

President Trump's Appointments: A Policy of Activism

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Abstract: Le nomine del Presidente Trump: una policy caratterizzata dall'attivismo – The paper examines some of the most relevant features of President Trump's appointments, with reference to the highest ranks of the executive branch, ambassadors, and federal judiciary. The aim of the analysis is to demonstrate that President Trump's term had a profound impact on the appointment power of the President of the United States. A special attention is given to the way in which President Trump, thanks to his appointments, reshaped the federal judiciary.

Keywords: Presidential Appointments; Activism; Cabinet; Ambassadors; Federal Judiciary.

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1. Introduction

According to Article II, Section 2, Clause 2, of the Constitution (the so-called Appointments Clause), the President of the United States is empowered to appoint a wide range of public officials. Depending on the level of the officials, the appointment process requires either the "advice and consent" of the Senate or, simply, an individual decision by the President him/herself. Among the officials whom the President is entitled to appoint, the most significant positions within the Executive and the Judiciary are established either by the Constitution or by legislation.¹

Due to its scope, the power of appointment is one of the most significant powers to define a President, not only in relation to the immediate impact of his or her policies but also with regard to his or her capacity to influence the public apparatus for decades following the end of his or her mandate. This applies especially to the judicial branch, as Article III, Section 1, of the Constitution protects judges from removal, granting them the power to "hold their offices during good behavior." Therefore, judges appointed by a president can (and generally do) remain in office even

¹ Article II, Section 2, Clause 2, of the Constitution reads as follows: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

for many years, throughout the terms of subsequent presidents.

Of course, the great power allocated to the President in theory may have different practical outcomes, depending on the circumstances and the context in which it is exercised and on how the President decides to act.

With regard to President Donald J. Trump's mandate, it is fair to state that the political context surrounding the appointments afforded him a significant freedom to choose appointees, because in the 2016 elections, Republicans maintained a majority of seats in the Senate (52, reduced to 51 one year later²). Indeed, despite the narrowness of their majority, during the first two years of Trump's Presidency Republicans were able to support presidential nominations and, as a general rule, no compromise with Democrats seemed to be needed, as the House of Representatives too had a Republican majority – and a comfortable one at that, with 241 seats against Democrats' 194. The political context partially changed with the mid-term elections, because in the House of Representatives Democrats gained a majority (235 seats, with 199 seats for Republicans); on the contrary, Republicans strengthened their majority in the Senate (53 seats). In any case, these changes did not affect the practice of appointments, because rather than searching for compromises in the activity of two chambers, the main feature of the appointment process to federal office was the implementation of the majority rule.

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Such a favorable situation, for the whole mandate, allowed President Trump to carry out a policy in appointments characterized by a significant activism. Actually, "activism" can be the keyword that helps understanding President Trump's approach to appointments, starting from the fact that precisely because of this activism Trump's Presidency is supposed to have a longstanding impact on the American system, in particular as far as the Federal Judiciary is concerned.

In the following paragraphs, I will examine some of the most relevant features of President Trump's appointments with reference to different sectors of the federal government to which appointments are made.

2. The Turnover in the Highest Ranks of the Executive Branch

One of the most significant features of the Executive branch during President Trump's term was the high turnover rate in the individuals covering the roles of advisers and secretaries to the President. The turnover rate became the focus of particular attention from the very first months of the presidential mandate, such that several in-depth analyses of the changes were soon conducted. One of the most interesting studies in this vein was presented by the Governance Studies program at the Brookings Institution

² In February 2017, Senator Jeff Sessions, of the Republican Party, resigned. In the elections held in December 2017 in Alabama to replace Senator Sessions, Doug Jones (Democratic Party) was elected.

in January 2018;³ it was later periodically updated and developed with reports, the last of which was published in October 7, 2020.⁴ The data on turnover in President Trump's administration referred to in this presentation are drawn mainly from this report.

A first set of data focuses on the most important members of the Executive Office of the President,⁵ identified on the basis of the "Decision Makers" editions of the National Journal.⁶

There are estimated to be 65 "decision makers" in Trump's administration, slightly more than the average number in previous presidencies since 1981. In fact, the average number of decision makers in the five previous presidencies was 60.6; it was only during the Clinton years that the number (70) exceeded that of Trump's administration today. Two other presidencies were close to Trump's total: Reagan's administration had 60 such positions, and G.W. Bush had 63. There is a significant gap only with the 57 positions in place during G.H.W. Bush's Presidency and, in particular, with the 53 positions during Obama's term.

The crucial factor, however, is the turnover rate. During President Trump's term, 58 positions out of 65 went through turnover, which was equivalent to almost 91%. The rate of turnover decreased over the years: 22 positions changed hands during the first year (35%), 20 during the second (31%), 11 during the third (17%) and only 5 from January to October 7, 2020 (8%). During the previous presidencies, the threshold of 80% was not crossed and only under the first term of Presidents Reagan, Clinton and Obama the rate exceeded 70% (78%, 74% and 71% respectively), whereas during G.H.W. Bush's Presidency and the first term of G.W. Bush's mandate the rate was between 60% and 70% (66% and 63%; respectively). In the light of the decreasing trend of turnover in President Trump's mandate, the most striking comparison can be drawn with reference to the presidents' first year, in which turnover is generally very limited: while President Trump changed more than one-third of his highest advisers, all of the other presidents changed less than 10% of their appointees to the posts, except for Reagan (17%) and Clinton (11%).

