

President Biden and The Congress

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Abstract: *Il Presidente Biden e il Congresso* - The article illustrates the political composition of the 118th U.S. Congress and discusses to what extent it has influenced the second half of President Biden's term. The inability of the Republican party to smoothly elect the Speaker and its unprecedented removal are addressed. The article also provides data on the use of executive orders, proclamations, signing statements and the development of the federal workforce over the second half of the first and only term of President Biden.

Keywords: Unilateral Presidency; Congressional Review Act; House Speaker; Executive branch; Executive orders.

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

In the second half of his first and only mandate President Joe Biden has enjoyed much less favorable conditions than in the first half. At the beginning of January, 2021, the Democratic majority in the House of Representatives amounted to 226, including 4 Delegates, against 213 Republicans, also including a Delegate and the Resident Commissioner of Puerto Rico, plus two vacant seats. Due to several vacancies, at the end of September 2022, a few weeks before the mid-term elections, the party breakdown showed a 224-213 relationship, still with four vacant seats. In the Senate 50 Republicans confronted 47 Democrats and 3 Independents, all of them caucusing with the Democrats, and one more member changing her party affiliation from Democrat to Independent in December 2022.¹

Since January 2023 the 118th Congress began with a party alignment in the House of 222 Republicans and 212 Democrats, with one vacant seat. The Senate had then 49 Republicans, 48 Democrats and 3 Independents all caucusing with the Democrats, but in May 2024 one more Democrat changed party affiliation to Independent (but remained still caucusing with

¹ See Congressional Research Service, *Membership of the 117th Congress: A Profile*, Washington, D.C., December 2022. See also G.F. Ferrari, *President Biden and the Congress*, in *Id.* (Ed.), *The American Presidency after two Years of President Biden*, in *DPCE online*, 2023, Sp. Iss. 1). The Senator mentioned in the text is Krysten Sinema (D-Ari).

the Democrats).² The official data now shows a feeble diminution in the average age of both the Representatives (from 58.4 years to 57.9) and the Senators (from 64.3 years to 64.0). The average length of service was slightly lower for the Representatives (8.5 in comparison with 8.9 in the 117th Congress), and insignificantly higher for the Senators (11.2 years compared to 11.0 in the former two years). The number of House Members elected for the first time grew from 12.9% to 16.8%, while 137 House Members (31.1%, compared to 29.7% in the former two years) had no more than two years of experience in their Chamber: apparently a younger and less experienced lower House than ever before. The number of women Members has been steadily increasing, reaching the level of 130 in the House and of 25 in the Senate: a growth of 7 and a percentage of 28.65% of the total membership. Women's representation was, as usually, more numerous on the side of the Democrats: 94 and 15 (plus an Independent, caucusing with the Democrats) respectively and only 36 and 9 with the Republicans. The record number of minority groups also increased again. In the 118th Congress there were 64 African Americans, 3 more than in the previous two years, 60 in the House and 4 in the Senate, thus reaching an 11.8% of the total membership: 56 and 3 respectively caucused with Democrats, 4 and 1 with the Republicans. 62 Members were of Hispanic or Latino ancestry, with 56 in the House and 6 in the Senate, 10 more than in the 117th Congress, reaching an 11.46% of the total membership; 38 and 4 respectively belong to the Democratic party, 18 and 2 to the Republicans. 22 Members are of Asian or Pacific Islander ancestry (4% of the total), 19 of whom serve in the House (15 are Democrats and 4 Republicans) and 2 in the Senate (both caucusing with the Democrats). 5 Native Americans also serve in the 118th Congress, 4 in the House (equally divided between the two Parties) and one Republican in the Senate.

Immediately after the turning point of the November 2022 elections, Nancy Pelosi announced that she was going to leave the leadership of both the House of Representatives and the party. The caucus then elected Hakeem Jeffries (NY, born 1970) as party leader, while Steve Scalise (LA, born 1965) became majority leader and Kevin McCarthy (CA, born 1965), former majority whip (January 2011-August 2014), majority leader under Speakers Boehner and Ryan (August 2014-January 2019) and minority leader (January 2019-January 2023), was elected Speaker of the House.

