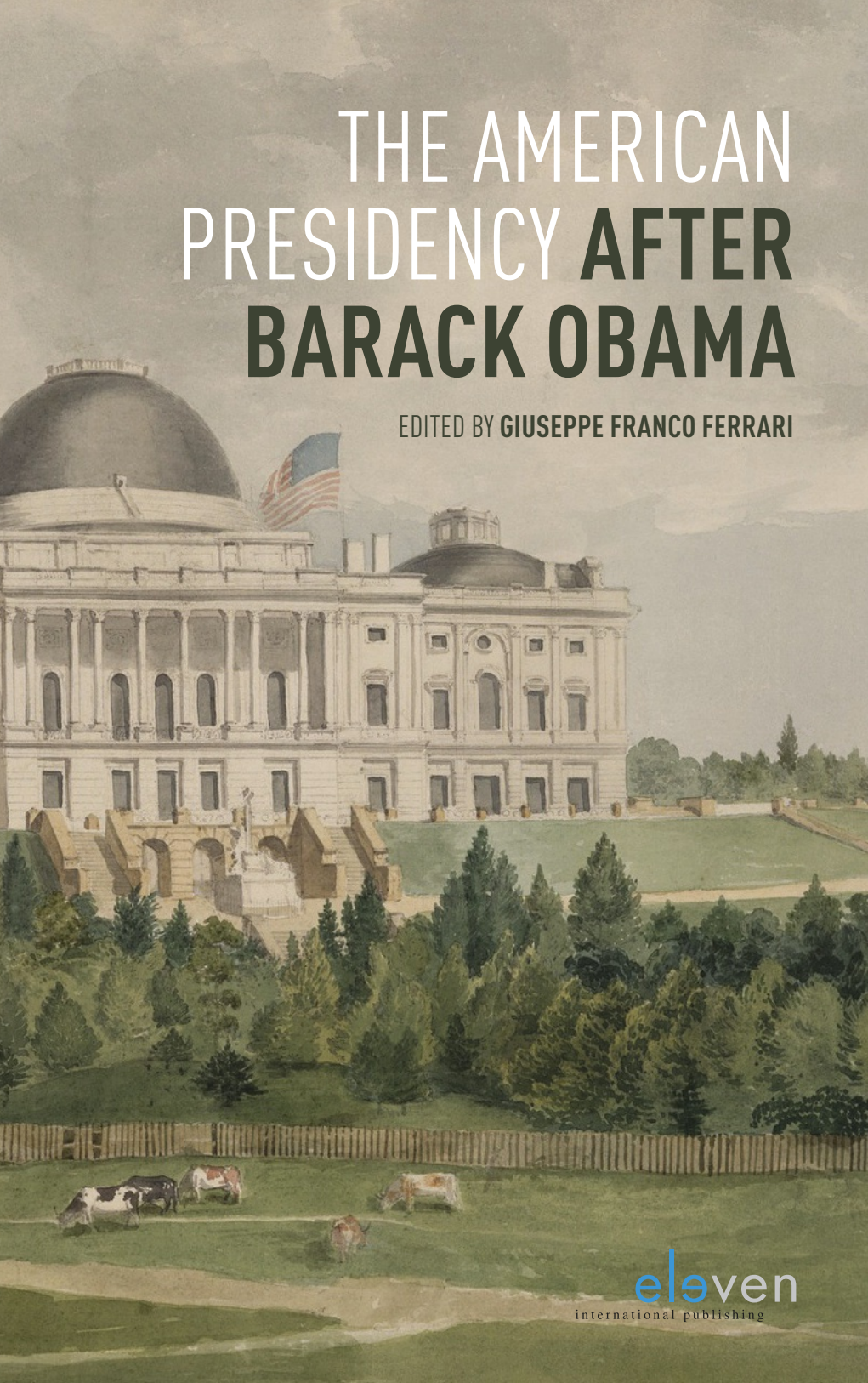
THE AMERICAN PRESIDENCY **AFTER BARACK OBAMA**

EDITED BY **GIUSEPPE FRANCO FERRARI**



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At the end of October 2016, Italy's Public Comparative and European Law Association (DPCE) in collaboration with the Consulate General of United States of America organised a congress in Milan entitled 'The American Presidency after Barack Obama' about the evolution of the presidential role during Barack Obama's eight years in office. The seminars allowed Italian scholars to focus on the different profiles of the Presidency as a governmental institution.

This volume is the outcome of that congress.

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Introduction

The Presidency has been the most important institution in the American form of government for almost two and a half centuries, and probably the secret of its efficiency is its capacity to adapt to historical situations.

There are markedly different definitions of the different stages of the evolution of the American Presidency and rather diverse assessments of the Presidents as individuals have been made.

Henry Lee defined George Washington as "first in peace, first at war, and first in the hearts of his compatriots." About 40 years later, Alexis de Tocqueville stated that the Presidency of Andrew Jackson was the result of a growing plebiscitary mechanism, fed by conformism and majority dictatorship that would have prevented the selection of the best. At the end of the nineteenth century, historians and political scientists, such as Lord Bryce and Ostrogorsky, who commented on the Presidencies of Rutherford B. Hayes, James A. Garfield, Chester Arthur, and Stephen Grover Cleveland, stated that the caucus system was unable to produce anything better, urging a change in order to improve the quality of the political class in the United States. Max Weber, in his pages about Woodrow Wilson, perceived signs of a more efficient selection, though in a context of plebiscitary personalization. Franklin D. Roosevelt seemed to his contemporaries able to cumulate unprecedented powers, also thanks to the economic crisis and the world conflict. The best political scientists of their times deemed John F. Kennedy, and even more Lyndon B. Johnson, dealing with overly powerful responsibilities and growing administrative apparatuses described as executive government: Johnson even gave up the second mandate that he was likely to easily get. Richard M. Nixon badly damaged the image of the institution itself, and the price was paid by Gerald Ford and

even Jimmy Carter. Reagan personified the rhetorical Presidency formula, focusing on the quest for consensus in an increasingly segmented political environment. The story continues up till the Presidency of Barack Hussein Obama, which is the subject of this book.

On the other side, there has always been an interplay between the evolution of the form of government and the figure and character of the President. It is well known that the Founding Fathers, in their quest for a political theory to be translated in terms of a constitution, tried to build up a form of government where separation of powers and checks and balances went hand in hand: both the structure of every constitutional organ and the whole of their relationships were designed to stimulate a cooperative approach and to prevent the prevailing of factions. The "separated institutions sharing powers"-formula presupposed an accurate functional definition of competences and a balanced organization of Presidency, Senate, and House of Representatives, rooted in different constituencies or interest communities. In output terms, it was conceived to govern through a moderate political system, far from harsh conflicts and leaning toward an accurately fair political representation.

The unrestrainable democratization process that has continuously permeated both the American Constitution and American politics has radically changed the form of government. The powerful and cyclical influences of the Jacksonian grassroots democracy, the Civil War, the progressive movement, the New Deal have yielded constitutional revisions, waves of legislation, powerful evolutions in the case law, whose cumulative effect has been an enormous simplification of the form of government.

Universalization of suffrage, equalization of vote, homogenization of the constituencies of the constitutional bodies, and extensive application of the one-turn plurality system have made political representation limitlessly immediate, pushing political conflict

up to the top of the form of government. Checks and balances have been softened, if not swept away; the cooperative nature of the separation of powers has given way to a conflictual competition between constitutional subjects; all the functions wisely distributed by the Founding Fathers have become battlegrounds. The "separated institutions competing for power"-formula fits the present state of the constitutional framework much better than any other. Both Congress and the Presidency have been increasingly strengthened in quantitative, financial, and functional terms, paving the way to a kind of "separate government" where President, Senate, and House of Representatives contend prerogatives to each other. The Presidency has become dominant, moving away from the original Madisonian design.

The Presidency of Barack Obama must be situated in this context, with which it is fully consistent. The usual tensions between President and Congress resemble the shape assumed in former constitutional experiences. It will probably take some years before a complete and mature assessment can be made. However, an at least partial evaluation could be anticipated.

At the end of October of 2016, the Italian Association of Public Comparative and European Law (DPCE), with the assistance of the Consulate General of the United States of America in Milan, organized a seminar entitled "The American Presidency after Barack Obama" at Bocconi University about the evolution of the presidential role during the eight years of the Obama Presidency. This book collects the proceedings of this seminar, revised and integrated by the authors. All of us hope to be able to have future chances of organizing similar events during the Trump Presidency.

Giuseppe Franco Ferrari
Milan, December 2017

1 The Relationship between Presidency and Congress

*Giuseppe Franco Ferrari**

1.1 The Political Structure of Congress during the Obama Presidency

The evolution of the Presidency as a governmental institution obviously depends on its relationship with Congress, which is a function of its political composition.[1] In the case of the Obama Presidency, the Administration enjoyed no less than seven years of Democratic majority in the Senate and only three in the House of Representatives.

In November 2008, on Election Day, the Senate was evenly divided between 49 Republicans and 49 Democrats, even though the two independent members (Joseph Lieberman of Connecticut and Bernard Sanders of Vermont) caucused with the Democrats. The House had a majority of 233 Democrats, which increased to 257, and 178 Republicans, respectively, in the 111th Congress (2009-2011). Simultaneously, the Democrats in the Senate also reached a comfortable majority of 57 to 41, with two independents (Senators Lieberman and Sanders) again voting with the

* Bocconi University, Milan.

1 This obvious remark mounts back to the classical scholarship about the American Presidency, such as C. Rossiter, *The American Presidency*, New York, NY, 1956, ch. 8, R.E. Neustadt, *Presidential Power and the Modern Presidents*, New York, NY, rev ed., 1990, *e.g.* 45, 174, 194 of the paperback edition, 1991; M. Nelson, *The President and the Political System*, New York, NY, 10th ed., 2015, 1st ed. 1984; S.M. Milkis and M. Nelson, *The American Presidency. Origins and Development, 1776-2014*, Washington, DC, 7th ed., 2015.

Democrats. One Senator (Arlen Specter, Pa) was elected as a Republican candidate, but switched to the Democratic Party in 2009.

In 2011, the House passed to the Republicans with ample majorities that proved impossible to be overthrown (242 to 193 in the 112th Congress, 234 to 201 in the 113th, 247 to 188 in the 114th Congress). In the Senate, a Democratic majority was sustained through the years during the 112th Congress (51 to 47 plus the two independent senators) and the 113th (53 to 45 with the same two independent members). The switch to a Republican majority (54 to 44 with two independents) came in November 2015, making the Administration much weaker and forcing the President into difficult negotiations to which he was not accustomed. More generally, the political framework changed completely and the events necessarily altered the way the Presidency had to confront the most important issues.

Therefore, an obvious distinction must be made between the first three and the last 5 years of the Presidency. As long as he could count on a large and ideologically consistent congressional majority, the largest since the times of Lyndon B. Johnson, Obama was able to push very important measures, such as the American Recovery and Reinvestment Act (ARRA)[2] through both Houses. It allowed for new heavy finance rules[3] less than one month after taking office and a huge extension of health care coverage, which was quickly renamed after him.[4] Political scientists have noted that during his first years in office he was able to transform the passionate rhetoric of the initial joint address to Congress and the three State of the Union addresses into pieces of legislation at a median rate of 47.6%. That is the highest capacity of persuading Congress to fulfill

2 Pub. L. 111-5, 123 Stat. 115.
3 Dodd-Frank reform, Pub. L. 1111-203, 124 Stat. 1376.
4 Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, so-called Obamacare.

presidential requests since the two Reagan mandates.[5] During the same period, he had a rate of success on roll call votes in Congress higher than 90%, which is the highest since Franklin Roosevelt's Presidency.[6] Occasional Republican filibustering was cut short by the frequent recourse to cloture motions.[7]

During the first 3 years, the President's language was open to cooperation with the minority, he welcomed and even urged a serious and constructive opposition and repeatedly declared his desire to move forward together with the minority. The landslide victory of November 2008 and the consequent strength of the party and of its congressional leadership, the continuing financial crisis, the state of the national economy, and the high level of expectations in the public were some of the main factors influencing presidential actions.

When the Democratic Party lost the majority in the lower chamber, which it had regained in 2007 after more than a decade and which it had managed to strengthen in 2009, the President's language changed radically, in accordance with the increase in frustration following the difficult translation of his political agenda into legislation. The dramatic increase in polarization of congressional activities along partisan lines and the harsh diminution of statutes enacted[8] led him to complain about the inefficiency of

5 D.R. Hoffman and A.D. Howard, "Obama in Words and Deeds", *Social Science Quarterly*, Vol. 93, 1316 (2012).

6 A. Rudalevige, "A Majority is the Best Repartee: Barack Obama and Congress, 2009-2012", *Social Science Quarterly*, Vol. 93, 1272, 1277 (2012).

7 Not less than 136 motions in 2 years, and 91 of them were actually voted, according to Rudalevige, "A Majority is the Best Repartee", cit., 1282. Yet the figure was already high (112 in 2007-2008) in the last 2 years of the Bush Administration, when the Democratic Party had already gained the majority, in comparison with the previous years with the Republicans in control of the Senate (54 in 2005-2006). *See also* F.E. Lee, *Beyond Ideology. Politics, Principles, and Partisanship in the U.S. Senate*, Chicago, IL, 2009.

8 *See infra*, par. 1.4.

Congress. He promoted a "We can't wait"-agenda,[9] which was to be implemented by the Executive without and even against Congress, in order to avoid a standstill yielded by the hostility between the two branches. This policy led to progressively expansive interpretations of presidential powers and to legal controversies about the construction of their real scope. The result was a highly ideological Congress, which may have contributed to the nomination of Donald J. Trump as a candidate for the 2016 presidential elections. However, a long-term study demonstrated[10] that an active involvement of the Presidency in important policy issues could contribute to an increasing polarization in Congress.

The dividing line between the two phases was represented by the budget crisis of the summer of 2011.

1.2 The Exercise of Veto Power

Between January 2009 and December 2015, the presidential veto power was exercised in 12 cases by President Obama, of which two occurred during the 111th Congress, none in the 112th and 113th, 10 in the 114th. This happened when the tension between the two branches had become harsher and the proximity of the presidential campaign made conciliation or mediation much more difficult. It is also interesting to notice that in no case the vetoes were overridden, at least until September 2016. In 2016, the veto rate increased substantially: President Obama vetoed a transportation appropriations bill over low funding, cuts to former Presidents' office allowances, efforts to repeal regulations of financial advisers, and above all, a bill that would have curtailed the Obamacare legislation by cutting the pertinent funds. Only the veto on the bill

9 Published as such on the White House website.
10 Lee, *Beyond Ideology*.

forbidding American citizens to sue Saudi Arabian subjects for damages from terrorism was overridden almost unanimously on September 23, 2016.

In comparison, President G. W. Bush exercised a veto in 12 cases, 11 of which during the 110th Congress, when the Republicans had lost the majority in both Houses. Four of them were overridden.[11]

During the Obama years, the sectors that generated the toughest conflicts between Congress and President were the appropriations for fiscal years 2010 and 2015, gas emissions, electricity, waters and environmental themes in general.

Apparently, the conflicts between the two branches are usually transferred onto other battle fields, and do not require the formalizing of regular vetoes. Thus, item and pocket vetoes practically disappeared, with the eventual exception of the last 2 years of the second presidential term, when the President cannot enjoy the help of a congressional majority or, even worse, when a strong ideological conflict adds to the normal difficulties of the divided government.

1.3 The Use of Signing Statements

The story of the rise and increase of signing statements, even recently, has been authoritatively told.[12] The practice as such

11 In November 2007, with the Water Resources Development Act, which became Pub. L. 110-114; in May 2008, with the U.S. Farm Bill, which became Pub. L. 110-234; in June, with the same Bill reenacted due technical errors, which became Pub. L. 110-246, and finally in July with the Medicare Improvements for Patients and Providers Act, which became Pub. L. 110-275.

12 *See* C.A. Bradley and E. Posner, "Presidential Signing Statements and Executive Power", *Constitutional Commentary*, Vol. 23, 307 (2006); Am. Bar Ass'n, Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Washington, DC, 2006; R.A. Cass and P.L. Strauss, "The Presidential Signing Statements Controversy", *William & Mary Bill of*

goes back to the beginning of the nineteenth century, but its use increased vastly since the Nixon Presidency, after which it was used 30 to 50 times per year. It can be defined as an official statement that the President adds to the bill's text when signing. This preempts interpretations in order to protect presidential prerogatives from encroaching dispositions, but also raises constitutionality doubts not driving to a veto, announcing implementation criteria or enforcement intentions. It has no capacity of modifying the legislative text and is not a formal part of the legislative process. It has no binding effect on judicial interpretation, though it might have a weight in times of originalism. It has become a more or less aggressive way of influencing the interbranch balance using an indeterminate source of power. Such conclusion is especially true since Congress has increasingly adopted omnibus legislation, on which the power of veto cannot be easily applied. From this viewpoint, signing statements worked as a proxy for vetoes, mostly since the Supreme Court has declared the item veto unconstitutional.[13] Late President George W. Bush was accused of massive use of signing statements, formulating twisted meaning of the statutes, reserving the right to deny enforcement to various provisions, and doing so without adequate constitutional motivations while expanding the executive power improperly.

Since the 2007 campaign, Obama had been complaining about the excessive and overarching use of signing statements, promising to cut them short in number and to restrain them to a more restricted perimeter. In his first 3 years of office, he adopted only

Rights Journal, Vol. 16, 11 (2007); T.J. Halstead, Congressional Research Service, RL33667, Presidential Signing Statements: Constitutional and Institutional Implications, Washington, DC, 2007; up till the first Obama Presidency, Developments in the Law. "Presidential Authority", *Harvard Law Review*, Vol. 125, 2057 (2012).

13 Clinton *v.* City of New York, 524 U.S. 417 (1998).

18 signing statements, in comparison to 125 of the 8 years of the second Bush administration. Their number has not significantly increased after 2011.[14] Their quality is different, in that he avoided vague generalities about the executive power and its preservation, raised specific doubts about the constitutionality of some individual provisions, and announced the intention to work with Congress to repeal or modify them or to mitigate their effects. Living up to electoral principles is never easy, but President Obama tried to do his best consistently, considering the fallouts of the divided government.[15]

1.4 Bills Related to the Presidency

There is a wide consensus among scholars who look into the evolution of government procedures[16] that in recent years the White House has adopted an expansive role in the classical articulation of the legislative process. It promoted the elaboration of draft legislation, it organized meetings during the draft phase, issuing invitations to authoritative members of both Houses and actively intervened through legal aides in the formulation of texts. Apparently, this process has nothing to do with the divided government, since it has been demonstratively used in the preparation of both the Dodd-Frank reform of finance regulation and the health reform, that is in the first years of the Obama Administration. Allegedly,

14 They have been 1 in 2012, 5 in 2013, 5 in 2014, I in 2015, 2 in 2016.

15 A quite different opinion about the use of signing statements respectively by Presidents G.W. Bush and Obama in T. Cruz, "The Obama Administration's Unprecedented Lawlessness", *Harvard Journal of Law & Public Policy*, Vol. 38, 63, 94-96 (201*).

16 *See, e.g.*, A.R. Gluck, A.J. O'Connell, and R. Po, "Unorthodox Lawmaking, Unorthodox Rulemaking", *Columbia Law Review*, vol. 115, 1789, 1820 (2015). The classical reading on this subject is W.E. Binkley, "The President as Chief Legislator", *Annals of the American Academy of Political and Social Science*, Vol. 307, 92 (1956).

in his first years, the President used to formulate general principles, leaving the details with the Democratic congressional leaders.[17] It is controversial whether such approach depended on deference to Congress, on trust in the capacity of Speaker Nancy Pelosi and Senate majority leader Harry Reid, or on the wish to interpret his role as an active agenda setter or an external leader,[18] in conformity with the right to recommend of Art. II, § 3 of the Constitution.

Such practice can be considered as a kind of informal presidential cooperation with legislative proceedings, which in theory, by anticipating the viewpoint of the presidency, can help to prevent future tensions, which may otherwise lead to signing statements or even vetoes. Yet, an at least partial distortion of the constitutional structure of the legislative process and indirectly of the principle of separation of powers is undeniable. This trend, however, is not likely to be scrutinized by federal courts, since an informal practice is not quite transparent, so that it is hardly subject to litigation.

During the first Obama Presidency, the average number of legislative requests included in his presidential addresses to Congress was 37. This is substantially higher than the median number (31) of all Presidents after 1965.[19] Additionally, at least in the first 3 years, the rate of congressional approval of presidential initiatives has been slightly higher than Reagan's (47.6 to 45) and even higher than the agenda of all Presidents between 1953 and 1996.[20]

17 B. Sinclair, "Doing Big Things: Obama and the 111th Congress", *in* B.A. Rockman, A. Rudalevige and C. Campbell (Eds.), *The Obama Presidency: Appraisals and Prospects*, Washington, DC, 2012.

18 A.E. Busch, "President Obama and Congress. Deference, Disinterest, or Collusion?", in C. McNamara and M. Marlowe (Eds.), *The Obama Presidency in the Constitutional Order. A First Look*, cit., 71, 78.

19 *See* again Hoffman and Howard, "Obama in Words and Deeds", cit., 1327.

20 *Ibidem*, 1332.

1.5 Appointments and Recess Powers

The power of appointment after 2011 has generally been executed by President Obama in the ordinary ways that mark divided governments. Among other things, he had the opportunity of nominating two Supreme Court Justices, Sonia M. Sotomayor in 2009 (with a confirmation vote of 68-31) and Helena Kagan in 2010 (with a confirmation vote of 63-37), though the vacancy created by Antonin Scalia's death in February 2016 has proved impossible to fill. This is due to the strong resistance of the Republican majority of the Senate against consenting to any presidential nominee before the November elections. Almost 330 persons have been nominated to judicial positions, without ever using the recess power, and other 54 are waiting for senatorial confirmation. In the last 2 years, Senate Republicans have tried to block Obama's nominees either through a formal up-and-down vote or more frequently by simply delaying the examination of the nominee, until he/she withdraws or is withdrawn. Since the Senate's standing order requires a majority of 60 to cut short filibuster,[21] a standstill is likely. President Obama had serious problems with the confirmation of Dawn Johnsen to the Office of Legal Counsel in 2009, but the total number of confirmations of nominees for civilian positions during the 112th Congress has been of 285 out of 503 (57%), in comparison with 740 out of 981 (75.4%) during the last 2 years of the G. W. Bush administration with a Democratic majority of the Senate.[22] The growing delay in the confirmation process is another important signal of presidential difficulties.[23]

21 S. Doc. No. 113-18, Rule XXII (2013). The proposal of abrogating such rule is currently called "the atomic option".

22 *See* Developments in the Law. Presidential Authority, cit., 2148.

23 The 166-day delay for the confirmation of Loretta Lynch as Attorney General (April 2015) has been the third longest in history. *See*, *e.g.*, A.J. O'Connell,

President Obama also made moderate use of the Recess Appointment Clause of Art. II, §2, cl.3. According to official data,[24] President Clinton made 131 appointments, 95 of which were full-time positions and President G. W. Bush made 171 appointments, of which 99 were full-time positions.[25] President Obama made only 32, all full-time positions,[26] against the mounting tension between the Presidency and the Republican majority of the Senate. It was one of these appointments of 2012, however, that brought about an important decision of the Supreme Court, written by Justice Breyer with a concurrent opinion of Justice Scalia. *National Labor Relations Board v. Noel Canning*[27] dealt with an intra-session recess, that is a break not between the adjournment *sine die* of one session and the convening of the next, but during a session on the occasion of some holidays, for three days or more, with the consent of the other Chamber through a concurrent resolution, as prescribed by art. I, §5, cl. 4 of the Constitution. Such appointments have been more frequent since the end of the 1940s, when transportation to and from the capital became quicker and easier. It did arouse occasional controversies. In this case, President Obama appointed three members of the NLRB, who had contributed to some adjudication procedures with a casting vote or anyway contributing to make a quorum, during a brief break in the Senate's work, when the

"Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014", *Duke Law Journal*, Vol. 64, 1645 (2015).

24 H.B. Hogue, Congressional Research Service Report, Recess Appointments: Frequently Asked Questions, RS 21308, March 2015, Washington, DC and V.S. Chu, Congressional Research Service Report, Recess Appointments, A Legal Overview, RL 33009.

25 H.B. Hogue and M.O. Bearden, CRS Report, Recess Appointments made by President George W. Bush, RL 33310.

26 H.B. Hogue and M.O. Bearden, CRS Report, Recess Appointments made by President Barak Obama, R 42329.

27 134 S. Ct. 2550 (2014).

Chamber was convened only pro forma, not having any business to conduct.

The majority concluded that the President's appointment's recess power does extend to both intersession and intra-session recess, but that a President can use it only when a recess lasts a minimum of 10 days, three not being enough to trigger such faculty. The Senate is at work when it says so, with the consent of the House of Representatives, and its formal will is sufficient to prevent the President from resorting to his recess power, with the exception of unusual or emergency circumstances. The decision was interpreted by the media as a rebuke to the President[28] and was saluted by Republican leaders as a victory for the Senate. Justice Scalia, ordinarily a strong defender of presidential prerogatives, writing in concurrence for the conservative minority of the Court in his usual barbed style, lamented the watering down of the constitutional clause, asserting its applicability only to intersession recesses and to vacancies occurring during the intermission.

NLRB v. Noel Canning marks an important step in the evolution of the relationship between the two branches. It should satisfy those who periodically worry about the expansion of presidential powers,[29] but also those[30] who believe that Congress should be more effective in asserting and exercising its powers, among them the authority to fix its own internal rules, without leading to gridlock. When it does so it prevents other branches, first of all

28 *See, e.g.*, A. Liptak, "Supreme Court Rebukes Obama on Right of Appointment", *New York Times*, June 26, 2014.

29 At least since A.M. Schlesinger Jr.'s, *The Imperial Presidency*, New York, NY, 1973, such as C. Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*, New York, NY, 2007; M.J. Rozell and G. Whitney (Eds.), *Testing the Limits: George W. Bush and the Imperial Presidency*, Lanham, MD, 2009, and B. Ackerman, *The Decline and Fall of the American Democracy*, Harvard, MA, 2010.

30 Like J. Chafetz, "Congress's Constitution", *University of Pennsylvania Law Review*, Vol. 160, 715 (2012).

the presidency, from poaching its constitutional prerogative. Other authors,[31] to the contrary, consider an intolerable burden to the presidential authority the filibuster of nominees, that can persuade the President to recess appoint, escaping troubles in Senate confirmations. Unfortunately, the stronger the polarization in Congress and within the country is, the harder the finding of a balance between Legislative and Executive becomes.[32]

1.6 Administrative Control over Policy

The growing polarization in American politics,[33] which has contributed to worsening the conflict between President and Congress, has had significant effects on the actions of the Executive, on the working of the independent agencies, on their relationships with the Presidency and also on the kind of oversight that Congress tries to exercise over them.

First, the Presidency has tried to strengthen its own administrative structure, in order to be able to cope with the necessity of resorting to executive orders and any other administrative instrument, including soft law, in order to compensate for the difficulty of

31 Such as Lawrence H. Tribe, "Games and Gimmicks in the Senate", *New York Times*, January 6, 2012.

32 On this topic, *see*, *e.g.*, G.C. Jacobson, "Partisan Polarization in American Politics. A Background Paper", *Presidential Studies Quarterly*, Vol. 43, 688 (2013) and C.R. Farina, "Congressional Polarization: Terminal Constitutional Dysfunction?", *Columbia Law Review*, Vol. 115, 1689 (2015). It must also be remembered that in June 2011 the Senate approved legislation reducing the number of posts requiring its confirmation (Presidential Appointment Efficiency and Streamlining Act of 2011), that the Representatives did not examine.

