The Independence of the Judiciary in the Trump era

di Maria Elisabetta de Franciscis

Abstract. L'indipendenza della magistratura nell'era di Trump. – The assumption of this paper is that the effects of a given presidency on the solidity of democracy can be evaluated by analyzing the relationship between the Chief Executive and the Federal Courts. Thus the research aimed at evaluating the relationship between Trump and the judiciary under the dual perspective of Trump as the Executive in Chief and of Trump as the addressee of judicial investigations and/or actor in litigations. The results show that on the latter track, the judiciary proved to be still rather independent while the high rate of life appointments to the judiciary has shaped an ultra conservative body that will haunt many generations to come.

Keywords: Judiciary; Independence; Appointments to; conflicts; Litigations.

1. The Executive and the Judiciary are they still balanced powers?

By the end of this year 2020 scholars of American politics and government will have a compass for their studies and, the world at large will know if the Trump "era" consisted of a one term presidency or of a longer span of time. That is to say that it will become apparent if Trumpism is "just" an accident or rather only the point of an iceberg. Scholars will be in a much safer environment to analyze the effects of Trumpism on the American-style democratic government; perhaps speculate about the means to overcome it and guide society to safer harbors. The compass will certainly prove to be essential in order to navigate in a culture still strongly embedded in common law notwithstanding the century old familiarity with statutory law.

The Constitutional Convention of Philadelphia created a system of "separated institutions sharing power"[1] to the extent, to name a few, that the Legislative production was subjected to the executive's veto, to the interpretation by the Courts, and even-at times- to a veto from the Courts, and the enforcement by the executive departments; the President appointment power and treaty making power was to be shared with the Senate; the House of Representatives was to declare wars led by the Commander in Chief. Due to the flexibility of the Constitution, many tacit amendments to practices and customs have occurred throughout the more than two hundred years of being in force, and yet the original scheme is still

[1] R. Neustadt, *Presidential Power*, New York, 1960, 33.

standing. No one branch of government can be fully independent of the others; no study of one institution can be complete were it to ignore its relationship with the others and no evaluation of democratic standards can be undertaken without considering the relationship amongst all three of them. A generally accepted method to measure democratic stability in the United States of America is to check the nature of the relationship between the President and the Congress.[2] Whether the latter has been conflictual or cooperative indicates in fact whether the balance of powers, and thus the check and balances, is in good standing.[3] In the short term of a presidential mandate then, the status of this balance allows scholars to claim no prevarication of one political branch over the other. In the long-term, however, one can best evaluate the effects of a given presidency on the solidity of democracy by analyzing the relationship between the Chief Executive and the Federal Courts.[4] Over time this practice has proven to be very effective in dismantling the standard assumptions that judicial offices are apolitical; that judges have no discretion; that they are only *la bouche de la loi*; that judges simply apply or interpret but do not make the law. Each of these assumptions had been behind the exclusion of courts and judges from most discussions of democratic accountability and proficiency, however, where judicial review is exercised such denials have proven to be misleading. Indeed, if judges may veto laws passed by the legislature, then there is clearly a judicial power.[5]

Courts in common law environments do not and cannot isolate themselves from the political process so much so that in fact much of the law is essentially judge-made.[6] Their active role occurs notwithstanding the introduction of constitutional measures to limit such interferences and to ensure their independence. The founders of the United States of America planned for an independent judiciary that was subject to the executive for its appointments and to the legislative for its confirmation. They planned for a constitutional framework that could prevent tyranny, yet their fear of legislative tyranny outweighed the apprehensions of judicial despotism.[7]

The foundation of the relationship between the Executive and the federal Judiciary stands on two very crucial pillars of the structure of

[2] This is an accepted principle by both the classical and most recent literature on the point. For all see, Franco Giuseppe Ferrari, *President Trump and the Congress* in G.F. Ferrari (ed.) *The American Presidency under Trump: the first two years*, The Hague, 2020.
[3] L. Fisher *Constitutional Conflict between Congress and the President*, Princeton,1985; C. Rossiter, *The American Presidency*, New York, 1956; G.C. Edwards III, *All the Margins: Presidential Leadership of Congress*, New Haven, 1990.
[4] All the federal courts established according to article III of the United States Constitution (known as constitutional courts) and those courts created according to the joint reading of article III and article I, sections 8 and 9 (known as legislative courts).
[5] M.L. Volcansek M.E. de Franciscis J.L. Lafon, *Judicial Misconduct: A Cross-National Comparison*: Miami, 1996, 4-6.
[6] M. Shapiro, *Courts: A Comparative and Political Analysis*: Chicago, 1981, 28.
[7] R. Berger, *Congress v. the Supreme Court*: Cambridge (MA), 1969, 184.

government: a) the justices hold tenure for life *quamdiu se bene gesserint*[8] while their salaries cannot be diminished and b) the final appointment of a federal judge is a presidential prerogative albeit the process is a shared one with the Senate.[9] The shared power is to take place for appointments to the cabinet and to the Judiciary. It is customary, however, for the Senate to accept with only a formal procedure the presidential appointees to the administrative offices based on the assumption that the President should indeed be able to choose the people he wants to work with. This courtesy does not apply necessarily when the appointments are to the federal bench and especially to the Supreme Court, as many presidents discovered just in the last fifty year. For instance, the Senate has refused to schedule the hearings (President B. Obama and the nomination of Garland in 2016); or to give favorable consensus (President Nixon's appointees Clement Haynesworth in 1969 was rejected by a vote of 45-55 and G. Harrold Carswell in 1970 was rejected by a vote of 45-51 or President R. Reagan's nomination in 1987 of Robert Bork was rejected by a 42-58 vote); or it has forced them to withdraw because of unfriendly hearings in the Judiciary Committee (President R. Reagan's nomination in 1987 of Douglas H. Ginsburg) or forced them to withdraw because of unfriendly political judgements before the hearings (President G.W. Bush's nomination in 2005 of Harriet Miers). [10]

It is no secret, moreover, that presidents make a concerted attempt to name individuals to the federal bench who they believe share their ideologies and this, in turn, was to guarantee a long-term equilibrium between conservative and liberal justices at all levels of the federal Judiciary.

There is no denying that a tie does in fact exist between the appointing President and the appointed judge and nowhere has this revealed itself the most as in *Bush v Gore* where the majority of the justices clearly sided on party lines.[11] The involvement of the Supreme Court in the 2000 presidential

[8] The federal judges in fact will cease their functions only upon death, resignations or impeachment. The only Supreme Court Justice to ever be impeached was Chase, in 1804. He was found not guilty by the Senate the following year, thus remaining in office until his death in 1811. Another attempt to impeach a sitting justice, yet not reaching a House vote, was Justice Douglas who was twice the subject of hearings, first in 1953 and again in 1970. No mechanism presently exists for removing a justice who is permanently incapacitated by illness or injury, both unable to resign and unable to resume service.

[9] Article II, Section 2 reads "The President shall nominate, and by and with the advice and consent of the Senate, shall appoint…".. M. E. de Franciscis, *Il potere di designazione: evoluzione della costituzione statunitense*: Napoli, 2009.

[10] Bork is the most recent nominee to have been officially rejected by the Senate.

[11] The Supreme Court decided the presidential election by a 5 to 4 decision. The majority was made of associate Justices Kennedy, O'Connor and Scalia (appointed by R. Reagan), Thomas (appointed by G.H.W. Bush), Chief Justice Rehnquist who had been appointed associate Justice by R. Nixon and Chief Justice by R. Reagan. The dissenting Justices were the associates Breyer and Ginsburg (appointed by W. Clinton), Stevens (appointed by Ford) and Souter (appointed by G.H.W. Bush). The majority was then made by "republican" justices while the dissenters were evenly divided. For more on the subject see M. L. Volcansek, *citt*, pp 3-15.

