfred Brophy, Holning Lau, Fred Harris, Kathryn Sabbeth, Erika Wilson, Trina Jones, Eric Muller, Damon Phillips, Katherine Phillips, Rachel St. John, and Richard Pildes for their helpful thoughts and insights that helped develop various portions of this paper. I am also very appreciative of the enthusiastic assistance and sharp research skills of Nick Byrne on this project.

1. See, e.g., I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES (Mark Tushnet ed., 2008).

2. Consider the definition of "dissent" in the Oxford English Dictionary: "[to] hold or express opinions that are at variance with those previously, commonly, or officially expressed: *two members dissented from the majority*." *Oxford University Press*, OXFORD DICTIONARIES ONLINE, <http://www.oxforddictionaries.com/definition/english/dissent> (last visited Mar. 11, 2014)."

3. See, e.g., M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 284-85 (2007) ("[D]issents communicate legal theories to other Justices, lawyers, political actors, state courts, and future Justices, and have sometimes later won the day as a result of this.").

4. Perhaps the most well-known example of the lone dissenter whose day in the sun arrived decades after his opinion is Justice Harlan in the *Plessy* decision. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). Though fraught with its own troubling ideologies about race and its role in the public sphere, Justice Harlan's dissent found support from a majority much later. The Supreme Court embraced the

John the Baptist served as an important presage of coming attractions,<sup>5</sup> a dissent whose true value is not yet appreciated may actually prove significant because of the later change that its vision of the law helps to usher in.

But of course, this very familiar setting for voicing dissent (at least to those who spend their time toiling in law schools) is not the only context in which the art of dissent can play an important role. In the realm of politics, elections, and public participation, the dissent (along with the dissenter) can serve important functions in public life and policy as well.<sup>6</sup> Political discourse is a time-honored foundation of this country's public sphere. While the majority generally rules in a democracy, the proper functioning of the political system privileges and protects a healthy portion of expressed dissent by members of the citizenry.<sup>7</sup> Inasmuch as democracy depends upon the articulation of the popular will, the expression of dissent helps to test, to temper, and at times to inform popular opinion. Whether the matter at issue concerns which candidate should be elected, which government policy is more responsive, or even what the nation's priorities ought to be, the back-and-forth of the exchange in the political sphere provides an important platform to resolve substantive differences in order to enhance the stability and legitimacy of the state.

Dissent, in this context, is best regarded as the product of a reasoned (and at times necessary) clash of viewpoints. A common model for the engagement of ideas in the political sphere is the "marketplace," where different concepts and thoughts about public policy are continually exchanged, compared, and assessed.<sup>8</sup> Through the electorate's constant review and consideration of the multitude of positions, goes the thinking, the

general notion of color-blindness in *Brown v. Board of Education*, 347 U.S. 483 (1954). The best known of the Court's many frequent dissenters is Oliver Wendell Holmes, who provided a quite prescient dissent in the now infamous case *Lochner v. New York*, 198 U.S. 45 (1905).

5. The reference here is to John the Baptist, the early and outspoken evangelist in the New Testament who spread the news about the coming of the Messiah. Although Jesus stated that "among those born of women there has not risen anyone greater," *Luke* 7:28, John the Baptist met an unhappy end when he was beheaded due to critical statements about King Herod. *Mark* 6:14-29.

6. In using the term "dissent" in this particular context, I refer to the statements and actions that register disagreement with official policies and viewpoints taken by government officials and institutions. This type of dissent, expressed in the political realm, is commonly expressed in elections (by donating to or voting for a losing or "protest" candidate), in political debates/forums, in protest marches and demonstrations, et cetera.

7. See CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 213 (2005) ("[I]t is in the individual's interest to follow the crowd, but in the social interest for the individual to say and do what he thinks best.").

8. See *U.S. v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (citations omitted) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas. The aim of the historic struggle for a free press was 'to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government.' That is the tradition behind the First Amendment.").

best ideas and policies are eventually brought into focus. The act of conveying dissent (even in a losing proposition) therefore carries value insofar as it serves the community's broader interests in arriving at a jointly held understanding about what should be accomplished by government and why.

Where these political exchanges about public matters occur within a particular racial community, though, this very sunny conclusion about the merits of expressed dissent may not necessarily apply in all cases. The complexities of traditional political discourse and perhaps even the value of expressed dissent itself become manifold. And where, as with African Americans,<sup>9</sup> a group's political efficacy is closely tied to the perception and expectation that they speak with a unified (critics might say monolithic) voice, the existence of this brand of intragroup dissent in the community poses special challenges.

Foremost among these is the challenge of hashing out conflicts and differences in the public space, where many non-group members (some of them unfriendly) are spectators. In addition, a related consideration is the difficulty of conducting an explicitly racial discourse in an era when such talk is disfavored and alternative frames (like class distinctions) increasingly shape the political landscape.<sup>10</sup> And finally, in the era of an African American president (and Attorney General), there is the existential challenge of registering dissent in protest of a government that is literally run by fellow African Americans whose success as leaders is of some value to the community. Is it ever possible for African Americans to conduct a truly effective political discourse, complete with dissent, about race and politics under these conditions?

This piece engages these questions by utilizing the illustrations of different actors who are well known as erstwhile African American dissenters in the current political environment. Each of them has posed specific forms of critique directed at both the President in particular and at national policy more generally, though from different perspectives (and, I argue, with distinct purposes). What lessons can these examples of African American

9. Throughout this work, I shall employ the phrase "African American(s)" or "black(s)" interchangeably. I mean to address the same group of American citizens whose experience in the United States includes the historical narrative of forced slavery in the antebellum south, the Reconstruction, and the struggle for civil rights. *See generally* JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* (2000).

10. Indeed, the concern becomes even more pressing because of the challenges of pursuing a race-centered discourse (which would include racial dissent) in an era where the legal and social principle of color-blindness, which de-emphasizes explicit attention to race, defines the political landscape.

dissenters offer about the potential and peril of registering differences within the community in midst of a larger political discourse?

Part I of this piece addresses the various structural issues associated with what I refer to as “racial dissent,” which I argue is a particular kind of political dissent directed at (but not exclusive to) the African American community. Part II turns to an analysis that helps to illustrate the different categories of racial dissent that I identify in the public space. Each of the characters offers a telling example of an approach to racial dissent, based on the platform of the dissenter and the message conveyed in the dissent. Finally, Part III utilizes these three illustrations to develop some key observations and pose some larger questions about how one ought to understand the art of racial dissent in the Obama era.

### I. THE ANATOMY OF RACIAL DISSENT IN POLITICS

As a general matter, the norm of voicing dissent is a necessity of a well-functioning electorate in the American political system.<sup>11</sup> The First Amendment privileges political speech, including dissent, among the core areas of expression that are generally shielded from governmental intrusion.<sup>12</sup> Supreme Court doctrine amply supports the proposition that restraint on political speech is heavily disfavored, with very few exceptions.<sup>13</sup> Parts of the very structure and norms of our electoral system also encourage great attention to dissent. Where a candidate or a party faces defeat at the polls, for example, the victor usually makes a special effort to appeal to the electoral losers for policymaking purposes.<sup>14</sup> This act is more

11. Robert L. Ivie, *Democratic Dissent and the Trick of Rhetorical Critique*, 5 *CULT. STUD. CRIT. METHOD.* 276, 279 (2005) (“Indeed, dissent is a practical, if underappreciated, necessity in a complex and volatile world. It is anything but an inconvenience to democratic governance.”).

12. U.S. CONST. amend. I.

13. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word.”). *But see Gertz v. Robert Welch, Inc.* 418 U.S. 323, 340 (1974) (holding that there is “no constitutional value in false statements of fact”); *Miller v. California* 413 U.S. 15, 36 (1973) (holding that certain obscene and “prurient” content is unprotected by the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (finding that speech which “tend[s] to incite an immediate breach of the peace” is unprotected).

14. See, e.g., Terry McAuliffe, *Governor-Elect Terry McAuliffe’s Acceptance Speech* (Nov. 6, 2013), in *CHANTILLY PATCH*, <http://chantilly.patch.com/groups/elections/p/governorelect-terry-mcauliffes-acceptance-speech> (quoting Terry McAuliffe’s recent remarks to those who voted for his opponent during an acceptance speech after winning the election for the Governorship of Virginia):

Finally, I wanted to say something specifically to the hundreds of thousands of Virginians who supported my opponents. And thousands of you didn’t just vote – you volunteered for Mr. Cuccinelli or Mr. Sarvis. I’ve been involved in a lot of campaigns that didn’t succeed, in-

than just a graceful public relations touch for a winner; governance decisions tend to demand greater cooperation and consensus than election campaigns do.<sup>15</sup> Therefore, gaining the support (grudging or not) from the political dissenters can mean the difference between success and failure for the incumbent.<sup>16</sup> Likewise, stark political realities require directing effort to dissenting views in certain settings, as in the U.S. Senate, where certain minority objections carry special power.<sup>17</sup> Even the dissenting views that lie on the fringe of national policy, in the form of third parties, are given consideration (to a point) as they are expressed in the political process.<sup>18</sup>

#### A. What is Racial Dissent?

When political dissent is practiced within the boundaries of a specific racial group (which I am here terming “racial dissent”), the broader racial discourse is fashioned to explore the ideas, theories, and policies that would prove most beneficial to the members of that group.<sup>19</sup> One way of considering the purpose of this “in-group” version of political discourse is posing a question about betterment: “What is in the best interest for us as a distinct group?” Of course, any number of answers can exist to that question on a

cluding when I ran for Governor in 2009. I understand emotions are raw. I’ve been there. I get it. So while I promise you tonight that I will be Governor for all Virginians, the real test is my actions when I take office. I expect you to hold me to my pledge to work with both sides.

15. Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 PERSP. POL. 1125, 1128-29 (2010) (“A successful campaign strategy . . . requires the opposite of a compromising mindset. It favors candidates who stand firmly on their principles, and condemn their opponents’ positions at every turn. . . . But to govern, elected leaders who want to get anything done have to adopt a compromising mindset.”).

16. *Id.* at 1126.

17. One readily familiar example is the U.S. Senate rule on the filibuster, which requires a supermajority to end through the process known as cloture. Because they can effectively stop all business in the Senate, expressed dissents of this kind demand far greater attention than in a typical majority-rule setting. See S. COMM. ON RULES AND ADMIN., SENATE MANUAL CONTAINING THE STANDING RULES, ORDER, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 112-1, at 21 (1st Sess. 2011).

