

# Back to Normalcy, Straight to Diversity: A Provisional Overview of President Biden’s Appointments

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**Abstract:** Ritorno alla normalità, dritto verso la diversity: una provvisoria descrizione delle nomine del Presidente Biden – The paper examines some of the most relevant features of President Biden’s appointments, with reference to the highest ranks of the executive branch, ambassadors, and federal judiciary. The aim of the analysis is to demonstrate that President Biden’s policy had a profound impact on the way in which the selection of federal officials is made. In fact, his commitment to diversity and to fairly represent all the parts of American society could become a turning point in the U.S. constitutional history.

**Keywords:** Presidential Appointments; Cabinet; Ambassadors; Federal Judiciary; Diversity.

## 1. Introduction

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

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

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

president can (and generally do) remain in office even for many years, throughout the terms of subsequent presidents.

Of course, the great power allocated to the President in theory may have different practical outcomes, depending on the circumstances and the context in which it is exercised and on how the President decides to act.<sup>2</sup>

With respect to the first two years of President Biden's tenure, it is fair to state that the political context surrounding the appointments afforded him, at least in theory, a certain support for his appointees. Indeed, with the 2020 elections, Democrats achieved equality of seats in the Senate and, according to Article I, Section 3, Clause 4, of the U.S. Constitution, the Vice President, acting as president of the Senate, has the power to cast a vote in case of equality, so as to break the tie.<sup>3</sup> Thanks to this provision, the Senate could work almost as if Democrats had a (very narrow...) majority. Moreover, as a general rule, no compromise with Republicans seemed to be needed, as the 2020 House of Representatives elections confirmed the Democrats' majority, with 222 seats against Republicans' 213.

Such a favorable situation could have provided ample space to make appointments. Actually, over time a significant gap has emerged between the number of nominees and the number of appointees in the first two years of President Biden's term. And after the 2022 midterm elections difficulties in the confirmation process are likely to remain, since the Democrats' majority in the Senate remained a very narrow one, and at the same time Democrats lost their majority in the House of Representatives, thus they will have to cope with Republicans trying to find compromises on the most relevant issues. And confirmations are very often relevant issues.<sup>4</sup>

Taking also into account the said difficulties, in the following paragraphs, I will examine some of the most relevant features of President Biden's appointments with reference to different sectors of the federal government

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<sup>2</sup> As far as the power of appointment and the practice of the last Presidents are concerned, I will refer to previous papers that I had the opportunity to write: see "Change We Can Believe In." *The Case of President Obama's Appointments*, in G.F. Ferrari (ed.), *The American Presidency After Barack Obama*, The Hague, 2018, 81 ff.; *President Trump's Appointments in Four Keywords*, in G.F. Ferrari (ed.), *The American Presidency under Trump: The First Two Years*, The Hague, 2020, 49 ff.; *President Trump's Appointments: A Policy of Activism*, in *DPCE online*, 1, 2021, 927 ff.

<sup>3</sup> Article I, Section 3, Clause 4, of the Constitution reads as follows: "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." So far, Vice President Harris has had frequently recourse to tie-breaking votes, and most of the times (20 out of 26) the vote was related to an appointment process: see *United States Senate – Votes to Break Ties in the Senate*, <https://www.senate.gov/legislative/TieVotes.htm> (last accessed November 11, 2022). Kamala Harris' first two years term made her the third President of the Senate by number of tie-breaking votes, after John C. Calhoun (1825-1832, 31 votes) and John Adams (1789-1797, 29 votes): see <https://www.senate.gov/about/resources/pdf/occassion-when-vice-president-broke-senate-tie-votes-1789-1980.pdf>.

<sup>4</sup> In other words, the appointment to the federal office could be sometimes considered as a compromise to ensure that some measures issued by the White House will be passed by the lower chamber.

to which appointments are made.

## 2. Appointments in the Executive Branch: Looking for Efficiency, Amidst Difficulties in Confirmation Process

The will to design and carry out new policies is a major feature of any new Federal administration. President Biden is far from being an exception in this respect.

In order to carry out new policies, appointments, especially in key positions, are required; and the more appointments a President can make in the shortest period, the more his or her policies can be carried out quickly and efficiently. Therefore, President Biden has worked to fill vacancies as soon as possible, to the point that a hundred days after the beginning of his term, Biden had made more nominations (approx. 190) than all his predecessors in the last forty years, roughly three times the number of President Trump (approx. 65). Even though, afterwards, the pace of nominations slowed down, six months after inauguration President Biden's score (approx. 235) was equal to the average of the last seven Presidents, starting from Donald Reagan.<sup>5</sup>

The good performance in terms of nominations was counterbalanced by the slow pace of confirmations by the Senate. At the end of the first six months of the term, only President Trump had fewer appointees confirmed than President Biden (approx. 45 *v.* approx. 85), both remaining far below the average number of the last seven Presidents (approx. 135).<sup>6</sup>

Tracking President Biden's nominations to key administrative positions, a comparison with Presidents Trump, Obama, and G.W. Bush was made considering July 8 of the first year of tenure. Biden's number of nominees (304) was much higher than Trump's (213), almost equal to Bush's (308), and lower than Obama's (348). Looking at appointments, only 29,9% of Biden's nominees were appointed (91), a rate that was higher than Trump's (23.0%, 49 appointees), but considerably lower than Bush's (42.2%, 130 appointees), not to mention Obama's (52.0%, 181 appointees).<sup>7</sup> This was not just a matter of number, since, after six months in office, "[t]he Biden administration [was] working to move past the pandemic without a permanent leader for the agency that authorizes drugs and vaccines"; at the same time, "a solicitor general to represent the government [...] that could come before the Supreme Court" still had to be nominated.<sup>8</sup>

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<sup>5</sup> These data are provided by the chart *Total Nominations at 7/18/\*\*\*\**, available at the page concerning *Appointments* of the *White House Transition Project*, <https://www.whitehousetransitionproject.org/appointments/> (last accessed November 12, 2022).