The Speaker's election in the 118th Congress, however, was highly contested, requiring 15 roll calls by surname, according to the procedural rules prescribed by the 20th Amendment of the Constitution, federal law and the Rules of the House. McCarthy, a strong supporter of President Trump, had followed him, at least initially, in his claim of voter fraud in November 2020 and in the efforts to overturn the result, changing his mind after the Capitol Hill riot in January 2021, declaring that he bore the responsibility of it, although reconciling with the former President before the mid-term elections. He was officially nominated on November 15, 2022,

² Congressional Research Service, *Membership of the 118th Congress: A Profile*, Washington, D.C., July 2024.

as the official candidate by a secret ballot of the Republican Conference of 222 by a 188-31 vote. In the following fifty days he was unable to gain the necessary number of votes to be elected on the first ballot. Therefore, on the 4th of January, a group of about 20 Republican Members-elect opposed him, with eight other candidates receiving at least one vote. The Democratic candidate, Hakeem S. Jeffries, consistently received more votes than McCarthy up until the twelfth ballot. It took a fatiguing series of ballots over the following four days to gain a bare majority of 216.³ The gradual decrease of the opposition was apparently due to troublesome concessions concerning committee assignments and conference practices. The level of political conflict not only between parties but even inside the GOP is witnessed by the fact that this was the first floor contest of the Speaker in 100 years, the second after the Civil war and the 5th longest in the overall history of the House.⁴

Yet, the party turbulence did not abate. On the contrary, a few months later, the compromise reached with the Republican defectors – while attempting to form a coalition with the Democrats never was a serious possibility at that time - backfired on McCarthy. While in his inauguration speech he had made vague promises about transparency in congressional proceedings and sympathy for debate, he abstained from punishing dissenters, all of them belonging to the House Freedom Caucus (HFC), a hard-right faction of the Republican party. However, he had to give way to an amendment to the House Rules allowing each Member to introduce a motion to vacate. Such a provision had been removed in 2019, at the beginning of the 116th Congress, when the Democratic majority imposed a provision requiring the approval by one of the two party caucuses. Such negotiations about procedural rules have been harshly criticized by some authoritative scholars.⁵

At the beginning of October 2023 one of the leaders of the HFC, Matt Gaetz, filed a motion to vacate against McCarthy. The underlying motivation concerned the procedure followed by the Speaker in reaching an agreement to prevent a shutdown envisaged by Treasury Secretary Janet Yellen since January. The bill had been approved by the House with a 217-215 vote after tiresome negotiations, incorporating almost all the requests by HFC members, but in procedural terms it had not been drafted by the competent committees, but by a restricted group of leadership allies; it had

³ The absolute majority of the House, composed by 435 Members, would amount to 218, but Members who abstain or vote “present” are not included in the denominator.

⁴ See the details in M. Glassman, *The Speaker Election in the 118th Congress: A Procedural Review*, in 21(2) *The Forum* 193, 194 (2023); E. Baer, *The House Freedom Caucus, Kevin McCarthy’s Race for Speaker, and the Fate of Rules Reform in the 118th Congress*, in 21(2) *The Forum* 163 (2023); C.W. Johnson, J. V. Sullivan, T.J. Wickham, Jr., *Precedents of the United States House of Representatives, 115th Congress, 2nd Session*, Washington, D.C., 2015; Congressional Research Service, *Speakers of the House: Election, 1913-2023*, Washington, D.C., November 2023. The record case took place in 1855-56, when Nathaniel Banks was elected after 133 ballots.

⁵ See L.H. Tribe, D. Aftergut, *To Become Speaker, McCarthy Undercuts Law, Order, and Country*, in *Verdict*, 9 January, 2023.

also avoided serious committee discussion in legislative hearings and all markup processes, and had gone to the floor to be submitted to the final a vote in a very short time span. The motion was approved on the 3rd of October by a 216-210 vote, with 8 Republicans joining 208 Democrats. An incumbent House Speaker, therefore, has been revoked for the first time in American constitutional history.: The only motion to vacate formerly introduced, but rejected, dates back to 1910, when the Republican Speaker Joseph. G. Cannon had survived the motion thanks to a 192-155 vote.⁶

The story has not easily reached a conclusion, yet. In fact, the first Republican candidate to succeed McCarthy, Jim Jordan (OH, 1964), member of the HFC, did not exceed 200 votes in three ballots, while his Democratic opponent, once again H.S. Jeffries, reached 212. The natural candidate as Republican House leader, Steve Scalise, had been compelled to give up after acrimonious discussions in the Republican Conference and the majority whip, Tom Emmer (MN, 1961) withdrew after harsh criticism by Donald Trump. On October 17 Mike Johnson, (LA, 1972) was finally elected by a 220-209 vote on the fourth ballot, prevailing on Jeffries. Lawyer, member of the Baptist Church, conservative and a strong opponent of abortion and same-sex marriage, he has been able to counter Trump on the occasion of the approval of grants to Ukraine in May 2024.

