President Biden and the Supreme Court

by Vittoria Barsotti

Abstract: *Il Presidente Biden e la Corte Suprema* - The first part of the paper takes into account what is left of the Report of the Presidential Commission on the Supreme Court of the United States. In the second and third paragraphs, in order to have a sense of the difficult relation of President Biden with the Supreme Court, some of the most significant cases decided by the Supreme Court are discussed and it is also underlined the relevance of the cases not decided or decided with summary orders. The paper stresses as well that not only the Justices are able to interfere with the administration but also the District judges through the nationwide injunctions.

Keywords: Biden; U.S. Supreme Court; Federal Judges; Presidential Commission on the Supreme Court; Reform; Nationwide Injunction; Shadow Docket

1. What is left of the Report of the Presidential Commission on the Supreme Court of the United States?

On July 16, just a few days before the announcement of the withdrawal from the 2024 presidential election,[1] the news reported that President Biden was seriously considering proposals to establish term limits for Supreme Court Justices and an ethics code that would be enforceable under law.[2]

Even though it is very unlikely that this initiative will find its way forward, it symbolizes the result of a long story that started during President Biden's first presidential campaign when he promised the establishment of a Commission on the Supreme Court of the United States and eventually fulfilled the promise on April 9, 2021. The Commission, made of a bipartisan group of the most prominent constitutional scholars of the time, headed by Bob Bauer, who was Obama's White House counsel, and Cristina Rodriguez, a Yale Law School professor who also served on the

[1] President Biden announced his withdrawal from the Presidential 2024 campaign on July 21.

[2] See, e.g., By C. Long, Z. Miller, *Biden seriously considering proposals on Supreme Court term limits, ethics code, AP sources say*, https://apnews.com/article/election-supreme-court-biden-9c1a40b8f989bfa31a08eb3890abb1a7, July 17, 2024, The Times Herald, *Biden Seriously considering proposals on Supreme Court term limits, ethics code, AP sources say*, July 16, 2024, https://www.timesherald.com/2024/07/16/biden-seriously-considering-proposals-on-supreme-court-term-limits-ethics-code-ap-sources-say-2.

DPCE online
ISSN: 2037-6677

Obama administration, issued its heavily footnoted 288-page report on May 19, 2021.[3] The report described the intense debate around the role and function of the Supreme Court and discussed possible reforms without in the end suggesting the adoption of any of the reforms discussed.[4]

The immediate reasons for the establishment of the Commission can be found in the nomination of two of the three Justices chosen by President Trump but can also be explained by the fear of the new democratic administration aware of having to deal with one of the most conservative Supreme Court in recent American history. A fear that was entirely justified, considering that during the first period of the Biden presidency, the Supreme Court has declined to protect abortion[5] and voting rights;[6] has invalidated affirmative action,[7] environmental protection[8] and gun control;[9] and has cancelled the entire body of doctrine that kept high the wall separating church and state.[10]

The nomination process of Neil Gorsuch and Amy Coney Barrett has been politically incorrect and constitutionally dubious. In February 2016, at the outset of his last year of presidency, Obama had the opportunity of filling a vacancy following the sudden death of Antonin Scalia. The Senate, led by Republican Mitch McConnell, denied President Obama the possibility of pursuing the nomination of Merritt Garland claiming that a nomination at the end of the President's term was not possible. Justice Gorsuch was then appointed as one of President Trump's first acts. The rule applied to Obama in 2016 was not applied in 2020. Indeed, when Justice Ruth Bader Ginsburg passed away in September 2020, President Trump was able to rapidly appoint Amy Coney Barrett within a few weeks from the presidential elections.[11] Considering that President Trump had the opportunity of also

[3] More precisely: the Commission consisted of 36 experts, including lawyers, law and political science professors, former federal judges. The ideological makeup of the Commission split roughly into three groups, according to two commissioners interviewed by TIME. The first was conservatives who felt major changes to the Supreme Court would be dangerous. The second, largest group, was made up of more moderate liberals who worried about looming attacks on American democracy but argued that any radical reform to the Court could weaken its legitimacy during a time where institutions must be strengthened. A third, smaller group of progressives argued that the Court's legitimacy has already been mortally weakened and the best path forward is reform. See M. Carlisle, *Behind the Scenes of President Biden's Supreme Court Reform Commission*, in *TIME.com*, 1/7/2022.

[4] Executive Order 14023, establishing the Commission, did not call for the Commission to issue recommendations, but the report does provide a critical appraisal of arguments in the reform debate.

[5] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[6] *Rucho v. Common Cause*, 588 U.S. 684 (2019).

[7] *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

[8] *West Virginia v. EPA*, 597 U.S. 697 (2022).

[9] *N.Y. State Rifle and Pistol Association v. Bruen*, 597 U.S. 1 (2022).

