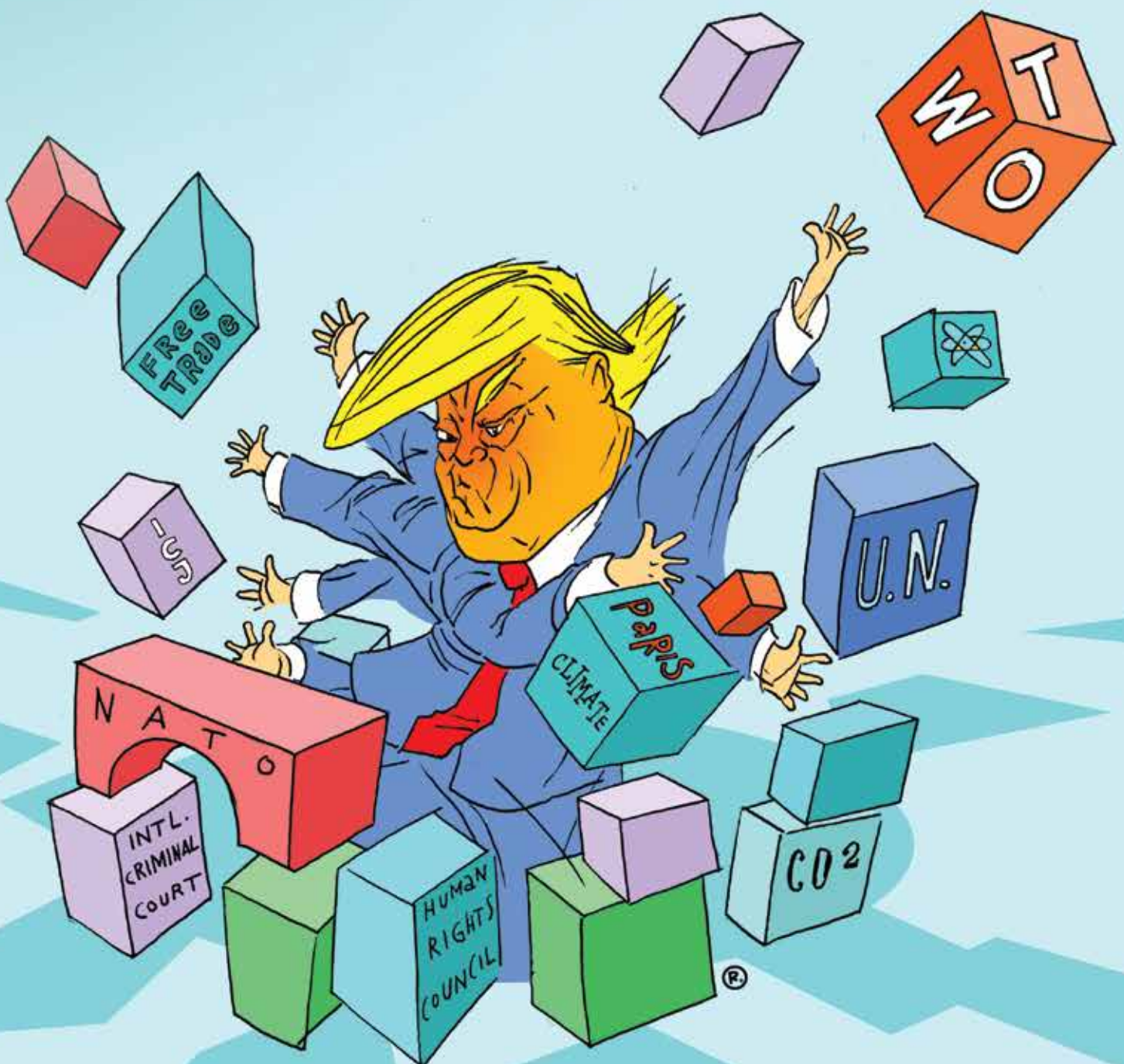


# IBA GLOBAL INSIGHT

OCTOBER 2020

## The Trump Presidency

Four years of disruption, destruction  
and disengagement from the rule of law



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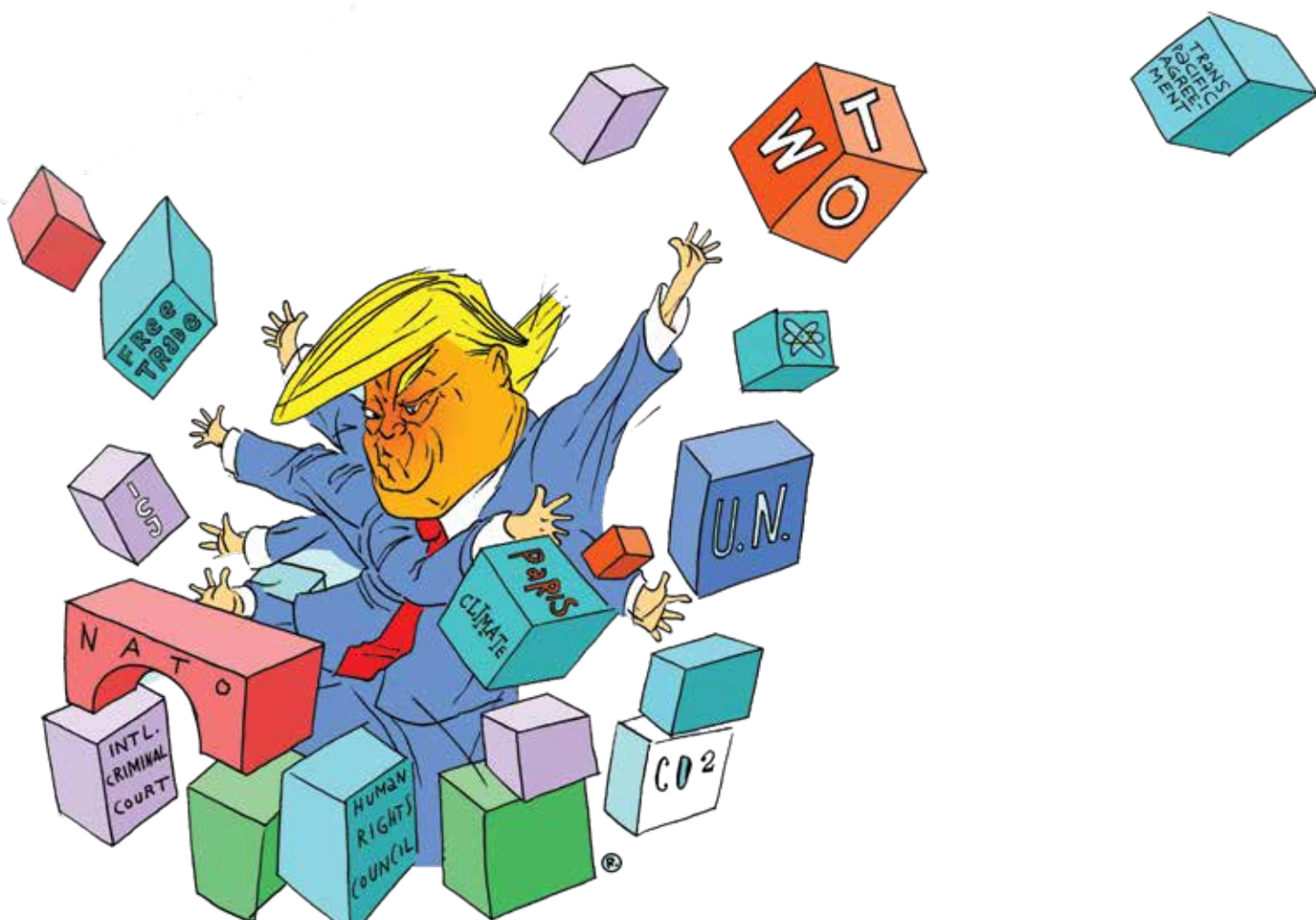
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President Donald Trump looks out from inside an elevator at Trump Tower in New York, United States.

# American Presidency: Trump's treaty undoing project

MICHAEL D GOLDHABER

A few hours after last year's Brussels terror attacks, Donald Trump was asked what he had to say about international law. 'I would say,' he responded, 'that the eggheads who came up with this international law should turn on their television and watch CNN.'

Almost lost in the regressive headlines of late January was a draft executive order in which the new United States President contemplates a review of all multilateral treaties unrelated to security, extradition or trade. Rumour has it that he doesn't love trade treaties either.

Ratifying a treaty under US law is notoriously hard. Would it really be so easy for one president to throw 240 years of agreements out of the window? Quite possibly, yes.

There are three types of international agreements under US law. A 'treaty' is ratified by two-thirds of the Senate. A 'congressional executive agreement' needs only a majority of both houses of Congress. The president can make a 'sole executive agreement' himself.

At the drop of a hat, Trump can shred a sole executive agreement, or a mere 'political commitment'. But can he tear up a treaty or congressional executive agreement at will? As with many other norms that have rarely before been tested, the legal answer is unclear.

The US Supreme Court found this question non-justiciable in *Goldwater v Carter* (1979), when Jimmy Carter unilaterally withdrew the US from its Taiwan defence treaty. But if Congress opposed the

President's move, the question would be fair game.

Suppose Trump withdraws the US from the North Atlantic Treaty. Then suppose that Congress contests Trump's power to do so himself, and votes to stay in the North Atlantic Treaty Organization (NATO), removing any question of justiciability. In such a case – let's call it *Schumer v Trump* – how would the Court resolve the clash between the two political branches? The precedent of *Bush v Gore* might suggest a vote along straight party lines. But the Republican party would be deeply divided. Who knows? The case might even be called *McCain v Trump*. If the new President were to make a move as radical as withdrawing from NATO, it seems likely the Court would reign in executive power, and wisely so.

domestic statute. That Congress would object in the current climate is no certainty.

Most of the countless treaties Trump might review are more mundane, but no less vital. John Bellinger of Arnold & Porter Kaye Scholer, who was State Department legal adviser in George W Bush's second term, has made this point eloquently. Without such treaties, he suggests, 'Americans could not have our letters delivered in foreign countries; could not fly over foreign countries or drive on foreign roads using our state driver's licenses; could not have access to a foreign consular official if we are arrested abroad; could not have our children returned if abducted by a parent; and could not prevent foreign ships from polluting our waters.'

## “ Three key agreements that Trump has at times threatened to kill are NAFTA, the Paris climate agreement and the Iran nuclear deal

A more formalist commentator, who has studied all nine justices' thinking on the separation of powers, might beg to differ.

While Trump has said heretical things about NATO, he's never threatened to withdraw, and the same goes for the World Trade Organization. Three key agreements that he has at times threatened to kill are the North American Free Trade Agreement (NAFTA), the Paris climate agreement and the Iran nuclear deal.

Technically, the Iran nuclear deal is only a political commitment, so Trump surely has the power to reinstate US sanctions. But Catherine Amirfar, who recently returned to Debevoise & Plimpton from the Obama State Department, argues that such a move by the US might not unravel the deal, as the European Union would maintain leverage over Iran.

The Paris climate pact is a sole executive agreement under US law. Trump could pull out on his own – but the soonest he could do so, by its own terms, is November 2020. A faster option would be to pull out of the United Nations (UN) Framework Convention on Climate Control, which underpins it. But that's a treaty, so an executive pull-out would set up a *Schumer v Trump* challenge. If worse comes to worst, Amirfar is optimistic that the world's other major polluters, and most US states, would remain committed to the Paris climate goals.

NAFTA is a treaty. So for Trump to withdraw over Congress's objection would set up another *Schumer v Trump* scenario, with the added wrinkle that NAFTA is implemented by a

A more measured approach may yet prevail on existing treaties. But don't hold your breath on the Senate ratifying any of the 44 already pending. By Bellinger's count, the number of treaties ratified over eight years has declined from 163 under George W Bush to 20 under Barack Obama. Some Senate Republicans have convinced themselves that the UN conventions on the rights of children and the disabled are somehow a threat to Christian home-schooling. Activists used to shame the US for being the only nation not to ratify the Convention on the Rights of the Child, excluding Somalia and South Sudan. Yet, even the failing states got their act together in 2015 — making Uncle Sam the world's sole dissenter.

Professor Oona Hathaway of Yale Law School has predicted the death of treaties. But by 'Treaty's End,' she had in mind a salutary shift to congressional executive agreements. We now face the possibility of an administration that espouses virtually no international agreements of any kind.

Then again, people can surprise. Nothing would say 'Nixon in China' like Trump endorsing the Convention to Eliminate All Forms of Discrimination Against Women. ☒

Michael D Goldhaber is a freelance writer based in New York and was Senior International Correspondent at *American Lawyer* magazine for 12 years. He can be contacted at [michael.goldhaber@gmail.com](mailto:michael.goldhaber@gmail.com)

# AMERICAN PRESIDENCY: EXECUTIVE ORDERS



Serving as Deputy Assistant Attorney General under George W Bush, John Yoo authored the 'Torture Memos' that provided the legal basis for US detention and interrogation policies following 9/11. Here, he assesses Donald Trump's early days in power and says the use of executive orders is damaging his presidency.

**Michael Goldhaber (MG):** You've written about how being born in South Korea influenced your position of being in favour of a strong executive. Tell us more.

**John Yoo (JY):** My interest in presidential power came about because my family moved to the United States from Korea in the mid-1960s. I was always conscious of the Korean War, and the

US intervention in 1950 that prevented South Korea from becoming a communist country. And seeing the misery of people who live in North Korea now makes me especially conscious of the benefits of executive power.

The constitutionality of the Korean War is one of the great issues among constitutional lawyers who study war powers. If President Harry Truman hadn't taken decisive action

and acted quickly; if he'd waited to ask Congress for permission for a declaration of war, I could well be living in North Korea right now.

### On executive orders

“ He’s gone too far and it’s harming his presidency. A better conception of executive power would stabilise his administration

**MG:** And yet you’ve criticised President Trump’s early use of executive power. Why is that?

**JY:** I was trying to raise something that I hope was more cautionary: that he’s gone too far and that it’s harming his presidency. If he could come to a better conception of the purpose of the office and the nature of executive power, it would stabilise his administration.

There are things that worry me. For example, the President has said that he’s going to build a wall along the Mexico-US border and then charge Mexico for it by imposing a trade tariff, or a tax of some kind on financial transfers to Mexico from the US. I think, under the Constitution, that’s outside the power of the president.

**MG:** And the most controversial executive order, the travel ban signed in January 2017, do you think this also goes too far?

**JY:** Parts of it do; parts of it don’t. If you look at the statute that’s involved, the Immigration and Naturalization Act, there are two provisions that conflict. One says the president has the authority to block entry of, as the statute puts it, any class of aliens that’s defined by the president. So that would seem to support the legality of the travel ban order. But the Immigration and Naturalization Act also has a fairly broad provision saying that immigration laws cannot be used to discriminate based on national origin.

Personally, I would say the statutory conflict would come out on the side of the president, but then there’s a constitutional difficulty that the president, in the face of the executive order, doesn’t talk about religion.

However, President Trump said on the campaign trail before he took office that he was interested in banning Muslims from



John Yoo is a lawyer, law professor and author of *Crisis and Command: the History of Executive Power from George Washington to George W. Bush*. He served as Deputy Assistant US Attorney General at the US Department of Justice from 2001–2003, where he worked on issues involving foreign affairs, national security and the separation of powers.

John Yoo. <https://creativecommons.org/licenses/by/2.0>

entering the US. I think that would raise serious problems under the First Amendment: both the free exercise right of religion and also the prohibition on the establishment of religion.

The problem the courts in the US are wrestling with is how far are judges allowed to look behind the face of the order and question the motive of the President, which is something the courts generally are reluctant to do.

**MG:** It’s not only you. Former Vice-President Dick Cheney and others who were very senior in the George W Bush administration, and associated with some of its most controversial policies, seem to be appalled by this executive order. Perhaps it’s also counter-productive as a matter of terrorism policy, and outside the mainstream of American values?

**JY:** There's two different points there. Does it make sense, as a counter-terrorism policy, to ban immigration from these countries? I don't think it does, and I think a lot of counter-terrorism experts would agree. Also, it's too easy to get around. If ISIS or Al Qaeda want to slip operatives into the US [while the ban is in force], you just pick someone who's got a passport from a country that's not affected.

The better thing to do is to engage in close scrutiny of people coming from countries where you're worried about terrorist infiltration and the flow of people coming in, rather than trying to just block off whole countries. The ban also prevents the US benefitting from cooperation with more moderate people from those countries, who might help identify and track down people trying to get into the US.

In terms of broader immigration policy, up until 1965 we had quotas for specific countries. It weighted in favour of Western-European countries and basically cut off immigration from other parts of the world. We decided to do away with that. There's lots to talk about in terms of what's the best way to allocate immigration slots, but we don't want to return to national quotas.

**MG:** I'd like to pick out the two presidents that may resemble Trump the most: Andrew Jackson and Richard Nixon.

**JY:** Jackson's presidency is almost defined by his conflict with the courts: the Supreme Court and Chief Justice John Marshall in particular. This goes to your point about the parallels with Trump. Jackson represented a kind of revolt against what he thought of as the northeastern elites in Boston, New York and Washington, and the courts. He was the first president to portray himself as a 'small d democrat' – someone who represented the people.

A famous quote from Jackson is: 'Well, Chief Justice Marshall has rendered his opinion, now let him execute it', which has been taken ever since for the idea that the president can refuse to enforce a judicial decision if he has a different view of the Constitution. I think Jackson was much more thoughtful than Trump about his attitude towards the courts, but it does have the same level of hostility and doubt about the legitimacy of judicial review.

**MG:** What are the lessons for today? Doesn't it show the limits of judicial control in the face of a president who can more or less plausibly claim popular mandate?

**JY:** This goes back to these fundamental questions we have in our constitutional system about how far does judicial review run when, as one of the founding fathers of the US, Alexander Hamilton, said: the judiciary doesn't have force or will behind it, it only has judgment. By that he meant that the courts don't control the sword, they can only persuade the other branches, and ultimately the American people, to agree and carry out what they want.

Earlier in our history, presidents like Jackson or Thomas Jefferson challenged the courts and sometimes suggested they would not obey a Supreme Court opinion they disagreed with. Franklin Roosevelt and Teddy Roosevelt made similar arguments. Abraham Lincoln did refuse to obey a Supreme Court order.

There are similar sounds coming out of the Trump administration today, about 'so-called judges', or judges being 'disgraceful' in their opposition to his travel ban, or Trump aides saying that judges are not allowed to question the president's power over immigration law.

### *On the travel ban*

“ The problem is how far are judges allowed to look behind the face of the order and question the motive of the president

But with Trump, I worry about the intention behind the travel ban executive order, if it's really there to almost retaliate against certain immigrants because of their religion. I don't think it has the same noble purpose as Jackson had about keeping the Union together.

**MG:** What about similarities with President Nixon?

**JY:** Presidential power fluctuates and expands based on the circumstances – war, emergencies, crises – but during periods of stability without external threat, presidential powers ought to recede. One of the failures of bad presidents is that they don't understand the circumstances they're in. They might be in a period of crisis and they don't step forward, like James Madison or James Buchanan. Or, as with Nixon, they are no longer in a period of crisis, but they try to invoke the broader powers of the presidency out-of-step with the times.

Nixon made claims that the president can do no wrong, but I think those were mistaken because there was no emergency or crisis to which he was responding. He was taking tools that are really for the defence of the country and aiming them domestically.

The travel ban order is similar. Trump is claiming a national security emergency, essentially, with immigration into the US, and claiming a right under statutes, but also keeping from the courts any explanation of why he's issued the order.

### *On presidential power*

“ Bad presidents don't understand the circumstances they're in. Nixon tried to invoke his broader powers out-of-step with the times

There's no emergency about immigration. Immigration has always been under the constitutional authority of Congress. If we were in a war, I would think the President could block people from coming into the country. There are various statutes which allow him to do that. But we're not in a war with these countries.

To me, the overall similarity between Trump and Nixon is not constitutional, it's political. Trump is claiming he represents a forgotten majority in the country, and he thinks it gives him some kind of leverage to make claims about situations which then invoke great presidential power. That was a fault of Nixon.

**MG:** Congress, both through its investigation and its impeachment powers, is the ultimate check on the executive. How do you view it?

**JY:** Congress has plenty of constitutional powers to restrain an executive – if Congress has the institutional will to use them. That's really the question. If Congress wanted to turn around Trump's travel ban order, it could do that in a simple, one-sentence statute.

Congress can stop the building of a wall; it can prevent withdrawal from the North American Free Trade Agreement. So Congress can check a lot of presidential power, even before you start to consider something as serious as impeachment.

On that subject, I'm in favour of much broader use of impeachment. If you go back and look at what the writers and ratifiers of the Constitution said about impeachment, it was originally seen as something that would be more widely used. But, over time, we've narrowed it to this idea that you have to commit a crime as president in order to be impeached. I think Congress initially would have been allowed to remove presidents for being bad at being president, for maladministration, or just because they had serious constitutional conflicts.

**MG:** Your final observations on Trump's early days in power?

**JY:** It's incredible how much controversy accompanied just the first few weeks of the administration. Trump hasn't been doing a good job in navigation or cooperating with Congress, but I think he was still hungover from the campaign. After campaigning on this idea of 'draining the swamp' in Washington, it's hard then to come in and work within the system.

### *On the role of Congress*

“ Congress has plenty of constitutional powers to restrain an executive – if it has the institutional will to use them

He certainly doesn't see his modus operandi to be working within the regular channels of power in Washington, but I think that's a mistake because he has to work with Congress to achieve a lot of his agenda. He can't cut taxes and get the economy growing by himself. That's really only something Congress can do, and that's what his re-election is going to hinge on. ☒



This interview is also available as an IBA podcast at [tinyurl.com/IBAJohnYoo](https://tinyurl.com/IBAJohnYoo)

## Trump's new travel ban further tests image and rule of law

EMAD MEKAY, IBA MIDDLE EAST CORRESPONDENT, CAIRO

**W**hen United States President Donald Trump signed his second travel ban executive order, people in the Middle East, the majority of whom are Muslim, saw the move as the US not living up to its own image and reputation as a bastion of law and democracy. In the US, lawyers and activists saw it as another timely test of the country's much-cherished system of checks and balances.

The new order, signed early in March, blocks travel to the US by citizens from six Muslim-majority countries – Iran, Libya, Somalia, Sudan, Syria and Yemen – on national security grounds. Iraq, which was on the original list, signed in January, was removed. The new order maintains a 120-day suspension on the processing of refugees into the country.

The second order was met by similar scepticism to that which followed the first. It didn't help that it was accompanied by reports of what many rights and immigration lawyers said was 'unconstitutional and systematic ideological' questioning of American-Muslim citizens and foreign travellers about their religious values and political views.

It was reported extensively in the Middle East that Muhammad Ali Jr, son of the legendary US boxer, was detained while travelling with his mother, and asked at least twice about his religion at US airports.

Such incidents may be welcome for white supremacists and the small minority of anti-Muslim fringe groups that appear to have become aligned with the Trump administration. But they do not pass a legal litmus test.

From a legal prospective, there is a near consensus that the latest scaled-back version of the travel ban shares the same flaws as the original Muslim ban that created so much uproar around the world.

'The genesis of the travel ban was Mr Trump's oft-expressed intention to bar Muslims from the United States,' said Philip Berkowitz, New York-based Co-Chair of the IBA's Discrimination and Equality Law Committee and Co-Chair of Littler's international practice. 'While the Administration has tried to soften the current version's language

in some respects, nevertheless the President's prior statements, and the courts that have considered the travel ban thus far are declining to pretend that these statements were never made, and therefore concluded that it suffers from precisely the same flaws as the initial one.'

### “Imposing a religious test on immigration is contrary to US and international law

Philip Berkowitz

Co-Chair, IBA Discrimination and Equality Law Committee; Co-Chair, Littler

There are many, including in the US, who believe that what the US President is doing is both illegal and unconstitutional. Worse, the ban actually opens the door for discrimination based on faith and religion and could easily be rehashed to fit people of other faiths.

'To the extent that the travel ban was implemented in order to discriminate on the basis of faith or religion, it is unlawful and unconstitutional,' Berkowitz says. 'While the President's right to oversee the immigration laws is broad, it is not unfettered. He cannot act in an arbitrary manner. Nor can he act in a manner that is contrary to the Constitution or the laws of the US'

This is now a significant matter for the US image in the Middle East and across the globe. The US helped pioneer international bodies and human rights charters that forbid religious discrimination in any form. But, the Trump administration risks being viewed as violating America's own laws prohibiting religious discrimination.

Omar Jadwat, Director of the American Civil Liberties Union's Immigrants' Rights Project, says it was clear that the White House was searching for reasons to permit religious discrimination. 'The changes the Trump administration has made, and everything we've learned since the original ban rolled out, completely undermine the bogus national security

justifications the President has tried to hide behind and only strengthen the case against his unconstitutional executive orders,' he says. 'The only way to actually fix the Muslim ban is not to have a Muslim ban. Instead, President Trump has recommitted himself to religious discrimination, and he can expect continued disapproval from both the courts and the people.'

Berkowitz says the US is a country of laws, and that the executive orders are a case where the people and the courts can indeed monitor the President's power using a plethora of existing anti-discrimination US laws. The Establishment Clause of the First Amendment, for example, prohibits the federal government from officially preferring one religion over another while the Due Process Clause of the Fifth Amendment bars the federal government from depriving individuals of their liberty interests without due process of law, Berkowitz notes.

Furthermore, the Immigration and Nationality Act permits any alien who is physically present in the US to apply for asylum regardless of their nationality. The US has ratified the United Nations Convention Against Torture, that prevents the government from involuntarily returning any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

'Imposing a religious test on immigration is contrary to US and international law,' says Berkowitz. 'And arbitrarily excluding individuals from certain countries where there is no evidence that doing so will reduce a terrorist threat is an arbitrary act that is contrary to law as well.'

'If the President acts in a way that is an abuse of discretion and in violation of the Constitution and the laws of the US, then the courts must step in and take action. This has been part of our tradition and it is ingrained in our Constitution. We are seeing a proper response to the president's actions, and I think that everyone can be confident that the rule of law is alive and well in the US.'

## American presidency: Bush and Obama ethics gurus reprimand Trump White House and DOJ over 'Russiagate'

MICHAEL GOLDHABER, IBA US CORRESPONDENT, NEW YORK

As pressure mounts on US Attorney General Jeff Sessions to appoint an independent prosecutor to probe the ties between the Russian Federation and the Trump campaign, the question of the moment is whether the Department of Justice (DOJ) can be trusted.

Ethics advisers to both George W Bush and Barack Obama agreed in interviews with *Global Insight* that the Trump White House and DOJ are off to a bumpy ethical start. 'This White House better get its act together with respect to ethics issues or there's going to be a lot of trouble,' says Republican former Associate White House Counsel Richard Painter.

'The Trump administration has shown that it's not willing to treat the DOJ as independent,' declared the Democratic former Associate White House Counsel David Sandler.

Painter echoes the conclusion of more than 100 Democratic lawmakers that Attorney General Jeff Sessions should resign after misleading Congress as to his contacts with the Russian Federation during the campaign. 'I do not think his testimony before Congress was candid,' says Painter. 'His level of deception may have fallen short of perjury, which is a criminal offense. But it did not meet the standard of candour of an Attorney General when testifying before Congress, and other Attorneys General who have given misleading testimony before Congress have been required to resign... I think Attorney General Sessions should do the same.'

Both ethics experts are troubled by reports that White House Chief of Staff Reince Priebus asked Federal Bureau of Investigation Director James Comey and his deputy in mid-February to refute accounts of Trump's Russia ties. Sandler and other Obama alumni perceive a pattern of political interference – pointing to two other reported episodes in Trump's first two months. White House Senior Adviser Stephen Miller reportedly called a US Attorney to guide the defence of Trump's travel ban. And White House Counsel Donald McGahn reportedly asked to see a purported surveillance order relating to the Trump campaign.

These reported contacts appear to defy 40 years of executive branch ethics policies, according to a group

of Obama White House attorneys who have formed an anti-authoritarian watchdog under the name United to Protect Democracy.

'It is not appropriate for the White House to be contacting lower level people at DOJ to talk about cases and for that not to be done through the White House Counsel's office,' says Sandler.

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“The Trump administration has shown that it's not willing to treat the DOJ as independent

David Sandler

*former Associate White House Counsel*

Such actions are likely to violate ethical norms embraced by every White House and Justice Department post-Watergate, according to a United to Protect Democracy analysis that Sandler helped draft. United to Protect Democracy concluded by calling on Trump's administration to reaffirm and follow these norms.

In a recently leaked 27 January memo to White House staff, White House Counsel McGahn did caution that contact with the DOJ about specific cases should generally be restricted to the President, Vice-President, the White House Counsel or his designees in discussion with the Attorney General, Deputy Attorney General, Associate Attorney General or Solicitor General. 'In order to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence,' McGahn stresses, 'these rules must be strictly followed.'

Ethics experts, however, remain troubled. First, the reported contacts would violate the Trump White House's own policy, as they were not confined to senior officials on either side. Second, and perhaps more fundamentally, the reported contacts would violate the longstanding DOJ policy – reaffirmed by George W Bush Attorney General Michael Mukasey – that the White House may contact the DOJ about an open case only when it is constitutionally necessary and appropriate for law enforcement.

'The White House chief of staff has absolutely no business contacting the FBI or anyone else in the Justice Department about an ongoing criminal investigation; that is never acceptable in any administration,' says Painter. 'The White House chief of staff contacting the DOJ is an invitation to trouble... It's not itself a crime but if it were combined with other efforts to obstruct justice, such as the destruction of documents or the types of things that happened in the Nixon White House, having the White House chief of staff contacting the FBI about an ongoing investigation would be a very, very bad situation.'

Finally, the McGahn memo differs from the memos on which it's modelled in not barring the White House from meddling in cases or investigations at other law enforcement departments (for instance Homeland Security) or independent agencies (for instance the Securities and Exchange Commission, Federal Election Commission or Federal Communications Commission). And, in contrast to its predecessor policies, McGahn's does not forbid the White House from interfering in other sorts of agency client matters – for instance grant making or contract procurement. Whether the Trump administration has adopted these additional policies in other memos is not known.

The ethical norms embraced by the executive after Watergate aim to stop the President from politicising justice, and to reassure the public that the President or Attorney General will not put himself above the law. At the same time, they guard against political vendettas and crony capitalism. A victim of politicised justice, or a competitor who has lost a contract because of favouritism, might have standing to challenge the result under the constitutional principles of equal treatment or due process.

'If you look at democracy indices that measure authoritarianism,' says Sandler, 'this is one of the things they consider: whether there is prosecutorial independence. And whether or not the administration is able to steer contracts to their friends and away from their enemies. I think these are fundamental issues of democracy.'



# World trade:



# US v China

Following the recent summit between American President Donald Trump and China's President Xi Jinping, *Global Insight* considers the reversal on protectionism and free trade, assessing the potential for a major trade war between the two global superpowers.

**MICHAEL D GOLDHABER, IBA US CORRESPONDENT**

**B**efore directing the White House National Trade Council, Peter Navarro directed, wrote and produced the documentary 'Death by China'. Navarro's may be the first documentary on trade policy to be promoted with a horror film poster. A serrated steel knife plunges into a map of the American heartland, painted with stars and stripes, spurting blood and bringing to mind posters for films like 'Psycho' – the marker of origin: 'Made in China'. The official website leads with Donald Trump's endorsement: "Death by China" is right on.'

President Trump's other leading trade adviser cuts a more conventional figure only superficially.

United States Trade Representative (USTR) Robert Lighthizer is legendary for disposing of an unsatisfactory Tokyo trade proposal when he was Deputy USTR in the 1980s, by folding it into a paper aeroplane and launching it out the door. A long-time lawyer for US Steel at Skadden, Arps, Slate Meagher & Flom, he is willing to contemplate taking extreme steps against China with eyes wide open. '[W]here a trade relationship has become so unbalanced,' he said in 2010, '[o]ne must ask whether potential retaliation from China really would or could even remotely offset the benefits to the United States of more aggressive trade measures.'

That's about as close as a trade lawyer will come to saying that a trade war would be rational. And to those who treasure global economic stability, it's just as horrifying as Navarro's lurid imagery. As men like these have President Trump's ear, some free traders worry that the sequel to 'Death by China' will be 'Death by China Trade War'. On the hustings, Trump pledged to slap a 45 per cent tariff on Chinese imports, without specifying how. The trade lawyer Bill Perry, who writes the US China Trade War blog, takes Trump at his word. He expects the President to 'start imposing tariffs willy-nilly' on the pretext of national security.

Others, in surveying the landscape of US-China trade policy, foresee less a trade war than a Twitter war. The only result of Trump's summit with Xi Jinping was 'a plan to create a plan,' says WilmerHale Senior International Partner Charlene Barshefsky. 'It will not change the structural nature of the relationship. It will not change market access in a real sense. It will not engender particular areas of reform in China. It will be scattershot but tweetable.'

### What's the problem?

As the USTR under Bill Clinton, Barshefsky led the long talks that led to China's 2001 World Trade Organization (WTO) entry. Before that tango began, in 1996, the US ran a \$34bn trade deficit with China. Terry Stewart of Stewart & Stewart, who is a leading voice for fair trade, went back and studied the congressional debate during the period. Although \$34bn was regarded as shockingly high, the conventional wisdom was that the US trade deficit would plummet after China joined the WTO. As Stewart drily observes, 'The results obviously were not that.'

In fact, over the next 20 years, the deficit with China grew tenfold to \$347bn. In 2016, China accounted for nearly 70 per cent of America's global trade deficit of roughly \$0.5tn in goods and services. (As if that weren't staggering enough, President Trump prefers to cite the \$734bn goods deficit, and ignore America's surplus in services.)

Trump and Navarro obsessively cite the trade deficit as the starting point for any discussion of US-China trade policy. For them, it's a shameful scorecard that shows America to be the greatest loser in the history of commerce. Both Navarro and Commerce Secretary Wilbur Ross insist that China is an anchor on US growth, because gross domestic product (GDP) equals the sum of domestic economic activity (consumption, investment and government spending), adjusted by adding exports and subtracting imports.

Economists are apoplectic that Trump's leading trade advisers misunderstand the

definition of GDP. Imports are not subtracted from the equation because they are negative. Imports are subtracted because (unlike exports) they've already been counted as an aspect of domestic economic activity.

'This is a conceptual error,' says Barshefsky. 'There is a very fringe group of economists that take the view that trade deficits are equal to or a sign of unfair trade but, if I had a guess, 95 per cent of the world's economists do not believe that to be the case. Trade deficits in the US are a function of our lack of savings, and substantial capital inflows into the US.'

Of the capital inflows there can be no doubt. China holds more than \$1tn in US Treasury bonds. And while China has a comparatively modest base of US direct investment, in 2016 it ploughed a record \$46bn into American assets. These investments create US jobs.

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“ While, from a mathematics point of view, obviously you offset trade deficits with inflows that come in... the fact that you're basically selling your country piece by piece ought to be of some concern

Terry Stewart

*Stewart & Stewart, a leading advocate for fair trade*

Navarro and his allies retort that auctioning the US's crown jewels to China is a problem in its own right. 'While, from a mathematics point of view, obviously you offset trade deficits with inflows that come in, which can either be debt or investments,' says Stewart, 'the fact that you're basically selling your country piece by piece ought to be of some concern.'

Navarro makes the same point less subtly. 'Suppose,' he writes, 'that it is not a benign ally buying up our companies, our technologies, our farmland and our food supply chain, and ultimately controlling much of our defense-industrial base. Rather, it is a rapidly militarising strategic rival intent on hegemony in Asia and perhaps world hegemony.'

Although free traders find Navarro's tone hysterical, they generally agree that Chinese bids for overseas tech firms merit close scrutiny given China's record on cyber-espionage and

US President Donald Trump welcomes Chinese President Xi Jinping at Mar-a-Lago estate in Palm Beach, Florida.



forced technology transfer. Similarly, while most economists scoff at the notion that trade deficits are a net drag on growth, all concede that globalisation creates some economic losers in the US. As the Democrats belatedly discovered, those losers form Trump's political base.