³ See Kathryn Dunn Tenpas, *Why is Trump's staff turnover higher than the 5 most recent presidents?*, *The Brookings Institution*, January 19, 2018, www.brookings.edu/research/why-is-trumps-staff-turnover-higher-than-the-5-most-recent-presidents/.

⁴ See Kathryn Dunn Tenpas, *Tracking turnover in the Trump administration*, *The Brookings Institution*, October 2020, www.brookings.edu/research/tracking-turnover-in-the-trump-administration/. The first report, in 2018, considered only the President's most influential staff, whereas since the 2019 report also cabinet positions were taken into account.

⁵ The Executive Office of the President, overseen by the White House Chief of Staff, has had a key role since its establishment in 1939. In fact, many of the President's closest advisers are part of this Office. Senate confirmation is required only for some advisers, whereas most of them are appointed by the President at his own discretion.

⁶ From 1981 to 2009, the National Journal published these figures during each president's first year. The criteria that were used to select the most influential advisers are explained in *How the 250 Decision Makers Were Selected*, July 16, 2013, *National Journal*, www.nationaljournal.com/s/75992/how-250-decision-makers-were-selected.

The distance between the practices followed by previous presidents and that of President Trump is remarkable. This is all the more so if it is considered that 23 of the 58 positions in which change occurred underwent *serial* turnover: over the past four years, the position of Communications Director was covered by six persons and the same occurred for the position of Deputy National Security Adviser; five persons exercised the function of Deputy Chief of Staff as many as those who exercised the function of Senior Director for Europe and Russia, NSC. Nine other positions underwent four replacements each.

The rate of change occurring at the highest level of the Executive branch was corroborated by the rate of turnover in the Cabinet. President Trump made two changes during his first year in office, five during the second, and three during the third, while no changes took place during the last year. The overall number of changes was ten, which was the highest if compared with the first term presidencies in the last forty years: if G.H.W. Bush made eight changes (all in the second half of his term) and President Reagan's first term was characterized by six changes (mostly in the central years), the other Presidents were even more reluctant: Clinton made four changes, Obama three and G.W. Bush only two.

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The high turnover rate had multiple reasons. With regard to the most influential members of the Executive Office, 23 out of 58 changes (40%) were due to a promotion of the person who held the position, while the other 35 were the result of resignations. Among the resignations, 15 were defined as "resignations under pressure," although there were no clear criteria to describe when this situation occurred other than "the general sentiment at the time of [the] departure" of the person holding the office.⁷ As for turnover in the Cabinet, promotion was the cause in only one out of ten cases; seven of the nine resignations were defined as having been tendered "under pressure" and one was an explicit "protest resignation."⁸

Every case of departure from office, of course, is the result of specific reasons and circumstances. It is impossible to analyze each case individually, also because of the lack of information required to provide a reliable overview. Considered as a whole, however, the changes that occurred in the Trump administration – especially compared to the practice followed by previous presidents – appear to show a clear innovation that can be explained, in part, by the high number of outsiders to traditional political membership and careers appointed. However, the main reason that might

⁷ See Tenpas, note 6: "The departure status was difficult to determine in some cases because media reports were often at odds with an individual's claim that they were resigning. In the end, I decided to create the category "resigned under pressure," which I believe captures the general sentiment at the time of their departure."

⁸ Indeed, the resignation of the Secretary of Defense Jim Mattis can be considered an explicit "protest resignation" because of his resignation letter tendered to President Trump on December 20, 2018, in which the retired general objected to the United States' withdrawal from Syria and criticized the President's attitude towards the Nato and the country's traditional allies.

underlie the turnover rate was probably related to the concentration of executive power in the hands of the President, who tended to act as a true “Commander-in-Chief”, such that his advisers and secretaries were subject to a sort of accountability based on their alignment to the President’s policies. The second part of the presidential term and the reduction of the turnover rate might suggest that huge number of changes that characterized the first two years was somehow linked to President Trump’s atypical entry into politics, which made a period of adjustment necessary to strengthen the stability of his staff.

3. The Weight of Politics in Ambassadorial Appointments

The ambassadors of the United States are nominated by the President, and their appointment must be confirmed by the Senate.

In four years, President Trump appointed, of course, a significant number of ambassadors. The updated list as at September 14, 2020 includes 161 appointments and 28 nominations that were awaiting confirmation by the Senate. Five other nominations were returned to the White House (two on January 3, 2019 and three on January 3, 2020), whereas another nomination was withdrawn on September 8, 2020.⁹

Taking into account the number of appointments alone, President Trump’s pace of appointment (approximately 40 per year) was considerably lower than his predecessors: President Obama appointed 416 ambassadors in eight years (52 per year),¹⁰ President Clinton appointed 417 (52.125),¹¹ President Reagan appointed 420 (52.5)¹² and President Carter appointed 202, although in four years (51).¹³ An even higher rate characterized President G.W. Bush, who made 460 appointments in eight years (57.5),¹⁴ and President G.H.W. Bush, who made 214 appointments in four years (53.5).¹⁵ Of course, the 28 pending nominations could change, at least to some extent, this analysis, to the point that President Trump’s term, with 189 appointments (47.25 per year), might eventually be characterized by a rate that could be considered in alignment with his recent predecessors.