18. One oft-cited limitation on the broadcasting of dissent involves the usual limitation of third party candidates in presidential debates. With few exceptions, the organizers typically exclude third parties from the nationally televised debates, see John Nichols, *Open the Presidential Debates!* THE NATION (Sept. 17, 2012) <http://www.thenation.com/article/169635/open-presidential-debates>. A rather fascinating proposal, as of late, from perennial third party candidate Ralph Nader is to develop a third party of billionaires to break the stalemate between the two major parties in presidential contests. The concept has not been especially supported in the community of columnists. See Joan Walsh, *Go Away, Ralph Nader*, SALON (July 29, 2013), [http://www.salon.com/2013/07/29/go\\_away\\_ralph\\_nader](http://www.salon.com/2013/07/29/go_away_ralph_nader).

19. To be clear, the political discourse within a racial group is but one form of a broader discussion or conversation about matters of common concern to the members of a group. The topics of concern could range from matters ranging from politics, to history, to economics, to sociology, to culture. I emphasize here the current of the racial discourse explicitly directed at the world of political decision-making and its interaction with race, which would include matters such as elections, voting, policymaking – all of which have racial elements both in their underlying premises and in the likely effects on the groups at issue.

given topic; however, some of them inevitably enjoy status as a broad consensus view.<sup>20</sup> And when an individual or a small group of individuals take issue with the sensibility or effectiveness of a generally held or accepted answer to this question, he (or they) may rightly be viewed as engaging in the art of racial dissent.<sup>21</sup>

Notably, one confronts several structural and cultural barriers to robust racial dissent that do not exist in the prototypical form of dissent in the political discourse for other types of identity groups. This is especially true for African Americans, whose distinct place in the American political system is marked by a history of oppression and a political tradition of group-based mobilization around a single party in elections. Expressed political dissent in this context thus is not as easily embraced within the African American political discourse. There are some understandable explanations for this reality, which are outlined in more detail below. Still, some observers might well view the limits on dissent in this setting as unhealthy or perhaps even undemocratic because it is inconsistent with the expectations of political discourse.

20. An illustration of how racial dissent might work may prove helpful. Among the more common debates within the African American community (though not exclusively so) is whether legislative districts should be intentionally designed to include majorities of African Americans. While there are legal rules that have intervened to define the scope of such policies, see *Shaw v. Reno* 509 U.S. 630 (1993) (establishing the limiting principle of racial gerrymandering to constrain the development of some districts); *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (exploring the benefits and costs of developing so-called “influence” or “coalition” districts), there remains a robust debate within the African American community about the benefits surrounding the policy.

The traditional and prevailing view is that the strategy of drawing majority-black districts serves the broader political interests of the community because it represents an important achievement of increasing the number of black elected officials. Proponents urge that this policy would encourage more African Americans to take a meaningful part in electoral politics and to enhance what has been called “descriptive representation”—having persons who are authentically reflective of the community manage the levers of public power. See Katherine Tate, *The Political Representation of Blacks in Congress: Does Race Matter?* 26 LEG. STUDIES Q. 623, 624 (2001). Pursuing this path would assure that the array of elected representatives resembles the level racial diversity present in the larger population.

Others dissent from this view by questioning the value of descriptive representation. They warn that this goal can at times be an impediment to “substantive representation,” or the ability to direct different policy outcomes. See generally CAROL SWAIN, *BLACK FACES BLACK INTERESTS* (2006) (outlining the point of substantive representation). Without the ability to work across racial lines, African American elected officials may find themselves powerless to change decisions in political institutions. To maximize their political impact, African Americans should favor alternative sub-majority district configurations that forge alliances with other racial groups. Doing so, they would posit, might not elect as many African Americans but would assure a greater chance of electing a majority of persons with viewpoints that favor the community.

21. There can be various forms of the dissent, but the purpose of the racial dissent is to inform and perhaps persuade group members who hold the prevailing view to reconsider their positions. The argument springs from the premise that all members are in favor of maintaining or improving the well-being of the group, but the method of achieving that end is in some dispute. The forms of racial dissent are linked closely to the identity or vantage point of the dissenter. The prominent typologies are expressed below in greater detail. See *infra* Part II.

For one thing, the salient political structures within African American communities, at least by tradition, have been organized into mostly hierarchical models. The major institution for African American participation and social engagement is the church. This organization is usually designed around a minister (or other cleric) and a congregation that dutifully follows his instruction. Much of the political science scholarship on black politics acknowledges that the black church plays a role whose prominence is difficult to overestimate.<sup>22</sup>

This institution has been the heart of black political and social life long before most black Americans could become citizens.<sup>23</sup> Black Americans have depended upon churches both for inspiration, for economic support, and for political organization from the antebellum period through the twentieth century civil rights movement.<sup>24</sup> And no other single institution in the black community has been more responsible for the development of the nation's most prolific public figures – from Frederick Douglass to Martin Luther King. Throughout this period, the black church has served as the major focal point for the formation and evolution of a distinct political ideology as well.<sup>25</sup> Then, as now, the church remains the lone point of contact in black public life that has remained largely protected from regulation by the larger society. The concept of dissent rarely finds a home in the religious discourse of churches because it is regarded as a challenge to the minister or perhaps a substantive rejection of doctrine and teaching.

A second barrier that helps to explain the challenge of expressing racial dissent is the historical reality for black political development in America. What is noteworthy about African American advancement in politics is the extent to which the community's *en masse* support for a single party has been accountable for its success. Since the structure of the American system is organized around the winner-take-all principle, political "swing" groups are highly prized because their allegiances are constantly up for grabs between the political competitors in elections.<sup>26</sup> The political flexibility of the swing group cannot be taken for granted, and it therefore receives

22. See MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994); FREDRICK C. HARRIS, *SOMETHING WITHIN: RELIGION IN AFRICAN-AMERICAN POLITICAL ACTIVISM* (1999); see also C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* (1990).

23. See WILLIAM E. MONTGOMERY, *UNDER THEIR OWN VINE AND FIG TREE: THE AFRICAN-AMERICAN CHURCH IN THE SOUTH, 1865-1900* (1993).

24. See Fredrick C. Harris, *Black Churches and Civic Traditions: Outreach, Activism, and the Politics of Public Funding of Faith-Based Ministries*, in *CAN CHARITABLE CHOICE WORK?: COVERING RELIGION'S IMPACT ON URBAN AFFAIRS AND SOCIAL SERVICES* 140 (Andrew Walsh ed., 2001).

25. See, e.g., *id.* at 15.

26. See Kareem U. Crayton, *Beat 'Em or Join 'Em?: White Voters and Black Candidates in Majority-Black Districts*, 58 *SYRACUSE L. REV.* 547, 555-56 (2008).

substantial attention from competing candidates no matter the election.<sup>27</sup> African Americans decidedly have not followed this evolutionary path, though their political positioning has been criticized by some observers for this reason.<sup>28</sup>

Black voters have only sparingly moved from one party to another – and even when they do, it occurs in substantial waves. For most of the Twentieth Century, for example, Republicans enjoyed a sizable share of black support, but the Civil Rights revolution marked a migration into the Democratic Party – just as white Southerners began abandoning the party.<sup>29</sup> Today, African Americans are the single most readily identifiable group that is aligned with the Democratic Party.<sup>30</sup> In the Obama era, for instance, more than eighty percent of African Americans voted with the Democratic Party, and their public approval rating of the president continues to be the strongest of any subgroup in the electorate – even as the President’s overall ratings have sharply declined below fifty percent since his re-election.<sup>31</sup> While some might view this positioning as a lamentable example of group “capture,” others find that the potential for greater influence of African Americans within the party is a valued asset.<sup>32</sup> What this political reality means, though, is that the art of dissent within the black community can prove tricky when the established viewpoint aligns closely with the party’s perspective. Insofar as the group’s formal political power exclusively emanates from its place in the Democratic Party, an intragroup dissent that might otherwise prompt a meaningful and helpful in-group debate might be cut off due to its potential for upsetting an otherwise accepted point of party orthodoxy.<sup>33</sup>

27. William G. Mayer, *The Swing Voter in American Presidential Elections*, 35 AM. POL. RES. 358, 360 (2007).

28. *Id.* at 382-84.

29. See EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 35 fig.1.6 (2002); see also LANI GUINIER, *TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY*, 31, 37 (1994).

30. Indeed, even the U.S. Supreme Court has recognized the close connection between race and party in limiting the application of certain colorblindness principles in its *Shaw* doctrine. See *Easley v. Cromartie*, 532 U.S. 234 (2001) (approving the state’s singling out African Americans in a district based on evidence that their race served as a reliable proxy for Democratic voting).

31. Even in the period where President Obama’s approval rating has slipped, African Americans remain steadfastly behind him. See Lesley Clark, *President Obama’s Job Approval Ratings Plunge*, MCCLATCHY DC (Nov. 12, 2013), <http://www.mcclatchydc.com/2013/11/12/208336/president-obamas-job-approval.html> (“Democrats approve 79 percent to 14 percent. White voters disapprove 62 percent to 32 percent; while black voters approve 75 percent to 15 percent and Hispanic voters disapprove by a slim 47 percent to 41 percent margin.”).

32. See, e.g., ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 234 (1987).

33. A familiar example from the political world might prove appropriate. In the 1964 Democratic Convention, the credentials of an all-white delegation from Mississippi were challenged by the Missis-

A final consideration that is relevant to the limits and challenges of racial dissent among African Americans is the close linkage to the political culture and history of racism in America. Because of the shared historical experience with slavery, Jim Crow, and contemporary forms of race discrimination, the black community has maintained an emphasis on group political solidarity as a means of protection.<sup>34</sup> As Lani Guinier has explained, the “pariah” group’s only recourse under these circumstances is to work in concert to achieve jointly held goals where possible. Separate and distinct from its important linkages to expressing racial pride and identity, African American political solidarity serves as a protective shield against assaults from outsiders.<sup>35</sup> Even though this phenomenon poses risks that critics of essentialism readily describe, group solidarity has remained a major feature of African American political discourse.<sup>36</sup>

As other commentators on the topic have described the matter, the “siege mentality” has often worked into the expression of political consciousness movements within the community.<sup>37</sup> Where a group perceives its interests as under the continuous threat of assault or even annihilation from unfriendly external forces, the priority of maintaining a united front against opposing actors becomes paramount – at times, to a fault. Put succinctly, the political ideology of the siege mentality that proves most effective is that a danger to one member poses an imminent source of concern to all members. The ideology sometimes leads to a rather protective posture toward politicians and leaders who speak on behalf of African American political interests.

As I have written elsewhere, this defiant posture partly accounts for the circumstances that have led African Americans at times to defend pub-

sippi Freedom Democratic Party—which primarily consisted of newly enfranchised African American voters. To avoid a messy public dispute about this matter, convention leaders sought to broker a compromise by offering the MFDP two of the available seats, which led to the famous comment about “no two seats” by Fannie Lou Hamer. Members of the MFDP, to varying degrees, were divided about rejecting the offer, due to the possible leverage that they might lose within the Democratic Party in general, and with incumbent President Lyndon Johnson in particular. EARNEST N. BRACEY, FANNIE LOU HAMER: THE LIFE OF A CIVIL RIGHTS ICON, 115-19 (2011).