The November 2022 elections had taken place in the highly polarized context that has become the usual backdrop in the last decade. The “bedrock” issues were inflation, immigration and the effects of the pandemic on the side of domestic politics and the Ukraine war on the side of foreign policy. A Republican landslide was initially foreseen. It is possible that the publication of *Dobbs v. Jackson’s Women Health Organization*⁷ at the end of June might have spurred a mobilization in favor of the Democrats above all among women and the young. The result has been yet another divided government with a high polarization rate. The Congressional events during the troubled 118th legislature have shown that the fracture inside the Republicans is quite deep and cannot be welded even by a presidential candidate of the temperament of Donald Trump.

The process of balkanization has gone too far and unifying issues are very hard to find. The constitutional problem is that party divisions evolve or degenerate into institutional arrangements designed to resolve, to conceal or to bypass them. The frequent modifications of Congressional rules, both in the Senate and in the House of Representatives, witness that the system has got into a loop, that involves the work of the Congress, its relationships with the President, and even the selection procedures of the members of the federal Judiciary, depending on the majorities necessary in the Senate to express consent and advice to presidential designations. Such a vicious circle is hard to break up. It is even difficult to suggest remedies adequate to

⁶ See D. Zecca, *The Speaker of the House Is Dead! Long Live the Speaker!*, in *DPCE on line*, 26 November 2023, at <https://www.dpceonline.it/index.php/dpceonline/americadopotrump>.

⁷ 597 U.S. 142 (2022). See R.L. Wagner, B.E. Shafer, *Electoral Dynamics for 2022: The House of Representatives in the Modern Era*, in 21(4) *The Forum* 573, 592 (2023).

trigger a readjustment, let alone a reversal, of such disastrous and obnoxious trends.

2. Executive orders and proclamations

When a divided government succeeds periods of uniform prevalence of the presidential party in both Houses, Presidents tend to leapfrog Congress, in order to achieve political aims without having to waste too many energies in fatiguing legislative proceedings that are likely to end up in very limited results. Such evolution is even clearer in times of harsh polarization, which increases the conflict level in Congress and often triggers the resort to filibustering. In fact, in the 118th Congress, the Republican minority in the Senate has deployed all the possible artifices to slow down the action of the majority.

The Presidential attitude in such conditions is often overestimated. The pertinent data help to state the correct dimension of this phenomenon. During 2023 President Biden has signed 24 executive orders, 13 in the first ten months of 2024. Such numbers can be compared with 45 and 69 in the 116th Congress, when President Trump had to confront with a Democratic majority in the House.

During 2023, the greatest part of the orders has concerned either foreign policy items, belonging to the sphere of presidential powers beyond any doubts,⁸ or the conditions of employment of federal personnel such as the Coast Guard or the members of the Reserve,⁹ or the treatment of veterans and survivors. Some more¹⁰ concern ancillary topics, such as the amendments to the manual for Courts-Martial,¹¹ always within the area of the prerogatives of the Executive.

On the contrary, a bunch of orders have definitely been issued with the aim of by-passing Congress, prevent endless discussions without concrete outputs or even compensating for Supreme Court decisions and/or State policies. This is, for instance, the case of the orders concerning

⁸ Such as EO 14114, of December 22, Additional Steps respect to the Russian Federation Harmful Activities; EO 14108, of September 20, Ensuring the People of East Palestine Are Protected Now and in the Future; EO 1409, of May 4, Imposing Sanctions on Certain Persons Destabilizing Sudan and Undermining the Goal of a Democratic Transition.

⁹ Such as EO 14106, of August 14, U.S. Coast Guard Officer Personnel Management; EO 14102, of July 13, Ordering the Selected Reserve and Certain Members of the Individual Ready Reserve of the Armed Forces to Active Duty; EO 14097, of April 27, Authority to Order the Ready Reserve of the Armed Forces to Active Duty to Address International Drug Trafficking.

¹⁰ EO 14100, of June 9, Advancing Economic Security for Military and Veteran Spouses, Military Caregivers, and Survivors.