In any case, the keyword “activism” can hardly apply to ambassadorial appointments, since it is clear that the total number of choices made was not a distinguishing feature of President Trump’s policy. On the contrary, a point that certainly deserves special mention, which does appear to characterize Trump’s Presidency, is the high rate of political appointments. Indeed, this kind

⁹ The full list is available on the website of the American Foreign Service Association www.afsa.org/appointments-donald-j-trump. The data referred to in the text are the result of a reprocessing based on the table available on the website.

¹⁰ See www.afsa.org/appointments-barack-obama.

¹¹ See www.afsa.org/appointments-william-j-clinton.

¹² See www.afsa.org/appointments-ronald-reagan.

¹³ See www.afsa.org/appointments-jimmy-carter.

¹⁴ See www.afsa.org/appointments-george-w-bush.

¹⁵ See www.afsa.org/appointments-george-h-w-bush.

of appointments, because of their number, could even evoke the idea of some activism. The choice between appointing a career diplomat or an outsider falls within the President's margin of discretion. In the last forty years, however, most ambassadors were chosen from among diplomats. Even if Democratic presidents appeared to be slightly more willing to value career experience than Republicans, the general trend was to reserve no more than one-third of appointments to political choices: the most "diplomat-oriented" president was Carter, only 26.24% of whose ambassadorial appointments were selected on a political basis; President Clinton's rate was 28.06%, President Obama's 30.05%, President G.H.W. Bush's 31.3%, and President G.W. Bush's 31.8%. Only President Reagan, probably the least "conventional" president of those considered here, gave greater consideration to political choices, which constituted 37.6% of his total appointments. President Trump's choices were in the same vein of President Reagan's and went even further, as 67¹⁶ of his 161 appointed ambassadors (41.61%) were not chosen from the diplomatic corps. Therefore, during the last four years, political selection bore unprecedented weight. In this regard, if one takes the 28 pending nominations into consideration, the weight of politics gains additional momentum, as exactly half these nominees are non-career diplomats. Assuming that all 28 nominations was confirmed, 81¹⁷ of the 189 ambassadors appointed by Trump would not be career diplomats (42.86%) and 'only' 108 (57.14%) would be the expression of the most traditional way of selecting representatives of the U.S. abroad. These data seem to confirm the unconventionality of President Trump's choices and may suggest a link with the idea of an executive apparatus that tended to be oriented, more than in the past, towards an administration that strengthened personal links instead of most neutral forms of selecting officers. This approach to the choice of the persons who are entitled to represent the U.S. around the world was criticized by some scholars, in particular because of the lack of guarantees concerning the fact that the appointees would be enough qualified: the policy of appointing "campaign contributors and other political affiliates to ambassadorships"¹⁸ was the object of criticism *per se*, thus the massive implementation of this policy by President Trump was especially targeted.

4. Appointments in the Executive Branch: An Unfinished Work or A Lean Government?

The President of the United States has to appoint a large number of federal officers, both to the Executive branch and to the Judiciary.

In the Executive branch, the number of appointments is relatively standardized, due to the spoils system. And, just like his predecessors,

¹⁶ The total amount includes 5 appointees from the Civil Service, that are counted as political appointments as they are not from the career Foreign Service.

¹⁷ Among them, 6 would be appointed from the Civil Service.

¹⁸ See Ryan M. Scoville, *Unqualified Ambassadors*, *Duke Law Journal*, Vol. 69, 2019, p. 71 at 195.

President Trump, at the beginning of his term, had a significant number of vacancies to fill.

The *Washington Post* newspaper, together with *Partnership for Public Service*, a nonprofit, nonpartisan organization founded in 2001,¹⁹ tracked the confirmation process of more than 750 key Executive branch nominations. This constituted a significant proportion of the approximately 1,200 positions that require Senate confirmation.²⁰

As at November 2, 2020, the number of nominations confirmed by the Senate amounted to 530, approximately three-fourths of the key positions, while 106 nominations were still to be confirmed. For six other positions, the name of the nominee had been announced, but the nomination had yet to be officially made. 132 vacancies were still to be filled, which means that approximately one-sixth of key executive positions were not occupied during President Trump's term.

The situation changed depending on the department taken into account. 87% of the key positions in the Department of Energy were filled, and 83% of those in the Department of Health and Human Services. In three further departments, individuals had been appointed to three-fourths of the key positions: Housing and Urban Development, 77%; State, 76%; and Veterans Affairs, 75%. On the other hand, less than 50% of key positions were filled in two departments: Justice, 45%; and Homeland Security, 35%. With regard to the Department of Homeland Security, on the day of the Presidential elections, the nominated secretary, Chad F. Wolf, still waited for a formal confirmation by the Senate.

The number and significance of the vacancies could not be neglected, as they were likely to affect the effectiveness of the Executive's policies in some way. This remark could suggest that President Trump left the appointment work unfinished. If numbers seem to justify this conclusion, it is however more likely that the positions remained without nominees were the result of a deliberate strategy (rather than the product of inefficiency): actually President Trump could have opted for a lean government, to show, also by the number of the staff, the purpose to reduce federal government activities and to concentrate the powers in the hands of the leader.

5. Judicial Appointments: An Enduring Legacy

A very common statement concerning the relationships between President Trump and the Judicial branch points out that the President strongly

¹⁹ See the organization's website: ourpublicservice.org.

²⁰ "These positions include Cabinet secretaries, deputy and assistant secretaries, chief financial officers, general counsel, heads of agencies, ambassadors and other critical leadership positions." See *PowerPost*. *Tracking how many key positions Trump has filled so far*, *The Washington Post*, Updated Nov. 2, 2020 at 9:25 a.m., www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?utm_term=.f9139aa96f61.

influenced, or even reshaped the Federal Judiciary. The main reason that is invoked to explain the assumption is related to the huge number of appointments that President Trump made during his 4-year Presidency.