33 Among the stream of recent writings on this subject, *see* Jacobson, "Partisan Polarization in American Politics" and N. Persily, *Solutions to Political Polarization in America*, Cambridge eBooks, 2015.

getting legislation through Congress.[34] Such approach has become more evident after the emerging of the "We can't wait"-policy. Such officers were promptly labeled "czars."[35]

Second, the production of executive orders started to grow, resting on a generous construction of presidential powers in accordance with the Constitution and on an extensive though sometimes dubious interpretation of statutory authorities. Often, the legal help of the Office of the White House Counsel, grown separately from the historical Office of Legal Counsel, has been crucial. Dozens of cases are reported from this viewpoint: the creation of new national parks or wilderness areas, the prosecution of leakers of government's secret information as spies, the suspension of the deportation of some categories of illegal immigrants, and many others. Citing some recent samples, two Executive orders were published in July 2016, and four in August. In this last month, the President adopted 12 memoranda of conspicuous importance: four of them concern the continuation of the national emergency and one, in the form of a letter, designates the vice-chair of the US International Trade Commission.[36]

The Presidency has been able to further expand the wide delegation of powers both to the Executive itself and to independent agencies,[37] which started with the New Deal and that globalization

34 It must be remembered that in the 112th Congress the number of bills passed into law was only 151, in comparison with an average of 637 from 1947 to 2010: *see* Rudalevige, "A Majority is the Best Repartee", cit., 1285.

35 *See* A.J. Saiger, "Obama's 'Czars' for Domestic Policy and the Law of the White House Staff', *Fordham Law Review*, Vol. 79, 2577 (2011).

36 Data included in the White House website, last access on August 31, 2016.

37 *See* P.L. Strauss, "Foreword: Overseer, or the 'Decider'? The President in Administrative Law", *George Washington Law Review*, Vol. 75, 696 (2007).

has exalted:[38] the Supreme Court has not contrasted this trend since long.[39]

With reference, in particular, to the agencies, he seems to have used some of them as tools for his own policies, whenever it proved impossible to obtain the approval of the relevant bills from Congress.[40] That definitely happened at least with the Environmental Protection Agency's rules on power plant emissions and with Department of Homeland Security regulations concerning immigration, but several other examples are possible. Yet, the inclusion of the agencies in controversial issues that could be solved in the ordinary dialectic procedures between Congress and President, triggers reactions on the side of the Houses, and increases polarization. Possible instruments of retaliation are the delay in the confirmation of presidential nominees to agency posts, the limitation on available resources through resolutions on funding, the approval of legislation making inconsistent regulation impossible, and the intensification of congressional oversight, for instance by the Oversight and Government Reform Committee created by the House of Representatives. In at least one case, the Supreme Court had to strike down EPA regulations that aimed at modifying the levels of emission for greenhouse gas permits, due to the forcing of the unambiguous statutory content.[41] At the end, the vicious circle of polarization was aggravated.

Furthermore, the Presidency enforced centralization of the regulatory review in the Office of Information and Regulatory Affairs (OIRA), which has been presided over by Harvard professor Cass

38 *See* J. Ku and J. Yoo, "Globalization and Structure", *William & Mary Law Review*, Vol. 53, 431 (2011).

39 That is from Panama Refining Co. *v.* Ryan, 293 U.S. 388 (1935).

40 *See* G.E. Metzger, "Agencies, Polarization, and the States", *Columbia Law Review*, Vol. 115, 1739 (2015).

41 Util. Air Regulatory Grp. V. EPA, 134 S. Ct. 2427, 573 U.S. (2014).

Sunstein since September 2009. Such coordination can be even more helpful when congressional power has been delegated to more than one agency (so-called joint rulemaking or omnibus rules).

It must be added that, while more norm production is being concentrated in the Executive, allegedly a lot, approximately one-third, of the published rules are promulgated in a less formal or unconventional way than ordinarily prescribed. That is without the observance of the prior notice and comment procedure a relaxed application of the APA exemption is guaranteed.[42] Such practice greatly reduces the openness of the Executive, while its rule production increases.

1.7 Administrative Control over Personnel

At the end of 2014, the number of federal employees was more or less the same as it was in 2008. There was a slight increase between 2009 and 2010, possibly in part due to persons temporarily hired for the decennial census. Furthermore, since 2013 there has been a constant decrease on a monthly base[43] and in November 2014, the total amount of federal employees went down to the lowest level since the Johnson Presidency.[44] The distribution of federal employees, both civilians and military, also remained the same, though the process of closing some bases is still ongoing.[45] The number of

42 *See* C. Raso, "Agency Avoidance of Rulemaking Procedure", *Administrative Law Review*, Vol. 67, 65 (2015).

43 Official data of the U.S. Office of Personnel Management, Historical Federal Workforce Tables, Washington, DC, 2015. In 2008 the total number of civilian government employees, excluding legislative and judicial branch personnel, was 2,692 thousands, grew to 2,776 in 2011 and declined steadily since then to 2,663 in 2014. The number of uniformed military personnel was 1,450 thousand in 2008 and 1,459 thousands in 2014.

44 *See* J. Zumbrun, "The Federal Government Now Employs the Fewest People Since 1966", *Wall Street Journal*, November 7, 2014.

45 *See supra*, par. 1.7.

local government employees, on the contrary, increased from about 4 millions in the 1950s to over currently 14. Nevertheless, this is a long-term trend: In fact, it remained about the same between 2008 and 2014.[46] All the allegations about big government, therefore, lack any foundation with regard to the Obama Administration.

1.8 National Security

National security has obviously been one of the most sensitive issues in American politics, even more so after 9/11. Due to the connection to foreign policy, it represented one of the areas of harshest confrontation between the two branches. Presidential policies are traditionally included in a National Security Strategy Report, serving the primary purpose of illustrating the strategic vision of the Executive to Congress: it used to be published yearly during the Clinton years, was printed only twice under President George W. Bush,[47] and has been produced twice again, in 2010 and in February 2015, by President Obama.[48]

As a Senator, Obama is recorded to have criticized the approach of former President Bush and invoked substantial changes to surveillance policies by supporting bills, dated 2005, 2007, and 2008, aiming at overhauling the Electronic Communications Privacy Act of 1986 (ECPA),[49] as applied in practice. On several occasions, the ACLU has openly attacked President Obama for radically changing his attitude toward all kinds of mass surveillance. Allegedly, there has been a steady increase in warrantless electronic surveillance by the Department of Justice, while reliable figures from the Department of Homeland Security, Immigration and Customs Enforce-

46 U.S. Census of local governments, 2012, Washington, DC, December 2014.
47 In 2002 and 2006 respectively.
48 The texts are available on the White House website.
49 Codified as 18 U.S.C. §§2510, 2701, 3121.

ment, secret services, state and local police are lacking. The intensification of controls concerns also phone and email tapping, use of software to sift through rough internet data, request of gag orders preventing phone companies from disclosing customer data, warrantless elaboration of previously collected meta data, and court orders authorizing wiretapping.

It must be said that the international framework has been changing frequently and not always consistently during the last 8 years, and the new forms of terrorism lead to a need of increasingly advanced and invasive technologies. Yet, from a constitutional viewpoint, these measures might constitute a slippery slope, hard to be kept under control by the Executive.

1.9 The President as Commander in Chief

Very different opinions have been expressed about Obama's foreign policy and even more about his attitude as Commander in Chief. His celebrated speech given in Oslo in December 2009, on the occasion of him receiving the Nobel Peace Prize, was a summary of his approach, between a principled reluctance to the frequent use of force and some measure of necessary cynicism. In practice, he has been praised for his prudence in resorting to military action and even more in putting US boots on the ground, but also criticized for making bold statements or warnings that were not followed by the announced action. Furthermore, he was accused of undermining the American credibility.[50] It has to be said that some failures or incomplete successes depended on previous choices amenable to former President George W. Bush, such as the Iraq invasion and the Afghanistan swamp.

50 A survey of opinions toward Obama's policies in F. Kaplan, "Obama's Way. The President in Practice", *Foreign Affairs*, January/February 2016, 46.

If a single key to the understanding of the presidential attitude toward the use of military force has to be isolated, it seems correct to say that Obama has always preferred to get Congress involved in the hard choices concerning the deployment of American forces abroad. At least two cases can be cited. First, in April 2013, Obama warned the Syrian leader, Bashar Al-Assad, that the use of chemical weapons would be unacceptable. At the moment of retaliating action concretely, he decided to ask Congress for a resolution implying or requiring the use of military force. Then, the Russian foreign Minister stepped in, probably in order to protect the best ally of Russia in the Middle East. He offered to persuade Assad to hand over his chemical weapons. At the end, the American intervention was avoided, because of both the American pressure and the Russian guarantee. Second, in autumn of 2014, after some disastrous experiments of training and equipping groups of Syrian rebels in Saudi Arabia – another ally whose loyalty is questionable – who turned out to prefer to fight Assad rather than ISIS, and after some successful air strikes, the President decided to deploy Special Forces to support Kurd fighters. People died in the course, obliging the Administration to declare such action publicly and to ask for the consent and advice of the Senate.

In the Libyan crisis of Spring 2011 as well, President Obama, instead of putting the United States ahead of a coalition for the removal of Muammar al-Qaddafi straight away, waited for UN resolutions, and met the leaders of the Houses repeatedly. He announced his intention of avoiding the deployment of ground forces, and was very careful in sticking to the criteria of the War Power Resolution of 1973.

Summing up, the President has often preferred to share responsibilities with Congress when there were risks of escalation in employing military forces. In doing so, he might have given the impression of playing down the role of the United States in the

international scenario or even of being a hesitant Commander in Chief.[51] On the other side, by using procedural caution and invoking the involvement of Congress, he tried to build up a reasonable legal framework in contexts where stakeholders, NGOs, and international agencies are always ready to question the legality and morality of American military policies.

1.10 Openness and Freedom of Information

As far as the attitude of the Administration toward openness and state secrecy is concerned, Obama showed respect of the Constitution also in terms of faithful application of the Freedom of Information Act,[52] promising "a new era of openness." The promise was at least partially fulfilled, since during his very first days in office he adopted several measures: the Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government,[53] which required the achievement of an unprecedented level of openness in executive offices and independent agencies. He furthermore created an Open Government Directive inside the Office of Management and Budget. The Memorandum on the Freedom of Information Act included a "commitment to accountability and transparency."[54] The Executive Order No. 13,489[55] repealed a previous Order from 2001 and allowed heirs of former Presidents to prevent disclosure of documents by invoking a constitutional

51 *See* M.M. Marlowe, President Obama, Commander-in-Chief, in C. McNamara and M.M. Marlowe (Eds.), *The Obama Presidency in the Constitutional Order*, cit., 237, 263.

52 *See*, *e.g.*, D.K. Nichols, Professor Obama and the Constitution, in C. McNamara and M.M. Marlowe (Eds.), *The Obama Presidency in the Constitutional Order*, cit., ch. 2 and K. Clark, "A New Era of Openness?": Disclosing Intelligence to Congress Under Obama, 26 Const. Comment. 313 (2009-2010).

53 January 21, 2009.

54 *Ibid*.

55 Of the same date.

privilege. Within a couple of months, Attorney General Eric Holder adopted the prescribed memorandum, declaring that the policy of the Justice Department in the future would deny the release of documents and defend denials only in cases of express law prohibition or of harm to one of the "interests protected by … statutory exemptions."[56]

On the other side, the Obama Administration decided to follow some previous practices of the Bush Presidency and opposed relevant modifications to others. Some scholars[57] have criticized such decisions, but in most cases, different choices would have imperiled the reliability of the Presidency as an institution rather than of individual former Presidents. Or it might have jeopardized the accountability of civil servants or secret agents that had obeyed orders adopted in conformity with provisions applicable at the time of their execution.

For instance, the opposition of the Administration and of the President personally to start investigations against agents involved in past intelligence programs carried out with improper means, like warrantless surveillance, torture and extraordinary renditions, or to disclose information and pictures concerning such persons was justified with the need of relying on some measure of secrecy in the future. Thus, when, in autumn of 2008, the Justice Department was ordered by the federal court of appeal of the DC Circuit to release photographs of military personnel allegedly having abused prisoners in Iraq,[58] the Administration favored the approval in Congress of an FOIA amendment, which granted the Secretary of State

56 Memorandum by the Attorney General to Heads of Executive Departments and Agencies, May 19, 2009.

57 *See* Clark, "A New Era of Openness", cit., 315 ff. and the newspaper articles quoted ibid.

58 American Civil Liberties Union v. Dep't of Def., 543 F.3d 59 (2nd Cir. 2008).

discretion in denying such release.[59] After that, the Supreme Court reversed the appellate court decision.[60]

Another area of continuity with the Bush Administration has been the attitude toward the previous disclosure of intelligence-related information to Congress.[61] Permanent Committees have been created by the Senate in 1976 and by the House in 1977 in order to oversee intelligence activities. At the end of the Carter Administration in 1980, Congress required the Executive to keep the two Committees fully informed of such activities.[62] Later on, in 1990,[63] a rule of prior notice was introduced, forcing the President to give previous information about covert operations, i.e., where the role of the US Government is not intended to be disclosed, to a limited number of members of the Chambers, such as chairs and vice-chairs of the intelligence committees, majority and minority leaders of the Senate, speaker and minority leader of the House of Representatives (so-called "gang of eight"). After some controversial use of such rule by the Reagan Administration and the resorting to controversial intelligence techniques by the G. W. Bush Administration, there was wide discussion about the introduction of legislation aimed at broadening the intelligence information to be supplied to Congress or to its Committees.

The Obama Administration, more or less like the Bush Administration, opposed the enlargement of the notification of covert actions to all Committees or partial withholding of funds of the intelligence budget in case of delayed or incomplete disclosure of

59 Department of Homeland Security Appropriations Act of 2010, Pub. L. 111-83, §565, 123 Stat. 2142 (2009).
60 Dep't of Def. V. ACLU, 130 S. Ct. 777 (2009).
61 The detailed story in Clark, "A New Era of Openness", cit., 317 ff.
62 Intelligence Authorization Act for Fiscal Year 1981, Pub. L. 96-450, § 407, 94 Stat. 1975, 1981, 50 U.S.C. §413 (2006).
63 Intelligence Authorization Act for Fiscal Year 1991, Pub. L. 102-88, § 503 €, 105 Stat. 429, 442, 50 U.S.C. §413b(e) (2006).

information. It even threatened to veto against possible modifications of the status quo. The same approach was followed toward other disclosure provisions, like the creation of an Inspector General for the intelligence sector or the enlargement of the protection of intelligence whistleblowers. The main argument displayed against intelligence disclosure-related policies has been the possible limitation of the powers of the President in a sensitive sector, where the control of classified information is a key factor.

It must be said that, given the international framework, the Presidency hardly could have devised or suggested, let alone imposed, a higher level of openness, especially in the intelligence field. In the next years, a radical shift in policy is unlikely, unless sudden changes take place in the world security context.

1.11 Unitary Executive or Executive Independence?

There can be no doubt that the Founding Fathers designed and construed the Presidency as the only truly national institution and concentrated many important powers in it. Therein, they entrusted all controls over the executive power, sealing the constitutional provision with wide formulas such as the "take care" clause. This approach was a response to the ineffectiveness of the form of government chosen by the Articles of Confederation.[64] The presidential prerogatives, however, are not limitless, cannot be abused of, and are obviously subordinated to the Constitution.[65]

64 Besides the classical texts cited in n. 1, other important readings are P. Cooper, *By order of the President. The Use and Abuse of Executive Direct Action*, Lawrence, KS, 2001 and R.J. Barilleaux, *Venture Constitutionalism and the Enlargement of the Presidency*, Albany, NY, 2006.

65 Any quotations of the Federalist Papers, n. 70, 72, 74, 77, are redundant.

During the Presidency of George W. Bush, the so-called "unitary executive" theory has been somewhat inflated and sometimes interpreted as a take-all sweeping formula, propped up by the aggravating legitimation deriving from the international terrorism emergency. The effects of the latter rebounded in the home affairs in terms of national security measures.

Barack Obama, first as Senator and then as a candidate, objected to many methods of the Bush Administration, supported by important legal scholars, such as Cass Sunstein, the prospective chief of the OIRA.[66] Once installed in the White House, Obama had to accept some compromises, on several topics, in a more evident manner after the Republicans gained control of the House of Representatives first and then of the Senate. Those span from national security and related measures to the use of executive orders and agency rules, and from openness to almost all the other presidential prerogatives.

Can the conclusion be drawn that there has been full continuity between the G. W. Bush and the Obama Administrations?[67] Such a statement would be at least ungenerous. Exercising power compels the acceptance of limitations that can hardly be conceived in the planning phase. Some disappointment on the side of party supporters, civil liberties activists, and constitutional law scholars is quite reasonable. Yet, while working on the improvement of the quality of the American democracy is highly advisable and necessary, overstating continuity could pave the way to even worse experiences.

66 *See*, *e.g.*, What the "Unitary Executive" Debate Is and Is Not About, in the blog of the University of the Chicago Law School.

67 Which seems to be the final statement of M.M. Marlowe, President Obama and Executive Independence, in C. McNamara and M.M. Marlowe (Eds.), *The Obama Presidency in the Constitutional Order*, cit., 61.

2 Seeking the Balance: President Obama's Use of the Veto Power

*Andrea Buratti**

2.1 Foreword

President Obama, like his predecessor George W. Bush, issued 12 vetoes during the 8 years he was in office. This number is the lowest number of vetoes among the post-World War II presidencies.

It is consistent with a general trend, which began immediately after the Roosevelt Presidency, of reducing presidential vetoes.[1] However, these statistics tell us very little about the actual use of the veto power, its transformation in contemporary American politics, and the way it has been used by Presidents for legislative bargaining. The main aim of this chapter is to explain the methods and strategies that had driven President Obama in the use of his veto power, as well as the other methods of legislative interference that were available to him. In the second part of this chapter, I will speak about the issue of signing statements, which is strictly linked to the veto power; and I will discuss the constitutional concerns regarding presidential power and the way Obama acted in order to balance his presidential power with constitutionally based criticism.

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1 R.J. Spitzer, *The Presidential Veto*, State Univ. of New York Press, Albany, NY, 1988.

I will then provide a historical overview, where I consider it more appropriate to show the link between presidential strategies and political contexts. Looking at the 8 years of Obama's presidency, one could argue that his use of the veto power was intermittent and discontinuous; of the 12 vetoes issued by Obama, only two (both of minor political relevance) were used in the first 6 years, and 10 (some of which were of crucial significance) in the last 2 years. These numbers indicate a "soft" use of the veto power in the first 6 years of his terms, with a marked increase during the period corresponding to the 114th Congress. The heterogeneity in the use of the veto power was mainly due to the different political composition of the Congresses at that time, and on his subsequent need to match antagonistic political frameworks. I will therefore try to contextualize Obama's imbalanced use of the veto power given the specific conditions of the political environment, by taking into consideration the political composition of the four Congresses, as well as the innovative legislative practices he had to face.

2.2 The 111th Congress (2009-2011): Two Protective Return Pocket Vetoes

The first 2 years of Obama's Presidency coincided with the 111th Congress, a Congress firmly in the hands of a Democratic majority. This period can be characterized by a cooperative attitude toward Congress, demonstrating an ability to prevent conflicts through cooperative instruments of preclearance, such as the Statements of Administration Policy issued by the Office of Budget and Management during the legislative business.

The two vetoes delivered by Obama in this period concerned issues of little political relevance. They are, however, worth mentioning due to their nature, and are called "protective return pocket vetoes."[2]

The practice of protective return pocket-vetoes dates back to the Ford administration, and served as a reaction to the rigid restrictions imposed by the jurisprudence of the 1970s, when different Federal Courts – but not the Supreme Court – excluded the use of pocket vetoes in case of a brief intra-session adjournment of the Congress. On the basis of that jurisprudence, the current organization of legislative business – with a limited number of long-lasting adjournments – prevents almost any use of the pocket veto. Statistics, indeed, show a drastic reduction of pocket-vetoes during the last presidencies: only one in Clinton's administration and none in those of Bush or Obama.

In order to regain some maneuvering room, the presidential strategy considered the intra-session adjournment the equivalent to a *sine die* adjournment, allowing the use of the pocket veto. Furthermore, the protective return is a dual procedure: in fact, the President also sends a "memorandum of disapproval" to the Congress, to avoid the risk that the bill be considered tacitly enacted by a Court, as happened in the cases mentioned above. Starting from the Clinton administration, the formula is the following: "To leave no doubt that the bill is being vetoed as unnecessary legislation, in addition to withholding my signature, I am also returning [it] to the Clerk of the House of Representatives, along with this Memorandum of Disapproval."[3]

2 R.J. Spitzer, *Growing Executive Power: The Strange Case of the "Protective Return" Pocket Veto*, Paper delivered at the *Annual Meeting of the American Political Science Association*.

3 Barack Obama: "Memorandum of Disapproval for Legislation Continuing Appropriations for Fiscal Year 2010", December 30, 2009; Barack Obama:

Obviously, Congress strongly refuses this construction of the presidential veto power. According to Congress, clerks are authorized to receive veto messages during an intersession adjournment. Currently, the regulations of the Houses expressly foresee this routine mechanism. Therefore, the President can adopt a regular veto and not a pocket veto, with the difference that Congress has the possibility to pass an override motion. Congress therefore accepts dual vetoes as regular vetoes. Facing a protective return by George W. Bush, the Speaker of the House Nancy Pelosi declared: "Congress vigorously rejects any claim that the President has the authority to pocket veto this legislation and will treat any bill returned to the Congress as open to an override vote."

In my opinion, Obama acted in a balanced manner. Explaining his behavior in a press conference, he declared: "The long standing view of the Executive Branch is that a pocket veto is appropriate in circumstances such as these, where the House is in recess […]. To avoid any doubt, however, and in keeping with past practice, the President made a protective return of the bill to the Clerk of the House of Representatives, so even if the House disagrees with the pocket veto issue, the House will treat the return of the bill … as a regular veto."

2.3 The 112th (2011-2013) and 113th Congress (2013-2015): A Congressional Deadlock

The two following Congresses present a common political pattern: they are split-controlled Congresses, with the Senate in the hands of a Democratic majority while the House passed to a Republican

"Memorandum of Disapproval on the Interstate Recognition of Notarizations Act of 2010", October 8, 2010.
All the Presidential documents quoted in this article are available at the American Presidency Project (<www.presidency.ucsb.edu/>).

majority. Despite the more conflictive relations between the Congress and the presidency, we do not find any veto during these 4 years.

This trend was consistent with the low number of vetoes adopted by President George W. Bush, and that brought some scholars to doubt the consistency of the veto power after the rejection by the Supreme Court of the Line Item Veto (*Clinton v. City of New York*, 1998).

However, records do not explain everything, and can be false indications: the very reasons that explain this trend are contingent.

Bush decided to marginalize the use of the veto power – despite the huge number of vetoes he adopted as Governor of the State of Texas – in order to implement the alternative strategy of the signing statements. These then provoked a great deal of criticism from the other branches of government.

In the case of Obama's presidency, instead, the specific and unusual composition of the 112th and 113th Congresses must be taken into account. In these Congresses, the diverging majorities provoked a deadlock, with an incredible reduction of legislative business; these Congresses were among the least productive in recent history, causing an obvious reduction of presidential vetoes. This is not what had happened in the past: usually, split-controlled Congresses resulted in Congressional cross-party bargains, and a high rate of presidential vetoes. However, in the two Congresses we are considering, the parties did not find easy agreements; the Democratic Senate remained loyal to the President, avoiding the passage of bills that were passed by the House. The House of Representatives, with a Republican majority, passed many bills to dismantle the ObamaCare (the Affordable Care Act), for example, and other key issues on Obama's agenda. However, the Democratic Senate subsequently blocked the passage of all of them. In these two Congresses, the Senate, not the President, was the actual veto player.

2.4 The 114th Congress (2015-2017): The Veto Strikes Back

The last Congress Obama dealt with was characterized by a strong majority in the hands of the GOP.

Since the aftermath of the midterm elections, all the forecasts were for a new season of presidential vetoes, because the Republican agenda was directly intent on repealing the main political achievements of Obama's administration, beginning with ObamaCare.

This prediction was immediately confirmed: the Keystone Pipeline Act was vetoed in February, just six weeks after the meeting of the new Congress.[4] This was the first regular veto of Obama's presidency, and we are therefore given an idea of Obama's style and rhetoric in veto messages: a concise but tough message, different from the rambling style of many of his predecessors, especially that of George W. Bush.

This is only the first of a series of vetoes, and although few in number, they were all related to major issues on the political agenda.

Two protective return pocket vetoes of the same year confirm the political significance of Obama's use of veto power: First, the President refused to sign a bill that would have limited the autonomy of trade unions in the private sector;[5] and after, he would not sign a resolution meant for limiting Federal clearance over gas emissions.[6] Labor and environment, two of the major issues on

4 Barack Obama: "Message to the Senate Returning Without Approval the Keystone XL Pipeline Approval Act", February 24, 2015.

5 Barack Obama: "Memorandum of Disapproval Regarding Legislation Concerning the National Labor Relations Board Rule on Representation Case Procedures", March 31, 2015.

6 Barack Obama: "Memorandum of Disapproval Concerning Legislation Regarding Congressional Disapproval of an Environmental Protection Agency Rule on Standards of Performance for Greenhouse Gas Emissions", December 18, 2015.

Obama's agenda, as confirmed by two regular vetoes in 2016: the first one stopping a resolution that would have deleted the standards against water pollution,[7] and the second aimed at preserving the neutrality of financial advice to workers and retired workers in choosing their retirement plans.[8]

As expected, Obama also vetoed the main attempt by the Republican Congress to repeal several provisions of Health Care Reform. In this case, the presidential message was broader, intent on defending the achievements reached by Health Care Reform:

> Republicans in Congress – Obama said – have attempted to repeal or undermine the Affordable Care Act over fifty times. Rather than refighting old political battles by once again voting to repeal basic protections that provide security for the middle class, members of Congress should be working together to grow the economy, strengthen middle class families, and create new jobs.

At the core of the political fight was the nation's defense strategy, which was strongly conditioned by the financial power of Congress. Obama vetoed the National Defense Authorization Act for 2016, an Act that provided funds for the administration, but also conditioned the military strategy consistent with Republican goals.[9]

7 Barack Obama: "Message to the Senate Returning Without Approval Legislation Regarding Congressional Disapproval of an Army Corps of Engineers and Environmental Protection Agency Rule on the Definition of 'Waters of the United States' Under the Clean Water Act", January 19, 2016.

8 Barack Obama: "Message to the House of Representatives Returning Without Approval Legislation Regarding Congressional Disapproval of the Department of Labor's Final Conflict of Interest Rule", June 8, 2016.

9 Barack Obama: "Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 2016", October 22, 2015.

It was a brave decision, which ran the risk of leaving the military administration without a necessary budget.

The last veto by Obama went against the first Congressional override, a vote passed just a few days before the end of the Congressional term. Obama vetoed the "Justice Against Sponsors of Terrorism Act," which would, among other things, remove sovereign immunity in the US Courts from foreign governments considered to be sponsors of terrorism.[10]

2.5 Obama's Policy on Signing Statement

Obama also issued 32 signing statements. My analysis of presidential interference in legislative business must consider this method as well. In fact, in the last few years, the main difficulties for Presidents have come from the practice, undertaken by Congress, of passing comprehensive omnibus legislation. This involves provisions, such as appropriations for the Federal Government,

10 Barack Obama: "Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act", September 23, 2016. "As drafted, JASTA would allow private litigation against foreign governments in U.S. courts based on allegations that such foreign governments' actions abroad made them responsible for terrorism-related injuries on U.S. soil. This legislation would permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack here[…]. JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests. The United States has a larger international presence, by far, than any other country, and sovereign immunity principles protect our Nation and its Armed Forces, officials, and assistance professionals, from foreign court proceedings. These principles also protect U.S. Government assets from attempted seizure by private litigants abroad. Removing sovereign immunity in U.S. courts from foreign governments that are not designated as state sponsors of terrorism, based solely on allegations that such foreign governments' actions abroad had a connection to terrorism-related injuries on U.S. soil, threatens to undermine these longstanding principles that protect the United States, our forces, and our personnel."

necessary for the administration, together with pieces of legislation that the President does not agree with. The lack of a selective veto power is, indeed, a presidential weakness that Congress learned to use; statistics tell us that bills passed by the Congress are becoming more and more vast and heterogeneous.