¹¹ EO 14103, of July 28, Amendments to the Manual for Courts-Martial, United States.

contraception and family planning,¹² social services,¹³ reduction of gun violence,¹⁴ advancement of racial equality through federal help,¹⁵ promotion of environmental justice,¹⁶ vaccination of federal workers.¹⁷ In all these cases the President has made up for lack of intervention in form of legislation or has introduced measures aiming at promoting the equal availability of services that could suffer in quality or availability from judicial statements or lack of Congressional care about renewal or extension; some of these orders have manifestly tried to compensate for the hostility of a number of States towards some social services. The order concerning contraception is explicitly intended to counter possible barriers to the access to contraception created by some States after *Dobbs v. Jackson Women's Health Organization*,¹⁸ following previous measures issued in 2022.¹⁹ The order about prevention of mass shootings follows the *Bipartisan Safer Communities Act of 2022*.²⁰ The statute included a bunch of provisions extending checks for purchase under 21 years of age, clarifying selling license requirements, financing school safety and mental health programs: such norms needed to be implemented by the Executive.²¹ Finally, the order about environmental justice is a kind of visionary document that, following a similar action by President Clinton,²² strengthens the Government commitment to a meaningful involvement of all people into activities of identification, analysis and address of disproportionate and adverse human health and environmental effects and hazards of federal activities.

Some other orders have implied less criticalities, although they raised some concern both in Congress and public opinion: for example, those regarding the use of artificial intelligence,²³ investments in security

¹² EO 14101, of July 13, Strengthening Access to Affordable, High-Quality Contraception and Family Planning Services.

¹³ EO 14095, of April 18, Increasing Access to High-Quality Care and Supporting Caregivers.

¹⁴ EO 14092, of March 13, Reducing Gun Violence and Making Our Communities Safer.

¹⁵ EO 14091, of February 16, Further Advancing Racial Equality and Support for Underserved Communities through Federal Government.

¹⁶ EO 14096, of April 21, Revitalizing Our Nation's Commitment to Environmental Justice for All.

¹⁷ EO 14099, of May 9, Moving beyond COVID-19 Vaccination Requirements for Federal Workers.

¹⁸ 597 U.S. 215 (2022).

¹⁹ EO 14076 and 14079, of July and August 2022 respectively.

²⁰ Pub. L. 117-159, 136 Stat. 1313.

²¹ The whole story is told in White House Office of Gun Violence Prevention, *A Report on the Implementation of the Bipartisan Safer Communities Act*, Washington, D.C., June 2024.

²² EO 12898, of February 11, 1994, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

²³ EO 14110, of October 30, Safe, Secure and Trustworthy Development and Use of Artificial Intelligence.

technologies²⁴ and modernization of regulatory review.²⁵ Of such four orders, the first one tries to introduce a machinery of governmental guidance for responsible AI development and deployment by government agencies and of possible engagement with international partners; the second and the third provide for the creation of new rules concerning the notification of contracts relating to the sale of American technologies to foreign subjects; the last one revises the notice-and-comment procedures in the productions of rules and regulations, improves participation, transparency and data disclosure, opening the way to petitions by the public and to a duty to respond, and introduces technological changes.

The less abundant production of executive orders in the first ten months of 2024 includes initiatives in favor of women,²⁶ foreign policy measures,²⁷ limitations on data sharing with some foreign governments,²⁸ maritime law rules,²⁹ new provisions concerning COVID-19,³⁰ investigations about railways operations,³¹ the promotion of educational and economic opportunities for minority groups,³² the creation of a new body in the White House structure.³³ Apparently, the last part of Biden's mandate has yielded less occasions of clash between White House and Congress or at least fewer occasions of bypassing the Legislative to achieve important political results.

²⁴ EO 14105, of August 9, Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern and EO 14093, of March 27, Prohibition on Use by the United States Government of Commercial Spyware That Poses Risks to National Security.

²⁵ EO 14094, of April 6, Modernizing Regulatory Review.

²⁶ EO 14121, of March 27, Recognizing and Honoring Women's History and 14120, of 14120, Advancing Women's Health Research and Innovation.

²⁷ Such as EO 14115, of February 1, Sanctions on Persons Undermining Peace, Security, and Stability in the West Bank and EO 14118, of March 4, Termination of Emergency with Respect to the Situation in Zimbabwe.

²⁸ EO 14117, of February 28, Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern.

²⁹ EO 14116, of February 21, Amending Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States.

³⁰ EO 14122, of April 12, COVID-19 and Public Health Preparedness and Response. This EO provides for the transfer of some functions previously carried out by the President or by his Counselor and Coordinator of the COVID-19 Response to the Office of Pandemic Preparedness and Response Policy (OPPR), established in December 2022 under Pub. L. 117-328.

³¹ EO 14125, of July 24, Establishing an Emergency Board to Investigate a Dispute Between New Jersey Transit Rail Operations and Its Locomotive Engineers.

³² EO 14124, of July 17, White House Initiatives on Advancing Educational Equity, Excellence and Economic Opportunity Through Hispanic-Serving Institutions.