[10] *Carson v. Makin*, 596 U.S. 767 (2022) and *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

[11] An exhaustive account of the Senate's refusal to consider Merritt Garland nomination is in N.S. Siegel, *The Trouble with Court Packing*, in 72(1) *Duke L. J.* 71, 133-143 (2022). For a complete story of the Amy Coney Barrett nomination see L. Greenhouse, *Justice on the Brink*, New York, 2021, xi-87. For a short account see also

nominating Brett Kavanaugh in 2018, and that the nominations were direct expression of the President political agenda,[12] the new administration's alarm was legitimate, and the Presidential Commission on the Supreme Court was a comprehensible consequence of the alarm.[13]

In considering the reform debate on the Supreme Court, the Commission held numerous public meetings, heard many oral testimonies from expert witnesses and received an incredible high number of written statements by various organizations. Informed by this material and by the broader public debate, the Commission divided its work in five parts: one devoted to providing the historical background for any possible reform, underlying that debates about how to adjust the size, role and operation of the Supreme Court are as old as the Court itself; and the other four devoted to analyzing the major categories of reform proposals highlighting the pros and cons of each solution as well as their constitutional basis and legitimacy.[14]

Looking schematically at the report, the reform proposals are grouped as follows: size and composition of the Court; Justices' tenure; powers of the Court and its role in the constitutional system; transparency and the Court's internal processes.

The first group takes into consideration one of the most controversial topics related to the Supreme Court which has been known, since F. D. Roosevelt times, as "court packing" – that is the proposal of increasing the number of Justices who sit on the Court. In the same group are considered proposals suggesting the reorganization of the membership of the Court as,

P. Passaglia, *President Trump's Appointments. A Policy of Activism*, in ***DPCE online***, 1/2021, 938-941.

[12] President Trump, in a single term, had the opportunity of nominating three Justices, the same number that President Reagan did in eight years, while Presidents Obama, G.W. Bush and Clinton appointed only two Justices in eight years. Since 1961, only President Nixon, with four appointments in six years, had a greater impact on the Supreme Court's composition. See P. Passaglia, *Back to Normalcy, Straight in Diversity: A Provisional Overview of President Biden's Appointments*, in ***DPCE online***, Special issue, *The American Presidency After Two Years of President Biden*, 2023, 23.

[13] In order to set President Trump's nominations in a broader perspective, it's worth recalling that for a long part of American history the Senate did not follow partisan lines in confirmation votes and only in recent times the votes have divided increasingly and sharply between red and blue - reflecting an ever more polarized political system which in turn reflects an ever more polarized society. Some examples may be telling: Justice Sonia Sotomayor received 68 votes (all Democrats and nine republicans voting to confirm); Justice Elena Kagan, 63 (all but one Democrat and only five Republicans voting to confirm); Justice Neil Gorsuch, 54 (all Republicans and only three Democrats voting to confirm); Justice Brett Kavanaugh, 50 (all Republicans and only one Democrat voting to confirm); Justice Amy Coney Barrett, 52 (all but one Republican and no Democrat voting to confirm); Ketanji Brown Jackson, 53 (all Democrat and three Republicans voting to confirm). See *Presidential Commission on the Supreme Court of the United States*, Final Report, 16.

[14] Antonia Baraggia offers a precise and exhaustive account of the content of the report, see A. Baraggia, *Reshaping the US Judiciary in times of polarization: Biden's Judicial nominations and Supreme Court reform*, in ***DPCE online***, Special issue, *The American Presidency After Two Years of President Biden*, 2023, 9.

for example, having cases decided by panels instead of the entire court, or by periodically rotating other federal judges onto the Supreme Court.[15]

The Constitution provides that Justices hold their office "during good behavior", meaning for life, unless they voluntary leave the Court or they are removed through an impeachment procedure. The proposals discussed in the second group would limit the length of time that Justices serve on the Court and, relatedly, would define the intervals at which Justices are appointed.[16]

Another set of proposals seek to disempower the Court in relation to the political branches, particularly to limit the Court's ability to declare legislative acts unconstitutional. This category includes modifying the Court's jurisdiction, as well as changing the Court's voting rules and standards of review it uses when considering whether to invalidate the actions of elected officials. It also includes proposals to allow Congress to override constitutional decisions of the Supreme Court following the Canadian example.[17]

The final category of potential reforms includes proposals that would address internal operations of the Court. These proposals concern: the procedures and principles the Court applies to emergency applications; judicial ethics and transparency with respect to recusals and conflicts; and making the Court's proceedings widely accessible in real time through audio or video transmission.[18] It is worth noting that, differently from other reform proposals taken into consideration, the report endorses some of these smaller reforms, such as a judicial code of ethics – which has been recently supported by President Biden.

This extremely brief summary of the reform proposals examined by the Commission's report is evidence of the completeness of the analysis and its theoretical relevance but, notwithstanding the high expectations, the only immediate result of the report was to put the Supreme Court under strict scrutiny by public opinion[19] and at the center of an intense scholarly debate.[20]

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[15] *Presidential Commission on the Supreme Court of the United States*, Final Report, 67 ff.
[16] *Presidential Commission on the Supreme Court of the United States*, Final Report, 111 ff.
[17] *Presidential Commission on the Supreme Court of the United States*, Final Report, 152 ff.
[18] *Presidential Commission on the Supreme Court of the United States*, Final Report, 202 ff.
[19] Recent polls show that approval of the Supreme Court reached a record low in 2023, see M. Brenan, *Views of Supreme Court Remain Near Record Low*, GALLUP (Sept. 29, 2023), http//news.gallup.com/poll/511820/views-supreme-court-remail-near-record-low.aspx. See also, S. Shepard, *Faith in the Supreme Court is Down. Voters Now Say They Want Changes*, in *Politico* (Sept. 30, 2023), http://www.politoco.com/news/2023/09/30/supreme-court-ethics-poll-00119236. To the increasing unpopularity of the Supreme Court corresponded an increasing popularity of Court reform, especially after the *Dobbs* decision: see, L. Saad, *Broader Support for Abortion Rights Continues Post Dobbs*, GALLUP (June 14, 2023), http://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs-.aspx .
[20] The August 17, 2023, issue of the *New York Review of Books*, presented a review by Laurence Tribe of five new books all addressing the Supreme Court and its crisis, see L.H. Tribe, *Constrain the Court – Without Crippling It*, 50. In the recent academic literature, see, e.g., D. Epps, G. Sitaraman, *The Future of Supreme Court Reform*, in 134(7) *Harvard L. Rev.* 398 (2021); N. Bowie, D. Renan, *The Separation-of-Powers*

