

President Biden and the Congress

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Abstract: The present article provides for an in-depth analysis of the relations between the two branches of the U.S. form of government, namely the President Joe Biden and the Congress. By describing the Congress' political structure as resulted from the most turbulent presidential campaigns in American constitutional history, the present essay explores the current extraordinarily contentious political environment in the U.S., which makes it likely for the proposed initiatives to face significant political hurdles. Moreover, through a comparison with former Administrations, the Author gives account of the exceptionality of the absence of vetoes under a Presidency and the growing use of executive orders. Lastly, due consideration is given to President Biden's agenda providing for a strong revitalization of federal employment, with specific reference to the difficulties in the confirmation of political appointees.

Keywords: President; Congress; Executive Power; Legislative Power; Form of Government.

1. The political structure of the Congress during the first two years of the Biden Presidency

The 2020 elections, held on November 3th, provided the incoming President, Joseph Robinette Biden, Jr., a discrete Democratic majority in the House of Representatives and an uncertain situation in the Senate, where the President's party expected to gain more seats. In fact, the 117th Congress started with a narrow 222-211 Democratic majority in the House, with a Republican gain of 14 seats, plus two vacancies.¹ At the end of 2021 the

¹ During 2021 special elections were called in order to fill the following vacancies: the Louisiana seat, formerly belonging to Luke Letlow (rep.), died on December 29, was filled by Julia Letlow (Rep.); the Louisiana seat occupied by Cedric Richmond (Dem), who resigned on January 15, was assigned to Troy Carter (Dem.), elected on April 24; Alaska Donald Edwin Young (Rep.) died on March 18 and his seat was taken by Mary Sattler Peltola (Dem.); the Texas seat belonging to Ron Wright (Rep.), died on February 7, was filled by Jake Ellzey (Rep.) on July 27; the Ohio seat, belonging to Marcia Fudge (Dem.), who resigned on March 10, was filled by Shontel M. Brown (Dem.), on November 2; the New York seat belonging to Antonio Delgado (Dem.), who resigned on May 25, was filled by Ryan Patrick (Dem.), elected on August 23; the New Mexico seat, belonging to Debra Haaland (Dem.), who resigned on March 16, was filled by Melanie A. Stansbury (Dem.) on June 1; the Florida seat belonging to Alcee L. Hastings (Dem.), died on April 6, was filled by Sheila Cerfilus-McCormick (Dem.) on January 11, 2022; the Ohio seat belonging to Steve Stivers (Rep.), who resigned on May

relationship was 221-213, plus one vacant seat. As of the end of September 2022, immediately before the mid-term elections, it had changed into a 224-213 relationship, with two vacant seats.² In the Senate, the Republicans lost 3 seats in comparison with 2018, thus reaching the number of 50; only the two run-offs in Georgia, held on January 5, 2020, allowed the Democrats to obtain the majority thanks to the vote of the Vice-President, Kamala Harris. A profile of the membership of the 117th Congress³ reveals that in the average both Representatives and Senators were older than ever before: the mean ages were respectively 58.4 and 64.3. The average length of service was now higher, amounting to 11 years. The number of women Members had increased steadily and was 127 in the House and 24 in the Senate, a total percentage of 27. Women's representation was much more numerous on the side of the Democrats: 93 and 16 respectively caucus with the Democrats, only 34 and 8 with the Republicans. Minority groups have reached record numbers. There were 61 African Americans, 4 more than in the previous Congress (11.3% of the total membership), 58 in the House and 3 in the Senate: 56 and 2 of them respectively are Democrats. 52 were Hispanic or Latino members, 9.6% of the total membership, 45 serving in the House and 7 in the Senate, of whom 32 and 4 respectively are Democrats. 21 were Asian or Pacific Islander Americans, 3.9%, 19 in the House and 2 in the Senate, of whom 16 and both the Senators were Democrats. 6 Members of the House were American Indians, the highest number ever, equally divided between the two Parties.⁴