The bitter debate over trade deficits masks a consensus that China is a bad actor on trade. Even those who dismiss Trump's general approach to economics, and the wider world, know that China plays dirty. 'There's no current or former US trade official I know of who's going to defend China's current trade practices,' says Warren Maruyama of Hogan Lovells, who served as General Counsel to George W Bush's US Trade Representative. 'Not on the Hill, not in this administration, not in past administrations. There's very little sympathy or good will.'

'There's no question about it,' says Barshefsky. 'The relationship is problematic and I don't need deficit numbers [to tell me so]... China has embarked on a massive indigenisation effort... with increasingly less reliance, dependence or interest in foreign multinationals other than those that can bring technology... China has embarked on a zero-sum, very mercantilist strategy of import substitution to reduce the presence of multinationals in the market and ramp up the presence of local companies in the market by embarking on a series of highly prejudicial policies. Forced technology transfer, cyber-espionage, the resurgence of state-owned enterprises, the creation of champion companies, the heavy subsidisation of new [strategic] sectors...'

China's list of misdeeds on trade is endless. Among other frequently-cited offences are its internet ban, the use of health concerns as a pretext to shelter agriculture, and (until recently) currency manipulation. Perhaps most notably, industrial subsidies and easy credit have created

overcapacity on a huge scale in commodities like metals, cement, rubber and glass.

China is the Saudi Arabia of steel; it can forge unneeded tonnes by the hundreds of millions. Indeed, China's *excess* steel capacity equals the full capacity of the US, the European Union and Japan put together. In aluminium, China's overcapacity was five times America's full capacity at the end of 2015 – and then Alcoa closed a smelter that drove US output down to 1950 levels.

Barshefsky calls these numbers astonishing. 'China has pumped in massive amounts of government money to create and then sustain industries which are in substantial overcapacity,' she says. 'As the returns dry up because the market price has totally cratered as a result of overcapacity, the government is forced to pump more money into these companies, to keep the jobs. Those companies then pump out more product. And this is a vicious cycle.'

On this, the proponent of a free trade and the proponent of a fair trade are in total agreement. 'What is clear is that the world faces serious economic challenges in many manufacturing sectors flowing from state activism by China,' writes Stewart. Overcapacity on this scale 'has never been seen before and could not have happened under market economy conditions'.

### **Trump solution one: rip up your old deals**

Amidst all the attention given to the drama of Trump's first 100 days, the promises he's made good on sometimes get forgotten. Literally as the first order of business on his first day in office, the President theatrically signed an order withdrawing the US from the Trans-Pacific Partnership (TPP).

He told the cameras it was a great thing for the American worker, but didn't elaborate on why. Michael Wessel – a long-time advocate for United Steelworkers and a member of the congressional US-China Economic Security and Review Commission – argues that the TPP would have empowered China. A new rule of origin would have seen 'Made in America' stamped on goods assembled from parts that were two-thirds made in China. The pact, he complains, had no effective provisions on currency manipulation, no discipline on state-owned entities, and no provisions on overcapacity. Of course, it's also true that China was not one of the 12 signatories.

In Barshefsky's view, cancelling the TPP was 'first and foremost a repudiation of our partners and allies in the Asia Pacific where, quite independent from China, the US has substantial economic and security interests'. She also argues that TPP withdrawal tilts the Asian balance of power away from America. Obama USTR Michael Froman summed up this attitude in his exit memo: 'If we step back from a global leadership role, it will be our loss and China's gain.'

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“ China has embarked on a massive indigenisation effort... with increasingly less reliance, dependence or interest in foreign multinationals other than those that can bring technology

Charlene Barshefsky

*Partner, WilmerHale and US Trade Representative under Bill Clinton*

Intriguingly, Trump's agenda for renegotiating the North American Free Trade Agreement (NAFTA) – ostensibly updated protections for trade in services and technology; stronger protections for labour and the environment – sounds remarkably like the TPP. 'If the new administration is smart,' says Barshefsky, 'a new NAFTA would look a whole lot like the TPP, and that would be the first step in reconvening, if you will, the TPP countries on an, in quotes, "bilateral" basis, but essentially very rapidly putting TPP back together.'

However, if Trump wishes to start from scratch with each nation, says Barshefsky, that's 'not remotely realistic'. The USTR simply lacks the staff.

In any event, she says, 'the notion that Congress will vote on 11 separate trade agreements is political suicide. There is no member of Congress who will tolerate that number of trade votes in the current environment.'

Why not just cut a deal with Japan then, and recapture most of TPP's benefit in one blow? 'I suspect many blue collar workers who supported President Trump would dislike a Japan agreement just about as much, if not more, than TPP,' says Maruyama. 'One of the benefits of TPP from the Obama administration's point of view was that it was a way to do a deal with Japan without it being overtly a US-Japan deal. So it would require President Trump to go against an important part of his political base.'

The upshot is that a Pacific pact won't be reached any time soon. Trump's first policy move may be among his most lasting.

### Trump solution two: double down on trade remedies

The prevailing method to address unfair trade practices is to slap specific Chinese goods with dumping penalties or countervailing subsidy duties. Perry estimates there are nearly 200 orders in place against China, which effectively block \$10bn to \$20bn of annual imports.

Even so, Wessel says America needs to be more responsive to hurting industries. Obama would sit for a year on a winning aluminium case, and prolong futile dialogue on overcapacity. The trade deficit will never fade, he says, 'if all we do is to say, "Gee why didn't you fix this problem, why didn't you fix that problem?" It may be time to simply load up the case chart.'

Without making huge headlines, Trump is bringing complaints urged by industry at an unusually high pace. He filed seven trade remedy cases in his first three months – including four against China, targeting aluminium foil, tool chests and cabinets, carton closing staples and cold-drawn mechanical tubing. 'We're seeing a wave of cases here,' says Perry. 'I was talking to one of my friends in a petitioner's law firm and he said, "Bill, there are a lot more coming".'

One danger in this strategy is that national trade remedy law is vulnerable in Geneva – home of the WTO – but the main limitation of trade remedies is that they're too piecemeal to matter economically. Targeting this or that subsector can't make a dent in a \$1bn-a-day deficit. For the world's biggest trade partners, such fines are merely a token offering to the protectionist gods, a steam release valve for free trade. Of course, they still matter greatly to the targeted industries and their lawyers. 'Yes, trade remedy cases are somewhat whack-a-mole,' says Stewart. 'But, for every worker whose future is shattered by unfair trade, we have to continue to pursue them.'

### Trump solution three: risk a trade war by turning the tax system upside down

The US has griped for 60 years that the Value-Added Tax (VAT) other nations levy on US exports amounts to a trade barrier. This grievance has only grown over time, as every major economy except the US adopted a VAT, and the prevailing rates rose into the vicinity of 20 per cent.

Coincidentally, as the House Republicans worked early this year to design a tax cut that might pass Congress, they needed to make it revenue-neutral under the Senate rules. They lit on the idea of a VAT-like Border-Adjusted Tax, or 'BAT', that would raise \$1tn plus over ten years. As the Harvard economist Martin Feldstein describes it, the BAT would effectively be a 20 per cent levy on imports combined with a 20 per cent subsidy for exports. Supporters say it would be VAT-like enough to qualify as an indirect tax that may be rebated under global trade law. And to the delight of Trumpist trade hawks, American exports would boom.

However, most card-carrying trade experts doubt a BAT would survive a Geneva challenge. That's partly because the US lost challenges to similar tax schemes in 1981 and 1999.

'There are 167 members of the WTO, and probably 160 of them would immediately join in a case challenging a US BAT,' says former USTR General Counsel Maruyama. 'The WTO consistency of BAT is extremely dubious because it's basically a tweaking of the US corporate income tax as opposed to a real VAT. The only people I've seen who have said it would be WTO-consistent have been tax law professors.'

'There's a reason international trade lawyers shouldn't dabble in corporate tax advice,' Maruyama adds with a wink, 'and it probably goes both ways. At the end of the day, the amount of retaliation that could be authorised against US exports would be massive. Exports of things like aircraft, agriculture, hi-tech – basically you could kiss them goodbye.'

Reasonable minds can differ on the merits of the WTO analysis, Barshefsky says – but she agrees that the BAT would be begging for an immediate worldwide trade war. 'If you're a trading partner, and your product is going to the US and a 20 per cent tariff is slapped on it, are you going to wait two years for a WTO ruling? No way. You'll retaliate now.' The Peterson Institute for International Economics envisions an unprecedented \$385bn in trade retaliation.

These fears seem to have halted the BAT's momentum, with a big assist from the import-reliant retail and energy sectors, as well as the Koch brother kingpins of Republican campaign finance. The one-page tax plan released by President Trump before his one-hundredth day in office made no mention

of border adjustment. Still, Trump's one-pager is an opening position; the pressure to find new revenue remains, and House Republicans are pushing for the BAT.

### Trump solution four: risk a trade war by hiking tariffs in the name of national security

National security in trade presented President Trump with a rare opportunity for bridge building. Everyone from Barshefsky to Wessel thinks that China's aggressive policy of strategic mergers and acquisitions (M&A) in technology calls for strengthening the national security review of cross-border M&A deals conducted by the Committee on Foreign Investment in the United States (CFIUS).

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“ President Trump has raised serious questions about the continued viability of the WTO and I think that would be a broadly shared view in Congress

Michael Wessel

*Member of American congressional US-China Economic Security and Review Commission*

Trump's early big surprise in trade policy was to instead invoke national security as a grounds for the Commerce Department to broadly investigate raising tariffs on global steel and aluminium imports under an obscure Cold War-era law: section 232 of the Trade Expansion Act of 1962. Is this a way for the President to fulfil his protectionist pledges through the back door? Bill Perry of the US China Trade War blog foresees stiff tariffs on metal imports within the year, with more sectors to follow. 'This could be the real beginning of a trade war,' he says.

For starters, section 232 may appeal to Commerce Secretary Wilbur Ross as an end-run on the International Trade Commission (ITC). In ordinary trade remedy cases, Commerce can't act without an injury finding by the ITC – a bipartisan body funded by Congress that is no one's puppet. The ITC 'will not be embracing any alternative facts,' the Democratic ex-Commissioner Jennifer Hillman has tartly warned President Trump. In February, the ITC riled US industry by halting a \$1bn dumping case

against Chinese truck and bus tyres in its tracks. Perry, who worked at both agencies, estimates that the ITC finds ‘no injury’ close to a third of the time. By contrast, he thinks the Commerce Department, which is fully controlled by the executive, finds dumping at least 90 per cent of the time. ‘Section 232 is totally a creature of the Commerce Department,’ Perry argues, and ‘the Commerce Department is very protectionist.’

But, in Perry’s view, what really makes section 232 a game changer is that it could evade juridical oversight. US courts might decline jurisdiction because the Trade Expansion Act does not expressly provide for judicial review. The WTO might take its national security clause to be self-judging. In either forum, jurists naturally tend to defer on national security.

‘We know Donald Trump wants to find a way to unilaterally impose tariffs on his own,’ Perry says. ‘In the campaign he always said, “I’m going to put a tariff on them!” Well, now he’s got a way to do so. And he’s going to do so with a friendly Commerce Department, no independent check at the ITC, no court review of the determination... And, [in] the WTO, [the only check is] a provision that’s never been used and gives a country wide latitude.’

However, Professor Robert Howse of NYU says it’s far from certain that Commerce will find a section 232 violation or that the executive would choose aggressive tariffs as the remedy. And it’s unlikely that such a tariff would survive review by the US courts and WTO.

Launching a section 232 investigation is good for a tweet or a soundbite, says Howse. ‘But it’s completely preposterous. I’d be very amused to see any reasoned argument that steel imports threaten US security.’ The logic seems to be that America lacks the means to supply its military, yet these industries are far from extinct. And, in any event, a tariff won’t magically build a new steel mill in Pittsburgh. In the end, Howse predicts, ‘we’ll hear a lot of belligerent rhetoric. But will there be any actions in obvious violation of WTO treaty obligations? I don’t think so.’

Howse expects the US courts to read a reasonableness requirement into the Trade Expansion Act. He doubts the WTO would undermine its own system by giving members carte blanche to impose tariffs under the guise of self-assessed national security needs. And, at both levels, the decision-makers may feel a responsibility to act as a check on a President who openly campaigned in opposition to free trade, globalisation and the liberal world order. Even as he signed the section 232 orders, Trump was slinging protectionist slogans. ‘We’re going to fight for American workers and American-made steel,’ he proclaimed. ‘For decades, America has lost our jobs and our factories to unfair foreign trade... and we’re going to reverse that.’

Just as US judges read Trump’s ‘travel ban’ in light of his rage against Muslims, the WTO may read his ‘national security orders’ in light of his protectionist pledges. Ambassador Barshefsky says jurists aren’t deaf: ‘Look, there’s such sensitivity internationally because of all the rhetoric in the campaign, that as the administration takes action that looks like that rhetoric, it will be interpreted as fulfilling the rhetoric... I don’t think there’s any panellist in the world, just as there’s no judge in the world, who wouldn’t also say, I know [why] this was enacted the way it was.’

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“ If your product is going to the US and a 20 per cent tariff is slapped on it, are you going to wait two years for a WTO ruling? No way. You’ll retaliate now

Charlene Barshefsky  
Partner, WilmerHale and US Trade Representative  
under Bill Clinton

In any event, the stakes may stay low. Julia Ya Qin of Tsinghua University rejects the notion that the section 232 strategy will spread from steel to sector after sector. Trump has ‘realised that the economies of China and the US are so interdependent that neither side can afford a trade war,’ she says. And steel tariffs ‘would not trigger a full blown trade war’.

### **Trump solution five: make a new and better trade deal**

One school of thought holds that the US President is merely aiming to intimidate China, and to win trade concessions before hostilities escalate. Wessel says that’s certainly his hope. ‘No one is looking for trade wars,’ says Wessel, ‘but if one steps back and looks at the composition of trade, the volume of trade and also the political situation in each country, I would argue China has a lot more to lose.’ The Communist Party’s hold on power, he stresses, depends on keeping their people employed. ‘And so I think China has to be very careful about how it approaches the US and needs to be much more responsive [to its] complaints.’

Exactly what concessions Trump would pursue in negotiations is anyone’s guess. In general, the administration is trying to make

'reciprocity' the new touchstone for equitable deals. Stewart, for one, would like to see managed trade. 'Look,' he would say, 'we're happy to accept as much from China as China is willing to accept from us, and we'll give you five years to get there.' Such an approach is the antithesis of free trade, but it would probably be WTO-compliant if it were negotiated bilaterally as part of a comprehensive deal.

If threatening a trade war is Trump's negotiating strategy, Barshefsky is underwhelmed. Threatening a war only works if you're willing to wage a war, she says, and the business community isn't. 'China may be more trade dependent than we are,' she says, 'but do you want to lop off a third of the growth in GDP? Can the US actually afford that? I don't think so. So this notion, this talk about trade war, which I view as so much bravado, is completely undesirable.'

In practice, when he met with Xi, Trump seemed willing to subordinate the trade agenda he campaigned on to North Korean diplomacy. 'I think it's astonishing,' says Barshefsky. 'I think it's astonishing to say to a country... you're cheating us, you're raping the US... but I won't mind if you help me on North Korea.' On the flip side, Howse was scandalised when then President-elect Trump voiced a willingness to subordinate Taiwanese diplomacy to his trade agenda. Trump quickly backed down on Taiwan so, in terms of trade, China won both skirmishes.

Professor Qin would remind us that China is no stranger to the art of the deal. 'So long as it is a matter of making deals,' she says, 'China should be able to manage just fine.'

### Coming to terms with China in the world trade system

If Charlene Barshefsky could reconvene the WTO talks of the late 1990s, she'd do it all over again. 'So you have the world's largest country, a nuclear power, a permanent member of the Security Council, the world's largest standing army, the centre-pole of Asia, and it knocks on your door and says, "we want to reform our economy". You don't say no.'

As Bill Clinton's US Trade Representative, her only regret is that the Republican Congress didn't adequately assist displaced workers. She'd like both parties to pay more attention to trade adjustment policy. Wage insurance and apprenticeships in Denmark, Germany, Korea and Singapore should be emulated. Counselling for small businesses should be scaled up. 'I think China has to be credited with a lot of the progress that it's made,' she says, 'and it has to be criticised for a backsliding on reform.'

China has 'reformed its economy substantially,' she continues. It 'so substantially opened its economy that, in fact, it's the second-largest

importer in the world... Its contribution to global growth has been exceptionally important... Where China fell off the wagon was beginning seven-ish years after WTO entry, when you saw, beginning 2007, a trickling down of economic reform and opening, and a ramping up of discriminatory measures, elevated to ideology almost by Xi Jinping.'

Professor Qin of Tsinghua wrote an influential paper on 'The Impact of WTO Accession' in *The China Quarterly*. From a Chinese perspective, she sees a different mix of blessings and curses. And she disagrees with the Western narrative of Beijing's recent betrayal.

'Everyone, including the Chinese government itself, underestimated the economic impact of China's accession to the WTO,' she says. 'For China, it has brought economic prosperity for millions and made China a great economic power within a short span of a decade. It has also helped China to modernise its domestic governance. But, the amazing speed of China's economic rise has come at the expense of severe environmental degradation, and has led to an enormous wealth gap, and created many other social problems.'

'Politically, outsiders may have had some misconceptions about the Chinese system and thought that China would gradually evolve into a market economy not fundamentally different from the prototype. In reality, the Chinese government has been very consistent in its policy of making the state sector stronger and more competitive – this basic position has never changed. And the government has never indicated that it would give up using industrial policies in economic development. In this regard, I don't see a fundamental shift in 2007.'

Whether or not they see China's deviation from the Western model as consistent or foreseeable, committed internationalists would address them *within* the WTO system.

Barshefsky would like to see the US bring a WTO case that attacks every facet of China's programme to nurture a new field of technology through non-market practices. She'd also like the US to update China's 1999 WTO agreement with a series of bilateral accords. It pains free traders that the liberal President of the future can't build on the platform of a TPP. But, they are determined to complete their historic project. 'When you need to see systematic change, the one thing you don't do is throw out the agreement that would have pushed China to make systematic change, and that was the TPP,' she says ruefully. 'Now we have to do it area by area, negotiation by negotiation. But it has to be done.' ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



# American Presidency:

## The conundrum of Justice Gorsuch's Supreme Court appointment

**After his first 100 days in office, President Trump understands he can't simply govern by executive order. Experts expect deregulation to be the Administration's next major focus, but Justice Gorsuch's appointment to the Supreme Court raises intriguing questions.**

**MICHAEL D GOLDHABER, IBA US CORRESPONDENT**

**D**onald Trump's executive orders have commanded more attention than action. Some, like the travel ban, are foundering in court. Others, like the decree to halt the Clean Power Plan, are merely a declaration of intent to deregulate. As his legislative programme stalls, Trump (like Obama) may be expected to rely on rulemaking all the more.

The puzzle, then, is why, in Neil Gorsuch, he has nominated to the Supreme Court a man whose track record suggests he might be inclined to second-guess the President's agencies.

White House Chief Strategist Steve Bannon explained Trump's agenda with astonishing frankness at the Conservative Political Action

Conference: 'If you look at these cabinet appointees, they were selected for a reason and that is deconstruction [of the administrative state].' Sure enough, Environmental Protection Agency (EPA) Administrator Scott Pruitt challenged EPA rules in 14 lawsuits as a state regulator. Health and Human Services Secretary Tom Price led the charge to repeal Obamacare over 50 times in the House of Representatives. Shortly after Congress refused to pass Trumpcare, Price tweeted: 'There are 1,442 citations in [Obamacare] where it says "The Secretary shall..." or "The Secretary may...". [W]e'll look at every single one.'

In response, experts predict a wave of

## The US Supreme Court – The Presidents’ people

Name	Born	President who appointed	Senate vote	Age when appointed	First day
Chief Justice John Roberts	Jan 1955	George W Bush	78–22	50	29 September 2005
Anthony Kennedy	Jul 1936	Ronald Reagan	97–0	51	18 February 1988
Clarence Thomas	Jun 1948	George H W Bush	52–48	43	23 October 1991
Ruth Bader Ginsburg	Mar 1933	Bill Clinton	96–3	60	10 August 1993
Stephen Breyer	Aug 1938	Bill Clinton	87–9	55	3 August 1994
Samuel Alito	Apr 1950	George W Bush	58–42	55	31 January 2006
Sonia Sotomayor	Jun 1954	Barrack Obama	68–31	55	8 August 2009
Elena Kagan	Apr 1960	Barrack Obama	63–37	50	7 August 2010
Neil Gorsuch	Aug 1967	Donald Trump	54–45	49	10 April 2017

regulatory lawsuits – whether by blue states prodding dilatory regulators to act on Obama’s surviving legal mandates, or by liberal advocacy groups challenging Trump’s deregulatory rules as arbitrary or unauthorised. If so, then Trump’s best friend for the next four years may be the ‘Chevron’ doctrine, which gives agencies rather than courts the primacy in interpreting murky United States laws.

“ If you look at these cabinet appointees, they were selected for a reason and that is deconstruction [of the administrative state]

Steve Bannon  
White House Chief Strategist

However, the nomination of Neil Gorsuch to succeed Antonin Scalia as Associate Justice of the Supreme Court raises interesting questions. Justice Gorsuch is a leading critic of the Chevron doctrine, which dates back to the Reagan era, and wants courts to take back the power of statutory interpretation from agencies. The intriguing

nature of the appointment is heightened by the fact that the regulator who established the now-questioned agency power in *Chevron v NRDC* was Gorsuch’s mother, who torched EPA rules as Reagan’s environmental administrator.

In last year’s *Gutierrez-Brizuela v Lynch*, Gorsuch sided with an immigrant over the Bureau of Immigration Appeals, and did so on the broadest possible doctrinal grounds. *Chevron* and its progeny, he complained, ‘permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design’. Some court watchers think liberals should count their blessings.

Increasing the mystery, House Republicans in January voted for a ‘Regulatory Accountability Act’, which would nullify *Chevron*, and give courts the upper hand over agencies in discerning Congress’ intent. (The bill is not expected to pass the Senate.)

‘It’s somewhat puzzling in the current climate that [Republicans] continue to push [to overturn Chevron] now that Trump is in office,’ says Kathryn Watts of the University of Washington School of Law. ‘[T]his is Congress trying to take back some of the power they have handed to the executive branch. So why a president would want to sign it if the bill passed both houses I don’t understand.’

Michael Dorf of Cornell Law School puts the problem succinctly: 'It's weird that a Republican Congress would be trying to get rid of deference to the executive branch while there's a Republican president.' Equally, that Trump has nominated to the Supreme Court a critic of agency power is something of a conundrum.

One explanation, Dorf says, is that the House passed a bill developed under Obama without thinking about it carefully (and Gorsuch was nominated for other reasons). An alternative explanation is that Republicans know justices and doctrines are in place for decades, and believe that the long-run effect of rolling back *Chevron* would be deregulatory.

'The Code of Federal Regulations is enormous,' Dorf notes. 'To say that none of those are presumptively valid anymore would be a kind of full employment act for administrative

lawyers to go find regulations that clients don't like.'

But, Dorf doesn't believe the *Chevron* doctrine is about to vanish. 'I'm dubious that the Court, even with Gorsuch, would overrule *Chevron*,' he says. 'I don't count five votes – although I do think there would be a further weakening.'

Watts agrees, and adds that *Chevron* is not the only game in town. Whether under new, old or tweaked administrative law doctrines, she says, the courts have lots of ways to act as a check on presidential agencies that interpret legislative texts aggressively. As the White House Chief Strategist, Steve Bannon must be forewarned that you can't deconstruct the state legally unless judges like your literary deconstruction. ☒

**Michael Goldhaber** is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



# America's real border problem

**'We're going to build the wall' ranked among President Trump's most recognisable election campaign slogans. But, even the highest wall can't stem the flow of dirty dollars sustaining the drug cartels. The epic HSBC case shows the limits of the United States' unique approach to money laundering.**

**MICHAEL D GOLDHABER, IBA US CORRESPONDENT**

**F**rom the moment he descended the gilded escalator at Trump Tower to launch his presidential campaign, Donald Trump declared that Mexico sends the United States drugs, crime and rapists. Asked to apologise, the candidate would only add infectious disease to his list. 'Bad hombres' became a central grievance for the Trump campaign. 'Build the Wall' became its refrain.

In reality, arrests on the Rio Grande peaked at the turn of the millennium. More Mexicans have left the US than have arrived since 2009, according to fact checkers. Mexican immigrants are more likely to be vaccinated than the average US citizen, and less likely to commit violent crimes.

The seed of truth in President Trump's narrative is that North America has a drug problem. Multinational gangs cause untold misery on both sides of the border, with Mexico suffering an astonishing 23,000 drug-related murders last year. The serious question for policymakers and legislators is not how to stop the slowing flow of immigration, but how to dam the continuing flood of dirty money that pumps life into the drug cartels. 'Building a wall will do nothing to solve or even impede the problem of drug money being repatriated back to Mexico where it's laundered,' says Richard Elias of Elias Gutzler Spicer.

The only solution to money laundering is anti-money laundering (AML). But, what sort

of AML? Five years ago, the US caught HSBC banking billions in suspect Mexican cash. Faced with the greatest scandal of money laundering history, the US deferred prosecution in favour of massive fines and regulation under the gaze of a court monitor.

Now, as the five-year mark approaches, the US must decide whether to extend its supervision, renew its prosecution or declare victory. The expiration of HSBC's monitorship does more than test compliance at the world's biggest bank outside of China. More fundamentally, it tests the US's stark choice to control dirty money through its distinct system of regulation and settlement rather than prosecution.

While establishment lawyers perceive progress on money laundering, civil society is sceptical. 'Banks are investing tremendous resources into this issue,' says Carlton Greene, who served as General Counsel at the Financial Crimes Enforcement Network (FinCEN) during the Obama administration. 'Compliance has really hit a fever pitch of prioritisation.'

But, despite swelling fines and compliance units, 'it's just as likely that a scandal as big as the HSBC scandal could still happen,' counters *Global Witness* US Director Stefanie Ostfeld. 'The US continues to roll out the red carpet to dirty money from around the world.'

### The good news on AML

As it happens, the US received its once-a-decade combing-over by the Financial Action Task Force (FATF) just before President Trump arrived on the scene. Add that multilateral assessment to a quick survey of President Trump's start and you get a vivid snapshot of the US' AML regime. There's good news aplenty.

Overall, the FATF deemed the US system 'robust'. It gave the US highest marks on asset forfeiture, which tops \$4bn a year, and counter-terrorism, which is 'highly effective'. Amazingly, the US 'appears to have kept terrorist funds out of

its financial system to a large extent'. Where the bad guys are known, the US blacklist keeps them out. Bank regulations 'seem to have the desired impact'. Money laundering prosecutions, often complex and global, march at the clip of 1,200 a year. The US' initiative to recover kleptocrat assets is one-of-a-kind.

Obama's Department of Justice (DoJ) summed up the mainstream progressive view by concluding that the FATF showed its AML regime to be 'unmatched', with 'room for improvement'.

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“ Building a wall will do nothing to solve or even impede the problem of drug money being repatriated back to Mexico, where it's laundered

Richard Elias  
Elias Gutzler Spicer

Despite a general hostility to the administrative state, the Trump administration has actively carried on the fight against money laundering. One too-cynical column predicted that President Trump's first move would be to deregulate luxury real estate, because he has a history of selling condos to oligarchs and kleptocrats (like Haiti's 'Baby Doc' Duvalier, who bought a Trump Tower unit through a Panamanian shell company). But, in February, President Trump renewed a successful 'targeting order' that forces title insurers to report cash buyers of upscale New York properties. Adding to the irony, Trump's FinCEN has spent much of its time hounding casino operators. Maybe it's not curtains for corporate transparency after all.

In May, Citigroup and the DoJ struck a \$97m deferred prosecution agreement on Mexican

money laundering, which looks much like the HSBC settlement on a smaller scale. FinCEN's staff and budget remain intact. Trump has not tried to roll back FinCEN's new 'Customer Due Diligence' rule, which makes banks report beneficial owners. Nor has Trump tried to wipe out the new Internal Revenue Service rule forcing companies to report financial data 'country-by-country'.

Greene, now at Crowell & Moring, is hopeful that his successors at Trump's FinCEN will finally regulate investment advisers and expand the luxury real estate orders, which are limited in time and space, into a rule. It's true that Trump has hamstrung rulemakers with his '2-for-1' order, erasing two old regulations for every new one issued. But, a strong argument can be made that all money laundering rules fall under the exception for national security.

'At the very least', says Greene, 'I haven't seen retrenchment on any of what FinCEN does.'

#### The bad news from the FATF

Sharper critics of money laundering policy think the FATF is being diplomatic. 'The US pays for over 25 per cent of the organisation,' says Cambridge University's Jason Sharman, 'and the organisation is very aware of that. There's a fine line between maintaining the pretense of objectivity and not annoying the US.' Even so, the FATF gave Uncle Sam low grades for failing to name the beneficial owners of shell companies – and for failing to regulate lawyers. The FATF focused on the same two key policy gaps a decade earlier. Perhaps the best that can be said, to borrow Transparency International's phrase, is the US has 'more roof than holes'.

On beneficial ownership, the US made strides last year by adopting a 'Customer Due Diligence' rule, which ostensibly forces banks in the US to name the true owners of new accounts. But, to *Global Witness*, it's a flawed and limited rule. Bad

guys can still hide by lowering their ownership stake below 25 per cent. Worse, the Treasury will let banks satisfy the rule by merely naming managers. Most fundamentally, the rule doesn't reach the incorporators of shell companies. If you're a bad guy, 'you can still set up a shell company in Delaware on Monday, and open a bank account in Panama on Tuesday,' says Ostfeld. Incorporation transparency remains 'the Achilles heel of US AML policy'.

When John Cassara was at FinCEN, he led training sessions for money laundering officials in dozens of countries. 'Invariably,' he says, 'in the class or on a break, I would have a student come up to me and say "I'm working a money laundering case where the bad money from my country goes to this place called Delaware. Can you help us?" There's nothing I can do. There's nothing we can do. Do you know how embarrassing that is? I'm standing there preaching the gospel of money laundering and what these guys should do to clean up their act and then they throw Delaware in my face.'

US embarrassment deepened in June, when European Union nations had to pass beneficial owner laws under their new Anti-Money Laundering Directive. Ironically, though the idea has yet to bear fruit in Washington, DC, the EU stole it from a 2008 bill sponsored by then-Senators Carl Levin and Barack Obama. On 29 June, Congress tried to catch up by re-introducing the US Incorporation Transparency and Law Enforcement Assistance Act. Incorporation transparency has always had bipartisan appeal because it would super-charge the fight on drugs and terror. Its champions hope the bill will gain momentum from the newfound support of banks (who don't wish to be the sole US enforcers of beneficial ownership), and the increased clout of Trump-friendly law enforcement groups who have always liked the idea. While Obama's Treasury Department favoured some form of incorporation transparency, Trump has yet to take a position. Congress is otherwise occupied.

The FATF's second chief complaint is the US' refusal to impose AML obligations on attorneys. This too was dramatised in the spring, when the DoJ sought to seize another \$0.5bn of assets traced to an alleged slush fund for Malaysian kleptocrats, known as '1MDB', which was linked with the financing of the film *Wolf of Wall Street*.

*US v Wolf of Wall Street*, as one of the seizure cases is styled, spotlights a gaping loophole in US law identified by the FATF. When money is funneled through a lawyer-client bank account, the lawyer has no due diligence duty whatever – and the bank needs only to do due diligence on the law firm. 'There's no suggestion that these law firms have done anything wrong,' says *Global Witness*' Murray Worthy. 'What we're saying is this is a gap in the regulations.'

An episode that illustrates both of the gaps highlighted by the FATF is last year's 'Anonymous Inc' sting of New York lawyers. A *Global Witness* researcher posed as an agent for an African kleptocrat, while hidden '60 Minutes' cameras rolled. In pre-client interviews, 11 of the 13 lawyers tested spoke of forming a US shell, and some contemplated using their client accounts.

The prevalence of lawyer trust accounts being abused by money launderers may be impossible to quantify, Worthy says – but this handful of examples is 'evidence enough' that it's a problem.

What is the proper response? 'Require transactional lawyers to do money laundering checks on all their clients,' says Ostfeld. Elise Bean, of the Levin Center at Wayne Law, says Congress might simply extend Bank Secrecy Act

obligations to lawyers, drawing on the content of the bar's voluntary best practices. Alternatively, the bar itself could make AML due diligence a binding professional duty. 'I definitely think the ABA has a role to play,' says Worthy.

Meanwhile, conspiring to launder money is already a crime and an ethical breach. Bean would like to see lawyers prosecuted and disciplined for forming shells and using client accounts to launder funds. 'In an appropriate case,' she says, 'it would be a good deterrent.'

### The bad news under President Trump

While President Trump has carried on the fight against money laundering proper, AML cannot be viewed in isolation. The Trump Congress' first act of deregulation of any kind was to rescind the Securities and Exchange Commission (SEC) rule forcing natural resource companies to disclose payments to foreign nations. 'The rollback of the extractive disclosure rule shows we are abandoning our position as the anticorruption leader globally,' says Ostfeld. '[This rule was] important for stopping money from going missing in the first place, before the money is laundered. That's the behaviour we're trying to stop.'

In AML proper, experts fear that Trump's rhetoric on the Mexican wall will undermine cross-border cooperation. President Obama offered a timely reminder of its importance by securing extradition of drug kingpin 'El Chapo' Guzman on his last day in office. With Trump's approval rating in Mexico at a world-low of five per cent, we may see less of that. 'Any US special agent will tell you that collaboration with law enforcement in Mexico is imperative,' says Elias.

Indeed, former agent Robert Mazur, legendary for his work as an undercover money launderer, is passionate on the subject. 'I hope that the Trump administration recognises how precious and important the relationship is with the Mexican government and law enforcement community,' he says. 'Because, absent that cooperation, the cartels win, absolutely. In my view, that's more important than a 50-foot wall. The most important thing is a robust, trustful relationship between these two nations and their respective law enforcement communities. Anything we do that might unnecessarily undermine that relationship is shooting ourselves in the foot.'

'We need a secure border but a secure border is not the answer to the problem. The closest thing to a silver bullet you're ever going to get is having the most positive, truthful, honourable relationship between nations politically, law enforcement-wise and intelligence-wise.'

'I wish that leaders in our country would recognise that, when you look at the dilemma of Mexico (depending on whose numbers you take),

more than 100,000 people have lost their lives in connection with the activities of Mexican drug cartels. Let's say it's 120,000. Of that 120,000, there's a big percentage of people who are former prosecutors, reporters, law enforcement officers, military personnel, shop owners, etc, who had the courage to fight the cartels and are now dead. I think the Mexican people would appreciate us more if we recognised the sacrifice that a good segment of their population has made in an effort to try to fight this war. Such recognition would do nothing other than strengthen the relations between governments and law enforcement agencies.

### What the FATF forgot: the prosecution gap

The FATF doesn't care *how* a nation achieves its objectives. And that's sensible for a group that bridges legal cultures. But, it misses the major US debate: does the DoJ need to pursue the

criminally could have serious side effects. It could chase able people from the compliance field. And, it could drive banks to abandon whole sectors or regions under the cover of derisking. 'If they were to start prosecuting people for having a bad AML programme,' he says, 'it would have to be really egregious for them to be able to do that and not completely spook the industry.'

The sceptics counter that there will be no deterrent until the threats of liability are backed by actual criminal prosecutions of both banks and banking executives (which is not to say compliance officers). And, if HSBC Mexico wasn't 'egregious' enough to prosecute, what is?