Behind the President's activism in appointing judges the main feature to take into account is, of course, the number of vacancies. In this regard, fate always has, of course, a major role: vacancies simply occur when a judge resigns or ends its mandate for any other reason, thus a President is able to make many appointments depending on events that go beyond his (one day, her) control. Nevertheless, it would not be appropriate to bring everything down to a matter of "fortune" or "misfortune" of a President. What happened in the last few years is very revealing.

5.1 A Huge Number of Vacancies To Fill

The data regarding vacancies in the Federal Judiciary at the beginning of a presidency show that, in the long term, a slightly "increasing" trend may be identified. At the beginning of President Reagan's term, the number of vacancies was 38. These grew to 43 (+13.2%) at the beginning of President G.H.W. Bush's term. The increasing trend gained tremendous momentum during this term, such that at the beginning of Clinton's presidency there were 109 vacancies (+153.5%). During Clinton's presidency, the figure slightly decreased, so that President G.W. Bush had 92 initial vacancies to fill (-15.6%). His activism in making appointments produced a remarkable fall in the number of offices to be filled at the beginning of President Obama's first term: 59 (-35.9%).²¹

During President Obama's years, the number of vacancies swelled dramatically (by 98.3%). As a result, at the beginning of his term, President Trump had 117 vacancies to fill, which constituted more than one-eighth (13.1%) of all 890 federal judge offices.

If President Trump, while taking office, had a number of vacancies to fill which almost doubled President Obama's, admittedly something had occurred during President Obama's mandate. Actually, the explanation of the huge number of vacancies that President Trump had to fill during his term dates back precisely to his predecessor's mandate.

To outline the circumstances in which the power of appointment was exercised by President Obama, one of the most important elements to take into account is the split of the Senate majority after the 2014 elections. As a matter of fact, for the most part, the statistics on Obama's appointments were based on the first six years of his tenure, when Democrats controlled

²¹ These data were collected comparing the number of vacancies at the beginning of February of the relevant years, as provided by the Federal Judiciary on the U.S. Courts website, in the *Archive of Judicial Vacancies* section: www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies (last accessed: November 5, 2020). On judicial vacancies at the beginning of President Trump's term, see James Marion, *So Many Seats To Fill: The Future Of The Federal Judiciary*, San Francisco Attorney, Vol. 43, 2017, 36.

the Senate; since the Republicans gained a majority, the number of confirmations of Obama's nominees fell dramatically: as a matter of fact, since the new senators took office at the beginning of 2015, only 2 court of appeals judges and 17 district court judges were confirmed.

In other words, with regard to appointments, Obama's Presidency could be divided into two periods: its last two years were characterized by robust opposition from the Republican Party, whose majority in the Senate strongly influenced the number of successful nominations. However, regardless of the political confrontation, from a legal and constitutional point of view, the first six years of President Obama's mandate were even more important, since the Democratic majority in the Senate was forced to overcome the strong objections made by the Republican minority. Conflicts between majority and minority in the Senate occurring during the "advice and consent procedure" are far from unusual, and it could not be otherwise. After all, the President's power of appointment is so crucial that many political issues are necessarily tied to the individuals whom the President chooses; therefore, the debate surrounding his or her choices may actually give rise to a seminal moment of confrontation on national politics.²²

Therefore, the fact that conflicts took place did not distinguish Barack Obama's Presidency from those of the past. Nor did the way in which confrontations were conducted appear to be significantly different: on the one hand, senatorial opposition resorted to filibustering; on the other, the majority sought to contain time-wasting as much as possible, so as to obtain the expected result and also, possibly, speed up the appointment process.

What truly characterized the first years of Barack Obama's Presidency was not how confrontations took place, but the frequency and the degree of opposition made to the presidential choices.²³

It is no coincidence that in the first six years of President Obama's mandate, that is until the slip of Senate majority did not occur, the frequency of cloture motions became a key element of the entire confirmation process: to clear the hurdle of the vigorous filibustering conducted against President Obama's nominations, the Democrats were increasingly compelled to end the debate by using a "clean-cutting" measure. The use of these motions was greatly facilitated, compared to the past, because the interpretation of U.S. Senate Rule XXII, Paragraph 2,

²² With regard to the "advice and consent" power of the Senate and to the limits that this power displays on the President's action, *see, e.g.*, Adam J. White, *Toward the Framers' Understanding of 'Advice and Consent': A Historical and Textual Inquiry*, *Harvard Journal of Law & Public Policy*, Vol. 29, 2005, p. 103; Caprice L. Roberts, *Discretion and Deference in Senate Consideration of Judicial Nominations*, *University of Louisville Law Review*, Vol. 51, 2012, p. 1; Steven I. Friedland, *'Advice and Consent' in the Appointments Clause: From Another Historical Perspective*, *Duke Law Journal Online*, Vol. 64, 2015, p. 173.