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election marked the lowest point in the Court history as that lone decision crushed its long standing reputation of being above political engagement as a result of its strict adherence to judicial self-restraint.[12] Since then in fact, courts, at both state and federal level, have witnessed an increase in electoral litigations through which the political parties search for advantages. In fact, a recent study shows that prior to 2000 an average of 96 election law cases were brought every year in state and federal courts.[13] By 2004, that average had raised to 254, and this year (as of October 15) already 365 cases have been filed in 44 states.[14] The expectation that the Supreme Court will be involved again in determining this year's presidential election; the rushed nomination of Judge Amy Coney Barrett to fill the vacancy created by the death of Justice Ruth Bader Ginsburg on 18 September 2020; the urgency affirmed by Trump to have a full court as of 3 November of this year, will undoubtedly place pressure on the Supreme Court. If indeed the Court should intervene by electing the President for the next 4 years, then its reputation and the confidence in its neutrality will be even more at risk and will most certainly deepen the divide in an already divided and polarized nation.[15]

In order to fully appreciate the relationship between a President, any given President, and the Judiciary, it is further useful to analyze the situation of judicial vacancies inherited by each of them on inauguration day.[16] In fact, this measurement was considered a key element to evaluate the strength or the weakness of an administration. The Congress elected in 2015, strongly changed that reality, in part because it was the last biennium of the outgoing President (a "double" lame duck) and in part because it was a highly polarized assembly. The 114th Senate contributed to the contentiousness and polarization of the once semi-peaceful and semi-ministerial function of confirming judges causing the process to a halt whenever there is a split government between the Senate and the White House.[17] Because of this

[12] The theory of Judicial restraint was clearly affirmed in 1946 in *Colegrove et al. v Green et all.* by Associate Justice Felix Frankfurter, but it had already started being eroded as of the 1960s when Courts began accepting cases on redistricting and gerrymandering.

[13] A. Sarat, *Judges used to stay out of election disputes, but this year lawsuits could well decide the presidency* in *The Conversation*, 16 October 2020, www.theconversation.com.

[14] For more data, see the Stanford-MIT Healthy Elections Project in httbs://healthyelections-case-tracker.stanford.edu/

[15] M.J. Nelson and A.U. McGuire, *Opportunity and Overrides: The Effect of Institutional Public Support on Congressional Overrides of Supreme Court Decisions*, in *Political Research Quarterly*, Volume 70, issue 3, pages 632-643. Re-published on the PRQ online, 24 May 2017. A synthesis made by the same authors may be found at: blogs.lse.ac.uk/usappblog/2018/07/24/confidence-in-the-us-supreme-court-is-declining-and-that-puts-its-decisions-at-risk-from-congress/ .

[16] This was indeed the accepted deadline for presidential appointments from *Marbury vs Madison* (1803) onwards until the lame duck final biennium (2015-2017) of President Barack Obama.

[17] R. Wheeler, *Senate obstructionism handed a raft of judicial vacancies to Trump-what has he done with them?* in *Brookings Institute*, 4 June 2018.

politicized break from customs, President Obama was only allowed to make 2 appointments to the Courts of Appeal and 18 to District Courts in his final biennium. The latest confirmation was submitted in November of his 6th year and approved in January of the 8th year. No surprise then, that President Trump inherited so many vacancies: 1 Supreme Court, 17 Court of Appeals and 88 District Courts and no surprise he results as one of the most active Chief Executives of the last forty years.

Yet the Trump's administration is a unique case in American history and, in order to be able to evaluate the depth and width of its influence on the federal Judiciary and vice versa the impact of the Judiciary on his Presidency, one needs to further look at an additional element: the "private" recourse to the Judiciary. That is to say that a characteristic of the Trump Administration has been an unprecedented recourse to the Judiciary in order to defeat personal political enemies, impair potential adversaries, clear all pending accusations from the past and defend his very broad interpretation of executive powers and privileges.[18] In many cases the Judiciary obliged itself to serve the administration[19] yet there have been also judges who refused to bend to the President capricious requests.[20]

To fully appreciate the relevance of the relationship between President Trump and the federal courts, to measure the latter's independence from Trump and to comprehend the effects that their relationship will have on the next few generations, it is crucial to review, albeit very briefly, the scope and the functions of the Federal Judiciary.

2. The Federal Judiciary

The Federal Judiciary operates separately from the Executive and Legislative branches, but often works with them as the Constitution requires. Federal laws are passed by Congress and signed by the President. The judicial branch decides the constitutionality of federal laws and resolves

[18] K. Lucius, *Will the Federal Judiciary remain a check and balance after Trump?* in *Harvard Law Review blog*, Feb 16, 2018.

[19] On multiple occasions the Courts have ruled in favor of "executive privilege" impeding further investigations on Trump's deeds. Most recently, on 31 August 2020 the Appeals Court for the D.C. Circuit dismissed a House lawsuit seeking to force White House Counsel Donald McGahn to comply with a Congressional subpoena. The court ruled that McGahn did not have to respond to Congress about whether Trump tried to block the special counsel's Russia investigation. R.S. Mueller III's report says that Trump "pushed" McGahn to try to oust Mueller.

[20] By April 2019, there were over 70 lower courts decisions against Trump or against the political agenda of his administration. One of the most recent cases, is the decision of the 2nd US Circuit Court of Appeals on 6 October 2020, that dealt the President another setback in his effort to shield his tax returns from investigators. "We have considered all of the President's remaining contentions on appeal and have found in them no basis for reversal". Furthermore, the Supreme Court has been involved in July 2020 handing out two opinions *Trump v Vance* and *Trump et AL. v. Mazars USA, LLP, et AL.* trying to bring back the terms of conflict between Congress and the President to its political framework. For more, see *infra*, paragraph 1.5.1, pages 10-12.

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other disputes about federal laws. However, judges depend on the government's executive branch to enforce court decisions. Its origin is founded in the constitution whereas article III Section 1, affirms that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish…". And indeed, it was the First Congress in 1789 that established the Circuit and the District Courts through the Judiciary Act through which the country was divided into 13 Judicial districts in turn organized into 3 circuits: Eastern, Middle and Southern. At first each Circuit Court was presided by a Supreme Court Justice, but it eventually became clear that a restructuring was necessary and in 1891 Congress established the Courts of Appeal to reduce and to filter the cases that would reach the Supreme Court. Today there are 13 appellate courts that sit below the Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a Court of Appeals.[21]

The jurisdiction of these courts is clearly enumerated in the constitution [22]and it spans from controversies between member States to conflicts between the branches of government, from equity to the defense, and at times to the endorsement of the civil liberties enshrined in the Bill of Right. In essence, the jurisdiction of the federal courts embraces *ratione materiae* all the subjects the States delegated to the federal government in the Constitution. The appellate court's task is to determine whether or not the law was applied correctly in the trial court. Appeals courts consist of three judges and do not use a jury. A court of appeals hears challenges to district court decisions from courts located within its circuit, as well as appeals from decisions of federal administrative agencies. Last but not least relevant, the Courts of Appeal "screen" the cases that arrive to their benches. They decide on those cases that would take too much time away from the Supreme Court and send forward those upon which it would be appropriate timing for the Supreme Court to pronounce itself. At a trial in a U.S. District Court, witnesses give testimony and a judge or jury decides who is guilty or not guilty — or who is liable or not liable. The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decisions in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly.

The Federal Judiciary also consist of other courts known as Article I courts or legislative courts.[23] Amongst these the Military Courts, the Court

[21] The regions for appeal courts are 12 but the courts are 13 one for each of the original States. One appellate court today deals with matters concerning D.C. and the territories.
[22] Article III, Section 2.
[23] Article I, Section 8 "The Congress shall have power to… constitute tribunals inferior to the Supreme Court."

of Claims, the Custom Courts.[24] Albeit they are correctly considered as part of the Federal Judiciary, these courts are not filled by presidential appointments, they are highly specialized courts with limited jurisdictions *ratione materiae.*

3. Trump activism and the appointment of judges

The appointment of the federal judges is an intentionally complex procedure that falls within the shared powers between the President and the Senate.[25] Likewise, their mandate is for life and the criteria to safeguard their independence are established in the same constitutional article that creates them.[26] The overwhelming and undiscussed intention of the Founding Fathers was to preserve the independence of the Federal Judiciary by affirming the principle of *nec spe, nec metu* thus freeing the judges from political threats or promises.[27]

Overall this constitutional arrangement has proven to be a strong bulwark for the independence of the Judiciary throughout two centuries, a civil war, political unrests, strong lobbies and partisan influences. The independence of the judicial branch, moreover, has grown to be the stabilizing factor between the other highly political branches. This was true until the 2000 presidential election was decided by the Supreme Court in *Bush v Gore.* [28] Abandoning their self-restraint policy, the Justices revealed through their concurring and dissenting opinions a highly divided and politicized Court and not just to scholars of the Judiciary and a few others, but indeed to the whole country and further, to the whole world. Most significantly this was the perception of millions of Americans who "traced" the political background of each of them to their appointing President and saw a "dependent and grateful" Court rather than an "independent" one. [29] With hindsight, twenty years later,

[24] To be sure, The Court of Claims and the Court of Customs and Patent Appeals were created by Congress according to Article I but by a subsequent Act of Congress were respectively declared constitutional in 1953 and in 1958.
[25] The Founding Fathers intention was to assure an independent judiciary resulting from a bipartisan political agreement, thus the requirement of a high consensus by the Senate. It was only in 2013, that the Democrats — who controlled the Senate at the time — invoked the "nuclear option" for judicial nominees, changing the rules so that federal judicial nominees would be only requiring confirmation by a simple majority of Senators, instead of the previous 60-vote super majority. The declared intention was to facilitate the reaching of consensus on appointments, blocking obstructionism and filibustering from the other party. Yet the new quorum allowed Republicans under the leadership of McConnell, to block or delay most of Obama's nominees.
[26] In the same Article I, Section 8 we read:" The judges, both of the supreme and inferior courts, shall hold their offices during good behavior…".
[27] Article III, Section 1: the judges "shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office".
[28] *Bush v Gore* 531 US 98 (2000).
[29] R. Toniatti, *President Trump's Political Agenda via à vis the Supreme Court* in G. F. Ferrari (ed.), *The American Presidency under Trump: the first two years,* The Hague, 2020, 65-67.