³³ EO 14123, of June 14, White House Council on Supply Chain Resilience. It is also provided a stronger coordination inside the White House between the Assistant to the President for National Security Affairs (APNSA) and the Assistant to the President for Economic Policy (APEP).

However, in the last weeks before the November elections, the President has placed a tail blow. EO 14126³⁴ looks indeed like a piece of legislation. In the perspective of spurring investments, rebuilding infrastructures, bringing back American manufacturing and catalyzing a clean air economy, the Federal Government is called to prioritize, in giving financial assistance, projects that promote family-sustaining wages, positive labor-management relations, economic security for workers, high-quality training, workers health and safety, and combat discrimination. A special task force is created inside the Executive Office of the President in order to support the pursuing of aims that have always been on the top of the presidential agenda. Perhaps hoping to prevent the judicialization of any kind of claims, the final provision states that “this order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party”. Apparently, a mix of rhetorical engagement and leapfrogging.

Twenty days later, drawing inspiration from the decline in the homicide rate following the *Bipartisan Safer Communities Act of 2022*,³⁵ President Biden has addressed the problems linked to gun violence, such as machinegun conversion devices and unserialized 3D printed firearms, often undetectable by magnetometers, by creating another task force, in this case an interagency one. Such a workgroup has to submit to the President reports including risk assessment and strategies to counter the danger concerning such devices, plans, recommendations about future measures. Furthermore, information shall be developed and published about school-based active-shooter drills. In this case, the White House shows a genuine concern, that might even be risky in this political contingency.

In global terms, anyway, Biden has issued a total of 143 executive orders before the end of July 2024, compared with 169 published by Trump from January 2017 to July 2020, and 127 in the first three years, compared with 147 released by Trump in the same timespan: during Trump’s term, however, the final number reached the amount of 220, with a steep increase in the final months. Criticism on Biden’s use of executive orders,³⁶ therefore, is exaggerated and overlooks the dimension of the phenomenon. Both Presidents succeeded in having major legislation passed during their first two years, when they enjoyed the advantages of a unified government, in the 115th and 117th Congress respectively. After the end of such fortunate periods, both had to resort to presidential powers in areas where they could use their most consolidated prerogatives and tried to circumvent the isolation produced by the loss of control of the House and by the internal fractures of their own party. The trend towards the so-called unilateral Presidency is steady, without blips.

³⁴ Of September 6, 2024.

³⁵ Pub. L. 117-159, 136 Stat. 1313.

³⁶ Such as in the words of the Republican Governor of North Dakota, Doug Burgum, in a CNN interview dated June 23, 2024, accusing the President of “circumnavigating the two other branches of government”, with special reference to student loan relief and EPA regulations, adding that “the open borders and the inflation are things that (Biden is) doing by himself alone”.

President Biden has kept on using proclamations as the other main element of the toolbox available to further policy goals outside Congress. The pace of resort to this kind of statements, however, has remarkably grown if compared with Trump's mandate, with special reference to the first three years. In fact, the White House issued 197 proclamations in 2021, 188 in 2022, 103 in 2023 and 149 in the first ten months of 2024. As usually, the greatest part of them has a merely ceremonial nature, such as commemoration of special events, holidays or anniversaries, or promotion of cultural topics. Yet, several proclamations have been used to address COVID-19 problems,³⁷ to handle immigration issues³⁸ and to manage international trade problems.³⁹ A certain amount of them has been reserved to revoke or amend similar acts by the former President.⁴⁰

3. Veto power and use of the Congressional Review Act

Despite the high rate of polarization in American politics, the cases of harsh confrontation between the Congress and the Presidency on signing bills into law or vetoing them straight away have been very rare, both in the last two years and during the whole mandate of President Biden. Confrontations have taken place in an earlier phase, when bills needed to be pushed through the Houses, and the President had to ask for the compact support of his party and to look out for some help by the members of the other. In recent months Biden has had a very few chances of gaining the bi-partisan votes necessary for the approval of important measures. Therefore, the legislative activity of Congress has slowed down enormously, while the real battlefield has been the frequent resort to the *Congressional Review Act*.⁴¹ Approved in 1996 during the second Clinton Presidency, it had been virtually ignored, with the only exception of one case in 2001, up until a sudden awakening in 2017.

During the second part of the Biden Presidency, in 2023 there have been eight cases of resolutions of disapproval by one of the Chambers, following the simplified procedure authorized by the statute and implying, at least in the Senate, the preclusion against filibustering and the requisite of a simple majority, while from January to May 2024 the cases have been three. The new rules temporarily paralyzed by either Chamber concerned very different items, but all of them had a serious impact on sensitive regulations, often at the crossroad between opposite approaches followed by the last two Administrations.