Except for the introduction of several unsuccessful bills in Congress, the report produced no tangible political effect until July 16, 2024, when President Biden announced to the public his ideas about setting term limits for the Justices and establishing an effective and enforceable ethics code. Both the reforms were analyzed in the report and whereas the first derives primarily from Biden's discontent with Trump's appointments and with the Court's decisions rendered during his presidency, the second probably originates in the recent scandals that had affected the Justices.

If changing the size of the Supreme Court is such a dramatic measure that encounters very little support, even from those that are most critic of the present Court,[21] reforms considering the length of the Justices' term are relatively popular – especially those establishing for the Justices a non-renewable term limit.[22] As for every reform discussed, the report considers pros and cons of term limits that is worth recalling. On one side, a term limit would enable a regularized system of appointments to the Court that would preserve the value of judicial independence, make it more likely that all Justices would serve for roughly equal numbers of years, and ensure that the Court's membership would be broadly responsive to the outcome of democratic election over time. On the other side, life tenure is traditionally considered the best guarantee for judicial independence, being the "during good behavior" clause the same used in the Act of Settlement of 1701 for the Royal Courts' judges; moreover, a too immediate response to the outcome of the elections could raise the level of polarization and politicization of the Court. Furthermore, life tenure is provided for Justices by Art. III of the Constitution and there is no agreement that such a reform could be achievable without a constitutional amendment.[23] In his July public statement, President Biden did not mention how to address this issue.

Starting from the Spring of 2023, media reported that some Justices had received undisclosed gifts valued hundreds of thousand dollars from wealthy benefactors and failed to recuse themselves when those benefactors' matters went before the Court, or otherwise misused their position and influence for personal gain.[24] Following the news, Supreme Court ethics became an issue of public concern to a degree non seen from 1969 – when Justice Fortas resigned in a scandal over receiving a considerable sum of money from a Wall Street financier. These recent scandals have sparked

Counterrevolution, in 131(7) *Yale L. J.* 2020 (2022); a complete and useful account of the reform debate can be found in Developments in Court Reform, in 137(6) *Harvard L. Rev.* 1619 (2024). With specific reference to adding new Justices to the Supreme Court, see N.S. Siegel, *The Trouble with Court Packing*, cit.

[21] E.g., N.S. Siegel, *The Trouble with Court Packing*, cit. The size of the Court is not fixed in the Constitution, making it possible for Congress to expand it or contract it, though it remained at nine Justices for more the 150 years, see, C.A. Bradley, N.S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, in 105 *Geo. L. J.* 255, 267-274 (2017).

[22] For an exhaustive analysis of a reform providing term limits, see A. Chilton, D. Epps, K. Rozema, M. Sen, *Designing Supreme Court Term Limits*, in 95 *South. Cal. L. Rev.* 1 (2021).

[23] *Presidential Commission on the Supreme Court of the United States*, Final Report, 11-145.

[24] The Spring and Summer of 2023 brought particularly harsh Supreme Court ethics lapses to the public which set amid the storm Justices Thomas, Gorsuch, Alito, and Sotomayor. See *Developments in Court Reform*, cit., 1680-1683.

discussion about the adequacy of existing ethical standards and financial disclosure rules for Justices, and how to enforce them. The Court first responded to these discussions with claims that any sort of ethics reform imposed by Congress would violate constitutionally required separation of powers principles. Then, in November 2023, the Court promulgated an ethics code that nevertheless excused the Justices' problematic conduct and included no enforcement mechanism, leaving the situation largely intact.[25]

After announcing his ideas about reforming the Supreme Court on July 16, President Biden confirmed his plans in an official statement released from the White House on July 29. The statement is significantly titled "President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law" as a direct consequence of the *Trump v. United States*[26] decision and in the first place calls for no immunity in cases of crimes committed by a former president in office. The second and third sections provide some details for the Supreme Court's reform proposal:[27]

1. "Term Limits for Supreme Court Justices: Congress approved term limits for the Presidency over 75 years ago, and President Biden believes they should do the same for the Supreme Court. The United States is the only major constitutional democracy that gives lifetime seats to its high court Justices. Term limits would help ensure that the Court's membership changes with some regularity; make timing for Court nominations more predictable and less arbitrary; and reduce the chance that any single Presidency imposes undue influence for generations to come. President Biden supports a system in which the President would appoint a Justice every two years to spend eighteen years in active service on the Supreme Court.
2. Binding Code of Conduct for the Supreme Court: President Biden believes that Congress should pass binding, enforceable conduct and ethics rules that require Justices to disclose gifts, refrain from public political activity, and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest. Supreme Court Justices should not be exempt from the enforceable code of conduct that applies to every other federal judge".