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it can be affirmed that the decision of 2000 marked the beginning of a process of delegitimization of the Court which Chief Justice Roberts has tried to slow down by joining the liberal members of the Court in many instances and by exercising a very careful selection of the cases to be deliberated. It can be moreover argued, that the main juridical aspect of the 2000 decision was that the majority entangled the Court in matters of exclusive competence of the member States while the minority held the Court should have not become involved and should have left the electoral matter to the State of Florida.

Taking into consideration the size of the United States and of its population, the Federal Judiciary represents a very small cluster. There are 1770 judgeships in 209 "inferior courts" structured in 94 district level trial courts and 13 regional appeal courts. Approximately half of these judges (885) are appointed by the President of the United States for a life term[30] while the remaining judges are selected by peers sitting on Circuit or District Courts for terms of defined lengths.

These judgeships are usually and sadly filled in the silence of the media or ignored by the greater part of the people albeit these are the courts that most citizens will ever encounter when trying to redress wrongdoings or fight against the limitations of their civil rights and liberties. Only very few cases, in fact, will find a way to the Supreme Court compared to the overwhelming majority that will find their final stay at the level of regional Appeal Courts.[31] A further rationale for following these appointments more closely, is based on the fact that frequently judges on Appeal Courts become the natural basin from which to choose the candidates for a judgeship at the Supreme Court. In fact, 8 out of the 9 Supreme Court justices serving in July 2020, previously served as Appeals Court justices.[32]

In order to advance their political agenda, republican presidents have been particularly attentive to the federal courts and filling the vacancies with conservative judges. Of all recent presidents, Trump is the one who most had the opportunity to "pack the judiciary" due to inherited vacancies, many retirements and a Senate republican majority for the last six year. It is not a fortuitous chance but rather a calculated plan, that throughout the four years of the Trump administration the chair of the Judiciary Committee has worked so closely to the Senate majority leader to almost be one.[33] This

[30] See *infra*, paragraph 1.1 footnote 3.
[31] The Supreme Court of the United States hears about 100 to 150 appeals of the more than 7,000 cases it is asked to review every year. That means the decisions made by the 12 Circuit Courts of Appeals across the country and the Federal Circuit Court are the last word in thousands of cases.
[32] Elena Kagan, is the only Supreme Court Associate Justice who did not serve as an Appeal judge before being installed.
[33] In June 2019 Senate Majority Leader Mitch McConnell receiving the Distinguished Leader Award at Susan B. Anthony List Annual, said that his goal was to leave no Circuit Court vacancies by the end of the 116th Congress. "You know, not many cases make it all the way to the Supreme Court. To put that in context, that's about one in five of the Courts of Appeal judges nationwide have now been appointed by this

predicament indeed facilitated a hurried review at Committee level and guaranteed a successful and prompt vote by the Chamber to the extent that in mid-September of this year, Senator L.O. Graham (the Chair of the Judiciary Committee) pushed through the Committee and then to the vote of the Senate, 6 judges in 30 hours. Thus, as of September 2020, Trump had appointed 216 federal judges and approximately 30 more could be installed before the election. Furthermore, according to the Federal Judiciary Records as many as 64 positions could become vacant by the end of the term. In the event Trump and McConnel were to lose the election more appointments could be confirmed even during the "lame duck session" of the Congress.[34]

Comparing Trump's judicial activism with the appointment records of his immediate predecessors and setting a fictitious deadline of July 7 of each fourth presidential year, Trump results as the most active President going back to Jimmy Carter. A study conducted by the Pew Research Center based on official data released by the Federal Judicial Center, shows that as of July Trump had appointed 194 federal judges, that is to say 24% of the total while his predecessors scored much lower. In eight years Barack Obama appointed 312 judges (39% of the total); George W. Bush 166 judges (21% of the total); Bill Clinton appointed 87 judges (11% of the total); George H.W. Bush 14 judges (2% of the total); Ronald Reagan 18 (2% of the total); and Jimmy Carter 1 judge (0% of the total).

Were we to split each total between Supreme Court, Appeals Court and District Court judges, it becomes even more dramatically clear that Trump has systematically packed the Appeals Courts. In fact, albeit Trump and G.W. Bush have similar total numbers of appointments, Trump stands out for his unusual large number of 53 versus Bush's 35. An opposite picture of the comparison, but yet a strong showing for Trump, will results for the rate of appointments recorded for each president, were we to look at the installed District Courts judges. In fact, Trump appointed 143 such judges while Obama 121; G.W. Bush 162; Clinton 152; G.H.W. Bush 126; Reagan 117 and Carter 190. [35]

In dealing with appointments and federal courts it is most relevant to consider also the appointment of Supreme Court justices since this is the top

president and confirmed by this Senate in two and a half years. And I want you to know that my view is, there will be no vacancies left behind. None".

[34] A "lame duck" session of Congress is one that takes place after the election for the next Congress has been held, but before the current Congress has reached the end of its constitutional term. Under contemporary conditions, any meeting of Congress that occurs between a congressional election in November and the following January 3 is a lame duck session. The significant characteristic of a lame duck session is that its participants are the sitting Members of the existing Congress, not those who will be entitled to sit in the new Congress.

[35] J. Gramlich, *How Trump compares with other recent presidents in appointing federal judges* in *Factank News* in the Numbers: 15 July 2020, Pew Research Center. Also available at: www.researc.org/fact-tank/2020/07/15how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ .

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tier court, the tip of the iceberg, the final redress and perhaps the one court for which the nomination process receives high visibility because of its extreme partisan nature. As it is for the lower courts also at the Supreme Court level vacancies can occur at any time, since these are likewise life appointments, yet Supreme Justices are not new at retiring at opportune times to favor one President or the other, one party or the other, one ideology or the other.[36] This in time has favored the blending of the liberal and the conservative jurisprudence, has shaped the Court as a balanced body and has further increased its reputation as a non-partisan institution. On average Justices serve for 16 years, yet there are several, especially in the early years who sat for longer times.[37]On average the appointment of a new Justice takes place every two years, yet there have been 4 Presidents who have not had the opportunity to appoint a Supreme Court Justice either because their term was too short (two) or because no vacancy occurred during their term of office (one).[38] A fourth President, Andrew Johnson (1865-1869), was impeded to fill a vacancy to the Supreme Court because Congress reduced the size of it from 10 to its present 9 as the final act of an arm wrestling relationship between the two institutions that had also seen two unsuccessful impeachment procedures against him.

President Trump has been given the infrequent opportunity to fill three vacancies at the Supreme Court. Among his predecessors only G. Washington and F.D. Roosevelt had the opportunity of shaping the highest Court like Trump. No surprise of course for George Washington since he was the first President (1789-1797), and it was upon him to select, nominate and then appoint all of the Court that at the time was set to be composed of 6 members.[39] As it is well known, Franklin Delano Roosevelt (1933-1945) had a conflicting relation with the Supreme Court especially during his second mandate. His

[36] Just in recent times, Justice Anthony Kennedy who had replaced retiring Justice Lewis F. Powell Jr (June 1987) was appointed by Ronald Reagan on 11 November 1987, announced his retirement on 31 July 2018. He was replaced by Brett Kavanaugh nominated by Donald Trump. John Paul Stevens was nominated by Gerald Ford in 1975 and served until retirement in 2010. He was replaced on 10 May 2010 by Elena Kagan nominated by Barack Obama.

[37] Just to name a few: John Marshall's tenure interrupted by death was of 34 years and 5 months while most of the Justices on his Court served for more than 20 years. Clarence Thomas, presently Associate Justice, has already been on the Supreme Court for 28 years. Conversely, there have been Justices who sat on the Supreme Court for an extremely short period of time, such as John Rutledge who was Associate Justice for 1 year and 18 days (1790-91) or James F. Byrnes who was on the Court for 1 year 2 months and 25 days (1941-42).