³⁷ Such as No. 10575.

³⁸ Such as No. 10773.

³⁹ Such as, lately, Proclamations 10522, 10523, 10771, 10779, 10790.

⁴⁰ Such as Nos. 10149, 10209, 10322, 10329,

⁴¹ Pub. L. 104-121, 110 Stat. 847, 868-74, 5 U.S.C. § 801. See G.F. Ferrari, *President Trump and the Congress*, in G.F. Ferrari, *The American Presidency under Trump. The First Two Years*, The Hague, 2019, 7 ff.

A good example is the first rule undergoing the CRA procedure in 2023. Since January 2021 President Biden had issued an executive⁴² order directing federal agencies to review and amend regulations not considering environment and public health or climate-related financial risks. Therefore, in October the Department of Labor issued a rule named “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, which had to be considered economically significant and subject to OIRA review”.⁴³ The rule was intended to replace a former Trump’s “Financial Factors in Selected Plan Investments” rule, which required fiduciaries under the *Employee Retirement Income Security Act of 1974* (ERISA)⁴⁴ to keep into account only financial returns and material risk factors while preparing pension plans in private industry. The new intent was to include environmental, social and corporate governance (ESG) factors in investment-related decisions. The Department opened the comment period and closed it in December 2021. A coalition of 50 Senators introduced a CRA resolution in January 2023, in order to nullify the rule, arguing that “Biden ... is putting liberal priorities over the best interest of the American people by allowing ridiculous and illegal ESG policies into employer-sponsored retirement plans” and “jeopardizes the hard-earned nest egg millions of families rely on to retire comfortably”. At the end of February the House passed a 216-204 resolution and on the 1st of March the Senate also passed a 50-46 resolution, with Democratic Senators Joe Manchin and Jon Tester joining the Republican Senators. On March 20, President Biden vetoed the resolution stating that “environmental, social, and governance factors can have a material impact on markets industries, and businesses ... retirement plan fiduciaries should be able to consider any factor that maximizes financial returns for retirees across the country”. As of consequence, the rule remained in effect since January 2023, because the veto could not be overruled. The dispute was apparently merely ideological but in fact had a potential economic impact on trillions of investments. The story, however, tends to be never ended, because a federal district judge for the Northern District of Texas had declared the new rule compatible with both ERISA and the *Administrative Procedure Act*, founding his decision of the ambiguity of the first statute and applying the traditional Chevron deference rule.⁴⁵ After the epochal overruling of Chevron and its progeny,⁴⁶ the Court of Appeals for the 5th Circuit, at the end of July 2024, has ordered a review of the case in the light of the recent Supreme Court decision.

Other clashes between Congress and President have apparently had a less political and more technical ground. Such has been the case of the rule

⁴² EO 13990, followed by EO 14030.

⁴³ Within the meaning of EO 12866 of 1993, as modified by EO 14094 of 2023, which provides for a review by the Office of Information and Regulatory Affairs (OIRA) to verify the consistency of the new rule with applicable law, President’s priorities, principles set forth in the order itself and policies or actions taken or planned by other agencies.

⁴⁴ Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. 18.

⁴⁵ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁴⁶ *Loper Bright Enterprises et al. v. Raimondo*, 603 U.S. ____ (2024).

on Revised Definition of “Waters of the United States”. In May 2023 the Supreme Court⁴⁷ has unanimously redefined the notion of federal waters as included in the *Federal Water Pollution Control Act Amendments of 1972*,⁴⁸ adhering to the former interpretation of a plurality opinion in *Rapanos v. United States*,⁴⁹ thus including in the definition only relatively permanent, standing or continuously flowing bodies of water forming streams, oceans, rivers and lakes, with the exclusion of wetlands having a continuous connection if the relevant interpretation incorporates a “significant nexus” test and resorts to a reading of “adjacent” other than those adopted by the plurality in *Rapanos*. The Department of the Army and the E.P.A. consequently prepared a revised text of the pertinent regulation of 2023⁵⁰ to conform to *Sackett*. A Senate 53-43 resolution lamented a “blatant executive overreach”, that would cripple energy and infrastructure projects with red tape. The President issued a veto on April 6, objecting that blocking the rule would increase uncertainty specially in the farm community and threaten economic growth, favoring pollution. A legal technicality has yielded a first rate economic controversy.