<sup>6</sup> See the chart *Total Confirmed at 7/18/\*\*\*\**, at <https://www.whitehousetransitionproject.org/appointments/>.

<sup>7</sup> See T. Pager – A.E. Marimow – L. McGinley, *Vacancies remain in key Biden administration positions*, July 10, 2021, [https://www.washingtonpost.com/politics/biden-administration-vacancies/2021/07/10/635b5eba-e0e1-11eb-a501-0e69b5d012e5\\_story.html](https://www.washingtonpost.com/politics/biden-administration-vacancies/2021/07/10/635b5eba-e0e1-11eb-a501-0e69b5d012e5_story.html).

<sup>8</sup> *Id.*

It is therefore quite clear that the transition between Trump and Biden took much longer than expected. If one widens the analysis to the first two years of President Biden's term, further evidence of criticalities in the appointment process can be easily identified. Indeed, taking into special account appointments to the Cabinet and the high-ranking positions in the fifteen major executive departments, after 300 days in office a "snail's pace" for confirmations could be observed, deriving from the emergence of a Republican blockade. The outcome could be summed up in the confirmation record of President Biden after ten months in office, that was a poor 140 appointees, less than President Trump's (55), the record of whom was itself far behind President Obama's (274) and President G.W. Bush's (326).<sup>9</sup> During the last year, the situation has only slightly improved, since the President of the United States has yet to appoint a large number of federal officials.

The *Washington Post* newspaper, together with *Partnership for Public Service*, a nonprofit, nonpartisan organization founded in 2001,<sup>10</sup> is tracking the confirmation process of 810 key Executive branch nominations, as it was done for the previous Presidency. This constitutes a significant proportion of the approximately 1,200 positions that require Senate confirmation.<sup>11</sup>

As of October 31, 2022, the number of nominations confirmed by the Senate amounted to 465, less than three-fifths of the 810 key positions (57.41%), while 124 nominations were still to be confirmed (15.31%). For three other positions, the name of the nominee had been announced (0.37%), but the nomination had yet to be officially made. 139 appointees were serving in termed positions or were held over from previous administrations (17.16%): these appointees reduced to 79 the number of vacancies to be filled, nevertheless, almost one-tenth (9.75%) of key Executive positions were not yet occupied at the approach of the middle of President Biden's term.

The number of vacancies cannot be neglected, as they are likely to affect the effectiveness of the Executive's policies in some way.

Ultimately, difficulties in the confirmation process contribute to slowing down the implementation of presidential policies. Further problems in this regard can derive from turnover among senior-level Executive branch staff. This was particularly true during President Trump's years, as research presented by the Governance Studies program at the Brookings Institution showed.<sup>12</sup> The same Institution is now monitoring staffing changes at the

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<sup>9</sup> See K.D. Tenpas, *Biden's confirmations progress at the 300-day mark. Snail's pace continues leaving many high-ranking vacancies across the government*, Brookings.edu, November 24, 2021, <https://www.brookings.edu/blog/fixgov/2021/11/24/bidens-confirmations-progress-at-the-300-day-mark/>.

<sup>10</sup> See the organization's website: <https://ourpublicservice.org>.

<sup>11</sup> These positions include "Cabinet secretaries, chief financial officers, general counsels, ambassadors, and other critical leadership positions." See *Biden Political Appointee Tracker*, *The Washington Post*, Updated October 31, 2022, [https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/?itid=sn\\_the%20biden%20administration\\_4/](https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/?itid=sn_the%20biden%20administration_4/).

<sup>12</sup> See K.D. Tenpas, *Why is Trump's staff turnover higher than the 5 most recent presidents?*, *The Brookings Institution*, January 19, 2018, [www.brookings.edu/research/why-is-](http://www.brookings.edu/research/why-is-)

top of President Biden's administration.

The first set of data focuses on turnover among senior-ranking advisers in the executive office of the President (which does not include Cabinet secretaries), the so-called 'A-Team', identified on the basis of the "Decision Makers" editions of the National Journal.<sup>13</sup>

There are estimated to be 66 "decision makers" in Biden's administration, slightly more than the average number in previous presidencies since 1981. In fact, the average number of decision-makers in the six previous presidencies was 61.3; it was only during the Clinton years that the number (70) exceeded that of Biden's administration today. Three other presidencies were close to Biden's total: Reagan's administration had 60 such positions, G.W. Bush had 63, and Trump had 65. There is a significant gap only with the 57 positions in place during G.H.W. Bush's Presidency and, in particular, with the 53 positions during Obama's term.