'I cannot connect the dots between the Yates Memo and the performance of the DoJ during that time frame,' says Mazur. 'I don't see any conduct in the DoJ during the Lanny Breuer/ Eric Holder era holding individual people responsible [for money laundering], when you look at the Wachovia bank matter, when you look at HSBC.' By contrast, when it comes to tax evasion, says Mazur, the DoJ is willing to dig deep enough into bank revelations to identify who is culpable and chase them down.

*Global Witness* also finds the US strategy on money laundering lacking. 'What we've seen from HSBC is that fines by themselves don't work, they don't hurt the people responsible, [they're just] the cost of doing business,' says Ostfeld. 'What we've seen over recent years is a kind of increasing escalation in regulatory action,' adds Worthy. 'But, there's still a tendency to use deferred prosecution agreements.'

To prosecute both banks and executives, Worthy concludes, 'would build a much more effective AML compliance regime. It's about both corporate collective and individual responsibility.'

## “ Banks are investing tremendous resources into this issue. Compliance has really hit a fever pitch of prioritisation

Carlton Greene

Former General Counsel, Financial Crimes Enforcement Network

prosecution of banks and bankers in cases like HSBC's, in order to deter money laundering?

Greene thinks that mega-settlements, combined with regulation, are already starting to change banking norms. In particular, he argues, three new threats have instilled in bankers a healthy fear of individual AML liability. First, the DoJ's 2015 'Yates Memo' expressly makes personal prosecution a top priority, giving companies under investigation an incentive to point the finger at wrongdoers by making it a prerequisite to receiving credit for cooperation. Second, in this May's *Haider* settlement, a compliance officer agreed to a \$250,000 fine and a three-year ban to settle a FinCEN claim for civil liability. Third, as of this year, the New York State Department of Financial Services requires a senior officer or the board of directors to formally certify that a company is in AML compliance. 'You've got kind of a perfect storm on individual liability,' Greene says.

While Greene sees this fear as salutary, he warns that going further and pursuing people

### HSBC: a prosecution deferred

HSBC Mexico presented a case of money laundering as prosecutable as the US is ever likely to see. A drug lord effectively testified that HSBC Mexico was the cartels' bank of choice in a moment of honesty caught on tape in 2008. And, he could be corroborated by the bank's own AML director, who helpfully fretted in an email, sent as he resigned in panic, that HSBC had captured up to 70 per cent of the market for dirty money in Mexico.

According to the US indictment, HSBC tellers routinely accepted millions in cash from people with no identifiable income, packed in boxes custom-fit to the dimensions of their bank windows. In one scene, caught on closed-circuit television, the tellers had to get on the floor and count cash all day. Bankers didn't want to know, so they simply made up know-your-customer data, and opened fictitious 'offshore' accounts to get

around Mexico's ban on depositing dollars. At one point, the Mexico AML director fabricated half a year of imaginary meetings. After the US seized a client's assets for drug laundering, executives refused to drop the client. 'What is this, the School of Low Expectations Banking?' emailed an AML officer. Audits frankly concluded that controls were 'BELOW STANDARD'.

HSBC USA laughably classified Mexico as a low-risk country. It failed to monitor over \$670bn in wire transfers and \$9.4bn in bulk cash from Mexico between 2006 and 2010. Just for starters, prosecutors could trace nearly \$1bn of it to major drug cartels. 'I could probably go to a lot of elementary schools in the world and give that fact pattern,' says Mazur, 'and I think that most would follow the logic that this *could not* have been a bank *tricked* into carrying out these transactions.'

We now know this was the DOJ's first instinct too. In a bombshell 2016 report, Congress revealed that DOJ's Asset Forfeiture and Money Laundering Section had urged the US to prosecute HSBC, rather than to settle for a deferred prosecution agreement. According to the House Financial Services Committee's report *Too Big to Jail: Inside the Obama Justice Department's Decision Not to Hold Wall Street Accountable*, Attorney General Eric Holder overruled the prosecutors under pressure from the United Kingdom finance minister and Financial Services Authority, for fear that it 'could result in a global financial disaster'. Holder told the public countless times that he'd bring the prosecutable cases. But, either out of wisdom or caution, he dropped the most prosecutable case of all.

In December 2012, US authorities accepted \$1.92bn from HSBC to settle admitted violations of money laundering law and economic sanctions. It was far and away the largest Bank Secrecy Act settlement in history (though it has since been superseded by JP Morgan's \$2.05bn fine for failure to report the Bernard Madoff fraud). Most crucially, the US agreed to defer prosecution in return for a five-year monitorship. If, at the end of five years, the bank is not in compliance, the US promised to either extend the monitorship or renew the prosecution.

That time is nearly upon us, and the decision is not an easy one. HSBC's monitor is finding that the bank's 'compliance program still struggles,' according to a summary of this year's report filed by the US Attorney. Though the reports themselves are secret, some embarrassing details leaked last year. In one episode, HSBC took thousands in cash from a 19-year-old self-described shrimp farmer in the state of Sinaloa, notoriously dominated by the Sinaloa cartel. In another, HSBC Mexico lent money to a 'factory' after the site visit revealed only a well-staffed mansion. Though this year's report found

continued improvement and commitment, the monitor 'remains unable to certify that the bank's compliance program is reasonably designed and implemented to detect and prevent violations of AML and sanctions laws'.

HSBC spokesperson Suman Hughes says: 'HSBC is committed to implementing the most effective standards to combat financial crime and has made significant progress over the last five years. We continue to implement reforms in line with our plan.' Indeed, as *Global Insight* went to press, HSBC announced that its share price had improved by 55 per cent in one year. Some commentators attribute this to the bank avoiding scandal and implementing a cleanup. HSBC also now operates in 68 countries, rather than 93, as it did at one point – a move that's likely to have facilitated considerably better oversight by senior management.

“ It's just as likely that a scandal as big as the HSBC scandal could still happen. The US continues to roll out the red carpet to dirty money from around the world

Stefanie Ostfeld  
US Director, Global Witness

### The option of private enforcement

Like most great US scandals, HSBC Mexico enjoys a multifaceted legal afterlife. In *Zapata v HSBC*, plaintiffs' lawyers last year filed a suit for private civil enforcement on an arresting theory. They argue that US victims of Mexican drug violence can recover treble damages for their personal injuries because, by serving as the drug lords' banker, HSBC gave material support to 'terrorists' under the US Anti-Terrorism Act.

If nothing else, *Zapata* serves as a grim reminder of dirty money's human toll. In one incident, a gunman mowed down a pregnant mother in front of her baby daughter on their way home from a birthday party sponsored by the US Consulate. In another, gang members invaded a church wedding, kidnapped the best man and a groomsman, and asphyxiated them with duct tape.

HSBC initially seeks to remove the case from the federal courthouse near the Mexican border where it was filed. Once the venue is decided, the arguments may turn partly on the definition of terror. To be sure, the Sinaloa cartel differs from Al-Qaeda. But, the statutory definition of terrorism may be satisfied by violent criminal acts that merely 'appear intended to intimidate' a civilian population. 'If you hang a disemboweled

journalist from a bridge with a sign that says “This is what happened to me for speaking out,” that is clearly an act of terrorism,’ says Elias.

AML campaigners sympathise with any extra effort to publicise wrongdoing and compensate victims. But, as a matter of policy, private damage suits suffer from the same flaw as public fines. Even huge ones have little deterrent value, because their cost is borne by shareholders.

### What happens to a prosecution deferred?

‘Since the HSBC scandal,’ declares Ostfeld, ‘very little has changed’ in US money laundering policy. She sees only a toothless rule on customer due diligence, and an empty-letter memo on individual prosecution. Nor is there any indication of a decline in the underlying transnational crime trends. Certainly, the gangs keep finding ways to launder the funds that fuel their atrocities. Drug violence reached record levels in the first half of 2017, according to the International Institute for Strategic Studies, with one murder committed every 20 minutes.

The more immediate question is how much has changed at HSBC. The share price and pared-back global operation suggests that much has changed. Nevertheless, the monitor reports are not public. Summaries of the latest monitor reports suggest progress has been made, while compliance challenges remain. Both HSBC and US authorities declined to be interviewed for this article. Predictably, the secrecy of the monitor reports is itself the subject of intense litigation.

A disgruntled HSBC mortgage holder, Hubert Dean Moore, petitioned the New York federal district court that is supervising the deferred prosecution to make the monitor’s report public. Early last year, the court ruled that the public has a right of access to the report, subject to reasonable limits, both under common law and the First Amendment to the Constitution. That ruling was recently argued on interlocutory appeal to the Second Circuit. Both the bank and the government wish the report to stay secret. Moore contends that public access would improve the decision-making of the prosecutors, the monitor and, not least, the court. While Moore foresees an active role by the court in the case’s dismissal, HSBC suggests that a court should merely rubber-stamp any recommendation by the prosecutors to end a deferred prosecution.

The bank’s narrow view of a court’s role in supervising a settlement is generally consistent with the US judicial trend, if not public opinion. Last year, the DC Circuit refused to second-guess the amount of an economic sanctions Deferred Prosecution Agreement (DPA) between the Dutch aerospace firm Fokker Technologies and the DoJ. There was a brief moment after the financial crisis when US District Judge Jed Rakoff threw out a derivatives fraud consent decree between Citigroup and the SEC for its paltry factual admissions. In reasoning that retains its potency, Judge Rakoff wrote that ‘the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.’ But, while Judge Rakoff was hailed in the opinion pages, he got flipped by the Second Circuit on appeal.

No member of the public has an adequate basis to assess HSBC’s compliance with its deferred prosecution agreement, and the monitor has yet to make his final assessment. But, in principle, if a monitor finds a company to be out of compliance at the end of the deferral term, the proper response is to extend the monitorship, or (*in extremis*) to resume the prosecution. On paper, that’s the difference between deferred prosecution and non-prosecution.

‘Where DPAs are in place,’ says Worthy, ‘the point is to drive behaviour change. If that behaviour change isn’t happening and the DPAs aren’t being met, the idea is that prosecution is deferred – not that it simply goes away.’

The facts of HSBC Mexico showed the US’ promise to prosecute banks in egregious cases to be hollow. Having chosen the path of deferred prosecution, the US must make it work. HSBC has poured immense resources into compliance, and may well have turned things around. But, without a published monitor report, the public can’t judge. ☒

Michael Goldhaber is the IBA’s US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



The verb 'gerrymander' first appeared in 1812 when Massachusetts Governor Elbridge Gerry redrew district boundaries, hoping it would help his party in an upcoming senate election. Somebody noticed that the new district looked like a salamander, so they combined Gerry and -mander to create 'gerrymander'.

## Gerrymandering: does the road to autocracy run through Wisconsin?

The Gerrymandering case in front of the US Supreme Court is just one of the major issues prompting an assessment of the strength of institutions underpinning America's democracy.

MICHAEL GOLDHABER, IBA US CORRESPONDENT

**T**he United States Supreme Court has plenty of big issues on its October docket. From the constitutionality of the 'travel ban,' to the impunity of corporations for human rights abuse. But, the Wisconsin redistricting case is, arguably, the most fundamental, as it tests the willingness of US

courts to halt democratic backsliding. The key to saving democracy, say scholars who've studied its collapse around the world, is for strong institutions to constrain incumbents from treating it as a winner-takes-all game and achieving a 'one-party lockup'.

Wisconsin's *Gill v Whitford* presents the

first US gerrymander in 30 years to be rejected at trial for gaming an electoral map to favour one party. Having won a narrow edge in 2010, Wisconsin Republicans programmed a partisan ‘tilt’ into mapping software. They then won over 60 per cent of the Assembly with under 49 per cent of the vote.

Democrats use the same trick to magnify large majorities in states like Illinois and Maryland. But, in 2012, in seven key states, a Republican electoral minority captured a majority of either the congressional delegation (Arizona), the state legislature (Florida, Ohio), or both (Michigan, North Carolina, Pennsylvania, Wisconsin). And so, a nation divided roughly evenly has seen two-thirds of its legislatures captured by one party.

courts develop the standard over time, says Smith.

Wisconsin replies that such an approach would prompt chaos. Presumably all judges would need to subscribe to the *American Political Science Review*, its brief adds acerbically. In the absence of a workable standard, the Supreme Court should declare the issue nonjusticiable.

Libertarian Grand Old Party (GOP) amici, like Rick Esenberg of the Wisconsin Institute for Law & Liberty, object that the plaintiffs seek proportional representation, which isn’t a part of the US constitutional design by any account. He says the GOP advantage is a function of simple demography. Social scientists only confirm what we all know from any US map showing blue dots in

“ [Gerrymandering violates] the core principle of republican government, namely, that the voters should choose their representatives, not the other way around

John McCain  
Republican, Arizona  
Sheldon Whitehouse  
Democrat, Rhode Island

America has a long tradition of courts policing political maps for racial bias. But there’s an even longer tradition of both parties rigging maps for purely political advantage with wild abandon. The *Daily Milwaukee News* decried ‘A Horrible Democratic Plot’ to game the vote back in 1869. As technology improved, the plots grew more horrible. The US Supreme Court accepted in 1986 that a partisan gerrymander could at some point be unconstitutional. But it never laid out a standard and, until now, courts never attempted to draw a line. As Professor Daniel Tokaji puts it, ‘a constitutional standard for partisan gerrymandering is the holy grail of [US] election law’.

The plaintiffs argue that Wisconsin undermined their representational rights – under either the Equal Protection Clause or the First Amendment – by curbing their ability to translate votes into legislative seats on a state-wide basis. Lead lawyer Paul Smith – whose necktie from the day he won the gay rights milestone *Lawrence v Texas* is displayed at the National Museum of American History – says the Court need not adopt any one measure of partisan skew. He merely asks the justices to recognise that social scientists have now developed a range of suitable tools, and Wisconsin’s results were so extreme that its map fails any test. Let

a sea of red: that Democrats waste their votes by clustering in big cities and college towns.

Still, some moderate Republicans back the plaintiffs, from ex-presidential candidates Bob Dole and John McCain to the former leader of the Wisconsin State Senate. As McCain’s brief pithily puts it, gerrymanders now implicate the very ‘functioning of American representative democracy’ by violating ‘the core principle of republican government, namely, that the voters should choose their representatives, not the other way around’.

### Global epidemic

*Gill v Whitford* is best understood in the context of a larger debate over America’s vulnerability to a global epidemic of ‘democratic backsliding’. In ‘How to Lose a Constitutional Democracy’, Chicago law professors Aziz Huq and Tom Ginsburg count no fewer than 48 slides into partial autocracy. ‘The US is not immune from world trends,’ they warn, for there is ‘nothing particularly exceptional about the American Constitution – at least in any positive sense.’

In this light, the Wisconsin GOP’s electoral manoeuvre recalls the Fidesz Party of Hungary engineering a legislative

supermajority with less than half the popular vote. Likewise, the refusal of Poland's Law and Justice Party to seat judges appointed to the high court by the outgoing government evokes the refusal of America's GOP-controlled Senate to seat Obama's Supreme Court nominee; as well as efforts by the GOP-controlled North Carolina legislature to limit court appointments by the incoming Democratic governor (as part of a broad and hotly-contested assault on executive power in North Carolina). What unites all these episodes is a disdain for the legitimacy of the opposition, and a disregard for restraint (legal or normative) in the reckless pursuit of one-party dominance.

Huq and Ginsburg argue that political norms are vital in the US because, contrary to popular myth, the US Constitution is relatively weak. Other constitutions create ombudsmen for corruption and human rights, give the opposition party a right of investigation, guard against partisan press regulation, and entrench the independence of the courts and civil service. 'We would do well to reject feel-good talk about American exceptionalism,' caution Huq and Ginsburg, and embrace the founders' trepidation about the endurance of US democracy.

An exultant norm-breaker, President Trump wouldn't commit to accepting a loss at the polls. Now he complains of non-existent voter fraud in a bid to justify voter suppression.

He attacks judges who oppose his policies or interests. He sporadically threatens to prosecute opponents, protestors and critical media organisations.

He seeks to assert executive control over prosecutors and bureaucrats.

He hypes national security threats, and poisons the stream of public information. He pardoned a loyalist who considered himself above the law (Arizona Sheriff Joe Arpaio) and fired an official who insisted that the executive is subject to law (FBI Director James Comey) for disloyalty.

'The firing of Director Comey is a legitimate reason for grave concern,' says Huq, 'because the mechanisms we have for investigating either corruption, self-dealing or the misuse of power by high-level officials [is] very weak in the United States. We just don't have many such mechanisms, and the FBI has historically been one of the few mechanisms that might do some work.

And to see it attacked on the basis of it performing that very function... sends a signal across

government that loyalty to the current regime is more important than fidelity to the law or the Constitution.'

Of course, some political scientists still believe in American exceptionalism. Duke University's Peter Feaver is a self-described mainstream Republican, who served on the National Security Council under both parties. To Feaver, President Trump has only shown the resilience of American institutions. Congress, the courts, the media and, above all, the office of the special counsel: Feaver sees all as fulfilling their roles in checking executive power.

### Gridlock not dictatorship

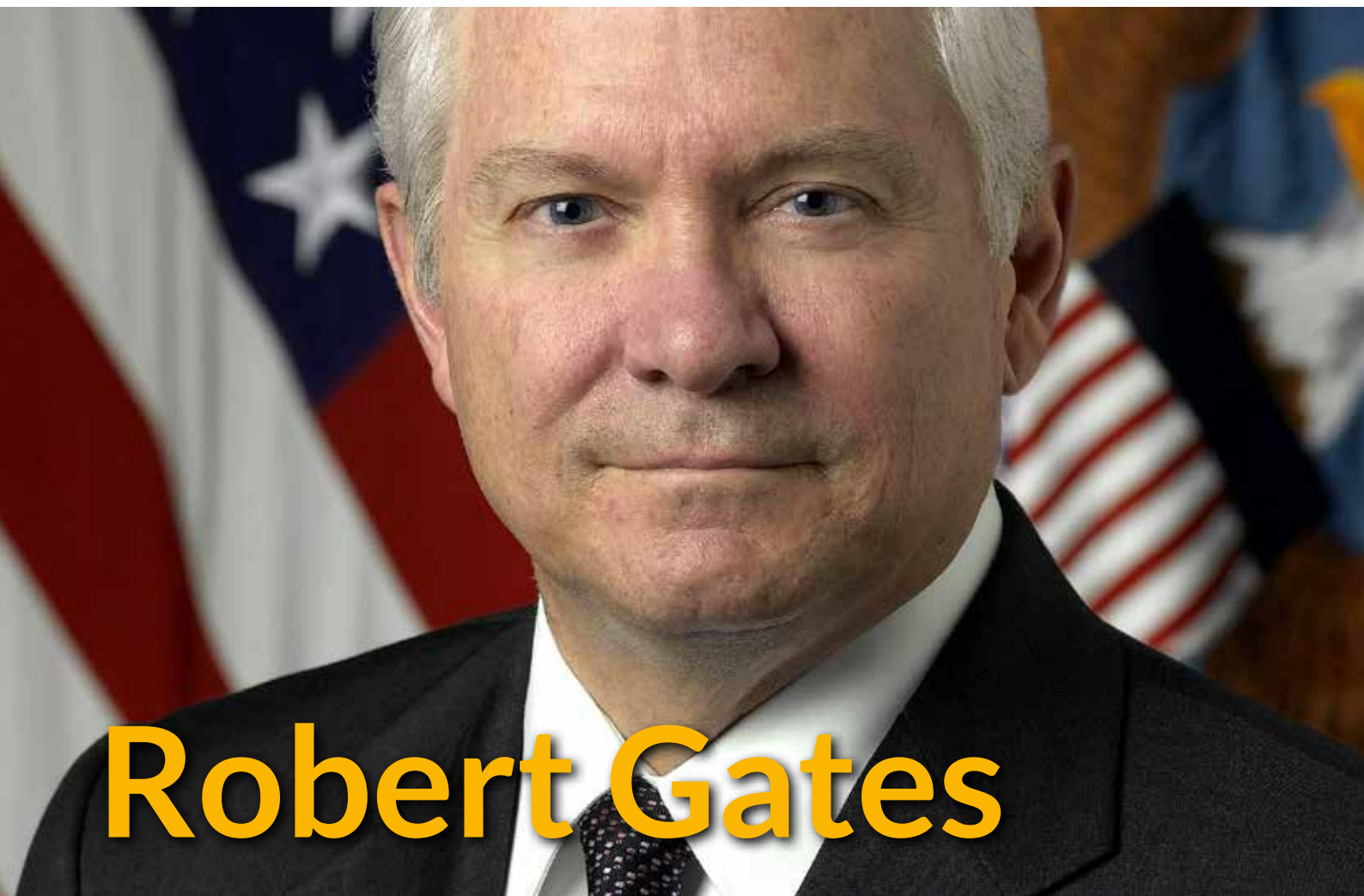
'Really, the dominant narrative [of Trump's first year] has been ineffectiveness, even weakness,' says Feaver, 'not malevolent effectiveness taking us to a dictatorship.' As for gerrymandering, it 'has contributed to political dysfunction,' Feaver concedes, 'and I do worry about that. [But] it hasn't produced political tyranny. We're on the road to political gridlock.'

It can't be denied that President Trump appears to step on his own toes. Most notably, the President's firing of Comey sealed the appointment of a fiercely independent special counsel. But is this sufficient assurance that America's institutions could withstand a defter demagogue? It's easy to imagine an alternative reality where the President appointed loyalists throughout the top ranks of the Department of Justice, and opposed the selection of Robert Mueller as Special Counsel. A lucky near miss is not the same as a stress test. Furthermore, the President can still demand Mueller's removal, or obstruct his work.

Nor should we be complacent because gerrymandering has mainly produced gridlock of late. The same mechanism that lets a party construct a modest, temporary governing advantage could be used to construct a big, permanent advantage.

Judicial review is the rare check that a strong majority of US experts still believe in, according to a recent academic survey. But, judges can only control what they deem justiciable. A Supreme Court that lets gerrymandering run amok may doom itself to become another single-party institution. Challenging Wisconsin's map would be a good first step in preserving democracy. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



# Robert Gates

**With the United States' position on the world stage under intense scrutiny, the former Secretary of Defense assesses the challenges facing the Trump administration. Gates, who served under both George W Bush and Barack Obama, speaks to the IBA's US Correspondent, Michael Goldhaber, about resolving the North Korea crisis and American policy in the Middle East, as well as matters closer to home.**

**Michael Goldhaber:** I want to plunge right in and ask about Russian policy. Did President Obama respond adequately to the intelligence that Russia was interfering in the United States elections last year?

**Robert Gates:** I was out of government, so I don't know how much information was available to the President or the deliberative process that went on, other than what I've read in the newspapers. If there had been a concern, I can understand that speaking out too strongly might have been interpreted as the President using Russian interference as a way to weigh in on the outcome of the election himself.

So, I can see where they may have been deterred perhaps if they didn't have a full read on the extent of Russian interference, but also by their own concerns about being seen to interfere in the election process. But I think the general feeling is, if they had any concept then of how much we now know the Russians were doing, then the response was not sufficient.

**MG:** Now, to the extent that the Trump campaign did have ties to Russia: are the media, the US Congress and the Special Counsel, Robert Mueller, responding at an appropriate level, or are they overreacting?

**RG:** I can't really speak for any of those with direct knowledge, because I don't know what they know. But, it seems to me that the investigations that are going on are appropriate and there have not, to the best of my knowledge, been leaks out of the Mueller investigation that would create problems. And, frankly, the congressional investigations have been pretty discreet.

Part of the problem here is that we are not the only targets of Russian interference. So the more other countries know about Russian activities to interfere with or delegitimise their elections, as has happened with us, the better off we all are.

**MG:** Let's move on to North Korea, where President Trump faces his first major security crisis. When the President pushes China to punish North Korea economically, do you worry more that this strategy will be ineffectual, or that it might trigger the collapse of a nuclear state?

**RG:** I think clearly the latter is China's primary concern. The one thing that worries China more than a nuclear-armed North Korea is a North Korean regime that collapses, sending millions of refugees across the border into China, but also potentially leads to a reunified Korean peninsula under the auspices of US ally, South Korea.

I think we underestimate how difficult the relationship between China and North Korea is right now. Kim Jong-un has never been to Beijing, has never been to Pyongyang. In some ways, the nuclear tests were as much a gesture of scorn and an attempt to embarrass President Xi Jinping as to send a message to the West, to us and our allies, to Japan and South Korea.

China is signing up to an additional set of sanctions. But maybe more important is the announcement that the Chinese government is now telling Chinese banks to close North

Korean accounts. China's trying to walk a very fine line between putting additional pressure on North Korea and avoiding bringing about collapse.

**MG:** When President Trump threatens North Korea with 'fire and fury', do you worry he is being reckless?

**RG:** It seems to me that he was saying there would be a military retaliation if North Korea attacked the US or one of its allies. When you have a delicate situation like North Korea, people need to be careful about the rhetoric they use, because we don't understand them very well and they don't understand us very well. The potential for misunderstanding is serious.

That said, we're dealing with the reality that a quarter-century of US policy toward North Korea has failed. How do you change the game in a way that somehow either eliminates or limits the potential of North Korea holding an American city at risk while it pursues other agendas in South Korea or who knows where? We're in a very difficult situation now, because we know what's gone before has failed.

How do we try and contain or get rid of the nuclear threat from North Korea? Maybe some stronger language communicating, particularly to the Chinese, that we're very concerned about this and will not allow the status quo to continue. But, when you go down that road, you have to be very careful and certainly don't want to send any spontaneous messages that have not been carefully thought through.

**MG:** The President has tweeted that 'Talking is not the answer!' He's also accused Seoul of appeasement. Should talking be a bigger part of the answer?



A closer look at the strike plans drawn up by Kim Jong-un's generals and how the United States could respond.

## Robert Gates also discussed a potential solution to the North Korea nuclear crisis – and the role of China – during an interview at the IBA Annual Conference in Sydney

“The President’s comments in many respects have gotten the Chinese attention that we have to have some action to prevent North Korea from having the ability to strike the US with nuclear weapons. But I’m not seeing any strategy beyond that. Where do we go from here?”

My own view is that to ask the North Koreans to denuclearise at the outset is a complete non-starter. It has no chance of success. This guy in Pyongyang,

he may be reckless, he may be inexperienced, he certainly is ruthless, but he’s very pragmatic.

First of all, are we prepared to tolerate North Korea having some number of nuclear weapons for some period of time, and what are we prepared to do to limit that threat and perhaps eventually arrive at our goal: the denuclearisation of the Korean peninsula? Let the Chinese do the negotiation because they know that the

consequences of not succeeding are very dangerous for them, as well as for the North Koreans?

At least initially, the North Koreans would have to limit the number of nuclear weapons they have to a very small number – half a dozen – and no more ballistic missile tests at all, ever, plus there will be any time, any place inspections. In exchange for that, we will sign a peace treaty, recognise the government and, as they

comply, we will be willing to lift certain sanctions. If they don’t do this, then we are going to put a huge number of anti-missile capabilities into Asia.

So there’s no good solution to this problem, but maybe there’s a path that involves the US going to Beijing and saying, ‘here’s the deal, it’s not a negotiation, take it or leave it, but it includes some real carrots but also some real sticks’, and see what happens.”

**RG:** Secretary of Defense James Mattis and Secretary of State Rex Tillerson have both made it pretty clear: talking or negotiation is the only alternative to conflict, so obviously it’s central to the solution.

**MG:** I’d like to discuss the Middle East next. You were, of course, deeply identified with President George W Bush’s military surges. In Afghanistan, President Trump has announced his own mini-surge, which appears to amount to a move from about 11,000 to nearly 15,000 troops. Is it possible for him to succeed without specifying the criteria of success?

**RG:** I think that the changes in strategy are important, they’re not just superficial. The mission now is not counterinsurgency, but a focus on training the Afghan forces and helping them become more effective. Changing the mission to something much less ambitious than nation-building, but rather focusing on the security forces and the ability of the Afghan government to simply maintain control of its own territory, is much more realistic than the objectives set by either President Bush or President Obama.

**MG:** Under President Trump, America dropped the Massive Ordnance Air Blast (MOAB), known as the ‘mother of all bombs’, in eastern Afghanistan. US drones have inflicted greater civilian casualties without presidential signoff in all of the declared war zones of the Muslim world. The Pentagon is on a spending spree and, we’ve learned, is studying the possibility of

making small tactical nuclear weapons. Does the military have too much autonomy?

**RG:** First of all, the Pentagon is not on a spending spree. It has had continuing resolutions at the beginning of every fiscal year for the last ten years. It’s been operating under sequestrations since 2011, which have dramatically cut back its spending. Many of the maintenance and training problems we’re seeing manifested in accidents are the result of these budgetary stringencies and the unpredictability of how much money the Pentagon is going to have to spend. They’ve got a lot of plans – whether it’s modernising the nuclear triad or anything else – but those plans aren’t funded to follow through.

**MG:** Would it be accurate to say that President Trump’s proposed budget envisions a spending spree?

**RG:** If you mean taking the US from having fewer warships afloat today than at any time since before World War II, to a higher number of warships; or going from air force combat aircraft that are, on average, 27 years old, to something newer, then I suppose you can call that a spending spree. I don’t. This is about long-neglected modernisation of US forces.

**MG:** I sense from the tenor of all your answers that you give pretty high grades to the Trump administration for its conduct of foreign policy and security policy so far.

**RG:** Well, I have some concerns. I think walking away from the Trans-Pacific Partnership was a huge mistake, and a gift to the Chinese. I think the rhetoric going after our allies in South Korea and Japan and initially in the North Atlantic Treaty Organization (NATO), as well as the early reluctance to reaffirm the Article V commitment of the NATO Charter, were problematic. All involved unnecessary turbulence that has conveyed a sense of unreliability in the eyes of others about the US.

But President Trump has done well in terms of being in touch with Chinese President Xi on a regular basis. That relationship, which is really important, has been managed relatively well. Obviously, we have much bigger issues in the Middle East, and we have Russia, and so on. So it's a mixed record.

**MG:** What about domestically?

**RG:** In domestic policy, frankly, we haven't done anything. We've got a lot of big problems in front of us, and we haven't seen any progress from the government in general, whether it's the President, the White House or Congress. We've got infrastructure problems, problems with public education, the immigration issue and a need for tax reform. So I guess I'd have to give everybody an 'incomplete' but, if we continue to see a lack of action, that may move into the 'fail' column.

### *On foreign policy:*

“ Unnecessary turbulence has conveyed a sense of unreliability in the eyes of others about the US

**MG:** Changing tack again, what do you make of the President's use of executive orders?

**RG:** I think there's been a big abuse of executive orders, and not just under this President, but under President Obama and others. The reality is that an executive order leads people to believe that something is going to change permanently when, in fact, it will likely last only as long as that president and his successors want it to. So, if you have a change of parties, as we have had, going back and forth over many years, anything that one president does can be overturned by the next president without

Congress or the public having a vote or a single thing to say about it.

Part of my concern is that presidents, both Republican and Democrat, have seen executive orders as an outlet for their frustration of the difficulty of getting Congress to act. But recent presidents have not invested very much time in cultivating Congress and doing the hard daily slogging necessary to carve a majority out of Congress to get these things done on a permanent basis.

The key is for presidents to be willing to invest the political capital and the personal time in working with Congress and making compromises to get actual laws enacted. Only when Congress acts and there's a law can you be assured that it will last. That's the way things move forward in this country.

### *On the President and Congress:*

“ Only when Congress acts and there's a law can you be assured it will last. That's the way things move forward in this country

**MG:** In your recent book on leadership and in related writings, you've said the greatest duty of a statesman is to educate, and called on the President to restore civility in politics. You've also warned of candidates who would place all that holds us together as one people at risk for their own ambitions. Is President Trump failing in his duty as a statesman and a leader?

**RG:** I think a lot of our political leaders are failing in their responsibilities as leaders, in terms of sacrificing what's best for the nation to what's best for them personally, politically, or what's best for their party. There are far too many people across the political spectrum who are not focused on what brings us together as a people. When it comes to facing challenges, we can have our disagreements, but why can't we treat each other with respect and dignity? Frankly, I don't see many politicians in either party who are stepping up to that plate. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



A film of the Sydney interview with Robert Gates is available on the IBA website at [tinyurl.com/iba-gates](http://tinyurl.com/iba-gates)

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February 2017

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Mark Zaid

Washington-based specialist in national security law and government accountability

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Richard Painter, White House ethics counsel to George W. Bush

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“The investigation will continue to put huge pressure on the President, as more people are indicted and more people cooperate...

Professor Mark Greenberg, UCLA Law School

## US presidency: Can the green rollback be rolled back?

MICHAEL GOLDHABER, IBA US CORRESPONDENT

President Donald Trump announced last autumn that America's Environmental Protection Agency (EPA) aims to rescind its Clean Power Plan rule. It was intended to be the linchpin of America's compliance with the Paris Climate Agreement, though the legislation is yet to take effect. Environmentalists, not just in America but globally, are hoping the courts can save the plan.

The key question is whether the seminal legislation – the Clean Air Act, which dates back as far as 1963, and has received thorough amendments in 1970 and 1990 – permits the Clean Power Plan's creation or destruction.

This question is already being litigated in the DC Circuit Court of Appeals by the Trump administration and a group of fossil fuel-friendly states headlined by West Virginia, versus a coalition of green non-profits and pro-regulatory states led by New York.

But, President Trump's lawyers have asked the DC Circuit to stay this case until the EPA actually rescinds the Clean Power Plan.

In the meantime, two schoolboys and a green non-profit, represented by the renowned anti-cartel lawyer Michael Hausfeld, have stepped forward with a bold strategy. In a suit filed in Philadelphia for the Clean Air Council, Hausfeld argues that President Trump's rollbacks of global warming policy violate constitutional rights to the enjoyment of life and property, as well as violating the government's duty as a 'public trustee' to protect natural resources.

'We want the court to officially recognise the due process right to a life-sustaining climate,' says Robert Routh of the Clean Air Council. It should declare that 'the government can't undermine the modest protections we currently have', and broadly recognise 'the need to use good science in rulemaking'.

In contrast to the DC Circuit Clean Power Plan suit, 'we're not looking at one act in isolation,' says Hausfeld. 'We're looking at the aggregation of cumulative acts that are being taken to minimise scientific understanding and [to slow] the advancement of the

United States to prepare for climate change.'

Hausfeld's suit also seeks to enjoin the Trump administration from any future rollbacks of climate change policy. That might, for instance, cover a loosening of fuel standards, a reconsideration of the finding that global warming endangers public health, or the promised withdrawal from the Paris Climate Agreement.

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“ We want the court to officially recognise the due process right to a life-sustaining climate

Robert Routh  
Clean Air Council

The Philadelphia children's suit broadly resembles a 2015 climate action filed by children in Oregon known as *Juliana v US*. Each invokes due process and public trust to attack global warming policy. But, while the Oregon plaintiffs argue the government has an 'affirmative duty to protect,' says the Clean Air Council's Joe Minott, 'we argue there's a duty not to endanger – not to undo what's already in place'.

Hausfeld elaborates: 'Both deal with climate change, with whether what is being done is sufficient,' he says. '*Juliana* is looking at what's been done over the past half-century and saying it's not enough. We're looking at a short period of history and saying, "Wherever we were on 20 January [2017], that was the floor. If you go beneath that floor without anything but junk science to support it, you're increasing the dangers."'

In seeking to persuade courts to take the momentous step of protecting the climate through constitutional law, the Philadelphia strategy claims two advantages. First, the US has a long line of jurisprudence on the inadequacy of junk science in the context of excluding evidence at mass tort and antitrust trials. The complaint notes that the US government acknowledged global warming as early as 1965, and the

plaintiffs aim to expose the EPA's unscientific basis for its rollbacks through document discovery.

Second, US courts are historically loathe to force an agency to go further when it is already moving forward. Courts tend to be more comfortable prodding regulators when they are either standing still or moving backwards. In short, Hausfeld believes that 'it's a clearer, more forceful claim when the government affirmatively acts to place people in danger – particularly based on junk science'.

John Cruden is President of the American College of Environmental Lawyers and served as Assistant Attorney General for the Environment and Natural Resources under both President Barack Obama and President George W Bush, leading on both the Deepwater Horizon and Volkswagen litigation.