President George W. Bush reacted to this congressional tactic by issuing hundreds of signing statements, with the purpose of announcing the presidential interpretation of a provision, or the federal administration's noncompliance with unconstitutional and unsound legislation. This was a controversial practice, strongly contested by scholars, the Democratic Party, and by Obama as well during his first campaign for the Presidency. Quoting Obama,

> While it is legitimate for a President to issue a signing statement to clarify his understanding of ambiguous provisions of statutes [...] it is a clear abuse of power to use such statements as a license to evade laws that the President does not like [...]. I will not use signing statements to nullify or undermine Congressional restrictions as enacted into law.

Despite the shared criticism against Bush's abuse of signing statements, we must be aware that, from a presidential perspective, signing statements are the only means to match the lack of a selective veto, to block single legislative provisions in big legislation. Obama clearly linked the need of signing statements to a reaction to the growing dimension of legislation: in a signing statement he wrote,

> Even though I support the vast majority of the provisions contained in this Act, which is comprised of hundreds of sections spanning more than 680 pages of text, I do not agree with them all. Our Constitution does not afford the President the opportunity to approve or reject statutory sections one

> by one. I am empowered either to sign the bill, or reject it, as a whole. In this case, though I continue to oppose certain sections of the Act.

It is not surprising, therefore, that Obama's policy about signing statements was not as rigid as announced in the campaign.

At the beginning of his first term, Obama released his first signing statements, together with a memorandum expressing his vision:

> There is no doubt that the practice of issuing such statements can be abused. Constitutional signing statements should not be used to suggest that the President will disregard statutory requirements on the basis of policy disagreements. At the same time, such signing statements serve a legitimate function in our system, at least when based on well-founded Constitutional objections.[11]

Moving from this premise, Obama indicated four criteria, which influenced his use of signing statements: first, immediately inform Congress about the presidential doubts on the constitutionality of a bill; second, use shared opinions about the unconstitutionality of a provision; third, propose clear and precise, not generic, claims of unconstitutionality; and fourth, interpret the provisions consistent with the text.

Therefore, according to Obama, the President could refuse the application of legislative provisions only in the case of unconstitutionality, not in the case of political disagreement, but mostly on the basis of shared and precise Constitutional grounds. It is much more

11 Barack Obama, *Memorandum on Presidential Signing Statements*, March 9, 2009.

than what Congress accepts. However, Obama's policy on signing statements was the first attempt to regulate and balance this controversial power, lacking a clear ruling by the Supreme Court.

Consistent with this policy, Obama's use of signing statements was moderate (32 times), especially when compared with his predecessor George W. Bush, who refused the application of more than 700 provisions in almost 150 statements. Obviously, a detailed analysis should take into consideration the actual implementation of all the provisions submitted to signing statements. However, such an analysis goes far beyond the limits of this essay, because from the perspective of Constitutional law it is more important to look at the presidential use of the tool and to assess its impact on the relationships between the branches of government, regardless of the administrative follow-up.

Among the 32 signing statements issued by Obama, 17 statements were of agreement/congratulations, whereas 15 reflected disagreement/disappointment. These statements – sometimes relevant to the political agenda, as in the case of the treatment of the detainees of Guantanamo – were definitively consistent with the Constitution. Nineteen statements were instead aimed at expressing a presidential interpretation of problematic provisions, and at pointing out the administration's implementation policy. Seven of these 19 statements refer to several provisions, and to major legislation; in most of the cases they refer to the National Defense Authorization Act for the following fiscal year.

Obama mainly used the statements to: (a) protect the presidential power of appointment, especially in military appointments; (b) refuse constraints, advice and any other interference from Congress in general administrative activity; (c) preserve presidential discretion in military operations, intelligence operations, and foreign policy, even refusing mandatory advice by Congress in foreign policy and in negotiations with foreign states.

The formulas we find in the statements are the following: "My administration will interpret (or 'will implement') the provision in a manner that avoids Constitutional conflicts," or "in order to preserve executive and Presidential prerogatives," or "to protect the separation of powers," or "will interpret (or 'will implement') the provision in a manner consistent with constitutional duty to take care that the laws be faithfully executed," or "will interpret the provision in a manner that does not interfere with the presidential discretion in foreign ('or military') affairs," or "my administration will treat these provisions as advisory."

In my opinion, Obama's use of signing statements was balanced and consistent with the policy expressed at the beginning of his term. In criticizing this method – which clearly can lead, and has led to, abuse – we must take into consideration the lack of a clear position by the Supreme Court, the lack of a selective veto power for the President, and the legislative practices that Congress implemented, in order to weaken the presidential veto power.

In conclusion, it is my opinion that Obama used the veto power and other methods of interference in legislative business in a proper and balanced way: the veto power was used as a last resort, always forewarning Congress about his aims and seeking preliminary bargains with Congress. As for signing statements, he was able to, on one hand, reduce the excesses we saw in the Bush administration, while on the other hand, preserve the presidential prerogatives necessary to maintain a balance between the branches.

3 Presidential Spending between Scylla and Charybdis: Interpretive Problems in US Federalism after *King v. Burwell*

*Roberto Scarciglia**

3.1 Introduction: Why an Ancient Myth?

In Homer's epic Odyssey, the hero Odysseus chooses which monster to confront while passing through the Strait. In Greek mythology, Scylla and Charybdis were two immortal and mythical sea monsters on the opposite sides of the Strait of Messina between Sicily and the Italian mainland. Scylla was a rock shoal (six-headed sea monster) on the Italian part of the Strait, and Charybdis was a whirlpool off the coast of Sicily.[1] Odysseus opted to pass by Scylla and lose only a few sailors, rather than risk the loss of his entire ship in the whirlpool. In the title, I indicate two equally perilous alternatives for his domestic reform agenda containing health-care bill. Obama, like Odysseus, passed between the rock of Congress and the whirlpool of Supreme Court to affirm his presidential

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1 *See Scylla and Charybdis*, *in* Britannica Online Encyclopedia, <www.britannica.com/EBchecked/topic/530331/Scylla-and-Charybdis> (last visited November 28, 2016).

spending power and defend the Affordable Care Act (ACA) of 2010 (the so-called Obamacare).[2]

During the 2008 Democratic presidential primaries, both Hillary Clinton and Barack Obama endorsed health-care reform plans. The words "*we can*" are a symbol of the first presidential campaign of Barack Obama and after the congressional approval of health-care reform. From this point of view, also in the 2016 presidential election campaign, the two candidates, Hillary Clinton and Donald Trump took diametrically opposed positions in this reform. Among other things, it requires that all employers must have an insurance policy for health costs. The entry into force of this law represents a development of a constitutional maturity of Congress about the issue of welfare rights.

From a historical perspective, we must remember that, only in 1765, the University of Pennsylvania opened the first medical college and the Massachusetts Medical Society, and President John Adams signed the first compulsory social insurance program into law in 1798 and guaranteed medical care in a hospital setting for sick and injured sailors. About it, Alexander Hamilton, the first US Secretary of the Treasury, in his Federalist Paper (11), wrote that the existence of a "nursery of seaman ... [is] a universal resource," postulating the idea of a strong federal government capable of providing a public good shared by all of the former colonies.[3] Until the Obamacare, health reform projects had not been successful, from

2 Patient Protection and Affordable Care Act, Pub. L. 111-148, tit. I, section 1501, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act (ACA), Pub. L. 111-152, 124 Stat. 1o29 (2010).

3 A. Hamilton, "Report on Marine Hospitals, April 17, 1792", *in* H.C. Syrett et al. (Eds.), *Papers of Alexander Hamilton*, Vol. 11, New York, Columbia University Press, 1966, pp. 294-296.

Roosevelt to Truman, from Kennedy to Clinton.[4] After the reform, there has been a very intense political and social debate, and a public opposition to the Affordable Care Act.[5] The Supreme Court legitimated the choices of the President in the case *King v. Burwell*, and mainly resolved the question whether this Act "authorizes the Internal Revenue Service to issue tax credits for the purchase of health insurance through exchanges established by the federal government."[6] In the next few paragraphs, I would like to introduce some constitutional issues related to reform and the Supreme Court's decision on the Affordable Care Act.

This chapter proceeds as follows. Section 3.2 will focus on the congressional power of the purse. It is an hard power, but there are, of course, other congressional hard powers such as the contempt power, the impeachment power and the Senate's power to advise on and consent to the appointment of federal judges and principal executive branch officers. Section 3.3 will focus on the spending power under President Obama and, from this point of view; I will compare spending growth over eight years under Obama to spending growth under past Presidents. Section 3.4 will briefly introduce the decision of the US Supreme Court in *King v. Burwell* and Section 3.5 will focus on some interpretive problems in US Federalism after this decision of Supreme Court.

4 *See* P. Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry*, New York, NY, Basic Books, 1982.

5 *See* J. Dolgin and J. Dieterich, "Social & Legal Debate About the Affordable Care Act", *UMKC Law Review*, Vol. 80, No. 1, 2011, pp. 45-90.

6 King *v.* Burwell, 135 Sup. Court 2480, 2495 (2015).

3.2 The Power of the Purse and the Presidential Spending Power

One of Congress's most significant constitutional prerogative is the so-called "power of the purse"[7] (namely also "appropriation clause"). The Constitution of the United States provides for two different provisions that define this power. The first is Article I, Section 7, Clause 1, which states: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills," while the second – Article I, Section 9, Clause 7 – expressly provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The power of the purse has always played a critical role in the relationship of Congress and the President of the United States. The extent to which Congress may flex this power is a matter of debate: the congressional power of the purse is not unlimited.

The British constitutional history influenced the choices of the Framers of the American Constitution. The power of the purse has its roots in the *Confirmation of the Charters* of 1297 by Edward I at the dawn of the emergence of the Model Parliament in England.[8] Despite the fact that the *Confirmation* was the beginning of parliament's authority, the English kings continued to dispute with the Commons the exercise of the power of the purse far down into the seventeenth century. The House of Commons had the "exclusive"

7 *See generally*: J.J. Sidak, "The President's Power of the Purse", *Duke Law Journal*, Vol. 1989, No. 5, 1990, pp. 1162-1253; K. Stith, "Congress' Power of the Purse", *The Yale Law Journal*, Vol. 97, 1987-1988, pp. 1343-1396.

8 My approach here follows R. Kirk, *The Roots of American Order*, La Salle, Open Court, 1974.

right to create taxes and originate money bills.[9] English history shows us that the power of the purse has been one of the structural elements of the relationship between parliament and government. It could not be otherwise in the United States. The famous pre-Revolutionary patriot James Otis, in his pamphlet *The Rights of the British Colonies* published in 1764, stated that

> no parts of His Majesty's can be taxed without their consent; that every part has a right to be represented in the supreme or some subordinate legislature; that the refusal of this would seem to be a contradiction in practice to the theory of the constitution.[10]

The American colonists also appealed to the principle of "Taxation without representation is tyranny," referring to the injustice of London imposing taxes on them to help pay for the French and Indian War without the benefit of a voice in parliament. Particularly, in more recent times, the power of the purse was always at the center of discussions in Congress, during debates over the appropriation of funds, to the point of becoming a tautological concept as one interprets it more broadly.[11] Sidak considers this question when he writes:

> Judiciary [decides] cases or controversies, or for the President to negotiate treaties, but the necessity of certain inputs of capital and labor to the production of those public goods does not of consequence empower Congress to constrain or direct the

9 J. Otis, *The Rights of the British Colonies: Asserted and Proved*, Boston, MA and London, J. Almon, 1764, p. 69.

10 Quoting H.E. Edgerton, *The Causes and Character of the American Revolution*, Oxford, Clarendon Press, 1931, p. 66.

11 Sidak, "The President's Power of the Purse", p. 1165.

> exercise of discretion by the Judiciary or the President in the course of respective functions under the Constitution.[12]

However, the judicial role of interpretation is critical to the balance of powers of the President and Congress with respect to the exercise of this power. Congress may limit the ability or discretion of the President to perform duties and exercise prerogatives granted to him by Article II of the US Constitution. As it was pointed out at the beginning of the section, Article I, Section 9, Clause 7, the drawing of public funds must be made "in Consequence of Appropriations made by law," and this clearly implies respect for the rule of law.[13] In this respect, we can interpret this expression in the sense that, through the rule of law, the arbitrariness of government action can be restrained.[14] As the space available for this chapter is rather limited, it is necessary to be selective, leaving out an analysis of the diachronic development of the power of purse in the experience of Congress, but, nevertheless, according to Sidak, we can assert that the fundamental principle of the separation of powers dictates a unitary Executive "and that unitary Executive cannot tolerate congressional encroachments that, under the pretext of guarding the public purse, deny the President the funds necessary to perform the duties and exercise the prerogatives conferred on him by article II" and it can be assumed that there is an implied power for the President to obligate the Treasury to perform the duties and exercise the prerogative that Article II grants to his office.[15]

12 *Id.*, p. 1165.
13 *See* F.A. Hayek, *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960, pp. 162-192.
14 *See* G. Stourzh, *Alexander Hamilton and the Idea of Republican Government*, Stanford, CA, Stanford University Press, 1970, pp. 56-63.
15 Sidak, "The President's Power of the Purse", p. 1253.

It is important to briefly review how the exercise of this power works according to Article I, Section 9, Clause 7, of the Constitution. If directing money to be spent requires the concurrence of the House, the Senate, and the President, then either the House or the Senate, acting alone, can withhold money. This is true of any bill because the House and Senate are each absolute veto gates to the passage of legislation, and the annual budget process guarantees that, every year, each house of Congress has the opportunity to give meaningful voice to its political priorities. The US Constitution requires that Congress assemble at least once per year, and it specifies that "no appropriation of money" for the purpose of "rais[ing] and support[ing] Armies ... shall be for a longer term than two years," but it does not otherwise limit the duration of appropriations. Annual appropriations serve the same function as sunset provisions in substantive legislation: both reset the legislative baseline. To explain this, I will use the example proposed by Josh Chafetz: At time *t1*, Congress passes a law delegating a certain amount of power to an administrative agency. If that law has no sunset provision, then, in order to take that power back at time *t2*, Congress would need to pass a second law, which would require either presidential concurrence or two-thirds supermajority in both chambers. The *t1* law empowers executive branch actors and thereby empowers the President, so it is unlikely that the President would consent to giving that power back. And, in this case, Congress could be stuck with the *t1* law.[16] A long-term or indefinite appropriation increases executive power. An annual appropriation, however, forces the President to negotiate with Congress. From a

16 J. Chafetz, "Congress's Constitution", *University of Pennsylvania Law Review*, Vol. 160, 2012, p. 727.

political point of view, budget execution and spending could be described as the "dark continent" of federal budgeting research.[17]

D. E. Lewis demonstrates the extent of presidential influence over spending across the executive establishment and why the Presidents have more influence over spending.[18] Although this influence exists, it depends upon whether federal spending is mandatory or discretionary and whether Congress sought to limit its own role in spending decisions. In a case of mandatory spending programs (e.g., entitlements, social security benefits, Medicare), Congress has already established a regulatory framework under so-called authorization laws. These laws both establish the federal programs and mandate that Congress must appropriate whatever funds are needed to keep the programs running: Congress cannot reduce the funding for these programs without changing the authorization law itself. Discretionary spending is that part of the US federal budget that Congress appropriates each year. The Constitution gave Congress the authority to raise and spend money for the federal government. The budget process begins with the President's budget and describes his priorities and what the various agencies need for the performance of their duties.[19]

From a constitutional point of view, also the spending power must be regulated by a system of checks and balances, enabling full mutual cooperation between the representative bodies. We have the common idea that the Framers went to great lengths to balance institutions against each other – balancing powers among

17 *See* D.E. Lewis, *Political Control and the Presidential Spending Power*, p. 3 (paper presented at the annual meeting of the Southern Political Science Association, San Juan, Puerto Rico, January 7-10, 2016).

18 *Idem*, p. 3.

19 The discretionary budget is $1.241 trillion for Fiscal Year 2017, which is October 1, 2016, to September 30, 2017. *See* the Economic Report of the President, *in* <hiips://www.whitehouse.gov/administration/eop/cea/economic-report-of-the-President/2016> (last visited November 29, 2016).

Congress, the President, and the Supreme Court; between the House of Representatives and the Senate; between the federal government and the states; and between the powers of government and the rights of citizens, as spelled out in the Bill of Rights. The basic idea of balance is that no one part of government dominates the other. And it means that the decisions that emerge from the process in which everyone has a right to participate are in a sense shared decisions, carrying with them a sense of authority and legitimacy. Throughout the Constitution there is an elaborate system of checks and balances to prevent abuse and concentration of power. Consequently, we can consider any form of misuse of appropriations power to be a constitutional problem. In that regard, the US Supreme Court stated that:

> [t]he actual art of governing under our Constitution does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[20]

From this point of view, the Framers would not have assigned to the President such responsibilities as the making of treaties or the faithful execution of laws if they expected that Congress could arbitrarily veto the execution of these functions by defunding them.[21] We can say that, on the one hand, presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with

20 Youngstown Sheet & Tube Co. *v.* Sawyer, 343 Sup. Court 579 (1952).
21 Sidak, "The President's Power of the Purse", p. 1253.

those of Congress, and on the other, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. As Sidak observes, the President has an implied power "to obligate the Treasury, at least for the minimum amount necessary for him to perform the duties and exercise the prerogatives that Article II grants to his office."[22]

3.3 Obama – Presidential Spending Power

President Obama sent the final budget proposal of his Presidency to Congress on February 9, 2016, which included his 2017 spending proposal. The federal deficit would shrink to $503 billion in fiscal 2017, down from the current fiscal year but substantially more than the $438 billion figure for last year, which Obama used in boasting about deficit reduction. In the plan, the federal deficit over the next decade would average 2.6% of gross domestic product, the same as its share of the economy for fiscal 2017. Among the key figures for the budget, the President stressed that nearly 18 million people had gained health coverage under the Affordable Care Act, cutting the uninsured rate to a record low. Without going into the details of the budget, here we can only remember that on social indicator plan, federal government has significant responsibilities in six sectors: economic, demographic and civic, socioeconomic, health, security and safety, and environment and energy. We will shortly compare spending growth over 8 years under Obama to spending growth under past presidents.

22 *Idem*, p. 1253.

If we consider annual average real (inflation-adjusted) spending growth during presidential terms, Lyndon B. Johnson (+5.7%) was the big-spending champ. He increased spending enormously on both guns and butter, as did fellow George W. Bush. Bush II was the biggest spender since Lyndon B. Johnson. As for Obama, he comes out as the most "frugal" President (only +1.7%). Regarding total outlays other than defense, all statistical data show that recent Presidents have presided over lower spending growth than past presidents. Richard Nixon, for example, still stands as the biggest spender (+9.3%), and the mid-twentieth century was a horror show of big spenders in general. The Bush II and Obama years have been awful for limited government, but the Johnson-Nixon tag team was a nightmare – not just for rapid spending during their tenures, but also for the creation of many spending and regulatory programs that still haunt us today. Some scholars will note that the "power of the purse" is supposed to belong to Congress, not to presidents. But, according to Sidak, we can consider that the veto gives Presidents and congresses roughly equal budget power. Health-care spending growth, during each president's tenure, reflects the fiscal disposition of both the administration and Congress at the time. Spending growth during the Clinton and Obama years, for example, was moderated by Republican congresses, which leaned against the larger domestic spending favored by those two presidents. Also, with regard to Obama's presidency, a relatively slow growth was generated in Medicare in recent years. Before the 2010 national elections, in March 2009, at the outset of his effort to overhaul America's health-care sector, President Barack Obama remarks:

> If there is a way of getting this done where we're driving down costs and people are getting health insurance at an affordable rate, and have choice of doctor, have flexibility in terms of

> their plans, and we could do that entirely through the market, I'd be happy to do it that way.[23]

Despite the enthusiasm of the president, the Act was under attack in courts, in Congress, in state legislatures, and in public forums. Opponents of the Act moved to repeal it in Congress and, after national elections in November 2010 and the loss of majority in the House of Representatives by the Democrats, many of the new Republican members of the House campaigned to repeal the Act.[24] The legal challenge to the Patient Protection and Affordable Care Act reconsidered many aspects of US constitutional first principles. From this point of view, according to Shapiro, we can reconsider the fundamental relationships between citizens and the government and between the states and the federal government.[25] The Act provides that individuals can purchase competitively priced health insurance on American Health Benefit Exchanges ("Exchanges"), which may be run by either the states or the federal government.[26] It also authorizes a federal tax credit for low- and middle-income individuals who purchase insurance on the Exchanges. The Internal Revenue Service (IRS) issued a regulation confirming that the federal tax credit is available to all financially eligible Americans, regardless of whether they purchase insurance on a state-run or

23 Quoting in M.F. Cannon, "Yes, Mr. President: A Free Market Can Fix Health Care", *Policy Analysis*, No. 650, 2009, p. 1. From a diachronic point of view, *see* J. Cannan, "A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History", *Law Library Journal*, Vol. 105, No. 2, 2013, pp. 131-173.

24 *See* Dolgin and Dieterich, "Social & Legal Debate About the Affordable Care Act", pp. 70-72.

25 I. Shapiro, "Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of Obamacare Ruling", *Texas Review of Law and Politics*, Vol. 17, No. 1, 2013, p. 2.

26 From a critical point of view, *see* A. Amar, "The Lawfulness of Health-Care Reform", available at <hiip://ssrn.com/abstract=1856506>, pp. 1-29.

federally facilitated Exchange. The Act expands the health protection, more than Medicaid, which was originally a program to help four narrow categories of people – the disabled, the blind, the elderly, and poor children. It was not a national redistribution or health-care program for the entire non-elderly population with income below 133% of the poverty line, which is what Obamacare creates. Health-care providers are licensed at the state level, but health insurance creates a national market of the sort long regulated by Congress.

It's hard to say how President Donald Trump will modify this budget proposal, but it is not so casual that he signed his first executive order to minimize the economic burden of the Affordable Care Act, according to his electoral program.[27]

3.4 The Affordable Care Act and US Supreme Court Decision in *King v. Burwell*

Soon after President Obama signed the Affordable Care Act, some state general attorneys challenged the law's constitutionality in a federal district court in Florida, and others joined shortly after that. As it is pointed out by Dolgin and Dieterich, "[t]hese cases and the law they challenge have provided a stage on which the nation is considering many issues that encompass, but go beyond questions about the constitutionality of the bill." Within a year of the Act's promulgation, 28 states had challenged the Act, and five courts reached decisions on merit. These courts focused on the "individual mandate" and the limits of the authority extended through the Commerce Clause to the federal legislature and on the allegation that the individual mandate could exceed the power granted to

27 Executive Order 13765, *Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal*, January 20, 2017, available at <www.whitehouse.gov>.

Congress under the Commerce Clause of Article 1, Section 8, of the US Constitution. The solutions they found were different: two judges upheld the statute and the individual mandate, two others invalidated it, another one tried to declare void the Act as a whole, and other judges stopped challenges to the law.[28] From a constitutional point of view, the judges took another element into consideration: the Tenth Amendment of the Constitution. It asserts that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Among the decisions that validated the Affordable Care Act, we can point out *Thomas More Law Center v. Obama*,[29] *Liberty Univ. v. Geithner*,[30] and *Mead v. Holder*,[31] while, among those which invalidated the Act or its significant previsions, the most important are *Virginia ex rel. Cuccinelli v. Sebelius*[32] and *Florida v. United States Department of Health and Human Services*.[33] Opponents of the Act moved to repeal it in Congress and, after national elections in November 2010 and the loss of majority in the House of Representatives by the Democrats, many of the new Republican members of the House campaigned to repeal the Affordable Care Act.[34] *King v. Burwell* represents "a resounding victory for the Obama administration,"[35] a milestone for the survival of the Patient Protection and

28 *See* N.C. Aizemann and A. Goldstein, "Judge Strikes Down Entire New Health-Care Law", *Washington Post*, 1 February 2011, 9.32 AM; Dolgin and Dieterich, "Social & Legal Debate About the Affordable Care Act", 2011, p. 61.

29 Thomas More Law Center *v.* Obama, 720 F. Suppl. 2d 882 (E.D. Mich. 2010).

30 Liberty Univ. *v.* Geithner, 753 F. Suppl. 2d 16 (D.D.C 2011).

31 Mead *v.* Holder, 766 F. Suppl. 2d 16 (D.D.C 2011).

32 Virginia *ex rel.* Cuccinelli *v.* Sebelius, 728 F. Suppl. 2d 768 (E.D. Va. 2010).

33 Florida *v.* United States Department of Health and Human Services, No. 3:10-CV-91-RV/EMT, 2011 WL 285683 (N.D. Fla. January 31, 2011).

34 *See* Dolgin and Dieterich, "Social & Legal Debate About the Affordable Care Act", pp. 70-72.

35 J.H. Adler and M.F. Cannon, '*King v. Burwell* and the Triumph of Selective Contextualism', *Cato Supreme Court Review*, 2014-2015, p. 36.

Affordable Care Act, a landmark law dedicated to achieving widespread, affordable health care[36] and was the Supreme Court's third ACA case in four years: in 2012 the Court upheld its constitutionality in *National Federation of Independent Business v. Sibelius*[37] and *Hobby Lobby Stores v. Burwell*.[38] In *King v. Burwell*, the Court considers whether the ACA exceeds the boundaries of federal authority under the various provisions of the Constitution that establish the relationship between local and national governance. The Act: (a) adopts the guaranteed issue and community rating requirements; (b) requires individuals to maintain health insurance coverage or make a payment to the IRS, unless the cost of buying insurance would exceed 8% of that individual's income; (c) seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100% and 400% of the federal poverty line; (d) gives each state the opportunity to establish its own Exchange, but provides that the federal government will establish "such Exchange" if the state does not. In the state of Virginia, where there is a Federal Exchange, four citizens, refusing to purchase health insurance, challenged the IRS Rule in Federal District Court. The Court of Appeals for the Fourth Circuit viewed the Act as ambiguous and deferred to the IRS's interpretation under *Chevron*, the most famous case in administrative law,[39] a quasi-constitutional text, the undisputed starting point for any assessment of the allocation of authority between federal

36 King *v.* Burwell, 135 Sup. Court 2480, 2495 (2015). *See* on this Case: Adler and Cannon, '*King v. Burwell* and the Triumph of Selective Contextualism', pp. 35-77.

37 National Federation of Independent Business *v.* Sibelius, 132 Sup. Court 2566 (2012).

38 Hobby Lobby Stores *v.* Burwell, 134 Sup. Court 2751 (2014).

39 Chevron U.S.A. Inc. *v.* Natural Resources Defense Council, Inc., 467 Sup. Court 837 (1984).

courts and administrative agencies.[40] When the judges analyze an agency's interpretation of a statute, they often apply the two-step framework announced in *Chevron*, which provides that when a statute is ambiguous, courts should defer to the interpretation of the implementing agency. According to Adler and Cannon, we can certainly consider that "[t]he rationale for refusing to apply *Chevron* deference in such cases is that such deference is only appropriate where Congress would have wanted the implementing agency to exercise such authority."[41] On the contrary, the Court's decision does not apply the *Chevron* deference-to-agencies doctrine in *King*. It explained that *Chevron* does not provide the appropriate framework in this case and "the tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep 'economic and political significance'."[42] This aspect of the *King* decision gives opponents of agency action a new arrow for their legal quivers.

Due to the limited space, we cannot retrace here the whole process of reasoning followed by the Supreme Court, but only put out a few other points.

The Court reminds the conditions of insurance market regulations before the ACA: in the 1990s, several states sought to expand access to coverage by imposing a pair of insurance market rules, a "guaranteed issue" requirement. These reforms bar insurers from denying coverage to any person because of his health, and impose a "community rating" requirement, and have thus achieved the goal of expanding access to coverage. They also encouraged people to

40 C.R. Sunstein, 'Chevron Step Zero', *Virginia Law Review*, Vol. 92, No. 2, 2006, pp. 1-60.

41 Adler and Cannon, '*King v. Burwell* and the Triumph of Selective Contextualism', p. 70.

42 There was precedent for the Court's refusal to apply *Chevron* deference: FDA *v.* Brown & Williamson Tobacco Corp., 529 Sup. Court 2480, 2495 (2000).

wait until they got sick to buy insurance. Moreover, consequently, the number of people buying insurance declined, and insurers left the market entirely.