Even though both reforms are highlighted as the less problematic in the report, neither has a chance to be adopted for several reasons, the most important of which are the present Republicans' majority in the House of Representatives and the close end of Biden's term. In any case, since July 29, Biden's reform proposals disappeared from the news.

[25] For a complete and detailed account see *Developments in Court Reform*, cit., 1677-1700.
[26] 603 U.S. 593 (2024). See i*nfra*, text and notes 47-49.
[27] The White House, *Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, July 29, 2024, https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/. The reforms were also announced in a speech at the Lyndon B. Johnson Library and Museum in Austin, Texas, on the same day of the statement released, in Biden's first public engagement since announcing his decision to end his 2024 presidential campaign, see K. Rogers, *Warning of "Extreme" Agenda, Biden Calls for Supreme Court Overhaul*, in *N.Y. Times*, July 29, 2024.

2. Justices and Judges

Whilst Trump nominated three Justices,[28] only after the retirement of Justice Breyer in 2022 Biden had the opportunity of nominating Ketanji Brown Jackson, the first black woman and the first former public defender to serve on the Supreme Court. Nevertheless, whilst Trump had nominated a total of 234 judges, Biden, as of October 1, 2024, has nominated a total of 213 and the number is likely to increase before the end of the term.[29]

These numbers are relevant not simply because they show a quasi-tie between Trump and Biden in the game of the federal judicial appointments but, from a more qualitative perspective, they show a significant difference in the policy of appointments. In this regard, it is fair to state that during his presidency Biden succeeded in rebalancing the composition of the federal judiciary and, more specifically, his policy has been characterized for the careful choice of appointees, both in terms of professional qualifications and diversity.[30]

The numbers are important also because federal judges have the power of interfering with the President's political agenda almost as much as the Supreme Court, although in a more subtle and less evident way. Therefore, in discussing the relation between President Biden and the Justices, it is worth looking at the practice of the courts linked to the highest federal Court.

The main instrument trough which district judges are able to throw a spanner into the policies of the executive branch is the "nationwide injunction".

In general terms, the injunction is an equitable remedy that enables the court to control a party's conduct, either by prohibiting or requiring action by the party. An injunction is thus a drastic and extraordinary remedy, and courts generally retain broad discretion to craft the injunction's scope.[31] In particular, the "nationwide injunction" is a universal remedy whereby a court enjoins a party with respect to all persons not just the parties to the litigation. When this type of injunction is directed against the federal government it completely enjoins the government from enforcing a federal statute or implementing an executive policy.

The exceptional force and the potential disruptive impact of the nationwide injunction, especially when used against the federal government, is quite evident and considerable scholarly literature has grappled with this practice. Some scholars criticize the practice as an inappropriate abuse of power;[32] others defend nationwide injunctions as a strong way to check federal agency overreach and ensure robust relief to plaintiffs.[33]

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[28] See *supra*, text and note 13.
[29] All the data relative to federal judges are taken from P. Passaglia, *An Overview of President's Biden's Appointments*, in the present collection. I am grateful to Paolo for letting me read his paper before publication.
[30] P. Passaglia, *An Overview of President's Biden's Appointments*, in the present collection.
[31] See A. Frost, *In Defense of Nationwide Injunctions*, in 93(5) *N.Y.U. L. Rev.* 1065, 1070 (2018).
[32] See, e.g., S.L. Bray, *Multiple Chancellors: reforming the Nationwide Injunction*, in 131(2) *Harv. L. Rev.* 417, 420 (2017).
[33] A. Frost, *In Defense of Nationwide Injunctions*, cit.

What is important to underline when discussing the number of judges nominated by Trump and Biden is that nationwide injunctions are more common in recent years, and they are overwhelmingly issued by judges appointed by a President from the opposite political party as the President who promulgated the statute or is in favor of the policy at issue.[34] This is especially true for judges appointed by Trump that, reassured by the ideology of the conservative Supreme Court, issue nationwide injunctions against policies meaningful for the democratic party.[35]

There are relevant cases showing how district courts can interfere with a President's policy through nationwide injunctions and a good recent example is strictly connected to one of the most dramatic decisions of the Supreme Court that occurred during Biden's Presidency: *Dobbs v. Jackson Women's Health Organization*.[36]

On November 18, 2022,[37] five months after *Dobbs* decided that abortion was not a right protected by the federal constitution and in the wake of the conservative orientation of the Supreme Court on reproductive matters, a group of antiabortion doctors and organizations brought suit in the District Court for the Northern District of Texas.[38] The plaintiffs sought a preliminary and permanent injunction ordering the Food and Drug Administration to withdraw its two-decades old approval of mifepristone, a drug commonly used in the United States for medication abortion.[39] The plaintiffs alleged that the FDA's approval process for mifepristone violated the Administrative Procedure Act. On April 7, 2023, Judge Kacsmaryk issued a nationwide injunction that suspended the FDA's drug approval.[40] Hours later, Judge Rice of the District Court for the Eastern District of Washington granted an opposite injunction that enjoined the FDA from changing its guidance and approvals in seventeen states and the District of Columbia.[41] Confusion and public outrage followed the two injunctions, and President Biden defined Judge Kacsmaryk's order "the next big step toward the national ban on abortion that Republican elected officials have vowed to make law."[42]