Though describing himself as 'very sympathetic' to their suit's goals, he views the strategy with scepticism. 'This case and *Juliana* both have a positive effect in the sense that they focus people's attention on important and vital issues, though I frankly don't expect either case to be successful,' he says.

Cruden says Clean Air Act rules can only be challenged in the DC Circuit under the terms of the statute. While Cruden agrees that courts are generally bolder when the EPA has failed to act, he thinks it essential that each statute in question has imposed a responsibility to act. A broader ground for decision is unlikely, he says, because the courts have squarely rejected the idea of a federal public trust doctrine, and the current Supreme Court is highly unlikely to embrace a new constitutional right to a clean environment.

For his part, Hausfeld believes that the deepening of an existential climate crisis obligates advocates to think outside the box, and judges to rule creatively. That the plaintiffs will face Republican-appointed judges leaves them unperturbed. Global warming 'is not a Democratic or Republican issue,' says Minott. 'Most Republicans are fully cognisant of the science.'

# How US election law logged off

In February, Special Counsel Robert Mueller indicted 13 Russian nationals for conspiring to undermine US democracy, and many believe such meddling paved the way for the Trump administration – with its deregulatory agenda. *Global Insight* assesses whether it was electoral deregulation that cleared the way for Russian intervention.

MICHAEL GOLDHABER, IBA US CORRESPONDENT

As Donald Trump took his first steps towards the White House in the primary debates, few noticed or cared that the Federal Election Commission (FEC) let a German pornographer spend \$300,000 to defeat a Los Angeles ballot measure for ‘Safer Sex in the Adult Film Industry’. But the FEC’s then-Chair, Ann Ravel, saw the implications. Deadlock at the agency had the effect of hanging ‘a giant neon sign announcing to hostile actors worldwide that there would be no consequences for illegally meddling’ in United States politics. ‘I mean, think of it,’ she warned presciently at a hearing in October 2015, ‘do we want Vladimir Putin... to be influencing American elections?’

Most in the media either ignored her or called her concerns over Putin ‘bizarre’. But, perhaps surprisingly, *Breitbart News* ran its own warning about the case. ‘What about the impact of foreign dollars on national security issues?’ asked Republican campaign consultant from Alabama John Pudner, Executive Director of the organisation Take Back Our Republic. ‘As conservatives, we cannot continue to dismiss any attempt to change or enforce campaign finance laws as a “liberal” cause.’

Deadlock has been the norm at the FEC since Donald McGahn – now White House Counsel to President Trump – became an influential figure at the agency in 2008. ‘When McGahn arrived,’ says ex-FEC litigation head

David Kolker, ‘we shifted from not only having a conservative interpretation of the law, but an utter lack of interest in enforcing the law.’ Pudner says McGahn came in ‘with the stated cause of making sure this thing would never work again. He stands for the concept that basically no rules are best.’

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“ I mean, think of it, do we want Vladimir Putin... to be influencing American elections?

Ann Ravel  
Former Chair, Federal Election Commission (October 2015)

In the run-up to the last presidential vote, Ravel believes that the FEC’s deadlocks followed a specific and disturbing pattern: ‘They had to do with foreign money, they had to do with the internet, and they had to do with disclosure. Those were the three things. And it turns out those are the things that were significant in the 2016 election.’

McGahn declined repeated invitations from *Global Insight* to respond to these critiques, as did the two Republican commissioners he served with, Matthew Petersen and Caroline Hunter,

and his successor, Lee Goodman. All have publicly stressed that their narrow approach is faithful to the law. At the FEC, McGahn proudly pled 'guilty' to enforcing campaign statutes as strictly interpreted in court.

Whatever US election law may mandate, the undoubted effect of the FEC's paralysis during the Obama era was to open up America to undisclosed foreign internet advertising. And undisclosed foreign internet advertising is what America got. Dan Coats, Director of National Intelligence since March 2017, grimly predicts that America will get more of the same in this year's election season. As Russian troll farms gleefully reap what the FEC has sown, bipartisan advocates of campaign reform are calling on the US to regulate Facebook political advertising.

### An agency set up for deadlock

When the FEC was created after Watergate, Washington, DC was collegial enough that Congress thought it a good idea to split a commission evenly between three Democrats and three Republicans. But the FEC wasn't 'set up to deadlock,' argues longtime Democratic Commissioner Ellen Weintraub. 'It's set up to compromise'. Trevor Potter – a Republican elder statesman who served as Commissioner from 1991 to 1996 – emphatically agrees. The FEC deadlocked only once during Potter's tenure, and that was by accident. 'We saw avoiding deadlock as our job,' he says. As late as George W Bush's time,

the Commissioners cooperated against groups like the Swift Boat Veterans for Truth.

The era of functionality ended at midnight on 31 December 2007, when Congress let three FEC seats go empty. As Potter tells the tale, while the FEC operated without a quorum, any regulation of money in politics was impossible. But, when Republican presidential candidate John McCain opted for public funding, this required an FEC vote. So Senate Minority Leader Mitch McConnell chose to fill the three empty seats with three Republican commissioners.

Weintraub, who's been on the Commission for 15 years, says the change was instant. 'We always used to talk to each other. We didn't retreat to our corners. That all





Members of the audience stand underneath a sign inside the Republican US presidential candidates debate sponsored by ABC News at Saint Anselm College, New Hampshire, 6 February 2016 © REUTERS/Carlo Allegri

changed in 2008. I recall distinctly an email from one of them early in their tenure saying, “The three commissioners believe X on this issue.” I was really taken aback by that. I said, “What are you, the class secretary?” I was perplexed.’

The rate of deadlock soared from three per cent to 30 per cent between 2006 and 2016, but that understates the degree of paralysis. Potter says virtually any vote of consequence fails. ‘The matters we can still handle,’ Weintraub says, are the ‘equivalent of traffic tickets.’

The political strategist Steve Bannon has openly proclaimed that President Trump’s agenda is to ‘deconstruct’ the vast edifice of regulation that has been painstakingly built over the past century. Those who accept the need to regulate see what they view as the stymying of the FEC as the trial run. A month after her Putin prophecy, Ravel appeared on *The Daily Show with Jon Stewart*. Asked to rate the uselessness of the agency she then chaired, Ravel memorably joked: ‘I would say that the FEC and men’s nipples are probably comparable.’

By all accounts, McGahn was the man who made this analogy possible. The son of an Atlantic City lawyer who helped open Donald Trump’s first casino, McGahn made his name as Ethics Counsel to the House Republicans’ campaign arm at a time when campaign irregularities led to the indictment of House Majority Leader Tom DeLay. The long-locked McGahn moonlighted as lead guitarist for a weekend rock band covering 1980s hits by Metallica and Loverboy, and occasionally jammed while reading FEC campaign filings. ‘I call him a libertarian bad boy,’ says Kolker, ‘and I suspect he wouldn’t disagree.’

McGahn had a histrionic side at work, too. Weintraub recalls one Commissioners’

meeting where he slammed his law books on the table and stormed out of the room. Kolker remembers a case where McGahn was so annoyed at a position taken by the in-house counsel that he posted a statement online to undermine it while the in-house counsel was on his way to court.

Weintraub calls him a disrupter. ‘He came in with the notion of throwing all the cards up in the air and breaking all the china,’ she says. ‘If we didn’t get the work at the agency done that was even better from their perspective, because they didn’t like the laws, and they didn’t want to see them vigorously enforced.’

McGahn and his allies cast themselves as faithful agents of Congress and the courts. ‘We’re not willing to take the law beyond where it’s written,’ Commissioner Hunter said. ‘I don’t view my role as [to] step into the void when Congress doesn’t act,’ Commissioner Petersen added. ‘This agency is functioning as Congress intended,’ concluded Commissioner Goodman, and ‘democracy isn’t collapsing around us.’

### The consequences of deadlock

But democratic collapse is exactly what the FEC’s critics see. Before 2008, the FEC ‘viewed their job as making sure that both parties received equal justice,’ says Potter, who advocates bipartisan reform as Chair of the Campaign Legal Center. ‘Since then, the view of three commissioners is that their party should be protected. And that’s very different.’

Exhibit A is Commissioner Goodman’s open admission at a 2015 hearing that he delays complaints by election law reformers because they mostly target Republicans. The Campaign

Legal Center is chaired by a Republican and has sued the Clinton campaign for hiding its payments for the infamous dossier on Trump in Russia. One of its lawyers compared the Commissioner's statement to a judge confessing: 'I don't like people who bring... lawsuits against my party, so I'm just not going to hear those cases.'

When cases are heard, says Kolker, the Republican commissioners 'consistently come up with pretty shameless extreme interpretations of why the law hadn't been violated'. For sheer shamelessness, Ravel says the Bob Murray and Thom Tillis cases are hard to top. With respect to Murray, the FEC ignored repeated allegations that the nation's top coal baron makes his managers support Republicans – despite punishing unions that force members to support Democrats. In the Tillis case, the FEC wouldn't admit that a group donating 97 per cent of its budget to a Republican senator was engaged in 'political action' – despite the group's founder being caught on video at the Tillis victory party wearing a Tillis hat, saying 'We did it.'

corporate spending would be disclosed to the public. Election reformers say it's what the FEC didn't do after *Citizens United* that made the case so harmful.

After *Citizens United*, the FEC Republicans stymied the FEC Democrats' push for a rule that would clarify the disclosure duties for new forms of independent political expenditures. Adiv Noti, who then served as the FEC's Associate General Counsel for Policy, says it was this inaction that created the explosion of untraceable 'dark money' in US campaign finance. A cautious estimate of dark money in the last voting cycle is \$800m. But, dark money's scale, like its origin, is unknowable. Among other things, dark money is a ready vehicle for foreign currency – including rubles. 'We simply don't know the full extent of the Russian involvement,' says Noti. 'It wouldn't at all surprise me if we find out [that] Russian money flowed through dark money groups into political ads.' What needs no speculation is that Russia exploited the FEC's failure to regulate social media.

In 2006, the FEC expressly left free internet communications unregulated, as no one anticipated the spread of political advocacy on social media. Then, in 2011, Facebook asked the FEC to clarify that even paid online advertisements are exempt from the disclosure rules for television or other media. The internet giant reasoned that online adverts are too small to make disclosure of the advert's source practical. Never mind that television can now be streamed on the internet. And never mind the ease of linking to a landing page large enough for the full works of Tolstoy. Predictably, the FEC deadlocked on Facebook's advisory opinion. Weintraub tried to convene a hearing about social media, but couldn't get a rulemaking off the ground. As Commissioner Petersen put it, the FEC provided 'regulatory space' for the development of online political activity.

This is a point on which FEC Republicans and Democrats agree. 'There's no doubt at all that the FEC's inaction on requiring disclosure for internet-related election advocacy helped facilitate some of the Russian activity in the 2016 election,' says Noti, the former Associate General Counsel for Policy. 'There was just no cop on the beat ensuring that the people who were actually subjected to this advertising had any way of figuring out who was paying for it.'

The issue of internet disclosure was revived in a 2014 FEC test case brought by Citizens for Responsibility and Ethics in Washington, DC. A dark money group called Checks and Balances had spent close to \$1m, undisclosed, on a pair of YouTube videos accusing President Obama of 'ABSOLUTE LIES'. A deadlocked ruling ensued. Ravel lamented that the FEC was turning 'a blind eye to the internet's growing force in the political arena,' and called a 're-examination of [its] approach... long overdue'.

## “ We simply don't know the full extent of the Russian involvement

Adiv Noti

Former Associate General Counsel for Policy, Federal Election Commission

But, what most troubles Ravel are the three inactions she believes paved the way for Russia's electoral intervention. *Mindgeek* was the case where a German pornographer blocked a ballot measure to protect actors in adult films. This would seem an obvious violation of the ban on foreign money in US elections. But FEC Republicans reasoned that a ballot measure isn't an 'election'. Ravel regards this logic as shameless, and believes it invited foreign mischief. Nevertheless, it is true that *Mindgeek* had no direct implications for federal elections proper, as it concerned only local ballot measures. But, foreign money in US elections remains clearly forbidden if it can be detected.

So, the biggest help the FEC could provide would be to make foreign influence undetectable. The FEC did this in two ways: by leaving social media unregulated, and by creating a vast new category of unidentified political donations known as 'dark money'.

Casual observers blame the Supreme Court in *Citizens United* (2010) for turbocharging the US political money culture, by opening the spigot for corporate donations. But, Justice Anthony Kennedy clearly envisioned that

Ravel naively vowed to ‘bring together technologists, social entrepreneurs, policy wonks, politicians, and activists – from across the spectrum – to discuss new and emerging technologies’.

The Republican commissioners warned against ‘a shift in course that could threaten the continued development of the internet’s virtual free marketplace of political ideas’. Commissioner Goodman told *Fox News* that Ravel raised the ‘specter of a government review board culling the internet daily’ and ‘a regulatory regime reaching deep into the internet’. The *Drudge Report* ran a banner headline: ‘DEMS ON FEC MOVE TO REGULATE DRUDGE’.

Social media accounts tweeted death threats and bombarded Ravel with hate mail. They called her a ‘disgusting fascist Nazi’ and likened her to Joseph Goebbels. ‘Die, fascist, die!’ they told her. ‘Go fall down ten flights of stairs.’ And, in a zealous invocation of the Bill of Rights: ‘You’re the kind of person the Second Amendment was made for.’

Two years later, Donald Trump was elected President. Ann Ravel resigned from the FEC with a report entitled *Dysfunction and Deadlock*.

### An end to deadlock?

Facebook subsequently admitted that Russian posts for Trump had secretly reached 126 million Americans. ‘All the Russia stuff came out and suddenly everybody was interested in foreign money,’ says Weintraub. So the Commissioner dusted off her six-year-old proposal to regulate online advertising. On 14 September – eight days after Facebook’s confession – the FEC voted unanimously to reopen the rulemaking for public comment.

In the past, the plan had drawn only a handful or two of comments. But ‘who wants to get their information from a Russian troll farm?’ asks Weintraub. ‘We got 150,000 comments – 98.5 per cent of them saying, “yes, you should do something”.’

Suddenly, Facebook said it favours disclosure rules for online political advertising, but asked for flexibility in how the identifying information must be displayed. Google said that it ‘strongly supports’ an FEC rule that would put the onus on political advertisers. Twitter voiced a willingness to work with regulators. The three companies have likewise expressed a guarded openness to the bipartisan legislation in both houses of Congress, known as the Honest Ads Act, which would broadly require the same disclosure online as for television.

A December filing from an unexpected source kept the FEC’s feet to the fire.

Pudner is the Republican reformer who echoed Ravel’s concerns about foreign influence. After growing up in the same Virginia community as Steve Bannon, Pudner spent four decades advising Republican campaigns, culminating in the race that ‘primaried’ the House Majority Leader Eric Cantor for being insufficiently right-wing. But Pudner grew up dirt poor, and he’s troubled by big donors dominating US politics. His Alabama-based nonprofit, Take Back Our Republic, is devoted to ‘conservative solutions for campaign finance’.

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“ All the Russia stuff came out and suddenly everybody was interested in foreign money

Ellen Weintraub

Commissioner, Federal Election Commission

The Take Back Action Fund said it planned to run online attack ads against Democrats on Facebook, and asked for an advisory opinion clarifying its duties. ‘I am filing this request with the FEC because I am dead set against the ridiculous lack of transparency in politics that invites countries like Russia to secretly run political ads,’ Pudner stated.

Once again, the Russia scandal shamed the FEC into avoiding deadlock. In late December, the Commission ruled that the Take Back Action Fund must include disclaimers on its proposed Facebook adverts. However, it confined the precedent to express political advocacy ‘indistinguishable’ from Pudner’s. ‘I don’t think this is an earth-shattering answer that will affect lots of people going forward,’ cautioned Commissioner Hunter. The Campaign Legal Center’s Potter says a rule is needed to sweep broadly, and to mandate a registry for privately targeted Facebook adverts.

Weintraub called the Take Back opinion ‘a small step forward’ and the Commission’s agreement to consider a draft rule ‘a baby step in the right direction’. She expresses ever-so-cautious hope that the FEC can push a meaningful rulemaking to completion. But hardened campaign finance reformers will believe the progress when they see it. Says Noti: ‘The will to do something may be fleeting.’ 🌀

Michael Goldhaber is the IBA’s US Correspondent.

He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)

## Gun control: a glimmer of hope from the ‘Gunshine State’

MICHAEL GOLDHABER, IBA US CORRESPONDENT

Americans are accustomed to legislators offering nothing but hollow prayers following the latest unthinkable school shooting. But two new things happened in the wake of February’s massacre of 17 schoolchildren in Parkland, Florida.

At the state level, a Republican governor and legislature took bold action against gun violence. At the federal level, a Republican President promised even bolder action, although his promises ultimately proved to be empty.

On 9 March – despite a culture so gun-friendly that it’s sometimes called the ‘Gunshine State’ – Florida responded to high school protests by swiftly enacting a package of mostly sensible gun control measures.

To the applause of gun control advocates, Florida banned devices that turn semi-automatic weapons into machine guns, raised the minimum age for buying long guns to 21, and empowered courts to disarm individuals who are shown to pose an ‘extreme risk’. To the alarm of gun control advocates, it also gave local officials the discretion to arm school personnel, in a solution embraced by President Trump and the National Rifle Association (NRA).

Of course, Florida’s law is incomplete, and arming teachers would be the height of folly, says Chelsea Parsons, Vice President of Gun Violence Prevention at the Center for American Progress. ‘But, the biggest point I’d make is that it happened – that the “Gunshine State” debated and quickly passed a gun control package, and it was signed into law by a Republican governor who was rated A+ by the NRA. That in and of itself speaks to tremendous progress, and frankly speaks to the tremendous power of these students.’

Nevertheless, gunmakers have little to fear from litigation, because in 2005 the United States Congress gave them near total immunity. But, reinforcing the shift in state politics is a changed investment climate. Share prices in the US gun industry usually rise after mass shootings (because sales spike), but this time they fell. The fund giant BlackRock talked gun safety with two leading gunmakers and Dick’s Sporting Goods ended assault weapon sales after a pressure campaign by the Interfaith Center on Corporate Responsibility.

At the same time, guns demand a federal solution, because they cross state

and national borders. America’s gun murder rate is 25 times higher than in peer nations, according to a new *American Journal of Medicine* study. What’s more, Parsons recently found America produces 70 per cent of the crime guns seized in Mexico, which suffers grievous gun violence despite reasonably tight gun laws. The President’s border rhetoric overlooks how the export of violence goes in the other direction, says Parsons. Unfortunately, at the federal level, the post-Parkland progress of the gun debate has been halting.

“The ‘Gunshine State’ debated and quickly passed a gun control package, and it was signed into law by a Republican governor rated A+ by the NRA. That speaks to tremendous progress

Chelsea Parsons  
Vice President,

Gun Violence Prevention,  
Centre for American Progress

Appearing live on television at the end of February, President Trump surprisingly embraced universal background checks and an assault weapons ban – a pair of policies that top the wishlist of gun control experts. There was widespread scepticism given the President’s friendship with the NRA, and his reversal last year of an Obama executive order to bar the mentally ill from buying guns.

After two weeks of pressure, the President abandoned his vows on assault weapons and background checks on 12 March, as well as his commitment to raise the federal age limit for buying long guns. ‘Not much political support (to put it mildly),’ he said of the age policy on Twitter.

Although the President might be correct if one defines political support as support in Congress, over 80 per cent of the public favours raising the age limit, according to a new POLITICO/Morning Consult poll. Universal background checks command near-universal support, as does the ban on selling guns to the mentally ill that the President rescinded last year. ‘The

gun lobby has shown how damaged our democracy is,’ says gun regulation researcher John Donohue of Stanford Law School. ‘If you look at public opinion polls, 93 per cent of gun owners believe you should have universal background checks – and the federal government won’t even put that to a vote.’

Still, the Parkland massacre has shifted the debate even at the federal level. The President now supports a bill to improve background checks by forcing other federal agencies to share their records with the Federal Bureau of Investigation. He also urges states to empower their courts to issue ‘extreme risk protection orders’, as Florida has done. Meanwhile, an aggressively gun-friendly bill that passed the House in December may be stalling. The gun lobby wishes to force ‘gun-control states’ to let visitors from ‘gun-rights states’ carry concealed weapons. After Parkland, 60 senators are less apt to make ‘conceal carry’ a national policy.

Parkland poses a sharp contrast with the 2012 shooting at Sandy Hook Elementary School, which inspired Republican state legislatures to pass 70 laws that only expanded gun rights. Even more disturbing, a recent *Science* study found that Sandy Hook inspired the purchase of three million extra guns in the following five months.

Donohue thinks this moment is different because the past six months have seen three of history’s worst mass shootings: in Parkland, Las Vegas and Sutherland Springs, Texas. He also cites the galvanising of dissent in Trump’s America – and the new energy of youth protests, seen most potently during the ‘March For Our Lives’ demonstrations in late March.

‘After these big shootings, there’s a cycle that we go through, and there’s a dance that happens,’ says Parsons. ‘It’s the outrage and then it’s “thoughts and prayers” and then it’s calls for action and then critiques of calls for action and then it plays itself out in a couple of days.’

‘What has happened this time, because of the advocacy of the students from Parkland, is that we have extended the life of this conversation. We’re still talking about gun violence a month after that shooting. I think that is directly credited to the students... From the moment this happened, they stood up and said “No more.”’

# Scott Pruitt versus the Environmental Protection Agency

President Trump's environmental chief appears to be battling his own agency. *Global Insight* assesses an internal struggle at the EPA that could have dire consequences for the fight against climate change.

MICHAEL GOLDHABER, IBA US CORRESPONDENT

On 28 March 2017, the United States President Donald Trump paid a surprise visit to the Environmental Protection Agency's (EPA) neoclassical headquarters in Washington DC's Federal Triangle. Formally, he was there to declare an end to 'the war on coal'. Informally, agency staffers say he was launching a war on the EPA.

Coal miners in khakis and carbon executives in suits had front row seats as the President ordered a review of every rule that covers the exploitation of energy. Lest any doubt his top target, the President mused that no rule 'threatens our miners, energy companies and economy more' than the Clean Power Plan, linchpin of the Obama EPA's policy to slow global warming.

By phasing out coal-fired plants, the Clean Power Plan would do as much for the planet as taking 160 million cars off the road.

EPA staffers – cleared from the room and forced to watch by closed-circuit television – recall their bitter impressions in an oral history by Christopher Sellers. The speech was 'about basically dismantling the whole climate change program,' says one, yet 'the word climate change was never used'. Another wondered when human health would be mentioned: 'Apparently never!' Having only learned of the visit in an email titled 'Our Big Day Today', 'The question many of us had was who is "our" referring to? Was it the many EPA career staff that worked for years developing the work that was rescinded or

revoked? Was it the EPA career staff that should be jubilant the President came to the EPA to poke a finger in our eye...?’

scale [and] a total rejection of the agency’s traditional public health mission.’ On this view, Pruitt is following through on the vow of former

## “ By phasing out coal-fired plants, the Clean Power Plan would do as much for the planet as taking 160 million cars off the road

Jody Freeman

*White House Counselor for Energy and Climate Change, 2009–2010*

As a self-dubbed ‘beachhead team’ of Trump advisers invaded the EPA, the feeling gelled among the lifelong green regulators that they were ‘the enemy’. With a security detail of up to 30 personal guards, Administrator Scott Pruitt certainly didn’t exude trust. In his office, Pruitt searched for surveillance devices, put fingerprint readers on the locks, and installed a sound-proof phone booth. Pruitt required staffers to be escorted in his presence, and forbade them from taking notes. But, mainly, it was his regime’s regulatory policy that rankled. ‘There’s a general consensus among the career people that at bottom they’re basically trying to destroy the place,’ said another participant in the oral history.

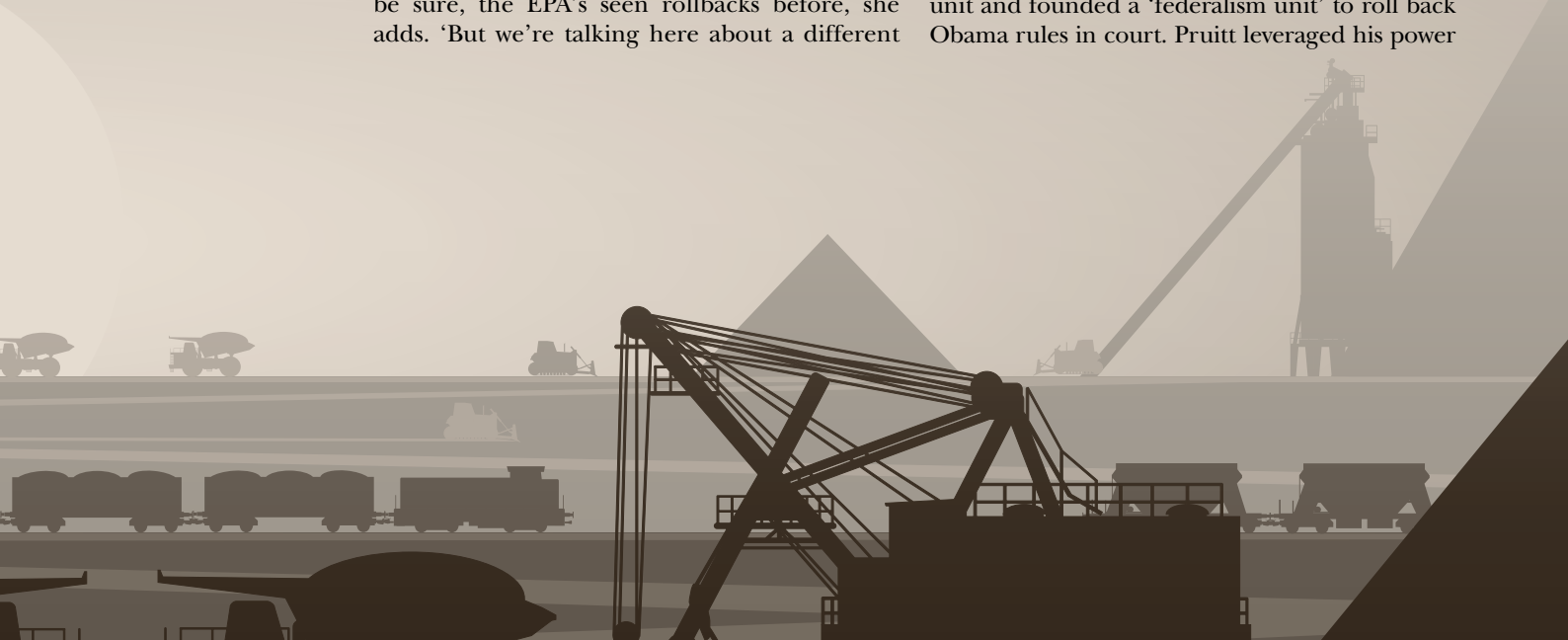
Jody Freeman, who served as White House as Counselor for Energy and Climate Change in 2009–2010, thinks they’re right. ‘There is a cynical story here about trying to incapacitate the government,’ she says. ‘That if you work hard enough to demoralise the staff and to devalue science and expertise, you can dismantle the capacity of the government to regulate.’ To be sure, the EPA’s seen rollbacks before, she adds. ‘But we’re talking here about a different

White House Chief Strategist Steve Bannon to ‘deconstruct’ the regulatory state.

Pruitt declined comment through his spokesperson, but Jeff Holmstead (former Deputy Administrator of the EPA in the George W Bush administration who was reportedly considered for EPA Chief in the Trump administration) offers a more benign take on Pruitt’s agenda. ‘I think deconstruction is a vast overstatement,’ says Holmstead, ‘because deconstruction can only be done by Congress. I take the Administrator at face value when he says the EPA is getting back to basics. Certainly there’s an attempt to streamline the agency. [It’s a vision] based on the rule of law, and the conviction that the EPA is authorised to do only what Congress intended it to do.’

### **The Pruitt agenda and the Rule of Law Defense Fund**

Educated at an evangelical Baptist college in Kentucky, Pruitt first became the scourge of the EPA as Attorney General (AG) of Oklahoma. There, he abolished his office’s environmental unit and founded a ‘federalism unit’ to roll back Obama rules in court. Pruitt leveraged his power



by heading the Republican Attorneys General Association (RAGA), where he launched an anti-regulatory advocacy arm, funded by undisclosed 'dark money', known as the Rule of Law Defense Fund. His mission was to coordinate a nationwide legal attack on Obama-era regulation – effectively weaponising the Republican AGs against the environment. Pruitt sued the EPA 14 times, with two of the suits appropriately captioned *Pruitt v EPA*. He also tried to stall Democratic state AGs' investigation of ExxonMobil Corporation for promoting climate change denial.

McConnell regards this as his most historic decision, and environmentalists agree.

The EPA historian Chris Sellers says it's no coincidence that Pruitt rose to power in Oklahoma, which lies at the crossroads of the Bible Belt and the fracking belt. It's a region ripe for climate change denial, says Sellers (who also hails from the American South), because of a 'toxic mix' of new shale oil energy money with old evangelical hostility to science. Pruitt's mentor Jim Inhofe – the dean of Oklahoma politics and full-throated climate denialism – is known for trying to disprove global warming

“ From day one, Pruitt began dismantling Barack Obama's legacy with startling effectiveness and cunning. And for this, radical environmentalists and other left-wingers despise him

Andy Surabian

Former Deputy White House Strategist



Scott Pruitt

As a candidate for Oklahoma AG, as well as the head of RAGA and its Rule of Law Defense Fund, Pruitt was bankrolled by the fossil fuel and power sectors, and by the Koch family of energy billionaires. When *The New York Times* won the Pulitzer Prize in 2015 for a series showing state AGs to be the puppets of lobbyists, Pruitt was Exhibit A. In one notorious instance, Pruitt let Devon Energy, an Oklahoma-based fracking giant, ghostwrite a letter in his name to the EPA, resisting a rule that would limit methane leakage from natural gas wells. The coal miner Murray Energy sent a cheque to RAGA shortly after Pruitt intervened in support of Murray's suit against the EPA over-regulating carbon emissions.

Pruitt's most noted achievement in the Obama era was to lead the coalition of Republican AGs who won a stay of the Clean Power Plan while the courts weigh its legality. Less noticed, but perhaps more important, Pruitt swiftly mobilised Republican AGs to oppose the confirmation of a Democrat to replace Justice Antonin Scalia. This too advanced the aims of fossil fuel donors. For staying the Clean Power Plan was Scalia's last major vote. When Scalia passed away the next week, with 14 months left in Obama's term, environmentalists expected that the Supreme Court would swing back in favour of the Clean Power Plan. (One over-optimistic columnist called Scalia 'the vanished robe that saved the globe'.) But a letter from Pruitt, the day after a Democratic justice was nominated, helped persuade Senate Majority Leader Mitch McConnell to defy tradition and delay Scalia's replacement until next election.

by hurling a snowball on the floor of the US Senate. Former Oklahoma Congressman Jim Bridenstine, newly confirmed as Trump's National Aeronautics and Space Administration Chief, blames global warming on the sun. Pruitt himself is a soft denialist, refusing to admit that the human origin of climate change is proven enough to justify action.

Environmentalists see President Trump's EPA as particularly perilous for several reasons. First, global warming is catastrophic and irreversible. Second, control of Congress means there is no call for the ousting of a highly controversial administrator, as it did for the Reagan-era Anne Gorsuch, for example. Third, as Pruitt illustrates, the South has helped to move Republican ideology in the direction of fossil fuel boosterism – displacing the moderate business environmental tradition personified by William Ruckelshaus, who headed the EPA after it was created by President Nixon, and led an environmental restoration after Gorsuch.

'The US is the only place in the world where we see such a powerful organising and politicising of anti-climate change policy,' says Sellers. 'It's really quite unique. It's tied up with the new domestic energy boom, with the cooptation of evangelical Christianity, with the spread of conservative think tanks and policy networks. The conservative blogosphere and media bubble has really enabled it.'

Nervous career staffers were not reassured when the EPA filled its management ranks with five veterans from the office of Senator Inhofe, of

snowball fame, starting with Pruitt's Chief of Staff. Pruitt's second-in-command Andrew Wheeler was not only an Inhofe man but a lobbyist for Murray Energy, America's largest privately held coal miner. The toxic unit chief arrived from the American Chemistry Council, as did the head of public affairs. The congressional liaison boasts BP on his resume. One senior lawyer decamped from the American Petroleum Institute. Another (who is now gone) came from RAGA and its Rule of Law Defense Fund, after cutting her teeth at a libertarian nonprofit backed by the Koch family.

Perhaps unsurprisingly, Administrator Pruitt gives industry his ear. *The Washington Post* found that, on average, he meets with industry interests once every business day, while meeting with environmentalists barely once a month. One of his earliest steps was to unban a nerve gas pesticide manufactured by Dow Chemical, which donated \$1m to the Trump inauguration.

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“ Unlike other cabinet secretaries, Pruitt's very methodically going about his business, and he has good legal talent advising him

Jody Freeman

*White House Counselor for Energy and Climate Change, 2009–2010*

Murray Energy donated \$300,000 to the Trump inauguration, on top of \$1m for the Trump campaign, and has a history of supporting Pruitt. Soon after the inauguration, its Chief Executive Officer Robert Murray gave the administration a secret action list of 16 policy wishes that the President's agenda would closely track. The coal baron sat in the front row when the President paid his surprise visit to the EPA. And the issue he seems to care about most? Global warming.

Leaving the Paris Climate Accord was one of the first boxes ticked on Murray's checklist. The EPA's website now deems climate change language 'outdated'. The main climate page has disappeared, and the category vanished from the drop-down list of 'Environmental Topics'. The EPA's draft strategic plan for the Trump years omits mention of climate change (with only brief allusion to air toxics or wetlands protection). The US National Security Strategy now ignores the threat to global stability posed by climate-fuelled wars and refugee crises, which it had recognised since the George W Bush administration. US agencies no longer account

for rising flood risks in funding infrastructure. And they no longer account for the 'social cost of carbon' in assessing new rules.

Science itself appears to be outdated in some contexts. The EPA's Office of Science and Technology Policy removed 'science-based' from its mission statement. The EPA has purged over 80 per cent of its Board of Scientific Counselors. The agency drove out dozens through a creative redefinition of 'conflict of interest'. Under the current understanding, a scientist funded by the EPA is conflicted, whereas a scientist funded by industry is pure as the driven snow.

Pruitt professes to be animated by a philosophy of 'federalism', which would give the states primacy over the environment, and 'originalism', which would restrict the EPA, absent specific new laws, to pollution problems that were understood in 1970. The subtext is that Obama's rules – above all the Clean Power Plan – reflected an arrogant end-run on Congress by a self-righteous executive, justified by an over-aggressive interpretive style. Instead, Pruitt purports to be focused on traditional water and air pollution and, especially, toxic waste.

As a matter of history, Sellers says EPA originalism is nonsense, because the environmental laws were expressly designed to evolve with science. John Cruden, former US Assistant AG overseeing environmental enforcement, says Pruitt showed no concern for federalism when he disbanded the Oklahoma AG's environmental unit, or attacked California's freedom to enact stricter car fuel standards. Avi Garbow, EPA General Counsel in the Obama administration, argues that 'federalism animated all the work we felt we were doing for eight years'. After all, both Obama EPA chiefs started as state regulators, he notes. 'One thing I think the Obama EPA can't be faulted for is our engagement,' says Garbow. 'The Clean Power Plan had a record number of comments, and a record number of meetings with all stakeholders.'

If the Trump regime truly cared about old-fashioned pollution, greens argue, it would not have proposed a 31 per cent cut in the EPA's budget, or undermined enforcement across the board. They see Pruitt's rhetoric as window dressing for an attack on the planet pursued nakedly in the service of industry – with a preference for companies that are ideologically extreme and politically generous. Whatever his motives, Pruitt is officially Trump's champion deregulator. By the count of the Office of Information and Regulatory Affairs, the EPA rescinded 16 rules in 2017.