Another issue concerns the question if Congress can, under the Commerce Clause of Article I of the Constitution, regulate "inactivity" – namely, the decision not to buy health insurance – was initially dismissed by just about everyone who had an opinion on the matter. On the Commerce Clause, which grants to Congress the power to regulate interstate commerce, the Court said that Congress could not compel activity or create commerce in order to regulate it. In this regard, Shapiro suggests that, "[t]he Court distinguished Obamacare's requirement to buy health insurance from previous cases where there was already some sort of existing economic activity that the federal government then either regulated or prohibited."[43] We can remark that the Court's ruling on the states' challenge to Obamacare's Medicaid expansion will likely have a great impact on future constitutional litigation in this field because there is not much precedent regarding Congress's spending power. In the last Spending Clause case, *South Dakota v. Dole*,[44] Court decided 25 years ago and involved the federal government's conditioning of 5% of highway funds on states raising their drinking ages. The Court agreed with this framing of the matter and struck down a federal law as exceeding Congress's "spending power," without providing an exact standard regarding when an offer of federal funds becomes coercive. The Court rejected the Affordable Care Act's challengers' arguments. In an opinion authored by Chief Justice Roberts, the Court held that tax credits are available to individuals in states that utilize a Federally facilitated Exchange. According to Roberts, because the phrase "an Exchange established

43 Shapiro, "Like Eastwood Talking to a Chair", p. 3.
44 South Dakota *v.* Dole, 483 Sup. Court 203 (1987).

by the State" is ambiguous as it relates to tax credits, the Court must look to the broader text and structure of the Act to determine the meaning of that phrase. The Court correctly ruled that tax credits must be available to all qualifying citizens in every state; holding otherwise, the Court explained, would disrupt the interlocking reforms Congress put in place to achieve the law's goal of affordable health care for all Americans. The Court affirmed the understanding of the ACA that has been held by state governments and members of Congress since the Act's inception: tax credits must be available to eligible citizens for insurance purchased on any Exchange created under the ACA.

The Obamacare cases most directly ask how best to understand the appropriate bounds of federal power and, accordingly, *King v. Burwell* case raises current issues relating to US federalism.

3.5 Interpretive Problems in US Federalism

Can we consider the Affordable Care Act as an experiment in federalism?[45] From the constitutional point of view, *King v. Burwell* is a leading case. It will speak directly to the interpretive problems of federalism that have ensnared the practitioners, and scholars of American governance since the nation's first days. Federalism is the oldest question of American constitutional law,[46] and, after the New Deal, it became widely understood as a question of the proper "balance" between the federal government and the states.[47]

45 On this question, *see* K.A. Dropp, M.C. Jackman, and S.P. Jackman, "The Affordable Care Act: An Experiment in Federalism", *Center for Effective Public Management at Brookings*, October 2013, pp. 1-17.

46 H. Powell, "The Oldest Question of Constitutional Law", *Virginia Law Review*, No. 79 (1993), p. 633.

47 M.S. Greve, "Federalism", *in* M. Tushnet, M.A. Graber and S. Levinson (Eds.), *The Oxford Handbook of the U.S. Constitution*, Oxford, Oxford University Press, 2015, p. 436.

Analyzing the relationship between *King* and federalism, Erin Ryan raises the fundamental question if the state or federal government should make these kinds of health policy choices, and, especially in this case, if the political branches or the judiciary should make it.[48] The Constitution delegates some responsibilities to one side or the other. The federal government guarantees, for example, equal protection of the laws and regulates interstate commerce, while the states manage elections and regulate local land use. Between these extreme realms of governance, it's much harder to know what the Constitution really tells us about who should be in charge.

There is no doubt, however, that the Constitution creates spheres of state and federal authority that are at once separated and overlapping, providing management tools via the Supremacy Clause, and clarifying that legitimate federal law can always preempt conflicting state law. As federal authority often share regulatory space with the states even when preemption is clearly possible, especially when state and local government bring useful capacity to the regulatory table. The problem that pervades all federalism controversies is that the Constitution mandates but incompletely describes US system of dual sovereignty, in a way that forces those implementing it to rely on some interpretive theory about what American federalism is.[49]

Two models have influenced the Court's approach to understanding federalism. On the one hand, it considers the "dual federalism" approach preferring a stricter separation between proper spheres of state and federal power, as in *United States v. Morrison*, when it rejected federal remedies under the Violence Against

48 E. Ryan, "Obamacare and Federalism's Tug of War Within (June 21, 2012)". Available at SSRN: <hiips://ssrn.com/abstract=2088762> (last visited November 29, 2016). *See also* E. Ryan, *Federalism and the Thug of War*, Oxford, Oxford University Press, 2011.

49 Ryan, "Obamacare and Federalism's Tug of War Within (June 21, 2012)", p. 2.

Women Act.[50] If this approach captures the operation of state and federal powers side by side, in different spheres, the interpretation of US Constitution is complex. On this point, we can observe that the general government's powers are federal in extent but national in operation and, according to Greve, "dual federalism thinkers see federalism as a zero-sum game, in which any expansion of federal reach comes at the direct expense of state reach, and vice versa."[51]

On the other hand, the "cooperative federalism" approach rejects the zero-sum model and tolerates greater jurisdictional overlap. The Court has repeatedly relied on cooperative federalism thinking in upholding Congress's use of federal funds for social programs like, e.g., Social Security and Medicare, or the regulation of education and health care.[52] Also, for this reason, the Court, in *King v. Burwell*, concludes to reject petitioners' interpretation because it would destabilize the individual insurance market in any state with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid.

3.6 Conclusion

King v. Burwell does not represent a simple case about statutory interpretation. It is something more complex that concerns the essence of American federalism. As Antonio Perez points out, "U.S. federalism principles require a different approach to health care than simply following the nominally more efficient models, usually single-payer system employed in the rest of industrialized world." So Obamacare' federal exchange could be "the vehicle for the ulti-

50 United States *v.* Morrison, 529 Sup. Court 598 (2000).
51 Greve, "Federalism", p. 438.
52 *Idem*, p. 438.

mate realization of federal supremacy."[53] The Supreme Court's decision in *King v. Burwell* was a resounding victory for the Obama Administration, virtually guaranteeing that the ACA will survive, at the end of the president's second term. Under *Obamacare*, the federal government offers states a lot of money to expand their Medicaid programs. The Act provides for some conditions: states have to increase the number of people covered by Medicaid; create new regulatory structures; transform the administration of health care; and, perhaps most importantly, spend more of their money – even if that constituted a fraction of the federal funds.

The *King* case effectively removed the last significant threat to the Administration's ability to solidify its health reform legacy before the President leaves office. In conclusion, we can argue that the separation of powers dictates a unitary Executive and that a unitary Executive cannot tolerate congressional encroachments that, under the pretext of guarding the public purse, deny the President the funds necessary to perform the duties and exercise the prerogatives conferred on him by Article II. The Framers created checks and balances between local and national power to protect individuals against governmental overreaching or abdication on either side. Federalism fosters local autonomy, and we hope it will promote political accountability that enhances democratic participation.

If this principle worked well during President Obama's second term in office, Donald Trump's Presidency can introduce many variables, particularly after the nomination of Judge Gorsuch to the Supreme Court. He signed a long and ever-growing list of executive orders, with the aim of dismantling some important reforms, just like the Affordable Care Act. On the same wavelength with

53 A.F. Perez, "The Subsidy Question in King v. Burwell – A Federalist Response to Crony Capitalism", *University of Miami Law Review*, Vol. 23, p. 284.

President Trump, by a narrow margin, on May 4, 2017, the House of Representatives approved the American Health Care Act of 2017, and thereby repeal the Patient Protection and Affordable Care Act and the health-care provisions of the Health Care and Education Reconciliation Act of 2010.[54] The Senate has not yet given its approval to Bill, which could be modified after summer.[55]

In recent times, the crucial question for some legal scholars is what kind of federalism exists in the United States. *King v. Burwell* laid the foundations for a negotiated federalism, reinforcing the idea that only the US Supreme Court will decide whether the American Health Care Act will overcome the pitfalls of Scylla and Charybdis, and the changes in the structure of American federalism.[56]

54 15th U.S. Congress H.R. 1628, *The American Health Care Act of 2017*, available at <www.congress.gov/bill/115th-congress/house-bill/1628>.

55 The Congressional Budget Office estimates that, in 2018, 14 million more people would be uninsured under H.R. 1628 than under current law. The increase in the number of uninsured people relative to the number projected under current law would reach 19 million in 2020 and 23 million in 2026. From another point of view, federal budget over the 2017-2026 period, enacting H.R. 1628, would reduce direct spending by $1,111 billion and reduce revenues by $992 billion, for a net reduction of $119 billion in the deficit over that period, at <hiips://www.cbo.gov/publication/52752>.

56 *See* C.L. Black Jr., *Structures and Relationship in Constitutional Law*, Clinton, MA, The Colonial Press Inc., 1969.

4 The Obama Presidency and the Health Care Reform

*Guerino D'Ignazio**

4.1 Introduction

> The Affordable Care Act is the most important health care legislation enacted in the United States since the creation of Medicare and Medicaid in 1965. The law implemented comprehensive reforms designed to improve the accessibility, affordability, and quality of health care.[1]

The *incipit* of the Special Communication that President Obama has published in JAMA begins with this statement.

The US Congress approved the Patient Protection and Affordable Care Act (ACA)[2] and President Obama signed it into law on March 25, 2010, after an intensive and contrasted political debate. However, the final approval of the law did not solve the long series of social and political conflicts raised by the reform proposal, which the Democratic candidate presented in his program since the campaign for the presidential elections of 2008.[3]

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1 B. Obama, *United States Health Care Reform. Progress to Date and Next Steps*, *JAMA*, Vol. 316, No. 5, published online July 11, 2016, p. 525.

2 Patient Protection and Affordable Care Act, 124 Stat. 119 (2010).

3 Some of the priorities for his Presidency were: extending healthcare coverage, more resources for education, alleviating poverty and tackling climate change. Cf., E. MacAskill, "Obama's First Term: High Hopes, Missed Chances and a Signature Healthcare Win", *The Guardian*, January 4, 2017.

The law was one of the major reforms approved during the 8 years of Obama Presidency[4] and the one with the most immediate impacts on Americans. Yet, it had a troubled path because it was the most important step in the health system since the days of the introduction of Medicare.

It was easy to predict that a reform of this magnitude would cause tensions in the Congress and in the public opinion, but the ideological hostility toward the health-care reform was so big that the abrogation of the law seemed possible after the midterm elections in November 2010, when the Republican party became majority in the House of Representatives.

Disputes and conflicts are inevitable for any policy reform affecting health-care issues and the Affordable Care Act could not be an exception. But the litigations on the Affordable Care Act are emblematic of the "ideological" dispute that is likely to persist as federal agencies make policy choices about what sorts of health-care services can or must be covered, under what conditions, and at whose expense.[5]

The health system, reformed by the Obama administration, has a specific gap to fill as its main goal: the US health spending, including public and private funds, is one of the highest among Western countries in relation to GDP but, nevertheless, average life of American citizens is lower and infantile mortality is greater in comparison with Western countries. Approximately 46 million Americans did not have any health insurance and this inevitably caused a care

4 It is such a symbol of the Obama years that Trump will be under strong pressure from Republicans to dismantle it but it will be hard to take the health insurance away from the millions who now have it. Cf. *Id*.

5 Cf. J.H. Adler, "The Future of Health Care Reform Remains in Federal Court", *in* A. Malani and M.H. Schill (Eds.), *The Future of Health Care Reform in the United States*, Chicago, University of Chicago Press, 2015, p. 54.

deficit.[6] Indeed, since the Affordable Care Act became law, the rate of Americans without health insurance has dropped significantly, declining by 43% and from 16% in 2010 to 9% in 2015.[7]

Furthermore, the implementation of the reform by the states was very complex. The heart of the problem is the fact that, to implement the reform, each of the 50 states would have to set up its own program for the purchase of insurance policies, which will become an opportunity for all American citizens.

4.2 The Content of the Reform

The 2010 reform is a complex statute and mainly consists of amendments to already existing legislative measures and "has made significant progress toward solving long-standing challenges facing the US health care system".[8] Such a reform is not actually the first intervention in health matters signed by President Obama. In 2009, the Congress had, in fact, approved several measures in favor of children and unemployed people, but the real reform on the system, however, was to be finally implemented only with the Affordable Care Act aiming at a historic achievement: to extend health insurance coverage to all citizens, thus overcoming the limitations of previous legal protection of social rights in the United States. In fact, in the absence of a constitutional protection, social rights have always been based on the principle of individual responsibility and, thus, the freedom of choice about the actual signing (or not) of health insurance.[9] The heart of the Affordable Care Act lies on

6 Cf. C. Bologna, *Dall'approvazione delle riforma sanitaria alla decisione della Corte suprema: la parabola (inconclusa) dell'Obamacare*, Forum di Quaderni Costituzionali Rassegna, 2012, n. 11, p. 6.

7 Cf. Obama, *United States Health Care…*cit., p. 525.

8 Cf. *Id*., p. 525.

9 On the constitutional protection of the social rights Cf. G. Bognetti, *Lo spirito del costituzionalismo americano*, Vol. II, p. 140-149.

the principle that any single federal law attempts to solve the three major problems of American health policy: inequitable access to health insurance (Titles I and II), waste and ineffectiveness in the delivery of health-care services (Title III), and poor population health (Title IV).[10]

Almost all parts of the law also relate to fiscal matters, which are of primary importance for the American health policy. Provocative phrases such as "socialized medicine" and "death panels" were often used by political opponents, as a "slogan" for their political contraposition,[11] with the aim to stress that their hostility was beyond the content of the reform.

The enlargement of health insurance coverage was achieved through five regulatory pillars: the individual mandate, a federal regulation of the health insurance market, the establishment of state-level health insurance exchanges, the play or pay for employers, and the extension of Medicaid.[12]

One of the central features of the Affordable Care Act is the constitution of health insurance exchanges in every state, a "market" where citizens can acquire health insurance plans. The federal government may submit some financial or regulatory incentives for state cooperation, but the states will have the responsibility to decide. The Affordable Care Act is a push toward a "cooperative federalism," which is common in many other federal programs. If a state does not constitute an "exchange," the Department of Health and Human Services has to "establish and operate," thus performing the same functions as a state exchange.[13]

10 Cf. W.M. Sage, *Legal and Constitutional Influences on the Implementation of U.S. Health Care Reform*, <hiips://papers.ssrn.com/sol3/papers.cfm?abstract_id=2265640>, 2013 April 15, p. 2.

11 Cf. *Id*., p. 2.

12 Cf. Bologna, *Dall'approvazione delle riforma sanitaria alla decisione*…cit., p. 13.

13 Cf. Adler, "The Future of Health Care Reform…", cit., pp. 9.

Because of the poor health status of many citizens, Title I, "Quality, Affordable Care for All Americans," deals with the problems of difficulties of the insurability for these people. The law guarantees insurability by requiring insurers to accept and renew their insurance without medical underwriting or limitations on coverage. This strategy can only be successful if coverage is compulsory and not voluntary and, for this reason, the "individual mandate" to purchase insurance is considered the core of the Affordable Care Act.[14]

Certainly, there are several other problems in the US health insurance markets and, particularly, many people are simply too poor and cannot afford the insurance coverage because of their low income. In order to solve these problems, Title I of the law contemplates government subsidies to support low-wage workers to participate in health insurance exchanges, but the most important aspect, in order to let affordable health insurance, is the enlargement of Medicaid in Title II, "Role of Public Programs." Through Title II, Medicaid program is jointly cofinanced by federal and state governments and the states have to administer the program in accordance with federal rules. Despite the different implementation of Medicaid program from state to state, the law would expand Medicaid to set up a nationally uniform program of coverage for low-income people and the enlargement would be almost entirely attributable to the federal expense.[15]

Solving problems with health insurance coverage is very important, but it is known that the reform of the US health-care delivery system is highly contrasted in the political scenario.

In order to achieve this goal, the law envisages to withhold federal support to those states refusing to implement the federal

14 Cf. Sage, *Legal and Constitutional Influences on the…* cit., p. 2.
15 *Id*., p. 3.

policy, in particular to states being noncooperative toward highly vulnerable populations. Such states could have a negative impact on the efforts to maintain a uniform health insurance coverage for all American citizens.

> "No less significant, the operation of health insurance exchanges, and the availability of tax credits and cost-sharing subsidies in States that refuse to cooperate with the ACA, is a question that will be ultimately decided by the federal courts".[16]

The other major goal of the health-care reform was to compress health-care costs and reduce medical inflation. The ACA's primary cost-control measure is the institution of the Independent Accounting Oversight Board (IPAB), a new independent agency tasked with the aim to "reduce the per capita rate of growth in Medicare expenditures."[17]

Such agencies are subject to various procedural requirements, such as those established under the Administrative Procedure Act, for notice-and-comment rulemaking. Moreover, such agencies are also subject to judicial review, but, in this case, the Affordable Care Act expressly precludes judicial review of IPAB actions. "The result is the lack of any meaningful checks should the IPAB exceed the scope of its delegated authority."[18]

Finally, Title IV of the law, "Prevention of Chronic Disease and Improving Public Health," contemplates the achievement of communities that assist in choosing a healthy lifestyle by individuals and families.

16 Cf. Adler, "The Future of Health Care Reform…", cit., p. 24.
17 *Id*., p. 31.
18 *Id*., p. 33.

4.3 The Supreme Court Decisions: *National Federation of Independent Business v. Sebelius* and *King v. Burwell*

Political conflicts were not the only risk for the maintenance of Affordable Care Act. The law was, indeed, challenged by some aspects of unconstitutionality. The challenge seemed more recognizable at the state level, where the law was considered, in many cases, to be an invasion of the state's powers, in contrast to the federal structure and the principle of self-determination of every citizen. The main topics, concerning the constitutionality of the law, appeared to be those related to the allocation of competences between the federation and the states and, on the basis of these remarks, the unconstitutionality of the measures was in fact supported in several appeals before the federal courts and, afterwards, before the Supreme Court.

In *National Federation of Independent Business v. Sebelius* (*NFIB*)[19] the Supreme Court upheld some parts of the Affordable Care Act against constitutional attack. The decision was very complex and supported the constitutionality of the individual mandate: the opinion of the Court was written by the Chief Justice Roberts, appointed by President Bush in 2005, and by an unpredictable majority of the four liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Ginsburg wrote, on her own, a concurring opinion, while Justices Scalia, Kennedy, Thomas, and Alito wrote a dissenting opinion.

A different majority, this time consisting of five Justices of Republican nomination and by Breyer and Kagan, established, however, that the extension of Medicaid was not compatible with the Constitution.

19 132 S.Ct. 2566 (2012).

By choosing not to declare unconstitutional the individual mandate, Chief Justice Roberts mainly wanted to remove the responsibility of excessive political activism from the Court.[20] Such responsibility would have been confirmed if five Republican Justices had rejected the main reform of the Obama Presidency as completely unconstitutional. Saving the Affordable Care Act, instead, Roberts implemented the judicial self-restraint before major political decisions of the representatives elected by the people: the counter-majoritarian difficulty, the problematic nature of decisions that could alter the popular will of the majority is, indeed, one of the main topics in the contemporary doctrinal debate in the United States.

At the same time, the Court declared the extension of Medicaid unconstitutional, since it exceeded Congress's spending power and represented a case of coercion of the will of the states. As it envisaged, states not willing to extend it to new bands of the population would not only lose the funds destined to the extension of the program, but also those already being disbursed for decades within the same program. In this case, the states would lose funds that are now an essential part of their budgets and the majority in the Court believes that the amount of funds lost by the states, in case of refusal of accession, makes the measure a coercion of the will of the states themselves. The same sovereignty is, therefore, undermined.

Overall, with this decision, the Supreme Court issued a resounding victory for the national health-care reform and for President Obama as well. A whole century after Theodore Roosevelt's presidential campaign in 1912, finally, a comprehensive national health

20 L.H. Tribe, "Chief Justice Roberts Comes into His Own and Saves the Court While Preventing a Constitutional Debacle", June 28, 2012, in Supreme Court of the United States blog (<www.scotusblog.com/category/special-features/post-decision-health-care-symposium/>).

care was a reality in the United States.[21] The Congress managed to pass the comprehensive reform and, then, the Supreme Court upheld the resulting statute, against what had become a serious constitutional challenge.

The Supreme Court upheld the Act, which is one of the most controversial Acts, with a great impact on the life of Americans: extension of health insurance through the federal government's taxing power. However, it is likely that *NFIB* will not be the judiciary's last decision on health-care reform and discussions on how federal agencies will seek to implement this complex law will likely continue in the years to come.[22]

> "Health care reform is inherently more controversial and divisive than many other sorts of large-scale administrative reform efforts. Health care reform inevitably tranches on matters of deep ethical and personal concern for many Americans and the role of government in promoting public health and particular visions of individual freedom."[23]

It is important to highlight that Roberts agreed on both decisions of the Court and, as a consequence, the two majorities have had the significant support of the Chief Justice. With his decision, the Republican Chief Justice preserved – in that specific moment – the legislation promoted by a Democratic President. However, at the same time, it is not likely that the Supreme Court's resolution of the *NFIB* would stop the conflicts on the Affordable Care Act, since this law affects too many economic and political interests.

21 Cf. A.R. Moncrieff, *Understanding the Failure of Health-Care Exceptionalism in the Supreme Court's Obamacare Decision*, <www.bu.edu/law/workingpapers-archive/documents/moncrieffa071612_000.pdf>, July 16, 2012, p. 2.
22 Cf. Adler, "The Future of Health Care Reform…", cit., p. 51.
23 *Id*., p. 55.

The other important decision of the Supreme Court on the law was *King v. Burwell*.[24] The challengers, in *King v. Burwell*, argued that the statute provides for tax credits only for those who purchase insurance from a state-established exchange. The Supreme Court ruled on June 25, 2015, declaring subsidies legal.[25]

The court ruled, 6-3, that those purchasing insurance from exchanges, whether created by the federal government or by the states, are entitled to tax credits. Chief Justice Roberts declared that ruling for the challengers would collapse the health-care exchanges and that the Congress surely could not have intended to give states the capacity to undermine the Affordable Care Act by refusing to create exchanges. He concluded his majority opinion by declaring: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[26]

With these two important decisions, the Supreme Court affirmed the constitutionality of some basic principles of the law, safeguarding the main social reform of Obama's Presidency.

4.4 Conclusions

"Although partisanship and special interest opposition remain, experience with the ACA demonstrates that positive change is achievable on some of the nation's most complex challenges."[27]

24 576 U.S. (2015).
25 Particularly important also *Burwell v. Hobby Lobby*, 573 U.S. (2014), in which the Supreme Court ruled that for-profit employers with religious objections can opt out of providing contraception coverage under the ACA.
26 In <hiips://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf>, p. 21.
27 Cf. Obama, *United States Health Care*…cit., p. 525.

To some extent, the health reform (or the cd. Obamacare) earned a special status over the last few years and, surely, it should be considered as a landmark statute of entire Obama Presidency. This means that it could facilitate future health-care reforms, while making them easier to be approved.[28]

> As this progress with health care reform in the United States demonstrates, faith in responsibility, belief in opportunity, and ability to unite around common values are what makes this nation great.[29]

In conclusion, the subsistence of US health reform will not be easy. The greatest risk depends on the strong opposition of the new president, Donald Trump, to Obama's health reform and on the will to repeal and replace the law, which has also been expressed by some members of the Republican Party. But, in this case, as Obama declared, this would be a disservice to the American people, after 2 to 4 years of "transition period."[30]

28 Cf. Moncrieff, *Understanding the Failure of Health-Care*…cit., p. 2.
29 Cf. Obama, *United States Health Care*…cit., p. 530.
30 Cf. J. Glenza, "Obama Says Repealing Healthcare Law is 'Disservice to American People'", *Guardian*, January 6, 2017.

5 "Change We Can Believe In." The Case of President Obama's Appointments

*Paolo Passaglia**

5.1 Introduction

According to Article II, Section 2, Clause 2, of the Constitution (the so-called "Appointments Clause"), the President of the United States is empowered to appoint a wide range of public officials. Depending on their level, the appointment process either requires the "advice and consent" of the Senate or, simply, an individual decision made by the President him/herself. Among the officials that the President is entitled to appoint, the most significant offices of the executive and of the judiciary are accounted for either by the Constitution itself or by legislation.

Due to its extent, the power of appointment is one of the most significant ones in defining a president, not only in relation to the immediate impact of his or her policy but also with regard to his or her opportunity to influence the public apparatus for decades following the end of his or her mandate, especially with regard to the judicial branch, since Article III, Section 1, of the Constitution protects judges from removal, granting them the power to "hold their offices during good behavior." Therefore, judges appointed by a President can (and generally do) remain in office, even for many years, during the terms of subsequent presidents.

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The great power allocated to the President in theory may have different outcomes in concrete terms, depending on the circumstances and the context in which it is exercised and on how the President decides to act.

A presidential term may coincide with a period in which many high-profile appointments must be made, or, on the contrary, may be characterized by an ordinary flow of replacements in public offices.

Actually, the fluidity of circumstances is the key element in determining the impact of the presidential policy on appointments. Nevertheless, this policy can significantly contribute to the weight of a president's action, especially with regard to his or her conservative attitude or his or her innovativeness. Such innovation may be found in the choice of appointees, but also in the way that the appointment processes are designed.

The aim of this chapter is to briefly analyze the exercise of the power of appointment during President Barack H. Obama's mandate, focusing both on the circumstances in which it was exercised and on the policy implemented by the President.

5.2 An Overview of the Circumstances

During his 8-year mandate, President Obama has had the opportunity to fill a large number of vacancies. A database published by the White House shows that the President has nominated a total of more than 1,600 public officials.[1] The figure includes officials of all levels, therefore both nominations requiring the advice and consent of the Senate for appointment and direct appointments by the President.

1 The database is available at <www.whitehouse.gov/briefing-room/nominations-and-appointments>. The complete list – dated July 15, 2016 – includes 1,647 nominations.

5.2.1 *Some General Data on Ambassadorial and Judicial Appointments*

Two categories of nominations and appointments in particular are worthy of comment, since they can help to draw a comparison between President Obama and his predecessors.

The first category is that of ambassadorial appointments. According to statistics dated September 29, 2016,[2] President Obama nominated 446 officials, of whom 436 were appointed and eight still await confirmation. Of the 436, 135 were political nominations (for 134 appointments), or 30.3% of his total nominations, and 311 career nominations (with 308 appointments).

Obama's total number of nominations is lower than that of George W. Bush (460), but higher than those of Clinton (417) and Reagan (420), and more than double those of George H. W. Bush (214) and Carter (202). If compared in terms of percentage with the other Democratic presidents' nominations, Obama's are characterized by a relatively high proportion of political appointments (for Clinton, the figure was 28.06% and for Carter, 26.24%); the proportion remains nevertheless lower than those of Republican presidents, since that of George W. Bush was 31.8%, George H. W. Bush's was 31.3%, and Reagan's was 37.6%.[3]

The second category of appointments concerns the federal judiciary. Judicial appointments tend to be in the spotlight when analyzing a president's policy, not only because of the impact that presidential choices may have on a different branch, but also due to the controversies that arise from time to time concerning nominations. In this regard, President Obama's mandate has been characterized

2 Available on the website of the American Foreign Service Association, <www.afsa.org/list-ambassadorial-appointments>.

3 An overview of the presidential appointments made over the last 40 years is provided by the American Foreign Service Association in the "Ambassador Tracker" section of its website.

by a high number of vacancies, a number comparable to that arising during the 8-year mandates of his predecessors. President Reagan is still the President who has appointed more judges than any other president, with 384 federal judges, followed by President Clinton with 379; up to July 15, 2016, President Obama appointed 331 judges, only one more than the 330 appointed by President George W. Bush.[4] In terms of court of appeals judges, Obama's statistics are relatively low: his 54 appointments are overtaken by the 61 made by President George W. Bush, 62 by President Clinton, and 78 by President Reagan, and approximately equal to the 56 of a single term held by President Carter. As for district court judges, President Obama's "score" (268) is higher than that of President George W. Bush (263), but is still lower than those of President Reagan (292) and President Clinton (306).[5]

The key issue relating to judicial appointments is, however, that of Federal Supreme Court vacancies. In this regard, President Obama made two appointments, which are equal to those made by Presidents Clinton and George W. Bush (as well as those made during the 4-year mandate of President George H. W. Bush), and are overtaken by the three of President Reagan. However, President Obama's appointments record could have been considerably enriched if the vacancy in the Supreme Court was filled before the end of his tenure: a third appointment of a Justice of the Supreme Court would have resounded, for many reasons, as President Obama's "great appointment."