34. See generally, DAWSON, *supra* note 22.

35. See Dennis Chong & Reuel Rogers, *Racial Solidarity and Political Participation*, 27 POL. BEHAV. 347, 349 (2005).

36. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1083-84 (1991).

37. See generally TERRY SMITH, BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION (2012). As noted above, this kind of existential threat is not unique to African Americans. Scholars have identified similar concerns in animating the social and political identity of Israel (though as against states that neighbor the country). See Phillip L. Hammack NARRATIVE AND THE POLITICS OF IDENTITY: THE CULTURAL PSYCHOLOGY OF ISRAELI AND PALESTINIAN YOUTH 122 (2011).

lic figures due their status within the community. The behavior accounts for a Harlem constituency deciding to return Adam Clayton Powell, Jr. to Congress by huge margins even after the U.S. House of Representatives expelled him for claims of financial improprieties.<sup>38</sup> Powell's willingness to challenge traditional authority in Congress, specifically the Southern Dixiecrats who defended the segregationist policies he sought to dismantle, won a tremendous well of black support well beyond his district. The thinking also helps to explain the strong current of African American loyalty toward President Obama, whom many African American observers view as being often disrespected by some white officials in the political system.<sup>39</sup> While this factor is not unique among African Americans, this bias toward protective behavior through unanimity tends to work against expressing dissent, since disagreement is functionally indistinguishable from group disloyalty.<sup>40</sup>

### *B. Racial Dissent and Barack Obama*

The core concern of this piece is to explore the art of racial dissent as it has been practiced in the present political era—during the service of the nation's first African American president. How is possible for African Americans to pursue a (sometimes) divergent view in the discussion about what is best for the community when the prevailing policy is informed, if not entirely defined by, another African American?

At first impression, one might find Barack Obama to be a peculiar figure to fashion as a target for racial dissent, insofar as popular coverage about his views on race (let alone his active contribution to the African American political discourse) might be characterized either as largely neutral or entirely excised from public view. Indeed, some have characterized his position within the racial discourse as somewhat fraught.<sup>41</sup> While that argument is not without at least some basis in fact, a driving of this piece is to assert that, the President is in fact an especially appropriate individual for a critical examination of the practice of racial dissent within the African American community.

38. See Kareem Crayton, *What Powell v. McCormack Teaches Us About Contemporary Race and Politics*, SCOTUSBLOG (Feb. 24, 2010), <http://www.scotusblog.com/2010/02/what-powell-v-mccormack-teaches-us-about-contemporary-race-and-politics>.

39. See SMITH, *supra* note 37, at 142.

40. See Rakim Brooks, *A Linked Fate: Barack Obama and Black America*, 59 DISSENT 42, 43 (2012).

41. See David Ehrenstein, *Obama the 'Magic Negro'*, L.A. TIMES, Mar. 19, 2007, <http://www.latimes.com/la-oe-ehrenstein19mar19,0,1054126.story#axzz2x7V80OLn> (exploring the tenuous social position of certain black public figures like Obama and others in engendering unrealistic expectations and comfort among whites and sometimes unfair skepticism among other blacks).

## 1. Obama's Racial Bona Fides

By virtue of his service in the office of the Presidency, Barack Obama manages a massive government enterprise that has with a long history of crafting policies that sometimes worked at odds with African American political concerns.<sup>42</sup> From issues ranging from voter disenfranchisement, to mass incarceration, to economic policies, there are several examples of how current federal official policy continues to entrench racial disparities and marginalize African Americans as a group. Thus, the ongoing effort by African Americans to demand that government take programmatic steps at least to remedy the effects of these past legal injuries places any president (particularly a black one) squarely at the center of much racial discourse.<sup>43</sup>

Aside from this institutional reality, there are additional factors that make Barack Obama a valid and appropriate focus of racial dissent. Put simply, the President has done many things to earn the title, due to his own statements and actions within the racial discourse. While every president speaks to a larger public at times, Barack Obama is the first whose public identity and professional trajectory rely heavily (if not entirely) on a black political tradition.<sup>44</sup> Contrary to the assertion that Obama stands outside of the racial discourse for African Americans, there is ample evidence establishing that he is a product of this racial discourse. Indeed, the president remains a primary arbiter of it.

For many African American voters, Barack Obama stands as the realization of the civil rights generation's efforts to mobilize and participate in

42. The federal government has a considerably long record of enacting and enforcing policies that have imposed harsh consequences on African American communities. Several studies examine the ways that various federal agencies have engaged in policies that impose racially disparate burdens, see e.g., MICHELE ALEXANDER, *THE NEW JIM CROW* 11-15 (2012) (focusing on criminal justice); Jonathan Kaplan and Andrew Valls, *Housing Discrimination As A Basis For Black Reparations*, 21 *PUB. AFF. Q.* 255, 255 (2007) ("An important part of the story of racial inequality today is the history of housing and lending discrimination in the second half of the twentieth century."); MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 99-105 (2004) (analyzing the problems with the U.S. Supreme Court ignoring voting rights claims in the *interwar period*).

43. This point is well reflected in surveys examining racial differences in political interests. Compared to white respondents, for instance, more African Americans register skepticism about government intervention on matters ranging from business regulation and information gathering. However, African Americans also indicate greater support for governmental programs that respond to those in need. See *The Black and White of Public Opinion*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (Oct. 31, 2005), <http://www.people-press.org/2005/10/31/the-black-and-white-of-public-opinion/>.

44. I use the phrase "rely heavily" to emphasize a similar point that I have made in my earlier work. See Kareem Crayton, *You May Not Get There With Me: Barack Obama and the Black Political Establishment*, in *BARACK OBAMA AND BLACK POLITICAL EMPOWERMENT* (Manning Marable & Kristen Clarke eds., 2009). Obama's story is not neatly situated within this black political tradition (in the manner that Adam Clayton Powell's career did), even though it certainly benefits from that tradition.

the political system. For them, his election is the pinnacle of their pursuit of descriptive representation of African Americans. While he was not directly linked to the pioneering campaigns of earlier candidates, like Shirley Chisholm and Jesse Jackson, Obama benefitted from their efforts.<sup>45</sup> For instance, he could avoid the questions that his predecessors faced about being improbable as a candidate. Obama's profile was neither an institutional outsider nor a protestor in the mold of Chisholm or Jackson. Rather, he was something decidedly new—a sitting U.S. Senator who served a constituency that resembled much of the rest of the country. Thus, the basic issue of his credibility was less relevant than questions about the effectiveness of his proposed strategy to actually win the Democratic Primary.

Put differently, Obama's campaign could present itself as a more viable, even more realistic, repository for black political aspirations because it was not the first.<sup>46</sup> Obama was therefore able to concentrate his speeches in front of African American audiences (and the rest of the nation) on the notion that his candidacy had a realistic shot at making history. The claim offered a direct answer to hopes that both substantive and cultural improvements for African Americans were possible if the country could agree that an African American should have the chance to govern.

A second factor that illustrates Obama's participation in the racial discourse is evident in the manner in which he won the presidency. African American voters were crucial to Obama winning the 2008 Democratic Primary and defeating Hillary Clinton—a female candidate with broad popularity within the community. His electoral success depended upon his direct engagement with the black political discourse—by explaining to voters in the community why he was the better candidate.<sup>47</sup>

In fact, the campaign could not have gained a crucial lead among elected delegates without prevailing in a series of Southern primary con-

45. See Cary Clack Shirley, *Chisholm Broke Ground Before Barack Obama and Hillary Clinton*, SEATTLE PI (Feb. 27, 2008, 10:00 PM), <http://www.seattlepi.com/local/opinion/article/Shirley-Chisholm-broke-ground-before-Barack-Obama-1265680.php>; KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 8-9 (1994) (discussing Jackson's failure to gain the Democratic party nomination despite massive black support); Valeria Sinclair-Chapman & Melanye Price, *Black Politics, the 2008 Election, and the (Im)Possibility of Race Transcendence*, 41 PS: POL. SCI. & POL. 739, 740 (2009) (noting that Obama's campaign was not as reliant upon black support as Jackson's Rainbow Coalition).

46. David Axelrod, Obama's chief strategist has been quoted on this topic: "When people do something that they've never done before, I think that makes it easier to do it a second time." He continued, "So when people vote for an African American candidate, I think that it makes it easier for the next African American candidate." GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA I* (2009).

47. See generally Crayton, *supra* note 44 (describing the candidate's use of surrogates from the African American community).

tests held between February and March of 2008.<sup>48</sup> With few exceptions, African American voters represented nearly a majority of all those electorates, which Obama won handily. This outcome was the direct result of the campaign's organized effort to use its time and resources to organize and persuade African American voters.<sup>49</sup> A crucial part of the wooing strategy involved candidate appearances in large African American churches, which organized its members to take advantage of early voting following Sunday services. The record-level turnout among African Americans essentially foreclosed Clinton's chances to regain her early lead. Similarly, Obama's support among African Americans was also critical in delivering states like Florida and Ohio to his ticket in the general elections in 2008.<sup>50</sup> In sum, the electoral salience of the racial discourse kept Obama in close connection with the African American community.

Finally, there were some substantive moves demonstrating Obama's cautious embrace of a political agenda that had appeal with African Americans. For example, one of the major pieces of legislation touted during the campaign was Obama's concern with reforming sentencing practices within the criminal justice system. Obama had carefully stated his misgivings about drug sentencing, noting that the racial disparities for drug possession crimes were intolerable. Similarly, his statements about improving the state of public education systems in underperforming urban environments had appeal within African American communities that had often decried the lack of resources in largely non-white school districts. Obama's past work as a state legislator and later U.S. Senator was burnished by the strategic use of African American surrogates whose own credibility was helpful in cultivating more support among African American voters as well.

Taken together, Obama's message of inclusion and change that held appeal for the larger population included a promise that African Americans would have a place at the table to advance their political concerns in a government run by individuals who would be more responsive to their interests because they were familiar with and understood the distinct needs of the community.

## 2. Two Early Cases of Racial Dissent

One can find evidence of racial dissent focused on Barack Obama as early as the 2008 campaign. The choice between Hillary Clinton and

48. See CHUCK TODD & SHELDON GAWISER, *HOW BARACK OBAMA WON 14-15* (2009).

49. *Id.* at 13.

50. *Id.* at 58 (noting Obama's winning 96% of Florida's black voters); *id.* at 87 (noting Obama's winning 97% of Ohio's black voters).