²³ In fact, that several proposals for reforming the "advice and consent" procedure were presented. *See, inter alia*, Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, *Ohio State Law Journal*, Vol. 73, 2012, p. 287.

underwent a major change. According to this rule, in order to pass a cloture motion, the question “Is it the sense of the Senate that the debate shall be brought to a close?” “shall be decided in the affirmative by three-fifths of the Senators duly chose and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting.” On the basis of this rule, in order to end the debate and stop filibustering, the support of 60 senators is required to pass the motion; or rather, the support of 60 senators *was* required, precisely because of the major change abovementioned.²⁴

On November 21, 2013, the Democratic majority in the Senate adopted a reinterpretation of the rule with specific regard to the advice and consent process concerning both executive and judicial appointments, with the sole exception of nominations to the U.S. Supreme Court, the process for which was left unaltered. The new interpretation was considered the expression of the power to derogate from the Senate Rules that derives by the Constitution (actually, it was described as a “Constitutional option”), since the Constitution itself generally requires a simple majority, with the exception of specific, clearly identified cases. The interpretation allowed the Senate to pass a cloture motion with a simple majority of those voting, instead of three-fifths of the members of the Senate.²⁵ The impact of this interpretation is clearly demonstrated by its definition (not only as the “Constitutional,” but also) as the “nuclear” option.

The establishment of this interpretation allowed the Democratic majority to overcome filibustering by Republicans.²⁶ Nevertheless, the price to pay was the fueling of opposition in appointment processes. The effects of this confrontation were perceived mostly after the 2014 elections, when the Republicans gained the majority of the seats in the Senate, and were therefore – as noted above – in the position of blocking most of President Obama’s major appointments.

When President Trump took office, the Republican majority in the Senate, that had been blocking President Obama’s appointments, radically changed attitude, of course, towards the new President. And in order to help

²⁴ In a two-party system, this “super-majority” cannot be gained easily: in fact, the last Congress during which a party obtained at least 60 seats in the Senate was the 95th (1977-1979). In recent years, only the 111th Congress (2009-2011) was close to producing a supermajority in the Senate: Democrats had 57 seats and Republicans 41; the two remaining seats were occupied by independents both caucusing with the Democrats.

²⁵ The power to override the written rule was based on an opinion written by Richard Nixon in 1957 (when acting as vice-president and therefore as president of the Senate), according to which the Senate had the power to make a ruling that derogated from the Rules and thus establish a new, different practice.

²⁶ For a prospective analysis of the reform’s impact on the appointment process, based on the evolution of the political system and the past practice of confirmation, see Anne J. O’Connell, *Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, *Duke Law Journal*, Vol. 64, 2015, p. 1645.

the President making as many appointments as possible, the nuclear option became an important weapon in the Republicans' arsenal. Circumstances were thus extremely favorable for strengthening the proportion of conservative judges within the Federal Judiciary and to ensure longstanding influence in several circuits and districts.²⁷

Certainly aware that “[t]he judges a president appoints may be his most important legacy,” given that “[j]udges serve long after the appointing president leaves office,”²⁸ thanks to the activism of Senator Mitch McConnell, the Majority Leader in the Senate, President Trump was able, in nearly four years, to appoint – until November 3, 2020 – as many as 226 federal judges, thus 56.5 per year (even though the fourth was not yet concluded).²⁹ The overall number is interesting in itself, as it shows that the pace of President Trump's appointments was the highest since President Carter's term. In his 4-year mandate, President Carter appointed 262 federal judges (namely 65.5 per year) and President Reagan 402 in eight years (50.25 per year); their successors all remained below the threshold of 50 appointments per year: President G.H.W. Bush, with 197 appointments in four years, scored 49.25; President Clinton appointed 387 judges in eight years, thus 48.38 per year; the 340 appointments made by President G.W. Bush resulted in 42.5 per year; and President Obama, with 334 appointments, scored the record low of 41.75 appointments per year. President Trump's rate could become even more significant if one considered also the 41 nominations waiting for the Senate confirmation. If all these nominees were appointed, President Trump would obtain a record high of 267 (66.75 appointments per year), that would reduce the number of vacancies to 25 (-78.6%, if compared with the number of vacancies at the end of Obama's presidency).

This dramatic pace in appointments could not be possible without having recourse to the “Constitutional option” (or rather, if one takes into account its efficacy, the “nuclear option”). As a matter of fact, during President Trump's mandate, the advice and consent process was characterized by frequent implementation of the 2013 innovation: the option that was constructed by the Democrats backfired and considerably helped President Trump and a Republican Senate to reshape the Federal Judiciary. Not to mention the fact that the innovation even expanded its scope, with the removal of the sole exception that remained in the confirmation process.

²⁷ See Tom Westphal, *Polarization & Federal Judicial Appointments: A Positive Political Theory Analysis*, *Stanford Law & Policy Review*, Vol. 31, 2020, p. 267.

²⁸ See Thomas Jipping, *A New Way of Tracking Trump's Judicial Nominees*, *The Heritage Foundation*, November 13, 2018, www.heritage.org/courts/commentary/new-way-tracking-trumps-judicial-nominees.

²⁹ See L. Zwarenstejn, *Trump's Taleover Of The Courts*, *University of St. Thomas Law Journal*, Vol. 16, 2020, p. 146, esp. at 151.

5.2 *Sliding Doors at the Supreme Court*

The composition of the Supreme Court in the last five years has undergone important changes, but from a legal and constitutional perspective it is impossible to neglect the no less important changes that have not occurred, but that appeared at a certain moment to be possible. In particular, for a while, Democrats thought they could overturn the conservative majority in the Supreme Court. Not only did this not happen, but during President Trump's mandate what occurred was precisely the opposite: the conservative wing of the Court gained ground, and eventually it became clearly predominant.³⁰

In a political context characterized by a huge clash between Republicans and Democrats concerning presidential appointments, the death of Justice Antonin Scalia on February 13, 2016 created a rather complicated situation, both within the Supreme Court and with regard to the relationships between the President and the Senate.