The first two years of President Biden's term showed "a return to normalcy":<sup>14</sup> during the first year, only 5 positions went through turnover (7.58%), while during the second the score was 19 (28.78%). Approaching the middle of the term, the rate of turnovers is 36.36%, which means that President Biden roughly followed his predecessors, leaving aside President Trump's exception. Actually, during the latter's term, 60 positions out of 65 went through turnover, with the rate of turnover decreasing over the years: in particular, 22 positions changed hands during the first year (35%), and 20 during the second (31%).<sup>15</sup> For previous presidents, the first two years showed data similar to the Biden's ones: if President Reagan had frequent recourse to turnover, especially in his second year (for 40% of the positions; in the first, the rate was 17%), the others aimed at higher stability, with G.H.W. Bush scoring respectively 7% and 18%, Clinton 11% and 27%, G.W. Bush 6% and 27%, and Obama 9% and 15%.<sup>16</sup>

The stability in Biden's administration reached a record high in terms of turnover within the Cabinet. In the first two years, no turnover occurred: President Biden thus equals President Obama, who did not change any

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[trumps-staff-turnover-higher-than-the-5-most-recent-presidents/](#); K.D. Tenpas, *Tracking turnover in the Trump administration*, *The Brookings Institution*, October 2020, [www.brookings.edu/research/tracking-turnover-in-the-trump-administration/](http://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/).

<sup>13</sup> From 1981 to 2009, the National Journal published these figures during each president's first year. The criteria that were used to select the most influential advisers are explained in *How the 250 Decision Makers Were Selected*, *National Journal*, July 16, 2013, <https://www.nationaljournal.com/s/75992/how-250-decision-makers-were-selected>.

<sup>14</sup> See K.D. Tenpas, 'A-Team' turnover in the Biden administration: A return to normalcy, *The Brookings Institution*, January 20, 2022, <https://www.brookings.edu/blog/fixgov/2022/01/18/a-team-turnover-in-the-biden-administration-a-return-to-normalcy/>.

<sup>15</sup> See K.D. Tenpas, *Tracking turnover in the Trump administration*, *The Brookings Institution*, January 2021, [https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/](http://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/).

<sup>16</sup> See K.D. Tenpas, *Tracking turnover in the Biden administration*, *The Brookings Institution*, October 2022, [https://www.brookings.edu/research/tracking-turnover-in-the-biden-administration/](http://www.brookings.edu/research/tracking-turnover-in-the-biden-administration/).

member of the Cabinet in the first two years. The other Presidents proceeded to limited changes during the second (Reagan, 2; G.H.W. Bush, 2; Clinton, 3; G.W. Bush, 1); the exception is, again, President Trump, who made 2 turnovers during the first year and 5 during the second.<sup>17</sup>

### 3. The Weight of Politics in Ambassadorial Appointments

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

In less than two years, President Biden nominated a high number of ambassadors. The updated list as of September 30, 2022 includes 107 appointments and 41 nominations that were awaiting confirmation by the Senate.<sup>18</sup>

Because of the number of nominations still waiting for confirmation, taking into account the number of appointments, President Biden's pace of appointments (more than 53 per year) is roughly equal to that of most of his predecessors: President Obama appointed 416 ambassadors in eight years (52 per year),<sup>19</sup> President Clinton appointed 417 (52.125),<sup>20</sup> President G.H.W. Bush made 214 appointments in four years (53.5),<sup>21</sup> and President Reagan appointed 420 (52.5)<sup>22</sup> and President Carter appointed 202, although in four years (51).<sup>23</sup> A higher rate characterized the practice by President G.W. Bush, who made 460 appointments in eight years (57.5).<sup>24</sup> President Trump, with 191 appointments in four years (47.75),<sup>25</sup> marked the record low. Of course, the 41 pending nominations could considerably change this analysis, to the point that President Biden's first years might eventually be characterized by an extremely high rate, a record high unlikely to be repeated.

Notwithstanding the interest aroused by the number of appointments itself, another element deserves at least the same attention. It deals with the choices made concerning the appointees. In terms of mere numbers, it is evident that President Biden has favored carrier appointments: 83 appointees, confirmed or waiting for confirmation, were chosen from the Foreign Service (56.1%); the other 65 (43.9%) were mainly political appointments, even though the rate of civil servants (3) and of retired or recalled foreign service officials (6) is not negligible.

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<sup>17</sup> Id.

<sup>18</sup> The full list is available on the website of the American Foreign Service Association <https://afsa.org/appointments-joseph-r-biden>. The data referred to in the text are the result of a reprocessing based on the table available on the website.

<sup>19</sup> See <http://www.afsa.org/appointments-barack-obama>.

<sup>20</sup> See <http://www.afsa.org/appointments-william-j-clinton>.

<sup>21</sup> See <http://www.afsa.org/appointments-george-h-w-bush>.

<sup>22</sup> See <http://www.afsa.org/appointments-ronald-reagan>.

<sup>23</sup> See <http://www.afsa.org/appointments-jimmy-carter>.

<sup>24</sup> See <http://www.afsa.org/appointments-george-w-bush>.

<sup>25</sup> See <https://afsa.org/appointments-donald-j-trump>.

The choice between appointing a career diplomat or an outsider falls within the President's margin of discretion. President Trump used this discretion to make an unprecedented number of political appointments: surprisingly enough, his rate (43.5%) was lower than President Biden's, who thus distanced himself from the tradition established at least in the last decades according to which a much higher rate of ambassadors was chosen from among diplomats.

This is all the more surprising if one considers that presidents expressed by the Democrats appeared to be slightly more willing to value career experience than Republicans: if the general trend was to reserve no more than one-third of appointments to political choices, the most "diplomat-oriented" president was Carter, since only 26.24% of whose ambassadorial appointments were selected on a political basis; President Clinton's rate was 28.06%, President Obama's 30.05%; among the Republicans, President G.H.W. Bush's rate was 31.3%, President G.W. Bush's 31.8%; only President Reagan gave a little greater consideration to political choices, which constituted 37.6% of his total appointments.