[34] See *Developments in Court Reform*, cit., 1701-1724.
[35] *Id.*, 1709 ff.
[36] 597 U.S. 215 (2022).
[37] All the details of the story that follows are taken from *Developments in Court Reform*, cit., 1701-1702.
[38] *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 520 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab'ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), *and cert. granted sub nom.* FDA v. All. for Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).
[39] Mifepristone was first approved by the FDA in September 2000.
[40] "A devout Christian, . . . [who] has been shaped by his deep antiabortion beliefs," Judge Kacsmaryk was appointed to the bench by President Trump. C. Kitchener, A.E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, in *Washington Post* (Feb. 25, 2023) https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision [https://perma.cc/CXM7-DTK2].
[41] *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023).
[42] Press Release, The White House, *Statement from President Joe Biden on Decision in Alliance for Hippocratic Medicine v. FDA* (Apr. 7, 2023), https://www.whitehouse.gov/briefingroom/statementsreleases/2023/04/07/statem

The example of the Texas District Court is clear evidence of the use of the nationwide injunction as a political weapon and consequently of the importance of the number of federal judges a President is able to appoint. And it is also evidence of the relation between the ideological orientation of the Supreme Court and the action of the lower federal courts: Judge Kacsmaryk's order came just a few months after *Dobbs* announced a new era in reproductive rights.

Another prominent example that shows how district courts were able to interfere with Biden's policies is Covid-19 vaccine mandates. Four judges declined to issue nationwide injunctions against the Executive Order that imposed safety protocols for federal contractors,[43] but ultimately one judge did, and that single nationwide injunction caused great confusion and damage to the President's anti Covid-19 campaign.[44]

The Supreme Court is obviously of the greatest importance when considering the relations between the executive and the judicial power, but the importance of district and circuit courts must not be underestimated. Nationwide injunction can play an increasing role in political battles and when reforms of the Supreme Court are considered, one must also take into account possible reforms of such practices as nationwide injunctions.

3. Supreme Court decisions and the Biden Presidency

3.1 Four Supreme Court Terms

With the death of Justice Ruth Bader Ginsburg and the appointment of Amy Coney Barrett, the Supreme Court started a "conservative constitutional revolution"[45] which reflected and deepened at the same time the ideological divide in the country and greatly affected the political action of President Biden. Many of the most controversial Supreme Court's decisions of the last

ent-from-president-joe-biden-on-decision-in-alliancefor-hippocratic-medicine-v-fda [https://perma.cc/DX6Y-2TB8]. Scholars also reacted to Judge Kacsmaryk nationwide injunction: Professor Bagley asked: "[Judge Kacsmaryk is] just a single judge in a small courthouse in Amarillo, Texas. Does he really have the power to dictate national policy about drug safety? If so, should he have that power?", N. Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, in *The Atlantic* (Apr. 17, 2023). https://www.theatlantic.com/ideas/archive/2023/04/mifepristone-caseproblem-federal-judiciary/673724. Dean Chemerinsky explained how "the case reveals underlying problems in the judicial system" and argued that "[l]itigants should not be able to handpick a judge who then can issue a nationwide injunction throwing the entire country into chaos", E. Chemerinsky, *Opinion, Why One Judge in Amarillo Got to Decide Whether Any American Could Use the Abortion Pill*, in *L.A. Times* (Apr. 25, 2023), https://www.latimes. com/opinion/story/2023-04-25/supreme-court-mifepristone-ruling-abortion-judges.

[43] Executive Order 14042 - Ensuring Adequate COVID Safety Protocols for Federal Contractors, September 9th, 2021.

[44] *Developments in Court Reform*, cit., 1709-1712.

[45] N. Feldman, *The Court's Conservative Constitutional Revolution*, in *The New York Review of Books*, October 5, 2023, 34. For an excellent account of the transformative nature of the Supreme Court's decisions in the first year of President Biden's presidency, see L. Greenhouse, *Justice on the Brink*, cit.

four years are representative of this conservative shift and have been thoroughly commented by constitutional scholarship.[46]

One of the last in time but probably one of the most emblematic of the ideological posture of the present Supreme Court is the decision in *Trump v. United States*.[47] In early July 2024, when the presidential campaign was entering in its hottest days, the Supreme Court ruled in favor of Trump holding that a former president is entitled to at least presumptive if not absolute immunity for all official acts. Chief Justice Roberts, writing for the majority, distinguished between three types of actions a president may take. First, there are actions performed as part of the president's core constitutional authority which derive from the Constitution and lie outside the scope of Congress or the judiciary. According to the Court's majority, these actions deserve absolute immunity. Second, there are official acts that are taken as part of his role as president, but that do not constitute core constitutional powers; these are given "presumptive" immunity. Finally, there are unofficial acts for which there is no immunity. The Justices provided minimal guidance on how to determine whether an act is official or unofficial, leaving that for lower courts to explore. Turning to the specific actions in the indictment against Trump, the Court's majority provided a conclusive ruling on only one: discussions between Trump and the Acting Attorney General at the time were "within his exclusive constitutional authority" and therefore "absolutely immune from prosecution." Concerning other actions in the indictments, the Court's majority declined to determine whether they should be considered official and remanded those questions back to the district court. As in the most important and controversial decision taken during the Biden Presidency, *Trump v. United States* was decided with a 6:3 majority. Justice Sotomayor's dissent, joined by Justices Kagan and Jackson, charged that the decision "reshapes the institution of the presidency" and also noted that "the majority's opinion is inconsistent with the text and history of the Constitution, which do not support such broad presidential immunity." According to Justice Sotomayor, the decision's result is that "the President is now a king above the law", and she concluded by noting that the majority's decision leaves her with "fear for our democracy."[48]