4 The source of this data is the United States Courts' website. The table of Judgeship Appointments by President is available at <www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president>. Since the number of President Obama's appointments is updated to 2015, for the current Presidency the total amount was taken from the database mentioned above, note 1.

5 President Obama also appointed four judges of the United States Court of International Trade and three judges of the United States Court of Federal Claims.

5.2.2 The "Great Appointment": An "Unfinished Work"?

The death of Justice Antonin Scalia on February 13, 2016, created a rather complicated situation, both within the Supreme Court and with regard to the relationships between the President and the Senate.

Without one of its most senior and conservative members, the Supreme Court became equally divided between its conservative and liberal wings, such that the appointment of Scalia's successor by a Democratic President would have been likely to give liberals the majority and end the long period of dominance by Republican presidents' appointees, which began during President Nixon's first term.[6]

This simple statement provides sufficient grounds to define the choice of the new Associate Justice as a crucial one, not only for present times but also, and in particular, for the near future. In addition, the general political situation largely contributed to fuel the debate on President Obama's choice.

A first factor that deserves special attention is linked to the fact that the possible nomination was supposed to occur in the midst of controversy surrounding previous appointments that led to a dramatic confrontation between the White House and the Senate's Republican majority:[7] irrespective of these controversies, it is fair to state that the confirmation, of a Justice nominated by a Democrat, by a Republican Senate majority was in itself far from ordinary, since the last time it occurred was in 1895.[8]

6 The split was the result of the appointments of Justice Lewis F. Powell and William Rehnquist as Associate Justices on January 7, 1972.

7 On this controversy, see below, in particular para. 2.2.

8 Reference is made to the confirmation of President Grover Cleveland's nomination of Rufus Wheeler Peckham. The opposite case of a Republican President nominating a Justice and a majority of Democrats confirming him occurred, for the last time, in 1987/1988, resulting in the appointment of Justice Anthony Kennedy.

To outline the circumstances in which the power of appointment was exercised by President Obama, one of the most important elements to take into account is the split of the Senate majority after the 2014 elections. As a matter of fact, for the most part, the statistics on Obama's appointments are based on the first six years of his tenure, when Democrats controlled the Senate; since the Republicans gained a majority, the number of confirmations of Obama's nominees has fallen dramatically: since the new senators took office, only 2 court of appeals judges and 17 district court judges were confirmed.

It is true that when presidential elections approach, the pace of confirmations declines. This slowdown is clearly demonstrated in a painstaking analysis conducted for the Congress on the period between 1980 and 2004,[9] and has been confirmed by subsequent studies.[10] The peculiarity of the current situation probably lies in the numbers: 7 court of appeals judges (all nominated in 2016) were still waiting for confirmation in November 2016, as well as 40 district court judges (14 of whom were nominated in 2015 and 26 in 2016).[11] The most important nomination awaiting confirmation in

9 *See* D.S. Rutkus and K.M. Scott, *Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years*, August 13, 2008, CRS Report RL34615 (available at <www.fas.org/sgp/crs/misc/RL34615.pdf>).

10 *See e.g.* R. Wheeler, "Judicial Confirmations: What Thurmond Rule?", *Issues on Governance Studies*, No. 45, March 2012 (<www.brookings.edu/wp-content/uploads/2016/06/03_judicial_wheeler.pdf>); R. Wheeler, "Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies Up, Nominees Down", blog, <www.brookings.edu>, August, 18, 2015 (<www.brookings.edu/blog/fixgov/2015/08/18/confirming-federal-judges-during-the-final-two-years-of-the-obama-administration-vacancies-up-nominees-down/>); C. Tobias, "Filling Federal Court Vacancies in a Presidential Election Year", *University of Richmond Law Review*, Vol. 50, 2016, p. 1233.

11 Among the nominees awaiting confirmation, there were also five judges of the United States Court of Federal Claims and two judges of the United States Court of International Trade, all nominated in 2015.

November 2016 was, of course, that of Justice Scalia's successor: by that time, nominee Merrick Garland had beaten Justice Brandeis's record in waiting for confirmation, since the wait reached 7 months.

Another key element to take into account related precisely to presidential elections, since the death of Justice Scalia occurred at the beginning of the last year of President Obama's tenure, and therefore only a few months before presidential and congressional elections were due to be held.

Vacancies in the Supreme Court during an electoral year had already occurred. Analyzing all of the vacancies arising throughout the twentieth century,[12] eight concerned appointments to the Supreme Court in presidential election years. All but one of these appointments were made to fill a vacant seat: indeed, in six cases, the presidential nomination was confirmed by the Senate before the elections,[13] while in the seventh, the confirmation eventually occurred later, and was in any case rather peculiar, because it concerned a recess appointment.[14]

12 See A. Howe, "Supreme Court Vacancies in Presidential Election Years", SCOTUSblog (February 13, 2016), <www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/>.

13 On March 1912, President William Taft appointed Justice Mahlon Pitney; 4 years later, President Woodrow Wilson appointed Justice Louis Brandeis (in June) and Justice John Clarke (in July); in March 1932, Justice Benjamin Cardozo took office, appointed by President Herbert Hoover; on January 1940, President Franklin D. Roosevelt appointed Justice Frank Murphy. The latest confirmation made during a presidential election year was that of Justice Anthony Kennedy (see above, note 8), who was confirmed and appointed in February 1988; the peculiarity of the case derives from the fact that the appointment process was started in November 1987, thus not during the electoral year.

14 President Dwight Eisenhower had to fill a vacancy arising in October 1956, when the Senate was already adjourned. The President was therefore allowed to make a recess appointment. The appointee, Justice William J. Brennan, was then confirmed by the Senate only the following year. The notion of "recess appointment" is analyzed below, para. 2.2(b).

The eighth case was the appointment of Justice Abraham "Abe" Fortas as Chief Justice, once the incumbent Chief Justice Earl Warren had announced his retirement. President Johnson nominated Fortas in June 1968, submitting his name to the Senate, which at the time was led by a Democratic majority. Because of objections to the person, but mostly in response to the Warren Court's vigorous activism, the Republicans and a number of Democrats attempted to prevent the confirmation by filibustering. After an unsuccessful cloture vote in October, Justice Fortas asked the President to withdraw his nomination. However, this case can hardly be considered to set a precedent for the 2016 nomination, because then there was no vacancy to fill in the Supreme Court (Chief Justice Warren eventually remained in office until June 1969). Nevertheless, Fortas's failure was quickly evoked after the death of Justice Scalia, in relation to the "Thurmond Rule," a supposed rule suggested by the Republican Senator Strom Thurmond in 1968 according to which the Senate refrains from confirming the President's judicial nominations on the eve of the presidential elections. This "rule" refers generally to the election year, but is supposed to operate only at some point of the year. However, this "point" is not specified. It may perhaps be defined by taking into account the time (July 1968) when Senator Thurmond expressed the rule. With regard to the two cases occurring after the rule was expressed, the above definition may help to explain Justice Kennedy's confirmation in 1988 (which occurred in February); however, the same definition would not have hindered the 2016 nomination, since, in order to replace Justice Scalia, President Obama nominated Merrick Garland, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, on 16 March. Even if one closes an eye on the timing of the nominations and possible confirmations, the real issue is whether Thurmond really did establish a "rule."

Scholarship has noted that "the specter of the 'Thurmond Rule' has reared its head in presidential election years at least since the 1980s, when Senator Strom Thurmond […] chaired the Judiciary Committee."[15] Nevertheless, the validity of the "rule" was never clearly established, to the point that the American Constitution Society defines it as "the urban legend of judicial nominations," since the "idea of halting consideration of judicial nominees in the months leading up to a presidential election never became a part of formal Senate procedure, nor even an informal bipartisan agreement". "It never became a 'rule' at all, and as such, it can be disregarded for good reason – it is the *Thurmond Myth*."[16]

A detailed report compiled in 2008 clearly confirms these statements: "[s]enators of both parties, some closely associated with the judicial confirmation process, have, at different times, spoken of their expectations of a drop-off in Senate processing of lower court nominations occurring earlier in presidential election years than in other years", usually depending on their party affiliation and that of the President; "[t]here is no written Senate or Judiciary Committee rule concerning judicial nominations in a presidential election year," nor is "an apparent consensus or bipartisan agreement ever reached in the Senate regarding how many judicial nominations should be processed in a presidential election year or how late in the year they should be processed"; moreover, "[i]n the presidential election years […], there was no consistently observed date, or point in time, after which the Senate Judiciary Committee or the Senate ceased processing lower court nominations."[17]

15 *See* Wheeler "Judicial Confirmations", p. 1.

16 *See* "What is the Thurmond 'Rule'?", available on the American Constitution Society's website, at <www.acslaw.org/sites/default/files/pdf/ACS%20Talking%20Points%20-%20The%20Thurmond%20Rule.pdf>.

17 Rutkus and Scott, *Nomination and Confirmation of Lower Federal Court Judges in Presidential Election Years*, p. 3.

The slowdown in the Senate confirmation process is clear evidence that there is no rule preventing appointments at the turn of a presidential term, since nominations and confirmations, even if at a slower pace, may occur normally throughout a presidential election year.

Therefore, it could hardly be disputed that, theoretically, there was nothing to prevent the President from appointing a new Justice, even at the end of his or her term.

The outcome of the presidential elections, combined with that of the Senatorial races, might have created favorable conditions for eventually fulfilling the appointment process. In any case, a confirmation occurring in the aftermath of the election would not have been unprecedented. One of the most significant precedents in this respect concerned one of the current Justices: President Carter nominated Stephen Breyer to the United States Court of Appeals for the First Circuit on November 13, 1980, and the nomination was confirmed by the Senate's Democratic majority on December 9, 1980, just before the beginning of a new congressional session, with a new Republican majority in the Senate and a new Republican President.[18]

After all, a confirmation occurring after the elections would have been consistent with the so-called "Biden rule." Indeed, Obama's vice-president, when acting as Judiciary Committee Chairman in June 1992, expressed the view that

> if a Supreme Court Justice resigns tomorrow, or within the next several weeks, or resigns at the end of the summer, [the] President […] should consider following the practice of a

18 For an analysis of judicial appointments made after elections, *see* C. Tobias, "Judicial Selection in Congress' Lame Duck Session", *Indiana Law Journal & Supplement*, Vol. 90, 2015, p. 52.

> majority of his predecessors and not – and not – name a nominee until after the November election is completed.[19]

Trump's victory in the presidential election prevented Obama from achieving his second term with a "grand finale."

Indeed, President Obama did not have the opportunity to give Democratic appointees a majority at all levels of the appellate federal judiciary. Court of appeals judges were constituted by a majority of Democratic appointees (93 to 75, with 11 vacant seats), a prevalence that was much more solid than that resulting from President Clinton's term (78 to 76, with 25 vacancies), the only moment after President Reagan's first term in which circuit judges appointed by a Democrat had been the majority. At the end of Obama's second term, judges appointed by Democrats occupied the majority of seats in 9 out of 13 circuits (the remaining Republican strongholds being the Fifth, Sixth, Seventh, and Eighth Circuits).

Irrespective of the impossibility to make his third appointment to the Supreme Court, President Obama's appointments can hardly be defined as an "unfinished work": indeed, his Presidency appears to have occasioned a real turning point in the recent history of the judiciary, notwithstanding a rather ordinary number of appointments and the difficulties experienced in the last two years. As a matter of fact, the reason why his activity may be described as marking a turning point does not regard the numbers, but rather the president's policy, which will now be examined in more detail.

19 Sen. Biden, Congressional Record, S.16316-7, 6/25/1992. Excerpts of Biden's speeches in which he develops the "Biden standard" are available on the website of the Senate Republican Conference's Blog, <www.republican.senate.gov/public/index.cfm/blog?ID=7E53BFEC-32B0-4B55-A753-3860F588D30A>. *See* also C.E. Emery Jr., "In Context: The 'Biden Rule' on Supreme Court Nominations in an Election Year", *Politifact*, March 17, 2016 (<www.politifact.com/truth-o-meter/article/2016/mar/17/context-biden-rule-supreme-court-nominations/>).

5.3 President Obama's Policy

As noted above, several arguments support the assessment that Barack Obama's Presidency has resulted in significant changes, especially with regard to the composition of the federal judiciary. As important as these changes may be, they may hardly justify a definition of the Obama mandate as marking a turning point in the history of the power of appointment. However, the practice followed over the last 8 years is likely to profoundly influence not only federal offices, but the appointment process itself, as far as both the choice of appointees and the way in which the appointment process is carried out are concerned. These two issues will be sequentially analyzed in the following subsections.

5.3.1 President Obama's Appointees

The appointment policy may be easily interpreted as a part of President Obama's commitment to diversity,[20] a commitment that has produced a significant change in the attitude toward minorities compared to his predecessors' practices. Surveys agree on defining Obama's administration as the most diverse in American history. A survey issued in September 2015 has clearly demonstrated that Obama has presided over the most demographically diverse cabinet. In particular, Professor Anne Joseph O'Connell has compiled a database of all government appointees, confirmed by the Senate, to more than 80 top positions in the federal cabinet between January 1977 and August 2015.[21] The results are indisputable.

20 The attention for diversity and its implementation is defined as a key issue of President Obama's administration action aimed at strengthening civil rights (in this regard, *see*, on the White House's website, the presentation of the "Empowerment Through Diversity", available at <www.whitehouse.gov/issues/civil-rights/empowerment>).

21 *See* A.J. O'Connell, "Obama Ups Diversity in Appointees", *UC Berkeley Law / The Washington Post*, 20 September 2015, available at <www.washingtonpost.

All types of minorities have gained positions and established record highs, even though these increases are far from uniform. As far as sex is concerned, women have reached 35.3%, thus more than one-third, of the appointees in President Obama's cabinet. In the past, only during President Clinton's years did women exceed one-fifth of the appointees (23.3%), while the women in the Bush administrations were fewer than one in five (18.7% during President George H. W. Bush's term and 16.4% in President George W. Bush's cabinet). Going further back in time, in the Carter and Reagan years, women did not reach even one-tenth of the total number of appointees (9.9% for President Carter and only 7.4% for President Reagan).

This brief comparison demonstrates that, even though there may still be a clear underrepresentation of women, their appointments can no longer be considered exceptional; quite to the contrary, President Obama's administration seems to have paved the way to making the appointment of a woman an ordinary choice.

As for ethnicity, the appointments of African Americans have also increased, reaching 14.4% of the total amount. This percentage is slightly higher than that occurring during the Clinton years (13.1%), but nearly doubles that of President George W. Bush's administration (7.7%) and more than triples that of Reagan's and George H. W. Bush's cabinets (respectively, 4.2% and 4.1%).[22] Thanks to this huge rise, President Obama's years are characterized by the introduction of a percentage of appointees that slightly exceeds the proportion of African Americans in the United States' total population (12.6%).

com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679_graphic.html>.

22 The percentage during President Carter's administration was 8.1%.

President Obama's cabinet also displays a significant increase of Latinos, the percentage of which now amounts to 8.5%, roughly double that under President Clinton (4.5%) and greatly more than double that occurring under the other administrations: in President George W. Bush's years, the proportion was 3.9%, slightly higher than that under Carter (3.6%) and Reagan (3.3%), and significantly higher than that under President George H. W. Bush (2.4%). However, despite this dramatic rise, President Obama's cabinet is still characterized by a considerable underrepresentation of Latinos, since their percentage of the total population of the United States is nearly double that of the appointees (16.3%).

Finally, the underrepresentation of Asian Americans should not be an issue, after the Presidency of Barack Obama: as a matter of fact, the percentage of appointees (4.6%) is almost identical to that of the total population (4.8%). Perhaps even more striking is the fact that during President Obama's years, the representation of Asian Americans in the Cabinet has doubled with respect to the percentage that characterized the Presidency of Bill Clinton (2.3%), and has reached almost five times the representation of Asian Americans granted by President George W. Bush (1.0%).[23]

The advancements made in terms of the diversity of the federal cabinet are unambiguously reflected in the policy implemented with regard to appointments to the federal jurisdiction. An infographic issued by the White House in June 2016 highlights some of the most remarkable achievements of President Obama's administration in "[c]reating a judicial pool that resembles the Nation it serves."[24]

23 In President George H. W. Bush's term, the percentage was 1.6%, whereas during Reagan and Carter Presidencies no such appointments were recorded.

24 See the infographic "This is the First Time Our Judicial Pool Has Been This Diverse", 8 June 2016, available at <www.whitehouse.gov/share/judicial-nominations>.

This document lists several "all-time highs" and "firsts," the number of which is striking. For instance, women make up 42% of the total number of federal judges appointed by President Obama: in this regard, the proportions appointed under President George W. Bush (22%) and President Clinton (29%) lag far behind. Thanks to President Obama's appointments to the Supreme Court, for the first time, three women sit on the highest court of the nation.

Similar findings characterize the representation of African Americans: among the judges appointed, 19% were African American, a percentage that exceeds that appointed under President Clinton (16%) and that is almost three times higher than the proportion under President George W. Bush (7%).

Latinos also have an increased representation, although President Obama's actions in this regard indicate a progression rather than a turning point, compared to his predecessors: 11% of the judges appointed by President Obama marks a slight advancement vis-à-vis the 9% scored by President George W. Bush and the 7% of President Clinton. The most relevant achievement, however, is not strictly related to numbers, but rather, to the impact of appointments: indeed, Obama nominated the first Hispanic Supreme Court Justice (and it should be noted that this appointee is a woman).

However, the most amazing rate of growth in minority appointments concerns Asian Americans and Pacific Islanders: when President Obama's figure of 7% of appointments is compared to the 1% of both President George W. Bush and President Clinton, it is difficult to deny that a radical change in policy has occurred.

Indeed, when combining sex and ethnicity, the attention paid by President Obama to diversity within the federal jurisdiction cannot be questioned. To borrow Jonathan K. Stubbs's words,

> President Obama appointed more women than the total appointed by Ronald Reagan, George H. W. Bush, and George

> W. Bush in their combined twenty years in office. Obama has also elevated more Asian American women than all forty-three of his predecessors combined. Moreover, the total number of women of color confirmed to the bench during Obama's first term was greater than the total of any of his predecessors. President Obama also appointed the first Asian American woman to the federal appellate bench […].[25]

From a general point of view, taking into account the appointments to federal jurisdictions as well as the appointments to other federal offices, this overview unambiguously testifies to the fact that President Obama's commitment to diversity was not neglected. Quite to the contrary, the policy implemented throughout the two terms fulfilled a large part of what the 2008 presidential campaign slogan promised: diversity in federal offices was "a change [people could] believe in."

The same comments apply to other ways paved to provide specific categories of people with representation in the federal offices and, consequently, real legitimacy in society.

The LGBT community consistently benefited from President Obama's policy: if, before 2009, only one openly gay judge had been appointed (by President Clinton) to the federal jurisdiction, President Obama appointed 11 judges who were openly gay or lesbian, of various ethnicities.[26]

Diversity was also enhanced by opening up to different career paths to appointment. As a matter of fact, significant changes have taken place in the choice of lawyers to nominate, as proven by the five circuit judges with experience as public defenders who were

25 *See* J.K. Stubbs, "A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016", *Berkeley La Raza Law Journal*, Vol. 26, 2016, p. 92, at p. 109.

26 *See* the infographic mentioned *supra*, note 24.

appointed by President Obama – a figure that exceeds figures of all Presidents in history combined. In Obama's appointment policy, experiential diversity – although generally harder to assess than other kinds of diversity – is a distinctive feature, and targets the need to create a better understanding of the most vulnerable parties in the proceedings: it does not seem irrelevant that 88% of President Obama's appointees to federal jurisdiction have worked outside private law firms, 90% of his appointed circuit judges have worked in public service, and – even most notably – 64% of such judges have served on the boards of offices of indigent legal services or of other public interest organizations.[27]

This latter pattern of diversity gives a clear idea of what diversity ultimately stands for, in Obama's view. The "change to believe in" was – and is – not simply a matter of numbers and the percentage of offices held by people with different origins; diversity is first and foremost a means to reflect a diverse society and, at the same time, implement fairness to the greatest extent possible, through government action and judicial processes.

5.3.2 *The Appointment Process*

If, in light of the above, "change" is a key concept that denotes President Obama's policy of appointments, this holds true not only for the choice of people appointed, but also for the process that leads the nominee to taking office.

In this regard, the legacy of President Obama's years will probably be most closely associated with two major innovations: one occurring in the political context and the other resulting from a landmark judgment of the US Supreme Court. These are explored in Sections 5.3.2.1 and 5.3.2.2, respectively.

27 *Ibidem*.

5.3.2.1 The "Constitutional Option"

With regard to appointments, Obama's Presidency can be divided into two periods: as noted above, its last two years were characterized by robust opposition from the Republican Party, whose majority in the Senate has strongly influenced the number of successful nominations. However, regardless of the political confrontation, from a constitutional point of view, the first six years of President Obama's mandate were even more important, since the Democratic majority in the Senate had to overcome the strong objections made by the Republican minority. Conflicts between majority and minority in the Senate occurring during the "advice and consent procedure" are far from unusual, and it could not be otherwise. After all, the president's power of appointment is so crucial that many political issues are necessarily tied to the individuals whom the President chooses; therefore, the debate surrounding his or her choices may actually give rise to a seminal moment of confrontation on national politics.[28]

Therefore, the fact that conflicts have taken place does not distinguish Barack Obama's Presidency from those of the past. Nor does the way in which confrontations were conducted appear to be significantly different: on the one hand, senatorial opposition resorted to filibustering; on the other, the majority sought to contain time-wasting as much as possible, so as to obtain the expected result and also, possibly, speed up the appointment process.

28 With regard to the "advice and consent" power of the Senate and to the limits that this power displays on the President's action, *see*, *e.g.*, A.J. White, "Toward the Framers' Understanding of 'Advice and Consent': A Historical and Textual Inquiry", *Harvard Journal of Law & Public Policy*, Vol. 29, 2005, p. 103; C.L. Roberts, "Discretion and Deference in Senate Consideration of Judicial Nominations", *University of Louisville Law Review*, Vol. 51, 2012, p. 1; S.I. Friedland, "'Advice and Consent' in the Appointments Clause: From Another Historical Perspective", *Duke Law Journal Online*, Vol. 64, 2015, p. 173.

What truly characterizes the first years of Barack Obama's Presidency was not how confrontations took place, but the frequency and the degree of opposition made to the presidential choices.[29]

To measure the rise of this controversy over presidential appointments, the best marker is probably the number of cloture motions filed (or reconsidered) with regard to nominations. Throughout American history, until November 2013, the total number of motions had been 168; 82 of these (48.81%) were filed (or reconsidered) in President Obama's years.

Given the frequency of its use, it is fair to state that decisions to deploy the cloture vote became a key element of the whole "advice and consent" process: to clear the hurdle represented by vigorous filibustering, the Democrats were increasingly compelled to end the debate by using a "clean-cutting" measure.

According to US Senate Rule XXII, Paragraph 2, in order to pass a cloture motion, the question ("Is it the sense of the Senate that the debate shall be brought to a close?") "shall be decided in the affirmative by three-fifths of the Senators duly chose and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting."[30]

29 It is no coincidence that several proposals for reforming the "advice and consent" procedure were presented. *See*, inter alia, M. Teter, "Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process", *Ohio State Law Journal*, Vol. 73, 2012, p. 287.

30 "Before 1975, two-thirds of the Senators present and voting (a quorum being present) was required for cloture on all matters. In early 1975, at the beginning of the 94th Congress, Senators sought to amend the rule to make it somewhat easier to invoke cloture. However, some Senators feared that if this effort succeeded, that would only make it easier to amend the rule again, making cloture still easier to invoke. As a compromise, the Senate agreed to move from two-thirds of the Senators present and voting (a maximum of 67 votes) to three-fifths of the Senators duly chosen and sworn (normally, and at a maximum, 60 votes) on all matters except future rules changes, including changes in the

To end the debate and stop filibustering, the support of 60 Senators is required to pass the motion. In a two-party system, this "super-majority" cannot be gained easily: as a matter of fact, the last Congress during which a party obtained at least 60 seats in the Senate was the 95th (1977-1979).[31] Therefore, with reference to Rule XXII, the majority in the Senate certainly did not have the power to overcome a minority filibustering.

Facing tenacious filibustering in the advice and consent process, the Democratic majority had the same problems that previously affected Republicans, with the difference that the need to speed up the decision-making appeared stronger than in the past due to the increased frequency of filibustering. In this context, the use of cloture votes gained momentum, but always required some sort of collaboration by the minority: to obtain 60 votes, a part of the Republican Senators had to vote with the Democratic majority; therefore, a negotiation between the majority (with the White House on its side) and the minority was an essential part of the process. For instance, if several nominees were at stake, the minority could impose the withdrawal of one of them in exchange for accepting to vote for the cloture motion.

Nevertheless, as the confrontation became harsher, the negotiation became increasingly difficult to carry out.

Due to the political situation and the resulting inadequacy of cloture motions, many appointment processes were de facto blocked. This had happened before the Obama years, but during his presidency, the stalemate probably appeared more difficult to

cloture rule itself:" *see* R.S. Beth and V. Heitshusen, *Filibusters and Cloture in the Senate*, December 24, 2014, CRS Report RL30360, 7.

31 In recent years, the 111th Congress (2009-2011) was close to producing a supermajority in the Senate: Democrats had 57 seats and Republicans 41; the 2 remaining seats were occupied by independents both caucusing with the Democrats.

overcome than in the past. This resulted in the crossing of a threshold that the Senate majority had considered to cross several times, but ultimately decided against.[32]

On November 21, 2013, the Democratic majority in the Senate adopted a reinterpretation of the US Senate Rule XXII with specific regard to the advice and consent process concerning both executive and judicial appointments, with the sole exception of the nominations to the US Supreme Court, the process of which was left unaltered. The new interpretation allowed the Senate to pass a cloture motion with a simple majority of those voting, instead of three-fifths of the members of the Senate.

The power to override the written rule was based on an opinion written by Richard Nixon in 1957 (when acting as vice-President and therefore as President of the Senate), according to which the Senate had the power to make a ruling that derogated the Rules and thus establish a new, different practice. This power has been defined by its opponents as the "nuclear option," "because of the potentially significant result for Senate operations that could follow from its use."[33] More neutrally, the use of the power to derogate from the Senate Rules may be described as a "Constitutional option," since the Constitution itself generally requires a simple majority, with the exception of specific, clearly identified cases: in other words, Senate Rule XXII seems to have imposed a supermajority in a case for which the Constitution implicitly suggests the adoption of the general rule, and therefore the adoption of motions by simple majority; from this point of view, the constitutional option is nothing but

32 Most notably, in 2005, when Republican majority had to face strong opposition by Democrats against some presidential nominations. The same happened in July 2013, with reversed positions between the two parties. *See* V. Heitshusen, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, December 6, 2013, CRS Report R43331.

33 *See* B. Palmer, *Changing Senate Rules: The "Constitutional" or "Nuclear" Option*, April 5, 2005, CRS Report RL32684, p. 1.

the implementation of the implicit provision concerning majority that derives from the lack of anything providing otherwise in the Constitution.