Just as during President Trump's term, President Biden's data show an increasing impact of political orientation in implementing diplomatic relationships. This subject seems to reveal a key issue for foreign policy; however, it does not fall into the scope of this paper, and therefore it does not seem to be appropriate to dwell further on it.

#### 4. Judicial Appointments: A Bulky Legacy to Deal With

President Biden's predecessor had the opportunity to make a remarkable amount of appointments in the Federal Judiciary. In just four years, President Trump could appoint 3 justices of the Supreme Court, 54 appeals court judges, and 174 district court judges.

With reference to the Supreme Court, President Trump, in a single four-year term, had the opportunity to appoint the same number of justices that President Reagan did in eight years, while Presidents Obama, G.W. Bush, and Clinton (in eight years) and President G.H.W. Bush (in four years) appointed two justices. Since 1961, only President Nixon, with four appointments (in six years) had a greater impact on the Supreme Court's composition. Even more important than the number of justices itself was the impact of the changes made by President Trump: his three conservative appointees succeeded to a justice considered conservative, another liberal, and a third that often expressed the swinging vote. In other words, the balance between liberals and conservatives inside the Supreme Court was remarkably affected by President Trump's choices.

If 33.33% of the current members of the Supreme Court were appointed by President Trump, his rate of appointed appeals court judges was all but irrelevant, as a matter of fact his 54 appointees represented 30.17% of the 179 federal circuit judges. After the 56 appointments made by President Carter in his four-year mandate, President Trump's rate was the highest, since President Reagan appointed 101 circuit judges in eight years (50.5 per term), G.H.W. Bush's four-year presidency was characterized by 44 appointments and

the following eight-year presidencies had a lower rate: President Clinton appointed 73 circuit judges (36.5 per term), President G.W. Bush 72 (36 per term) and President Obama only 58 (29 per term).

The influence of President Trump on the district courts level was, on the contrary, rather limited, the rate of appointees being 25.70% of the 677 authorized judgeships. In any case, the resulting annual rate of President Trump (43.5) was significantly higher than his predecessors: President Obama appointed 270 district judges (33.7 per year), President G.W. Bush 264 (33 per year), President Clinton 307 (38.4 per year), President G.H.W. Bush 150, in four years (37.5 per year), and President Reagan 292 (36.5 per year). To find a higher rate, one must go back to President Carter's years, with 206 appointments (51.5 per year).

These remarkable records were the result of several factors, the most important of them was undoubtedly the number of vacancies that President Obama had left at the end of his second term. Against this backdrop, President Trump was able to fill a great part of these vacancies, with the active and decisive support of the Republican majority in the Senate.

#### 4.1. A Federal Judiciary “Already Reshaped”

The data regarding vacancies in the federal judiciary at the beginning of a presidency show that, in the long term, a slightly “increasing” trend may be identified. At the beginning of President Reagan's term, the number of vacancies was 38. These grew to 43 (+13.2%) at the beginning of President G.H.W. Bush's term. The increasing trend gained tremendous momentum during this term, such that at the beginning of Clinton's presidency there were 109 vacancies (+153.5%). During Clinton's presidency, the figure slightly decreased, so that President G.W. Bush had 92 initial vacancies to fill (-15.6%). His activism in making appointments produced a remarkable fall in the number of offices to be filled at the beginning of President Obama's first term: 59 (-35.9%).<sup>26</sup>

During President Obama's years, the number of vacancies swelled dramatically (by 98.3%). As a result, at the beginning of his term, President Trump had 117 vacancies to fill, which constituted more than one-eighth (13.1%) of all 890 federal judge offices.<sup>27</sup> When President Biden took office, vacancies had fallen to 57, with a rate of -51.3%, by far the highest reduction of vacancies in the last forty years.

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<sup>26</sup> These data were collected comparing the number of vacancies at the beginning of February of the relevant years, as provided by the Federal Judiciary on the U.S. Courts website, in the “Archive of Judicial Vacancies” section: [www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies](http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies) (last accessed: November 12, 2022).

<sup>27</sup> If President Trump, while taking office, had a number of vacancies to fill which almost doubled President Obama's, admittedly something had occurred during President Obama's mandate. Actually, after the 2014 elections, the Republicans gained the majority of the seats in the Senate and were therefore in the position of blocking most of President Obama's major appointments.

Taking into account the different judgeships, only 4 places had to be filled in appeals court, 1 in the U.S. Court of International Trade, 3 in the U.S. Court of Federal Claims; the other 49 were vacancies in district courts. These numbers could easily suggest that President Biden would not be able, in any event, to carry out significant interventions on the Federal Judiciary. Such a pessimistic outlook is at least partly contradicted by the analysis of the first two years of President Biden's tenure.

#### 4.2. A Speedy Pace Which Is Slowing Down

A research paper concerning judicial appointments made before August 8, 2022, the first day of the Senate August break, highlighted that "Biden ha[d] appointed more federal judges than any president since JFK at this point in his tenure": with 75 appointments, President Biden was far ahead of his two most recent predecessors (Trump made 51 appointments and Obama 42), and made slightly better than G.W. Bush (72), Clinton (74), G.H.W. Bush (57), and Reagan (72). President Kennedy's record of 102 appointments remained apparently unreachable.<sup>28</sup>

These data indisputably show that, despite a reduced number of vacancies to fill, President Biden was able to inject into the Federal Judiciary a considerable number of new judges. The number of appointments seems to be quite revealing *per se*.