From a more political perspective, it is fair to state that by delaying the consideration of Trump's case for a long time, and providing a large immunity, the Court ensured that even if Trump is capable of going to trial for some of the charged crimes, he will not be tried for these crimes before the 2024 election. The only other time in recent history where the Supreme Court intruded so heavily on a presidential election was the highly criticized

[46] See, *e.g.*, *The Harvard Law Review* "Forewords" for the 2020 and 2021 terms, respectively: C.M. Rodríguez, *Regime Change*, in 135(1) *Harv. L. Rev.* 1 (2021) and K.M. Bridges, *Race in the Roberts Court*, in 136(1) *Harv. L. Rev.* 23 (2022); and the books J. Biskupic, *Nine Black Robes: Drive to the Right and Its Historic Consequences*, New York, 2023; M. Waldman, *The Supermajority: How the Supreme Court Divided America*, New York, 2023.

[47] 603 U.S. 593 (2024).

[48] 603 U.S. 593 (2024).

decision in *Bush v. Gore*[49] that, stopping the recounting of votes in some Florida's counties, confirmed the victory of G.W. Bush.

Many other cases, decided with a 6:3 majority, are evidence of the new conservative era entered by the Supreme Court and some of these cases have been already mentioned in this paper.[50]

In *Dobbs v. Jackson* the majority stated that the federal constitution does not recognize a right to abortion, expressly and harshly overruling five decades of case law that gave women freedom of choice over their bodies.[51] In *New York State Rifle and Pistol Association v. Bruen*[52] the majority invalidated a 1911 New York State law and held that the ability to carry a gun in public is a constitutional right under the II Amendment. In *West Virginia v. Environmental Protection Agency* the majority ruled that the regulation of existing power plants in Section 7411(d) of the Clean Air Act fell under the "major question doctrine" and within that, Congress did not grant the EPA authority to regulate emissions from existing plants based on generation shifting mechanisms.[53]

As the First Amendment is concerned, *Carson v. Makin*[54] held unconstitutional a Maine's statute not permitting the use of vouchers to pay religious-based private school because the limitation violated the Free Exercise Clause. *Carson* should be considered together with *Kennedy v. Bremerton School District*,[55] a case involving a high school football coach in a public school in Washington State who used to pray on the field immediately after each game together with the players and others. The school asked the coach to pray elsewhere or at a later time, but the coach continued the practice, and his contract eventually was not renewed. The Supreme Court

[49] 531 U.S. 98 (2000). See V. Barsotti, *Bush v. Gore e il mancato esercizio delle virtù passive*, in *Foro italiano*, 124, IV, 2001, 201 ff.

[50] See *supra* notes 5-10.

[51] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) overruled the two landmark precedents *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[52] *N.Y. State Rifle and Pistol Association v. Bruen*, 597 U.S. 1 (2022).

[53] *West Virginia v. EPA*, 597 U.S. 697 (2022). The "major question" doctrine provides that when a government agency seeks to decide an issue of "vast economic or political significance", a vague or general delegation of authority from Congress is not enough. Rather, the agency must have clear statutory authorization to decide the issue. *Dobbs*, *Bruen* and *West Virginia v. EPA* are discussed by V. Barsotti, *Not only Dobbs v. Jackson, Abortion Laws and Private Enforcements*, in *DPCE online*, Special issue, *The American Presidency After Two Years of President Biden*, 2023, 24 ff.

[54] *Carson v. Makin*, 596 U.S. 767 (2022). It is worth recalling Justice Breyer dissenting opinion where he stated that "never previously held what the Court holds today, namely that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public-school education." Further concerns were raised by Justice Sotomayor, who wrote a separate dissenting opinion, noting that "Today the court leads us to a place where separation of church and state becomes a constitutional violation." 596 U.S. 767 (2022).

[55] *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). It is worth noting that Justice Sotomayor held in her dissenting opinion that the majority's decision rejects "longstanding concerns" surrounding government endorsement of religion," and that "Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment." 597 U.S. 507 (2022).

held that the Establishment Clause does not allow a public school to take a hostile view of religion under the Free Speech and Free Exercise Clauses and consequently held that the school acted improperly in not renewing the coach's contract. The decision overruled landmark cases such as *Lemon v. Kurtzman*[56] that provided a strict test to implement the separation between church and state and both decisions taken together show the new course of the Supreme Court in religious matters.[57]

One final decision is worth considering as telling of the conservative trend of the Supreme Court: *Students for Fair Admissions v. Harvard*.[58] In this case the Court's majority held that race-based affirmative action programs in college admission violates the Equal Protection Clause of the XIV Amendment and overruled longstanding precedents recognizing the constitutional validity of affirmative action in college admission provided that race had a limited role in decisions.[59] The consequence: one year after the decision, news reported that the enrollment in colleges of students of minority groups, especially black students, is dropping.[60]

There are certainly other significant cases decided by the Supreme Court in the last four years that had some impact on the Biden administration, but the cases mentioned can be considered examples of how the Supreme Court expresses its conservative ideology through the overruling of landmark precedents and are among the most revealing of the great distance that divides the executive branch and the least dangerous one and, more generally, of the profound gap that divides the Supreme Court and great part of the country.