The 2020 electoral campaign has been one of the toughest since 1960 and definitely one of the most turbulent in the whole of the American constitutional history. Some others have been troubled by serious events or particularly deteriorated political climates, such as for instance the campaigns in 1968, 1972, 2008. Traditionally the political struggle has always been harsh and it has never excluded arguments concerning the personal life of the candidates. This time, however, virulent language, mediatic exposition of often irrelevant facts, totally systemic conflict, declared unavailability to acknowledge a possible defeat have reached an unprecedented apex. Rimes of paper are being written by political scholars⁵ trying to explain reasons and dimensions of the wave of polarization. The truth is that the cleavage inside political class and public opinion is probably

16, was filled Mike Carey (Rep.) on November 2; the California seat belonging to Devin Nunes (Rep.), was filled by Connie Conway (Rep.), on June 7, 2022.

During the second session of the 117th Congress, six more vacancies had to be filled, and only in two cases the successors did not belong to the same party than the outgoing member: in Alaska Donald Edwin Young (Rep.) died on March 18 and his seat was taken by Mary Sattler Peltola (Dem.) on August 16, while in Texas Filemon Vela (Dem.) resigned on March 31 and his seat went to Mayra Flores (Rep.). 3 more seats became vacant between August and September 2022.

² Source: Congressional Research Service, Membership of the 117th Congress: A profile, Washington, D.C., September 30, 2022.

³ *Ibidem.*

⁴ *Ibidem.*

⁵ P. P. Pierson, E. Schickler, *Madison's Constitution Under Stress: A Developmental Analysis of Political Polarization*, *Annu. Rev. Political Sci.* 2020, 23, 37–58.

unbridgeable. Pandemic politics,⁶ where the health of millions of Americans was at stake and the lives of at least one million⁷ of them were lost, has not escaped the most acute polarization. More traditional topics for a presidential campaign, such as economics⁸ and foreign policy⁹ have not been saved from radicalized discussions.

Furthermore, it is well-known that the party system has been experiencing a dividing radicalization, which has longstanding roots but has been exacerbated in the years following the election of President Obama. The Republican Party has consistently moved to the right,¹⁰ both in the States and in Congress, or at least it has reached a consistent ideological coherence about some central issues. The influence of former President Trump is still pervasive and often forces Republican Congressmen to follow his requests, besides conditioning the selection of candidates to all the levels of government. The Democratic Party is less fragmented in its structure but it enjoys the support of a great number of social movements having their own organization, whose approach tends to maximize the collective interest that they pursue and does not incline to compromises. President Biden, therefore, has not had an easy time in making a political synthesis and to lead such a scattered bunch of liberal constituencies. In presence of a Democratically-controlled Congress, he has often been exhausted by discussions and quarrels inside his own party and compelled to resort to non-congressional means of enacting change and promote policies.¹¹

The context in which the presidential elections have taken place and their aftermath have contributed to the overheating of the political temperature. Racial demonstrations against improper police conducts preceded and surrounded the procedural elections influencing the turnout and voting behaviour. The enduring pandemic contributed to create a peculiar, albeit not less divisive, political context.¹²

More than two thirds of the eligible votes took part in the elections, often resorting to early voting, either by mail or in person. The outcoming

⁶ See e.g. S. Bombay, *Current Constitutional Issues Related to Vaccine Mandates*, *Constitution Daily*, The National Constitution Center, August 2021; P. Bump, *Republicans are still a Bigger Obstacle to Vaccination than Black Americans*, *Washington Post*, September 15, 2021.

⁷ See e.g. C. Da Silva, *Americans must not 'grow numb,' Biden says, as U.S. marks 1 million Covid deaths*, *NBC News*, May 12, 2022.

⁸ See e.g. N.F. Jacobs, *Economic Sectionalism, Executive-Centered Partisanship, and the Politics of the State and Local Tax Deduction*, 136 *Pol. Sc. Q.* 311 (2021).

⁹ G.M. Friedrichs, J. Tama, *Polarization and US foreign policy: key debates and new findings*, *International Politics* 59, (2022), 767-785.