Without one of its most senior and conservative members, the Supreme Court became equally divided between its conservative and liberal wings, such that the appointment of Scalia's successor by a Democratic President would be likely to give liberals the majority and end the long period of dominance by Republican Presidents' appointees which began during President Nixon's first term.³¹

This simple statement provides sufficient grounds to define the choice of the new Associate Justice as a crucial one. In addition, the general political situation largely contributed to fuel the debate on President Obama's choice. A key element to take into account was, actually, that the death of Justice Scalia occurred at the beginning of the last year of President Obama's tenure, and therefore only a few months before presidential and congressional elections were due to be held.

Vacancies in the Supreme Court during an electoral year had already occurred. Analyzing all of the vacancies arising throughout the 20th Century,³² eight concerned appointments to the Supreme Court in presidential election years. All but one of these appointments were made to fill a vacant seat: indeed, in six cases, the presidential nomination was confirmed by the Senate before the elections,³³ while in the seventh, the

³⁰ With regard to the clashes that have marked recent history of appointments to the U.S. Supreme Court (before the appointment of Justice Barrett), see Eric T. Kasper, *Theory and Practice: James Madison and the Constitutional Power to Appoint Supreme Court Justices*, *Quinnipiac Law Review*, Vol. 38, 2020, p. 605.

³¹ The split was the result of the appointments of Justice Lewis F. Powell and William Rehnquist as Associate Justices on 7 January 1972.

³² See Amy Howe, *Supreme Court vacancies in presidential election years*, SCOTUSblog (February 13, 2016), <www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/>.

³³ On March 1912, President William Taft appointed Justice Mahlon Pitney; four years later, President Woodrow Wilson appointed Justice Louis Brandeis (in June) and Justice John Clarke (in July); in March 1932, Justice Benjamin Cardozo took office,

confirmation eventually occurred later, and was in any case rather peculiar, because it concerned a recess appointment.³⁴

The eighth case was the appointment of Justice Abraham “Abe” Fortas as Chief Justice, once the incumbent Chief Justice Earl Warren had announced his retirement. President Johnson nominated Fortas in June 1968, submitting his name to the Senate, which at the time was led by a Democratic majority. Because of objections to the person, but mostly in response to the Warren Court’s vigorous activism, the Republicans and a number of Democrats attempted to prevent the confirmation by filibustering. After an unsuccessful cloture vote in October, Justice Fortas asked the President to withdraw his nomination. However, this case could hardly be considered to set a precedent for the 2016 nomination, because then there was no vacancy to fill in the Supreme Court (Chief Justice Warren eventually remained in office until June 1969). Nevertheless, Fortas’ failure was quickly evoked after the death of Justice Scalia, in relation to the “Thurmond Rule,” a supposed rule expressed by the Republican Senator Strom Thurmond in 1968 according to which the Senate refrains from confirming the President’s judicial nominations on the eve of the presidential elections. This “rule” referred generally to the election year, but was supposed to operate only at some point of the year. However, this “point” was not specified. It might perhaps be defined by taking into account the time (July 1968) when Senator Thurmond expressed the rule. With regard to the two cases occurring after the rule was expressed, the above definition might help to explain Justice Kennedy’s confirmation in 1988 (which occurred in February); however, the same definition would be applicable to the 2016 nomination, since, in order to replace Justice Scalia, President Obama nominated Merrick Garland, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, on March 16.

Notwithstanding frequent invocations by the Republicans, there was room to question whether Thurmond really did establish a “rule.” Scholarship has noted that “the specter of the ‘Thurmond Rule’ has reared its head in presidential election years at least since the 1980s, when Senator Strom Thurmond [...] chaired the Judiciary Committee.”³⁵ In any case, the

appointed by President Herbert Hoover; on January 1940, President Franklin D. Roosevelt appointed Justice Frank Murphy. The latest confirmation made during a presidential election year was that of Justice Anthony Kennedy (see above, note 8), who was confirmed and appointed in February 1988; the peculiarity of the case derives from the fact that the appointment process was started in November 1987, thus not during the electoral year.

³⁴ Article II, Section 2, Clause 3, of the Constitution states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” President Dwight Eisenhower had to fill a vacancy arising in October 1956, when the Senate was already adjourned. The President was therefore allowed to make a recess appointment. The appointee, Justice William J. Brennan, was then confirmed by the Senate only the following year.

³⁵ See Russell Wheeler, *Judicial Confirmations: What Thurmond Rule?, Issues on*

validity of the “rule” was never clearly established, to the point that the American Constitution Society defined it as “the urban legend of judicial nominations,” since the “idea of halting consideration of judicial nominees in the months leading up to a presidential election never became a part of formal Senate procedure, nor even an informal bipartisan agreement.” “[i]t never became a ‘rule’ at all, and as such, it can be disregarded for good reason – it is the *Thurmond Myth*.”³⁶

Therefore, it could hardly be disputed that, theoretically, there was nothing to prevent the President from appointing a new Justice, even at the end of his or her term. These arguments notwithstanding, Chief Judge Garland was not appointed, and he was never even given a Senate hearing.