[38] There was not enough time to appoint a Justice for both W.H. Harrison, who died only 31 days after the inauguration, and for Z. Taylor who was President for only 1 year from 1849 to 1850; and there were no vacancies for J. Carter (1977-1981).

[39] The Constitution does not establish the size of the Supreme Court thus delegating this detail to Congress. And in fact, the first Congress, through the Judiciary Act of 1789, decided the total to be 6 including the Chief Justice. The size of the Supreme Court changed oscillating between 5 and 10 until 1869 when Congress approved the present size of 9 Justices.

frustration with the Justices constantly blocking his New Deal legislation was behind his threat of "packing the Court" by appointing a new Justice for every sitting Justice over 70 of age. Albeit the intimidation never became reality, he still was able to appoint 9 Justices between 1933 and 1945 while G. Washington in the end appointed a total of 10 Justices, 4 of which because of resignations occurred during his second term.

4. Trump and three Supreme Court appointments

By the end of his first term, President Trump will have appointed 3 justices to the Supreme Court. The first and the third appointing procedures, those of Neil Gorsuch[40] and Amy Coney Barret[41] have raised doubts and have been contested because of issues related to the role of the Senate during the second stage of the appointing procedure, and to the timing of the nomination itself. In fact, upon the sudden death (while hunting in Texas) of Justice Scalia, President Barack Obama proceeded to nominate Merrick B. Garland[42] on 16 March 2016, yet the republican controlled Senate never moved forward his nomination to the Judiciary Committee claiming that the appointment power of the President *ex* article III Section 1, had an implied limit for filling vacancies at the Supreme Court when they happened on the eve of a presidential election. Notwithstanding the pressure by the Senate democratic minority, and a strong tradition of midnight appointments that would have allowed more than sufficient time, Garland's nomination remained on the dock until the last day of the Congress and was send back to the White House as "unfinished business" according to the traditional institutional courtesy procedures. In April 2017, only three months into the Trump administration, Neil Gorsuch replaced Scalia on the Supreme Court.

Loaded with political partisanship and highly criticized was also the nomination of Amy C. Barrett to fill the vacancy left by Justice Ruth Bader Ginsburg. The latter, in fact, died on 18 September and only a week later the former was nominated by Trump. The hearings were expected to move fast through the Judiciary Committee as to reach a Senate vote by end of October, in order to have a newly sworn-in conservative Justice by the eve of the election. Trump wishes, backed by Senators McConnel and Graham, became reality and Amy C. Barrett was sworn to the Supreme Court on 26 October 2020, eight days prior to the actual election day.

These two appointments and the diverse interpretations of the appointment powers during an election year raise more than one consideration on the evolving partisanship of the judicial appointments.

[40] Gorsuch was nominated in April 2017 to replace Antonin Gregory Scalia (appointed by Ronald Reagan in 1986) who had died on 2 February 2016.
[41] Barrett was nominated on 26 September 2020 to replace Ruth Bader Ginsburg (appointed by William Clinton on 10 August 1993) who has died on 18 September 2020.
[42] At the time of his nomination, Garland was Chief judge of the US Court of Appeals for the D.C. Circuit.

What happened in the eighth year of the Obama presidency had never and should have never occurred.[43]

Regardless of what it means to provide advice and consent, senatorial refusal to take into consideration Garland's nomination with the express purpose of transferring his appointment powers to the successor implicated a deeper problem of separation of powers.

To be sure, the President has the constitutional powers to nominate and appoint and thus it is unquestionable that President Obama was indeed divested from exercising his constitutional duties. Likewise, it is unquestionable that "advice and consent" bestows on the Senate the indisputable power to confirm, reject, or resist particular Supreme Court nominees. Yet in the Garland's case the Senate chose none of the three, preferring, instead, to ignore the White House submission. Thus, in addition to the divestment of the Presidential power to nominate and appoint, there was also the refusal of the Senate to act on the nomination, and the latter failure to act raises doubts on whether the Senate performed its constitutional duties of advising and consenting to the appointment. It is certain that the inaction of the Senate poses serious constitutional issues under the more generic subject of the separation of powers and we should be aware that attempts by one branch to divest a President of a constitutional power should always be viewed with suspicion.[44]

As the Supreme Court had already explained, "[t]he roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political."[45] In addition, while separation of powers problems typically involve "the danger of one branch's aggrandizing its power at the expense of another,"[46] a second risk exists with respect to appointments: "the Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."[47]

Notwithstanding the minority democratic party's cries, the tons of ink that poured in books, the loud complaints on social media, it must be said

[43] There have been 103 prior cases in which- as in the case of Obama's nomination of Garland- an elected President nominated someone to fill an actual Supreme Court vacancy and began the nomination process prior to the election of a successor. In all 103 cases, which go back to the earliest days of the Republic, the sitting President was able to both nominate and appoint a replacement Justice- by and with the consent of the Senate- and regardless of the senatorial rules and procedure in place. Thus, in none of the 103 cases that most closely resemble the "Obama/Garland" controversy has a sitting President been unable to fill an existing Supreme Court vacancy with some nominee.
For more on this subject see: R.B: Kar & J. Mazzone, *The Garland Affair: What history and the Constitution really say about President Obama's power to appoint a replacement for Justice Scalia* in *New York University Law Review Online*, Volume 91, 72-82.
[44] Id. Page 58.
[45] *Freytag v. C.I.R.*, 501 U.S. 868,878 (1991).
[46] Id. (citing *Mistretta v. United States*, 488 U.S. 361, 382 (1989).
[47] Id.

that the Amy C. Barret appointment followed the traditional and constitutional procedures albeit with some aspects that could generate problems for the future relationship between the President and Congress and might lead to a new interpretation of the separation of powers. This confirmation process was led by the Senate republican majority; was approved by only the republican senators while the lack of all of the requirements demanded of the previous nominees was not deemed essential of Barret. From the constitutional viewpoint however, the Senate could be praised for having returned to accepting the nominations with no limits of time during an election year.[48]

Although not foreseeable at the time of writing, another scenario could develop during the lame-duck of Congress involving the appointment of a Justice to the Supreme Court. There have been a few instances in the past, of vacancies occurred after the election but before the newly elected Congress is installed on 3 January or the newly elected President is sworn in on 20 January. Should this hypothesis materialize both the out-going Executive and the out-going Legislative should exercise self-restraint and allow the newly installed officers to start the nomination process. Taking into consideration history there have been instances that would fit this type of scenario. On three occasions the Senate transferred the President's powers to his elected successor while in six other instances the Senate instead confirmed the choice of the outgoing President. [49]

One final necessary footnote to the discussion of the president's appointment power and the senatorial duty to "advise and consent" relates to the event of a vacancy on the Supreme Court while the President was originally elected as Vice President and assumed the Presidency upon death, resignation or impeachment of an elected President. The Twenty-fifth Amendment cleared the succession procedures and also affirmed that Presidents by succession have full authority with respect to appointments and the exercise of other executive powers.[50]

[48] As the Supreme Court clearly affirmed in *Marbury v. Madison* (1803) the founding fathers did not foresee a "vacancy" of executive power and the President has been attributed the midnight appointment power, contrary to the Italian provision of the "semestre bianco".

[49] All nine cases occurred between 1800 and 1893 as reported by R.B. Karr & J. Mazzone, *cit.* pages 68-72 who reach the conclusion that the cases "suggests at most the *permissibility*, as opposed to the *necessity*, of senatorial transfers of one President's Supreme Court appointment powers to a successor in the limited circumstances where a new President has already been elected.".

[50] President Lyndon Johnson certified the amendment on February 23, 1967. The first use of the 25th Amendment occurred in 1973 when President Richard Nixon nominated Congressman Gerald R. Ford of Michigan to fill the vacancy left by Vice President Spiro Agnew's resignation. In less than a year, the 25th Amendment would be used again. This time, Vice President Ford became President after Richard Nixon resigned, and he nominated Nelson Rockefeller to fill the Vice-Presidential vacancy left by him.