Barack Obama as the Democratic nominee was a difficult question for many of the party's constituency groups, but few others viewed the issue as closely as African Americans.<sup>51</sup> While some African Americans maintained their support for Hillary Clinton, long after she lost the edge among black voters, these racial dissenters were met with resistance for taking their position. The strong weight of the viewpoints in the community took the historical significance of electing an African American president as a point of paramount concern.<sup>52</sup>

One example of a racial dissenter on this point was Bob Johnson, who founded and helmed Black Entertainment Television ("BET"), who was an early donor/supporter of the Clinton campaign. With the Obama win in Iowa and a narrow Clinton victory in the New Hampshire primary, public attention turned to South Carolina—the first primary with a significant presence of African American voters. The lone black congressman in the state, James Clyburn, had remained publicly neutral while several state officials had aligned themselves with the Obama campaign. In the absence of a major endorsement, several surrogates on both sides hit the trail to make the case for their candidate. In addressing the question of Obama's readiness for the White House (a major campaign issue), Johnson made comments that analogized Obama's appeal (particularly with white voters) to Sidney Poitier's character in the film *Guess Who's Coming to Dinner*.<sup>53</sup> The claim was that the candidate's substance was outpaced by his imagery: "I'm thinking to myself, this ain't no movie, Sidney. This is real life."<sup>54</sup>

The content and tone of Johnson's comment played heavily to the question of whether Obama was truly focused on African American interests. The suggestion was that, for black people, Obama was perhaps more focused on form than substance. Johnson then proceeded to confront the Obama campaign's ongoing substantive argument that African Americans had been ill served by the Clinton presidency. Referencing his own status within the community as a media pioneer in cable television, Johnson testi-

51. Much of the difficulty stemmed from the strong support that Bill Clinton maintained among African American voters throughout his administration. See Toni Morrison, *Talk of the Town: Comment*, THE NEW YORKER (Oct. 5, 1998), [http://www.newyorker.com/archive/1998/10/05/1998\\_10\\_05\\_031\\_TNY\\_LIBRY\\_000016504](http://www.newyorker.com/archive/1998/10/05/1998_10_05_031_TNY_LIBRY_000016504).

52. To be sure, the exchanges about the merits of each campaign addressed a variety of topics, but the arguments about the benefits and challenges that Barack Obama posed for African Americans are of interest here. See KATE KENSKI, BRUCY HARODY & KATHLEEN HALL JAMIESON, THE OBAMA VICTORY: HOW MEDIA MONEY AND MESSAGE SHAPED THE 2008 ELECTION 73-86 (2010) (describing factors used against Obama in the 2008 general election).

53. Katharine Q. Seelye, *BET Founder Slams Obama in South Carolina*, N.Y. TIMES: THE CAUCUS BLOG (Jan. 13, 2008, 2:39 PM), <http://thecaucus.blogs.nytimes.com/2008/01/13/bet-chief-raps-obama-in-sc/>.

54. *Id.*

fied about the commitment of the Clintons to African American political interests while also showing disdain for the opponent. And in doing so, he threw in a rather poorly-veiled and charged reference to Obama's admitted past drug use:

And to me, as an African-American, I am frankly insulted that the Obama campaign would imply that we are so stupid that we would think Hillary and Bill Clinton, who have been deeply and emotionally involved in black issues since Barack Obama was doing something in the neighborhood—and I won't say what he was doing, but he said it in the book—when they have been involved.<sup>55</sup>

Reaction to this particular expression of racial dissent—coming from fellow African Americans—was resolute and severe.<sup>56</sup> Johnson was dismissed by some as an out-of-touch Obama “hater” who had sold his allegiance to the Clinton campaign. Johnson's own credentials in developing positive media images caused some dispute, with some criticizing the media billionaire from profiting off gender and racial stereotypes in music videos. But perhaps the most controversial dimension of the comments was the reference to Obama's history with drugs. Johnson's attack appeared both intemperate and venomous to a member of the community. The comment more closely resembled the kinds of insensitive attacks leveled at black candidates by Republicans, with whom Johnson had allied in the past.<sup>57</sup> Johnson eventually apologized to Obama for the comments.<sup>58</sup>

A second case of racial dissent during the primary involved an elected official who faced a different type of pressure in reaction to his minority viewpoint. Congressman John Lewis of Georgia started the election season of 2008 as publicly ambivalent about the choice between the two candidates. Lewis had even more of an established pedigree within the African American community than Johnson did. He was the youngest speaker at the March on Washington. Lewis earned that spot on the stage because he led the Student Nonviolent Coordinating Committee, a position that placed him (among others) at the center of a brutal attack by Alabama police on the

55. *Id.*

56. See, e.g., Tyler Mills, *Bob Johnson - Clinton Surrogate and BET Founder Continues to Raise Eyebrows*, YAHOO VOICES (Apr. 3, 2008), <http://voices.yahoo.com/bob-johnson-clinton-surrogate-bet-founder-continues-1341945.html> (“Johnson himself has been divorced and admits to being no choir boy.”); Davey D, *The Hypocrisy of BET's Bob Johnson Obama Smears*, ALTERNET (Jan. 23, 2008), [http://www.alternet.org/story/74753/the\\_hypocrisy\\_of\\_bet's\\_bob\\_johnson's\\_obama\\_smears](http://www.alternet.org/story/74753/the_hypocrisy_of_bet's_bob_johnson's_obama_smears) (“Where does Johnson get off slamming Obama about the wrongs of drug use when he piloted one of the largest media institutions (BET) that provided a worldwide platform that for the most part glorified and legitimized the lifestyles of those who not only used drugs but also sold them?”).

57. *BET's Black Billionaire Trojan Horse: BET's “Democrat” Bob Johnson Fronts for GOP*, THE BLACK COMMENTATOR (Oct. 3, 2002), [http://www.blackcommentator.com/13\\_thw.html](http://www.blackcommentator.com/13_thw.html).

58. Suzanne Malveaux, *BET Founder Apologizes to Obama*, CNN (Jan. 17, 2008, 2:16 PM), <http://www.cnn.com/2008/POLITICS/01/17/clinton.obama/>.

Edmund Pettus Bridge.<sup>59</sup> His status as a civil rights icon was a key reason for his successful campaign to represent the city of Atlanta, Georgia, in the U.S. Congress.<sup>60</sup> As a major power-broker in the African American community, Lewis's endorsement was a potential game-changer in the contest for the nomination.

In the early going, Lewis maintained a neutral stance between the candidates. He took great care to avoid even the appearance of choosing sides, even publicly stating his internal turmoil over the decision.<sup>61</sup> For instance, at a well-publicized annual gathering in Selma to commemorate the 1965 voting rights march, Lewis avoided spending too much time with either of the candidates who sought his company.<sup>62</sup> However, Lewis eventually announced that he was supporting Hillary Clinton in the primary based on his longstanding personal relationship with the candidate and her husband. Lewis made a point not to speak disparagingly about Obama, noting that his decision took account of his belief that Obama offered a great deal to the party and would clearly be a leader in the future.

Although Lewis made no major gaffes during the course of the campaign of the variety that Johnson committed, Lewis faced his own political pressures from African Americans who did not accept his expression of dissent. The pushback in this case was of an electoral variety. Despite his decision to endorse Clinton before the Georgia primary on February 5th, Lewis could not convince a majority of the primary voters of his state to follow him. In that contest, Obama cruised to an easy victory over Hillary Clinton (60-27%) with a very strong level of support among African Americans.<sup>63</sup> Within majority-black Fulton County (home to Lewis' Atlanta

59. See STEVEN R. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941* p. 114 (1991).

60. MICHAEL BARONE & RICHARD E. COHEN, *ALMANAC OF AMERICAN POLITICS 2006* (2005). Congressman Lewis has represented Georgia's Fifth Congressional District since 1987.

61. In a March 2007 interview on NPR, John Lewis described his decision as an extremely tough choice that was quite unexpected. Though vexing, the situation was a happy one for Lewis:

[I]f someone had told me back in 1965—42 years ago when we were walking across that bridge in Selma, Alabama—that one day a white woman and a black man would be vying for the African American vote, I would say, you're crazy, you're out of your mind, you don't know what you're talking about. [Laughter.] It's a different world, but it says something about the distance we've come. It's a good position to be in.

*NPR News Morning Edition: Congressman John Lewis (D-GA) Tells NPR News His 2008 Presidential Endorsement Options between Senators Clinton and Obama are a "Tough Decision"* (NPR radio broadcast Mar. 30, 2000) (transcript available at <http://www.npr.org/about/press/2007/033007.lewis.html>).

62. Patrick Healy & Jeff Zeleny, *Clinton and Obama Unite in Pleas to Blacks*, N.Y. TIMES (Mar. 5, 2007), <http://www.nytimes.com/2007/03/05/us/politics/05selma.html?pagewanted=all>.

63. While exit polls from Georgia showed that Clinton won more votes than Obama among white men and women (49% and 62% respectively), she ran far behind among African American men and women—who combined were a majority of all primary voters (9% and 12% respectively). See *Election*

district), Obama won with a 3-1 margin—one of the largest leads he enjoyed in the entire state.<sup>64</sup>

Only weeks later, Lewis began a steady march of unpledged “superdelegates” in the party who would change their positions. His office issued a written statement that indicated the Congressman was shifting his endorsement from Clinton to Obama.<sup>65</sup> The reason he made the switch was that the Obama campaign “represents the beginning of a new movement in American political history.”<sup>66</sup> Additionally, Lewis felt compelled because of his own history as a leader of the movement and his concern with being “on the side of the people.”<sup>67</sup> As before, Lewis noted his enduring friendship with the Clintons, which figured into but did not sway his consideration. With more superdelegates moving away, Clinton’s early lead among unpledged delegates evaporated, and with it her last major advantage in the primary.

As an unpledged delegate to the nominating convention, Lewis was under no obligation to shift his endorsement based on the election results in Georgia. Indeed, other black members of Congress who supported Lewis stayed the course, despite their districts. However, Lewis’s effort to dissent from his constituents might have been a more difficult viewpoint to hold because of the overwhelming margin of Obama’s victory. With so many African American supporters rejecting his view, Lewis might well have assessed the electoral consequences of being out of line with the voters of his districts. While a Republican opponent surely would not be viable, there was no guarantee that an upstart challenger in the Democratic primary might move to unseat him in the next election cycle. Moreover, if that challenger were able to attack Lewis, due to his failure to support a black presidential candidate, the outcome would not be as certain even for a long-term incumbent.

## II. THREE PORTRAITS OF RACIAL DISSENT

This section lays out illustrations of three distinct forms of racial dissent, intended to provide an archetype of how each functions in the political system. In each case, I provide specific and familiar instances where the

2008: *Georgia Primary Results*, N.Y. TIMES, <http://politics.nytimes.com/election-guide/2008/results/states/GA.html> (last visited Mar. 26, 2014).

64. *Id.*

65. *Rep. Lewis Switches to Obama*, L.A. TIMES, Feb. 28, 2008, <http://articles.latimes.com/2008/feb/28/nation/na-endorse28>.