'When it comes to economy-strangling regulations, Pruitt is, as [the President] likes to say, "a total killer",' former Special Assistant to Trump and Deputy White House Strategist Andy



Protesters carry signs during the Peoples Climate March at the White House in Washington, US, 29 April 2017. REUTERS/Joshua Roberts

Surabian wrote with approval. 'From day one, he began dismantling Barack Obama's legacy with startling effectiveness and cunning. And for this, radical environmentalists and other left-wingers despise him.'

Indeed, many environmentalists basically share this view. 'Pruitt's been quite effective,' says Freeman, now a Harvard professor. 'Unlike other cabinet secretaries, he's very methodically going about his business, and he has good legal talent advising him.' At a minimum, the EPA has avoided the sort of hasty, self-defeating overreach that instantly doomed the initial travel ban. Benjamin Wittes of the Brookings Institution once described the spirit of the Trump administration as 'malevolence tempered by incompetence'. Some fear that Pruitt represents competent malevolence.

Across all agencies, Harvard and Columbia law schools counted 33 environmental policies killed in President Trump's first year, and another 34 under assault.

A few of these moves take instant effect. For instance, executive orders pulled US support for the Paris treaty's Green Climate Fund, and revived the Keystone and Dakota pipelines to carry oil from Canadian tar sands. In March, a new memo ended the EPA's 'Once In, Always In' policy for toxic air pollutants. Now polluters may backslide rather than maintain the strictest level of controls once they're in violation. Senator Ed Markey tweeted that this could be the Trump

regime's 'worst environmental sin yet'.

Likewise, enforcement of the laws on the books fell immediately. A *New York Times* comparison of the EPA's first nine months under Obama and Trump found that enforcement cases were down by a third, fines by 61 per cent, and injunctive relief by 88 per cent. And that's before an October memo killed the EPA's 'sue and settle' policy – achieving by fiat a goal that Pruitt had sought by litigation as Oklahoma AG. Environmentalists may no longer strike an agreement with the EPA as soon as they sue the agency for poor enforcement. 'It boils down to creating obstacles for citizens to publicly enforce statutes,' says Freeman.

However, the worst fears faded that enforcement would be radically defunded when Congress rejected the 31 per cent EPA funding cut pushed by the President in favour of a flat EPA budget. At least for this year.

The White House might aim to 'deconstruct' the regulatory state. But with rare exceptions, deconstruction takes time. Most deregulation must go through an arduous rulemaking – really an 'unrulemaking' – and then pass muster in court. As Gina McCarthy puts it, 'It takes a rule to undo a rule.'

The battles over the biggest rollbacks therefore lie ahead. For starters, Pruitt aims to weaken the rule on methane leaking from gas wells – the very rule that Devon Energy attacked on Pruitt's letterhead when he was Oklahoma AG.

The Trump EPA wishes to rescind the 2015 Clean Water Rule, and open to development thousands of streams and wetlands that flow only part of the year. It might also foul many waterways with heavy metals by letting states regulate coal ash pits. In a ground-shifting move for the transit sector, the EPA plans to lower car fuel efficiency standards, while querying California's power to set higher standards. (California and 16 other states have already filed suit.) In the power sector, Pruitt says he will undo Obama's rule on greenhouse gases from new power plants. But first and foremost, he seeks to revoke and replace Obama's plan for existing plants. Probably Pruitt's top target as Oklahoma AG, the Clean Power Plan is verifiably first on Murray the coal baron's hit list.

With all of these major moves legally untested, former Chief Counsel Garbow says the jury's out on Pruitt's effectiveness. 'The ultimate outcome of the administration's agenda is difficult to predict because very few cases have actually gone to court,' he says. 'There will be challenges, and courts will have to decide in 2018 and 2019. All of which will either make the agenda stand for a long time or make it quite short-lived.'

While the Clean Power case itself awaits a new rule, other early legal skirmishes have signalled that courts don't plan to roll over for environmental rollbacks. Thus, the DC Circuit in July quashed the EPA's quest to let gas wells spew greenhouse gas into the atmosphere while the courts deliberate. And a Montana federal court in August ordered a new environmental review for a coal mine because ignoring the social cost of carbon was 'illogical'. Still, most of the agenda is too immature to be litigated.

'When it comes to the "deconstruction of the administrative state", we're not even in round one,' says Cruden, who is now President of the American College of Environmental Lawyers. 'We've mostly just seen previews of coming attractions. In the next year we'll start seeing final decisions – but we'll also see significant pushback by environmentalists. There's going to be a tsunami of litigation.'

### The future of clean power

Coal miners in khakis again gathered around Pruitt when he announced repeal of the Clean Power Plan in the ironically named town of Hazard, Kentucky. Echoing the President during his surprise visit to EPA headquarters, the Administrator declared 'the war on coal' to be over. In truth, the economic war to preserve coal is doomed, while the legal war has no end in sight.

Economists agree that coal will continue to be steadily displaced as a power source as an assured result of natural gas's price advantage. They also regard coal's importance to the US economy as mainly symbolic. US coal

employment edged up by 1,300 in President Trump's first year, according to the Bureau of Labor Statistics, to 52,200. That's only a fraction of the 250,000 jobs in the US solar industry, according to the Solar Foundation, even after a 10,000 job dip.

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“ We're not even in round one... There's going to be a tsunami of litigation

John Cruden

*Former US Assistant Attorney General, Environmental Enforcement; President, American College of Environmental Lawyers*

Lawyers attacking the Clean Power Plan have long argued, with some plausibility, that President Obama needed to twist an old law to cover climate because he was unable to steer a new climate law through Congress. On their reading, Clean Air Act section 111(d) contemplates reducing pollution only within the 'fenceline' of the power plant (for instance, by fixing a boiler). Achieving the same aim by promoting energy efficiency or clean energy in the wider economy, the argument goes, overshoots the law's authority.

Supporters of President Trump say the EPA should have the discretion to revoke the Clean Power Plan by reverting to the old reading of the Clean Air Act. If an interpretation was standard for 45 years, they reason, then it's obviously permissible. And if it's permissible, then courts must defer to the Agency.

While it's easy to imagine judges might allow Pruitt to kill the power rule, it's harder to envisage that they might let him replace it with an empty letter. In *Massachusetts v EPA* (2007), the Supreme Court found a mandatory duty to regulate carbon pollution under the Clean Air Act. In *AEP v Connecticut* (2011), it wouldn't let tort law regulate carbon in the power sector, because Congress had taken that task on itself. In 2009, the EPA found that global warming 'endangers' health and, in 2012, the DC Circuit affirmed that finding. This would suggest that the scientific and economic case for carbon regulation has been getting stronger, not weaker.

In order to justify repeal of the Clean Power Plan, a flimsy 38 pages has been filed by Pruitt's EPA. Environmentalists say the cost-benefit analysis uses three major sleights of hand. It assumes away up to 3,600 deaths by positing that a little fine particulate matter poses zero risk. It excludes billions of dollars in energy efficiency cost savings. And it overlooks billions in benefits outside the US. Clean Power Plan sceptics respond

that, if the plan went beyond the law's authority, then costs and benefits are legally irrelevant. Still, sleight of hand would seem a weak foundation for any new rule.

Pruitt's new rules are more likely to endure if he listens to voices of business moderation. 'The Obama EPA took some positions that went well beyond what was authorised by statute, so a lot of these regulatory programs need to be fixed,' says former EPA Assistant Administrator Holmstead. 'But the reforms need to be done in a careful and thoughtful way to make sure they're actually durable. It's not helpful to industry or the public to have regulatory whiplash, where you go from one extreme to the other. Virtually everyone I meet with believes that climate change is real

and changes have to be carefully justified,' she says. Yet this EPA 'is not even talking to their own career staff to understand how their change in policy could be properly reflected in law. [Courts will] have difficulty if the Agency's policies now dictate that science will be unduly influenced by business, if there are shortcuts taken in the rulemaking process, if they haven't identified scientific or legal reasons why final rules should be revisited.' In short, she argues, Pruitt 'will have a very hard time overturning [our] rules'.

Even if the courts unplug the Clean Power Plan, McCarthy remains optimistic. 'My advice to everyone has been that you can worry, but worry shouldn't make you stand still. And it shouldn't make you think that because this administration does not appear to be committed to climate science and in many ways doesn't seem committed to the requirements under the law, in terms of the EPA and its mission and its responsibilities, it does not mean that the US lacks commitment. I know we still care about the core values that the EPA was created to uphold and to advance, and I sure know that cities and towns and the business community are stepping up as the federal government falls asleep.

'The most important thing I want to make sure an international community in particular understands is that many of the states are already at levels of reduction that the Clean Power Plan didn't require until 2022. Our energy system is changing to move toward clean energy and that's being driven by a market. [W]hen we did the Clean Power Plan, we made sure to underpin that market as best we could and send longer-term signals. But, even if this administration moves forward with a rule that repeals the Clean Power Plan, the international community needs to understand that it's time lost, and there will have to be battles in court, but [we will not] shift away from clean energy.'

Freeman, the ex-climate czar, warily shares McCarthy's optimism about the power sector. But the Clean Power Plan would insure against hiccups in the free market, and go beyond current trends by forcing laggard states to cut their emissions too. In the economy as a whole and in the long run, Freeman is convinced it will take national programmes to bring global warming under control. 'I'm a fan of state and local government commitment,' she says. 'I'm a fan of the corporate sector making commitments to try to address greenhouse gas emissions. Huge fan. But I think we have to be realistic about the fact that this kind of problem requires federal leadership... I think we need to temper our wishful thinking that [localities and businesses] will somehow just replace what the federal government can do.' ☒

and manmade. Most of my clients don't want a wholesale undoing of what Obama did, because parts were sensible. A lot of the folks I work with in industry see the need for regulation; they just want it to be reasonable and implementable and cost-effective – and everyone should want that.'

The Trump administration's withdrawal from the Paris Agreement discomfited big business. The car industry was content with California's tight fuel standards – yet Pruitt is challenging them. Would the Trump EPA dare to repeal the finding that global warming is bad for you? Holmstead says it would never be so foolish. But while big business may be at peace with the Paris pact and the endangerment finding, both appear prominently on the Bob Murray hit list that the Trump agenda is tracking.

For all of Pruitt's zeal, he has never clearly aimed to overturn the EPA's foundational finding on global warming. But, if Pruitt is removed, the acting chief would be the former Inhofe aide and Murray Energy lobbyist Wheeler – who has publicly agitated for rolling back the endangerment finding.

Pruitt's removal has become a real possibility because of a long list of non-policy scandals – capped by Pruitt receiving a sweetheart deal on a Washington, DC rental apartment from the wife of an Oklahoma energy lobbyist. Yet, those who are committed to battling climate change should be careful what they wish for. In contrast to the Reagan administration, a scandal-ridden anti-environmentalist might well be replaced with an even more extreme anti-environmentalist.

Whoever runs her old agency, McCarthy expects the EPA to overreach. 'The rules were done well,

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)

## “ It's not helpful to industry or the public to have regulatory whiplash, where you go from one extreme to the other

Jeff Holmstead

Former Deputy EPA Administrator, George W Bush administration



'March For Our Lives' protesters in Los Angeles, California, 24 March 2018. Hayk\_Shalunts / Shutterstock.com

## Cracking America's gun control conundrum

Recent events have presented reformers with a remarkable moment of opportunity. But overhauling a deep-seated gun culture and gun-friendly legal regime remains a considerable challenge.

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

Civilian guns kill ten times the number of Americans each year as the number of fatalities on the bloodiest day in United States history, on the Civil War battlefield at Antietam. By contrast, the European Union loses only one tenth as many lives to civilian guns each year as the combatants lost on the bloodiest day at the Battle of the Somme. America's sad exceptionalism is partly explained by a deep-seated gun culture. But it's also partly explained by a gun-friendly legal regime, and that legal regime has surprisingly shallow roots. Law is easier to change than culture, and gun reformers face a moment of opportunity. With America's conscience awakened by the massacre in Parkland, Florida, should the gun control movement aim to topple the legal pillars of gun protection?

The first pillar of the US gun regime is the Second Amendment, which reads simply: 'A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.' While this guarantee dates to 1789, Justice Antonin Scalia only interpreted it a decade ago, in *District of Columbia v Heller*, to extend beyond 18th-century militias and protect guns in the home. This will inevitably put the Supreme Court in the business of regulating and overseeing the regulation of guns, much as it does abortion. The Court has so far avoided defining the boundaries of the newly expansive Second Amendment. But gun advocates are agitating to constitutionalise the right to carry a concealed weapon anywhere (regardless of state law), and a

circuit split may be on the horizon. Though a few small nations like Guatemala and Haiti maintain equivalents to the Second Amendment (and both those nations have terrible gun problems), the US is unique among developing nations in constitutionalising gun protection.

After Parkland, Justice John Paul Stevens – Associate Justice of the Supreme Court from 1975 until he retired in 2010 – issued a ringing call to repeal the Second Amendment. But the lifelong Republican is forgetting the reality of a nation evenly divided. The last time an amendment was passed by two-thirds of the full Congress and promptly ratified by three-quarters of the states was 1971. ‘It’s science fiction,’ says gun scholar Timothy Lytton of Georgia State University College of Law.

Restraining or reversing Heller’s dubious interpretation of the Second Amendment is much desired. But threatening the amendment itself only validates the fantasies of gun rights defenders like the late Charlton Heston, who iconically said that whoever came for his rifle would need to pry it ‘from my cold, dead hands’. As recently as May, President Trump pledged to the National Rifle Association: ‘Your Second Amendment rights are under siege, but they will never, ever be under siege as long as I’m your president.’

### Unique and astonishing immunity

The second pillar of gun protection is the 2005 Protection of Lawful Commerce in Arms Act. This astonishing law – hailed by the gun lobby as the most significant in a generation – gave gun manufacturers and retailers near-complete immunity from tort liability. Denouncing anti-gun suits as an ‘abuse of the legal system’, it brought all litigation to a crashing halt. Guns now enjoyed a uniquely privileged position in American law. Of course, Congress has killed other forms of tort litigation. But vaccine makers, for example, needed to accept an administrative system of compensation for victims as a condition of immunity. And vaccines remained tightly regulated by the Food and Drug Administration. By contrast, Congress gave gun victims no compensation. And it has always exempted guns from regulation by the Consumer Product Safety Commission.

Amid continued bloodshed, plaintiffs have renewed their effort to poke holes in gun immunity, by exploiting the Act’s exceptions for torts flowing from ‘negligent entrustment’ or violations of law. A breakthrough came in 2015, when a Wisconsin jury tagged the Badger Guns gun shop with a \$6m verdict for selling a gun to someone who was transparently and unlawfully buying it for a teenager. The police officers who were shot by that teen sued and won a \$1m settlement before appeal. It sent ‘a message that

retailers are not immune from these types of lawsuits for irresponsible sales practices,’ says Lytton. ‘Rogue dealers are now on notice.’

In a closely watched test case, victims of the massacre in Newtown, Connecticut, are now trying to extend the same exceptions from retailers to manufacturers. Remington Arms is the maker of the Bushmaster AR-15 assault rifle used in the 2012 slaughter of 20 students at Sandy Hook Elementary School. Plaintiffs say the gun-maker violated the doctrine of negligent entrustment, as well as the state consumer protection act, by appealing to untrained and possibly disturbed civilians who are military fantasists with slogans like ‘Consider Your Man Card Reissued,’ and ‘... when you demand a rifle as mission-adaptable as you are’.

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“ It’s hard to see any other issue in American politics that is so universally embraced by the public but so completely shut down by the special interests...

John Donohue  
*Professor of Law, Stanford University*

Remington retorts that negligent entrustment only applies when a product is directly entrusted to a foreseeably risky individual, as opposed to a dangerous public, and the buyer here was the killer’s undisturbed mother. If plaintiffs’ argument is really about ‘negligent marketing’, that’s a theory that Congress squashed. Finally, Remington says plaintiffs needed to show that it broke a gun-specific law; the consumer act that they cite is too general, and anyway demands a relationship to the manufacturer that they lack. The Connecticut trial court dismissed the case – but the state Supreme Court will soon rule on appeal. ‘It’s very likely if the Connecticut Supreme Court opens the door to manufacturer liability,’ says Lytton, that the US ‘Supreme Court will want to clarify what the boundaries of immunity are for gun manufacturers. It’s an issue of national importance.’

For some reason, Parkland has provoked ambitious talk of taking an axe to the Bill of Rights, while a ten-year-old law immunising the gun industry from tort liability has been accepted as an immovable feature of the landscape. If the Sandy Hook plaintiffs fail to erode immunity through the courts, gun reformers should at least ask Congress to codify their broad reading of the exceptions to immunity. To whatever extent it is feasible, they should aim to roll back the gun industry’s immunity from product safety regulation, and even from tort liability.

The gun scholar John Donohue, Professor of Law at Stanford University, says that regulating firearms through tort litigation could be a worthy strategy precisely because the gun lobby has captured the nation's legislatures. 'It's hard to see any other issue in American politics that is so universally embraced by the public but so completely shut down by the special interests,' he says. 'So, in that context, turning the tort lawyers loose could be a democracy enhancing move.'

optimistic. Parkland's lasting legacy, she believes, will be to push gun reform toward the top of the progressive agenda. The last time Democrats controlled the Presidency and both houses of Congress, in the early Obama years, they didn't try to pass a single gun measure. The next time it happens, she thinks Democrats will have the courage of their gun control convictions.

A wise gun reform majority would not spend its energy attacking the sacred bastion of the

## “ Your Second Amendment rights are under siege, but they will never, ever be under siege as long as I'm your president

President Trump's pledge to the National Rifle Association

Lytton doubts Congress would reverse a generation-long trend by expanding access to the courts. And as someone who lives in Georgia, he's skeptical about the extent to which high school protests sparked by Parkland can galvanize the necessary change. 'You can get as many 17 year olds as you want to march in Washington, DC,' he says, 'but until you've talked to someone who has an AR-15 in their house and is convinced that there are four guys coming in to steal their stuff and rape their daughters, I don't think you can generalise about a big shift going on in America.'

Chelsea Parsons, who researches gun violence at the Center for American Progress, is more

Second Amendment, or vainly trying to pry a rifle from Charlton Heston's cold, dead hands. Rather, it would push overwhelmingly popular gun measures, like a ban on assault weapons and a universal background check. It would empower regulators to protect every facet of public health and safety, informed by fresh research on gun violence. And, in an ideal world, it would end the gun industry's anomalous total immunity from the bracing discipline of tort law. ☒

Michael Goldhaber is the IBA US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



The 'March for Our Lives' event demanding gun control after recent school shootings at a rally in Washington, US, 24 March 2018. REUTERS/Aaron P Bernstein

## Immigration: what happens to a Dreamer deferred?

MICHAEL GOLDHABER, IBA US CORRESPONDENT

**W**hile the United States Supreme Court is preparing to rule on President Trump's controversial travel ban, the lower courts are grappling with the President's decision of autumn 2017 to end the protected status of about 700,000 so-called 'Dreamers' – immigrants who came to America illegally as children, but then stayed out of trouble and pursued an education.

On 15 May, the Ninth Circuit Court of Appeals heard arguments over the Obama programme known formally as Deferred Action for Childhood Arrivals, or DACA. Though Congress and the President each voice sympathy for the youth in legal limbo, the inability to compromise on overall immigration policy has left the Dreamers' fate, at least for now, in the hands of several judges. Five courts in five circuits have wrestled with DACA over the past five months.

In January, in the first of four legal challenges to DACA rescission, a San Francisco federal court ordered the President to extend the legal status of Dreamers who have already qualified for DACA – allowing them to renew their work permits and avoid deportation. A Brooklyn federal judge in February issued a similar injunction, pending appeal to the Second Circuit. But the San Francisco case, argued in the Ninth Circuit, is the most advanced, and likeliest to reach the Supreme Court.

'We have a real story to tell,' says Gibson, Dunn & Crutcher's Ethan Dettmer, who represents the Dreamer plaintiffs in California. 'Lives and careers and dignity are hanging in the balance.'

DACA has not always fared so well in court. The Dreamers suffered a setback in March, when a Maryland federal judge sustained DACA's rescission, pending appeal to the Fourth Circuit. They suffered a more subtle blow in late April, when a DC federal judge gave the Trump administration three months to clarify why it would stop DACA.

Josh Blackman of South Texas College of Law calls the DC order a 'blessing in disguise' for President Trump. With a stronger rationale, he predicts that 'DACA rescission 2.0' will stand up in court.

Finally, in early May, seven Republican states led by Texas brought a late challenge to DACA itself (as opposed to DACA's rescission). They succeeded in drawing the same judge who ended the larger pre-DACA programme known as DAPA, or Deferred Action for Parents of Americans, in 2014. The new suit raises the distinct possibility of duelling federal injunctions, with a Texas judge ordering that DACA be dissolved, and a California judge ordering that it be extended.

“Lives and careers and dignity are hanging in the balance

Ethan Dettmer, lawyer representing Dreamer plaintiffs in California  
*Gibson, Dunn & Crutcher, San Francisco*

Ilya Shapiro of the Cato Institute argues that an anti-DACA order resting on constitutional grounds would obviously prevail, because the pro-DACA orders merely rest on administrative grounds.

But Luis Cortes, who serves as co-counsel to the California Dreamers, notes that the Ninth Circuit could affirm on constitutional grounds. To Cortes, the key question is what 'irreparable harm' would be inflicted by either rescinding DACA or extending it.

He argues that Dreamers are infinitely more at risk than the states who wish to avoid DACA's cost, because the programme has already been implemented, and 700,000 people are planning their lives around it.

To libertarians, DACA is self-evidently unconstitutional, however admirable its goals, because the President lacks the power to create new benefits and programmes without Congress. 'When DACA came out, Obama poisoned the well for legislative solutions, and exposed these young people to uncertainty,' says Shapiro. 'It only made sense if he thought the Republicans would never win the presidency again. You live by the executive order; you die by the executive order.'

President Obama maintained that taking it easy on Dreamers fell within his discretion. But that only invites a

simpler argument for DACA's rescission: if a President has the discretion to set enforcement priorities, they have the discretion to reset enforcement priorities.

Cortes – himself a Dreamer – answers that discretion must be bounded by the Constitution. Voiding DACA violated due process, he says, because the government had assured Dreamers that they could sign up for the programme without fear that it would ease their deportation. Revoking DACA violated equal protection because 93 per cent of its beneficiaries are Latino, he argues – and from the moment Donald Trump declared his candidacy, he's shown an obsessive anti-Latino animus. Maybe so, but even sympathetic observers say it's easier to draw the line from the President's anti-Muslim rhetoric to the travel ban, than from his anti-Latino rhetoric to his stance on Dreamers, whom he actually exhorts Congress to protect. And DACA's foes say it technically made no promises.

Dreamers draw support from large majorities in opinion polls. Unfortunately for them, a better indicator of the Supreme Court's position on DACA is the DAPA case in South Texas. Four million immigrants with US-born children lost the chance to be legalised when the Supreme Court – working shorthanded due to the Senate's refusal to seat a new justice in 2016 – let the Fifth Circuit kill DAPA by deadlocking 4–4. Although Cortes sees hope in the newly-appointed Justice Neil Gorsuch's voting record on immigration, Shapiro says killing DACA will be straightforward for a believer in separation of powers and strict statutory interpretation.

If Shapiro's right, then the justices might ultimately bless DACA's death with a ritual apology, as the Maryland judge did in March: 'This court does not like the outcome of this case, but it is constrained by its constitutionally limited role to the result it has reached. Hopefully, the Congress and the President will finally get their job done.'

Of course, Congress and the President may sit on their hands and blame the courts, says Shapiro. 'Instead of each branch being jealous of its own power, each branch is passing the buck.'



Anita Areli Ramirez Mejia, an asylum seeker from Honduras separated from her six year-old son Jenri near the Mexico-US border, is reunited with him in Harlingen, Texas, US, July 2018. REUTERS/Loren Elliott

# America's withdrawal from human rights

**Though America argues that its withdrawal from the United Nations Human Rights Council is not a retreat from human rights, it looks very much that way. From family separation to 'millions living in Third World conditions of absolute poverty', the situation looks increasingly dire.**

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**A**s it withdrew from the United Nations Human Rights Council on 19 June, America insisted this was not 'a retreat from human rights'. It's just that America's steadfast commitment to universal values, United States Ambassador Nikki Haley told the UN, 'does not allow us to remain a part of a hypocritical and self-serving organisation that makes a mockery of human rights'. Any sincerity in Ambassador Haley's statement was undermined by the timing.

The withdrawal came one day after the UN High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, told the Human Rights Council

that family separation at the US-Mexico border is an 'unconscionable' abuse of children. Two days prior, on Father's Day, global outcry over the separations had reached fever pitch. To pursue 'the best interests of the child', as required by the International Convention on Civil and Political Rights, is one of many US-born global standards that the country now dishonours.

Two days after the US withdrew from the Council, the UN Rapporteur on extreme poverty and human rights, Philip Alston, told the Council that the US disdains the right to a decent life by letting 5.3 million Americans live in 'Third World

conditions of absolute poverty'. Touring pockets of deprivation across the US, Alston met people who were homeless and toothless, while raw sewage flowed in the streets. Of course the US is a wealthy nation, as shown by its \$1.5tn tax cut, Alston said, yet that cut is so regressive that America bids 'to become the most unequal society in the world'. Among the 37 nations in the Organisation for Economic Co-operation and Development, Alston reported, the US already ranks last in youth poverty, infant mortality and incarceration rate, second-to-last in access to water and sanitation, and third-to-last in poverty. Even though the US last year affirmed its invitation to the rapporteur, Ambassador Haley retorted that it's 'patently ridiculous for the UN to examine poverty in America'.

of intent. Perhaps most consequentially, the Court set a very low standard for establishing that immigration policy complies with the constitution. It's an area where the President likes to test the law's limits.

Though President Trump backed down on family separation, he has yet to reunite the majority of 2,300 detained children with their parents, and maintains a policy of 'zero tolerance' for asylum seekers who illegally cross the border between points of entry.

One Latin American diplomat, who requested anonymity, says family separation has obscured the due process problems with zero tolerance. Border crossers coerced into guilty pleas will face prison time and lose custody if they return

## “ The United States has surrendered multilateralism to autocratic hostile powers. Those who will be empowered by our retreat are China and Russia and Cuba

Ambassador Keith Harper

*US Ambassador to the United Nations Human Rights Council (2014–2017)*

On the fifth day following the US' withdrawal, President Trump, having finally abandoned his family separation policy, called for illegal border crossers to be deported 'immediately, with no Judges or Court cases'. It was perhaps the President's most straightforward expression of his disdain for the rule of law. Over time, High Commissioner Zeid has rebuked President Trump for other attacks on judges, not to mention his frequent attacks on journalists, his failure to denounce white nationalist racism, his support for extrajudicial killings in the Philippines, his discriminatory comments about women and Mexicans, and his travel ban targeting Muslim nations.

On the sixth day, the US Supreme Court largely reversed a lower court finding that a Texas gerrymander was unconstitutionally motivated by racial bias. This followed a pair of earlier June rulings, out of Ohio and Wisconsin, rubber-stamping a voter roll purge that penalised African-Americans, and ducking on the Court's best opportunity to limit partisan gerrymanders. They fit a pattern – noted by Alston in his report – of the US diluting democracy through both partisan and racial redistricting, and racial voter suppression.

Finally, exactly one week after the US withdrew from the Human Rights Council, the Supreme Court upheld President Trump's latest travel ban. Dissolving the lower courts' injunctions, the Chief Justice declined to take at face value the President's anti-Muslim statements

after deportation in an effort to pay their smugglers or reunite with family.

Ilya Somin of George Mason University argues that family separation has obscured two other morally abhorrent asylum policies. Earlier in June the Attorney General overrode the Board of Immigration Appeals' (BIA) recognition of gender violence as grounds for asylum; and the BIA absurdly reasoned that people pressed into slavery by terrorists don't deserve asylum because they have 'aided' terrorists. To top it all off, the US declined to join the UN Global Compact for Migration, which was signed this July.

In exiting the Human Rights Council, Secretary of State Mike Pompeo cited as the President's chief complaint that egregious actors like Cuba and Venezuela can be members, thanks to a regional voting system that resists reform. Stephen Pomper, Senior Director for Multilateral Affairs and Human Rights during the Obama administration, fully agrees with this critique. But, by actively participating in the Council, Pomper argues, the Obama team was able to help produce reports of great value on abuses in Iran, Myanmar, North Korea, Syria and elsewhere. Stepping back at the UN, he argues, only enables 'China's push to grab the reins of the multilateral system' – and to remove human rights from the agenda. China has recently succeeded in dismantling the Secretary-General's human rights unit, and in defunding human rights posts in UN peacekeeping missions.

President Obama's last representative on the Human Rights Council makes the same point. 'The United States has surrendered multilateralism to autocratic hostile powers,' says Ambassador Keith Harper. 'Those who will be empowered by our retreat are China and Russia and Cuba.'

Secretary Pompeo's denunciation of autocrats on 19 June rang hollow, coming a week after President Trump showered North Korea's Kim Jong-un with praise at a summit replete with a commemorative White House coin honouring the 'Supreme Leader'. Ambassador Haley's attacks on Iran and Syria – neither of which have ever been members of the Human Rights Council – rang hollow given the accolades President Trump has bestowed on the autocrats in China, Egypt, the Philippines, Saudi Arabia and the United Arab Emirates – all of which are members of the Council. Secretary of State Rex Tillerson shockingly proclaimed a separation of American values from foreign policy, and his successor has not signalled a change in course.

Ambassador Harper concludes that the critique of the Human Rights Council emerging from the Trump administration can only be viewed as

'a fig leaf for an administration that clearly does not value the promotion of human rights'.

As Harper notes, 'We have a President who has in various ways complimented Putin; Duterte, who is using extrajudicial killings as a means of policing; Erdoğan; Orbán; the Saudis, who are just now letting women drive; Xi, who he has said is a great leader; and finally Kim. Can it really be taken seriously that an administration headed by an individual so hostile to human rights, an advocate of torture, is leaving the Human Rights Council because there are autocrats on it? It doesn't pass the straight face test.'

Diplomacy on behalf of the undiplomatic is a challenging task to be sure. But if Ambassador Haley, or any other US official, truly can't bear to 'remain a part of a hypocritical and self-serving organisation that makes a mockery of human rights', we can surely expect their resignations from the Trump administration sooner rather than later. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)

## US Supreme Court: replacement of swing voter Kennedy shifts balance for a generation

MICHAEL GOLDHABER, IBA US CORRESPONDENT

Justice Anthony Kennedy, who served on the United States Supreme Court for 30 years and was recognised as the centrist swing voter, retired in July. His replacement, Brett Kavanaugh, is expected to tip the balance of the Court for decades assuming he's confirmed.

Both of President Donald Trump's appointees to the Supreme Court to date – Kavanaugh and Neil Gorsuch – are conservative former Kennedy clerks.

President Barack Obama selected the moderate liberal Merrick Garland to replace Antonin Scalia on the Supreme Court following his death in 2016. However, Gorsuch now sits in that seat, as the Senate did not follow traditional norms of confirmation.

The new majority will consist of the two justices appointed by President Trump; two, John Roberts and Samuel Alito, appointed by President George W Bush; and a fifth, Clarence Thomas, appointed by George H W Bush, whose approach is to uphold the original meaning of the US Constitution and who is generally viewed as the Court's most conservative member. This backdrop is raising concerns about the future of the Court, particularly its balance.

For many years, Justice Kennedy formed the fragile fifth vote, ensuring a progressive outcome in numerous iconic cases. For example, he joined in preserving the right to abortion for women in *Planned Parenthood v Casey* (1992). He recognised gay and lesbian rights to marriage in *Obergefell v Hodges* (2015). He preserved some possibility of race-based affirmative action in *Fisher v University of Texas* (2016). In *Massachusetts v Environmental Protection Agency* (2007), he joined in reading the Clean Air Act to regulate greenhouse gases.

Justice Kennedy also joined the four conservative justices in some equally iconic rulings, which progressives blame for some of the major problems now facing America. For instance, in *Citizens United v Federal Election Commission* (2010), Justice Kennedy construed the First Amendment to lift any limits on corporate political influence. In *District of Columbia v Heller* (2008), he joined in reading the Second Amendment to enshrine a right to carry guns in the home. In June 2018, Justice

Kennedy joined the four conservatives in opening the door wider to racial gerrymanders (*Abbott v Perez*).

One of the key concerns is that the Supreme Court will now overrule or roll back some of the more progressive rulings. Paul Smith, Vice President, Litigation and Strategy at the Campaign Legal Center in Washington, DC, has argued 21 cases before the Court and helped to pioneer its gay jurisprudence. He remains relatively optimistic. 'The Supreme Court doesn't move nearly as fast as some would like and others would fear,' he says, citing Justice Elena Kagan.

On issues like abortion or gay rights, the Court is more likely to chip away incrementally at the edges. Smith predicts, for example, that the Court will not overturn the right to gay marriage.



Justice Kennedy stood down in June 2018

Smith cites the late Justice William Brennan Jr, who when the Court's liberal milestones were first threatened in the 1980s, encouraged plaintiffs to seek refuge in state courts and state law. Even if the Court repeals the federal constitutional right to an abortion embodied in *Roe v Wade* (1973), advocates will be able to fall back on a pitched battle state by state. Similarly with political gerrymandering, if federal litigation comes up short, activists can always focus their energies on the creation of redistricting commissions through state ballot measures.

It's possible, too, that the Court will seek to avoid the appearance of

partisanship in important cases. Chief Justice Roberts, who's the closest thing the new Court will have to a swing vote, takes his role in protecting the Supreme Court's reputation particularly seriously. Notably, he joined the Court's four liberal justices to save Obamacare.

A commitment to institutional values might also incline the Court to take a stand limiting President Trump's executive power in the appropriate situation. 'The Chief Justice,' says Smith, 'is a person who knows the difference between the rule of law and the absence thereof.'

Both Kavanaugh and Gorsuch, however, tend to have a narrow vision of regulatory power, which could be highly relevant on issues like climate change.



Brett Kavanaugh, Kennedy's replacement

Supreme Court advocate John Elwood of Vinson & Elkins served as Deputy Assistant Attorney General under President George W Bush. He believes Kavanaugh's strict views on standing – those who can legitimately bring a case before the court – could make it harder for challengers to President Trump's deregulatory policies to get a hearing.

But, says Elwood, it may also prove difficult for the Trump administration to repeal President Obama's rules unless the President's agencies are careful to dot their 'i's'. 'I think they'll play it straight,' Elwood says of the new justices, 'and may even welcome the opportunity to play it straight.'

House Minority Leader Nancy Pelosi makes remarks a day after the mid-term elections, on Capitol Hill in Washington, US, 7 November 2018. REUTERS/Mike Theiler



# Demosclerosis redux

Following the drama of the recent US mid-term elections, the IBA's US Correspondent makes a clear-eyed assessment of what a divided government will look like under President Trump.

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**T**he term, 'demosclerosis' was coined after the first mid-term vote of Bill Clinton's presidency. Then, as now, the party that had been shut out of power regained the House of Representatives and Washington was seen as too riven to pass laws. In fact, the Clintonian Democrats tacked toward the centre to reform welfare.

With Trumpist Republicans retaining the presidency and Senate, legal sclerosis will be more of a reality. House Democrats will block their agenda of repealing Obamacare, gutting entitlements and defunding regulators. Even where compromise is conceivable, as in infrastructure, the parties would need to overcome divergent policy approaches and universal ill will.

Deadlock over building a wall is more likely than a kumbaya over building bridges.

But Congress will not be wholly paralysed, for each chamber has unilateral powers, and as the norms of restraint erode, those powers will be deployed aggressively. The two-year forecast is for a downpour of House oversight subpoenas and Senate judicial confirmations.

What we won't see is a replay of impeachment. The 1990s taught us that impeachment is worthless without a Senate supermajority to convict and will only boost the President's popularity. Leading Democrats plan instead to use strategically the investigatory powers that come with a House majority.