As discussed earlier, on 20 January of every fourth year the passage of the baton between administrations occurs within minutes. Yet the highly partisan show of power that recently took place in the Senate for the appointment of Amy C. Barret could be prelude to great danger in the next Congress. In fact, should at some time the democrats win the majority of both Houses, they might be tempted to act as the republicans did these last six years. Still, to pursue this trail of decisions taken only by the majority party will definitively modify the long-established path of by-partisan balance within the Congress and between institutions. if the "nuclear option" is to become a consistent custom.[51] Were the Democratic party, eventually in the position of majority party, fail to exercise self-restraint this will determine the future of Supreme Court Justices appointments. In fact, no future Supreme Court Justice will be appointable unless the President and the Senate are of the same political party. Such a result could only lead to a more—rather than less—politicized appointment process and, ultimately, to a more politicized Court.[52]

5. Trump and the Courts

According to James D. Zirin, a former federal prosecutor, "for Trump, the idea is to beat the system, even if he can't beat the cases," and to achieve that goal he does not refrain from getting involved in lawsuits since they "will achieve delay . . . the wheels of justice grind very slowly."[53]

Trump's personal legal strategy has thus seen him involved in 3,500 legal actions in federal and state courts during the three decades prior to 2016. The office of President offered a greater stage and during his first term President Trump has been involved in close to 3,500 contentious cases in federal courts on both personal and institutional matters. [54] Some personal cases intermingle with the institutional ones since his lawyers have tried to protect him from court appearances by claiming executive privileges; and some cases can be ascribed to abuse of government such as when the Department of Justice has become involved in lieu of the President and even in lieu of the First Lady.[55] And indeed, throughout his tenure as President,

[51] In 2013, when the democratic party made recourse to the "nuclear option" a number of Senators — including Sen. Lindsey O. Graham (R-S.C.) — expressed concern, worrying that the rule change would encourage parties to appeal to their most hardline faction and create an increasingly partisan judiciary.
[52] Id., 106.
[53] J.D. Zirin, *Plaintiff in Chief: A portrait of Donald Trump in 3,500 Lawsuits*: Toronto, 2019 .
[54] Of all these cases, a small amount (*circa* 70) compared to the total figure, are related to government policies and their execution.
[55] One of the many episodes of blatantly abusing the government personnel for private legal affairs is the recent case of the U.S. Department of Justice filing a lawsuit against Stephanie Winston Wolkoff, former White House advisor and friend of first lady Melania Trump following the release of her book, "*Melania and Me: The Rise and Fall of my Friendship with the First Lady*." The lawsuit argues that Winston Wolkoff signed

Trump has faced persistent criticism for comments and other actions that legal observers see as bending the Justice Department to his political will.

5.1. Abuse of government

Perhaps the most telling misuse of executive privileges have been the refusals to respond to four subpoenas by the House of Representatives. In April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. The House Committee on Financial Services issued a subpoena to Deutsche Bank seeking any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. It issued a second subpoena to Capital One for similar information. The Permanent Select Committee on Intelligence issued a subpoena to Deutsche Bank that mirrored the subpoena issued by the Financial Services Committee. And the House Committee on Oversight and Reform issued a subpoena to the President's personal accounting firm, Mazars USA, LLP, demanding information related to the President and several affiliated businesses.

The Department of Justice supported Trump as he attempted to block congressional investigations of his finances by suing the Committees investigating the President and suing the companies the Committees subpoenaed for records. The support lent by the Justice Department has seen its lawyers acting as President Trump's lawyers arguing that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The argument was that Congress should not investigate the president's conduct. "A congressional demand for the President's personal records raises the specter that members of the Legislative Branch are impermissibly attempting to interfere with or harass the Head of the Executive Branch," according to a Justice Department brief filed at the U.S. Court of Appeals for the D.C. Circuit as part of the case involving Mazars USA. So far, federal judges have rejected Trump's argument, and the subpoenas are on hold. [56]

The legal challenge that has ensued those subpoenas has been perhaps one of the most notorious legal challenges of the Trump Administration, only temporarily being halted by the decision of the Supreme Court in July

a blanket nondisclosure agreement during her White House engagement. Government lawyers also insist she was bound to a confidentiality agreement far beyond her tenure. As a penalty for the alleged "breach of contract," the Justice Department is also seeking to offset all proceeds from the book to the federal government. For more on this subject, see *infra* paragraph 1.5.1

[56] "Congress plainly views itself as having sweeping authority to investigate illegal conduct of a President, before and after taking office," U.S. District Judge Amit Mehta wrote in Washington in refusing to block the House subpoena for Trump's accounting firm records. "This court is not prepared to roll back the tide of history."

2020.[57] In a seven to two decision, Chief Justice Roberts wrote: "The President contends, as does the Solicitor General on behalf of the United States, that congressional subpoenas for the President's information should be evaluated under the standards set forth in *United States* v. *Nixon*, 418 U. S. 683, (…that), however, involved subpoenas for communications between the President and his close advisers, over which the President asserted executive privilege. That protection should not be transplanted root and branch to cases involving non privileged, private information, which by definition does not implicate sensitive Executive Branch deliberations. The standards proposed by the President and the Solicitor General— if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities, giving short shrift to its important interests in conducting inquiries to obtain information needed to legislate effectively". [58]

Another case, albeit still related to the disclosure of Trump's tax returns, involves New York District Attorney, Cyrus Vance and his investigation focused on "hush-money payments" made just before the 2016 election to two women who said they had sexual encounters with Trump. Trump denied having relationships with the women and yet his former personal attorney admitted diverting campaign funds to make those payments.[59] The federal prosecutors completed their further probe in July 2019 and decided not to charge executives of the Trump organization nor to publish the findings in order to protect "third parties interests". Judge W.H. Pauley, of the Southern Districts of New York, ordered the prosecutors to give publicity to all findings of the probe because "the case is over, and the public deserves to see everything". It is after that probe, that Vance's office began asking for documents related to the payments, as well as seeking the tax returns for Trump and his businesses. The President then appealed to federal courts refusing to comply to the New York grand jury subpoena claiming he was protected by executive immunity and was not under any obligation to release his tax records.[60] A judge of the Second

[57] Supreme Court 591 U.S._2020, *Trump et al. v. Mazars USA, LLP, et al.* certiorari to the United States Court of Appeals for the District of Columbia Circuit together with 19–760, *Trump et al. v. Deutsche Bank AG et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

[58] Chief Justice Roberts delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, Kagan, Gorsuch and Kavanaugh joined while Justices Thomas and Alito dissented.

[59] In August 2018, Judge William H. Pauley, presided over the hearings in which the lawyer, M. Cohen
pleaded guilty to five counts of tax evasion, one count of providing false information to a credit institution, and two counts of campaign finance law violations. Trump was implicated by Cohen in the scandal. In December 2018, Pauley sentenced Cohen to three years in prison.

[60] The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena, arguing that a sitting President enjoys absolute immunity from state criminal process under Article II and

Circuit heard the case in the fall of 2019 and dismissed Trump's refusal.[61] Moving the case to the District Court that however dismissed the case[62] but the Second Circuit rejected the District Court's dismissal.[63] Vance also rejected Trump's arguments, arguing the President was seeking to invent and try to enforce a new presidential tax return privilege that would bar anyone from seeing his returns. The United States Justice Department as *amicus curiae* argued that a state grand jury subpoena seeking the President's documents must satisfy a heightened showing of need. In May 2020 the case was argued in front of the United States Supreme Court that handed its decision early in July.[64] Chief Justice John G. Roberts Jr. who wrote for the majority, said "that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding". [65] The Supreme Court further grounded the decision on two more similar precedents, the landmark rulings that required President Richard M. Nixon to turn over tapes of Oval Office conversations[66] and that forced President Bill Clinton to provide evidence in a sexual harassment suit[67] and concluded by reaffirming "that principle today, and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need." [68]

The Court of Appeals, however, had directed that the case be returned to the District Court, where the President could raise further arguments as appropriate. And in fact, in August 2020, Trump and the Department of Justice filed anew to halt the effects of the subpoena. This time the Attorney General did not explicitly support Trump's assertion of immunity from investigation yet urged the District Judge to slow the case down, keep the subpoenas on hold and listen carefully to Trump's arguments.[69] In the

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the Supremacy Clause.

[61] Victor Marrero is the judge of the US District Court for the Southern District of New York who, on October 2019, dismissed an attempt by President Trump to prevent his accountants from complying with a NY prosecutor's subpoena for 8 years of tax returns.

[62] The District Court dismissed the case under the abstention doctrine of *Younger* v. *Harris*, 401 U. S. 37

[63] The Second Circuit rejected the District Court's dismissal under *Younger* but agreed with the court's denial of injunctive relief, concluding that presidential immunity did not bar enforcement of the subpoena.

[64] On certiorari to the United States Court of Appeals for the Second Circuit, decided 7 to 2, on 9 July 2020, *Trump v. Vance, District Attorney of the county of New York, et al*, Supreme Court 591 U.S._2020.