66. *Id.*

67. *Id.*

racial dissent was expressed in a manner that received public attention. I also point out whether and why the expression was either embraced or rejected as a legitimate form of discourse. Further, I suggest in the present era of Obama, the consideration of what is and is not a legitimate expression is a complex matter, largely because the President (the object of this dissent) plays a part in the African American discourse. As a result, each kind of dissenter faces a particular set of considerations and challenges in adding their views to the discourse.

#### *A. The Public Dissenter(s)*

The first brand of the racial intragroup dissenter, the version that is most familiar in the African American community, is the public dissenter.<sup>68</sup> This brand of dissenter presents his concerns primarily through the major media outlets, as a means of expressing protest. This approach contrasts with the more discreet employment of back channels or designated intermediaries to convey dissent to those in power. The primary purpose of the public dissenter is not to share a privately held view to advise or persuade the president before he chooses to act. Indeed, the public dissenter usually does not enjoy the kind of personal access that allows for these means of communicating directly with decision-makers. Yet the public dissenter still has the marked capacity to influence the policy priorities in the White House, in the same manner as the president might choose to “go public,” or take his case to the people to gather support.<sup>69</sup> This tactic can be fruitful because the president’s likelihood for success rests heavily on his own ability to communicate with the electorate.<sup>70</sup> Thus, a major challenge to the White House’s agenda emerges when that linkage is disrupted or challenged by a contrasting message.

The intended audience for the public dissenter is the broader African American community, though the messages are presented well within earshot of the broader electorate as well. To the extent that the message is a

68. This form of dissent is most apparently the space occupied by many prominent figures in the African American community of protestors, including Fredrick Douglass, W.E.B. Du Bois, Malcolm X, and Martin Luther King. All of these individuals were important because they spoke directly to the African American community outside of the traditional government structure. They each, of course, were conversant with organized political power, but they were not formally part of the governmental system and often found themselves speaking in opposition to the established order. Further, each of these individuals at times was situated in opposition to a majority view *within* the African American political discourse, which distinguishes them as racial dissenters.

69. See generally SAMUEL KERNELL, *GOING PUBLIC* (1997) (describing the effort by presidents to make direct appeals to the voters to advance their agendas).

70. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29-33 (1990) (noting, importantly, that the power of the president rests entirely with his ability to persuade others – including the public).

critical one as to substance, the White House may become saddled with negative public reactions, media attention and ultimately low approval ratings. In order to advance his preferred substantive agenda, the public dissenter can grab the attention of the White House by prompting African Americans to take action or, alternately, to articulate the already-expressed concerns in the community. Where the operative identity is race, the mobilization of groups can interfere with the presumptive respect for the president as an African American leader.<sup>71</sup> The purpose of the public dissenter thus is to interact with the electorate itself to engage the president on issues of importance.

For this president, the direct invocation of race, even where the attention to substance might require it, conflicts with contrary institutional pressures to rely on a very closely scripted, seemingly impartial treatment of the topic. In the few instances where he directly involved himself in the racial dialogue on public matters, President Obama has received a very strongly negative reaction from the broader public. In the fiasco following the arrest of Harvard Professor Henry Louis Gates, Jr. in front of his home by Sergeant James Crowley—a white police officer,<sup>72</sup> the president (responding to the outcry of several African Americans about the perceived profiling of Gates by a white passerby) described the officer as behaving “stupidly” under the circumstances.<sup>73</sup> The president’s statement and the underlying sentiment were roundly criticized not only for the likely breach of official protocol in an ongoing legal matter but also because it also seemed to place the president on one side in a potentially heated racial exchange.<sup>74</sup>

Talk show commentator Tavis Smiley and Professor Cornel West have jointly assumed the mantle of public intragroup criticism of the President.<sup>75</sup> These two individuals each have enjoyed a place in the public arena as advocates for political engagement for years, particularly with respect to

71. See generally THE OBAMA PRESIDENCY: PROMISE AND PERFORMANCE (William Crotty ed., 2012); THE OBAMA PRESIDENCY: CHANGE AND CONTINUITY (Andrew J. Dowdle, Dirk C. van Raemdonck, & Robert Maranto eds. 2011).

72. Tracy Jan, *Harvard Professor Gates Arrested at Cambridge Home*, BOSTON GLOBE (Jul 20, 2009), [http://www.boston.com/news/local/breaking\\_news/2009/07/harvard.html](http://www.boston.com/news/local/breaking_news/2009/07/harvard.html).

73. Helene Cooper, *Obama Criticizes Arrest of Harvard Professor*, N.Y. TIMES, Jul. 22, 2009, <http://www.nytimes.com/2009/07/23/us/politics/23gates.html>.

74. See Katharine Q. Seelye, *Obama Wades Into a Volatile Racial Issue*, N.Y. TIMES, Jul. 23, 2009, <http://www.nytimes.com/2009/07/23/us/23race.html>.

75. See Melissa Harris-Perry, *Cornel West v. Barack Obama*, THE NATION (May 17, 2011), <http://www.thenation.com/blog/160725/cornel-west-v-barack-obama>.

the concerns for disenfranchised communities.<sup>76</sup> And both possess well established bona fides within the black community. Smiley, a well-known media talk show host, has convened several forums to examine policy issues of particular note to black political and economic empowerment.<sup>77</sup> For his part, West has been among the leading black public intellectuals in the country, writing and lecturing on race issues from a religious and philosophical perspective.<sup>78</sup> Each in his own right has an established ability to command a crowd in personal appearances and in broadcasts. In the past, the pair has unleashed blistering attacks on previous presidential administrations for their policies on issues ranging from the War in Iraq, criminal sentencing, and economic wages.<sup>79</sup> If there is a single theme about the thrust of these policies, it is that government has been either unresponsive or detrimental to non-white communities and the working class.<sup>80</sup>

Early on in the 2008 presidential campaign, the team of Smiley and West voiced cautious optimism about Barack Obama after he secured the Democratic nomination. While they did agree that the country had demonstrated a marked sign of advancement in that a national political party had selected a black man to lead the presidential ticket, they also warned that any successful black president would also need to be a champion of policies that would direct significant attention to improving minority communities. This proposed commitment appeared somewhat at odds with the candidate's early assertion that "[t]here's not a black America and white America and Latino America and Asian America; there's the United States of America."<sup>81</sup> To Smiley and West, this statement and early decisions

76. Professor West frequently appears on national news media outlets to discuss race and social issues. Mr. Smiley has hosted prominent radio and TV talk shows, including *BET Talk* (renamed *BET Tonight*), and also has been host of *The Tavis Smiley Show*, *Smiley & West*, and *Tavis Talks*.

77. Scott Collins, *Tavis Smiley Marks 10 Tenacious Years on PBS*, WASH. POST (Dec. 21, 2013), [http://www.washingtonpost.com/entertainment/tv/tavis-smiley-marks-10-tenacious-years-on-pbs/2013/12/21/5b8c35f0-6813-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/entertainment/tv/tavis-smiley-marks-10-tenacious-years-on-pbs/2013/12/21/5b8c35f0-6813-11e3-8b5b-a77187b716a3_story.html).

78. See, e.g., Cornel West, *Dr. King Weeps from His Grave*, N.Y. TIMES, Aug. 25, 2011, <http://www.nytimes.com/2011/08/26/opinion/martin-luther-king-jr-would-want-a-revolution-not-a-memorial.html>.

79. CORNEL WEST, RACE MATTERS 100, 180 (1994).

80. See Jenée Desmond-Harris, *The Election-Season Poverty Tour*, THE ROOT (Sept. 11, 2012), [http://www.theroot.com/articles/politics/2012/09/tavis\\_smiley\\_and\\_cornel\\_west\\_poverty\\_tour\\_20\\_launches.1.html](http://www.theroot.com/articles/politics/2012/09/tavis_smiley_and_cornel_west_poverty_tour_20_launches.1.html). One apparent example of their attention to poverty issues is a special nationwide tour organized to highlight ongoing issues of wealth and inequality in the country. See THE POVERTY TOUR 2.0: A CALL TO CONSCIENCE, <http://www.povertytour.smileyandwest.com> (last visited Feb. 9, 2014).

81. Senate Candidate Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004), WASH. POST (Jul. 27, 2004, 11:09 PM), <http://www.washingtonpost.com/wp-dyn/articles/A19751-2004Jul27.html>.

There's not a black America and white America and Latino America and Asian America; there's the United States of America. . . . The pundits, the pundits like to slice and dice our country into red states and blue States: red states for Republicans, blue States for Democrats.

taken to organize and staff his campaign were not especially encouraging signs that Obama would pursue their proposed goal of directly addressing the racial dimension of social problems. The pair was particularly concerned, for example, with the strong involvement of corporate actors and private money that seemed to drive the campaign in the general election.

Since the early days of the Obama administration in 2009, Smiley and West have continued their brand of criticism of the President's policy choices.<sup>82</sup> In part, their critique has met the President's invitation issued to more progressive and liberal interest groups who wish to advance new left-leaning policies—"go out and make me do it."<sup>83</sup> To that end, the pair has been aggressive in warning the public that it should not expect a radically different policy approach from this President based on his early decisions that seemed to break campaign promises. For example, they have been especially vocal in the President's surprising willingness to engage in combat abroad and continue Bush era policies like maintaining the prison at Guantanamo Bay.<sup>84</sup> In one rather pithily crafted headline, West emphasized that any comparison between Obama and Martin Luther King would not favor the former. Both men had in fact won Nobel Peace Prizes, but "Martin Luther King, Jr. had a dream," quipped West, while "Barack Obama's got drones."<sup>85</sup>

The dynamic on racial equity matters, though, reached a critical point with the Trayvon Martin incident in the summer of 2013, which sparked a series of rather vocal statements criticizing the President's lack of more swift action. Martin, an unarmed black teenager, had been shot and killed

But I've got news for them, too. We worship an awesome God in the blue states, and we don't like federal agents poking around our libraries in the red states.

*Id.*

82. See L.Z. Granderson, *What's Motivating Some of Obama's Black Critics?* CNN OPINION (Jul. 26, 2013, 4:55 PM), <http://www.cnn.com/2013/07/23/opinion/granderson-tavis-smiley/>; Mary C. Curtis, *Brother Cornel West Has Some Advice for Brother Barack Obama*, POLITICS DAILY (Nov. 2, 2009), <http://www.politicsdaily.com/2009/11/02/brother-cornel-west-has-some-advice-for-brother-barack-obama>.

83. See Peter Dreier, "Go Out and Make Me Do It," HUFFINGTON POST (Sept. 10, 2009), [http://www.huffingtonpost.com/peter-dreier/go-out-and-make-me-do-it\\_b\\_281631.html](http://www.huffingtonpost.com/peter-dreier/go-out-and-make-me-do-it_b_281631.html) ("In his speech, Obama, the one-time community organizer, gave health care reform activists the signal to accelerate their grassroots organizing campaign to push for a bold plan that includes a public option and requires insurance companies to act more responsibly.").

84. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13492.pdf>.

85. Melanie Hunter, *Cornel West: MLK Had a Dream; 'Barack Obama's Got Drones.'* CNS NEWS (Sept. 5, 2013), <http://cnsnews.com/news/article/melanie-hunter/cornel-west-mlk-had-dream-barack-obama-s-got-drones>.

by George Zimmerman while walking home.<sup>86</sup> The shooting received great public notoriety because Zimmerman, a neighborhood watch member, had not been arrested due to apparent concerns that he was acting in self-defense, a legally protected *mens rea* in Florida.<sup>87</sup>

Despite weeks of public outrage and demands that Zimmerman face federal civil rights charges, neither the President nor the Justice Department took immediate action. Not until weeks after media figures like Al Sharpton pressed the story did President Obama speak on the subject, noting that the young Martin “could have been my son.”<sup>88</sup> The statement, while sympathetic, carefully avoided any particular endorsement of the effort to bring Zimmerman to trial in state court. Further, the speech did not seem to indicate whether the President planned to prompt federal prosecutors to examine the issue. Nevertheless, the public statement was lauded as an important comment about the nature of race relations in this country, akin to the President’s remarks in Philadelphia, Pennsylvania on the heels of the outrage over the provocative statements by his longtime pastor.<sup>89</sup>

Smiley was unwilling to join in the praise of the President’s speech, since he viewed the White House’s slow reaction as unavoidable and the result of public protest. He specifically said “[The President] did not walk to the podium for an impromptu address to the nation. He was pushed to that podium. A week of protests outside the White House, pressure building on him inside the White House, pushed him to that podium.”<sup>90</sup> And the tepid nature of the remarks failed to advance the strongest possible federal response to the decision taken by the state jury to acquit Zimmerman of his charges. The illustration, for Smiley was precisely the kind of calculated

86. See *Trayvon Martin Case, A Multimedia Timeline*, USA TODAY <http://www.usatoday.com/interactives/news/nation/trayvon-martin-zimmerman-case/> (last visited Mar. 25, 2014).

87. Lizette Alvarez and Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, Jul. 13, 2013, <http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>.

88. *Remarks by the President on Trayvon Martin*, THE WHITE HOUSE (July 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>.

89. Senator Barack Obama, “A More Perfect Union” remarks at the National Constitution Center (Mar. 18, 2008), HUFFINGTON POST (Nov. 18, 2008), [http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th\\_n\\_92077.html](http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html); see also Kareem Crayton, *You May Not Get There with Me: Obama and the Black Political Establishment*, in BARACK OBAMA AND AFRICAN AMERICAN EMPOWERMENT: THE RISE OF BLACK AMERICA’S NEW LEADERSHIP 195, 196-200 (Manning Marable & Kristin Clarke eds., 2009) (providing context and analysis of the Philadelphia speech); see also Dan Balz, *Obama, from Rev. Wright to Trayvon Martin*, WASH. POST (July 20, 2013), [http://www.washingtonpost.com/politics/obama-from-rev-wright-to-trayvon-martin/2013/07/20/709ad8b8-f151-11e2-9008-61e94a7ea20d\\_story.html](http://www.washingtonpost.com/politics/obama-from-rev-wright-to-trayvon-martin/2013/07/20/709ad8b8-f151-11e2-9008-61e94a7ea20d_story.html).

90. See Rebecca Shapiro, *Tavis Smiley on Obama’s Trayvon Martin Speech: ‘He Was Pushed to That Podium’*, HUFFINGTON POST (July 21, 2013), [http://www.huffingtonpost.com/2013/07/21/tavis-smiley-obama-trayvon-martin-pushed-podium\\_n\\_3631739.html](http://www.huffingtonpost.com/2013/07/21/tavis-smiley-obama-trayvon-martin-pushed-podium_n_3631739.html).

and ineffectual stance not only in the specific case of Trayvon Martin but also the more general policy issue of racial profiling of black men and the structural biases that exist in the criminal justice system.<sup>91</sup> Even more strident reactions came from Cornel West, who noted that the President deserved no applause for the remarks because of his own policies:

I think we have to acknowledge that President Obama has very little moral authority at this point, because we know anybody who tries to rationalize the killing of innocent peoples, a criminal—George Zimmerman is a criminal—but President Obama is a global George Zimmerman, because he tries to rationalize the killing of innocent children, 221 so far, in the name of self-defense, so that there's actually parallels here.<sup>92</sup>

It is perhaps telling that not until his second term did the President exercise his pardoning authority to address the issue of mass incarceration. In a recent move, the President moved to commute the sentences of several individuals who had been sentenced to long periods of incarceration due to various concerns within the criminal justice system.<sup>93</sup>

### B. The Official Dissenter

A second type of racial dissenter that plays a role in the African American political discourse is the official dissenter, someone who holds a formal place in the policy-making process. Despite sharing the same political party with the president,<sup>94</sup> the formal dissenter also steps forward frequently to voice a marked difference with him on policy matters. This sometimes-awkward dissenting position in some ways is trickier to maintain than that of the public dissenter.

The official dissenter must swim against the tide in two different respects. Aside from providing a contrasting view in the eyes of the black

91. See Janet Langhart Cohen, *After Zimmerman Verdict, Obama Needs to Speak about Racism*, WASH. POST (July 16, 2013), [http://www.washingtonpost.com/opinions/after-zimmerman-verdict-obama-needs-to-speak-about-racism/2013/07/16/a3b48432-ee28-11e2-9008-61e94a7ea20d\\_story.html](http://www.washingtonpost.com/opinions/after-zimmerman-verdict-obama-needs-to-speak-about-racism/2013/07/16/a3b48432-ee28-11e2-9008-61e94a7ea20d_story.html).

92. *Cornel West: Obama's Response to Trayvon Martin Case Belies Failure to Challenge "New Jim Crow,"* DEMOCRACY NOW! (July 22, 2013), [http://www.democracynow.org/2013/7/22/cornel\\_west\\_obamas\\_response\\_to\\_trayvon](http://www.democracynow.org/2013/7/22/cornel_west_obamas_response_to_trayvon).

93. *Compare Statement by the President on Clemency*, THE WHITE HOUSE (Dec. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/19/statement-president-clemency>, with *Pardons Granted by President Barack Obama (2009–2013)*, UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/pardon/obamapardon-grants.htm> (last visited Mar. 7, 2014) (noting that, during his first term, the President commuted or pardoned twenty-two individuals; however, he has pardoned thirty people in his second term as of February 9, 2014).

94. As explained in *supra* Part I, the African American political establishment is quite heavily invested in the Democratic Party, a central force in organizing votes, developing policy, and (perhaps most important) raising money. Insofar as the party is run by the president, the official dissenter's place within the party (or indeed, their frustrations with the party) are at least partly the connected to the president's decisions or failure to act. For this reason, official dissenters find themselves in a rather unenviable position of possibly biting the hand that feeds them.

community, the official dissenter also must deal with a conflicting political agenda within her own party structure. While some of the same issues raised by the official dissenter may echo those of the public dissenter, the official can directly confront those in power in regularly scheduled formal settings – or the dissenter can be entrepreneurial in creating such situations.

The duality of this brand of dissent has been the primary work of the Congressional Black Caucus (CBC) since its inception in the 1970s. The CBC is among the oldest of the informal networks within the House of Representatives.<sup>95</sup> The CBC was established in 1971 with thirteen black House members who wanted to advance the civil rights agenda primarily through legislation and committee work in the House.<sup>96</sup> At its inception, all of the CBC members represented heavily urban, majority-black constituencies outside the American South.<sup>97</sup> Their immediate goal in organizing was to channel the electoral success of black candidates for office<sup>98</sup> following the passage of the 1965 Voting Rights Act.<sup>99</sup> With the increased presence of black officials throughout government, voters expected ever more improvements in policy outputs. These members understood that satisfying constituent expectations required tangible, substantive evidence of their effectiveness in Congress.

Members also recognized that the most salient national issues concerning black voters, like education and employment discrimination, transcended any single House district. In its first press statement, the CBC

95. For more comprehensive background information and a more thorough historical description of the CBC, see *Creation and Evolution of the Congressional Black Caucus*, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Permanent-Interest/Congressional-Black-Caucus/> (last visited Mar. 7, 2014). Arguably the oldest identity network in the House of Representatives (indeed, in Congress) is the association of white Democratic members from Southern states, who marshaled their seniority and mastery of the legislative process to wield an unparalleled level of control over the U.S. House of Representatives for most of the twentieth century. This group was largely responsible for maintaining the system of racial segregation in the American South—arguably the most significant flashpoint of domestic politics during the Twentieth Century. The group was instrumental in blocking anti-discrimination measures like the anti-lynching bill of the 1920s and 1930s as well as the equal education funding measures submitted by early civil rights advocates in Congress. Although ultimately ineffective, the group was a serious impediment to the passage of the Civil Rights Acts and the Voting Rights Act. The Southern Democratic Caucus's largely unchecked control of legislation in the House partly necessitated the establishment of the CBC.

96. *Id.* A precursor to the CBC, started two years before, was organized by Congressman Charles Diggs of Michigan, who managed an informal working group of the black members of Congress that worked with leaders in Congress on civil rights and social welfare issues.

97. *Id.* The original members included: Charles C. Diggs Jr. (Mich.), Robert N. C. Nix (Pa.), Augustus F. Hawkins (Cal.), John Conyers Jr. (Mich.), Shirley Chisholm (N.Y.), William “Bill” Clay (Mo.), Louis Stokes (Ohio), George W. Collins (Ill.), Ronald V. Dellums (Cal.), Ralph H. Metcalfe (Ill.), Parren J. Mitchell (Md.), Charles B. Rangel (N.Y.), and Walter E. Fauntroy (D.C.).

98. See *Creation and Evolution of the Congressional Black Caucus*, *supra* note 95.

99. Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1973bb-1 (2012).

announced that such concerns “do not stop at the boundaries of our districts; our concerns are national and international in scope.”<sup>100</sup> Accordingly, their work needed to “empower America’s neglected citizens and to address their legislative concerns.”<sup>101</sup> No individual member working alone could succeed with this agenda in the House of Representatives. Passing a bill that would address any of these massive social policy issues required the endorsement of multiple committees. A committee that authorized a bill would also need the support of the Rules Committee (to schedule a floor vote) and the Ways and Means Committee (to fund the program).<sup>102</sup> With so many decision points in the legislative process, members needed to band together to accomplish their goals.<sup>103</sup>

Perhaps the most spirited of official dissenters one can name is Congresswoman Maxine Waters, a member of the CBC who has made no hesitation in making her views known.<sup>104</sup> Since 1991, Waters has represented an urban district in Southern California – including much of the territory lying at the epicenter of the Los Angeles riots that year.<sup>105</sup> She has been an outspoken advocate on racial equity issues, which has led her into several high profile verbal conflicts with Dick Cheney, the Tea Party members, and some of her Republican colleagues.<sup>106</sup>

For all of these reasons, Congresswoman Waters has well-regarded credentials as a leading Democratic standard bearer – she has served as Chair of the Congressional Black Caucus and led the House Committee on Education. However, despite her solid place within the Democratic Party

100. ROBERT SINGH, *THE CONGRESSIONAL BLACK CAUCUS: RACIAL POLITICS IN THE U.S. CONGRESS 75* (1998).

101. *About*, CONGRESSIONAL BLACK CAUCUS, <http://cbc.fudge.house.gov/about> (last visited Feb. 19, 2014).