3.2 The case of the student loan forgiveness plan

In 2020, during his first presidential campaign and to answer to an unprecedented crisis that saw young persons overwhelmed by money obligations, Biden promised to cancel up to 10,000 dollars of federal student loan debt per borrower. After winning the election, President Biden fulfilled his promise and announced a plan that, through executive action, would have had forgiven up to 10,000 dollars for students with an annual income of less that 125,000 dollars. The plan would have had an extraordinary cost favoring more that forty millions of young Americans.[61]

The plan immediately divided the country: blue states in favor and red states against. Indeed, shortly after the announcement, Nebraska and other five states challenged the forgiveness program, arguing that it violated the

[56] 403 U.S. 602 (1971),

[57] Both cases are commented by S. Mancini, *Religious Freedom and Minority Rights Under the Biden Administration*, in *DPCE online*, Special issue, *The American Presidency After Two Years of President Biden*, 2023, 244. See also L. Greenhouse, *Justice on the Brink*, cit., 202-224.

[58] *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 600 U.S. (2023).

[59] The precedents overruled are the landmark cases *Regents of the University of California v. Bakke* 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[60] See, A. Hartocollis, *Harvard's Black Student Enrollment Dips After Affirmative Action Ends*, in *New York Times*, Sep. 11, 2024.

[61] The cost was estimated in $430 billion.

separation of power principle and the Administrative Procedure Act. The District Court dismissed the case, finding that the states lacked standing to sue, but the U.S. Court of Appeals for the Eighth Circuit enjoined the forgiveness program pending the appeal.

The case reached the Supreme Court that surprisingly recognized standing and held in *Biden v. Nebraska*[62] that the Secretary of Education did not had authority under the "Higher Education Relief Opportunities for Students Act" of 2003 to establish a student loan forgiveness program cancelling roughly 430 billion dollars in debt and affecting nearly all borrowers. The Court split again 6 to 3 and the majority opinion, in order to reject the constitutional validity of the plan, made express reference, as in *West Virginia v. EPA*,[63] to the "major question doctrine" – that is, when deciding an issue of "vast economic or political significance", a government agency must have clear statutory authorization to decide the issue and a vague or general delegation of authority from Congress (such as that coming from "Higher Education Relief Opportunities for Students Act" of 2003) is not enough.

The same day of the decision, a real *vulnus* to the administration, President Biden vowed to find other ways to provide debt relief. Following the commitment, a new and more nuanced plan was adopted based not on the "Higher Education Relief Opportunities for Students Act", but on a 1993 statute that allowed the Secretary of Education to fashion "income-contingent repayment" plans based on the borrower's annual earning.[64]

Again, the plan was contrasted by the Republican-led states and a new case reached the Supreme Court that, on August 24, 2024, enacted a temporary order to pause the plan while the inferior courts were considering the merits of the case. The case could soon make its way back to the Justices.

In the meantime, *Biden v. Nebraska* and its follow up, can be considered another excellent example of how the Supreme Court (and judges in the red states) have been contrasting Biden's political agenda.

3.3 The Shadow docket

President Biden's political agenda is contrasted not only through Supreme Court's opinions but also through the cases the Justices do not decide or decide summarily.

As it is well known, the Supreme Court decides with full and reasoned opinion only a very small number of cases: less than 1% of the cases that reach it every year.[65] The procedural instrument used for the selection

[62] 600 U.S 477 (2023).
[63] *West Virginia v. EPA*, 597 U.S. 697 (2022). See *supra*, note 53.
[64] For a complete and interesting account of the problem of the student debt in recent U.S. history see L. Serafinelli, *How Greedy They Are: Un discorso sui costi della higher education negli Stati Uniti dal New Deal ai giorni nostri*, in *Rivista di Diritti comparati*, 2/2024, 129. With specific reference to *Biden v. Nebraska*, see *id*., 200-207.
[65] In the past decade, approximately 7,000-8,000 new cases have been filed in the Supreme Court each year. Plenary review is granted in about 60/70 of those cases, and the Court typically disposes of about 100 or more cases summarily. The Supreme Court decided with plenary review 77 cases in the 2021 term, 47 cases in the 2022 term, and

of cases is primarily the *writ of certiorari*, but the Supreme Court is able to tailor its docket also through a strategic use of the doctrines of justiciability – that is, standing, mootness, ripeness and political question. Indeed, the Justices have complete discretion over their docket and an unchecked ability to decide what to decide and when.[66]

Probably not equally known is that the Justices have also the possibility of deciding cases summarily and the most frequently used summary decision is identified as *per curiam*. A *per curiam* is a very brief and unsigned order and only in extremely rare occasions there are dissents.

Cases not decided (generally "certiorari denials") and cases decided summarily (generally *per curiam* orders) form a parallel docket not less important than the official one which lists the cases that are chosen for plenary review, with oral argument by attorneys and fully reasoned and signed opinion by the Court. The parallel docket has been defined by some scholars "shadow docket" and represents a great part of the Court's work.[67]

Because the Supreme Court exercises its policymaking function and defines its role within the institutional system both deciding the merits of the cases and issuing summary orders, to have a more complete picture of the relations between the Court and President Biden, the shadow docket needs to be taken into consideration.