For starters, the House Committee on Ways and Means may now demand the President's tax returns from the Secretary of the Treasury. This would hardly be a surprise, as the Democrats symbolically asked for the President's tax returns 17 times while they were in the minority. According to incoming House Speaker Nancy Pelosi, 'That is one of the first things we'd do – that's the easiest thing in the world.'

Though Republicans expect a steady stream of hassle and embarrassment, they are far from powerless. The Trump administration will broadly assert executive privilege against subpoenas. In particular, presidential lawyer Rudy Giuliani has said he will relish the fight if Congress seeks the President's tax returns. As straightforward as these cases might seem, both of the last two Presidents have shown that

## “ Everyone knows Senate Majority Leader Mitch McConnell kept open a Supreme Court seat for President Trump to fill. Less well-known is that he kept open 108 lower court vacancies

Rather than impeach the President, Representative Jerrold Nadler will use the House Committee on the Judiciary to probe if the President's business conflicts amount to unconstitutional emoluments. Representative Elijah Cummings, set to chair the House Committee on Oversight and Government Reform, aims to focus on Trump administration corruption more broadly. Representatives Adam Schiff and Maxine Waters, who will head the Intelligence and Financial Services Committees respectively, share a keen interest in Russian money laundering and the Trump Organization.

Just as Nadler may complement and backstop court litigation over emoluments, so may Schiff complement and backstop the Special Counsel report. Ultimately, in the event that the President succeeds in hobbling the Special Counsel, Schiff may summon Robert Mueller to testify in Congress himself.

During the Teapot Dome bribery scandal of the 1920s, the Supreme Court affirmed Congress' power to subpoena witnesses or documents, and noted that power is at its peak in probes of executive corruption. A tax law inspired by Teapot Dome specifically mandates that if a tax committee requests a tax return, the Treasury Secretary 'shall' provide it.

After the Watergate scandal, Congress acquired the right to enforce its subpoenas through civil litigation under the Ethics in Government Act, on penalty of contempt. Then, in a crucial but forgotten example of norm erosion, 2015 Republican rule changes expanded the power of several House committee chairs, including Judiciary and Financial Services.

The majority party may now issue House subpoenas without the minority party's consent, and rarely needs to bother with consultation. Panicked Republicans, foreseeing this summer that they would lose the House, circulated a list of over 100 investigations that they have blocked Democrats from pursuing during the start of the Trump era.

obstructionist lawyers can tie up a subpoena in the courts, conceivably until the next election.

Court fights over the President's tax returns and congressional subpoenas might take their place alongside the emoluments litigation, not to mention a showdown with Mueller on issues ranging from the legality of his appointment to the publication of his report, to a presidential self-pardon. Beyond these tests of executive power, legal battles loom over countless policies, from the politicisation of the United States Census to the unravelling of Obamacare, to the rollbacks of the Clean Power Plan and tailpipe emission standards.

For all these reasons and more, Republicans are grateful to have kept the Senate power of judicial confirmation.

President Trump campaigned on transforming the courts with 'great judges, conservative, all picked by the Federalist Society'. Everyone knows Senate Majority Leader Mitch McConnell kept open a Supreme Court seat for President Trump to fill. Less well-known is that he kept open 108 lower court vacancies, or about an eighth of the federal bench. In his last two years, President Obama saw only one appeal judge confirmed. Even an impeached President Clinton managed 13 at the end of the first demosclerotic age.

Thanks to McConnell's norm-breaking, President Trump has filled the bench at a record rate at every level. In addition to creating a new conservative majority on the Supreme Court, he has already swung the Republican share of appellate judges from 41 per cent to 53 per cent.

That matters because the lower courts have, until now, been the strongest structural check on the President. District courts batted down the President's policy of separating border-crossers from their children, and dismissed as 'cynical' his request to instead detain children long-term. After other trial courts demanded actual proof of voter fraud, the White House abandoned the charade of its 'election integrity' commission,

'rather than engage in endless legal battles'. In regulating methane leakage and flaring by oil and gas drillers, courts have ordered environmental agencies to comply with existing rules, and forced them to do the hard, uncertain work of developing new rules rather than simply 'suspending' the old ones.

Other victories have been less permanent. The Supreme Court notoriously reversed the lower courts to uphold the President's final Muslim travel ban. The justices also vacated a circuit ruling that struck down the President's ban on teens in immigration custody obtaining abortions. Lower courts have provisionally struck down the President's ban on transgender soldiers, his betrayal of the promise that 'Dreamers' may avoid deportation and his defunding of 'sanctuary cities' that resist deportation. As the Senate continues to transform the judiciary, will these rulings stand? Will the courts remain a check on the President?

Realists may note with despair that Justice Brett Kavanaugh is so expansive on executive power and privilege that he would have sided with Richard Nixon in Watergate, having opined that all nine justices were wrong when they ordered the President to hand over his secret recordings in *United States v Nixon*.

Formalists would argue that party is not destiny. In last year's *Sessions v Dimaya*, Justice Neil Gorsuch joined the liberal bloc to void as unconstitutionally vague a provision that made aliens deportable for 'crimes of violence' because that phrase could cover any felony that might be committed with violence. The point is that the new justices' strict

constructionism will sometimes yield a progressive result. By the same token, Justices Gorsuch and Kavanaugh share a bias against regulatory lawmaking. And, because deregulation requires rule-making, that may paradoxically impede President Trump's deregulatory agenda.

Hope for judicial independence is certainly alive at the circuit level, where Democrats still hold majorities on seven of the 13 courts, including the influential DC, Ninth and Second Circuits. One reason is that Republican appeal judges are inefficiently concentrated in a few flyover regions. The other reason is that most recent retirees were Republican. Much as the Supreme Court's fate rests on Justice Ruth Bader Ginsburg, so the Circuits' future turns on the vitality of 36 elderly Democrats.

More fundamentally, jurists at every level and of every party can see that the President's uninformed and unprincipled demagoguery is antithetical with the law's veneration for facts and argument, fairness and due process.

'Why have courts been so willing to stand up to Trump?' asks the Head of the American Civil Liberties Union David Cole. 'One reason may be that Trump is so contemptuous of constitutional law – and indeed, of courts themselves.'

Whatever the weather in Washington, and however many judges are confirmed over the next two years, the President and the law are sure to maintain their mutual disdain. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)

Justices of the US Supreme Court attend the Presidential Medal of Freedom award ceremony on 16 November 2018 in Washington, DC. Sitting from left to right are: Brett Kavanaugh, Neil Gorsuch, Elena Kagan, Samuel Alito, Ruth Bader Ginsburg and Chief Justice John Roberts.



## US Presidency: the 'age of the downloadable gun'

MICHAEL GOLDHABER, IBA US CORRESPONDENT

Cody Wilson is no supporter of the Parkland student movement against guns in the United States. On the contrary, his avowed goal is to crush the teenagers' dreams: 'All this Parkland stuff, the students, all these dreams of "common-sense gun reforms"? No. The internet will serve guns.'

Wilson founded Defense Distributed, a non-profit company with the mission of posting online the 3D printer blueprints for making homemade plastic guns that can't be traced or detected.

Under the Obama administration, the Department of State blocked Defense Distributed, under the Export Control Act, from publishing instructions for making homemade guns on the internet. Defense Distributed sued but lost in a Texas federal court and the Fifth Circuit Court of Appeals. Then the Trump administration took over the case.

In summer 2018, the State Department abruptly settled the case – completely dropping its opposition to Defense Distributed's plan and announcing that it would narrow export control rules to permit the publication of technical data on gun-making. Cody Wilson trumpeted the 'age of the downloadable gun'.

But, at the end of the summer, a scrum of Democratic state attorneys general persuaded a federal judge in Seattle to grant a new preliminary injunction on the publishing of 3D gun blueprints. In the latest twist, Texas charged Wilson with sexually assaulting a 16-year-old girl he'd met online, and Wilson resigned from the firm he founded. Defense Distributed vows to carry on the lawsuit and win on the merits.

Gun reformers like Adam Skaggs, Chief Counsel of the Giffords Law Center to Prevent Gun Violence, blame the gun lobby for the government's flip flop. 'The only thing that changed in this case,' he says, 'is that the Trump administration took over and decided they had no problem with downloadable guns being available to anyone anywhere in the world.' Although manufacturers may care little about 3D guns, Skaggs says, the arms industry cares intensely

about expanding gun exports. 'The administration's reversal of course is almost certainly a product of gun lobby efforts to make it easier to export guns and gun technology,' he argues.



3D gun blueprints are at the centre of a US legal tussle over gun export controls

Defense Distributed lawyer Josh Blackman, of the South Texas College of Law, says that's nonsense. The gun lobby 'has never been on our side,' he says. 'The reason why the government settled is they were going to lose.' Courts had only ruled preliminarily against 3D guns, says Blackman, because it was a question of whether online publication would cause 'irreparable harm'. But if the case proceeded to the merits, that standard wouldn't apply, and the Justice Department told the State Department they'd lose.

The First Amendment demands that judges strictly scrutinise the constitutionality of rules that constrain speech based on its content, says Blackman. And under First Amendment case law, publishing gun plans doesn't fit the narrow exception for 'imminently inciting unlawful violence'.

Furthermore, Blackman argues, 'the export control law is not the vehicle to censor the internet'. That law traditionally applies to confidential rather than public information, he says, whereas 'all the files that Cody posted were already available on the internet'. In any event, export control has no relevance to the domestic gun violence that is the main concern of state attorneys general.

Skaggs views the case differently. 'The idea that Defense Distributed

was somehow destined to win, when they lost every step of the way, doesn't pass the laugh test,' he says. 'Their court papers are dressed up in First Amendment clothing – but [this

is] not about speech. It's not about communicating ideas to anyone. It's not about the expressive value of this computer code. What this is about is an effort to make guns available to anyone anywhere in the world with a click of a mouse... without a background check, without any government oversight.'

As for the export control law, Skaggs argues that 'the ability to create untraceable firearms poses as much a threat to public safety in the US as it does overseas, [because] the risks of terrorism or assassination are present everywhere'. A downloadable gun 'poses a threat to the national security interests' if it's 'easily accessible for those intent on' harming Americans either at home or abroad.

Defense Distributed continues to disseminate its plans domestically and to sell 'ghost gunner' machines for milling metal parts that complete plastic guns.

Meanwhile, President Trump has muddied the waters, saying 3D guns don't seem to 'make much sense' and gun reformers are eager for the Undetectable Firearms Act of 1988 to be strengthened. But Skaggs remains sceptical: 'The fact that you can be prosecuted for building a plastic gun after you commit an assassination,' he says, 'isn't going to stop you from building a plastic gun in the first place.'

## US and China announce trade truce as WTO reaches 'debilitating' dispute settlement impasse

RUTH GREEN, IBA MULTIMEDIA JOURNALIST

The possibility of an all-out trade war between the United States and China looked increasingly real. It took a face-to-face meeting at the G20 summit for the countries' leaders to declare a temporary truce while they work to resolve the dispute.

The feud arose when the US imposed tariffs on more than \$250bn of Chinese imports – from aluminium and steel to consumer goods – claiming China's 'unfair' trade policies had put US companies at a competitive disadvantage. This prompted retaliation, with China putting charges on \$110bn of US goods.

During the recent G20 summit in Buenos Aires, President Trump and President Xi Jinping agreed to a 90-day moratorium on raising tariffs. There have been three rounds of US tariffs on Chinese imports so far in 2018. Before the truce, the Trump administration announced tariffs on Chinese goods would rise from ten per cent to 25 per cent in January 2019. The White House says it will impose the tariff hike if the two parties fail to come to an agreement after 90 days of talks.

Vanessa Sciarra, Vice-President for Legal Affairs and Trade and Investment Policy at the National Foreign Trade Council, says that from the outset China has been the most pressing trade issue facing the Trump administration. 'The US President's instincts continue to be very hawkish on trade – very much "America First",' she says. 'He's very concerned about our bilateral relationships. I think he's consistently convinced the US has been taken advantage of and is not consistently pursuing our rights.'

Global stock markets jumped after the truce was announced, but China's economy has already taken a hit. Both the trade war and higher US interest rates spooked investors so much in mid-October that China's main stock exchange index slumped to its lowest level since 2014.

Companies across China have been affected, says Eric Jiang, a senior partner at Jurisino Law Group in Beijing and an officer on the IBA's International Trade and Customs Law Committee. 'Many businesses

are thinking of changing their supply chain, relocating their suppliers to another country, or sourcing from another country,' he says.

get consent from the US,' says Jiang. 'That's a serious check on China's ability to sign trade agreements with major economies.'



Businesses in China and the US have been facing considerable trade uncertainty

US companies are also feeling the heat, says Eric Emerson, Chair of the International Trade and Investment Group at Steptoe & Johnson in Washington. 'These tariffs are costing US businesses millions of dollars and forcing them to make difficult commercial decisions in an extremely uncertain legal environment,' says Emerson, who is also Co-Chair of the IBA's International Trade and Customs Law Committee.

Another challenge has emerged in the form of a new free trade agreement (FTA) negotiated between Canada, Mexico and the US. The agreement, which is set to replace the North American Free Trade Agreement, contains a US-devised provision that requires each party to inform the other signatories if they plan to sign an FTA with another state.

The clause effectively gives the US the power to veto any plans by Canada and Mexico to sign FTAs with other global powers like China. The concern now is that this provision could be replicated in any future FTAs brokered by the US, which is already planning to negotiate three separate deals with Japan, the European Union and the United Kingdom. 'They could have this poison pill everywhere, so if anyone wants an FTA with China then they'll need to

The Trump administration has repeatedly criticised the World Trade Organization (WTO) for allegedly treating the US unfairly. Yet there's growing unease that US influence at the WTO could severely affect the body's ability to resolve trade disputes. Since 2016, Washington has blocked the reappointment of judges to the Appellate Body of the WTO's Dispute Settlement Body, which deals with disputes between WTO members.

The Appellate Body typically consists of seven judges and requires a quorum of three judges to make a final decision on any dispute. However, the number of judges is now down to just three – one Chinese, one American and one Indian judge. In June, the Chair, Ujal Singh Bhatia, said the impasse on reappointing judges was 'debilitating' the WTO dispute settlement system and called on members to 'take swift and robust action to remedy this situation'.

Cases involving the US or China could be particularly affected since WTO rules stipulate that judges must be 'independent, impartial and avoid conflicts of interest' or risk being recused from a case. Jiang warns that the high potential for conflict of interest could prevent the Dispute Settlement Body from issuing judgments: 'I'm not optimistic about the WTO being able to settle this war.'

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Vera Eidelman

William J. Brennan Fellow, American Civil Liberties Union’s  
Speech, Privacy, and Technology Project

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Frank Montoya, Former FBI Director of  
National Counterintelligence

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Founder, DC Affordable Law Firm

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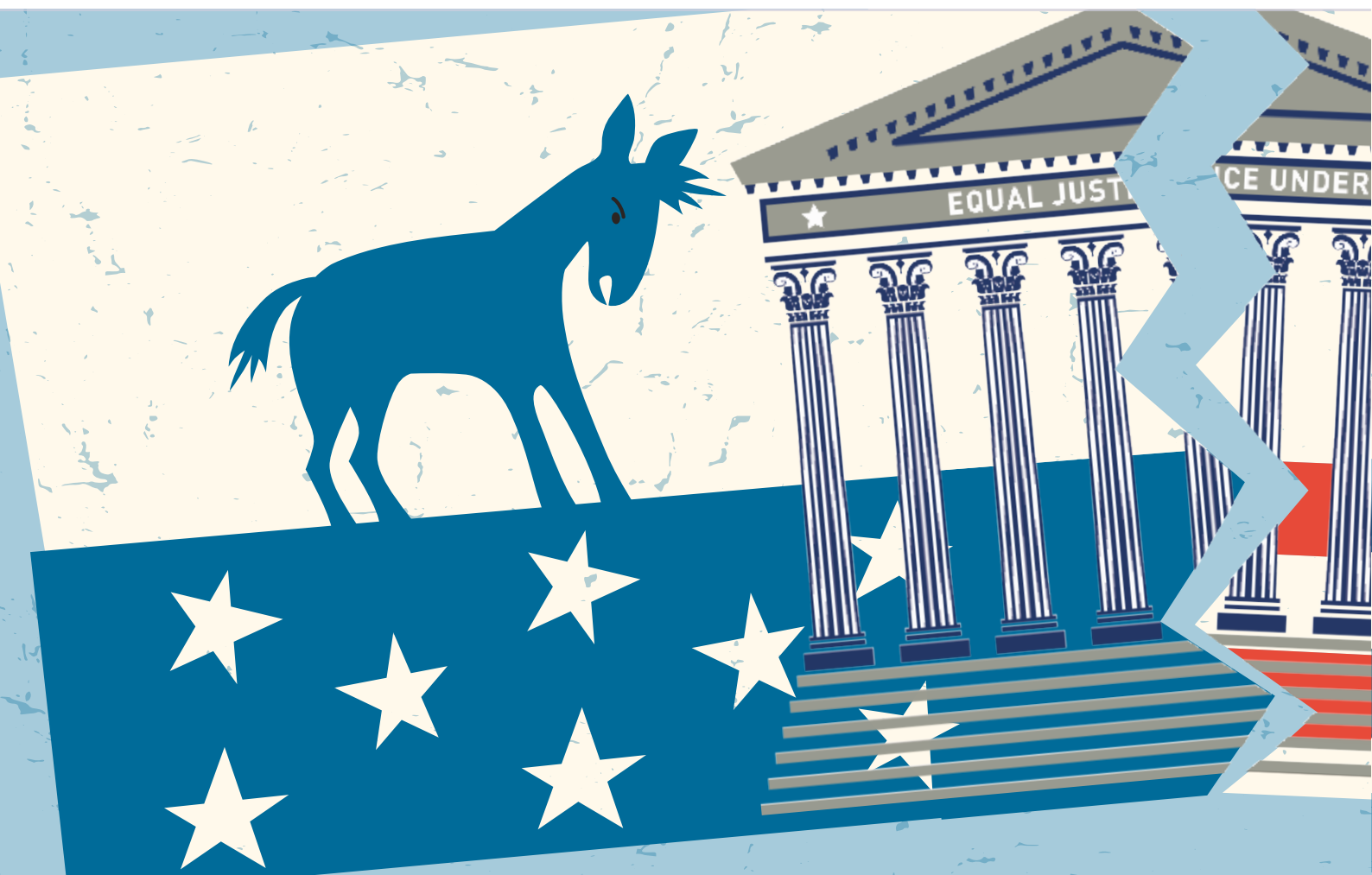
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Ghita Schwarz  
Senior Staff Attorney, Center for Constitutional Rights



# President Trump's

**The Trump administration has transformed the federal courts with unprecedented speed, largely by ignoring widely accepted norms for judicial appointments. The question now is what the response should be, in order to protect the rule of law.**

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

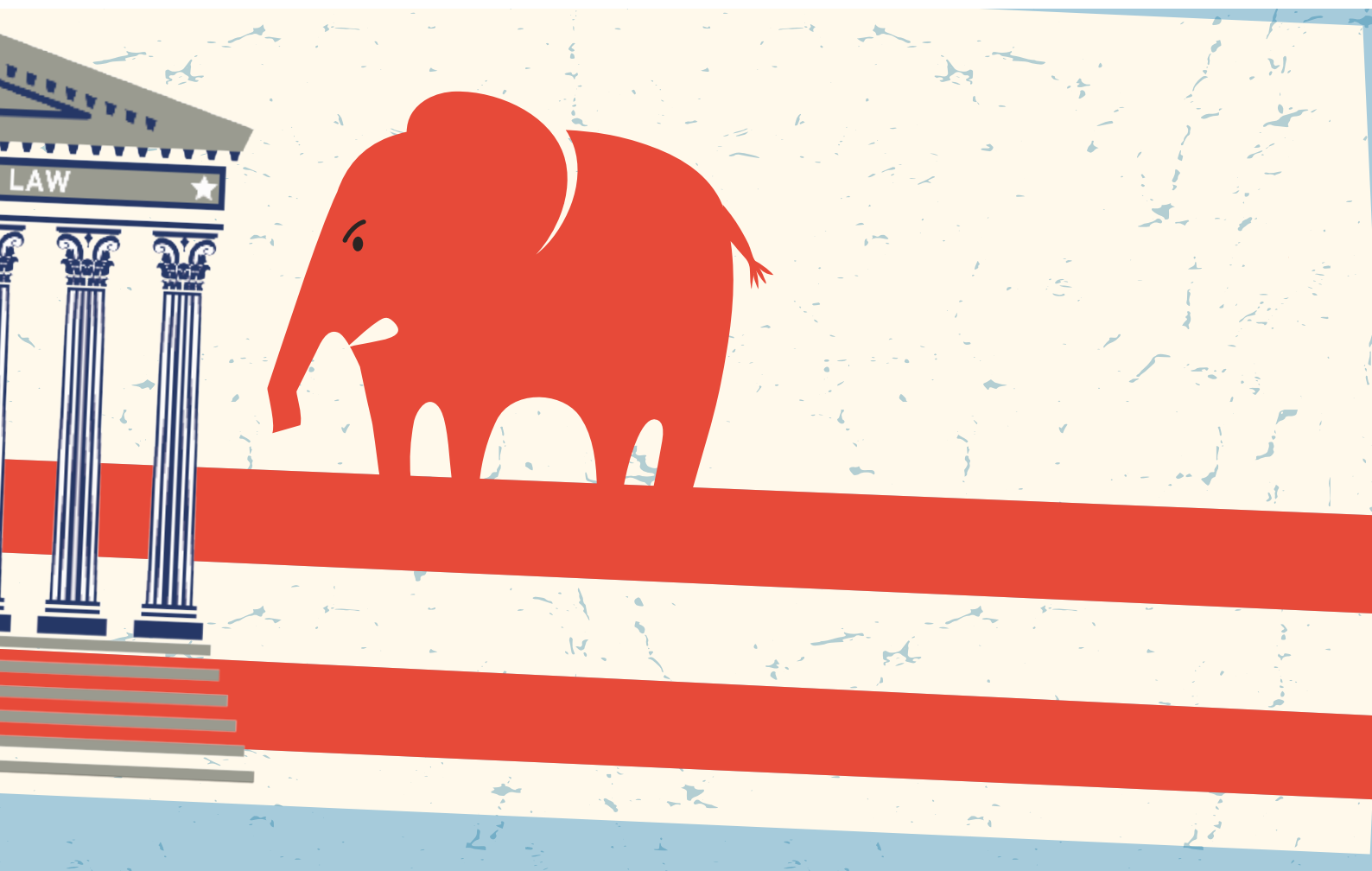
**P**resident Trump may now be unable to pass major legislation, because he has lost the House of Representatives. His regulatory rollbacks could be swiftly undone should Democrats reclaim the Presidency. But, because the Senate remains Republican, judicial transformation is ongoing.

With rare focus, President Trump has already forged a Republican majority in both the Supreme Court and the circuit courts. By 2020, his ideological appointees may well account for a third of active circuit judges, and possibly a third of the Supreme Court. Life tenure for these positions means the President's judicial influence is likely to persist longer than any

other aspect of his legacy – except perhaps climate change.

Yet, even regarding global warming, it's likely the impact President Trump has had on the judiciary could be considered of greater significance. Without a compliant bench, the President can have little effect on climate change or indeed any other issue.

Democrats, who trust in demography, foresee a future where a Republican federal judiciary continually frustrates a Democratic electoral majority. Outraged that Republicans have attained judicial dominance by shattering the norms of judicial politics, many Democrats would engage in tit-for-tat when they next



# lasting legacy

control the Senate – by leaving vacant the next open Supreme Court seat until a Democratic president is elected. A number of serious voices in political discourse go further, and openly advocate court packing. ‘The Republicans are already fighting court wars, and they’re winning,’ says David Faris, Program Director of Political Science at Chicago’s Roosevelt University, ‘so we’ve got to play hardball.’

A wide-ranging chorus of legal authorities retort that nothing could be more inimical to the rule of law.

## Norm breaking

The role of former Senate Democratic Majority Leader, Harry Reid, is important. In autumn 2013, with the political dynamics reversed, Reid eliminated the traditional right of the minority party to filibuster lower court nominees, when Republicans tried to block three moderate Obama nominees to the DC Circuit. ‘There was such Republican intransigence, Reid really had no alternative,’ says Sheldon Goldman, Distinguished Professor of Political Science

at University of Massachusetts, Amherst, and expert on the politics of judicial selection and confirmation.

Arthur Hellman is former Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System. ‘That was certainly a major, major escalation. In retrospect it was a major miscalculation,’ he says.

‘You’ll regret this,’ McConnell warned Reid, ‘and you may regret this a lot sooner than you think.’

When Justice Antonin Scalia died in February 2016, with 11 months left in the presidential term, Senate Majority Leader Mitch McConnell famously refused to hold a hearing to confirm the moderate Democrat whom President Obama nominated to the Supreme Court. Some consider that seat – and the Court majority that came with it – to be stolen.

Others, such as Curt Levey, President of the Committee for Justice, reply that ‘the situation was unprecedented because there had not been a nomination in a presidential election year with the opposition controlling the Senate since 1888, and then it wasn’t tipping the Court.

A good case could be made for letting the American people decide.’

Some social scientists, such as Harvard University’s Steven Levitsky and Daniel Ziblatt (authors of *How Democracies Die*), see Scalia’s succession as the epitome of one party pushing what’s constitutionally permissible to the limit, while defying the traditions of compromise that make democracy sustainable.

Levey offers a more sweeping historical frame. ‘Progressives have viewed the Court as a political tool since the Warren Court in the 1950s,’ he says. ‘After watching the Court implement a progressive agenda for 30 years, conservatives realised there was a need to push back.’ In the 1980s, under the influence of the newly formed Federalist Society, Republicans began to promote strict constructionist judges. And ever since, says Levey, Democrats have marred confirmation hearings. ‘Republicans get together and we say “we’re too nice”.’

It is less noted than Scalia’s succession, but perhaps equally significant, that Senator McConnell kept open 108 lower court vacancies, or about one-eighth of the federal bench. It didn’t occur by happenstance. Due to Senate stonewalling in the two years leading up to the 2016 election, President Obama won confirmation for only 12.5 per cent of his appellate nominees, and under 30 per cent of his district nominees. The historical norms are between 80 and 100 per cent, and never before had those rates (at different times) dived below 45 or 55 per cent. In absolute terms, the Senate confirmed only one circuit judge and 18 trial judges in Obama’s last two years, compared with the previous low of ten circuit judges and 58 trial judges in the final act of the Bush era.

Whenever the vicious cycle began, and whoever bears more blame, there’s no doubt Senate Majority Leader McConnell dishonoured norms once Republicans regained power. With the filibuster gone, the minority party in recent years relied heavily on the ‘blue slip’ tradition, which gave a Senator the right to veto a judicial nominee in their home state. But McConnell has ignored the blue slip for circuit nominees. By disempowering the Senate minority, some are concerned that discarding such traditions yields ideologically extreme nominees.

### President Trump’s judges

Due to the seats kept open by McConnell, the Trump administration has filled the bench at a record rate – especially in the circuits. President Trump’s 30 appellate judges are nearly double those appointed by President Obama in his first two years. Already comprising 18 per cent of active circuit judges, they’ve swiftly swung the

Republican share of the appellate bench from 41 to 53 per cent. Goldman says that number could reach 65 per cent in two years, and will skyrocket if Republicans hold the Presidency and Senate in 2020. ‘If Trump is reelected,’ says Levey, ‘then by the end of that term most or all of the circuits will tip.’

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“ After watching the Court implement a progressive agenda for 30 years, conservatives realised there was a need to push back

Curt Levey  
President, Committee for Justice

‘The circuit courts are very important because the Supreme Court can handle only a minute fraction of their cases,’ says Goldman – in the order of 0.1 per cent. ‘Effectively, they are our regional Supreme Courts.’ Levey argues that circuit courts serve as a crucial check on the cowboy district judges who are hand-picked by liberal litigants seeking nationwide injunctions. ‘Some of those district rulings could be written by an avowed member of the Trump resistance,’ he says.

President Trump campaigned on transforming the courts with ‘great judges, conservative, all picked by the Federalist Society’. The President has mostly been true to his word. Of his first 30 appellate picks, 24 were members of the Federalists, an expansive social network based on law school campuses that advances strict constructionism.

Mike Zubrensky helped to pick judges as Deputy Assistant Attorney General in the Obama administration. President Trump has, he says ‘outsourced the selection of judges to the Federalist Society’, whose main mission is to ‘overturn precedents, and make [it] more difficult for government to help people through attacks on administrative state.’

Donald McGahn – who took the lead in picking judges as President Trump’s White House Counsel until November 2018 – said in an address to the Federalists that ‘a strong judiciary’ is ‘the most effective bulwark against’ the threat of ‘the ever-expanding regulatory state’. He concluded emphatically: ‘Regulatory reform and judicial selection are so deeply connected.’

Levey, who serves on a Federalist leadership committee, replies that the Society merely plays a benign screening role, similar to that played by the American Bar Association (ABA) under Democratic presidents. ‘Basically every conservative lawyer in the country belongs to the

Federalist Society,' he says. 'Under the Democrats the ABA has veto power, and the ABA leans as far left as the Federalist Society leans right.'

Perhaps in part because he has dispensed with the tradition of pre-screening his picks with the ABA, to assess whether they are 'qualified', at least a few of the President's judicial nominees have been unlikely candidates. The Senate narrowly rejected an Alabama lawyer who moonlighted as a ghost hunter (formally, he was a member of the Tuscaloosa Paranormal Research Group) and a North Carolina lawyer who built his political name suppressing the African-American vote. Another failed nominee showed such ignorance of the courtroom that he inspired a Republican Senator to observe: 'Just because you've seen *My Cousin Vinny* doesn't qualify you to be a federal judge.'

But, for the most part, the President has hewed closely to the highly credentialed lists put forward by the Federalists and The Heritage Foundation, a conservative think tank. 'I think the quality of appointees overall is very, very high,' says Hellman. 'So many of them have Supreme Court clerkships, or are partners in top law firms.' Indeed, 24 of the first 30 Trump appellate judges began their careers as Supreme Court clerks. Perhaps tellingly, an astounding ten of them clerked for Justice Clarence Thomas, who sits at the far right edge of the Court's ideological spectrum. Former Thomas clerk James Ho set the tone by using his first opinion on the Fifth Circuit to call for a radical loosening of campaign finance regulation.

For now, Democrats still hold majorities on seven of the 13 courts, crucially including the DC Circuit, the Second Circuit (in New York) and the Ninth Circuit (in California). That's because Republican appeal judges are overrepresented in the middle of the country and the judges retiring under President Trump are mostly Republican. The compounding early effect has been to make Republican circuits more heavily and radically Republican. 'Where they are makes these appointments less transformative,' says Hellman, and 'more reinforcing.' Then again, he notes, the replacement of a free thinker like Justice Anthony Kennedy or the Seventh Circuit's Richard Posner with an ideological purist can be plenty transformative.

Last year's Fifth Circuit case of *Mance v Sessions* dramatises the courts' shifting balance – and its impact. The question was whether the Constitution allows Congress to regulate gun sales to out-of-state buyers. The circuit voted narrowly, 8-7, not to accept an *en banc* appeal or strike down the federal gun control. But the anti-gun bloc was precariously composed of the circuit's five Democrats and three moderate Republicans appointed by George W Bush. All four Trump appointees took the anti-gun



House Speaker-delegate Nancy Pelosi (D-CA) raises the gavel after being elected as House Speaker, Washington, DC, US, January 2019  
© REUTERS/Kevin Lamarque

position. Indeed, several Trump judges have echoed Justice Thomas's gripe that the Second Amendment has become a 'second-class right', and pushed for the Court to be more active in its pro-gun jurisprudence. What's more, the Fifth Circuit already had two more vacancies awaiting a Trump appointment. Had those vacancies been filled, the Circuit 'very, very likely' would have struck down the gun law, says Hellman. 'This case illustrates so much.'

At this juncture, Trump judges form at least a quarter of the Fifth, Sixth, Seventh, Eighth and Eleventh Circuits (based respectively in New Orleans, Cincinnati, Chicago, St Louis and Atlanta). With four Trump appointees apiece, the Seventh Circuit is now 9-2 Republican, and the Eighth Circuit is now 10-1. These courts could become a magnet for right-leaning forum shoppers, much as the West Coast draws the litigators of the Trump resistance. 'The Eighth Circuit may play a role during future Democratic presidencies similar to the Ninth Circuit in recent times,' says Hellman.

At the same time, several of the Democratic-majority circuits have rapidly neared the tipping point, including the Second and Ninth Circuits. Once current vacancies are filled, President

Trump will have more than doubled the number of Republican judges on the Ninth Circuit, from six to 13. The only factor delaying a Republican majority in every circuit by 2020 is the choice of 36 retirement-age Democrats to defer retirement, like the 79-year-old DC Circuit Judge Judith Rogers.

### Lower courts

Lower courts matter intensely because they've served as the strongest structural check on the President. District courts batted down the President's policy of separating border-crossers from their children and dismissed as 'cynical' his request to instead detain children long-term. After other trial courts demanded actual proof of voter fraud, the White House abandoned the charade of its 'voter integrity' commission, 'rather than engage in endless legal battles'. In regulating methane leakage and flaring by oil and gas drillers, courts have ordered environmental agencies to comply with existing rules, and forced them to do the hard uncertain work of developing new rules rather than simply 'suspending' the old ones.

“ The norm breaking has been bipartisan and it's been escalating like a Hatfield-McCoy feud. With each election, the other side gets a little more aggressive

Arthur Hellman

Former Deputy Executive Director,  
Commission on Revision of the Federal Court Appellate System

Provisionally, lower courts have blocked the President's ban on transgender soldiers (although this ban has since been allowed by the Supreme Court); his ban on asylum between ports of entry; his betrayal of the promise that 'Dreamers' may avoid deportation; and his defunding of 'sanctuary cities' that resist deportation. As the Senate continues to transform the judiciary, will these rulings stand, or will they vanish like the lower court injunctions on the third Trump travel ban?

President Trump's first appellate appointee, the Sixth Circuit's Amul Thapar, recently urged the Supreme Court to stop deferring to agencies' interpretation of their own rules. Trump-appointed justices Neil Gorsuch and Brett Kavanaugh are also noted skeptics of judicial deference to the fourth branch. Reining in regulators is 'one of the safest things you can predict,' says Hellman.

Levey agrees: 'I do think there will be pushback on the power of the administrative state.' Both hasten to add that this is a politically neutral position and, ironically, the policies to suffer near term may be President Trump's. But many liberals fear Republicans are playing a long game to hamper the Democratic regulators of the future.

For the rule of law, the most vital looming cases may involve executive authority vis-à-vis the Special Counsel or vis-à-vis Congress (for instance in the declaration of a national emergency). Optimists place their faith in the Chief Justice's concern for the Court's legitimacy. They find encouragement in Justice Kavanaugh recently joining the Chief (over the scorn of Justices Thomas, Alito and Gorsuch), in turning down a chance to narrow abortion rights – possibly showing a distaste for political controversy. However, pessimists warned the Senate at their hearings that Gorsuch and Kavanaugh took broad views of presidential power during their service in the second Bush's Justice Department and White House. It may be a token of how far the jurisprudential mainstream has shifted that Kavanaugh wrote a law review article criticising *United States v Nixon*, the 1974 case where the full Court – including five Republicans – took a narrow view of the President's power to resist a special prosecutor.

The longtime Federalist Society Chair, Steven Calabresi of Northwestern Pritzker School of Law, pushed an audacious court-packing plan at the dawn of the Trump era. It would have created up to 300 new circuit seats for President Trump to fill – tripling the bench with the avowed aim of 'Undoing President Barack Obama's Judicial Legacy'. Under bipartisan criticism, Calabresi removed his plan from the internet for revision and has yet to re-post it.