¹⁰ M. Grossman, D.A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats*, Oxford, 2016; J.S. Hacker, P. Pierson, *Confronting asymmetric polarization*, in N. Persily (ed.), *Solutions to Political Polarization in America*, Cambridge, 2015, 59–71

¹¹ See e.g. M. Grossmann, D.A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats*, New York, OUP, 2016.

¹² S.M. Milkis, D.J. Tichenor, *Rivalry and Reform: Presidents, Social Movements, and the Transformation of American Policies*, Chicago, Ill., 2019; G.C. Jacobson, *Presidents and Parties in the Public Mind*, Chicago, Ill., 2019.

President obtained about 74 million votes, Biden 7 more, and he also won 309 votes in the Electoral College, while Trump got only 232, exactly the same margin achieved by Trump four years earlier. However, Trump refused to concede, lamenting frauds, alterations in the programs of the voting machines, miscounting of mail votes, and tabulation irregularities. In the following days, 61 lawsuits were filed, mainly in the States where Biden's margin of success had been lower. 60 of them were dismissed due to lack of evidence. Nevertheless, Trump contested the electoral outcome and at a rally organized by his supporters on the 6th of January 2021, the day of the congressional certification of the States' votes, he confirmed the claims of conspiracy and fraud, authorizing or inspiring a march on the Capitol in order to reverse the result. He also required Vice-President Pence to stay the confirmation, to void the result of some States and to wait for new slates, which Pence declined to have the power to do. Congress finally acknowledge Biden's victory with the vote of only 26 Republicans out of 220. The presidential transition, regulated by the Act of 1963,¹³ was delayed, due to Trump's refusal to meet Biden personally, to the putting off to the new year of the necessary meetings by some top officials of several important departments and agencies, and even to the Trump administration's efforts to convert some agency positions from political into non-political even after the election, in order to preserve them from change.¹⁴

The conflict rate has been increased also in the daily operation of the Congress due the breakdown of normal standards of behaviour of some members,¹⁵ not necessarily linked to the storming of the Capitol and to the at least unusual presidential transition. In February, Representative Marjorie Taylor Greene was censured and deprived of her committee assignment due to social media posts allegedly supporting violence. Another resolution of censure was put forward four months later when she compared mask-wearing rules in the House to the Holocaust, but she apologized, and the resolution was withdrawn. In November Representative Paul Gosar was censured and removed from committee assignments due to a video posted in his social media accounts where he portrayed violence against the President and Representative Alexandria Ocasio-Cortez.

¹³ 3 U.S.C. §102 note, amended in 2010 (Pre-Election Presidential Campaign Act, P.L. 111-283, 124 Stat. 3045), in 2015 (Edward "Ted" Kaufman and Michael Leavitt Presidential transitions Improvements Act, P.L. 114-136, 130 Stat. 301), and in 2019 (Presidential Transition Enhancement, P.L. 116-121, 134 Stat. 138).

¹⁴ See S.J. Wayne, *The Biden Presidency, Politics, Policy and Polarization*, New York, N.Y., 2022, ch. 1.

¹⁵ See R.S. Katz, *The United States: Political Developments and Data in 2021*, 2021 Eur. J. of Pol. Research Pol. Data Yearbook, 1-13.

The promise of the President on Inauguration Day¹⁶ to repair, restore, heal, and build, therefore, preceded by similar calls during the presidential campaign, has been quite hard to keep.¹⁷

2. The transition and the organization of the White House, Departments and Agencies

According to the Presidential Transition Act, the incumbent President has to appoint a transition coordinator, organize transition teams both in the White House and in the agencies, and keep the committees of Congress informed with all necessary advance, while at the beginning of the 77 days elapsing (this time) between the election day and the Inauguration the General Services Administration should prepare all that is necessary in terms of resources, spaces and so on in order to facilitate the transfer of power.¹⁸ The Government machine must be ready to start without interruptions.