Another economically relevant controversy, yet not triggered by a Supreme Court decision, more or less in the same months, has concerned the “Rule Relating to Procedure Covering Suspension of Liquidations, Duties and Estimated Duties”. A previous Proclamation, numbered 10414, dated June 22, had declared a state of emergency with reference to the production of solar cells and modules, directing the Department of Commerce and the International Trade Administration⁵¹ to lift up some requisites and to soften the importation procedures of such materials from some East-Asian countries other than China for 24 months or anyway until the end of the crisis. Such measures would concur in the reduction of the inflation rate, help to limit exportation from China and in the medium run encourage the increase in domestic solar panel manufacturing capacity. Joint Resolution 39 tried to nullify the rule issued in the implementation of Proclamation 10414. Biden vetoed the resolution on May 16, alleging that his plan for promoting clean energy investments and boosting American business was effectively working, also thanks to the bridge created by the 24-month interval.

Other clashes were born on an even more openly political ground. For instance, the Congressional opposition that led to disapprove of the action of the Department of Columbia Council in banning chokeholds, restricting the use of force and deadly force and improving access to body-worn camera recordings was vetoed straight away on May 25, 2023. On June 7, President Biden similarly returned without his approval a Joint Resolution⁵² blocking the Department of Education rules concerning the help to college students to get debt relief after the pandemic. The veto message proudly claims that

⁴⁷ *Sackett v. E.P.A.*, 598 U.S. 651.

⁴⁸ Pub. L. 92-500, 33 U.S.C. 1251 et seq.

⁴⁹ 547 U.S. 715 (2006).

⁵⁰ 88 FR 3004.

⁵¹ H.J. Res. 42.

⁵² H.J. Res. 45.

his Administration has been able to support millions of working families across the country and that 26 million persons who applied for the plan were automatically deemed eligible for relief. On June 14 it was the time of a Senate resolution against the rules amending the Environmental Protection Agency heavy-duty emissions control program,⁵³ including standards test procedures and other requirements, vindicating pollution cuts, public health improvements, advancements in environmental justice.

In many more cases a political clash has come to surface through strictly technical issues. On September 26, 2023, for instance, President Biden vetoed a couple of resolutions⁵⁴ blocking rules issued by the U.S. Fish and Wildlife Service (USFWS) with reference respectively to the protection of northern long-eared bats and lesser prairie-chicken. On such occasions, technicalities seem to disclose value conflicts between opposite interpretations of environmental policy, the President being lined up on the side of wildlife conservation and ecosystem protection.

The last vetoes, between the end of 2023 and summer 2024, have concentrated on issues of some economic relevance. Maybe the approaching of the Presidential elections suggested to both President and Republicans to keep a more careful eye on the conditions of the economy, the income of the middle class, the unemployment rate and international commerce as forces able to influence such factors. Within this backdrop, Biden has vetoed first a Senate resolution disapproving of a Consumer Financial Protection Bureau's rule aiming at bringing transparency to small business lending;⁵⁵ then a Senate resolution disapproving of an action by the Federal Highway Administration (FHWA) introducing a waiver for American manufacturers producing electric vehicle chargers, lamenting serious damages to domestic employment;⁵⁶ later of a House resolution sanctioning a National Labor Relation Board rule strengthening workers' capacity of organizing and bargaining and preventing companies from evading their bargaining obligations and liability;⁵⁷ finally of another House resolution disapproving of a Securities and Exchange Commission rule imposing accounting obligations on some firms with regard to crypto-assets, vowing the intent of the Administration of ensuring a comprehensive and balanced regulatory framework for digital assets.⁵⁸

4. Signing statements

President Biden has made a quite moderate use of signing statements, in comparison with his predecessors. As of January 1, 2024, he had issued only 9 such documents in 36 months in office, while Trump had issued 77 in 48 months, Obama 37 in 96 months, and Bush 160 in an equivalent period. The

⁵³ S.J. Res. 11.

⁵⁴ S.J. Res. 9 and 24.

⁵⁵ S.J. Res. 32, vetoed on December 19, 2023.

⁵⁶ S.J. Res. 38, vetoed on January 24, 2024.

⁵⁷ H.J. res. 98, vetoed on May 3, 2024.

⁵⁸ H.J. Res. 109, vetoed on May 31, 2024.

number of acts affected was respectively 9 for Biden, 66 for Trump, 37 for Obama and 161 for Bush.⁵⁹ During the first 10 months of 2024 the current President has issued five more signing statements.

The most part of the statements have the declared aim of expressing satisfaction or pride for a certain legislative measure but at the same time of appending reservations or concerns on them, in order to bind future interpretations, underline the role of the Administration, or make reservations about the implementation of the statutes.