[65] Id. Chief Justice Roberts made specific reference to the decision of the Court in 1807 and to the opinion written by Justice Marshall in the case *US v Burr*, 25Fcos 30,33-34 (1807).

[66] *US v. Nixon*, 418 US 683 (1974).

[67] *Clinton v Jones*, 520 US, 681,704 (1997).

[68] *Trump v Vance, cit.* .

[69] Again, on 20 august 2020, Marrero dismissed another attempt by President Trump to allow his accountants to disregard the New York prosecutor's subpoena for 8 years of tax returns.

ruling, Judge V. Marrero held that the prosecutors's grand jury subpoena was valid and the Presidents attempts to challenge it were dilatory and without merit. He concluded "justice requires an end to this controversy".[70]

President Trump's attitude towards the Attorneys General has been controversial to say the least: very friendly, very appreciative and highly praised if they were complacent to his orders; very unfriendly, very denigrating and highly confrontational if they showed independence. Trump repeatedly attacked his first Attorney General, Jeff Sessions, over his recusal from the investigation into whether Trump's campaign coordinated with Russia to influence the 2016 election; he publicly expressed dismay about criminal cases against his allies and called for prosecutions of his political rivals.[71] The Department of Justice, led by Attorney general W.P. Barr, has often intervened in lawsuits in which Trump has personally sued those who are investigating him and seeking to get information on his private finances.[72] Mr. Barr's department has also intervened in other matters involving Mr. Trump, including the criminal case of his former national security adviser Michael T. Flynn. In the Flynn case, Mr. Barr's department sought to drop the prosecution.

5.2 Sexual harassment.

There have been many such cases in Donald Trump's life thus far and a few are still pending. At least 10 women accused Mr. Trump of sexual misconduct during the presidential campaign in 2016 and these suits would not qualify for academic attention were it not that two of these cases reached the court rooms during the presidency and that Trump refused to go to court because of his function. The first of these cases is *Carroll v Trump* while the second one is *Zervos v Trump*. Carroll published a memoir in 2019 in which she mentioned that she run into Trump at Bergdorf Goodman department store in New York City in the mid 1990s and said that Trump sexually assaulted her in a dressing room. During a Press Conference on 22 June 2020, Trump denied the allegations.[73] Carroll then sued Trump for

[70] A. Katersky, (oct 7,2019) *Judge rules Trump must turn over tax returns for hush money investigations ABC news*; L. Neumeister, *Judge rejects Trump challenge to release tax returns Yahoo.com Associated Press*, 7 Oct 2019; B. Weiser, *Trump must turn over tax returns to D.A., Judge Rules, The New York Times*, August 20, 2020.

[71] In December 2019, Trump seemed to hint in an interview on Fox Business that the legacy of Attorney General William P. Barr would be defined by whether he investigated former President Barack Obama and former Vice President Joe Biden, Trump's opponent in the 2020 campaign, as part of a review Barr ordered of the Russia case.

[72] The Justice Department has long defended Presidents when they've been sued, but now in Trump's first term it is also jumping in to support the President when he sues others. In so acting the Attorney General is sustaining Trump as he beseeches for an expansion of presidential immunity.

[73] President Trump vehemently denied the allegations. He called Ms. Carroll a liar intent on selling a new book. He said he had never met her, despite a photo of the two of them together in the 1980s. He told reporters that he would not have assaulted Ms.

defamation and his private attorneys sought to delay the case on the grounds that as a sitting president he was completely immune to civil lawsuits in a state court. In August 2020, Justice Saunders of the 1st Judicial District Supreme Court of New York rejected the claim by Trump grounding her rejection on the US Supreme Court's decision in *Trump v Vance*.[74] Although that ruling pertained to a criminal investigation Justice Saunders wrote that the same legal question was relevant to Ms. Carroll's lawsuit "whether the Supremacy Clause of the Constitution bars a state court from exercising jurisdiction over a sitting President of the United States during his term… No, it does not," Justice Saunders wrote. She said the Supreme Court's ruling applied to "all state court proceedings in which a sitting president is involved," including those involving the president's unofficial or personal conduct.[75]

Within a month, the Justice Department intervened in the case, moving the matter to federal court and signaling it wanted to make the U.S. government rather than Trump himself the defendant in the case.[76] In order to justify its intervention, the Justice Department cited a law designed to protect federal employees against litigation stemming from the performance of their duties.[77] Under that law the department sought to move Ms. Carroll's suit to federal court and to substitute the United States for Mr. Trump as the defendant, a move that would have likely led to the dismissal of the charges because the Justice Department cannot be sued for defamation. The Justice Department argued that Mr. Trump's statements denying the rape accusation were an official act because he addressed matters relating to his fitness for office as part of an official White House response to press inquiries. A week before the presidential election 2020, judge Lewis A. Kaplan of the Federal District Court in Manhattan, rejected the Justice Department's bid to make the U.S. government the defendant paving the way for the case to again proceed. In the ruling, Judge Kaplan wrote that Trump did not qualify as a government "employee" under federal law, nor was he acting "within the scope of his employment" when he denied

Carroll because "she's not my type."

[74] Cit. *infra*, footnote 64.

[75] US District Court Southern District of New York, case 1-20-cv-07311-LAK, document 32, filed 10/27/20. Justice Saunders's ruling also put additional pressure on Mr. Trump by opening the door not only to requiring him to be deposed before the November election, but also to compelling him to give a DNA sample. Ms. Carroll saved the dress she wore during the encounter and maintains that it has her attacker's genetic material on it.

[76] Mr. Barr told reporters that it was routine to substitute the government as the defendant in lawsuits against federal officials. "The law is clear," Mr. Barr said. "It is done frequently. And the little tempest that's going on is largely because of the bizarre political environment in which we live".

[77] The Justice Department has often used the Federal Tort Claims Act to provide a shield to members of Congress from being sued for defamation over things they have said, yet the Department has rarely, if ever, used it to grant immunity to a President, according to a report of *The New York Times*.

during interviews in 2019 that he had raped Ms Carroll during the 1990s. This ruling means that the lawsuit can move forward against Mr. Trump, in his capacity as a private citizen.

A very similar case is that of Summer Zervos. Ms Zervos, a 2005 contestant on Trump's reality television show "The Apprentice" who has filed a similar lawsuit against the President, saying he defamed her when he called her a liar after she said he had sexually harassed her during a 2007 business meeting. Since the filing of the lawsuit on 17 January 2017, Trump has tried to halt the course of it first in Trial court and then in Appellate court. Trump claimed immunity from the lawsuit because of being the president. The trial Judge, Jennifer G. Schecter denied relief to Trump ruling that "a sitting president is not immune from being sued for his personal conduct because no one is above the law." The case has been on hold while a New York State Appeals Court reviewes decision that Trump has to face the case even while he is in office and needless to say Trump's immunity argument will no longer apply once he is out of office. Both Ms Carroll and Ms Zervos have declared that the purpose of the lawsuits is "to demonstrate that even a man as powerful as Trump can be held accountable under the rule of law."

5.3 conflict of interest & the emolument clause

Another set of cases, perhaps the largest, stems from "conflict of interest" generated from Trump's refusal to enter a blind-trust agreement as Presidents have done before him. The constitution[78] and a set of laws would have encouraged him to do so. The reference here is to the federal conflict of interest law, which prohibits "officers" of the United States from participating in any governmental action in which they have a financial interest and to the Ethics Reform Act of 1989 which prohibits any senior "noncareer officer" of the government from permitting his or her name to be "used" by any firm that "provides professional services involving a fiduciary relationship".[79]

[78] The Constitution refers to "emoluments" in three provisions: The Foreign Emoluments Clause (art. I, § 9, cl. 8): "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." The Domestic Emoluments Clause (art. II, § 1, cl. 7): "The President shall, at stated Times, receive for his Services, a Compensation which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." The Ineligibility Clause (art. I, § 6, cl. 2): "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." The Emoluments Clause of the Constitution, has faced few judicial interpretations since it was written almost 250 years ago.