However, President Trump refused to acknowledge defeat and validity of the vote, although some Governors and a few former senior advisers did, and only on November 21 he resorted to a tweet to let the public opinion know that he would not create obstacles to contacts between Biden's staff and government officials. Yet he never met Biden or members of his team and the top management of some department and agencies put off all meetings to January 2021. The "Save America Rally", the Capitol riot on January 6 and its aftermath did not help to calm down the political context, flamed by the pandemic, the racial manifestations against police practices and the post-electoral turmoil.

Meanwhile, Biden appointed Jeff D. Zients, former director of the National Economic Council during the Obama Presidency, as transition director, and he put together a staff of about 1,599 members, keeping into account gender, race and other social variables and giving preference to skilled people able to address emergency topics and possibly to ensure stability in the office, in order to prevent the continuous turnover typical of the Trump years. A special unit of the transition team tried to cut off the appointments schedule by contacting key Senators and anticipating the names of some prospective candidates.¹⁹ Some hurdles had to be overcome, for instance, for the nomination of General Lloyd J. Austin III for Secretary of State for Defence, since he had left the military, after 43 years of service, just seven years before, as required by the applicable legislation, and later on had worked with some defence contractors, thus raising ethical considerations, and of

¹⁶ Available at the following url: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/> (last accessed Nov. 21, 2022).

¹⁷ N.F. Jacobs, S.M. Milkis, *Get out of the Way: Joe Biden, the U.S. Congress, and Executive-Centered Partisanship During the President's First Year in Office*, 19 *The Forum* 709 (2021).

¹⁸ See S. Hess, J. Pfiffner, *Organizing the Presidency*, Washington, D.C., 4th Ed., 2021.

¹⁹ About this acceleration see E. Posner, *Why Joe Biden Must not Shy Away from the Full Power of the Presidency*, *The New York Times*, January 21, 2021.

Chief Judge Merrick B. Garland, of the Court of Appeals of the District of Columbia Circuit, as Attorney General. When, on January 19, the Democrats and ten Republicans of the House of Representatives voted the resolution of impeachment against Trump for incitement of insurrection, Biden had appointed about 100 senior aides and staff members: such number rose to more than 250 at the end of the transition. Cabinet members and other top officials were appointed soon after, applying diversity criteria, with a preference for persons who had already served under former Democratic Presidents. His Chief of Staff, for instance, Ron Klein had covered the same post with Vice-President Al Gore and himself, while the other three Senior Advisers, Bruce Reed, Mike Donilon and Steve Ricchetti had had similar experiences in former administrations. The confirmation procedures, however, have not been quick nor easy. It is reported that out of the 806 top positions to be confirmed by the Senate, in the first six months of the Presidency only 90 had been ratified in the first six months of the Presidency and about 400 at the end of July, with another 150 appointments waiting for confirmation.²⁰ However, this time the White House has given priority to presidential appointments needing no Senate confirmation: 1.136 of them swore in on the same Inauguration Day.²¹

3. The legislative efforts of the Presidency

In his efforts of pushing through Congress legislation introduced by his party's leaders, President Biden had to keep into account the harsh polarization both in public opinion and on Capitol Hill and at same time to reach out very different interests and groups belonging to the area of his own party. He tried to find a compromise, resorting to alternate both methods, in different phases of his relationship with the Houses. As an old congressman he knows that managing a small majority in the House, probably doomed to vanish at the midterm elections, and an equally divided Senate requires patience and ability in cultivating personal relationships.

The White House has invested a lot of time and energies in meetings and conversations with individual members of Congress or small groups of them. Private conversations have been frequent as well, above all with Republicans, and many have taken place via telematic apparatuses. Much of the organizational work has been carried out by the Legislative Affairs Office, endowed of about thirty aides.

When the time was ripe for major pieces of legislation, however, the President did not hesitate to use all the instruments of parliamentary procedure in order to accomplish the desired result. First of all, his American Rescue Plan Act,²² a relief package of about 1.9 trillion dollars to households, small businesses, State and local governments, early in March 2021 was

²⁰ Cfr. S.J. Wayne, *The Biden Presidency*, cit., chs, 2 and 8.