The establishment of this precedent allowed the Democratic majority to overcome filibustering by Republicans.[34] Nevertheless, the price to pay was the fueling of opposition in appointment processes. The effects of this confrontation were perceived mostly after the 2014 elections, when the Republicans gained the majority of the seats in the Senate, and were therefore – as noted above – in the position of blocking most of President Obama's major appointments.

5.3.2.2 Recess Appointments

Article II, Section 2, Clause 3, of the Constitution states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The purpose of the clause was clear: the President should be able to ensure the operation of the government by filling those vacancies that emerged while the Senate was not in session. Recess appointments were essential when Congress had relatively short sessions, with even longer recesses. As Senate sessions became longer, recess appointments changed their role: the temporary appointment that was supposed to ensure the continuity of government increasingly turned into a means for the President to impose a nomination that was met with strong opposition by the Senate majority. Although the Senate still had to confirm the appointee, his or her temporary

34 For a prospective analysis of the reform's impact on the appointment process, based on the evolution of the political system and the past practice of confirmation, *see* A.J. O'Connell, 'Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014', *Duke Law Journal*, Vol. 64, 2015, p. 1645.

holding of office could benefit presidential action for several weeks or months and, at the same time, give the holder the chance to make his or her opponents change their minds.

Once the recess appointment had become a political tool, its use could no longer be analyzed without regard to the concrete political situation. It is no surprise that President Obama's recess appointments were considered to be a part of the confrontation strategy between Democrats and Republicans concerning the "advice and consent" procedure.

Comparing the recess appointments made by President Obama to those made by his predecessors, it is fair to state that Obama used the power in a very limited number of cases: President Obama has made 32 recess appointments,[35] whereas President George W. Bush made 171 and President Clinton 139. Therefore, the main feature of President Obama's practice is not related to the frequency with which the power was used, but rather to the circumstances of its use.

Debate has long surrounded the definition of "recess" and the conditions required by the constitutional provision to allow the President to temporarily appoint office holders waiting for the confirmation of the Senate.

There are two kinds of "recess."[36] First, "recess" is the break in Senate (and House of Representatives) proceedings between two sessions: when a session is adjourned sine die, before the next session begins, the Congress is in an "intersession recess," either because the same Congress has suspended its operation or because the current Congress has adjourned its last session and the following Congress has not yet begun operating. Second, "recess" is the

35 *See* H.B. Hogue, *Recess Appointments Made by President Barack Obama*, May 28, 2015, CRS Report R42329.

36 *See* H.B. Hogue, *Recess Appointments: Frequently Asked Questions*, March 11, 2015, CRS Report RS21308, p. 2.

break in proceedings within a session, due to national holidays or to mere organization of business within the House or the Senate: in this case, the break is called "intrasession recess."[37]

As previously stated, the core purpose of recess appointments was to avoid failures in the accomplishment of government tasks; therefore, the recess considered, both when the Constitution was drafted and in following decades, was the "intersession recess," the period during which an inactive Senate could not be in the position to guarantee the due functioning of government. In light of the original purpose of Article II, Section 2, Clause 3, of the Constitution, intrasession recess appointments were unusual, since a short break in Senate proceedings could not have a profound impact on the operation of government, to the point that intrasession recess appointments as such were also questioned from a legal point of view.[38]

The changed scope of recess appointments led Presidents to take advantage of relatively short periods of holiday and design a sort of "*fait accompli*" appointment policy.

Precisely to prevent this practice, in recent years, and in particular since the 110th Congress (2007-2008), during the last stages of George W. Bush's presidency, the Senate adopted a "defensive approach" vis-à-vis the president, an approach consisting of scheduling meetings in pro forma session every few days, so as not to suspend Senate proceedings for more than three days. During these sessions, no business can be conducted: their sole purpose is to allow the Senate to continue being in operation, since even a

37 Intrasession recesses require a concurrent resolution of both Houses. As Article I, Section 5, Clause 4, of the Constitution states, "[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting."

38 On this subject, *see* V.S. Chu, *Recess Appointments: A Legal Overview*, August 29, 2014, CRS Report RL33009, p. 4 ff.

short meeting avoids any recess occurring, and therefore prevent any presidential appointments.

President Obama attempted to react against this practice, and seized the opportunity to make four recess appointments when three days elapsed between two pro forma sessions, scheduled respectively on January 3 and January 6, 2012. The pro forma sessions were part of a set of meetings scheduled for the period between December 20, 2011, and January 23, 2012, and were intended to avoid any formal recess from being called during the break in Senate proceedings.

In order to contrast the Senate's move, the White House adopted a substantial interpretation, according to which, notwithstanding the formal session scheduled, the Senate could be considered as being in intrasession recess, since no business was supposed to be carried out for more than a month.

This interpretation, which led to four recess appointments being made on January 4, 2012, was upheld by the Office of Legal Counsel at the Department of Justice, which delivered, on January 6, a Memorandum Opinion for the Counsel to the President on the "Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic *Pro Forma* Sessions."[39] The final paragraph of the extensive opinion, drafted by Virginia A. Steitz, was unambiguous on this point:

> the text of the Constitution and precedent and practice thereunder support the conclusion that the convening of periodic pro forma sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a "Recess of the

39 The full text of the *Memorandum Opinion* is available online at <www.justice.gov/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion.pdf>.

> Senate" under the Recess Appointments Clause. In this context, the President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments.[40]

President Obama's recess appointments were challenged before the federal jurisdiction and finally came before the US Supreme Court in *National Labor Relations Board v. Noel Canning*. Noel Canning, a Pepsi distributor affected by a ruling of the National Labor Relations Board, had refused to execute a collective bargaining agreement with a labor union, claiming that three of the Board's five members, being appointed during the 2012 recess, had been invalidly appointed, thus leaving the board without a *quorum* of lawfully appointed members. The DC Circuit Court vacated the National Labor Relations Board's orders by a unanimous judgment delivered by a three-judge panel on January 25, 2013.[41]

On June 26, 2014, the Supreme Court, with nine votes, affirmed the DC Circuit Court's judgment.[42]

Justice Breyer, delivering the Opinion of the Court, focused inter alia on "the calculation of the length of the Senate's 'recess'"[43] to determine the significance of pro forma sessions, "that is, whether, for purposes of [Recess Appointments] Clause, [the Court]

40 *Id*., p. 23.

41 705 F.3d 490 (D.C. Cir. 2013). The full text of the judgment is available online at <www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf>.

42 *National Labor Relations Board, Petitioner v. Noel Canning, et al*., 573 U.S. __, docket no. 12-1281. The full text of the judgment is available online at <www.supremecourt.gov/opinions/13pdf/12-1281_mc8p.pdf>.

43 *Id*., p. 33.

should treat them as periods when the Senate was in session or as periods when it was in recess."[44]

The answer was that "the *pro forma* sessions count as sessions, not as periods of recess," for the simple reason that, "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."[45]

The immediate effect of the Supreme Court's judgment was that the recess appointments made on January 4, 2012, were found to be invalid. However, a much broader effect was inevitable: the presidential strategy aimed at overcoming Senate opposition to the confirmation of a nominee became impossible to follow, simply because the definition of "recess" had fallen completely in the hands of the Congress. It is therefore no surprise that, after the challenged 2012 recess appointments, no further application of Article II, Section 2, Clause 3, of the Constitution was made.

Against this backdrop, to reprise the "Great Appointment" of Merrick Garland,[46] it was impossible to envisage that the hurdle could be cleared by referring to the 1956 precedent concerning the appointment of a Justice of the Supreme Court, William J. Brennan, during the recess immediately prior to the presidential and legislative elections.

5.4 Conclusion

Reference to the deadlock over the appointment of the new Associate Justice of the Supreme Court may provide a good conclusion to this chapter, because it rather emblematically illustrates some

44 *Id.*
45 *Id.*, p. 34.
46 *See supra*, para. 5.1.2.

of the main features of President Obama's exercise of the power of appointment.

First, the – eventually vanished – opportunity to appoint a third Associate Justice arose as part of the high number of vacancies that occurred during President Obama's terms in office, and contributes to assess the possible impact that the appointments made over the last 8 years will have in the near future.

Second, the failure in appointing Merrick Garland is clear evidence of the troubles that the exercise of the appointment power has gone through. The reason is obviously related to the Republican majority in the Senate; however, overall, the Republican filibustering of the first years cannot be ignored.

Third, the impossible recess appointment of the new Associate Justice is one of the most powerful legacies of these years.

In any case, it is fair to state that Garland's nomination did not apply to the most important feature of President Obama's policy: the need to reach an agreement with the Republican Senate majority led the President to choose a very "traditional," "nondenominational" nominee, who was quite far removed from the ideal of diversity that has profoundly characterized the appointments policy. An ideal that, thanks to its implementation, explains and justifies – at least, so I hope – the title of this chapter and the choice to emphasize the "change" that President Obama's years in office have produced in the field of appointments.

6 President Obama in the "Regular Disorder" of the Budget Process

*Luigi Testa**

6.1 A Short Introduction to the Federal Budget Process

The aim of this chapter is to understand something more about the President's role and his powers in the Congressional federal budget process of the United States, in an attempt to evaluate the "Obama experience" from this specific point of view.

The rules governing the federal budget process are the result of the long and complex evolution that occurred over the past century.[1] As is well known, US budgetary process has been deeply influenced by the British model.[2] Through consecutive reforms, however, the United States has also introduced elements borrowed from the continental European tradition.

The influence of the British model is particularly evident in the two-pronged structure of the budget cycle, which culminates in the adoption of two final legislative acts. The first element of the cycle

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1 For a complete overview of the federal budget process, *see* A. Schick, *The Federal Budget. Politics, Policy, Process*, Washington, DC, 2007. *See also* H.M. Robert, *Robert's Rules of Order Newly Revised*, Reading, MA, 2011, and P. Mason, *Mason's Manual of Legislative Procedure*, St. Paul, MN, 2010.

2 For an overview of the Budge Process in the United Kingdom, *see* E. May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament (Parliamentary Practice)*, London, 2011, 711 ff.

consists of the discretionary spending legislation, which is implemented in the context of the annual Appropriation Acts.[3] This phase is followed by the "reconciliation process," with the adoption of some "Reconciliation Acts," which bring the existing revenue and spending law into conformity with the government's policies.[4]

The Appropriation Act and the Reconciliation Act are different not only in their scope, but also in their nature. The former is the legislative instrument to authorize public spending: Article I, Section 9, of the Constitution, indeed, provides that "no money shall be drawn from the Treasury but in consequence of appropriations made by law." If the Congress does not approve the Appropriation Acts (or some *interim* resolutions[5]) by the beginning of the new fiscal year – October 1 – the only solution is the federal government shutdown, with detrimental consequences for the country.[6]

The reconciliation process, instead, amends the fiscal legislation by means of a special procedure, different from the ordinary one, with some important advantages – but it does not represent a necessary step in the budget cycle.

This two-pronged structure is common not only to the UK system, but also to the common law area model in general. For instance, the Canadian budget also reflects the British model, more than the US one does. In fact, the former contains some elements that are common to the European model (or civil law area model,

3 *See* S. Streeter, CRS Report, *The Congressional Appropriations Process: An Introduction, 2008*.

4 *See* A. Schick, *Reconciliation and the Congressional Budget Process*, Washington-London, 1981; *also*: R. Keith and B. Heniff Jr., CRS Report, *The Budget Reconciliation Process: House and Senate Procedures, 2005*.

5 *See* J. Tollestrup, CRS Report, *Continuing Resolutions: Overview of Components and Recent Practices*, 2016.

6 *See* C.T. Brass, CRS Report, *Shutdown of the Federal Government: Causes, Processes, and Effects*, 2014.

which you can find not only in the Old Continent, but also, for instance, in Latin America).

For example, the initial steps of the US budget process are akin to the budget process of continental European states. Indeed, while the UK (and Canadian) model provides for two formal distinct initiatives by the Crown/government, under the Budget and Accounting Act of 1921, the President shall submit a unique document, which is a formal Budget to the Congress, by the end of February.[7] The Budget does not represent a formal presidential legislative initiative – which is provided for in the US Constitution[8] – and, after discussing this governmental formal proposal, pursuant to Congressional Budget Act of 1974, the House of Representatives and the Senate pass a "concurrent resolution," which is the first formal document of the Congressional budget cycle.

The "concurrent resolution" sets aggregate budget policies and functional priorities, according to government proposal, for the next 10 years, but, differently from a "joint resolution," it is not a law (and so it cannot be vetoed by the president), and it has not got statutory effect. For this reason we need Appropriation Act for spending legislation and Reconciliation Acts implementing this resolution.

6.2 The President in the Budget Cycle

From the Budget and Accounting Act of 1921 providing for a Presidential Budget, the US Budget process – according to the universal rule in the matter – derives from an Executive initiative. The

7 *See* M.D. Christensen, CRS Report, *The President's Budget: Overview of Structure and Timing of Submission to Congress*, 2013.

8 This is different from the European system, where the budget presented by the government is a formal legislative initiative, to be immediately discussed (and approved) by the parliament.

document is the product of a complex dialogue between the Office of Management and Budget (OMB)[9] of the White House and federal agencies, which starts about 9 months before the submission to Congress. The Budget is mainly undetermined both in format and in content – except for some details provided by the law – so that the President can use it freely, as a sort of "presidential pulpit,"[10] in the interaction with Congress.

The submission of the presidential budget is therefore the first presidential intervention in the Congressional budget process. But it is not the only one. Although the federal budget cycle is designed in accordance with the classic system of "divided powers," the President of United States may take part in the process in two other ways.

First, if the Congress is not able to pass the Appropriation Act (or *interim* resolutions) by the end of the current fiscal year, he shall officially declare the government shutdown, because of provision of Article I, Section 9, of the Constitution. According to Antideficiency Act and the strict interpretation given in the opinion of General Attorney *Civiletti* (1980-1981), if a "funding gap" occurs, the law prohibits the government and federal officials obligating funds before appropriation approved, apart from operations connected to the safety of human life or the protection of property. All this implies the furlough of federal employees and curtailment of agency activities and services, until Congress is able to approve a formal (definitive or provisional) appropriation.

Second, although the President cannot veto the "concurrent resolution," he can nonetheless veto the other legislative acts of the

9 *See* S.L. Tomkin, *Inside OMB: Politics and Process in the President's Budget Office*, New York, NY, 1998; *also*: B.A. Radin, "The Relationship Between OMB and the Agencies in the Obama Administration", *International Journal of Public Administration*, 2009, 781 ff.

10 Schick, *The Federal Budget*, 110.

cycle, that is to say the Reconciliation Acts, the Appropriation Acts, and also the Continuing resolutions, if adopted by the Congress. So, the presidential role in the budget process can be analyzed from three perspectives: the presidential initiative, the power of veto, and the management of a government shutdown.

6.3 From a "Regular Order" to a "Regular Disorder"

Before studying the presidential initiative, it is worth clarifying that the "regular order" we have just described – presidential proposal, concurrent resolution, Reconciliation process with its special rules, Appropriation Acts by the end of the fiscal year – is a bit far from what the budget process has become in the last 10 years. Some authors consider this sequence of budgetary process phases as an example of "regular disorder," rather than a "regular order."[11]

Such a disorder stems from the permanent delay that characterizes the procedure. This tendency is further exacerbated in a context of "divided government" – and, in the most recent experience, of divided Congress. As is well known, this situation occurred during both Obama's presidential terms, and impeded the orderly completion of the budget process.

During this period, the Congress failed to pass a common resolution on the budget for five times.[12] And, since the common resolution contains the so-called reconciliation instructions to amend the current legislation, the reconciliation did not take place for five years. As regards the appropriation process, because of the

11 *See* N. McCarty, "The Decline of Regular Order in Appropriations: Does It Matter?", 1, *working paper*, Princeton University, 2014; P.C. Hanson, "Abandoning the Regular Order: Majority Party Influence on Appropriations in the U.S. Senate", *Political Research Quarterly*, 2014, 520 ff; and, *Id.*, "Restoring Regular Order in Congressional Appropriations", *Economic Studies ad Brookings*, 2015.

12 The resolution is approved only for FY2010, FY2016 and FY2017.

Congressional filibustering, it was never completed by the beginning of the new year – except for the fiscal year 2010 – and the Congress was always forced to pass some *interim* measures in order to provide the fiscal coverage for mandatory expenses. The budget cycle, therefore, systematically ends after the beginning of the fiscal year.

Due to this delay, the OMB did not manage to timely complete the preparation of the presidential budget. As a consequence, the President could not present it to Congress on the scheduled Monday in February, and the new cycle starts itself late. Only in 2010 and 2015, Obama could timely submit the presidential budget, while in 2009 it was submitted with three months' delay – this was third biggest delay in the history of the presidential budget. In the US history, Obama has been an unmatched latecomer, with more than 200 days late, on the whole. Only for the fourth time, from 1921, the delay in the submission of presidential budget exceeded 60 days: two of them occurred during the Obama Administration.

Having said that, the delay of Obama Administration in presenting the budget on time cannot be regarded as a sign of "disinterest,"[13] but – according to the OMB – as a simple necessity.[14] In fact, as the delay became the "normal" situation, the presidential

13 *See* A.E. Busch, "President Obama and Congress: Deference, Disinterest, or Collusion?", in C. McNamara and M.M. Marlowe (Eds.), *The Obama Presidency in the Constitutional Order*, Lanham, MD, 2011, 71 ff.

14 For instance, in 2013, OMB Secretary explains: "The prime budget season for OMB is November, December. And given what was going on with the fiscal cliff negotiation, we needed to put much of it on hold to understand what was going to happen in the fiscal cliff negotiation… We had complexity around the sequester and the sequester kicking in unfortunately on March 1st. So given those delays primarily driven by fiscal cliff negotiation, made worse by the sequester, the budget was delayed, and we're happy to be rolling it out today" (<www.whitehouse.gov/the-press-office/2013/04/10/press-briefing-press-secretary-jay-carney-omb-acting-director-jeffrey-zi>).

staff started to place the blame on faults of Congress, on some occasion without any formal justification.[15]

6.4 The Twilight of the Reconciliation Process

Due to these delays, the Congress has less time to pass the first act of the cycle: the common resolution. Essentially on its approval depends the destiny of the reconciliation procedure and of the appropriation process as well, but the latter can also be decided by each House with another instrument (the so-called deeming resolution[16]), while the reconciliation procedures can be enacted on condition that Representatives and Senators find a common agreement on reconciliation directives.

During the Obama Presidency, even when Congress approved the common resolution and reconciliation instructions, the process got some problems.

The reconciliation process for FY2010 is the longest in the US history. The Congress approved the Reconciliation Act (Health Care and Education Reconciliation Act) with a delay of almost five and a half months from the deadline provided by reconciliation instructions in the "common resolution." The delay finds its explanation in the effort of Democratic majority to approve the Patient Protection and Affordable Care Act avoiding filibustering by Republicans in Senate. To this aim, the latter accepted not to oppose the Affordable Care Act, but to introduce some modifications to the reform with the Reconciliation Act for the fiscal year in course.

For FY2016, instead, the success of the process was seriously compromised by the effects of Congressional filibustering. In the ordinary legislative process, indeed, the majority needs a vote of

15 No justification is delivered for FY2012 (7 days of delay).

16 *See* M.S. Lynch, CRS Report, *The "Deeming Resolution": A Budget Enforcement Tool*, 2010.

three-fifths of the full Senate to limit consideration of a pending matter with a so-called cloture motion,[17] but Republicans do not have enough votes. The reconciliation process, on the contrary, is a procedure with strict rules of order and time that do not permit extension of the debate by "talking a bill to death" like in the filibustering practice, and the majority can use it to easily obtain approval for their measures.

Thus, on January 6, 2016, the Republican majority at Senate passed a Reconciliation Act – Restoring Americans' Healthcare Freedom Act – to amend the previous Patient Protection and Affordable Care Act, according to the reconciliation directives contained in the common resolution on Budget for fiscal year 2016. Few days after the adoption of the reconciliation instructions, the President announced with a statement of administration policy that he would have vetoed the law, in case of Congressional approval.[18] When the Act came to his desk, the President did not hesitate to exercise his right and issued a message accusing the Congress of "refighting old political battles by once again voting to repeal basic protections that provide security for the middle class."[19] In the American history, this was only the fourth time that the President had vetoed a Reconciliation Act.[20]

17 *See* C.M. Davis, CRS Report, *Invoking Cloture in the Senate*, 2015. A cloture motion enables to end a filibuster on any debatable matter the Senators are considering. Senate Rule XXII requires the votes of at least three-fifths of all Senators (normally 60 votes) to invoke it.

18 President Obama declares: "Rather than refighting old political battles by once again voting to repeal basic protections that provide security for the middle class, Members of the Congress should be working together to grow the economy, strengthen middle-class families, and create new jobs."

19 Here the text of presidential message: <www.congress.gov/congressional-record/2016/01/08/house-section/article/H210-1>.

20 A similar veto occurred in 1995, in 1999 and in 2000.

6.5 2013: "Sorry, Temporarily Shut Down"

The autumn of 2013 has been the most difficult moment in the relationship between the President and Congress. President Obama had to face the second[21] longest government shutdown in the American history.

On 20th September, 10 days before the beginning of the new fiscal year, the approval of the Appropriations Acts seemed far away. Therefore, the House of Representatives passed a Continuing Resolution – i.d. an *interim* measure – to provide budget authority for agencies and programs to continue in operation had the regular Appropriations Acts not been enacted on time. The Republican majority in the House introduced in the Resolution a suspension of some of the programs provided by the Patient Protection and Affordable Care Act – although President Obama, some days before, had threatened to veto another measure amending the tax credit and cost-sharing policies contained in the Obamacare.[22]

Not surprisingly, the Democratic majority in the Senate opposed such a measure, and the debate acquired polemical overtone in a short while. According to the Democrats, Republicans are more or less "fanatics [who] really point to disapproval for Obamacare as justification for taking the Federal Government and our economy hostage to their demands."[23]

The Resolution was rejected by the Senate on several occasions between the 23rd and the 29th September despite the fierce filibustering of the Republicans. But when the House of Representatives approved it again, on the September 30, the President intervened

21 The longest one was in 1995, with President Clinton, for 21 days.

22 Here is the text: <www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2775h_20130910.pdf>.

23 You can read the transcription of the whole debate at: <www.congress.gov/bill/113th-congress/house-joint-resolution/59>.

to denounce the irresponsibility of the Republican Party. The president's words are particularly strong and deserve to be quoted in brief:

> In the event of a government shutdown, hundreds of thousands of these dedicated public servants who stay on the job will do so without pay. And several hundred thousand more will be immediately and indefinitely furloughed without pay. […] These Americans are our neighbours.[24]

The presidential intervention did not achieve its objective. In the afternoon of the same day, the House approved once again the initial version of the Resolution, but the Senate rejected it for the last time passing a motion that ends any further debate on the matter. Some minutes before the midnight, the House approves a resolution, calling for a conference in order to resolve the contrast with the Senate. But the new fiscal year has begun, no Appropriation or Continuing Resolution passes, and "no money shall be drawn from the Treasury," as required by the Constitution.

While the federal agencies make executive the memorandum delivered by the OMB, Barack Obama comes out again in the Rose Garden of the White House, and he was quite outspoken: "Republicans in Congress chose to shut down the federal government. Let me be more specific: One faction, of one party, in one house of Congress, in one branch of government, shut down major parts of the government – all because they didn't like one law."[25] The government shutdown ended on October 17, when Congress

24 You can read the presidential message at: <www.whitehouse.gov/the-press-office/2013/09/30/statement-president>.

25 Read the message at: <www.whitehouse.gov/the-press-office/2013/10/01/remarks-president-affordable-care-act-and-government-shutdown>.

passed a Continuing Resolution providing budget authority until the Appropriation Act is enacted, on January 17.

According to the White House, federal employees were furloughed for a combined total of 6.6 million days, and the shutdown reduced fourth quarter Gross Domestic Product growth by 0.2-0.6 percentage points.[26]

Apart from the shutdown of autumn of 2013, all the spending legislation enacted by Appropriation Acts, during the Obama Presidency, knows a big crisis. For seven consecutive years (from FY2011 to FY2017), appropriation was not completed before the beginning of the fiscal year. As a consequence, Congress approved an *interim* measure every year, and for the first time such a measure provided for fiscal coverage for a whole year and for the whole administration (FY2011).

But there is something more. According to the "regular order," Congress shall enact 12 Regular Appropriation Acts for every fiscal year: one for each one of the Appropriation Subcommittees of the Houses – that is one for each general sector of the Administration. Each Regular Appropriation Act is discussed and approved separately by Representatives and Senate. Nevertheless, sometimes the Congress can choose to compact the spending legislation in one or more Omnibus Appropriation Act, which provides legislative authorizations for several sectors of the Administration. This choice makes the process faster, but it prevents a debate (and a vote) for separate parts; last but not least, it makes difficult the presidential veto, which must be exercised on the whole act.[27] In the Obama

26 *See* Executive Office of the President of the United States, *Impacts and Costs of the October 2013 Federal Government Shutdown*, 2013, p. 4; and *also*: M. Labonte and B. Momoh, CRS Report, *Economic Effects of the FY2014 Shutdown*, 2015.

27 In 2013 Tom Marino, Republican Party, proposed the prohibition "of including more than one subject in a single bill by requiring that each bill enacted

era, there were only seven Regular Appropriation Acts:[28] the other ones are incorporated in Omnibus Appropriation Act.

6.6 A Story Yet to Be Written

Let us draw the strings for a conclusion. President Obama did not have to face unprecedented situations. Other Presidents before him had to deal with delays – although less significant – in the presentation of the presidential budget; other Presidents (not so many) exercised the power of legislative veto for acts of the budget cycle; others had to face a governmental shutdown. What was unprecedented, however, was the double presidential term in which all the "pathological" situations occurred, becoming (let us think of the delay at the beginning of the cycle) completely ordinary.

The passage of the US budget cycle from a "regular order" to a "regular disorder" offers the President a chance to become a new protagonist of this story. The political division of the Congress and the deployment of filibustering strategies weakened the House of Representatives and Senate. This difficulty of Congress, in turn, reinforced the position of the president, who can easily blame the Congress for making management of public finances difficult.

Not surprisingly, the increased role of the President is fraught with consequences. First, the President feels entitled to submit the budget after the deadline provided under the law without providing official justifications – and this delay, among other consequences, reduces the time for the congressional debate, unless you accept the risk of a shutdown. In the worst scenario, the President may wish

by Congress be limited to only one subject" (*US House of Representatives Bill HR 3806*).

28 In two presidential terms – i.d. in 8 years – the Regular Appropriation Act should be (12 per year, that is) 96.

for such a reduction, to "hurry" the Congress, and thus make it easier to pass his proposal.

Second, the "politicization" of the budget process justifies *a political use* of presidential powers, taking away all inhibitions to exercise the veto power in a political way.

Last but not least, the decision-making paralysis of the House and Senate becomes an opportunity to turn public opinion against the Congress, or at least against its political majority. As for the shutdown of autumn of 2013, the President can easily pass on the responsibility of a crisis to the Congress, which has not been able to decide in time (because of a delay that perhaps he himself has contributed to generate).

All this can reveal complex scenarios in the relationship between the President and Congress, which might endanger the goodness of public budgeting. It remains to be seen what will happen in the coming years.

7 President Obama's Political Agenda and the Emphasis on Dissent within the Supreme Court

*Roberto Toniatti**

7.1 Introduction

The distinction between policy-making institutions – the President and Congress – and the judiciary is well rooted and practiced in the constitutional law of the United States. It is well known that US constitutionalism has widely circulated worldwide and has provided a source of inspiration for many constitution-makers, and yet it has features of its own that have not circulated as a comparative model and therefore remain typical and exclusive of this specific form of government.