[79] Congress explicitly said this Statute was meant to ban the use of an officer's name

Trump could have honored the "name law" by doing what every president since the 1970s has voluntarily done: sell off his assets, in particular his interests in his brand, and replace them with holdings in a blind trust, the contents of which would remain unknown to him; or he could replace them with Treasury bills and index funds whose value he couldn't affect in any direct way, as President Obama has done. He never proceeded to establish the trust nor to transfer the more than 268 business ventures that bear his name worldwide to his adult children, rather he chose to defy the law, risk being prosecuted and condemned to forfeit all the compensation he received from licensing his own name, and succeeded instead to accumulate well over 3,000 conflicts of interest as of October 2020.[80] Most of these cases are either in the beginning stages or still pending. They range from inappropriate enrichment of the Trump family businesses to violations of foreign and domestic emolument clause, to encroachment of government privileges for private use.[81]

Trump's company, which he still owns and controls, has received tens of millions of dollars from direct payments to his hotels and other properties, made by foreign countries and from the American people when he charges the Secret Service and other government agencies for staying at his properties and Trump own blatant promotions of his businesses. [82]

On this matter, federal lawyers have defended him against three lawsuits alleging he is violating the Constitution by continuing to do business with foreign governments through his family enterprise. Two of those lawsuits, which focus on the Constitution's "foreign emoluments" clause, are still pending. Another was dismissed, but the plaintiffs are asking for a rehearing.

In the first of these cases, *Citizens for Responsibility and Ethics in Washington (CREW) v. Trump*, the nonprofit government ethics watchdog, along with various organizations and individuals associated with the hospitality industries in New York and Washington, DC, alleged violations of the Domestic and Foreign Emoluments Clauses through President Trump's receipt of payments from the federal government and various foreign government officials at different Trump Organization properties.[83]

not only in traditional fiduciary-based firms, such as law partnerships, but in a range of other ventures including "real estate, consulting and advising, and architecture." The U.S. Office of Government Ethics regulations that apply the law adopted this broad definition.

[80] Citizens for Responsibility and Ethics in Washington has tracked 3,403 cases of conflict of interest as of 21 September 2020.

[81] Trump' adult children have become richer from business partnerships and other financial ventures made possible by their father's presidency.

[82] Citizens for Responsibility and Ethics in Washington has tracked around two conflicts per day since 20 January 2016, for a total charge to the United States government of $2.5 billion.

[83] The full filing for this case is *Citizens for Responsibility and Ethics in Washington (CREW) v. Trump* No17-CV-458, Southern District of New York. Information relevant to this and the next two cases in relation to the emolument clause were taken from K.J.

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President Trump moved to dismiss the suit, asserting that the plaintiffs lack standing and that the term "emoluments" does not extend to arm's-length commercial transactions. The district court dismissed the case for lack of standing, but the Second Circuit reversed, holding that the hospitality-industry plaintiffs had standing based on a theory of competitive harm resulting from the allegedly unlawful conduct. The full Second Circuit denied the President's request for rehearing on 17 August 2020 however, the President may still seek review from the Supreme Court.

In *District of Columbia v. Trump*, No. 17-1596 (D. Md.), the District of Columbia and the State of Maryland sued President Trump, alleging violations of the Foreign and Domestic Emoluments Clauses similar to those in the *CREW* lawsuit.[84] The Department of Justice for President Trump moved to dismiss based on standing and a failure to state a claim. In a series of 2018 rulings, the district court ruled that the plaintiffs had standing based on alleged injuries related to the Trump International Hotel, and denied President Trump's motion to dismiss, holding that plaintiffs had stated a claim because the President was subject to the Foreign Emoluments Clause and the term "emolument" reached any "profit, gain, or advantage, of more than *de minimis* value." President Trump moved to certify an interlocutory appeal of these rulings, but the district court declined to certify such an appeal. President Trump therefore petitioned the Fourth Circuit for a writ of mandamus. On July 10, 2019 a Fourth Circuit panel granted the writ and reversed the district court, holding that the plaintiffs lacked standing to pursue their claims. On May 14, 2020 after vacating that panel decision and agreeing to hear the case *en banc*, the full Fourth Circuit held that President Trump had not established a clear and indisputable right to mandamus relief, and therefore denied the petition for mandamus. The effect of the denial is to return the case to the district court for further proceedings. The President is seeking review from the Supreme Court.

In the last of these cases, *Blumenthal, et al. v. Trump*, 201 Members of Congress allege violations of the Foreign Emoluments Clause through the President's receipt of foreign-government payments at Trump properties, foreign licensing fees, and regulatory benefits, among other things.[85] President Trump moved to dismiss on the grounds that the plaintiffs lack standing and that he has not received any prohibited "emoluments." On 28 September 2018, the District Court ruled that the plaintiffs have standing, reasoning that these Members of Congress suffered an injury-in-fact through the deprivation of a voting opportunity under the Foreign Emoluments Clause. On 30 April 2019, the district court held that the

Hickey and M.A. Foster *The emolument clause of the US constitution* in *Congressional Research Service*, 19 august 2020.

[84] The full filing for this case is *District of Columbia v. Trump* No. 17-1596, district of Maryland.

[85] The full filing for this case is *Blumenthal, et al. v. Trump* No 17-1154, district of district of Columbia.

plaintiffs had stated a claim against the President. On 21 2019, the District Court certified an immediate appeal. On 7 February 2020, the D.C. Circuit reversed the District Court's standing decision, holding that the Members lacked standing because individual Members of Congress may not sue based on alleged institutional injury to the legislature as a whole. On 6 July 2020, the plaintiffs in *Blumenthal* asked the Supreme Court to review the D.C. Circuit's decision on the legislator-standing issue. But on 13 October 2020, The Supreme Court said it would not hear the case filed by Democratic members of Congress. As is typical when the Supreme Court declines to hear a case, the Justices did not explain their reasoning. The Supreme Court's decision to reject the appeal leaves in place the lower court ruling. Blumenthal said he is "disappointed that we have been denied the opportunity to hold the president accountable for his violations of the constitutional prohibition against taking foreign payments and gifts without the consent of Congress".[86]

5.4. Governmental policies

Finally, policies implemented by the Trump administration have brought financial benefits to the President's company such as new environmental and immigration regulations that favored "temporary hire" and greener- albeit polluted- grass and indirectly benefitted the 12 golf courses owned by the Trump company.[87] There have been 24 such changes to federal rules and regulations under the Trump administration that may have benefitted his businesses.

On this specific topic, on 30 October 2020, Citizens for Responsibility and Ethics in Washington (a government ethics watchdog organization) filed a complaint accusing White House Chief of Staff of finance crimes for allegedly spending thousands of dollars in campaign funds on personal

[86] The Associated Press, 13 October 2020

[87] Just to mention a few questionable changes of regulations that benefitted Trump Company: On Aug. 9, 2018, the U.S. Ninth Circuit Court of Appeals ordered EPA to ban chlorpyrifos, a pesticide used to kill insects that damage grass and golf courses, within 60 days. The following month, the Department of Justice requested a rehearing before an "en banc" panel of the court's judges (an 11-judge panel), which was granted on Feb. 6, 2019, effectively vacating the earlier ruling; On December 11, 2018, the EPA and the U.S. Army Corps of Engineers ("the agencies") released a new rule to replace the 2015 Waters of the U.S. Rule (WOTUS) that result ed in a rollback of Clean Water Act protections for a majority of the nation's streams and wetlands by loosening or eliminating rules on use of chemical pollutants. The Mara Lago golf club benefitted from these new regulations. In the springs of 2017-2018 and 2019 Labor Department and HomeLand Security released additional H-2A and H-2B temporary visa. The H2A and H2B Program provides a solution to the current labor market shortage by enabling companies that qualify for the federal program to acquire seasonal migrant labor to come and work for only those companies on a legal work permit. H2A is for temporary or seasonal agricultural employees and the trump winery usually hires all its manpower through this program; H2B is for temporary or seasonal not agricultural employees and the Trump businesses in Florida and New York usually employ approximately 150 of them.

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expenses including lodging at the president's hotel. The complaint urges the federal election Commission (FEC) to administer fines and to take further action "including, but not limited to, referring this case to the Department of Justice for criminal prosecution".[88] Although the complaint has been filed only against the Chief of Staff, there could be as many as 16 Trump administration official who violated the law to boost the President's campaign just in the month of October of this year.

There were 70 rulings against Trump by April 2019. The majority of these cases were filed in the early stages of the administration and decided by and about the time of the midterm elections at that point only a few cases had reached the Supreme Court.[89] All administrations have rulings against the innovations and changes they wish to make, and this is true especially in the early stages of their mandates, but no President has had as many as President Trump.[90] In order to get an overview of the complete picture, here are some of the subject headings concerning the major cases: Environmental (19); Immigration (14); Health care (12); Sanctuary cities (7); Transgender military ban (5); DACA (4); Census citizenship question (3); Miscellaneous (6). Some subjects received more attention than others:

1. *Environment.* Numerous courts have invalidated rollbacks or delays by the Environmental Protection Agency and other Trump administration agencies of rules promulgated during the administration of President Barack Obama. Among them have been rules on chemical accidents, waste prevention, methane emissions, endangered species, pipelines, oil and gas leases, clean air and clean water. Additional administration deregulatory efforts have been withdrawn after the filing of lawsuits.