²¹ More details in J.P. Pfiffer, *The Transition of the Presidency, 2020-2021*, Korean J. of Policy St., 110 ff., 2021.

²² P.L. 117-2.

pushed through Congress applying the reconciliation procedure, avoiding delays and exhausting discussions.

A few months later, in order to get the approval of his Infrastructure Investment and Jobs Act, defined in his words “a once-in-a- generation investment”,²³ the President chose the path of bipartisan negotiations: the dimension of the projected measures and the aborted efforts by some Republicans in the previous Congress suggested that an agreement would be possible. Biden personally, through invitations of congressmen of both parties to the Oval Office, and his aids, first among them Steve Ricchetti, engaged in fatiguing negotiations, having to placate conservative Republicans prompted by Trump, opposing any new taxes, and progressive Democrats, led by Nancy Pelosi, requiring the inclusion of clean air and climate measures, together with several social welfare programs. At last an agreement was reached and the bill was successfully enacted on August 10 in the Senate by a 69 to 30 vote and in the House at the beginning of November by a 228 to 206 vote, with the support of 13 Republicans and the abstention of 6 Democrats. Meanwhile the Senate had approved a long document including budget instructions on a party-line division. In this case the President combined sagacious patience, compromise ability and some muscles to pursue the output, including unprecedented investments in roads, bridges, airports, railways, ports, water, broadband and more, for a total of more than 1 trillion.

In the same months an even more gigantic bill named Build Back Better Act was introduced, whose provisions implied costs for 3.5 trillion. It should have provided cleaner energy and climate initiatives, money for childcare, grants for needy students, home care for the elderly and disabled, rehabilitation of older houses and help for first-time home buyers. This time the President had to gain the support of the moderate Democrats: two Senators, Joe Manchin (WV) and Kyrsten Sinema (AZ), in particular, opposed the introduction of new taxes and the bill, after being enacted by the House after a good amount of filibustering, had to be put off for examination by the Senate in the next session, when it was finally approved as the Inflation Reduction Act of 2022,²⁴ signed into law in August 2022 after the exclusions of social safety net provisions.

Some other pieces of legislation have successfully passed through Congress. For instance, the Safer Community Act of 2022²⁵ has been signed into law in June 2022 on the ground of a bipartisan agreement that has been reached on some restrictions on gun safety law: background checks for gun purchasers under 21, increased criminalization of arms trafficking and funding for State “red flag” statutes. The Postal Service Reform Act of 2022,²⁶ approved with bipartisan support, extends welfare and Medicare programs to USPS retirees and provides for the development and

²³ See Whitehouse.gov site. The bill has become P.L. 117-54.

²⁴ P.L. 117-169.

²⁵ P.L. 117-159, originally proposed by Senator Marco Rubio (R – FL), and modified with amendments proposed by Senator Chris Murphy (D – CT).

²⁶ P.L. 117-108.

implementation of a dashboard to track service performance that is going to help reduce possible mistakes or frauds in mail-in ballots. The Access to Baby Formula Act of 2022,²⁷ which authorizes the Department of Agriculture to take actions in order to address emergencies that could cause supply chain disruptions and in particular infant milk shortage, has also been passed on a bipartisan ground. Other foreign policy measures, above all those concerning the ban on importation of energy products from Russia and the imposition of sanctions following the violations of human rights in Russia and Belarus²⁸ have found no difficulties in obtaining large majorities in Congress.

However, the Presidency failed in obtaining the necessary consensus in Congress for measures that it believed of primary importance. In August 2021, for instance, the Supreme Court, with a 6 to 3 summary judgement,²⁹ stated that the Centers for Disease Control and Prevention had exceeded their authority in putting a temporary ban on evictions as a remedy to the consequences of the pandemic, compelling the President to ask Congress to approve a bill, that could not be pushed through because Congress was recessing: a great number of families, presumably belonging mainly to minorities and disadvantaged groups, so creating discontent in the Democratic electors and congressmen. Most States tried to compensate for such problem by increasing the distribution of federal rental assistance.