102. See H.R. DOC. NO. 110-49, at 21 (2007), available at <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf>.

103. One must note another important source of racial dissent that centers on the CBC is the question about whether the membership should be restricted to members of the Democratic Party. For years, Republican members like Gary Franks (Connecticut) or J.C. Watts (Oklahoma) ought to be included within the caucus despite their party affiliation. The matter launched any number of debates within the black policymaking and academic communities. On one hand were those who argued that some basic tenets ought to define membership, and Republican members should only be admitted if they would agree to them. Others argued that this position was essentialist, suggesting that black political thought could well embrace both liberal and conservative viewpoints. A more complete treatment of the “partisan dissenter” (African American Republicans who engage in racial dissent is offered below).

104. See James Taranto, *Riot Is the Voice of the Unheard*, WALL ST. J. (Apr. 6, 2010), <http://online.wsj.com/news/articles/SB10001424052702303411604575168041790910582>.

105. *About Maxine*, U.S. CONGRESSWOMAN MAXINE WATERS, <http://waters.house.gov/biography> (last visited Feb. 14, 2014).

106. See Vincent Carroll, *Maxine Waters a Bizarre Model for Denver Democrats*, DENVER POST (June 12, 2012), <http://blogs.denverpost.com/opinion/2012/06/20/maxine-waters-odd-model-denver-democrats/18651>.

organizational structure, Congresswoman Waters seized upon an opportunity to vocalize her dissent to what she perceived as a lack of Presidential attention to issues of racial equity in the economy.

Her most well-known public rebuke of the White House's policy choices was during a public forum in 2011 that had been put together to discuss the issue of joblessness.<sup>107</sup> Held in the sanctuary of a Florida church (a predominantly black one), Waters and other CBC members presided and had invited guests from Washington, D.C. to address the community. She specifically took the chance to interrogate statements from Don Graves, a White House policy adviser (also African American), who was present to describe some ongoing job initiatives. Having been chastened by the Professor Gates fiasco, the administration had avoided direct discussions that implicated race and instead relied far more on discussions about class and the economy. Both of which were of grave concern to the American public, as evidenced by the very forum where Graves appeared with Waters. Graves had developed very carefully drafted remarks, pointing out that the White House's policy goal was to promote economic development so the entire country could benefit from growth. Presumably, the policy relied upon a variation of the "rising tide" model.<sup>108</sup> To the extent that these generally available programs helped the country, African Americans would also benefit from the increased national productivity.

Waters interrupted the staffer mid-sentence, encouraging him to provide more precise answers that directly addressed the needs of those representing the non-white communities in the room. She stressed that the problems in urban districts like hers in California were far more severe than what was happening elsewhere in the country.<sup>109</sup> And the economic indicators remained markedly more negative in other areas with heavy concentrations of non-white employable citizens. Waters found nothing in the staffer's remarks recognizing the well-established racial disparities in the

107. Patricia Mazzei, *Beware the Tea Party, Jesse Jackson, Frederica Wilson and Black Democrats say at Jobs Meeting*, MIAMI HERALD BLOG, (Aug. 22, 2011, 7:54 PM), <http://miamiherald.typepad.com/nakedpolitics/2011/08/beware-the-tea-party-jesse-jackson-frederica-wilson-and-black-democrats-say-at-jobs-meeting.html>; see also Jennifer Epstein, *Waters to Obama Aide: Say 'Black,'* POLITICO (Aug. 23, 2011), <http://www.politico.com/news/stories/0811/61912.html>.

108. The White House official did not use this phrase, but the "rising tide (lifts all boats)" model refers to the theory that universalist policies that improve the lot of the full economy will also benefit all of the individuals who take part in the economy. In this context, the expression meant that job-seekers regardless of race will benefit if the government succeeds at improving the economy overall through its job programs. There is, of course, a serious critique of this model of governance, partly expressed in Derrick Bell's interest-convergence model. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-28 (1980).

109. Epstein, *supra* note 107.

country's economic landscape.<sup>110</sup> The staffer tried to return to his prepared remarks, stating that the President is ““focused on every community across the country,”” but acknowledged that ““certain communities have been hit harder than other communities.””<sup>111</sup> Waters urged him to be clear, saying, “Let me hear you say ‘black.’”<sup>112</sup> Unsurprisingly, the exchange met with a thunderous applause in the room.

Waters' frustration with the White House Staffer may likely have been as much due to what he was unable or unwilling to say as with the fact that he was the only person the White House assigned to the event. In fact, the CBC had only been sparingly invited for face-to-face meetings with the President since he assumed the office, and substantive policy decisions had been taken by the administration without much attention at all to their input.<sup>113</sup> To be sure, several Democratic groups in Congress shared the complaint about the apparent hands-off approach by the White House to legislative affairs.<sup>114</sup> However, the fact that a former member did not realize the significance of engaging the CBC in meetings enough to send a high ranking agency leader to a public forum may well have spawned the expression of the dissent when the opportunity presented itself.

The challenge of the official dissent, though, is that it can place stress on the normal functioning of existing political structures. As with most political systems, loyalty is encouraged through a series of incentives and punishments. To the extent that some comments are perceived as inconsistent with the agenda of the White House, one might encounter resistance from colleagues in established positions. Perhaps this reality accounts for a somewhat more conciliatory tone by Waters in a different setting that at once aligns herself with the President while also critiquing his apparent strategy:

We're [CBC members] supportive of the President, but we're getting tired. We're getting tired. And so, what we want to do is, we want to give the President every opportunity to show what he can do and what

110. *Id.*

111. *Id.* (statement of Don Graves, Executive Director of President Obama's Council on Jobs and Competitiveness).

112. *Id.* (statement of Rep. Maxine Waters, California).

113. See Jennifer Epstein, *After Gripes, Congressional Black Caucus Says Meeting with Obama Satisfied*, POLITICO (July 9, 2013), <http://www.politico.com/politico44/2013/07/after-gripes-congressional-black-caucus-says-meeting-167872.html> (noting the two year absence of any meeting with the CBC at the White House).

114. See David Rohde, *How Obama Has Contributed to His Own Aura of Scandal*, THE ATLANTIC (May 17, 2013), <http://www.theatlantic.com/politics/archive/2013/05/how-obama-has-contributed-to-his-own-aura-of-scandal/275984>; see also Michael Barone, *Like Chauncey Gardiner, Obama Is Profoundly Aloof*, REALCLEARPOLITICS (June 27, 2011), [http://www.realclearpolitics.com/articles/2011/06/27/like\\_chauncey\\_gardiner\\_obama\\_is\\_profoundly\\_aloof\\_110365.html](http://www.realclearpolitics.com/articles/2011/06/27/like_chauncey_gardiner_obama_is_profoundly_aloof_110365.html).

he's prepared to lead on. We want to give him every opportunity, but our people are hurting. The unemployment is unconscionable. We don't know what the strategy is. We don't know why on this trip that he's in the United States now, he's not in any black community. We don't know that.<sup>115</sup>

This may be one particular advantage of members like Congresswoman Waters. Her place as the incumbent in her district is secure, inasmuch as her support from within the black community remains substantial notwithstanding (and perhaps because of) her unfriendly remarks about the President's policy. And on behalf of her colleagues and the African American constituency, she is articulating a message to the President not to take the concerns of this group for granted in the effort to pursue re-election.

### *C. The Partisan Dissenter*

The final portrait of racial dissent in this typology is the partisan dissenter, who takes on the view that critique of the president need not occur within the typical party structure. The partisan dissent in the context of the African American experience is one that confronts the limitations of the group solidarity thesis, making the counterclaim that loyalty to the Democratic Party is short sighted, misplaced and counter-productive.<sup>116</sup> Only with a broader conception of political interests can the black community advance its agenda and convince national leaders to pay special attention to the distinct issues of the most severely challenged in our society. Thus, this form of dissent poses the most radical challenge to the established political discourse amongst blacks. At the same time, this brand of discourse is very readily dismissed as ineffectual or in fact subversive in ways that are unhelpful to African Americans.

Ironically, one reason this form of racial dissent is not accorded much weight relates to the realities of the political landscape. The partisan dissent, more often than not, comes from the Republican Party, which enjoys most of its support among white voters in a region of the country with a particular history of hostile treatment toward African Americans.<sup>117</sup> Further, recent evidence about racial bias tends to support the theory that the

115. Brian Montopoli, *Maxine Waters: Why Isn't Obama in Black Communities?*, CBS NEWS (Aug. 17, 2011), <http://www.cbsnews.com/news/maxine-waters-why-isnt-obama-in-black-communities>.

116. One particularly provocative academic account of this argument comes from Carol Swain. See generally CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* (1993).

117. See Adolph L. Reed, Jr., *The Puzzle of Black Republicans*, N.Y. TIMES (Dec. 18, 2012), <http://www.nytimes.com/2012/12/19/opinion/the-puzzle-of-black-republicans.html>; Kim Messick, *Modern GOP is still the party of Dixie*, SALON (Oct. 12, 2013), [http://www.salon.com/2013/10/12/modern\\_gop\\_is\\_still\\_the\\_party\\_of\\_dixie/](http://www.salon.com/2013/10/12/modern_gop_is_still_the_party_of_dixie/).

expression of partisan difference is not easily distinguishable from latent racially troubling viewpoints.<sup>118</sup> And finally, the African American spokespersons usually tapped to promote the racial dissent on behalf of the party do not tend to hold much respect at all within the community – further entrenching the skepticism and caution with which the lion’s share of African Americans approach the party.

In order to understand the import of the last point, one need only review the series of characters employed to launch campaigns against Barack Obama on his road to the White House. After Senator Obama lost his general election opponent in the race for the U.S. Senate in 2008, Republicans picked a well-known conservative commentator and former ambassador, Alan Keyes, to run against him.<sup>119</sup> The only problem was that Keyes was not even an Illinois resident and needed to take extraordinary efforts to qualify for the ballot.<sup>120</sup> Further, Keyes’ increasingly bizarre and provocative comments on the campaign trail led him to underperform even most Republicans on the Illinois ballot that year.<sup>121</sup> Similar Republican efforts that faltered quickly include the botched candidacies of Herman Cain and the rocky tenure of Republican National Committee Chairman Michael Steele.<sup>122</sup> All of these political figures seemed only to be relevant to Republicans when needed to launch a critique against an African American holding office.