For instance, in December 2022 the President signed into law the *National Defense Authorization Act for Fiscal Year 2023*, celebrating the benefits provided to military personnel and their families, but lamenting the bar to the use of funds to transfer Guantánamo detainees to the custody of foreign countries limiting the discretion of the Executive and its capacity of complying with the judgement of a court; at the same time, he forewarned that the provisions imposing on President and other executive branch officials the obligations to submit reports and plans to congressional committees would be interpreted consistently with the protection from unauthorized disclosure of classified information. This same concern was expressed in March 2023 on the approval of the *Covid-19 Origin Act*, providing for data collection and dissemination about the outbreak of the pandemic, with regard to information that would harm national security. In August, Biden had to herald that the Administration would treat as non-binding the provisions of the *U.S.-Taiwan Initiative on 21st-Century First Agreement Implementation Act* that would otherwise allow Congress, its Committees and even individual Members to intrude in the negotiation of further trade agreements, invoking a possible violation of the separation of powers principle. In December, the *National Defense Authorization Act for Fiscal year 2024* was again approved with the usual remarks concerning Guantánamo detainees and the disclosure of information to Congress; furthermore, the President declined congressional interference with the exercise of the President's constitutional authority to articulate the position of the United States in international negotiations, eventually drawn from some provisions of the statute. In March 2024 Biden saluted with satisfaction the approval of the *Further Consolidated Appropriations Act, 2024*, spurring Congress to pass other provisions concerning national security and border agreements with bipartisan majorities. In May he simply congratulated Congress for the approval of the *Federal Aviation Administration Reauthorization Act*. A week later, the *Recruit and Retain Act* was signed with satisfaction for the renewed effort to make communities safer, without adding reservations or suggestions. Finally in July, at signing into law the *Promoting a Resolution to the Tibet-China Dispute Act*, without criticizing the text of the statute, the President gingerly vindicated his competence in foreign policy.

Summarizing, the use of signing statements during the Biden Presidency has swayed between mere declarations of intent, reservations about the interpretation of statutes and competence vindications.

⁵⁹ White House data, October 2024.

5. Personnel and organization

The number of federal employees has remained steady during the Trump Presidency, moving from about 2.790.000 in 2017 to 2.860.000 in 2020, and as well during the Biden Presidency, oscillating from 2.850.000 in 2021 to 2.870.000 in 2022 and to 2.950.000 in September 2023, according to the last available data.⁶⁰ Civilian federal employment constantly amounts to about 1.900.000. Since their number amounted to about 2.780.000 in 2011, apparently there has been no substantial change in the last twenty years, with a consistent decrease in comparison with the '90s.

It is therefore necessary to have a look at the management policies to find out differences between presidential approaches in recent times.

President Trump, in the final months of his mandate, had tried to remedy a problem that he had always lamented: the difficulty in firing federal employees, "whether for poor performance or intransigence".⁶¹ Executive Order No. 13957⁶² had created a new Schedule F including career employees in policy-influencing positions, composing a "key portion of the federal bureaucracy" to be made accountable to the representatives of the American people. Such persons were made liable to dismissal on certain conditions. There was criticism against the uncertainty of the extension of the measure and of its impact on federal employment as a whole. Other critiques concerned the possibility of hiring politically engaged officers outside the ordinary procedures and of stabilizing them in the posts.

The Biden Administration has obviously frozen the Schedule F plan as soon as possible. Later on it has tried to make it impossible through preventive regulations.⁶³ The Office of Personnel Management has issued a rule, known as "Upholding Civil Service Protections and Merit Systems Principles",⁶⁴ that aims at shielding civil servants from change in status and loss of protections that they have already accrued. Federal employees should thus be insulated from a revival of Schedule F. The area of policy-committed positions should also be narrowed to political appointees only. Federal employee organizations have greeted the new regulation with enthusiasm.

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⁶⁰ Statista, *U.S. Number of Government Employees 1982-2002*, last updated August 23, 2024; USA Facts, last updated September 6, 2023.

⁶¹ America First Policy Institute, Center for American Freedom, *Biden Administration Proposal Insulates the Bureaucracy from Accountability*, Washington, D.C., September 20, 2023.

⁶² Of October 21, 2020.

⁶³ See e.g. R.A. Cass, *Thoughts on Civil Service Reform: A Tale of Two Civils*, C. Boyden Gray Center, Washington, D.C., April 2024.

⁶⁴ September 18, 2023, Fed. Reg. 63862.