Nonetheless, if one analyzes the number of appointments in relation to the passing of time, Biden's good, if not excellent performance cannot hide some reasons to worry about his enduring efficiency.<sup>29</sup> Indeed, a remarkable amount of appointments was made especially during the first year in office, when President Biden appointed 42 federal judges: in the last forty years, only President Reagan had a similar record (40), all the other presidents being far behind (Clinton and G.W. Bush, appointed 27 judges each; Trump, 22; G.H.W. Bush, 15; Obama, 13). During the second year, Biden's appointments underwent a slowdown, to the point that a survey updated to September 6, 2022 showed that President Biden increased the number of appointees only by 83% over the number of the first year, whereas all the other presidents achieved much better rates, up to President G.H.W. Bush, with 280%. All the others had rates between 167% (G.W. Bush) and 208% (Obama), the only exception being President Reagan, with 93%.<sup>30</sup>

As a result, as of September 6, 2022, President Biden lost his first place to President Clinton (83 *v.* 77 appointees) and President Reagan reached Biden's number.

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<sup>28</sup> See J. Gramlich, *Biden has appointed more federal judges than any president since JFK at this point in his tenure*, Pew Research Center, August 9, 2022, <https://www.pewresearch.org/fact-tank/2022/08/09/biden-has-appointed-more-federal-judges-than-any-president-since-jfk-at-this-point-in-his-tenure/>.

<sup>29</sup> See R. Wheeler, *Likely prospects for Biden's two-year judicial appointment total*, The Brookings Institution, September 6, 2022, <https://www.brookings.edu/blog/fixgov/2022/09/06/likely-prospects-for-bidens-two-year-judicial-appointment-total/>.

<sup>30</sup> *Id.* (Table 1. Second Year Judicial Confirmation through September 6).

After September 6, the number of appointments made by President Biden did not considerably raise, so that on November 12, the total amount of appointees was 86. The record suggests that by the end of the second year of his tenure President Biden will occupy an intermediate place between the most active presidents (Clinton, with 126 appointees, and G.W. Bush, with 100) and the less ones (Obama, with 60 appointees, and G.H.W. Bush, with 70), with a little better score than the two other presidents of the last forty years (Reagan made 87 appointments in his first two years, and Trump 83).<sup>31</sup> The slowdown in the appointment process of federal judges can find a significant confirmation in the number of vacancies in the Federal Judiciary, which has considerably increased since President Biden took office. The 57 'initial' vacancies have become 89 on November 12, 2022 (+56.14%): circuit courts vacancies have raised from 4 to 9; district courts vacancies from 49 to 76, and U.S. Court of International Trade from 1 to 2. Only the U.S. Court of Federal Claims has seen a reduction of vacancies, from 3 to 2.<sup>32</sup>

The increasing number of vacancies could never be explained by a hypothetical loss of interest in filling vacant positions in the Judiciary. The explanation is not related to nominations, but rather lies in the slowdown of appointments, which, in its turn, is the result of the length of the confirmation process and of the difficulties in overcoming Republicans' opposition to many nominations. It is no coincidence that 5 nominee appeals court judges are waiting for confirmation by the Senate and 40 district court judges are in the same position.<sup>33</sup>

This remark leads back to the difficulties that President Biden encountered in the confirmation process of the Executive branch nominees: for the Judiciary, too, an evenly divided Senate (irrespective of the tie-breaking vote of Vice President) had a negative impact on the complete unfolding of Biden's policy of appointments. This was true, in particular, for some nominations.<sup>34</sup>

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<sup>31</sup> See R. Wheeler, *Likely prospects for Biden's two-year judicial appointment total*, note 29 (Table 2. Second-Year Confirmation through December).

<sup>32</sup> See <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (last accessed November 12, 2022).

<sup>33</sup> Id.

<sup>34</sup> Maybe the most controversial of all the nominations that President Biden has made so far and that resulted in an appointment was the one that concerned Andre Mathis, now Judge of the United States Court of Appeals for the Sixth Circuit. The opposition of both senators of Tennessee was mainly based on Mathis' "rap sheet", which, according to senator Marsha Blackburn, had "a laundry list of citations, including multiple failures to appear in court" (actually Mathis' "rap sheet" consisted of old speeding tickets: see J. Bendery, *Marsha Blackburn Criticizes Black Judicial Nominee's 'Rap Sheet' Of Speeding Tickets*, *Huffington Post*, January 13, 2022, [https://www.huffpost.com/entry/marsha-blackburn-andre-mathis-black-judge-rap-sheet\\_n\\_61df1ec2e4b0603631b3d9a0](https://www.huffpost.com/entry/marsha-blackburn-andre-mathis-black-judge-rap-sheet_n_61df1ec2e4b0603631b3d9a0)). Due to the strong opposition by both senators of the State directly interested in the appointment, the presidential nomination of November 18, 2021 was confirmed only on September 8, 2022 – the appointment was made on September 27, more than ten months after the nomination.

### 4.3. Despite All, A Not Insignificant Impact

It would not be fair to state that President Biden, during the first half of his tenure, has reshaped the federal judiciary. It would not have been possible, considering the relatively low number of vacancies at the beginning. Regardless of that, the impossibility would be the result of the pace of appointments, which has been far too slow to accomplish such a task.