Such a fundamental distinction is not only a basic component of the principle of separation of powers as elaborated through and rationalized by republican and democratic constitutional theory since the American Revolution; it is also to be considered as an inherently substantive part of the principle of checks and balances, that provides a formal framework for interactions and sharing of powers between separated institutions, for constantly adapting the division of powers between the federal government and states to varying circumstances, for ensuring the guarantee that the *supreme* law of the land controls the law of the land, namely congressional

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and states' legislation and presidential executive actions (and whatever sources of federal common law there may be).[2]

Judicial review of constitutionality is a crucial part of the federal governmental architecture, at least from two points of view (as far as the main focus of this note is concerned): first, because of the coordinated exercise of the presidential appointing power of federal judges and the Senate's function of giving advice and consent to presidential nominations of candidates; and, in the second place, because of the Judiciary's interpretive discretion in developing an institutional policy of self-restraint or one of judicial activism, a policy inclusive of all the variables to be found in the spectrum between the two extremes.

From both points of view, policy considerations play a relevant role and the degree of discretion of all the institutions involved is fairly high. Constitutional practice – that is, a practice under the Constitution although not directly regulated and bound by it – does therefore matter almost as much as the formal normative setting. This distinctive feature of the system is, in part, due to the respectable age of the constitutional document (subject to relatively very few amendments throughout its long life) and, in the other part, a consequence of the common law cultural heritage. In comparison, constitutional texts in continental Europe leave quite more narrow margins of political discretion to governmental institutions,

2 Both principles of separation of powers and checks and balances essentially contribute to the concepts of a "limited government" – widely known – and also of a "limited Constitution," seldom referred to as such: "By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing," A. Hamilton, *The Federalist Papers*, No. 78 (where all the main distinctive features of judicial review are clearly anticipated, described, and argued).

although the functional equivalents of UK style "conventions of the constitution" are known and practiced there as well.

A functional area where constitutional practice is quite relevant concerns, for instance, the criteria to be adopted for the presidential selection of candidates as well as for their confirmation by the Senate, such criteria not being established in any constitutional source or legislative enactment; therefore, to what extent being guided by policy considerations in the appointment process is entirely up to the discretion of each one of the political branches of government. The judicial philosophy of prospective federal judges, more than strict party affiliation, is thus *the* factor that will ultimately lead to achieving a shared appointment process. Furthermore, although the expectations of the appointing political branches of government are not always faithfully matched by subsequent judicial decisions by appointees, the contribution that any new federal judge may give to shaping the overall policy attitudes of the federal judiciary is also to be considered. In no other jurisdiction subject to comparative legal analysis the judicial philosophy of individual members of the Supreme Court – going back to their previous judicial assignments or academic records as well – is under scholars' strict scrutiny as in the United States.

Judicial recruitment is thus a highly political process and such political nature is not only thoroughly public and well visible but also consistent with the normative setting of the Constitution.[3] A feature concerning the federal judiciary and especially the US Supreme Court that must be emphasized (in particular from an

3 *See* R. Toniatti, Appointing Power *e indirizzo politico: le nomine del Presidente Reagan alla Corte Suprema*, in *Quaderni Costituzionali*, 1987, p. 187. *See also* D.S. Law, "Appointing Federal Judges: The President, The Senate, and the Prisoner's Dilemma", *Cardozo Law Review*, 2005, p. 479. For the suggestion that the method of judicial recruitment ought to be amended (and how), *see* S.A. Binder and F. Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary*, Brookings Institution Press, Washington, DC, 2009.

European continental perspective) is that the very democratic visibility of the political nature of recruitment doesn't prevent the judiciary as a whole to be highly respected and its decisions, although even harshly criticized, to be eventually accepted and complied with.[4]

The provision that formally introduces a legally binding variable in the process of selection as well as in the adjudicatory performance by the federal judiciary at large is the "during good behaviour clause":[5] the appointment for life of federal judges is at the same time a guarantee for the independence of individual judges as well as a precondition for achieving some degree of stability in the judiciary's orientation supporting either a more liberal and interpretive or a more conservative and non-interpretive – an originalist – method of adjudication.

The appointing process – even more so for the selection of the nine Justices of the Supreme Court – is therefore to a fairly large extent affected by the ideological polarization of the political system, taking into account the policies agenda of both the President and Congress, mostly when the electoral results produce a pattern of divided government (or "*lame duck*").[6]

4 A striking example may be the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000) that decided the 2000 presidential election: *see*, among many, *Chi ha vinto l'elezione presidenziale del 2000?, Forum sull'elezione del Presidente degli Stati Uniti*, in *Diritto Pubblico Comparato ed Europeo*, 2000.

5 It has been argued that "The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient that can be devised in any government, to secure a steady, upright, and impartial administration of the laws", in Hamilton, *The Federalist Papers*, no. 78.

6 In the last 2 years of Presidency of all the three Presidents recently serving a second mandate (G. W. Bush, Bill Clinton, and Ronald Reagan) the Senate has been controlled by the opposition.

Within the theoretical framework synthetically outlined above and recalling the political division between the Presidency and Congress during most of President Obama's two terms (2008-2016), the paper will first examine some of the main features concerning the use of the presidential appointing power to the judiciary. As a second stage, on the assumption that the record of Barack Obama's Presidency suggests the perception of an activist executive, capable to push forward his political platform as far as compatible with the frustration produced by the lack of support by Congress, the chapter will also attempt at proposing a specific reading of the interaction between single decisions taken by the Supreme Court and some issues of the presidential political agenda that bear a particularly significant symbolic impact.

Lastly, the chapter will stress how the strict majority in such cases of constitutional adjudication not only gives further objective evidence to its internal divisions but does so in words that, due to the conservative Justices' reaction when not in the majority, undermine the traditional prestige of the Supreme Court as well as – again, in particular from a European continental perspective – the quality of its very credibility as a judicial institution.

7.2 The Political Context of Divided Government during the Obama Presidency

The election of President Obama took place over a Democratic political agenda that promised to be active, innovative, and challenging, even more so after a fairly long period of Republican conservative majority, both in the White House and in Congress.

Nevertheless, in spite of promises and expectations, the presidential agenda has not been supported by citizens' voting options after the first half term (2009-2010), the only period when Obama's Democrats held the majority in both Houses and two important

pieces of legislation – the Affordable Care Act and the Dodd-Franck Wall Street Reform and Consumer Protection Act – were adopted under the president's legislative initiative.

At the 2010 mid-term elections, in fact, the Republican Party won the majority of seats in the House and managed to keep it through 2016, in spite of Obama's reelection. The Republican Party was successful also at states' elections. At the latest midterm elections, also the Senate went Republican, thus establishing a permanent divided government framework. The implementation of the presidential political agenda was therefore severely affected by the political context in which the mechanisms of checks and balances were supposed to function.

It wasn't only the different electoral strength of the two parties that mattered, though, and that almost managed to transform the divided government – not certainly experienced for the first time in recent US history – into a standstill: the ideological polarization – or, as it has been termed, "hyperpolarization" – made the policies advocated by each one of the parties more and more mutually incompatible, thus making compromises less and less viable.

Divided government and ideological hyperpolarization deeply affected the substance and the priorities of President Obama's political concerns, with special regard to areas of federal public action that were highly important for his program, as in the field of immigration, civil rights – as related, for instance, to same sex nondiscrimination – and health care.

The president's political agenda was much wider, of course: we single out these three areas because they somehow symbolize the deep divergence between the policies advocated by the two parties and, consequently, by the two political branches of government; also because they offer a good amount of evidence of the means available for an activist President to overcome or, as it were, to dodge

Congress' opposition;[7] furthermore, because once again in the history of the United States they embody the connection between civil rights and federalism (the states – some states, at least – once again performing a conservative role against a liberal attitude promoted by the federal government);[8] and, finally, because in each one of the three fields the federal judiciary and eventually the Supreme Court have had their chance of settling the consequent litigation and saying what the law is.

7.3 On the Supreme Court during the Obama Presidency

During the presidential campaign, Barack Obama did not often express detailed views that would be meaningful for disclosing his

7 On the confrontational dynamics, *see* J.H. Read, "Constitutionalizing the Dispute: Federalism in Hyper-Partisan Times", *Publius: The Journal of Federalism*, Vol. 46, No. 3, pp. 337-365: "Policy disagreements have readily become constitutional disputes over federal versus state authority – disputes, moreover, in which one bloc of politically like-minded states confronts another. An equally important and closely connected development is the growing ineffectiveness of Congress to enact new policy – as opposed to blocking policy, for which it retains considerable power – and the consequent shift of initiative to the executive branch, the judiciary, and the states"; and "Immigration policy … has followed a broadly parallel course during the Obama years: a Congress unable or unwilling to enact new legislation, a President exercising substantial discretion in implementing existing law, and a constitutional challenge in which rival blocs of states line up on each side of the question."

8 On the relevance of "executive activism" and on the forms of implementation of presidential priorities, *cf.* "[while Congress was incapacitated by polarization] presidential policy-making [was challenged by] sharp state opposition: the President has turned to administrative action to achieve his goals, pushing his agenda on the nation under a justificatory "We Can't Wait" mantra… states have led the opposition to such executive action. Governors refuse to participate in Administration initiatives, and state attorney general sue the federal executive branch for overreach in a variety of areas" in J. Bulman-Pozen and G.E. Metzger, "The President and the States; Patterns of Contestation and Collaboration under Obama", *Publius: The Journal of Federalism*, Vol. 46, No. 3, pp. 308-336.

criteria for future judicial nominations.[9] But some of his comments, although occasional and not part of a systematic approach, do shed some light on his attitude.

For instance, he said once:

> when you look at what makes a great Supreme Court Justice, it's not just the particular issue and how they rule, but it's their conception of the Court. And part of the role of the Court is that it is going to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout.[10]

Among the qualities that a Supreme Court Justice ought to have, he indicated "common sense and pragmatism as opposed to ideology." Referring to Justice David Souter (a Republican appointee) and to Justice Stephen Breyer (a Democratic appointee) both as examples of his ideal candidates, Obama said:

> They believe in fidelity to the text of the Constitution, but they also think you have to look at what is going on around you and not just ignore real life. That I think is the kind of Justice that I am looking for – somebody who respects the law, doesn't think that they should be making the law ... but also has a sense of what's happening in the real world and recog-

9 He also said that "I think the Constitution can be interpreted in so many ways. And one way is a cramped and narrow way in which the Constitution and the courts essentially become the rubber stamps of the powerful in society. And then there is another vision of the Court that says that the courts are the refuge of the powerless. Because oftentimes they can lose in the democratic back and forth." *Obama Planned Parenthood Speech*, July 17, 2007 (at <hiips://sites.google.com/site/lauraetch/barackobamabeforeplannedparenthoodaction>).

10 *See* "The Democratic Debate", *The New York Times*, November 15, 2007 (at <www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html>).

> nizes that one of the roles of the courts is to protect people who don't have a voice.[11]

Furthermore, some of his statements in the Senate in opposition to President G. W. Bush's nominations are indeed reflective of his vision on the issue. For instance, his negative vote to the appointment of John Roberts was very accurately motivated:

> while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases – what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those 5 percent of hard cases, the constitutional text will not be directly on point... In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions ... in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.[12]

11 *See The Detroit Free Press*, October 3, 2008 (at <www.pressreader.com/>).

12 On a more personal bases on the nominee, senator Obama went on to say that "the problem I had is that when I examined Judge Roberts' record and history of public service, it is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak." The same also applies to the arguments for opposing Bush's nomination of Samuel Alito: Obama said that "I have no doubt that Judge Alito has the training and qualifications necessary to serve. He's an intelligent man and an accomplished justist. And there is no indication he's not a man of great character. But when you look at his record – when it comes to his understanding of the Constitution, I have found that in almost every case, he consistently sides on behalf of the powerful against the powerless; on behalf of a strong government or corporation against upholding Americans' individual rights," both statements in *Obama Senate floor speech*.

President Obama has been able to make only two appointments to the Supreme Court,[13] namely Sonia Sotomayor in 2009 (following Justice Souter's resignation) and (then Solicitor General) Elena Kagan in 2010 (replacing John Paul Stevens). After Justice Antonin Scalia passed away in February 2016, President Obama did nominate Merrick B. Garland as his candidate for the Supreme Court but the Republican Senate refused to follow the procedure for giving or denying advice and consent arguing that nomination should be left to the new President.[14]

As a consequence – and although the picture is quite different and more favorable to his legacy within the federal judiciary at large – President Obama has not had an opportunity to contribute further and significantly to the composition of the Supreme

13 In recent years, let us recall that Presidents R. Nixon and R. Reagan have been able to make four appointments each, President Carter none, and President D. Eisenhower five in five years. Nevertheless, not more than two appointments each is also the record of Presidents Clinton and George W. Bush.

14 *See*: "One person who correctly gauged the significance of Scalia's absence from the Court was Mitch McConnell, the Senate Majority Leader. An hour after the death was confirmed, when other politicians were offering condolences to the Scalia family, McConnell issued a statement announcing that the Senate would not allow a vote on any nominee whom President Obama might put forward for the seat. 'The American people should have a voice in the selection of their next Supreme Court Justice,' McConnell said. 'Therefore, this vacancy should not be filled until we have a new President.' Such premeditated obstruction by a Senate leader, aimed at a President with nearly a full year remaining in his term, was without precedent, but McConnell has shown no sign of wavering. (He has also said repeatedly that he will not allow a confirmation vote in the lame-duck period, after Election Day)", in J. Toobin, "The Supreme Court After Scalia", *Annals of Law, The New Yorker*, October 3, 2016 issue (at <www.newyorker.com/magazine/2016/10/03/in-the-balance). On November 17, 2016 the US District Court for the District of Columbia dismissed a lawsuit filed by an individual who claimed that inaction by the Senate violated his Seventeenth Amendment right to elect his senators "by depriving his home-state senators of a voice in the Senate" (the Memorandum by the D.C. is at <hiips://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv1729-20≥). *See also* William G. Ross, *Why the Supreme Court is not a Key Issue in the Presidential Election – and Why it Should Be*, in JURIST – Academic Commentary, 2016, <hiip://jurist.org/>.

Court.[15] Considering the age of three Justices (Stephen Breyer is 78, Anthony Kennedy is 80, and Ruth Bader Ginsburg is 83), the task of filling up to four vacancies is most likely to fall into the hands of the next president.

Since Scalia's death, the Court has been quite evenly split during a vacancy that lasted up to fourteen months, membership of the Court reflecting in this period the partisan divisions in the rest of the country where crossover voting rarely takes place anymore.[16] President Trump' appointment of Judge Neil M. Gorsuch in April 2017 – with the advice and consent of a split Senate[17] – may open a new course in the judicial philosophy expressed by Supreme Court's rulings.

15 In fact, "Obama has had two hundred and eighty judges confirmed, which represents about a third of the federal judiciary. Two of his choices, Sonia Sotomayor and Elena Kagan, were nominated to the Supreme Court; fifty-three were named to the circuit courts of appeals, two hundred and twenty-three to the district courts, and two to the Court of International Trade. When Obama took office, Republican appointees controlled ten of the thirteen circuit courts of appeals; Democratic appointees now constitute a majority in nine circuits. Because federal judges have life tenure, nearly all of Obama's judges will continue serving well after he leaves office" in J. Toobin, "The Obama Brief: The President Considers His Judicial Legacy", *Annals of Law*, *The New Yorker*, October 27, 2014 issue (at <www.newyorker.com/magazine/2014/10/27/obama-brief>).

16 In this period there were four Republican appointees on the Court: Chief Justice John G. Roberts, Jr. (nominated by George W. Bush), Anthony Kennedy (Ronald Reagan), Clarence Thomas (George H. W. Bush), and Samuel Alito (George W. Bush); and four Democratic appointees: Ruth Bader Ginsburg (Bill Clinton), Stephen Breyer (Clinton), Sonia Sotomayor (Barack Obama), and Elena Kagan (Obama).

17 The Senate confirmed the President's nomination of Gorsuch with a very narrow margin of 54-45 (three Democrats joining the Republican majority), in fact the lowest margin of approval of a Supreme Court nominee since the 52-48 confirmation of Clarence Thomas in 1991. President Obama had nominated his own candidate for the Supreme Court – Judge Merrick Garland – in March 2016 but the Republican-led Senate refused even to consider the nomination made during the last year of Obama's Presidency. The Democrats reacted through filibustering the procedure for the nomination of Gorsuch and the Republican majority reformed the procedure itself by allowing a lower vote of 51 votes, instead of the 60 previously required, to end the filibustering.

7.4 The Supreme Court and Divided Government at the Time of Barack Obama's Presidency

As indicated above, the extreme ideological polarization of the political system does indeed affect the efficiency of the whole federal government and also undermines the Supreme Court and its role at the best of its capacities.

Three distinct situations may be described that suggest how the Court is reflecting the context and expressing a malaise that develops into a pathology.

In the first place, mention needs to be made to the practice of not deciding a case when the conflict within the Court amounts to tie votes: the opinion of the Court is reduced to a few standard words only – "the judgment is affirmed by an equally divided Court" – and the previous verdict is therefore confirmed.[18] In other words, the Court cannot reach its own decision and, being unable to perform its own function, simply decides not to decide.[19] Of course, this pattern happens quite seldom and yet it must be taken into consideration.[20]

18 Two recent cases paralyzed on a 4-4 confrontation (June 2016) are *United States v. Texas* (allowing an order blocking enforcement of the Obama administration's immigration police to remain in place, under the challenge by Texas joined by 26 states) and *Dollar General Corporation v. Mississippi Band of Choctaw Indians* (confirming jurisdiction of tribal courts as to hearing civil cases involving non-Indian businesses that have contractual agreements with the tribe), as reported in *Obama immigration policy remains blocked by divided Supreme Court*, in *Jurist*, June 23, 2016 (at <www.jurist.org/paperchase/2016/06/obama-immigration-policy-remains-blocked-by-divided-supreme-court.php>).

19 Technically, the situation is also connected to the formal role of the Chief Justice as *primus inter pares* whose vote never bears more force that the vote of Associate Justices.

20 For instance, in the 2015-2016 Term the Court has delivered unanimous decisions in 48% of the cases.

A second situation, not certainly so unusual and yet quite paradigmatic of some weakness of the Court that is indeed mirrored into the ruling itself, consists in the Court adopting a decision by strict majority, that is 5-4.

This is indeed the case of those few judicial decisions, mentioned above, showing a strong symbolic potential insofar as they mirror a strong ideological polarization between the political branches of government: specific reference is to *NFIB v. Sebelius* (2011)[21] affecting the Patient Protection and Affordable Care Act – a major component of Obama's political agenda – and to *US v. Winsor* (2013) concerning the Defense of Marriage Act (DOMA),[22] in which the Department of Justice supported the plaintiff's view that the federal act was unconstitutional.[23]

21 The opinions given were as follows: Roberts, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-C, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined; an opinion with respect to Part IV, in which Breyer and Kagan, JJ., joined; and an opinion with respect to Parts III-A, III-B, and III-D. Ginsburg, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Sotomayor, J., joined, and in which Breyer and Kagan, JJ., joined as to Parts I, II, III, and IV. Scalia, Kennedy, Thomas, and Alito, JJ., filed a dissenting opinion. Thomas, J., filed a dissenting opinion.

22 The following is the majority and dissents pattern: Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, and in which Roberts, C. J., joined as to Part I. Alito, J., filed a dissenting opinion, in which Thomas, J., joined as to Parts II and III.

23 Such standing by the Executive – inconsistent with the theory according to which "the Constitution confers on the President alone the authority to defend federal law in litigation" – prompted a Bipartisan Legal Advisory Group (BLAG) to be established by Congress in order to defend the constitutionality of DOMA: the question is particularly considered in Alito's opinion, where it is clearly stated that "in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so."

It is indeed exceptional that some hard cases have been decided within this framework, by virtue of the strong determination by the ad hoc majority. Obviously, the precondition for obtaining a strict majority ruling is the presence of a swing vote, which breaks the wall-to-wall confrontation.

A third situation concerns a strict-majority decision (5-4 as above) further qualified by the choice of radical language by dissenting opinions of Associate Justices and, more in particular, by a burning dissenting opinion authored by the Chief Justice himself that expressly challenges the very legitimacy – on whatever ground – of the Court's ruling, as happened in *Obergefell v. Hodges*.[24]

In fact, it is the quality of words, the harshness of the dissent, the radical accusation against the Court and its alleged nonjudicial and thoroughly political interpretation used by some of the dissenters and by the Chief Justice that marks a clear-cut difference within the three decisions here considered as paradigmatic. The language of the dissents – with the minor exception of Scalia[25] – is indeed quite different.

24 The following picture describes the positions of the nine Justices: Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

25 While no picturesque language of his (or of the other dissenters) is to be noticed in Sebelius, in Windsor Scalia labels the attitude of the majority as "the black-robed supremacy" and adds that the decision "is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role. This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of 'primary' power, and so created branches of government that would be 'perfectly coordinate by the terms of their common

In fact, in his dissenting opinion in Obergefell, Justice Scalia did not hesitate to go as far as stating at the very beginning that the majority ruling is a "threat to American democracy" and – later in the text – named it "today's judicial Putsch," further adding that "today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact – and the furthest extension one can even imagine – of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves"; and that "This is a naked judicial claim to legislative – indeed, *super*-legislative – power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' 'reasoned judgment'. A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."

The final words written by Scalia are a further clear and quite heavily offensive attack on the Court as well as on his five "brethren" in the majority: "The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis."

commission,' none of which branches could 'pretend to an exclusive or superior right of settling the boundaries between their respective powers'", quoting J. Madison in The Federalist, No. 49.

Justice Alito, for his part, underlines that "the Constitution says nothing about a right to same-sex marriage, but the Court holds that the term 'liberty' in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings."

On such plurality of meanings he further elaborates describing that "for classical liberals, it may include economic rights now limited by government regulation" while "for social democrats, it may include the right to a variety of government benefits" and eventually remarks – quite sarcastically – that "for today's majority, it has *a distinctively postmodern meaning*."[26] He doesn't refrain also from charging the majority from altering the very judicial nature of the Supreme Court ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage").

Also, the dissenting opinion written by Justice Thomas – beyond emphasizing the different substantive reading of the due process of law clause adopted (along with the equal protections of the laws clause) by the majority as the constitutional foundation of their ruling – adds fuel to heavy criticism to the very role played by the Court: "The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built";[27] and "By straying from the text of the Constitution,

26 Emphasis added.

27 In this context, reference to "the original understanding" is quite obvious: "Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a 'liberty' that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea – captured in our Declaration of Independence – that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it

substantive due process exalts judges at the expense of the People from whom they derive their authority"; furthermore, "The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty."[28]

As already indicated, the dissent by Chief Justice Roberts is to be given its due evidence in the present context, not so much for the dissent by itself, obviously, but, rather, for the symbolic value of some radical remarks that, considering the institutional position of their author, leave no room for safeguarding the judicial credibility and the constitutional legitimacy not only of the specific ruling but of the Supreme Court itself: "Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex. But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."

inverts the relationship between the individual and the state in our Republic. I cannot agree with it."

28 It is to be noticed, though, that Thomas is the only Associate Justice joining the Chief Justice in not doing away with the usual formula ("I respectfully dissent" – although the "respectfully" is quite at odds with some of the criticism founding the motivation of his dissent) at the end of minority opinions.

The Chief Justice continues by stating that:

> Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition. Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens – through the democratic process – to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept. The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent.

The criticism continues the argument of a Supreme Court exceeding its proper role:

> […] the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions [...]. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

And: "Allowing unelected federal judges to select which unenumerated rights rank as 'fundamental' – and to strike down state laws on the basis of that determination – raises obvious concerns about the judicial role."

The Chief Justice adds that "The legitimacy of this Court ultimately rests 'upon the respect accorded to its judgments' [quoting Justice Kennedy, concurring in *Republican Party of Minn* v. *White*, 536 U. S. 765, 793 (2002)]. That respect flows from the perception – and reality – that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making 'new dimensions of freedom ... apparent to new generations', for providing 'formal discourse' on social issues, and for ensuring 'neutral discussions, without scornful or disparaging commentary'." Furthermore: "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked

their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after 'a quite extensive discussion'. The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it."

7.5 Final Remarks

The political history of the United States has experienced a good deal of difficult and seriously critical times – as when the National Guard was called to support the policy switch from constitutionally admissible racial segregation (in line with the separate but equal doctrine) to mandatory integration in public schools as determined by a *unanimous* Supreme Court in *Brown v. Board of Education* (1954) – and even a traumatic crisis like the Civil War has for better or for worse been managed and eventually overcome, to a large extent also thanks to myths and symbols. The federal Constitution is both a myth and a symbol in the United States of America, to the extent of founding an attitude of constitutional (non)interpretation – rather than a method – such as "originalism," the search of the original intent of the Framers. It may be argued that it is the federal Constitution that has provided – as it will hopefully continue doing – the necessary force of aggregation to preserve the country's cohesion as a nation.[29]

Needless to say, the contribution made by the judiciary and by the Supreme Court has been crucial in this continuous national

29 *See* R. Toniatti, *La "nazione costituzionale": genesi e consolidamento dell'identità repubblicana dell'ordinamento federale statunitense quale Stato-nazione*, in *Diritto Pubblico Comparato ed Europeo*, 2011, p. 1150.

endeavor in establishing the Constitution as *the* original myth and *the* symbol of the nation, in spite of constant criticism from one or both the political branches of government, from scholars and commentators, from the public at large. In fact, criticism of the Supreme Court may be paradoxically regarded as one of the fundamental freedoms protected by the Constitution and further safeguarded by the Supreme Court itself through its fairly liberal case law.

The recent period of the US political history has been experiencing a growing ideological hyperpolarization between two fronts, that – in an admittedly subjective perspective – appear to be, on the one hand, the more or less traditional liberal and progressive field (more recently inclusive of gays' rights) and, on the other, a new conservative world, quite more aggressive both on economic issues and public spending (for instance, due to the Tea Party movement), and on traditional civic and religious values.

The consequent radicalization of the political struggle is thus reflected on society, from which it originates, and on all governmental structures, both at national and state levels. Inevitably, the judiciary is affected by the process of ideological polarization and becomes itself the source of further divisions, inclusive of internal fragmentation within the Supreme Court. During the 2014 term, the Supreme Court has voted by a strict 5-4 majority in cases that were supported by the Democrats as well as in cases closer to Republican priorities.[30]

As we have evidenced with long and quite expressive quotations from their opinions in Obergefell, the acrimony of the dissenting Justices and of the Chief Justice himself against the majority's

30 For the first group reference is to *Obergefell v. Hodges* and to *Arizona State Legislature v. Arizona Independent State Redistricting Commission*; for the second to *Glossip v. Gross* and *Kerry v. Din*, as remarked in E.M. Maltz, "The 2016 Election and the Future of Constitutional Law; The Lessons of 1968", *Hastings Constitutional Law Quarterly*, Vol. 43, 735, 2016.

ruling – the majority being such just because of a swing vote in a 5-to-4 decision – does not refrain from repeating against the Court the most delegitimizing criticism that has traditionally proceeded from a thoroughly political *milieu*. The quality of the language of dissent – not dissent by itself – from within the Court and from its Chief Justice may contribute to putting in motion a systemic process that would ultimately shake the confidence of the public in the role of the judiciary and in constitutional adjudication, at least in the view of a European comparative lawyer.

The reliance of the dissenters on the (non)interpretive theory of originalism provides the methodological ground for opposing the interpretation by the majority. For instance, Justice Scalia relies on the historical circumstance that "when the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases"; and continues saying that

> when it comes to determining the meaning of a vague constitutional provision – such as "due process of law" or "equal protection of the laws" – it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification.

Justice Alito goes even further in charging the Court with the accusation of having evidenced "the deep and perhaps irremediable corruption of our legal culture's conception of constitutional inter-

pretation."[31] Such attitudes are eloquent examples of what might be defined as "*militant originalism*."