In the first place, it must be underlined that unsigned and unexplained orders have occasionally been used by the Supreme Court for a long time. Nevertheless, the raise in number of the orders can be dated to early 2017 and it accelerated consistently after the confirmation of Justice Amy Coney Barrett.[68]

Two examples, dealing once again with abortion and Covid-19 vaccines, can show how summary decisions have interfered with President Biden's policy.

In a paper I published in 2023, in order to have a complete understanding of *Dobbs v. Jackson*[69] and to place it within the complex net of litigation that took stage both at the federal and state level, considerable importance was given to *Whole Woman's v. Jackson*,[70] decided a few months before *Dobbs*.[71] More precisely, the case was decided a first time with a summary order and eventually with a full opinion.[72] At issue in *Whole*

58 cases in the 2023 term. See https://www.statista.com/statistics/1326129/number-supreme-court-cases-decided-term-us/.

[66] The seminal work on the topic is H.W. Perry, *Deciding to Decide. Agenda Setting in the Supreme Court*, Cambridge, M., 1991. See also, V. Barsotti, *L'arte di tacere. Strumenti e tecniche di non decisione della Corte Suprema degli Stati Uniti*, Torino, 1999.

[67] It was William Baude, who first used the term "shadow docket" to describe everything other than the Supreme Court's merits docket: W. Baude, *Foreword: The Supreme Court's Shadow Docket*, in 9 *N. Y. U. J. of Law and Liberty* 1 (2015). More recently, see the excellent book by S. Vladeck, *The Shadow Docket. How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*, New York, 2023.

[68] S. Vladeck, *The Shadow Docket*, cit., 17 ff.

[69] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[70] *Whole Woman's v. Jackson* 595 U.S. 30 (2021).

[71] See V. Barsotti, *Not only Dobbs v. Jackson, Abortion Laws and Private enforcements*, cit.

[72] *Whole Woman's v. Jackson* 595 U.S. 30 (2021). The procedural history of the case is extremely complicated. The citation in this note is to the fully reasoned opinion. The

Woman's was a Texas statute that prohibited abortion after a fetal heartbeat is detected restricting abortion very early in pregnancy, such as at six weeks.[73] The same five Justices who would later form the majority in *Dobbs* refused to block Texas's ban on abortions after the sixth week of pregnancy, a point at which women often don't know they are pregnant. Even though the Texas law, known as SB8, was clearly inconsistent with *Roe v. Wade* and posed other relevant constitutional questions,[74] five Justices allowed the law to go into effect and they did so with a brief and unsigned order. Unlike *Dobbs*, where the majority's opinion occupied 108 pages of the Supreme Court reports, the first cryptic decision in *Whole Woman's*, instead, was a single paragraph order offering only a technical reason for the Court's refusal to block SB8.[75] But for the people of Texas, since that brief order, abortion was impossible to obtain. The Court's refusal to stop Texas's law from going into effect was a premonition of things to come.

The same five Justices[76] have used similar unsigned orders to block numerous state Covid-19 restrictions over the previous year. These orders - of which *Alabama Association of Realtors v. United States Department of Health and Human Service*[77] is a good example - had decided new constitutional protections for religious worship altering established precedents that had erected a high wall between church and state[78] - and the new protections are part of the strategy confirmed with signed and fully reasoned opinions such as *Carson v. Makin*[79] and *Kennedy v. Bremerton School District*.[80]

In the end: "The shadow docket has begun to look less like a place of emergency cases than one where the Republican-appointed Justices can implement their preferred policies"[81] and can heavily interfere with presidential action.

correct citation for the brief order that was issued before the full opinion is: 141 S. Ct. 1494, 2495 (2021), mem.

[73] Not only the Texas statute prohibits abortion after the sixth week of pregnancy, in contrast with *Roe* and Casey, but does not allow state officials to bring criminal prosecutions or civil actions to enforce instead directing enforcement through "private civil actions". The unprecedented way in which the Texas statute is framed can be dangerous for reasons going far beyond the abortion issue. In the first place, the Texas statute creates a bounty-hunting scheme that encourages the public to bring harassing lawsuits against anyone who they believe has violated the ban. Secondly, the statute, in excluding from enforcement state officials, seems to be designed as a maneuver to avoid federal court review. The Supreme Court had the occasion of evaluating the constitutionality of statutes framed with the scope of evading judicial review, but *Whole Woman's Health v. Jackson* did not decide the issue. See V. Barsotti, *Not only Dobbs v. Jackson, Abortion Laws and Private Enforcements*, cit.

[74] See, *supra* note 73.

[75] 141 S. Ct. 1494, 2495 (2021), mem. The order can also be read in S. Vladeck, *The Shadow Docket*, cit., 235.

[76] Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

[77] 594 U.S. 758 (2021), *per curiam*.

[78] For details of Supreme Court's orders relating to Covid-19, see S. Vladeck, *The Shadow Docket*, cit., 163-227.

[79] 596 U.S. 767 (2022). See *supra*, text and note 54.

[80] 597 U.S. 507 (2022). See *supra*, text and note 55.

[81] Adam Serwer, writing in *The Atlantic*, as reported in S. Vladeck, *The Shadow Docket*, cit., 239.

DPCE online
ISSN: 2037-6677

More generally: in order to have a sense of the difficult relation of President Biden with the Supreme Court, the picture must comprehend the cases decided, the ones not decided or decided with summary orders, and the nationwide injunctions that district judges are able to issue.

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