In any case, a similar conclusion would be easily adapted to President Trump's first two years in office, notwithstanding he had the opportunity to completely change the impact of his policy, thanks to the circumstances of the second half of his term.

In other words, it is too early to give opinions on President Biden's judicial appointments. However, it does not seem to be incorrect to suggest that the current President has already had his say on the composition of the Federal Judiciary. The number of appointments is such that a demonstration can be provided: President Biden's appointees cover 11.11% of the members of the Supreme Court (1 out of 9), 13.97% of appeals court judges (25 out of 179), and 8.57% of district court judges (58 out of 677).<sup>35</sup> In two years, the rates should be much higher, up to the double, for circuit and district court judges. If that would be the case, at least for appeals court judges, a not insignificant impact could be identified.

In terms of political orientation, however, President Biden's appointments produced little changes.

Inside the Supreme Court, the appointment of Justice Ketanji Brown Jackson followed the retirement of Justice Stephen G. Breyer, a liberal appointed by President Clinton; as a result, the majority of 6 justices appointed by Republicans was not affected. With regard to circuit and district judges, no precise analysis is available at the moment, apart from an unverified Wikipedia source according to which from the end of 2020 to September 30, 2022, the number of circuit judges appointed by a Republican President fell from 96 (53.63%) to 91 (50.84%), while judges appointed by a Democrat passed from 81 (45.25%) to 79 (44.13%) – the reduction of both rates depends on the increasing number of vacancies.<sup>36</sup> Apparently, so far President Biden's appointments have not changed, on the whole, the political orientation inside the federal appeals courts.

## 5. Diversity: A Strong Commitment and Several Important Achievements

The most striking feature of the whole policy of appointments carried out by President Biden's administration is almost certainly the commitment to diversity and inclusion, which has produced a dramatic change in the attitude towards minorities. A change that appears all the more significant

<sup>35</sup> These data consider appointments made before November 12, 2022.

<sup>36</sup> See *Judicial appointment history for United States federal courts*, [Wikipedia.org, https://en.wikipedia.org/wiki/Judicial\\_appointment\\_history\\_for\\_United\\_States\\_federal\\_courts#cite\\_note-JudgeByPres-15](https://en.wikipedia.org/wiki/Judicial_appointment_history_for_United_States_federal_courts#cite_note-JudgeByPres-15) (last accessed November 12, 2022).

if Biden's attitude is compared to his predecessors' practices, including Barack Obama's, who was so far (and by far) the most active President in this respect.

Even though it is not strictly related to nominations, Executive Order 14035 on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce<sup>37</sup> illustrates the main purposes of the current Presidency concerning diversity and inclusion. Section 1 of the Executive Order outlines the Federal policy. An extract from the Section is quite revealing: "As the Nation's largest employer, the Federal Government must be a model for diversity, equity, inclusion, and accessibility, where all employees are treated with dignity and respect. Accordingly, the Federal Government must strengthen its ability to recruit, hire, develop, promote, and retain our Nation's talent and remove barriers to equal opportunity. It must also provide resources and opportunities to strengthen and advance diversity, equity, inclusion, and accessibility across the Federal Government. The Federal Government should have a workforce that reflects the diversity of the American people. A growing body of evidence demonstrates that diverse, equitable, inclusive, and accessible workplaces yield higher-performing organizations."

Of course, the objectives and principles expressed in Section 1 with reference to the Federal workforce could not be neglected while making nominations and appointments. Indeed, it is most likely that the same objectives and principles have inspired the whole action of the Administration concerning people serving the Federal Government, both in the Executive branch and in the Judiciary. As a matter of fact, President Biden has several times expressed his commitment to creating the most diverse Cabinet in American history.<sup>38</sup> The genuineness of this commitment was proved, after all, as early as the choice of his Vice President was made: a position that had always been occupied by white men is now occupied by Kamala Harris, a African American and Asian-American woman.

## 5.1. The Cabinet

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<sup>37</sup> The full text is available at the webpage <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>.

<sup>38</sup> See, for example, K. Sullivan, *Biden on nominating diverse Cabinet: 'I'm going to keep my commitment'*, *Cnn.com*, December 3, 2020, <https://edition.cnn.com/2020/12/03/politics/biden-diverse-cabinet-commitment/index.html>; reporting an interview to CNN (D. Merica, *CNN Exclusive: Biden says he will ask Americans to wear masks for the first 100 days he's in office*, *Cnn.com*, December 3, 2020, <https://edition.cnn.com/2020/12/03/politics/biden-harris-interview-jake-tapper/index.html>), the author of the article cites then President-elected confirming his "commitment that the administration, both in the White House and outside in the Cabinet, is going to look like the country," and highlighting that the group of nominees he had designed was "the most diverse Cabinet anyone in American history has ever announced."

As far as the Executive branch is concerned, the composition of the Cabinet could not be more explicit in focusing the attention to the representation of American society in all its complexity.<sup>39</sup>

In terms of gender, males and females are almost equal, since there are 14 men (53.85%) and 12 women (46.15%). The previous record high of women was 8, during the first term of President Clinton and during President Obama years: President Biden improved the rate by 50%.

In relation to ethnicity, there are 13 Whites (50%) and 13 Non-Whites. Among the latter, 5 are African Americans (19.23%), 4 are Latinos (15.38%), 2 are Asian Americans or Pacific Islanders (7.69%), 1 is Native American (3.85%), and 1, Vice President Kamala Harris, falls both into the category of African Americans and Asian Americans or Pacific Islanders.