Some programs that were apparently important for the Democratic majority have not reached bipartisan majorities or have had to be set aside completely: such was the case for education, health services, police reform in order to prevent abuses.

4. The veto power and the use of signing statements

President Biden has made no use of the veto power along his first two years. Such an event is very rare in American constitutional history, at least since the beginning of the XX Century: in fact, it was President Garfield in 1881, in the six months of his short mandate during the 47th Congress, to do without vetoes; before him, seven Presidents, starting from John Adams, had given up such power. Biden has had to confront a Democratic majority in both Houses, although in the Senate the Vice-President's vote was necessary. His main problem has been to persuade some congressmen belonging to his party to follow him in order to have his ambitious programs approved. When necessary, some bi-partisan agreements had to be reached or at least small groups of Republican congressmen had to be convinced to shore up bills introduced in the interest of the Presidency. In such conditions, there has been more need of persuasion and promotional ability

²⁷ P.L. 117-129.

²⁸ Such the Ending of Importation of Russian Oil Act. P.L. 117-109, dated April 2022, and the Suspending Normal Trade Relations with Russia and Belarus Act, P.L. 117-110, of the same days.

²⁹ *Alabama Ass'n of Realtors v. Department of Health and Human Services*, 594 U.S.____(2021).

than of increasing juxtapositions and vetoes. The switch of the House to Republican control after the midterm elections of November 8, 2022, is likely to modify the political framework.

The resort to signing statements by President Biden has been rare, probably due to the same reasons. He has been busier in looking for consensus in order to introduce legislation than in trying to limit the output of it. In fact, it is possible to trace only five signing statements released by the White House. Furthermore, three of them have a strictly ceremonial nature; another one is almost completely ceremonial; only one raises some constitutional objections and tries to create some interpretative hurdles to the probable congressional meaning.

On September 30, 2021, the President signed into law the continuing resolution, following a bi-partisan agreement aimed at funding the Government through December and including supplementary provisions concerning the relief for natural disasters and the resettlement of Afghan refugees.³⁰ The intent of the statement was to thank the Chambers and the most collaborative of its members for preventing a shutdown. A few days later, on October 8, he signed the Cybersecurity Act into law, as an instrument to enhance the protection of sensitive information maintained by educational institutions.³¹ In this case he simply intended to express satisfaction and congratulate for the congressional approval of an important statute. On that same day, he again wanted to celebrate the signing of another bi-partisan measure, referring to provide first-class medical care to civil servants, intelligence officers, diplomats and military personnel who have experienced anomalous health incidents.³² In May 2022 President Biden released a statement in order to share his admiration and friendship for Norman Y. Mineta, a Japanese-American incarcerated during WWII and later first Asian American to become Mayor of a major city (San José) and Cabinet member, for more than two decades member of the House and founder and chair of the Congressional Asian Pacific American Caucus, after whom, on the occasion of his recent death, the bill to be signed named the Department of Transportation Headquarters.³³ The only signing statement not founded on a ceremonial basis nor suggested by comity reasons has been released late in December 2021 and concerned the National Defense Authorization Act for fiscal year 2022,³⁴ providing appropriations for the Departments of Defense, of Energy and of State. The President first laments being barred to use funds to transfer Guantánamo Bay detainees to the custody or effective control of foreign countries or into the United States, unless some conditions are not met: the expectation here is that such provisions be removed as soon as possible.

³⁰ H.R.5305, P.L. 117-43.

³¹ S. 1917, P.L. 117-47.

³² S. 1828, P.L. 117-46, Helping American Victims Afflicted by Neurological Attacks (HAVANA) Act of 2021.

³³ S. 400, P.L. 117-117.

³⁴ S. 1605, P.L. 117-81, signed on December 27, 2021.