### Thinking the unthinkable

It was perhaps inevitable that liberals in the Trump age would also toy with the dream of packing the courts. 'Long seen as an unacceptable tactic, court-packing is now increasingly viewed as the least-bad option by an array of scholars and activists fearful that the Supreme Court has become a wholly owned subsidiary of the Republican Party,' writes Ian Millhiser of ThinkProgress in *Democracy: A Journal of Ideas*. *The New Republic* last year ran an essay titled, 'Democrats: Prepare to Pack the Supreme Court'. Figures as mainstream as Harvard Law School Professor Michael Klarman have embraced the taboo. Perhaps the idea's leading advocate is political scientist David Faris, whose book, *It's Time to Fight Dirty: How Democrats Can Build a Lasting Majority in American Politics*, was approvingly reviewed in *The New York Times*.

Faris's starting point is that Republicans have used undemocratic means to position themselves to undermine the Democrats' democratic agenda for a generation. 'All of the major political institutions in this country have strong anti-majoritarian tendencies,' he says. 'Over the past 26 years, Democrats have won the Senate by 30 million votes and the Presidency by 35 million votes, and yet here we are. We now have four Republican Supreme Court justices appointed by presidents who were initially elected with minority vote.'

## “ Regulatory reform and judicial selection are so deeply connected

Donald McGahn

*White House Counsel, 2016–2018*

Adding insult to injury, the Republican electoral minority, in this narrative, has used its institutional power to entrench itself and advance a radical unpopular agenda. 'Going back to 2000,' says Faris, 'a significant number of mostly 5-4 decisions have reinforced Republican political power, starting with *Bush v Gore*, and proceeding through the cases on "voter ID" laws, Shelby County gutting voting rights, and *Citizens United*' gutting campaign finance laws. 'The Court has refused to declare partisan gerrymandering unconstitutional, and is serving as a handmaiden to Republican voter suppression.'

In the coming years, Faris anticipates two dark futures. Either the Court will bless 'one-party rule' by the Republicans on the pattern of North Carolina, or – if the Democratic majority cannot be suppressed electorally – the Court will systematically overturn progressive legislation as in the years before 1937. 'This Court came very close to overturning [the] affordable care act on spurious grounds,' says Faris. 'We don't yet know what it will feel like to have nearly all of the Democratic majority's economic policies overturned, and social policies like *Roe v Wade* rolled back.'

What would happen in a world where the Democrats control the Senate without the Presidency? Most experts interviewed believe that the Democrats will at least play some form of tit-for-tat. To retaliate for McConnell's blockade of Obama confirmations, Democrats might put a freeze on circuit nominations. To retaliate for the norm-breaking confirmations of Gorsuch and Kavanaugh, Democrats are extremely likely to keep open the next two Supreme Court seats if they are vacated in an election year – and

quite likely to keep them open in any year if the President is not a Democrat.

'There's no question,' says Goldman, 'if the Democrats regain control of the Senate, they're going to play hardball, and say the Court can operate with seven or eight people.'

According to Zubrensky, 'It's very difficult for the minority party to take the high road when they come back into power after they have been rolled repeatedly. We may have reached the point in history where a President is only able to get a Supreme Court justice confirmed if their party controls the Senate.'

Faris is less equivocal: 'I think that's where we're at already but people don't want to say it out loud: you don't make Supreme Court appointments at any point during a President's four-year term unless you hold the Senate.'

'Holding a seat open for two or four years goes further, but far less troubling than court packing,' says Ilya Somin, Professor of Law at the Antonin Scalia Law School, George Mason University. 'It could be plausibly defended as retaliation in kind.'

And what might happen if Democrats control both Congress and the Presidency? Faris's preferred solution is to amend the Constitution to limit Supreme Court terms to 18 years, so that every President appoints one justice every two years. But logistically, a constitutional amendment is virtually impossible. By contrast, the Constitution is silent about the number of judges and justices. The number of justices has been set at nine since 1869, but routinely fluctuated before that. Faris predicts Democrats will, ultimately, be willing to do whatever it takes to 'restore the stolen normative order'.

Faris would then advocate legislation to create two to four new seats, depending on how many Democrats have resigned by then. Goldman thinks this idea is awful – but plausible. 'If the election of 2020 resulted in massive democratic win – White House, Senate, House – I think we might see legislation to enlarge the Supreme Court to reclaim what Democrats believe is Gorsuch's stolen seat and to reclaim the illegitimate-from-the-Democrats'-perspective Kavanaugh seat.' To make it less provocative, the legislation could provide that the next two vacancies not be filled, so that the Court returns to nine justices.

Somin has been equally critical of Republican and Democratic court-packing plans. Though the Republican plan for the lower courts was far more ambitious, he finds the Democratic plan more frightening, because it has been so favourably received by the mainstream media. Whoever starts, says Somin, the other party would surely 'counterpack' the Court and create its own judicial majority on returning to power, and then pack the rest of the courts. At best, the public

would perceive the Court as politicised. More likely, the Court would be politicised. Each party would see its own overreaching policies upheld – and judicial review would be severely degraded.

‘I do think it threatens the legitimacy of the judiciary,’ agrees Hellman. ‘At some point judges will be seen as purely the creation of politicians. This is the sort of thing that happens in “banana republics”.’

Somin echoes the University of Michigan Law School’s Richard Primus, who argues that democracy depends on each party following unwritten rules, not just the formal Constitution. Primus draws an analogy with pick-up basketball in a city playground: ‘If you care too much about winning this round and not enough about respecting your rival in the spirit of the game, pretty soon there might not be a game at all.’

Although Somin dislikes the Supreme Court’s travel ban ruling, among others, he says liberals would be foolish to undervalue the Court’s protections. First, the lower courts have been a highly effective check on President Trump, and even the Supreme Court has had its moments.

Somin cites the Court halting the deportation of aliens for ‘crimes of violence’. He argues that attitudes toward the Court shouldn’t turn on one set of cases against one administration.

An independent judiciary can check the impulses of every administration. ‘American democracy right now is teetering on the brink,’ argues Goldman. ‘These are very unwelcome disruptions of constitutional norms, the kind of disruptions that in our history lead to civil war. A lot may be attributed to the President but it’s not just him. It’s not a healthy development when “compromise” becomes a dirty word.’

Hellman agrees. ‘The norm breaking has been bipartisan,’ he says, ‘and it’s been escalating like a Hatfield-McCoy feud. With each election, the other side gets a little more aggressive. At some point I’d like to see both sides say, “Whoa, we’ve gone too far” and to recognise that we all have an interest in the judiciary not being seen as partisan.’ ☒

**Michael Goldhaber** is the IBA’s US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



# Fake rule of law

**When President Trump invokes the rule of law, he has something quite different in mind.**

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**T**he US Courts website aptly defines the rule of law as the principle of holding all accountable to public laws that are: ‘Equally enforced’, ‘Independently adjudicated’ and ‘Consistent with international human rights principles’. Hearing minority grievances is also noted as central to the notion. President Donald Trump likes to affirm that ‘We believe in the rule of law’, as he did in a speech to the gun lobby last spring. But the concept that emerges from his use of social media and from his statements is another creature entirely.

Far from equal enforcement, President Trump has routinely called for the jailing of his 2016 opponent, Hillary Clinton, by leading chants of ‘Lock her up’. Before the midterm elections, the President savaged his attorney general for lowering the Republicans’ electoral odds by prosecuting his first two supporters in Congress – Chris Collins and Duncan Hunter – for insider trading and misuse of campaign funds.

The President notoriously demanded ‘loyalty’ from then FBI Director James Comey and expressed hope that he’d let go of the probe into Russian contacts by his National Security Advisor designate Michael Flynn. In a controversial December 2017 interview, President Trump praised former Attorney General Eric Holder for ‘totally protect[ing]’ his President.

‘I have absolute right to do what I want to do with the Justice Department,’ President Trump opined. ‘But for purposes of hopefully thinking I’m going to be treated fairly,’ he explained, ‘I’ve stayed uninvolved’ in the Russia investigation.

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**“ I have absolute right to do what I want to do with the Justice Department**

**Donald Trump**  
*US President*

If law enforcement dares to be disloyal, that is, to enforce the law equally against the President, then it is they who threaten the rule of law as it’s defined by President Trump. Thus, on 15 January, the President retweeted: ‘We must stand with the rule of law against the coup targeting @realDonaldTrump.’

When it comes to the courts, the President again puts a partisan stamp on a non-partisan precept. ‘The Rule of Law is our Nation’s proud heritage,’ he declared last summer. ‘It is the cornerstone of our Freedom. It is what guarantees

equal justice – and the Senate now has the chance to protect this glorious heritage by sending Judge Brett Kavanaugh to the Supreme Court.’ After Kavanaugh was confirmed in the autumn, Democrats exercised their right of assembly on the courthouse steps. To which the President tweeted: ‘Republicans believe in the rule of law - not the rule of the mob. VOTE REPUBLICAN!’

To be generous, Trump’s speechwriter may have intended to echo the late Justice Antonin Scalia. In ‘The Rule of Law as a Law of Rules’ (1989), Scalia painted textualism as truer to the rule of law than dynamic interpretation, because it purports to place stricter bounds on judicial discretion. Or perhaps the speechwriter imagined Kavanaugh as a paragon of the rule of law because he is hostile to regulators. Then White House Counsel Donald McGahn told the Federalist Society that ‘the greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and the most effective bulwark against that threat is a strong judiciary.’

Whatever he meant by the rule of law in this context, the President has consistently shown a poor grasp of judicial independence. In the 2016 Trump University fraud case, the President assailed Judge Gonzalo Curiel as ‘totally biased’ and ‘very unfair’ on Twitter. On television, he explained: ‘Now, this judge is of Mexican heritage – I’m building a wall!... He’s a member of a society where – you know – very pro-Mexico and that’s fine, it’s all fine, but I think – I think – he should recuse himself.’

In 2017, the President attacked the judges who stayed his travel bans as political – compulsively warning in a series of tweets that they endangered the nation. ‘The opinion of this so-called judge,’ wrote Trump, ‘essentially takes law-enforcement away from our country; ‘What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.’; ‘The judge opens up our country to potential terrorists and others that do not have our best interests at heart.’; ‘I don’t ever want to call a court biased, so I won’t call it biased...But courts seem to be so political.’

At rallies, he expanded sarcastically on the theme: ‘The courts are not helping us I have to be honest. It’s ridiculous. Somebody said I should not criticize judges. Okay, I’ll criticize judges – to keep criminals and terrorists the hell out of our country; ‘I have to be nice, otherwise I’ll be criticized for ... speaking harshly about our courts. I could never want to do that.’; ‘You don’t think this was done by a judge for political reasons do you?’

The travel and asylum bans stand in special tension with the rule of law, as defined on the US Courts website, because they target minorities and offend international human rights law. But, ironically, border policy has been the primary inspiration for the President’s Twitterstorms on the rule of law.

Even before he was a candidate, @realDonaldTrump cited the rule of law in 2014 and 2015 in response to the Obama executive order protecting the children of illegal aliens, called ‘Dreamers’, from deportation. ‘If we do not protect the rule of law then we can expect even more illegals to cross the border,’ he tweeted on different occasions. ‘No amnesty. Protect the rule of law!’



Within weeks of declaring his candidacy, Trump began to connect this sentiment to his most iconic policy: ‘Respect for the rule of law is at our country’s core. We must build a wall!’ And again: ‘We must have a wall. The rule of law matters.’ In early 2018, the President reiterated the point when ‘sanctuary cities’ declined to assist in deportation: ‘I will not rest until we have secured our borders and restored the rule of law!’ In late 2018, the White House justified the asylum ban under the bolded heading, ‘UPHOLDING THE RULE OF LAW: The Trump Administration is rightfully and fully restoring the rule of law on our southern border’.

Finally, in the apotheosis of Trumpian rule of law, the white supremacist Congressman Steve King urged the President last month to stand firm on the wall even if he must declare an emergency. King’s tweet had the tone of an entreaty to ‘Our Father Who Art in Heaven’: ‘Mr. President, if the time comes,’ he wrote, ‘build the whole wall out of concrete. Let it stand forever as a monument to the Rule of Law.’

In framing Democratic immigration policy in opposition to the rule of law, the premise of populist discourse is that executive discretion in enforcement disdains lawful limits on immigration. This is rather rich given the broadening of executive power that an emergency declaration would entail, and given the tension between an asylum ban and US obligations under domestic and international law. But, the more fundamental confusion is between the rule of law and any substantive legal duty. Properly understood, the rule of law is a set of procedural guarantees subjecting everyone – from the head of state to an illegal alien – to consistent laws that are equally enforced and independently adjudicated. Let this President’s Twitter feed stand as a monument to the rule of law’s misunderstanding. ☒

Michael Goldhaber is the IBA’s US Correspondent. He can be contacted at michael.goldhaber@int-bar.org

In January 2019, the @realDonaldTrump account retweeted Tom Fitton, who shared a Fox News clip called ‘Tom Fitton: No evidence Trump is Russia agent’.

## American presidency: judges weigh crimes of Trump campaign chief Manafort in major wins for Mueller probe

MICHAEL GOLDHABER, IBA US CORRESPONDENT

In a pair of sentencing hearings in March, two judges rendered the different judgments of the two Americas for the crimes of Paul Manafort, who served as President Trump's campaign chief.

The sentences mark the most significant wins for Special Counsel Robert Mueller in his now-concluded investigation into links between the Russian government and individuals associated with Trump's presidential campaign. The role of Paul Manafort goes to the core of the Special Counsel's investigation.

In total, Manafort was sentenced to seven-and-a-half years in federal prison, on a maximum potential sentence of 34 years. Prosecutors also moved to seize about \$24m of Manafort's real estate, bank accounts and life insurance.

Judge T S Ellis III, appointed by President Ronald Reagan, gave Manafort just under four years in prison – on a maximum recommended sentence of 24 years – after a Virginia jury convicted him of multiple tax and bank frauds. Judge Ellis stated Manafort has lived 'an otherwise blameless life'.

Judge Amy Berman Jackson, appointed by President Barack Obama, gave Manafort the statutory maximum of five years for a broad conspiracy to defraud the US, to which he pleaded guilty, also encompassing money laundering, secret foreign bank accounts and secret foreign lobbying. Judge Jackson said it's 'hard to overstate the number of lies and the amount of fraud' Manafort committed merely 'to sustain a lifestyle at the most opulent and extravagant level'.

Because of overlapping conduct, Judge Jackson made half the conspiracy sentence concurrent with Judge Ellis's. She gave Manafort a year in prison, on a statutory maximum sentence of five years, for witness tampering.

Former US Attorney for Michigan, Barbara McQuade, called Ellis's sentence 'absurdly low', and Jackson's somewhat lenient, though well-reasoned. Former federal prosecutor Seth Waxman found Ellis's sentence 'extremely light' and Jackson's 'a bit light', but perhaps justifiable as Manafort has turned 70. McQuade felt it's 'still too low for such egregious conduct', and possibly too lenient to deter a conspiracy so lucrative.



Judge Ellis called the sentencing guideline 'way out of whack'. He complained that the Justice Department treats secret foreign bank accounts with undue seriousness and expressed the wish to avoid sentencing disparities between similar defendants.

McQuade criticised Ellis for ignoring the guidelines based merely on his sentiment that they are too high for certain white-collar crimes. 'You don't hear that sentiment expressed about other kinds of crime,' says McQuade. If Manafort demonstrates any disparities, he 'demonstrates the disparities between the haves and the have-nots'. The day before Manafort received 47 months, Brooklyn public defender Scott Hechinger saw a client offered 36–72 months 'for stealing \$100 worth of quarters'.

To view Manafort as 'otherwise blameless' is highly questionable. Manafort's plea admitted all the conduct in the ten counts on which the jury hung, as well as the lobbying offences for which he's not been tried.

Prosecutor Andrew Weissmann argued to Judge Ellis that Manafort's crimes 'served to undermine and not promote American ideals'. Manafort exported the dark arts of US campaign consulting to foreign figures exemplified by ex-convict Viktor Yanukovich, whose earlier efforts to steal the Ukrainian election

triggered the Orange Revolution. Manafort resurrected Yanukovich by stoking hatred between Ukrainian and Russian speakers. Manafort collected millions in secret payments, as Yanukovich distributed Ukraine's wealth to allied oligarchs and looted an estimated \$40bn from the Treasury.

Significantly, court papers refer to an alleged liaison in August 2016 between Manafort and Kiev collaborator Konstantin Kilimnik, who is linked by Mueller to Russian intelligence. According to the papers, Manafort shared 75 pages of Trump campaign polling data with Kilimnik.

Manafort has admitted reaching out through Kilimnik to tamper with witnesses at his trial. And Judge Jackson later found that Special Counsel Mueller was justified in voiding Manafort's cooperation agreement because Manafort repeatedly lied to him about Kilimnik.

Judge Ellis noted at the sentencing that Manafort had never 'decided the wisdom or appropriateness of delegating to special prosecutors broad powers'. In a revealing pre-trial moment, the judge exclaimed: 'You don't really care about Mr Manafort's bank fraud. What you really care about is what information Mr Manafort could give that would reflect on Mr Trump and lead to his prosecution and impeachment.'

By contrast, Judge Jackson rebuked Manafort's lawyers for suggesting she had found 'no collusion' – as collusion had never been charged and was never under discussion before either judge. 'Court is one of those places where facts still matter,' said Judge Jackson.

Nevertheless, outside court, Manafort's lead lawyer Kevin Downing told the press: 'Judge Jackson conceded that there was absolutely no evidence of any Russian collusion in this case. So... two courts have ruled no evidence of any collusion.' Hecklers drowned out Downing with cries of 'That's not what she said!'

McQuade was shocked. 'Judge Jackson clearly said this case is not about collusion, and to suggest otherwise is wrong. For Downing then to go out on the courthouse steps and carry on a disinformation campaign was quite bold and inaccurate. I can't believe he had the nerve.'

Central American migrants walk during their journey towards the United States, in Villa Comaltitlan, Mexico, 18 April 2019 © REUTERS/ Jose Cabezas



# Trouble at the border

While President Trump appears to have imagined a border crisis into being, the devastating human consequences are all too real.

MICHAEL GOLDHABER, IBA US CORRESPONDENT

Over the years, many US Presidents have attempted to galvanize support by creating their own myths. America's 45th President, Donald Trump, likes to talk about a burly Mexican border-crosser who pretends to need asylum. "I am very afraid for my life, I am afraid for my life," the President imagines the man whining, in the version he gave at his first 2020 campaign rally in March. 'Okay. And then I look at the guy. He looks like he just got out of the ring. He's a heavyweight champion of the world. It's a big fat con job, folks.'

The fraudster of the President's fancy could hardly differ more from the actual asylum seekers of the southern border who step forward to challenge his policies in court complaints – often adopting pseudonyms. Alex Doe was an evangelical pastor who worked with the US Agency for International Development to discourage Honduran youth from joining gangs, until the Mara 18 gang tried to execute him while riding home on his motorbike, and left him bleeding in the street. Ian Doe was a Honduran policeman on the drug task force. After Ian refused to collaborate, narco-traffickers tried to kill him, but killed his brother instead. John Doe was a Guatemalan dog groomer who fed stray dogs tortured by a Ronderos de San Juan death squad. The thugs abused him with indigenous slurs, until they suspected him of reporting them for animal cruelty, at which point they killed the strays, left them at his doorstep, and vowed that he would suffer the same fate. 'The death squad controls our entire community,' observes John Doe.

In December 2017, a secret memo was circulated at the top levels of the US Homeland Security and Justice Departments, laying out 'Policy Options to Respond to Border Surge'. This, despite the reality that border crossings were near a 40-year-low. In addressing an imaginary surge of illegal immigrants, the Trump administration has stoked a genuine surge of asylum seekers. 'Their absurd responses to a phantom crisis created a new demand for asylum,' says Brian Griffey, Regional Researcher/Advisor (North America) at Amnesty International. 'And now there's something of an emergency based on their international law-violating policies.'

In 2000, when migration was at its height, over 1.6 million border-crossers were caught, the vast majority single Mexican men in search of jobs. By 2016, that figure was 300,000. The numbers are expected to have ballooned again to as much as 800,000 in 2019. Equally important, the 'nature of the migration has fundamentally changed,' notes Leon Rodriguez, former Director of US Citizenship and Immigration Services. At the turn of the century, Central American families fleeing violence were scarcely in the picture. Now, for the first time, they form a majority of border-crossers.

The President speaks about Latin America 'sending their worst' to the US. If anything, this is the wrong way round. El Salvador perennially leads the World Economic Forum's ranking of nations most plagued by organised crime, Honduras and Guatemala rank in the top five.

These nations form Central America's troubled Northern Triangle. Their gangs emerged at the end of the region's civil wars in the 1990s, when the US shipped back young men from gangs like



MS-13 and Mara 18 that developed in Los Angeles (and US prisons). ‘Having left as boys, they returned as gangsters,’ notes Roberto Saviano in his essay ‘The Migrant Caravan: Made in USA’. Many of those gangsters were toting American guns; the Center for American Progress traces nearly half of the crime guns in El Salvador and Honduras to the US.

Then, in an equally crucial shift – after the US ramped up the Mexican War on Drugs in the late 2000s – Mexican drug cartels adapted by trafficking Colombian cocaine to the US via the Northern Triangle. Gangs best known for extortion developed a nasty sideline as hitmen for the drug cartels. In 2016, El Salvador led the world with a murder rate of 83 per 100,000, and Honduras placed second with 57. That’s ten to 15 times the US murder rate, which is the highest in the developed world, and comparable to the rate of war deaths in Afghanistan.

‘In the face of this growing humanitarian challenge, the administration’s answers have all been punitive,’ says Doris Meissner, Director of the US Immigration Policy Program at the Migration Policy Institute.

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“ In the face of this growing humanitarian challenge, the administration’s answers have all been punitive

Doris Meissner  
Director, US Immigration Policy Program,  
Migration Policy Institute

‘We’re stuck in an outdated enforcement-first mindset designed for economic migrants, and that’s why we see children in cages,’ says Sarah Pierce, a policy analyst for the US Immigration Policy Program. ‘The President’s punitive measures have only backfired.’

President Trump calls asylum an immigration law ‘loophole’. But protecting migrants is often the point of immigration law. The right to asylum lies at the core of the 1951 Refugee Convention, embodied in the US Immigration and Nationality Act. That means giving asylum seekers access to fair procedures on the host nation’s territory – and not sending them back to where they fear for their lives. The principle of ‘non-refoulement’, enshrined in the Protocol Relating to the Status of Refugees and the Convention against Torture, has acquired the status of a fundamental principle under customary international law.

The President is ‘attempting by fiat to destroy a system established by the will of Congress in accord with international law,’ says Karen Musalo, Director of the Center for Gender & Refugee Studies and the Refugee and Human Rights Clinic at University of California Hastings College of the Law. We’ve seen ‘an unrelenting series of attempts to eliminate’ asylum.

### Family separation

It began with family separation. On 7 May 2018, then Attorney General Jeff Sessions announced a strict policy of prosecuting illegal border-crossers, even if accompanied by children. Over 2,700 migrant children were stripped from their parents in a matter of weeks. The Homeland Security Inspector General found that ‘thousands’ had been separated earlier. Amnesty International documented border agents telling parents seeking asylum at legal ports, ‘you don’t have any rights here’ as they tore away their children.

President Trump insists that his predecessor practised the same policy of family separation. This comes as news to President Obama’s Assistant Secretary for the Administration for Children and Families of the Department of Health and Human Services, Mark Greenberg. ‘We separated children only in the best interests of the child, for instance if a father was abusive,’ he says. ‘At the end of 2016 it was about six kids a month – the numbers were so low I didn’t even realise we were doing it.’

Under the Obama administration, thousands of children who arrived without parents were detained, but with the aim of reuniting them with family. For unescorted children in Trump’s administration, the approach is that where possible, relatives who step forward to take their custody should be deported. ‘Trump erased the line between enforcement and child welfare,’ says Greenberg. ‘And that made families fearful to come for their children.’

The net result is that more children filled shelters, and fewer left. A new tent city of 3,800 children mushroomed in Tornillo, Texas. ‘I don’t like to use adjectives about anything,’ says Greenberg, ‘but the way the Trump administration treated families last spring is the most horrendous thing I’ve ever seen in my career.’

On 20 June 2018, in the face of extreme international outcry, President Trump halted family separation. Six days later, San Diego federal judge Dana Sabraw declared family separation unlawful. ‘The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property,’ Judge Sabraw concluded in *Ms L v ICE*. ‘Certainly, that cannot satisfy the requirements of due process.’

The judge demanded family reunification, and the government is complying, though significantly hampered by shoddy record-keeping.

Yet, by the same executive order that ended family separation, the Trump administration sought to indefinitely detain children and parents together. In July, Los Angeles federal district judge Dolly Gee quickly ruled this unlawful, calling it a cynical attempt to unravel the longstanding *Flores* consent decree, which caps child detention at 20 days. Undeterred, the Trump administration went back to its secret options memo, and proposed family detention by both legislation and regulation. But these options are unlikely to be successful, largely because the Republicans lost Congress, and because regulation must satisfy Judge Gee. For the time being, the President has given up on separating or detaining families, and looks for other ways to deter asylum seekers.

In June 2018, the Attorney General abruptly reversed Obama-era precedents recognising a right to asylum based on private violence. 'Generally,' he decreed, 'claims by aliens pertaining to domestic violence or gang violence... will not qualify for asylum'. No ruling could better target the Northern Triangle. 'Domestic violence is rampant in these countries, as is gang violence,' notes Judy Rabinovitz, Deputy Director of the American Civil Liberties Union's Immigrants' Rights Project.

Sometimes, a legal tweak can do more damage than abject physical cruelty. Asylum approval rates, already down from 43 per cent to 30 per cent in two years, seemed sure to plunge further. But, at the end of last year, DC federal judge Emmet Sullivan blocked the new policy, pending appeal, stating there's 'no legal basis for an effective categorical ban on domestic violence and gang-related claims'.

The President has already expressed his wish for a categorical ban. 'When somebody comes in,' he tweeted in the summer of 2018, 'we must immediately, with no Judges or Court cases, bring them back from where they came' and 'When people, with or without children, enter our Country, they must be told to leave... Tell the people "OUT," and they must leave, just as they would if they were standing on your front lawn.'

In November, the President officially proclaimed an asylum ban on those who cross the Mexican border between legal ports of entry. Just 12 days later, San Francisco federal judge Jon S Tigar granted a temporary restraining order to halt the asylum ban nationwide. *East Bay Sanctuary Covenant v Trump* provisionally found the ban at odds with the Immigration and Nationality Act proviso that any alien who arrives in the US, 'whether or not at a designated port of arrival', may apply for asylum. This January, the Supreme Court kept this injunction in place while the asylum ban is litigated on the merits.

What about those who seek asylum at legal ports of entry? At least as far back as April 2018, activists allege that the Trump administration has followed a policy, practice and pattern of 'turning back' migrants who seek asylum where they're supposed to. According to the complaint filed in San Diego federal court this autumn in *Al Otro Lado v Nielsen*, US Customs and Border Protection has manufactured severe bottlenecks

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“ Travelling by caravan is less an invasion tactic than a desperate strategy of self-protection

at legal border-crossing points by artificially restricting their capacity and adopting a waiting list or 'metering' policy. Of course, if crossing at ports of entry is impracticable, and asylum between points of entry is banned, the border would effectively be sealed.

With family separation and the asylum ban blocked in court, and the 'turnback policy' under challenge, the Trump administration turned to their favoured long-term option from the leaked memo: 'Remain in Mexico'. The 'Migrant Protection Protocols', as they're euphemistically known, have been tested since January at a crossing between San Diego and Tijuana, and in some other sectors since March. The idea is to force migrants to await their asylum hearings in Mexico. The stress on Mexican society will obviously be immense. For the moment, however, Mexico is cooperating to curry favour with President Trump on trade, perhaps hoping that US courts will void the policy.

The problem, activists argue, is that Mexico isn't safe for migrants. Along the migration route, gangs routinely kidnap those passing through, holding them for ransom – or worse.

In Tamaulipas, on the Texan border, a group of 72 migrants were massacred by the Zetas cartel in 2010. In the same state, this February and March, two busloads of Northern Triangle migrants were kidnapped en masse, while a third busload (including 15 children) was rescued. It is little wonder that the US State Department treats Tamaulipas and four other Mexican states like war zones in its travel advisories. Vulnerable and stigmatised, Central Americans in Mexico must also contend with street and hate crime. Mexican police are often indifferent, and sometimes predatory. In 2017, Médecins Sans Frontières found that over two-thirds of Northern Triangle migrants face

violence on their journeys, and nearly a third of the women suffer sexual abuse. Howard Doe, for instance, alleges that he was kidnapped by cartel Los Zetas in Mexico en route from Honduras. After escaping, he was mugged for his phone in Tijuana, on the California border. Grimly, one of the few spots on earth with a higher murder rate than the Northern Triangle is Tijuana (close to 20 times the US rate), where America now deposits asylum seekers for their safety. Travelling by caravan is more a desperate strategy of self-protection than an invasion tactic.

The plaintiffs in *Innovation Law Lab v McAleenan* say 'Remain in Mexico' lacks support in the statute's text, while disrespecting the rights to counsel and non-refoulement. San Francisco federal judge Richard Seeborg temporarily enjoined the policy in April. But, whereas the 'asylum ban' is void pending appeal, the Ninth Circuit is allowing America to make migrants stay in Mexico while the courts deliberate.

A key issue is whether the US still honours the right to apply for asylum without fear. On paper, America won't return someone who asserts that they fear returning, and is deemed 'more likely than not' to be persecuted. In practice, asylum officers are reportedly under heavy pressure to return all migrants to Mexico. When they don't, they're likely to be overturned.

### Family separation 2.0

Through each of these policy experiments, migration has continued to rise. In 2019, unescorted children have been coming at a record pace, and families at a wholly unprecedented level. From October 2018 to May this year, Border Patrol caught 45,000 stranded

children (up 73 per cent), and 250,000 family members – five times as many as the same period a year earlier. 'It's hard to say there's no crisis now,' says Rodriguez.

We can't know what's driving the Trump-era migration. But the flow is unusually dominated by families, and the upward trend began in summer 2018, after the President halted family separation. To the Migration Policy Institute, this suggests that Trump's actions are at least partly to blame. Central American families or their recruiters saw the start-and-stop nature of Trump's policies and decided they should travel north while they could.

The surge that followed has made the President seethe. At the turn of the year, he forced a government shutdown in order to pressure Congress to fund a border wall. This failed. In February, he declared a national emergency to justify \$6bn in executive funds, setting off a new round of litigation.

'[W]e're turning to what some folks might think [are] extreme measures,' Chief of Staff Mick Mulvaney publicly stated in late March. The same week, the President reportedly ordered the Mexican border to start closing to all trade and traffic, until he was talked down by Mulvaney. Subsequently, the President ordered the State Department to cut off \$500m in humanitarian aid to the Northern Triangle. Virtually anyone who knows anything about either migration or Central America was apoplectic. The Northern Triangle has accounted for 95 per cent of families and 83 per cent of stranded children crossing the border in 2019. What could America gain from defunding efforts to dissuade Honduran youth from joining gangs? The President was halting the only programmes that struck at the root of the problem. Five ex-chiefs of the US

Immigrant children are led by staff in single file between tents at a detention facility next to the Mexican border in Tornillo, Texas, US, 18 June 2018 © REUTERS/Mike Blake



Southern Command in Latin America, including a favourite Trump general, declared the US was cutting off its nose to spite its face. But this time no one could talk the President down.

With his preference for punitive solutions, the President circled back to family separation, reportedly spending four months pressuring then Homeland Security Secretary Kirstjen Nielsen to renew the practice. ‘He just wants to separate families,’ a top administration official said. ‘At the end of the day, the President refuses to understand that [we are] constrained by the laws.’ On this account, Nielsen privately resisted. In early April, she resigned.

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“ Their absurd responses to a phantom crisis created a new demand for asylum. And now there’s something of an emergency based on their international law-violating policies

Brian Griffey

Regional Researcher/Advisor (North America), Amnesty International

Though it hardly seemed possible, the pace of immigration reform accelerated. On 16 April, the Attorney General William Barr ended bail for asylum seekers, pending litigation. On 29 April, the President announced he would charge fees for asylum, limit immigration cases to 180 days, and raise the total of troops or National Guards at the border to 5,200. On 30 April, the President asked Congress for \$4.5bn in non-wall border funds, including \$2.8bn for children’s shelters. ‘So you create chaos,’ says Democratic Representative Katherine Clark, ‘and then ask for more money?’

More chaos is sure to come, and it might take the form of family separation. Trump lawyers know that *Flores* limits child detention, and *Ms L* bars family separation. But on their theory, it’s fine to make parents choose either to be warehoused with their children (waiving their *Flores* rights), or to give up custody of their children (waiving their *Ms L* rights). ‘Forcing families to choose between indefinite incarceration and family separation is no choice at all,’ says Human Rights First. The White House calls the idea ‘binary choice’, while critics call it Family Separation 2.0, in an allusion to the court-approved Travel Ban 3.0. ‘Unfortunately, I think their model is the Muslim Ban,’ says Griffey. ‘Adopt manifestly illegal policies and then invite court challenges. Once you lose, try to squeeze the policy through the courts in altered form even though it still violates international law.’

Is there a legitimate aim to all these policies? In 2017, the Committee against Torture clarified that states can’t drive away asylum seekers with ‘dissuasive measures’. In *RILR v Johnson*, a DC

federal court held that a President can’t act ‘for the purpose of deterring future immigration’. Rights advocates accuse President Trump of doing exactly that, again and again.

‘The government wants to deter asylum seekers from coming in any way it possibly can,’ says Melissa Crow, Senior Supervising Attorney at the Southern Poverty Law Center.

‘It’s like you’re at the dike and there’s one hole here and another there, then another, and you’re just going from plugging one hole to the next,’ says Rabinovitz, who’s clear on the motives for all of these moves: “We’ll do what we can to keep people from coming.”

Secretary Nielsen denied this. But the December 2017 memo predicted family separation would have ‘a substantial deterrent effect’. An April 2018 memo to Nielsen said it would ‘have the greatest impact on current flows’. The President told Fox News in April: ‘When they used to separate children... far fewer people would come... [Then] we go out and we stop the separation. The problem is, you have ten times more people coming up with their families. It’s like Disneyland now.’

Christopher Hajec, Director of Litigation at the Immigration Reform Law Institute, says their aim was ‘to deter *illegitimate* asylum claims – and that’s not unlawful’. Chief of Staff John Kelly said they merely aimed to deter people from risking their lives on a ‘terribly dangerous’ journey.

‘That’s just a false narrative,’ retorts Rabinovitz. ‘The goal of all these policies is to shut the border instead of setting up a meaningful process to determine who has valid asylum claims.’

Ghita Schwarz, Senior Staff Attorney at the Center for Constitutional Rights, goes much further. The attack on asylum is ‘about demolishing people in a weak position and demolishing people who are facing violence,’ she says. ‘Part of it is racial and part of it is just cruelty.’ Schwarz points out that the President has pending lawsuits relating to the deportation of a million Latinos. That includes over 600,000 Mexican ‘Dreamers’ (those who entered America illegally as children) and some 400,000 Salvadorans, Hondurans, Haitians or Nicaraguans who were given ‘temporary protected status’ during times of crisis.

‘I don’t think it’s racist when some of the prime victims of the current system are the migrants themselves,’ says Hajec. ‘These bodies they’re finding on ranches on the border as a matter of routine in various degrees of decomposition are those of migrants.’

At the rallies where he speaks his mind, the President doesn’t dwell on the suffering of migrants. His concern is those who are ‘caught and released’. ‘You say, “Come back in three years for your trial.” Tell me what percentage of people come back?’ he said to a crowd in January. ‘Would you say 100 per cent? No, you’re a little off.

Like how about two per cent? [Laughter] And those people you almost don't want, because they cannot be very smart. Two per cent. Two per cent. Two per cent come back. Those two per cent are not going to make America great again, that I can tell you.'