But the most recent and perhaps interesting example of among those in the partisan dissent category is Dr. Ben Carson, a world-renowned physician and author of several inspirational books.<sup>123</sup> Carson is a well-known figure in African American circles largely because of his time on the lec-

118. Alexandre Mas and Enrico Moretti, *Racial Bias in the 2008 Presidential Election*, 99 AM. ECON. REV. 323, 328 (2009); Carol K. Sigelman et al., *Black Candidates, White Voters: Understanding Racial Bias in Political Perceptions*, 39 AM. J. POL. SCI. 243, 246 (1995).

119. *Keyes Challenges Obama for Illinois Senate Seat*, CNN (Aug. 9, 2004), <http://www.cnn.com/2004/ALLPOLITICS/08/09/il.keyes/index.html>.

120. *Id.*

121. John Chase & Liam Ford, *Senate Race Gets Personal*, CHI. TRIB. (Oct. 22, 2004), <http://www.chicagotribune.com/news/local/chi-0410220071oct22,0,3945624.story> (noting that “Keyes said he does not believe Jesus would support Obama because the Democrat backs abortion rights. ‘Christ is over here, Sen. Obama is over there: the two don’t look the same,’ Keyes said, spreading his arms far apart.”)

122. See Andrew Goldman, *Ballad of the Long Shot*, N.Y. TIMES (June 30, 2011), <http://www.nytimes.com/2011/07/03/magazine/herman-cain-talks-about-herman-cain.html>; Jim Rutenberg & Jeff Zeleny, *Republicans Maneuver to Oust Their Leader*, N.Y. TIMES (Nov. 9, 2010), available at <http://www.nytimes.com/2010/11/10/us/politics/10repubs.html>.

123. Trip Gabriel, *Neurosurgeon’s Speeches Have Conservatives Dreaming of 2016*, N.Y. TIMES, Mar. 20, 2013, <http://www.nytimes.com/2013/03/21/us/politics/dr-benjamin-carson-obama-critic-have-conservatives-dreaming-of-2016.html?pagewanted=all>; see Company Biography for Benjamin Solomon Carson, Sr., M.D., JOHN HOPKINS MEDICINE, [http://www.hopkinsmedicine.org/face/facial\\_pain\\_ralylis\\_pain\\_treatment\\_center/about\\_us/our\\_team/carson.html](http://www.hopkinsmedicine.org/face/facial_pain_ralylis_pain_treatment_center/about_us/our_team/carson.html) (last visited Mar. 13, 2014).

ture circuit discussing his success in life despite some very challenging social and economic conditions.<sup>124</sup> Carson grew up in a Detroit ghetto, but his single mother valued education enough to take steps to ensure Carson and his siblings went to college.<sup>125</sup> His persona story lines up not only with the appealing African American narrative of empowerment in spite of circumstances but also with the conservative (and indeed Republican) conception of how traditional institutions of family and religious belief can overcome virtually any social reality.<sup>126</sup> Carson, who had previously steered clear of any notable statements about politics, seemed to embody a variation on the theme that Booker T. Washington outlined in his book *Up From Slavery*,<sup>127</sup> which emphasized the need for black self-help as a means of uplift – by developing the kinds of skills that were of use to society.<sup>128</sup>

Carson took a direct turn into a racial dissent as he addressed a national prayer breakfast in 2013, with the President in full view.<sup>129</sup> As the featured guest, Carson began with his now familiar personal narrative but then unexpectedly launched a broad based criticism of the President's health care policy. He wondered why it was necessary to create a government health care insurance mandate and then provided stories from his own professional experience to suggest that the President's approach would be ineffective. His proposed solution was radically different from the model advanced by the President:

Here's my solution. When a person is born, give him a birth certificate, an electronic medical record, and a health savings account, to which money can be contributed, pre-tax from the time you are born, to the time you die. When you die, you can pass it on to your family members so that when you're eighty-five years old and you've got six diseases, you're not trying to spend up everything. You're happy to pass it on and nobody is talking about death panels. That's number one.<sup>130</sup>

Carson then offered his take on the concerns of tax equity and poverty, suggesting that government assistance is not necessarily the best cure for long term and deeply entrenched poverty – echoing many conservative

124. See Gabriel, *supra* note 123.

125. *Id.*

126. See ALLAN J. LICHTMAN, WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT 320 (2008).

127. BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY (1901).

128. Jonah Goldberg, *A Speech Worthy of Booker T. Washington*, NATIONAL REVIEW ONLINE (Feb. 13, 2013, 12:00 AM), <http://www.nationalreview.com/articles/340481/speech-worthy-booker-t-washington-jonah-goldberg>.

129. Frank James, *Ben Carson Says No Apology Needed after Controversial Speech*, NPR IT'S ALL POLITICS (Mar. 11, 2013), <http://www.npr.org/blogs/itsallpolitics/2013/03/11/174026740/ben-carson-says-no-apology-needed-after-controversial-speech>.

130. *National Prayer Breakfast: Carson Prayer Speech*, C-SPAN (Feb. 7, 2013), <http://www.c-spanvideo.org/clip/4353213>.

critiques of the social welfare programs.<sup>131</sup> After a scattershot discussion about a variety of other hot button issues, Carson then wandered into a more sweeping criticism of the lack of attention to the Republican Party, which suggested a criticism about African American allegiance to Democrats in a more subtle way than any of the aforementioned nominees for a partisan dissenter could have accomplished:

Now, what about the symbol of our Nation? The Eagle. The Bald Eagle . . . It comes from the Old English word Piebald, which means crowned with white. And we just shortened it to bald. . . . But, why is that eagle able to fly, high, forward? Because it has two wings: a left wing and a right wing. Enough said.<sup>132</sup>

These comments were an immediate sensation with conservatives, who boasted how uncomfortable Carson's comments appeared to make the President.<sup>133</sup> But in ways that the earlier candidates for a partisan dissenter could not do, Carson drew on his credibility within the African American community along with his professional expertise to advance a cause that helped to support the current Republican campaign strategy against the policy now widely known as "Obamacare."<sup>134</sup> Carson has since continued his speaking engagements against the health care reform policy and is rumored to be under consideration for a place on the Republican presidential ticket in 2016.<sup>135</sup>

### III. RACIAL DISSENT IN THE OBAMA ERA

One of the most difficult matters in the Obama era to address is how to advance an agenda that includes criticizing government critique when the head of government is a black man who enjoys a strong current of existing black support. Terry Smith has suggested that one simply should forge a critique in the same manner that one would a white president. Even while Bill Clinton enjoyed strong African American voter support during his presidency, there were episodes in which African American political discourse challenged his positions on high profile matters ranging from

131. *Id.*

132. *Id.*

133. See Cheryl K. Chumley, *FLASHBACK: Carson tells Obama at prayer breakfast that country is in moral decline*, WASH. TIMES, Feb. 8, 2013, <http://www.washingtontimes.com/news/2013/feb/8/conservative-ben-carson-speech-upstages-obama-pray/>.

134. "Obamacare" refers to the informal name used in the press for the Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119-1025 (2010). See also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

135. See Gabriel, *supra* note 123. In addition, supporters of a Carson candidacy have already begun a National Draft Ben Carson for President Committee, see RUN BEN RUN, <http://www.runbenrun.org/> (last visited Mar. 13, 2014).

welfare reform to civil rights appointments.<sup>136</sup> In at least some respects, Clinton proved responsive to these criticisms.

Indeed, the failure to level same kind of criticism on the Obama presidency plays into a strategy that Smith describes as “racial triangulation,” in which a political actor strategically distances himself from African Americans and their interests in order to advance a his distinct (and arguably de-racialized) agenda that de-prioritizes problems of race discrimination and disparities as racial problems *per se*.<sup>137</sup> To the extent that Smith correctly describes the current politics of the Obama era, one cannot help but to wonder about the best strategy for racial dissenters and for the African American political discourse.

There is clearly a role to be played for the public dissenter, even as contrary views raise question about the motivation behind these critiques when they emerge. Tavis Smiley and Cornel West have been sharply chastised for comments that critics find are deeply troubling insofar as they show no respect to the President’s very difficult position in the polls. At the same time, the two have advanced issues that have otherwise gone underreported in the national media. And, to the extent the President himself invited advocates to pressure him into action, it seems rather inappropriate to decry those who in good faith engage in a forthright discussion about issues on which they may want to persuade the White House. That these efforts occur in the public sphere should be welcomed insofar as the conversation remains open to contributions and reactions from the broader public.

At the same time, the official dissenter faces a very distinct challenge. Power in Washington is largely dependent upon access to decision-makers and the ability (unilateral or collective) to spur official action. While actors like Maxine Waters were exceedingly important in the President’s electoral strategy, they have not figured especially salient in his governing strategy. And there have been precious few individuals who have direct linkages into African American political institutions like the CBC who can maintain an open line of communication on topics of interest to the CBC. In the absence of these networks, the CBC is left to utilize its more traditional brands of protest-oriented lever points to gain the White House’s attention.

136. See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, THE ATLANTIC ONLINE (Mar. 1997), <http://www.theatlantic.com/past/docs/issues/97mar/edelman/edelman.htm> (describing the harms of welfare reform); see generally LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* (1998) (offering a view about Clinton’s distancing himself after her nomination for a Justice Department position encountered controversy).

137. TERRY SMITH, *BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION* 2-3 (2012).

How the larger public views a critique that occurs in the open among black elected officials is quite unknown. But it certainly poses an interesting challenge for those who wish to maintain a relationship with executive decision makers. Agencies are not especially likely to engage members of Congress who are just as likely to meet privately as they are hold a press conference to criticize the president.

Finally, the partisan dissenter may have the most risk in advancing an agenda of change in the African American political discourse. Unlike most of the typical figures who issue this form of critique, Ben Carson may be the most provocative and potentially transformative person who assumes this position. He has no particular need to align with the Republican Party, since he is not dependent on the political party structure in the way that a perennial candidate or a party chair might be. Yet he has concluded that his personal narrative and his professional experience lead him more to a conservative outlook that differs from that of the President. What this offers African American observers (and indeed non-black observers as well) is the opportunity to see a contrasting perspective on national politics and policy coming from a black person with intellectual *bona fides*.

Regardless of what one makes of those views substantively, the fact that one might articulate a view of that kind and in that forum offers an interesting concept of how even partisan dissent might occur in a public forum. It can both develop a critique that is aware of and attentive to race without being consumed in the racial project in ways that can overtake any other element of the debate. Perhaps in this manner, one might find the most potential for a fully developed method of dissent in this particular thorny political context.