However, some more observations concern the construction of sections which pose serious problems of constitutional nature, with reference to the relationship between executive powers and the Congress. First, provisions requiring executive departments and agencies to submit reports to congressional committees, including highly sensitive classified information, clash with the authority vested in the President to protect the national security by preventing disclosure of some kinds of information. Accordingly, he claims that the act be construed so to keep this vindication into account, although the words used are quite soft and non-provocative: the President “believe(s) that Congress shares this understanding” and “presume(s) that it is incorporated into statutory reporting requirements”. Secondly, other sections direct the Executive on how to proceed in discussions with or votes within international organizations. Biden objects that, although “it is not for the President alone to determine the whole content of the Nation’s foreign policy”,³⁵ he can make efforts to take action consistent with congressional inputs, but cannot feel limited in his “constitutional discretion to articulate the views of the United States before international organizations and with foreign governments”. Thirdly, another provision requires the Secretary of State of Defense to create a working group on the challenges to operational energy demand, the members of which are nominated by the Department but confirmed by the Senate. The President objects that such persons would operate inside the executive branch, although with advisory and consultative function, which does not make them officers in the constitutional sense. Therefore, subjecting them to Senate confirmation would conflict with the principle of the separation of powers and with the Appointments Clause enshrined in Art. II, sec. 2, cl. 2 of the Constitution. The Administration will consult with members of the Senate before appointing the working group, but will not submit their names for confirmation. Finally, the President declares that he will oppose all exemptions to the use of open-air burn pits during cleanups of contamination, as authorized by another provision of the Act, due to the prohibition introduced by a more general statute governing such procedures.

Summarizing, President Biden has been quite sober in the resort to signing statements. In the only case where he felt obliged to use them, he tried to circumscribe their breadth and impact to constitutional principles, also applying a moderate and technical language and avoiding all disrespectful expressions or harsh motivations. He tried not to be responsible of tough confrontations or clashes able of shaking the Senate’s power sharing agreement normally applied in cases of 50-50 partisan split or anyhow to alter the precarious balance of partisan politics.

5. Biden’s executive orders

³⁵ *Zivotofsky v. Kerry*, 576 U.S. 1 (2015).

The production of executive orders by President Biden has not only continued the tradition of his predecessors,³⁶ but grew in number and importance. The reasons were of a double order: first, he had to reverse many administrative actions implemented by Trump, above all in the first months of his mandate; secondly, systematically circumventing Congress has never been his policy, having experienced congressional life for almost four decades (1973–2009) before the eight years of Vice-Presidency, but some gridlocks had to be confronted through all the instruments available in the constitutional toolbox.

Therefore, the average number of orders published by Presidents Obama and Trump³⁷ has been by far overcome, at least in his first year. Only in January 2021 25 were issued, 9 of which on his first day in office and 8 on the second, then 9 in February. From March on, the number abated to a much lower level, between 3 in March and November and 8 in September. The total amount reached a peak of 77 in the year,³⁸ while in the first 10 months of 2022 it raised to about 100. Biden, however, has made a much lesser use of proclamations³⁹ and even less of memoranda,⁴⁰ at least in 2021; in his second year the number of proclamations has been slightly higher.⁴¹ At the beginning he tried to keep the promises made during the electoral campaign by introducing measures concerning the treatment of Covid-19, the revision of immigration policies and their enforcement, but also the prevention of discrimination on the basis of gender identity or sexual orientation and the advancement of racial equality, the operation of schools and the advancement of educational equity, the reduction of the use of privately operated criminal detention facilities, the strengthening of the Medicaid and Affordable Care Act, the promotion of the access to voting, the improvement of cybersecurity, the declassification of official documents, the implementation of infrastructure investments. In the following months some foreign policy measures concerning Russia, China, Ethiopia have been adopted and topics such as energy and climate risk or transnational organized crime, targeted sanctions and national defense, monopolistic practices and assistance procedures to women seeking abortion have been faced up. In several cases former orders obviously had to be revoked or amended. Much care has been also dedicated to restore the efficiency of the civil service, by re-establishing the full respect of the merit-based system and starting a review of existing regulations on scientific bases while

³⁶ See in general A. Rudalevige, *By Executive Order: Bureaucratic Management and the Limits of Presidential Power*, Princeton, N.J., 2021.