Thanks to the Republicans’ opposition, a new Associate Justice still had to be appointed when President Trump took office. And President Trump did not waste time, since he soon announced (on January 30, 2017) the nomination of Neil Gorsuch. As a reaction to the Republicans’ attitude towards President Obama’s nominee, the Democrats strongly opposed President Trump’s nomination and filibustered the advice and consent process. To overcome the Democrats’ opposition, Republicans invoked the need to extend the “nuclear option” also to nominations to the U.S. Supreme Court and, on April 6, 2017, this extended method was actually used to pass a cloture motion. The next day, Neil Gorsuch was confirmed with 54 votes against 45.³⁷

The appointment of Neil Gorsuch roughly confirmed the former balance between conservatives and liberals within the Supreme Court. On the contrary, the retirement of Justice Antony Kennedy on July 31, 2018 created the conditions for a first important change, since Justice Kennedy was the swing vote in many decisions. Therefore, the appointment of another conservative member of the Court would have shifted the majority to the right. It is precisely what happened with the nomination of Judge Brett Kavanaugh. The criticism leveled against Kavanaugh, especially concerning sexual assault allegations, led Democrats to a fierce opposition.³⁸ It is also for this reason that his confirmation by the Senate required the extension of the nuclear option to be reiterated, on October 5, 2018. At the

Governance Studies, No. 45, March 2012 (<www.brookings.edu/wp-content/uploads/2016/06/03_judicial_wheeler.pdf>), p. 1.

³⁶ See *What is the Thurmond ‘Rule’?*, available on the American Constitution Society’s website, at <www.acslaw.org/sites/default/files/pdf/ACS%20Talking%20Points%20-%20The%20Thurmond%20Rule.pdf>.

³⁷ On the appointment of Justice Gorsuch, see Michael Goldhaber, “American presidency: the conundrum of Justice Gorsuch’s Supreme Court appointment”, *IBA Global Insight*, 2017, Jun/Jul., p. 13 ff.

³⁸ With regard to the appointment of Justice Kavanaugh, see Peter J. Aschenbrenner, *United States of America: nomination of DC Circuit Judge Brett Kavanaugh to the United States Supreme Court ignites public firestorm over allegations of sexual misconduct, alcohol-fuelled misbehaviour and lack of judicial temperament – nominee brutally describes Senate Judiciary proceedings: ‘This is a circus’*, *Public Law*, 2019, Jan., p. 220 ff.

end of the appointment process, the Supreme Court still had a 5-4 majority of conservatives, but the swing vote became Chief Justice Roberts' one,³⁹ whose views were considered more conservative than Justice Kennedy's ones.

It was a significant change indeed, but not a real turning point, at least if compared with what occurred weeks before the 2020 elections, when, on September 18, one of the four liberal Justices of the Court, Ruth Baden Ginsburg, died. Four years after having invoked the "Thurmond rule" to prevent the appointment of a Justice who had been nominated on March of an electoral year, the Republican majority in the Senate scheduled hearings of Judge Amy Coney Barrett, a conservative lawyer nominated by President Trump on September 26. The nuclear option allowed Republicans to overcome the opposition of Democrats and on October 26, eight days before the elections, and when early voting had already started, the confirmation vote saw a 52-48 majority, along with party lines except for a Republican senator who voted with Democrats.

Because of the choice to ignore the 2016 precedent, President Trump, with the crucial help of Republican majority in the Senate, was able to change the composition of the Supreme Court so as to ensure a strong conservative majority (6-3). A majority that could last for quite a long time. Indeed, this seems to be the purpose that inspired President Trump while appointing relatively young Justices (Gorsuch was born in 1967, Kavanaugh in 1965 and Barrett in 1972). The three other conservative justices being born in 1955 (Chief Justice Roberts), 1950 (Justice Alito) and 1948 (Justice Thomas), it is fair to state that at least the next decade will be characterized by a right-wing majority in the Supreme Court.

Fate had a major role in this, since all depended on the outcome of 2016 elections: if Hillary Clinton had won, the Supreme Court would have likely had a liberal majority. On the contrary, by winning the 2016 elections, President Trump, in only four years, had the opportunity to appoint the same number of justices that President Reagan did in eight years, while Presidents Obama, G.W. Bush and Clinton (in eight years) and President G.H.W. Bush (in four years) appointed two justices. Since 1961, only President Nixon, with four appointments (in six years) had a greater impact on the Supreme Court's composition.

5.3 *The Federal Judiciary Reshaped*

With regard of the appointments to the Federal Judiciary, as it is obvious the choice of new Justices of the Supreme Court particularly captures the attention of observers. Nevertheless, the impact on case law of appointments to circuit courts is far from negligible, especially taking into account the firm case selection policy carried out by the Supreme Court. In

³⁹ See Benjamin Pomerance, *The King in His Court: Chief Justice John Roberts at The Center*, *Albany Law Review*, Vol. 83, 2019/2020, p. 169 ff.

this regard, President Trump appointed 53 circuit judges in in the space of a term. After the 56 appointments made by President Carter in his 4-year mandate, President Trump's rate is the highest, since President Reagan appointed 101 circuit judges in eight years (50.5 per term), G.H.W. Bush's four-year presidency was characterized by 44 appointments and the following 8-year presidencies had a lower rate: President Clinton appointed 73 circuit judges (36.5 per term), President G.W. Bush 72 (36 per term) and President Obama only 58 (29 per term). As far as President Trump is concerned, four years were then sufficient to appoint nearly one-third (29.61%) of the total number of circuit judges (179).