Further factual consequences of the contentious confrontation within the Supreme Court may be seen in some relevant events following the ruling in *Obergefell v. Hodges*. For instance, in September 2016 the Alabama Court of the Judiciary suspended the state's Chief Justice Roy Moore for directing probate judges to enforce the state's ban on same-sex marriage thus showing "disregard for binding federal law." In fact, the Chief Justice of Alabama claimed that the Supreme Court decision legalizing gay and lesbian nuptials nationwide was targeted at Michigan, Kentucky, Ohio, and Tennessee but did not specifically address the Alabama ban. Therefore, "until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary

31 The closing words of Alito's dissent deserve a full quotation: "Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims. Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation. Most Americans – understandably – will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends."

to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect."[32]

Mention may also be made of a movement of academics, significantly named "constitutional resistance," admittedly inspired by the Chief Justice's harsh condemnation of the Obergefell decision. Such "resistance movement is now playing out simultaneously with efforts to exempt religious objectors from laws requiring equal treatment of same-sex couples."[33]

Such events are limited in scope and effects and should not be overemphasized, of course, as it is in the very nature of a free and plural society to react – in any direction – in response to institutional innovations. However, it is appropriate to witness them and keep analyzing critically the course of events: further political and judicial developments are in fact to be expected, for instance from the perspectives of conscientious objection.

The involvement of President Obama in Obergefell – although substantively relevant – has been formally low, consisting in the submission of an *amicus curiae* brief by the Solicitor General asserting and motivating that

> the United States has a strong interest in the eradication of discrimination on the basis of sexual orientation […] The President and Attorney General have determined that classifications based on sexual orientation should be subject to

32 On the issue, on Chief Justice Roy previous record with violation of judicial ethics and more details on the support he received, *see* <www.jurist.org/paperchase/2016/10/alabama-top-justice-suspended-over-gay-marriage-order.php>.

33 *See* J.K. Oleske Jr., "A Regrettable Invitation to 'Constitutional Resistance,' Renewed Confusion Over Religious Exemptions, and the Future of Free Exercise", *Lewis & Clark Law Review*, Vol. 20, 2016 (forthcoming, available at <hiips://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837392>).

> heightened scrutiny [….] The United States also has an interest because marital status is relevant to many benefits and responsibilities under federal law.[34]

Nevertheless, it is most likely that the legacy of President Barack Obama with regard to the Supreme Court will be associated with the expansion of ideological divisions in the country, in Congress, and in the Supreme Court itself. Considering the outcome of the 2016 presidential and congressional elections, the prospective of overcoming such divisions appears low. Forthcoming judicial appointments – also for the Supreme Court and starting from the substitute of Justice Scalia – may in the near future provide a first step to confirm how much constitutional practice in the United States determines the making of constitutional law.

34 The brief may be read in <www.scotusblog.com/case-files/cases/obergefell-v-hodges/>.

8 Was There an Obama Doctrine? Some Preliminary Reflections on the Foreign Policy of Barack Obama

*Mario Del Pero**

8.1 Introduction

It's one of the most common criticisms pundits and scholars have moved to Barack Obama during his eight years in office: that of lacking a clear and comprehensive grand strategy; of purportedly choosing not to elaborate a foreign policy doctrine. According to this criticism, Obama's approach to international relations has been at best purely empirical and at worst tentative and passive. Lacking a clear vision of what US interests are and how they must be defended and pursued, Obama – his many critics maintain – has promoted a foreign policy that was invariably reactive and that left to others, and to America's rivals, the possibility to dictate the tempo of world politics. By doing so – by abdicating America's hegemonic responsibilities – the administrations of Barack Obama have allegedly done nothing to counter the relative and absolute decline of the United States, actually contributing to its acceleration and intensification.[1]

* Centre d'Histoire SciencesPo, Paris.

1 For scathing critiques of Obama's foreign policy, *see* C. Dueck, *The Obama Doctrine: American Grand Strategy Today*, Oxford, Oxford University Press, 2015 and V. Nasr, *The Dispensable Nation. American Foreign Policy in Full Retreat*, New York, NY, Doubleday, 2013. More moderate, critical assessments

This kind of reading is debatable and, at least in some journalistic accounts, borders on caricature. As historians know well, US foreign policy doctrines have often been little more than discursive artifacts: rhetorical tools deployed to systematize (and justify) *ex post* specific choices; ideological statements crafted to confer strategic coherence to often ad hoc and unplanned decisions; tools used to build political consensus and mobilize the support of domestic public opinion around a specific line of action (such was the case of one of the most famous examples, the "Truman doctrine" of March 1947, which represented the first salvo of the incipient Cold War between the United States and the Soviet Union).[2]

Furthermore, if measured by these standards, it is hard to argue that Barack Obama has been so different from his predecessors. At a closer look one can indeed identify the basic traits and draw the ensuing contours of a specific Obama doctrine, as historian Hal Brands has recently underlined.[3] This doctrine has been based on three pillars, which for convenience we could define as *discursive*, *geopolitical*, and *operational*.

8.2 Obama's Foreign Policy Discourse

Let us look first at the four fundamental elements of the *foreign policy discourse* of Obama. The first is the emphasis on the necessity to manage the international order multilaterally and collabora-

are in L.H. Gelb, "The Elusive Obama Doctrine", *The National Interest*, Vol. 5, September-October 2012, pp. 18-28 and S. Walt, "Obama Was Not a Realist President", *Foreign Policy Blog*, April 2016 (<hiip://foreignpolicy.com/2016/04/07/obama-was-not-a-realist-president-jeffrey-goldberg-atlantic-obama-doctrine/>).

2 H.W. Brands, "Presidential Doctrines: An Introduction", *Presidential Studies Quarterly*, Vol. 1, March 2006, pp. 1-4.

3 H. Brands, "Barack Obama and the Dilemmas of American Grand Strategy", *The Washington Quarterly*, Vol. 4, 2016, pp. 101-125.

tively, abandoning the unilateral (and radical) illusion of the Bush years. A simple perusal of Obama's main foreign policy and security documents – beginning with his national security strategies of 2010 and 2015 – reveals how central this emphasis on cooperation (via international *fora* and institutions) has been.[4] Of course, the right to act unilaterally – and if necessary preemptively – was not discharged. But the discursive shift has been relevant and coherent with the more general objective of delegating to local allies and regional powers greater responsibilities in the management of the international order (so to address, also, the request coming from the domestic public opinion to reduce US global commitments). Intimately connected to this is the second pillar of the *Obama Doctrine*'s discourse: the assertion, somehow embodied by the first black President himself, that the United State should not just be back in the world but could re-claim its mantle as the world itself. Many of Obama's major foreign policy speeches have made an explicit use of the president's syncretic and global biography to stress this alleged, intrinsic globality of the United States. Think of Obama's opening to the Muslim world in Cairo, in June 2009, when he claimed to intimately know Islam and celebrated its fundamental contribution to US history:

> part of this conviction is rooted in my own experience. I'm a Christian, but my father came from a Kenyan family that includes generations of Muslims. As a boy, I spent several years in Indonesia and heard the call of the azaan at the break of dawn and at the fall of dusk. As a young man, I worked in Chicago communities where many found dignity and peace

4 *National Security Strategy*, May 2010 (<hiips://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf>) and *National Security Strategy*, February 2015 (<hiips://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf>).

> in their Muslim faith. As a student of history, I also know civilization's debt to Islam …I also know that Islam has always been a part of America's story. The first nation to recognize my country was Morocco... Since our founding, American Muslims have enriched the United States. They have fought in our wars, they have served in our government, they have stood for civil rights, they have started businesses, they have taught at our universities, they've excelled in our sports arenas, they've won Nobel Prizes, built our tallest building, and lit the Olympic Torch.[5]

Or think of the speeches in Ghana the following June and in Dublin in May 2011, when the President had an easy game in reminding the audience of his African heritage ("I have the blood of Africa within me ... and my family's own story encompasses both the tragedies and triumphs of the larger African story") or even in playing with his purported Irishness ("My name is Barack Obama of the Moneygall Obamas. And I've come home to find the apostrophe that we lost somewhere along the way"[6]).

5 *Remarks by the President at Cairo University*, June 4, 2009 (<hiips://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09>).

6 *Remarks by the President to the Ghanaian Parliament*, July 11, 2009 (<hiips://www.whitehouse.gov/the-press-office/remarks-president-ghanaian-parliament>); *Remarks by the President at Irish Celebration in Dublin, Ireland*, May 23, 2011 (<hiips://www.whitehouse.gov/the-press-office/2011/05/23/remarks-president-irish-celebration-dublin-ireland>). Cfr. R. Chiyoko King-O'Riain, "Is 'No One as Irish as Barack O'bama?'", *in* A.J. Jolivette (Ed.), *Obama and the Biracial Factor. The Battle for a New American Majority*, Bristol, The Policy Press, 2012, pp. 113-128 and M. Ledwidge, "Barack Obama. Cosmopolitanism, Identity Politics and the Decline of Euro-Centrism", *in* M. Ledwidge, L. Miller, and I.M. Parmar (Eds.), *Obama and the World. New Directions in U.S. Foreign Policy*, Londra, Routledge, 2014, pp. 67-79.

This universalism – centered first and foremost on Obama's "cosmopolitan blackness"[7] – had clear exceptionalist roots: by exalting the plural, inclusive, and ever-evolving nature of the United States, it reaffirmed notions deeply ingrained in the history of American progressive nationalism. This sort of liberal exceptionalism was however matched, and complemented, by a clearly (and somehow heretically) anti-exceptionalist narrative when it came to defining the tools and means the United States should deploy in the international arena. In particular, Obama has shown a remarkable skepticism on the utility and possible deployment of America's main asset: the military hard-power that has been increasingly used in the post-Cold War era. In a famous interview with *The Atlantic* magazine editor, Jeffrey Goldberg, the President has made this diffidence explicit, partially criticizing the 2011 intervention in Libya that led to the downfall of the Qaddafi regime. With remarkable candor and using an idiosyncratic, quasi-post-imperial language, Obama has dismissively decried the rules, implicit and explicit, of what he called "the Washington playbook." "There's a playbook in Washington that Presidents are supposed to follow" Obama told Goldberg. "It's a playbook that comes out of the foreign-policy establishment. And the playbook prescribes responses to different events, and these responses tend to be militarized responses. Where America is directly threatened, the playbook works. But the playbook can also be a trap that can lead to bad decisions." Moreover, according to Obama the rules of the playbook have been driven by an obsession for constantly reaffirming the credibility of the United States and its foreign policy, thus leading to decisions contrary both to common sense and a clear understanding of America's national interests. "Dropping bombs on someone to prove that

7 L.F. Selzer, "Barack Obama, the 2008 Presidential Election, and the New Cosmopolitanism: Figuring the Black Body", *MELUS*, Vol. 4, Winter 2010, pp. 15-37.

you're willing to drop bombs on someone is just about the worst reason to use force," Obama quipped with a reference to one of the most used, and abused, lessons of history: the one that led the United States into the Vietnamese quagmire.[8]

The fourth and last element of Obama's foreign policy discourse has been its realism. One can see here another tension between Obama's rousing rhetoric – which captivated and fascinated millions of people all over the world – and his pragmatic approach, constantly stressing both the limits the United States faces in dealing with world affairs and the existence of an evil one can struggle with but never eradicate. This kind of language has helped justify a partial disengagement, particularly from the Middle East, but also reaffirming the necessity to actively deploy force when called to. Obama's Christian realism, clearly indebted to the reflections of theologian Reinhold Niebuhr (his "favorite philosopher," Obama once said), was on display for example during his Nobel Peace Prize Lecture. In Oslo, Obama restated a central, and often misunderstood, element of a creed that while being skeptical toward the overuse of military force, did not translate into absolute pacifism. "I know there's nothing weak – nothing passive – nothing naïve – in the creed and lives of Gandhi and [Martin Luther] King," the President maintained.

8 Obama's citations are in Jeffrey Goldberg, *The Obama Doctrine*, "The Atlantic", April 2016 (<www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>). On this obsession for credibility and how it has affected U.S. foreign policy *see* F. Ninkovich, *Modernity and Power. A History of the Domino Theory in the Twentieth Century*, Chicago, The University of Chicago Press, 1994 and M.A. Lawrence, "Policymaking and the Using of the Vietnam War", *in* H. Brands and J. Suri (Eds.), *The Power of the Past: History and Statecraft*, Washington, DC, Brookings Institution Press, 2015, pp. 49-71.

> But as a head of state sworn to protect and defend my nation, I cannot be guided by their examples alone. I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: Evil does exist in the world. A non-violent movement could not have halted Hitler's armies. Negotiations cannot convince al Qaeda's leaders to lay down their arms. To say that force may sometimes be necessary is not a call to cynicism – it is a recognition of history; the imperfections of man and the limits of reason.[9]

To recap, the four basic elements of Obama's foreign policy discourse can be summarized as diplomatic multilateralism, identity cosmopolitanism, minimalist and post-imperial interventionism and, finally, sober and pragmatic realism.

8.3 Obama's Geopolitical Vision

Let us now move to a very synoptic description of *Obama's geopolitical vision*. It has been based on two fundamental assumptions, indicative themselves of Obama's inner realism. The first is that the declining US power, and the decreasing domestic political capital in support of interventionist policies abroad, impose a selective and particularist approach, capable of discriminating between the theaters that are vital for America's security and those that are instead secondary or marginal. An inevitable corollary has been

9 *Remarks by the President at the Acceptance of the Nobel Peace Prize*, December 10, 2009, (<hiips://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>). On Obama's "Christian Realism" see the original reflections of A. Preston, *Sword of the Spirit, Shield of Faith: Religion in American War and Diplomacy*, New York, Anchor Books, 2012, pp. 610-615 and E. Owens, "Searching for an Obama Doctrine: Christian Realism and the Idealist/Realist Tension in Obama's Foreign Policy", *Journal of the Society of Christian Ethics*, Vol. 2, 2012, pp. 93-111.

the desire, and again necessity, to delegate greater responsibilities and tasks to local allies and partners.[10]

The main consequence has been the definition of a clear geopolitical hierarchy that placed Asia at the top and somehow downscaled the importance of both Europe and a Middle East where – Obama and his advisors believed – the United States had overcommitted itself, America's strategic interest was diminishing (given the drastic contraction of US dependence on imported oil) and the intrinsic dysfunctionality of many local political regimes rendered useless, or even counterproductive, an active American presence.[11]

This sort of *Asia first* policy of America's self-proclaimed "first Pacific President"[12] was congruent with deeper transformation in the international system and world political economy of the past four decades. It was on the many Transpacific routes that ran – intense, deep, and contradictory – some of the most important forms of interdependence of the contemporary age, beginning with that between the United States and China, marked by huge trade imbalances, the outsourcing of various phases of US manufacturing production to China, growing Chinese foreign investments (FDIs) in the United States, and Beijing's key contribution in

10 One can see here clear echoes of the other famous realist-particularist moment of post-1945 US foreign policy, that of the Nixon administration (with Henry Kissinger mostly at the helm of US foreign and security policy). *See* J.L. Gaddis, *Strategies of Containment. A Critical Appraisal of American National Security Policy During the Cold War*, Oxford, Oxford University Press, 2nd ed., 2005, pp. 272-340.

11 F.A. Gerges, "The Obama Approach to the Middle East: The End of America's Moment", *International Security*, Vol. 2, 2013, pp. 299-323; M. Lynch, "Obama and the Middle East. Rightsizing the U.S. Role", *Foreign Affairs*, Vol. 5, 2015, pp. 18-27.

12 *Remarks by President Barack Obama at Suntory Hall*, November 14, 2009 (<hiips://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>).

subsidizing US domestic consumption by purchasing an increasing portion of America's skyrocketing debt.[13]

Furthermore, what became known as the "Asia-Pacific" was marked by the emergence of a dual hegemony – that of the United States in the field of security and that of China with regard to regional trade – that while not necessarily conducive to antagonism and competition could foster tensions and instability. Regional countries' dependence on Chinese FDIs and their intensifying commercial exchanges with Beijing often made them even more eager to get some sort of American protection thus furthering the US role as the key provider of security in the area.[14]

Managing this new condition, that simultaneously reduced and modified US regional influence, has constituted one of the fundamental priorities of the Obama administration, particularly during the tenure of Hillary Clinton as Secretary of State. With ambivalent results, the United States has attempted to re-pivot toward the "Asia Pacific" its strategic commitments and attentions, and to co-opt China as a "responsible stakeholder" into the management of a regional and international order that required adjustments to the existing mechanisms of global governance, but not – Clinton and Obama maintained – radical transformations and changes.[15]

13 N. Ferguson and M. Schularick, "Chimerica and the Global Market Asset Boom", *International Finance*, Vol. 3, Winter 2007, pp. 215-239; D. Drezner, "Bad Debts: Assessing China's Financial Influence in Great Power Politics", *International Security*, Vol. 2, Fall 2009, pp. 7-45.

14 G. John Ikenberry, "Between the Eagle and the Dragon", *Political Science Quarterly*, Vol. 1, 2016, pp. 9-43 and S.G. Brooks and W.C. Wohlforth, "The Rise and Fall of the Great Powers in the Twenty-first Century: China's Rise and the Fate of America's Global Position", *International Security*, Vol. 3, Winter 2015-16, pp. 9-53.

15 The far from fortunate slogan of China as a "responsible stakeholder" was first used by then Deputy Secretary of State, and then World Bank's President, Robert Zoellick in 2005. *See* R.B. Zoellick, *Whither China: From Membership to Responsibility?*, *Remarks to National Committee on U.S.-China Relations*, New York, September 21, 2005 (<hiip://2001-2009.state.gov/s/d/former/zoellick/

The "Pivot to Asia," as it became known, was possible even because Europe, and the Transatlantic relationship, had allegedly lost the centrality of the past. In what proved to be a very optimistic assessment, the Obama administration initially adhered to the idea that the Old Continent was stable and pacified, and this allowed the United States to accelerate a disengagement under way since the end of the Cold War. To compound this geopolitical shift were also tensions and political differences between the two sides of the Atlantic, particularly visible in the realm of economics, where Berlin-imposed austerity recipes in the EU area were not shared, and sometimes openly criticized, by Washington.[16]

8.4 Obama's Foreign Policy in Action

Finally, the *political/operational dimension* of this flexible, and in part non-doctrinal, "Obama doctrine." It followed quite logically from the above-discussed discursive and geopolitical pillars. Military disengagement was pursued more or less consistently even where – as in Afghanistan – Obama had decided initially to undertake a surge and escalate the US commitment via the deployment

rem/53682.htm>). *See also* E. Ratner, "Rebalancing to Asia with an Insecure China", *The Washington Quarterly*, Vol. 2, 2013, pp. 21-38 and S. Zhao, "A New Model of Big Power Relations? China-US Strategic Rivalry and Balance of Power in the Asia-Pacific", *Journal of Contemporary China*, Vol. 93, 2015, pp. 377-397.

16 These differences and tensions are frequently underlined in the memoirs of Obama's first Secretary of the Treasury Timothy Geithner, *Stress Test: Reflections on Financial Crises*, New York, Broadway Books, 2014. More generally for a very critical assessment of Obama's approach to European affairs *see* A. Applebaum, "Obama and Europe. Missed Signals, Renewed Commitments", *Foreign Affairs*, Vol. 5, September/October, 2015 and for more balanced evaluations G.S. Smith (Ed.), *Obama, US Politics and Transatlantic Relations*, Brussels, Peter Lang, 2012 and D.H. Dunn and B. Zala, "Transatlantic Relations and U.S. Foreign Policy", *in* Ledwidge, Miller, and Parmar, *Obama and the World*, cit., pp. 197-217.

of additional troops (much less, however, than those requested by the military and with a clear, and somehow strategically bizarre, pre-definition of a deadline, after which a new withdrawal would begin). A more active military presence in Asia was matched by a further decommissioning of US installations in Europe and, more broadly, a transition that reduced the importance of huge military bases in favor of flexible and cheaper "lily pads" centers. Allies were urged to take up the burden: sharing the costs of alliances for which the United States was the long-standing benefactor (for instance, for the costs of NATO); contributing more to joint interventions (in Afghanistan); helping the United States with the intractable problem of what to do with the special prison of Guantanamo (which Obama promised to close within one year of his installation as president); contributing via expansionary economic policies to a global growth that could not rely exclusively on US consumption and recovery. All of this was to be matched, and enabled, by the restoration of America's "soft power," through the abandonment of the most controversial policies the country had adopted in its global war on terror and, even more, thanks to an infatuation with the figure of the new President – a true "Obamania" – that initially swept Europe and most of the world.[17]

17 For a good synthesis, *see* H. Brands, "Barack Obama and the Dilemmas of American Grand Strategy", cit.; for various polls highlighting the extraordinary popularity of Obama outside the United States *see* the *Transatlantic Trends* of the German Marshall Fund (<http://trends.gmfus.org/>) and the recent ones of the Pew Research Center, *As Obama Years Draw to Close, President and U.S. Seen Favorably in Europe and Asia*, 29 June 2016, (<www.pewglobal.org/2016/06/29/as-obama-years-draw-to-close-president-and-u-s-seen-favorably-in-europe-and-asia/>) and of Gallup, *U.S. Global Image Remains Strong Among Major World Powers*, 14 October 2016 (<www.gallup.com/poll/196376/global-image-remains-strong-among-major-world-powers.aspx>).

8.5 Conclusions

Results have been mixed at best, although historians must be wary of hasty judgments formulated without the necessary time distance and the availability of indispensable primary sources. Foreign policy successes have been many – from the extraordinary opening to Cuba to the deal on Iran's nuclear program to the 2015 Paris accord over climate change – and their importance and significance cannot be underestimated. However, the "Obama Doctrine" in action has been marred by structural constraints, some foreseeable and other unpredictable, and by inner contradictions that have often limited or blocked the change Obama promised to bring to the conduct of US foreign relations.

Among the constraints, it is necessary here to stress the above-mentioned, objective decline of US power in the international system along with a decreasing domestic support for proactive, interventionist, and inevitably costly foreign policy choices. Disengagement and selective "particularism" – to mention two possible ways to summarize Obama's approach to world affairs – were not just options of choice; they reflected the inescapable adjustment to a domestic political landscape exhausted by the US wars of the twenty-first century (America's "longest war," in the case of Afghanistan) and the failure to deliver the promises that had justified them. Similarly, Obama's reluctance to use force in a traditional way – particularly in the Syrian scenario – can be explained also as a response to the pressures of a domestic public long critical of an overreliance on military power (a skepticism further reinforced by the disastrous consequences of the 2011 Libyan intervention).[18]

18 P. Gross, *Leading from Behind. Contour et importance de l'engagement américain en Libye*, "Politique Américaine", 1, 2012, pp. 49-68; M.W. Doyle, "The Politics of Global Humanitarianism: the Responsibility to Protect Before and After Libya", *International Politics*, Vol. 1, 2016, pp. 14-31. For some polls high-

Domestic constraints operated also in other ways. The high level of partisanship and political polarization extended to the foreign policy realm, itself more permeable to this kind of divisions than it is asserted in many false legends on the primacy of the national interest and on politics allegedly stopping "at the water's edge" (i.e.: within national borders).[19] On multiple occasions during Obama's two presidencies, his Republican opponents acted with the goal of filibustering and, if possible, derailing some of his landmark foreign policy achievements. They refused for several years (2010 to 2015) to ratify the reform of the International Monetary Fund that granted greater voting rights to China. Long-awaited and reflecting the changed realities of power distribution in the international system, this reform was a key element of the strategy to integrate China into what was still meant to be a US-led international order. Combining with other initiatives and with positions, in large part of the US Right, that often bordered on Sinophobia, this kind of opposition greatly complicated Obama's strategy of pivoting to Asia.[20] When it came to the Middle East – to offer another example – Obama's attempts to relaunch the Israeli-Palestinian peace process and to engage with an Iran greatly strengthened and emboldened by America's strategic mistakes of the previous decade, also faced strong domestic opposition. Amidst acts of unprecedented institutional disrespect – among them inviting the Israeli

lighting the skepticism, if not opposition, of many Americans to new wars in the Middle East *see* J.M. Jones (Gallup), "Americans Oppose U.S. Military Intervention in Syria", May 31, 2013 (<www.gallup.com/poll/162854/americans-oppose-military-involvement-syria.aspx>) and Idem, "Americans Shift to More Negative View of Libya Military Action", June 24, 2011 (<www.gallup.com/poll/148196/americans-shift-negative-view-libya-military-action.aspx>).

19 H.V. Milner and D. Tingley, *Sailing the Water's Edge: The Domestic Politics of American Foreign Policy*, Princeton, Princeton University Press, 2016.

20 *See*, for example, P. Trubowitz and J. Seo, "The China Card: Playing Politics with Sino-American Relations", *Political Science Quarterly*, Vol. 2, estate 2012, pp. 189-211.

premier Benjamin Netanyahu to speak in Congress against Barack Obama or sending a letter, signed by 47 senators, to the Iranian leadership stating that the signed agreement had little chances of surviving – the Republican congressional leadership consistently obstructed Obama's foreign policy in ways, and with effects, that were difficult to foresee and imagine. Other examples could be offered – the effort to close Guantanamo, so crucial in the message Obama aimed at offering after his election, clashed itself against the rocks of public and Congressional oppositions – the point being that domestically the President faced hurdles that greatly impaired the possibility, and outcomes, of the promised change.

Moving to the international stage, we see similar dynamics at play. Achievements cannot be overlooked or minimized and it is hard to argue that in terms of national security or global influence the United States is worse off today than it was in 2009. But the redefinition of geopolitical priorities has been attained only in minimum part. Unforeseen and on a few occasions mismanaged crises and events, from Ukraine to Syria, rendered complicated, and sometimes impossible, the promised disengagement from Europe and the Middle East. Grand strategizing notwithstanding, foreign policy – even that of the only left superpower – is often ad hoc and reactive, as historians working in the archives well know. It responds to events and has much less room for maneuver than is commonly believed.[21] The Obama years have been no exception, although some sectors of the administration (and of the Department of State) are certainly to be blamed for the persistence of a

21 On this, see the useful historiographical and methodological reflections of M. Trachtenberg, *The Craft of International History*, Princeton, Princeton University Press, 2000.

mentality that, for example, contributed to furthering the crisis in Ukraine, and with Russia, instead of helping solve it.[22]

Meanwhile, the double promise of using force less (and more carefully) and abandoning the controversial anti-terrorist methods adopted under G. W. Bush has only partially been fulfilled. In one realm in particular, that of the use of unmanned aerial vehicles (i.e., drones) in the selective targeting and assassination of suspected terrorists, the discontinuity between Bush and Obama has been toward an escalation, and not a reduction, of the use of force. Drones pose multiple political, legal, operational, and ethical issues that cannot be discussed here, but are bound to be a key, and highly problematic, legacy of the Obama age.[23]

What are we left with, then, aside from multiple questions and dilemmas that will provide work and doctoral dissertations' topics for legions of historians in the years to come? In a nutshell, we can argue that Obama was the first President called to address the inner, structural flaws of post-1970s US hegemony, which had been exacerbated both by G. W. Bush's strategic blunders and by the effects of the economic crisis of 2007-2008. His administration devised a strategy and offered a changed – minimalist and post-imperial – lexicon to convey this change to the American and international public. Achievements and failures coexisted and scholars

22 R. Sakwa, *Frontline Ukraine: Crisis in the Borderlands*, Londra, I.B. Tauris, 2014 and L. Freedman, "Ukraine and the Art of Crisis Management", *Survival*, Vol. 3, 2014, pp. 7-42.

23 For some useful analyses, *see* R. Brooks, "Drones and the International Rule of Law", *Ethics and International Affairs*, Vol. 1, 2014, pp. 83-103; M. Zenko and S. Kreps, "Limiting Armed Drone Proliferation, Center for Preventive Action. Council on Foreign Relations", Special Report No. 69, June 2014; C. Enemark, "Drones, Risk, and Perpetual Force", *Ethics and International Affairs*, vol. 3, 2014, pp. 365-381; M.J. Boyle, "The Legal and Ethical Implications of Drone Warfare", *The International Journal of Human Rights*, Vol. 2, 2015, pp. 105-126; S. Shane, *Objective Troy: A Terrorist, a President, and the Rise of the Drone*, New York, Duggan Books, 2015.

are called to examine and discuss them. The magnitude of the challenge and the boldness of the response cannot, however, be denied or disregarded.