³⁷ See e.g. G.F. Ferrari, *President Trump and Congress*, in Id., (ed.), *The American Presidency under Trump: The First Two Years*, The Hague, 2020, 10 ff.

³⁸ Obama in 2009 and Trump in 2017 had totaled 28 and 55 respectively. See also R.C. Lee, Jr, *Governing in an Age of Polarization: Biden's Use of Executive Orders in His First 100 Days*, 2021 *Un. Of Ill. L. Rev. on line*, 163 ff.

³⁹ 179 in 2021, in comparison with 1227 by Obama and 570 by Trump in their first years: source, U.S. Government, Federal Register.

⁴⁰ 31 in 2021, compared to 128 by Obama and 119 by Trump in the correspondent years.

⁴¹ Reaching the level of 285, while memos raise to 87.

requesting not to issue new ones before a complete reappraisal of current provisions. In 2022, a part of the measures imposed by the Russian invasion of Ukraine, President Biden has addressed areas such as courts-martial, intelligence activities and national security, arts, humanities and museums, biotechnologies, national forests, criminal justice. The variety of themes covered by Biden's administrative activity confirms the ability of the normative production of the Executive of almost equalling the legislative activity.

6. Personnel and organization

President Biden's agenda included a strong revitalization of federal employment, severely stricken by the "deep state" rhetoric. Low morale among civil servants and lack of confidence by the public needed to be remedied. Therefore, he published memos and issued speeches praising the work of the employees, set aside the hiring freeze and tried to offer jobs to minorities and women. He also required agencies to abstain from issuing new regulations for some months, so that a complete review of the existing rules could be carried out before implementing new policies. The 2022 fiscal year budget has provided resources to finance an increase of about 50.000 in the number of civil servants and a 2.7% salary increase, although it is alleged that the enduring freeze on all pays exceeding 176.300 \$, at least for political appointees, together with the growing level of inflation, might have reduced the attractiveness of federal employment. Biden has also encouraged the Office of Management and Budget to open up to telework and to review the rule-making process.

The process of senatorial confirmation of the political appointees has been slow: it is reported that in his first year the President has been able to have only 286 nominees confirmed, that is about 10% less than Trump and 30% less than Obama.⁴² He has also had problems with some Trump's appointees who refused to resign, were fired and started lawsuits and with the effort of reconverting into non-political positions that the incumbent had inappropriately qualified as political.

President Biden has only partially followed his predecessors' tradition of relying on "czars"⁴³ to manage some policy initiatives. He has kept on preferring turning to his White House staff than to Cabinet members in order to take the lead on some particularly important issues. The most important cases have been those of Gina McCarthy as climate "czar" and John Kerry as special climate envoy, participating in several worldwide conferences. Special envoys have been also appointed for other foreign policy issues, concerning for instance Lybia, Yemen, Iran, the Horn of Africa.⁴⁴ It

⁴² See S.J. Wayne, *The Biden Presidency*, cit., ch. 9.

⁴³ A recent summary of this practice in M. Sollenberger, M. Rosell, *The Presidents' Czars: Undermining Congress and the Constitution*, Lawrence (KS), 2021.

⁴⁴ See e.g. K.D. Tenpas, *Key Staff in the Biden Administration*, Miller Center, University of Virginia, <https://millercenter.or/biden-administration-tracker>; J.P. Pfiffner, *Organizing the Biden Presidency*, 51 *Pres. St. Q.* 818, 827 (2021). Detailed data in White

is also alleged that the Chair of the National Economic Council, Brian Deese, has been more influential than Treasury Secretary Janet Yellen and that Senior adviser Gene Sperling has been entrusted of the overview of the use of the enormous resources of the American Rescue Plan, which in theory belongs to the competence of the Treasury.⁴⁵

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House Office, Executive Office of the President, Annual Report to Congress on White House Office Personnel, July 2021.

⁴⁵ See J.P. Pfiffer, *ibidem*.