Combining gender and ethnicity criteria, the number of white men is reduced to 9,<sup>40</sup> that is a considerable record low if compared to previous presidencies, although the number seems to be still too elevated to establish an equal representation of the different parts of American society.

Among the different categories that are represented in the Cabinet, special attention deserves the appointment of Deb Haaland as Secretary of Interior: she has become the first Native American Cabinet Secretary, and it does not seem to be a coincidence that she was put in charge of a department that in the past not rarely carried out policies against the protection of Native Americans' lands and traditions.

The commitment to diversity also applies to LGBTQ appointments. President Biden's Cabinet, in this respect too, has made history. Pete Buttigieg, candidate in the 2020 Democratic Party presidential primaries, was the first openly gay candidate to win a presidential primary or caucus (in Iowa) before dropping out and endorsing Joe Biden. Thanks to his appointment as Secretary of Transportation, Buttigieg became the first openly gay cabinet secretary.

## 5.2. The Top Positions in the Federal Government

The record highs that characterize President Biden's Cabinet find a clear confirmation if one looks at the 315 top positions in the Federal administration.<sup>41</sup> Indeed, when enlarging the point of view, it appears that the Administration is still much more diverse than all the previous presidencies. Although there are sometimes cases of underrepresentation and cases of overrepresentation, it is fair to state that a pretty good balance was established among the different parts of American society. Of course,

<sup>39</sup> The data that will be exposed in the text are available on the website *Inclusive America*, and in particular on the page concerning the *Biden Administration*, <https://inclusiveamerica.org/data/biden/> (last accessed November 12, 2022).

<sup>40</sup> The President is one of them, together with the Attorney General, the Chief of Staff, the Director of the C.I.A., and the Secretaries of State, Agriculture, Labor, Transportation, and Veterans Affairs.

<sup>41</sup> See *Inclusive America, Biden Diversity Tracker*, <https://docs.google.com/spreadsheets/d/1fLW7JM21x4IhJ8AK8-2g7PqjVGBEm4lyORt4MOCa62M/edit#gid=0> (last accessed November 12, 2022).

more could and should be done,<sup>42</sup> but a quick outlook on President Biden's practice of appointments suggests that his commitment to diversity was certainly not neglected.

When it comes to gender, 59.0% of the 315 top positions are occupied by women: this overrepresentation can be considered a positive action toward equality. Another element that must be underlined is that also transgenders are represented, with one appointee in President Biden's Administration.

In relation to ethnicity, Whites cover 57.1% of the positions. Even though they are a majority, Whites are a little underrepresented, since according to the last U.S. census they are 60.1% of the population. As a result, a slight overrepresentation of Non-White people can also be considered a positive discrimination.

Among Non-White minorities, there are two categories that appear overrepresented. African Americans cover 19.0% of the 315 positions, while they are 13.4% of the U.S. population. Even more favored are Asian Americans and Pacific Islanders, with 14.0% positions in the Administration, to compare with the rate of 6.1% of the population.

On the contrary, three other minorities are underrepresented. Latinos, who are 18.5% of the whole population, are only 8.3% of the appointees, so that the rate of appointees is less than half of the rate of the U.S population. The gap is even more significant in relation to Middle Eastern and North Africans, who are 3.0% of the population but only 1.0% of appointees. Finally, Native Americans are represented only by the Secretary of Interior:<sup>43</sup> 1 appointee out of 315 means 0.3% of all the appointees, far below the rate of Native Americans in the U.S. population (1.3%).

Appointments trackers also highlighted the impact of openly LGBTQ people in the Administration. Apart from the Secretary of Transportation,<sup>44</sup> it is noteworthy that at least 6 other appointments were made of people belonging to this community,<sup>45</sup> an important step in the process of fighting against inequality and discrimination.

### 5.3. The Federal Judiciary

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<sup>42</sup> See C.R. Wootson Jr. – D. Nakamura, *Biden has achieved historic diversity. A new study says more can be done*, *The Washington Post*, September 12, 2022, <https://www.washingtonpost.com/politics/2022/09/12/biden-diversity-inner-circle/>. The study that is cited focuses on African Americans, who are considered underrepresented in key positions, especially taking into account the rate of Blacks who voted for Biden in the 2020 elections: see K. McCray, *Black Representation Among Commissioned Officers in the Biden White House*, *Joint Center for Political and Economic Studies*, September 12, 2022, <https://jointcenter.org/black-representation-among-commissioned-officers-in-the-biden-white-house/>.

<sup>43</sup> See above, para. 5.1.

<sup>44</sup> See above, para. 5.1.

<sup>45</sup> See Gender on the Ballot Team, *Landmark LGBTQ Appointees to the Biden-Harris Administration*, Gender on the Ballot, January 28, 2021, <https://www.gendersontheballot.org/landmark-lgbtq-appointees-to-the-biden-harris-administration/>.