2. *Transgender military ban.* President Trump announced on July 26, 2017, a ban on transgender people serving in the military, reversing an Obama administration decision. In response to court rulings saying the ban was probably discriminatory, the Defense Department modified the restrictions, but four courts blocked it, with one being overruled by an appeals court. On 22 January 2019, the U.S. Supreme Court allowed the restrictions to go into effect while the 5 legal battles continued.

3. *Travel ban.* At least three courts ruled against the administration's travel ban applied to certain Muslim-majority countries, which, after being redrafted, was upheld by the Supreme Court on June 26, 2018. Other cases can be grouped under miscellaneous.

4. *First Amendment.* There are two cases related to the first amendment. A federal court ruled that Trump's practice of blocking his critics on Twitter violated the First Amendment. CNN filed a lawsuit against the Trump

[88] citizensforethics.org .
[89] R. Toniatti, *cit.*
[90] Most of the data up and including to April 2019 has been verified and updated while for more recent cases the research is based on varied media and civil society websites since it is close to impossible to find out all the pending cases in all the courts of the 50 States and of the Federal Circuits.

administration, alleging a First Amendment violation and demanding that journalist Jim Acosta's White House credentials be restored. A federal court ruled that due process and notice must be given before the administration can revoke a press pass.

5. Civil Rights, Equal Opportunity. A judge ordered the Trump administration to reinstate an Obama-era rule that required companies to report pay data by race and gender, a move, advocates say, that will help shrink the wage gap.

6. Labor Relations. Executive orders making it easier to fire federal employees and weaken representation were struck down as a violation of federal labor-management relations law.

7. *Education.* Nineteen states and the District sued the Education Department and Education Secretary Betsy DeVos for delaying regulations protecting students from predatory lending practices. The court vacated the department rule, saying it dispensed with improper rulemaking procedures.

In total, the Trump administration has lost 79 out of 85 cases involving federal agencies on deregulatory or policy issues tracked by the Institute for Policy Integrity.[91]An environmental group that regularly sues the administration over regulatory issues has won 33 of 40 cases on merit alone.[92] Two-thirds of all the cases accuse the Trump administration of violating the Administrative Procedure Act (APA).[93] The normal "win rate" for the government in such cases is about seventy percent, yet according to analysts, studies show that by mid-January 2020, Trump's win rate was at about six percent.[94]

Democratic appointees, many of them appointed by presidents Barack Obama and Bill Clinton, are responsible for 45 decisions. Republican appointees dating back to President Ronald Reagan issued the other rulings. Magistrate judges, who are not appointed by presidents, made three of the decisions.

6. The Judiciary and voting related rights

For approximately six months before the November 2020 elections, many States' legislatures[95] across the country rushed to embrace mail ballots to facilitate voter turnout notwithstanding the Covid-19 pandemic and travel related restrictions. As those efforts developed so have the legal battles.

A review by The Washington Post[96] of nearly 90 state voting lawsuits

[91] The Institute for Policy Integrity is a think tank connected to New York University School of Law.
[92] This is the official data offered by "Earthjustice" an environmental group.
[93] APA is a 73 years old law that has resulted as the major protection against arbitrary rule.
[94] This data was made available from the data base maintained by the Institute for Policy Integrity at the New York University School of Law.
[95] The break is about even between Republican and Democratic led State Legislatures and/or Gubernatorial mandates.
[96] E. Viebeck, *Courts view GOP fraud claims skeptically as Democrats score key legal victories over mail voting*, in *The Washington Post*, 28 September,2020.

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out of a total of 502 cases and appeals[97] found that judges have been broadly skeptical as Republicans use claims of voter fraud to argue against such changes, declining to endorse the GOP's arguments or dismissing them as they examined limits on mail voting. In no case did a judge back President Trump's view that fraud is a problem significant enough to sway a presidential election. In many cases, judges issued split decisions, granting some of the changes sought by liberal plaintiffs and otherwise maintaining the status quo as favored by Republicans. Judges appointed by Republicans and Democrats alike have been dubious of GOP arguments that lowering barriers to mail voting could lead to widespread fraud. In general, state judges have been actually found more in favor of expanding voting rights.

In order to have a complete overview of the voting-related litigations it is necessary to analyze, albeit briefly, those cases that were decided by federal judges between end of September and throughout October preceding the November 3rd elections.

In general, Federal judges nominated by President Trump have largely ruled against efforts to loosen voting rules in the 2020 campaign and sided with Republicans seeking to enforce restrictions, underscoring Trump's impact in reshaping the Judiciary.[98] An analysis by The Washington Post found that nearly three out of four opinions issued in voting-related cases by federal judges picked by the president were in favor of maintaining limits. That is a sharp contrast with judges nominated by President Barack Obama, whose decisions backed such limits 17 percent of the time.[99]

The impact of Trump's court picks could be seen most baldly at the appellate level, where 21 out of the 25 opinions issued by the president's nominees were against loosening voting rules. Indeed, voting rights advocates challenging restrictions had a series of successes at the district court level only, however, to see those wins frequently reversed by the appeals courts. Trump nominees have not uniformly sided with Republicans, but many have ruled in favor of the GOP in major cases involving rules about mail voting, ballot deadlines and signature requirements that have affected millions of Americans.[100]

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[97] The data was retrieved from the Stanford MIT Healthy Elections Project, a data bank that keeps track of all election related cases.

[98] Decisions to maintain voting restrictions, including by Trump judges, affected rules in 18 states. The 36 voting-related cases had a disproportionate impact on States in the South and Midwest. A.E. Marimow and M. Klefer, *Judges nominated by Trump play key role in upholding voting limits ahead of Election day* in *The Washington Post*, 31 October 2020

[99] *ibid*

[100] Wendy R. Weiser of the Brennan Center for Justice, a nonprofit group that has advocated for expanded mail voting this year, said that judges nominated by Trump are "not uniformly against voting rights."

The pattern shows how Trump's success installing a record number of judges in his four years in office has played a critical role in determining how people can vote this year and which ballots will be counted.

7. Concluding remarks

While researching litigations and decisions that took place during the Trump Administration in order to complete the evaluation of the independence of the Judiciary from the Executive, it has become apparent that notwithstanding the determination of the Republican party to stack the federal courts with conservative judges, at present, there is still a very healthy balance between liberal and conservative members of the Judiciary and that this is true nationwide. In fact, cases were discussed in almost all federal district as indicated hereafter and were we to create a table of the geographic locations of the rulings this would display that there was one ruling in the First Circuit; seven rulings in the Second Circuit; one ruling in the Third Circuit; eight rulings in the Fourth Circuit; two rulings in the Seventh Circuit; twenty nine rulings in the Ninth Circuit and fifteen rulings in the District of Columbia Circuit. Furthermore, the appointing party for judges who have given these rulings does not seem to be influencing their verdicts since they are split almost evenly: 21 Republican and 39 Democrat.

Yet the effects of the determined and careful packing of the federal lower and appeals courts by the republican party - and especially by the team McConnel-Trump - are already showing the ripple effect on election rule and voting rights whereas the decisions in favor of disenfranchisement issued by the lower courts have been overruled or given a stay by the appeals which are now fully stacked by Trump appointees.

In general Trump did not fare well in courts. Aside from the personal conflicts due to encroachment, the poor fairing of the Administration in court was mostly due to superficiality and/or arrogance in drafting both executive orders and legislation. The calls for legal reckonings will be difficult to halt due to the aggression he has shown towards his opponents and the sheer volume of allegations against him. Still in his uniqueness it must be realistically recognized that he is only the emerging tip of an iceberg that has been growing unnoticed by most, for at least the last four decades and whose seeds were planted by R. Reagan and nurtured by Republican presidents since. The ripple effect of the Supreme Court decision to become involved in presidential elections in 2000 has unfortunately yet inevitably led the non-scholarly community to look at the political color of justice chipping away at the aura of independence held by the Judiciary since the early days of the Republic. The tarnished aura of the Judiciary will inevitably weaken the two political branches unless the Supreme Court will return to strictly exercise self-restraint.

In the premises to this research I affirmed that "in the long-term, however, one can best evaluate the effects of a given presidency on the

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solidity of democracy by analyzing the relationship between the Chief Executive and the Federal Courts". The results have proven that the long-term effect of a hopefully short presidency is an ultra conservative Judiciary that will haunt many generations to come.

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