The special attention that the Trump Administration paid to filling circuit courts was certainly due to the impact that these courts can have on case law, such that an enduring legacy could be ensured, in particular by appointing relatively young judges, who were likely to serve for a long time.⁴⁰

In the first half of his term President Trump seemed to focus on appellate judges: as a matter of fact, only 53 appointments of district judges were made in two years.⁴¹ In the second half of his mandate, however, President Trump's score was considerably increased, so that the overall number of appointments was, at November 3, 2020, 162. At the end of his mandate, the resulting annual rate of President Trump (40.5) was significantly higher than his predecessors: President Obama appointed 270 district judges (33.7 per year), President G.W. Bush 264 (33 per year), President Clinton 307 (38.4 per year), President G.H.W. Bush 150, in four years (37.5 per year), and President Reagan 292 (36.5 per year). To find a higher rate, one must go back to President Carter's years, with 206 appointments (51.5 per year).

The deep impact on the Federal Judiciary that President Trump's appointments had gave rise to analyses of the type of appointees selected. In this respect, observers expressed criticism, especially with regard to diversity.

The most prominent feature of President Obama's appointment policy was, most likely, his commitment to diversity,⁴² a commitment that

⁴⁰ See Carrie Johnson and Renee Klahr, *Trump Is Reshaping The Judiciary. A Breakdown By Race, Gender And Qualification*, *National Public Radio*, November 15, 2018, www.npr.org/2018/11/15/667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification.

⁴¹ The low rate of appointments of district judges was one of the main reasons of the intensification of "vacancy crisis" in the Federal Judiciary during the first times of President Trump's mandate: see Carl Tobias, *Curing The Federal Court Vacancy Crisis*, *Wake Forest Law Review*, Vol. 53, 2018, p. 883. With regard to the different pace in appointing appellate judges and district judges, see also Carl Tobias, *Filling the Federal District Court Vacancies*, *New York University Journal of Legislation and Public Policy*, Vol. 22, 2019/2020, p. 421.

⁴² The attention paid to diversity and its implementation was defined as a key aspect of President Obama's administrative action aimed at strengthening civil rights (in this regard, on the White House's website, the presentation of the "Empowerment Through

produced significant changes in general attitudes toward minorities compared to his predecessors' practices. In fact, surveys agreed on defining Obama's administration as the most diverse in American history.⁴³ On the contrary, President Trump's policy was characterized by a non-negligible reduction of diversity.⁴⁴ A research based on the appointments made before July 7, 2020,⁴⁵ shows that 165 out of 194 judges appointed were white: the rate of 85% was higher than that of the Presidents recently expressed by the Democrats (President Obama's was 64%, President Clinton's 72% and President Carter's 79%), but it was also higher than that of President G.W. Bush (82%). Only President G.H. Bush (91%) and President Reagan (93%) were keener than President Trump in appointing white judges. Among non-white, President Trump favored Asian-Americans (12 out of 29), while Black and Hispanic (8 appointments each) saw a comparative reduction, if one takes into account President Obama's appointments (Blacks were 27, Hispanic 12 and Asian-Americans 9).

In terms of gender, 25% of appointees by President Trump were women, a rate that was considerably lower than that of President Obama (45%); it was also lower than that of President Clinton (30%), but was higher than the rates of other recent predecessors: President G.W. Bush scored 21%, President G.H. Bush 15%, President Reagan 10% and President Carter 16%.

6. Conclusion

President Trump's term had a profound impact on the appointment power of the President of the United States. In the last four years, in fact, the number of appointments was extremely high: it is no coincidence if yet in the title of this paper, reference was made to a policy of "activism" that characterized Trump's Presidency.

However, it is not just the number of appointments that must be taken into consideration. Reasons that led to such a massive exercise of this presidential power are even more important, in fact. And there are many

Diversity" initiative, was extremely revealing; the presentation, once at page www.whitehouse.gov/issues/civil-rights/empowerment, last accessed November 2016, is no longer available).

⁴³ See Anne Joseph O'Connell, *Obama Ups Diversity in Appointees*, *UC Berkeley Law / The Washington Post*, September 20, 2015, www.washingtonpost.com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679_graphic.html (last accessed: February 14, 2019).

⁴⁴ On this subject, see Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity In Federal Judicial Selection: The Prospects for Judicial Diversity In The Trump Years*, *Wisconsin Law Review*, 2017, p. 345; Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, *Wake Forest Law Review*, Vol. 54, 2019, p. 531.

⁴⁵ See John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, *Pew Research Center*, July 15, 2020, www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

reasons that must be considered.

With regard to the Executive power, the large body of appointments was the result of a centralization in the hands of the leader of powers and responsibilities: the officials who were appointed (and often revoked or led to resign) were in many cases conceived as the mere executors of a highly personalized policy. In this regard, one could evoke both the high turnover rate and the rather high number of offices for which no appointments were made.

On the contrary, as far as the Judiciary is concerned, the very high number of appointments was the result, on the one hand, of the blocking of appointments proposed by President Obama and, on the other, of the commitment to confirm, sometimes very quickly, the nominations made by President Trump (the appointment of Justice Barrett is particularly indicative in this regard). The combination of these factors produced the conditions that allowed President Trump to shape the Judiciary presumably for a rather long period.

The question that arises and remains to be answered is whether the close link between the President and the majority in the Senate does not risk to reduce the importance to the “advice and consent” procedure. This issue will probably be addressed in a more informed way once that the trend of appointments over the next two years will be analyzed, when the White House and the majority of the Senate will be again the expression of different parties.