Diversity in the Federal Judiciary is a major issue, since in the courts there is a very high rate of white male judges. An in-depth analysis carried out by the American Constitution Society<sup>46</sup> shows that, in terms of gender, 63.52% of federal judges are men. With regard to ethnicity, Whites are 70.66%. As a result, on the one hand, both Whites and Men are considerably overrepresented and, on the other hand, all the minorities are, more or less, underrepresented, if one compares the number of judges with the share that each minority expresses of the U.S. population. Only 9.06% and 12.24% of judges belong to the most relevant minorities, respectively Latinos and African Americans. That means that African Americans are slightly below the rate of the U.S. population (13.4%), whereas the gap for Latinos is much higher, the share of federal judges being approximately half of the share of the population (18.5%). Asian Americans and Pacific Islanders judges are 4.97% (to be compared with 6.1% of the U.S. population). Only 3 federal judges are Native Americans, thus their rate amounts to 0.38%, a third of the rate of the U.S. population (1.3%). The remaining judges either are of two or more races (2.42%) or belong to other minorities (0.26%).

These data cause concern with reference to diversity. It could not be otherwise. The most positive aspect is that a significant improvement in diversity can be easily observed since the beginning of President Biden's tenure. Actually, the appointment of the first black woman to the U.S. Supreme Court, Ketanji Brown Jackson, is nothing more than the tip of the iceberg of Biden's policy on judicial diversity. The comparison between the appointments made so far and appointments during President Trump's term show a completely different approach to the issue, but also the comparison with President Obama's appointments leads to recognizing the deep impact of President Biden in shaping a Federal power that "looks like America".<sup>47</sup> As far as gender is concerned, President Obama came quite close to equality, since 41.95% of his appointees were women. President Trump, on the contrary, strengthened the traditional predominance of men, by appointing women only in 23.93% of the cases. President Biden completely turned the tide, appointing women in a large majority of cases, 75.29%. If this policy is confirmed in the next future, President Biden will have paved the way to reach equality in the Federal Judiciary, an outcome that was hard even to conceive only a couple of years ago.

Data concerning ethnicity are in the same vein. With President Obama, the share of White appointees fell to 63.83%, a rate that was almost equal to the share of the White population in the U.S. Minorities were represented accordingly, apart from a little overrepresentation of African Americans

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<sup>46</sup> See American Constitution Society, *Diversity of the Federal Bench. Current statistics on the gender and racial diversity of the Article III courts*, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> (last accessed November 15, 2022).

<sup>47</sup> The comparison between the last three Presidencies is carried out by the American Constitution Society in the report cited above, note 46. For a comparison of President Obama's policy with policies of his predecessors, see A.J. O'Connell, *Obama ups diversity in appointees*, *UC Berkeley Law / The Washington Post*, September 20, 2015, [www.washingtonpost.com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679\\_graphic.html](http://www.washingtonpost.com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679_graphic.html).

(17.93%), mainly at the expense of Latinos (9.73%), considerably underrepresented, likewise Native Americans (0.30%). On the contrary, Asian Americans' and Pacific Islanders' rate (5.78%) was consistent with their share of the U.S. population. 2.43% of the appointees represented two or more races.

President Trump got back to a huge overrepresentation of Whites (84.19%), which resulted in a clear underrepresentation of all minorities, with the only exception of Asian Americans and Pacific Islanders: their rate, 5.56%, was substantially higher than the rate of African Americans and Latinos, 3.85% for both. With Native Americans neglected, the other appointees were people of two or more races (2.14%), or people of other races (0.43%).

Again, President Biden completely shifted the balance. For the first time, White appointees are simply the largest minority, with 34.12%. The dramatic fall of Whites' rate allows minorities to be almost all overrepresented. Blacks' rate is 24.71%, which is approximately twice their rate in the U.S. population; the same applies to Asian Americans and Pacific Islanders, with a rate of 12.94%, and for Native Americans, who are 2.35% of all the appointees. The only minority that is not overrepresented is that of Latinos, who are 17.65% of the appointees, thus slightly underrepresented if compared with their share of the U.S. population. Other races are represented by 1.18% of appointees, while people of two or more races cover 7.06% of the appointments.

On the basis of these data, it is clear that a remarkable series of positive actions is in progress.

## 6. Conclusion

In less than two years, President Biden has shown all the impact that the appointment power can have.

President Trump had a profound impact on American politics using this power, because of the high number of appointments that he made, because of the circumstances that allowed him to exercise a deep influence on the Federal Judiciary (basically thanks to the choice of three justices of the Supreme Court) and because of the ways in which the appointment process was carried out, with the constant support of the majority in the Senate and the frequent recourse to turnover. None of these features characterizes President Biden's policy, as a result of fate (the vacancies to fill) or of a different political context (the very narrow majority in the Senate), but also as a result of a different idea of how Federal Administration must operate, so that key positions must be covered as soon as possible and must remain as stable as possible.

If these differences with his predecessor were the most relevant features of President Biden's policy of appointment, it would have been hard to arouse interest in it. The reason that justifies the choice to focus the attention on Biden's appointments undoubtedly lies elsewhere. It is the commitment to diversity that is making Biden's Presidency a possible turning point in the history of the selection of Federal officials.

Thanks to a brand-new approach to diversity and inclusion, for the first time the Federal Government really tends to look like American society. This is, at the same time, a critical challenge, and a great opportunity. It is a critical challenge because the introduction of a real diversity in the Federal Administration and in the Federal Judiciary can be an answer (or rather, one of the answers) to societal demands for equality and non-discrimination, which have been gaining tremendous momentum in the last years. It is a great opportunity because it can help strengthen the fairness and efficiency of Federal action thanks to the convergence of different sensitivities and experiences.

The next two years will prove whether the work is really in progress. In any case, there is a strong feeling that on the commitment to diversity there is no way back. Unless more and more anachronistic views should accidentally return to the surface.

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