Like many of the President's numbers, this 'two per cent' is a mystery to those in the know. On the contrary, a *California Law Review* study of immigration hearings from 2001 to 2016 found that 'family members seeking asylum who were released from detention' showed up 96 per cent of the time. Homeland Security's own experts testified in the Senate last year (based on 2014 data on the Mexican border) that the rate of family members showing up to hearings is 47 per cent.

The President would like to shift the decision on asylum from immigration judges to the gung-ho border patrol (among his fiercest partisans). Meissner and Pierce would prefer to shift the final asylum decision to asylum officers, who are already trained to make initial assessments. 'We'd like to see asylum officers make the ultimate determination within a month or two,' says Pierce.

## “ The way the Trump administration treated families last spring is the most horrendous thing I've ever seen in my career

Mark Greenberg

Former Assistant Secretary, Administration for Children and Families, Department of Health and Human Services

Rodriguez led the asylum officers as Obama's head of Citizenship and Immigration Services. His advice is to hire more immigration judges. 'Don't build a wall,' he urges. 'Build courtrooms.' The wall is simply irrelevant for today's core border crisis. 'Earlier waves of migrants were predominantly economic,' says Rodriguez. 'Their goal was to go to remote areas and sneak across. Now the drivers of migration are humanitarian. These people want to get caught.'

According to recent Gallup, Pew and Politico polls, a record three-quarters of Americans say immigration is good for the country. The same proportion approve a strong border patrol. However, only a quarter favour child separation, only 30 per cent wish to make asylum harder – and only 40 per cent want a wall.

Musalo, co-author of *Refugee Law and Policy*, says immigration courts need to be improved, not just expanded. In 2018, the Attorney General voided the right of asylum seekers

to a hearing, limited immigration judges' discretion, and gave each an annual quota of 700 cases. 'Immigration judges are treated as minions of the Attorney General, and they're getting a clear message not to grant asylum,' says Musalo. In the future, she'd like them to be given independence, vetted for judicial temperament and trained rigorously.

Of course, the best solutions would significantly diminish the demand for immigration judges by improving conditions in Central America.

### Back to the border

Seven-year-old Jakelin Caal Maquin liked climbing the trees near her family's dirt-floor hut in the rural Mayan township of Raxruhá, Guatemala. Her father, who harvested corn and beans for \$5 a day in a region under stress from climate change and deforestation, mortgaged his small farmholding to pay smugglers to bus them to the US border. He bought Jakelin her first pair of shoes for their hike through the New Mexico desert.

Jakelin and her father joined a caravan of about 150 Central American families and children who sought out the US border patrol and surrendered with the goal of seeking asylum. In every respect, her group typifies today's migration on the US-Mexico border. Jakelin died on 8 December 2018 of a bacterial infection after a night in US custody near Antelope Wells, a ghost town inhabited by only a handful of well-meaning border agents, who were not equipped for an influx of families. The story of Jakelin's tragic death provides a snapshot of the Southern migration.

She didn't resemble the ultimate Mexican fighter of President Trump's imagination. Neither did she resemble the martyrs who populate legal test complaints, tailor-made for US asylum. Jakelin was selected by fate rather than by the President or the American Civil Liberties Union. So was eight-year-old Felipe Alonzo-Gomez, who also hailed from a remote village of Mayan farmers in Guatemala, and died in the custody of US border patrol on Christmas Eve 2018. Jakelin and Felipe were not bad *hombres* with bulging biceps. Like so many others, they were probably mainly economic migrants, who can be seen as victims of a complex humanitarian disaster.

'So what if some people are just coming because they're poor?' asks Rodriguez. 'If our answer as the wealthiest, most powerful country on earth is to say, "Screw you, you're not our problem," then we need to have a new national conversation... At the end of the day, I believe our national consensus is pro-immigrant and pro-humanitarian.'

Jakelin deserved a fair, swift hearing based on clear thinking about America's national priorities. What Jakelin didn't deserve was a choice of cruelties based on a myth. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



## GLOBAL LEADERS

# Richard Haass

## President of the US Council on Foreign Relations

**Richard Haass has been at the forefront of US foreign affairs for more than 30 years. He was a close adviser to former Secretary of State Colin Powell, and served in key positions coordinating the Northern Ireland peace process and US policy in Afghanistan. He speaks to the IBA's US Correspondent, Michael Goldhaber, about the fault lines in international relations and America's role in the world order.**

**Michael Goldhaber:** In assessing global affairs today, you've quoted the poet WB Yeats when he described the state of the world after the First World War. Yeats wrote: 'Things fall apart; the centre cannot hold.' Is that a model for our times?

**Richard Haass:** It was written a hundred years ago, but I think it's a pretty good model for our times. In the recent elections for the European Parliament, traditional parties associated with the centre, which had dominated European politics for a long time, were weakened, and smaller parties more to the left or the right did better. In the US, in the Democratic Party, you see strong voices on the political left. We'll see how that plays out. And the Republican Party now essentially moves away from the centre on any number of issues.

Even though a plurality of Americans show up as independents, the truth is it's harder and harder to secure a governing centre. What we see is a much more polarised, divided electorate. We see that manifested in Congress.

What we've essentially seen is a hollowing out of the centre. There's all sorts of reasons to account for it – from social media, to narrowcasting rather than broadcasting on platforms like cable television, to how we raise money, to the weakening of political parties.

**MG:** You've observed that the real danger may arrive when we see a coalition between right-wing cultural populism and left-wing economic populism, the way perhaps we're now seeing in Italy. That could be a very potent combination.

**RH:** We're seeing it in Italy, and that's not an attractive model. I think the problems it will cause for Italy and Europe could be considerable. One could imagine a version of it in France if at some point the yellow vests movement and the former National Front find a way to work together. It's hard to say exactly who's who nowadays. And in the US, we're seeing elements of left and right agree on certain issues. On trade, for example, it's hard to see differences between the Trump

administration and some of the people running for the Democratic nomination.

We have to be wary that this kind of anti-establishment mood could invite some strange bedfellows. They may not always agree on what it is they're for, but they could agree on what it is they're against. The problem with the politics of agreeing on what you're against is you tend to disrupt before you come to an agreement on what to replace it with.

## “ There are lots of reasons to be concerned by the trend lines in international relations. One is the revival of great power

**MG:** You've been saying since the last years of the Obama administration that the liberal postwar order is in decline. What do you base your view on?

**RH:** There are lots of reasons to be concerned by the trend lines in international relations. One is the revival of great power. Competition frictions are potentially worse. US–Chinese and US–Russian relations are far rougher than they were just a few years ago. What Russia did in Ukraine, with the re-emergence of the acquisition of territory by force, is a violation of what many consider to be the most basic law or norm of international relations. There's also Russian interference in American and European elections.

The US is introducing all sorts of tariffs, which is a real threat to the global trading order. And America has now come out of any number of international agreements. Multilateralism is under pressure. Alliance relationships are under pressure. Institutions created after the Second World War are now a bit long in the tooth, and in many cases haven't kept up with new power balances or new technologies. I could go on.

**MG:** You alluded to Russia conquering Crimea. Is the US position on these sorts of issues, like Israel's annexation of the Golan Heights, sending a signal that UN Security Council resolutions aren't worth the paper they're written on?

**RH:** I worry that people in the [Trump] administration aren't always connecting the dots.

In a recent example, we were very rough on China on the 40th anniversary of the Tiananmen Square events. The administration issued tough criticism of China, which is fair enough in principle, but it would have been a lot more impressive if the US had been critical of other governments that have been trampling human rights, including the Philippines, Russia, Turkey and so on.

Any time we are selective or inconsistent in our application of principle, we create openings for others, justifications for others. This administration didn't invent it by the way. It's interesting to see what the US did against Libya under the Obama administration: situations like that are then cited by someone like Russia's President Putin as justification for what he then did in Crimea. We have to be really careful about precedents, about inconsistencies, about selective justifications for actions.

**MG:** You've said trade might be an area of stability or resilience. Have you become more pessimistic of late, given President Trump's brinkmanship on trade with China and Mexico?

**RH:** There's been some good news on trade. A few months ago, global trade volume was still up. And even though the US declined to

Russia's President Vladimir Putin and US President Donald Trump attend a meeting on the sidelines of the G20 summit in Osaka, Japan, 28 June 2019. Sputnik/Mikhail Klimentyev/Kremlin





A placard showing a 1989 photo of 'Tank Man' from Tiananmen Square is seen among other notes posted on a wall near the Legislative Council Building in Hong Kong, June 2019. REUTERS/Jorge Silva.

join the Trans-Pacific Partnership, the other 11 countries went ahead and did it. But what we're seeing now is a much greater use of tariffs to accomplish all sorts of ends, some of which are trade-related, some of which aren't. Some of these practices are wildly inconsistent with our trade obligations.

So I'm more worried than I was because we're beginning to set in motion steps that others now are emulating to some extent. Even though the world trade order is holding up – it's robust and does reflect collective self-interest – some recent developments give pause for thought.

**MG:** Is President Trump as anti-democratic as some of his critics say?

**RH:** He's certainly anti-institution and doesn't seem to have much time for multilateralism. He's said things that I believe are inappropriate for the president of a democracy to say, in terms of his attacks on the independence of the judiciary and his comments about the media, calling them enemies of the people. He's also been willing to overlook all sorts of transgressions by others in relation to human rights and democracy around the world.

**MG:** You've noted parallels between President Trump and President Putin, in the personalisation of their rule. I think the point

you've made is that both Putin and Trump are trying to shut out their own bureaucracies.

**RH:** President Trump does have a very personal style, though he's not the first US president to come along and personalise diplomacy. But I don't think it's particularly helpful to compare it to Russia. The systems between the two countries are obviously very different. Putin doesn't really have a bureaucracy anymore. What you see in Russia is the institutionalisation of cronyism.

In the US, checks and balances fortunately still exist. But this White House has taken claims of executive privilege to levels we haven't seen before, ignoring certain congressional requests. So this administration is operating in a zone that in many ways lacks precedents within the US. It's taken what's been called 'the imperial presidency' to a new level.

**MG:** You've said that President Trump has at least two core convictions.

**RH:** The President feels very strongly that the costs of American foreign policy over the decades are not justified and are much greater than the alleged benefits. I disagree about that, but so be it. In terms of trade, he feels the US has been taken advantage of regularly.

On balance, I believe trading arrangements are not just of economic, but of strategic, interest. The US, our trading partners and allies have all benefitted. The fact that they've benefitted for the most part has not come at our expense.

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## “ Institutions created after the Second World War haven't kept up with power balances or new technologies

He and I have discussed both of these subjects. All I can say is he feels passionately about it: there's no political opportunism on these issues.

I want to mention something on lack of conviction. A lot of people who ought to be standing up for traditional norms and policies are not. I see it in Congress. There are people who claim to be conservatives who aren't acting as conservatives. They seem to be putting politics

ahead of principle. There are green shoots [suggesting] a degree of pushback against some of the administration's policies, but so far they're the exceptions that prove the rule.

**MG:** How do you think the US courts are performing to check executive power and protect democracy?

**RH:** The courts are the last refuge of democracy, but there's probably a limit to which they can protect American democracy. The courts are obviously independent, but there's politics in the courts and the people appointed are human beings. They're going to exercise their discretion.

In foreign affairs, there were certain forms of diplomacy that couldn't resolve the differences between the US and the Soviet Union during the Cold War. I'd almost say something similar about the courts: don't ask too much of them. The courts have a role to play. But my sense is that they alone can't be a substitute for the self-policing of the executive branch, and what other institutions and Congress need to do.

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“ On trade, the President feels passionately that the US has been taken advantage of. There's no political opportunism

**MG:** The courts are particularly deferential in the context of national security. President Trump has a habit of wrapping policies, in areas as far flung as trade and immigration, in the flag of national security.

**RH:** You're exactly right. As far back as 40 years ago, when looking at the role of Congress in foreign policy, I was struck by the deference the courts showed and their unwillingness often to step into what they judged to be political disputes. With very few exceptions, they were not going to be the ones acting as referee between Congress and the executive when it came to national security.

**MG:** And do you foresee the US Supreme Court soon being asked to mediate the clash between the executive branch and the legislative branch – and the executive encroaching on legislative power?



**RH:** If history is any guide, they're going to be extremely careful to avoid that. My sense is, in many cases, they're going to say this is a political matter, not a legal matter. Those who are hoping or expecting the courts to be the arbiter, to resolve a lot of the frictions in our democracy right now, are likely to be disappointed. Either because of the political views of certain people sitting in the courts, or their views on where they ought not to go, the courts are going to push it back to the politicians and say, 'you were elected, you solve it'. ☒

US President Donald Trump and China's President Xi Jinping pose for a photo ahead of their bilateral meeting during the G20 leaders summit in Osaka, Japan, 29 June 2019. REUTERS/Kevin Lamarque

## The US Presidency: abortion at the threshold

MICHAEL GOLDHABER, IBA US CORRESPONDENT

In recent weeks, nine American states have enacted highly controversial new laws severely restricting the rights of women to choose to have an abortion.

Six states – Georgia, Kentucky, Louisiana, Mississippi, Missouri and Ohio – passed bills banning abortion as early as six to eight weeks into pregnancy.

Arkansas and Utah drew the line at 18 weeks, while Alabama passed the most restrictive law, prohibiting abortion from conception, with no exception for rape or incest.

‘The fact that we have had so many states propose essentially all-out bans on abortion [makes] this legislative session deeply, deeply concerning,’ says Center for Reproductive Rights Litigation Director Julie Rikelman.

All nine states are attempting to force the US Supreme Court to either void their new laws, or overturn its landmark 1973 decision *Roe v Wade*, which held that the US Constitution protects a pregnant woman’s freedom to choose to have an abortion until the fetus is medically viable (now on average about 24 weeks into pregnancy).

women who dominate her clientele to save money, arrange time off, and travel to a distant clinic.

‘Those laws – six weeks, Alabama, whatever – under current law are one hundred percent unconstitutional,’ says National Right to Life General Counsel James Bopp, Jr. ‘Any prohibition prior to viability, there’s simply no question under current law that it’s unconstitutional. And so [if] you prohibit all abortions for any period prior to viability, no federal judge in the United States is going to vote to uphold [any] of those laws. Georgia, Alabama, 15-week bans – just not gonna happen.’

As a matter of law, Rikelman agrees with this assessment. ‘It’s really important to recognise that the bans are extreme and outrageous and unconstitutional,’ she says. But she also stresses that the pro-life movement is pursuing a parallel strategy: ‘to eliminate access to abortion at the state level with one restriction after another restriction after another restriction even while *Roe* remains the law.’

abortion providers’. Their sponsors say these laws aim to protect health. But their real objective, pro-choice lawyers argue, is to force embattled abortion clinics to close by imposing requirements that are difficult to meet (for instance, specifying how wide a hallway must be).

‘In many places, access to abortion is already hanging by a thread,’ notes Rikelman. Six states are down to one abortion clinic (the Dakotas, Kentucky, Mississippi, Missouri and West Virginia). In May, regulators tried to close Missouri’s last clinic for alleged health code violations. A state judge temporarily blocked the closure, while a commission has given the clinic more time to resolve its licensing dispute.

The case of *June Medical Services v Gee* will decide whether Louisiana becomes the next state with only one abortion clinic – down from 11 a decade ago. The Center for Reproductive Rights is challenging a Louisiana ‘TRAP law’ requiring each doctor to obtain admitting privileges at a local hospital. Some Court watchers view *June Medical* as likely to be the Court’s next major abortion case, in part because the Court reached out to stay the law pending the plaintiffs’ petition for *certiorari*.

Rikelman expresses confidence that the Supreme Court will void the law summarily, because it voided a near-identical Texas law only three years ago. But the replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh introduces deep uncertainty. Many Court watchers think it’s less likely that the Court will overturn *Roe* in one fell swoop in a case like Alabama’s, than that the Court will chip away at *Roe* by overturning its precedents on precisely the sort of narrow but consequential abortion regulation presented in *June Medical*.

Justice Stephen Breyer appears to be concerned about the new majority’s disrespect for precedent. In this term’s *California v Hyatt*, the Court overturned its rule on states being sued in the courts of other states. On the face of it, this had nothing to do with abortion, but Breyer’s dissent could be interpreted as the most thinly veiled of references to *Roe v Wade*. ‘Today’s decision,’ he lamented, ‘can only cause one to wonder which cases the Court will overrule next.’



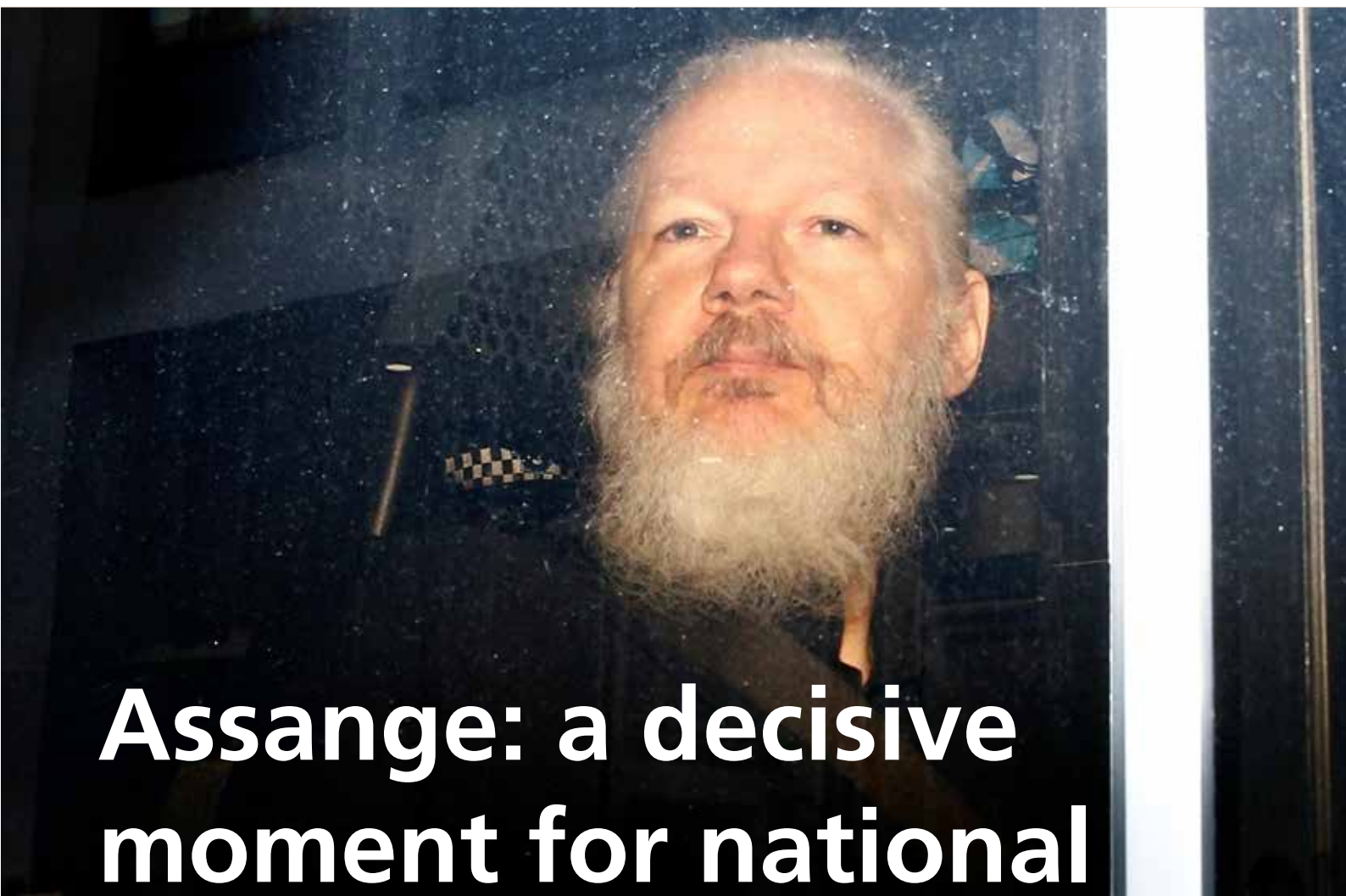
US states have passed bills banning abortion as early as six weeks into pregnancy

The sponsor of Alabama’s extremely restrictive law, State Representative Terri Collins, publicly admits that her aim is ‘to get this case in front of the Supreme Court so *Roe v Wade* can be overturned’.

The bans on abortion as early as six weeks have also proven highly controversial. ‘Six weeks of pregnancy is just two weeks after the average woman misses her period,’ notes Shannon Brewer, who directs Mississippi’s last abortion clinic. That leaves no time for the lower-income

Rikelman cautions: ‘Even if all of these bans are struck down by the courts – as they should be because they are clearly unconstitutional – the other strategy continues and it is just as dangerous.’

By Rikelman’s count, states have passed over 400 abortion restrictions since 2010, mostly in the South and Midwest. Of the dozen or so now under challenge in the federal circuit courts, most don’t regulate when women can have an abortion, but rather how or why or with whom. So-called TRAP laws impose ‘targeted regulation on



# Assange: a decisive moment for national security journalism

Depending on who you listen to, Julian Assange is either a dangerous threat to national security in cahoots with the Russian state or a swashbuckling crusader for free expression.

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**W**hen the US indictment of Julian Assange was expanded in late May to include 17 counts under the Espionage Act, the WikiLeaks founder took to the barricades on his favourite social media platform. ‘This is madness,’ he said. ‘It is the end of national security journalism and the First Amendment.’

The man hunting Assange, Assistant Attorney General for National Security John Demers, assured a group of reporters that it was nothing of the sort. ‘The Department [of Justice] takes seriously the role of journalists in our democracy and we thank you for it,’ he said. ‘It has not and never has been the Department’s

policy to target [journalists] for reporting. But Julian Assange is no journalist.’

The truth, as usual, lies between the extreme postures adopted by the two parties to the case. Assange is enough like a national security journalist to alarm guardians of the First Amendment, but distinguishable enough to satisfy national security lawyers who genuinely care about press freedom. The problem is that the distinctions may be irrelevant under the Espionage Act – leaving future publishers of intelligence leaks at the mercy of prosecutorial discretion.

The Assange prosecution does not mark the end of national security journalism so

much as its recalibration. Media counsel, who used to be secure in the belief that there would be no consequences to the media for publishing leaks, must now think more carefully about the publication of military or diplomatic secrets. It's hard to believe that the Trump administration does not welcome this development, given that it reopened the Assange investigation as part of a trumpeted crackdown on leaks – knowing full well that the Obama Department of Justice (DOJ) quashed an earlier Assange indictment, reportedly out of concern for the First Amendment.

The 1917 Espionage Act has long been called a 'ticking time bomb' by the dean of the First Amendment bar, Floyd Abrams, because it would seem by its terms to apply to journalists. And there is no constitutional precedent that clearly protects the press from prosecution. The Pentagon Papers case (which a young Abrams helped to litigate for *The New York Times*) protects the publisher of security leaks only from prior restraint. The case of *Bartnicki v Vopper* helpfully established that a journalist cannot be punished for publishing information obtained illegally on a matter of public concern, so long as they didn't actively collaborate in obtaining the information. But *Bartnicki* was not a leak case and the courts have never tested the argument that, when it comes to the public interest, national security overrides free speech.

For years, media lawyers have dreaded an Assange prosecution because he is a deeply unsympathetic test plaintiff, and he plays a role awfully similar to any good journalist on the security beat. Both actively solicit classified information of 'political, diplomatic or ethical significance' (to borrow from WikiLeaks'

mission statement), and offer a mechanism to share it securely and anonymously. Indeed, according to *The Washington Post*, in 2013 the Obama administration dropped their plan to prosecute Assange for spreading secrets shared by the former intelligence analyst Chelsea Manning precisely because they feared that Assange couldn't be distinguished from a journalist; they called it a '*New York Times* problem'.

“Assange’s indictment was a shot across the bow to make news organisations more reticent to publish government secrets

Gabe Rottman

Director, Technology and Press Freedom Project,  
Reporters Committee for Freedom of the Press

So what happened to change the Justice Department's mind between 2013 and 2019? The innocent explanation, offered by Mary McCord, who served as Acting Assistant Attorney General for National Security during the Obama administration, is that the case became more distinguishable. The investigation found new evidence that Assange not only encouraged Manning to leak secrets (as any journalist would), but tried to 'crack the password' for the Secret Internet Protocol Router Network used by the Pentagon for military secrets. The less innocent explanation



Former White House press secretary Sarah Huckabee Sanders takes questions from reporters at the White House

is that what the Obama DOJ viewed as the ‘*New York Times* problem’, the Trump DOJ viewed as their *New York Times* opportunity. Harvard Law School’s Jack Goldsmith sees the Assange prosecution as a conscious attempt to curtail the epidemic of security leaks in the internet age by sowing doubt about the media’s perceived impunity for publishing state secrets.

McCord agrees with her successor, Demers, that on the facts presented, ‘Assange is no journalist’. First, reporters don’t personally hack into the Pentagon’s computers. Second, they don’t conspire with a hostile power to torpedo US democracy, as the Mueller Report shows Assange did. Third, responsible media outlets protect vulnerable whistleblowers and intelligence informants, whereas WikiLeaks failed to redact the names of 100 Afghan sources (to the public consternation of its media partners). Indeed, the three counts in the indictment based on the sheer act of publication focus on Assange naming individuals ‘who risked their safety and freedom by providing information to the United States and our allies’.

Media advocates are unmoved. James Goodale, the legendary ex-General Counsel of *The New York Times*, has written that if it succeeds, ‘investigative reporting based on classified information will be given a near death blow’.

Gabe Rottman, Director of the Technology and Press Freedom Project at the Reporters Committee for Freedom of the Press, is most disturbed by the three counts based on pure publication (as opposed to complicity in the leaking of secrets, or computer fraud conspiracy). ‘The legal theory in those charges is that you can violate the 1917 spying law in this country by publishing classified information online,’ says Rottman. ‘That’s something new and it’s profoundly troubling from a First Amendment perspective.’

Rottman finds little comfort in McCord’s distinctions. ‘The theory of liability does not turn upon the publication of informants’ names,’ Rottman argues. Naming an informant is ‘an ethical and practical distinction, but it’s not a legal distinction’. The hacking allegation matters only for the single count of computer fraud, he says. And the allegation of conspiring with Russia is not part of the Manning case.

At the end of the day, the only thing standing in the way of an Espionage Act case against a journalist is prosecutorial discretion. And prosecutorial discretion is just a fancy way of saying Justice Department norms. That inspires little confidence under a President who routinely shows disdain for norms of

all kinds, attempts to politicise the Justice Department and calls the media an ‘enemy of the people’.

Abrams has nothing but harsh words for Assange, and contrasts his recklessness with *The New York Times*’ painstaking efforts to handle leaks responsibly. But weaponising the Espionage Act against Assange is an undeniable threat to the media.

‘The real risk here is that something will be published that really gets this president in particular, and this attorney general in particular, angry,’ says Abrams. ‘And ready to do whatever they can in whatever they define as the law to sort of pay back. My real concern, at least in the immediately foreseeable future, is that something goes badly wrong. Some military, quasi-military activity fails and some American government, especially this one, looks around for who to blame. And this indictment does open the door for that.’

It’s entirely possible that the case dead-ends because the US fails to extradite Assange from the UK. Political offences are not extraditable under the governing treaty, and the English courts could easily deem espionage ‘political’. Alternatively, Sweden could revive its rape charges against Assange, and the English courts could deem rape more serious than espionage.

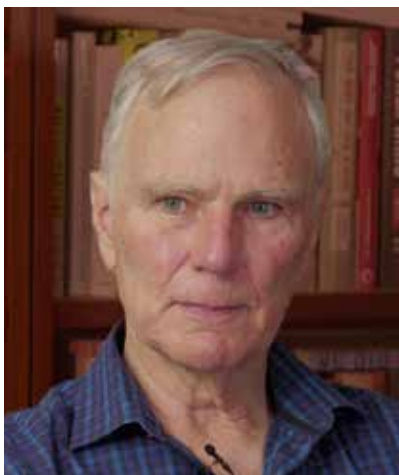
Even in this scenario, the battle could proceed on another front. The Democratic National Committee is pressing a civil case against Assange (alongside WikiLeaks and Russia) for the hacking detailed in the Mueller Report. Free press advocates argue in an amicus brief that the civil suit jeopardises the principle that the First Amendment protects the publisher of information obtained unlawfully by a source. The Democratic National Committee retorts that the First Amendment does not create a right to undermine democracy or commit espionage.

More fundamentally, if America’s aim in prosecuting Assange was to recalibrate the practice of national security journalism, it may already have succeeded. ‘I think it is indisputable that the [mere] existence of the superseding indictment has changed the way that lawyers think about national security reporting,’ says Rottman. ‘Newsroom lawyers will have to contend with the fact that the government has brought charges against an entity simply for publishing classified information online. That will be part of their calculus.’ On this view, Assange’s indictment was ‘a shot across the bow to make news organisations more reticent to publish government secrets’. ☒

Michael Goldhaber is the IBA’s US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



Skid Row area of downtown Los Angeles, California, US © Alamy



# Professor Philip Alston

UN Special Rapporteur on extreme poverty and human rights



**Over the past few years, Philip Alston, UN Special Rapporteur on extreme poverty and human rights, has challenged governments around the world on their lack of political will to address poverty. He speaks to the IBA US Correspondent, Michael Goldhaber, about the injustice of wealth inequality in the US.**

**Michael Goldhaber:** When you presented the findings of your US country visit, then US ambassador to the UN Nikki Haley scoffed: ‘it is patently ridiculous for the UN to examine poverty in America.’ So why is she wrong?

**Professor Philip Alston:** If 40 million people living in poverty is not a human rights issue and not something that external scrutiny should be focused on, I’m not sure what is. I guess that every country thinks that its human rights record is fine and that the UN should be focusing elsewhere,

but it’s clear that the US has a blind spot on a lot of these issues. It’s very important for the international community to shine a spotlight on the extent of poverty in the US and the implications that has for the enjoyment of civil and political rights in this country.

**MG:** You said that there was a sharp contrast between the attitude of US officials and those in other nations you visited. Have you found that officials are more committed to addressing the problems, or is denial a universal condition?

**PA:** The US is different in the sense that it doesn't recognise social rights – it doesn't accept a right to healthcare, for example, let alone the right to housing. In other countries, at least in Western Europe, that's taken for granted. The levels can be debated, but there's no question that the government must ensure that its citizens have those basics.

In terms of reaction to critical reports, that's more of a universal phenomenon. No government wants to be criticised. They're going to try to discredit it in some way, but that's not the key issue. The key issue is what does the government really do about it? And where there's the political will, governments, having said 'we don't like the report', will then start trying to address the key issues. Where there is no political will, they will simply dismiss it and move on.

**MG:** American exceptionalism is taken as an article of faith in this country. So, in what ways, positive or negative, did you find us to be exceptional?



Protesting welfare cuts © Alamy

“ There are endless ways in which the criminal justice system is now being set up to penalise the poor and ensure that their future is much grimmer than their past has been

**PA:** The US is clearly exceptional in terms of its social welfare programmes. They are very intermittent, deliberately inadequate, premised on sort of libertarian assumptions. I think that certainly makes it different from most other developed countries. America is exceptional in the sense that there's a real openness to public debate. There's a really vibrant civil society. There were lots of groups that were very keen to engage. There's a Congress which has quite a few members who were fully engaged with my reporting and who made an issue of it afterwards and so on. I think the US has both good and bad aspects of exceptionalism.

**MG:** You talked about the country having an ethos that the rich and poor deserve what they have; that the poor are takers and scammers. You also talked about the American Dream turning into the 'American Illusion'.

**PA:** I think the conservatives, over the past 40 years or so, have really hammered this view that anyone

who is on welfare is basically doing it unnecessarily and has intentionally made themselves a burden on the state. We are encouraged to see that anyone who's receiving welfare really could be out working instead. No account is taken of all of the things that befall average people in terms of bad medical health, mental health challenges, what happens to their kids, car and industrial accidents, and so on. Lots of people are simply unable to work and need to have decent support. That's not factored into the US mentality when we think of welfare. In terms of social mobility, the sad reality of the 'Great American Dream', which people still believe in very firmly, is that statistically the US is less mobile than almost any other developed country. You have a better chance in countries like the UK, which used to be very hidebound, on being able to move from one low income group to a much higher one through your own effort.

**MG:** In its official response to the UN, the Trump administration offered some very different statistics from yours. They made the claim, which demographers called a joke, that only 250,000 Americans are in extreme poverty. What do you regard as the most meaningful measures of poverty in the US?

**PA:** One can debate that endlessly. But to suddenly say that 'no, the figure of 40 million is wrong, and it really should be replaced by something like 300,000', is ludicrous. One can always do this on the basis of statistics, but it's also important just to look around you, to open your eyes. We know the sort of poverty that exists in most of the large cities

in the US, we know the extent of rural poverty in areas from which employment opportunities have disappeared. There is a huge amount of poverty that's not really being addressed. And when you meet the people who are living in those conditions, they don't have access to dental care for example – nothing. If they are in acute pain, they can go to an emergency room, which might extract a tooth. They don't have access to a doctor except in a dire emergency. It makes it much harder to get work. Their kids are very badly off, receiving a low-quality education and so on. To say that there isn't any real poverty in the US is not to look around the country.

**MG:** You wrote about the US leading the OECD in infant mortality, youth poverty, obesity, incarceration rate, second-to-last in sanitation. And perhaps most striking is that the US now leads its peer nations in inequality in the OECD.

## “ In Skid Row there are cities of tents, and toilets are provided at a ratio that wouldn't be acceptable in a refugee camp in Syria

**PA:** Just at the end of my visit to the US, the World Health Organization announced that China had actually overtaken the US in terms of healthy life expectancy for a child born today. Now, China is still a very uneven country – it might be rich in global terms, but per capita it's way below the US – but for it to have a better healthy life expectancy is truly shocking. Skid Row [downtown Los Angeles] was an amazing experience because you are right in the shadow of a thriving and prosperous central business district and within a few hundred yards you can see the 'other side' of life.



A woman pushes a cart with her belongings past tents and tarps erected by homeless people along streets in the skid row area of downtown Los Angeles, California, US © REUTERS/Patrick T Fallon

In Skid Row there are cities of tents, and toilets are provided at a ratio that wouldn't be acceptable in a refugee camp in Syria. Leading to people urinating and defecating in the streets.

**MG:** Which is in turn criminalised.

**PA:** Yes, that's part of the perversity of it all. Rather than trying to come up with longer-term solutions, the LA police were issuing citations and eventually arresting people at higher rates than they had been for a long time.

And the poor have no serious access to the legal system in the US. Despite all of the rhetoric, public defenders are hugely overworked, hugely underpaid. The sort of services that the poor can access are very grim. They simply can't really expect to get a decent deal from the courts.

**MG:** You also spoke about the many millions of disenfranchised felons, part of a pattern that you talked about in the criminal justice system.

**PA:** I think what's happened is a very determined effort to make people pay for their own access to justice. It's fine for me as I'm quite well off. If I'm fined, if I have to pay for a night in prison, I can do it. If you take a low-income person, those fines can put them out of the game for years. They have to pay their probation officer. They have to pay to spend nights in county jails. They have to pay high bail amounts.

There are endless ways in which the criminal justice system is now being set up to really penalise the poor and ensure that their future is much grimmer than their past has been.

**MG:** As you put it, to criminalise poverty leads to a cycle of homelessness, unemployment, imprisonment and disenfranchisement.

**PA:** And the irony is that Nikki Haley said at one stage, 'we have never criminalised poverty, there is no law in this country that criminalises poverty.' Of course that's such a formalistic reading of it because there isn't a law that says 'if you're poor you should be put in prison'. But there are all these other laws that are designed to benefit the well off and to punish the poor.

**MG:** You wrote about the link between the decline of political rights and the decline of social and economic rights, especially for minority groups. Would they be so deprived of basic services if they were not also effectively deprived of the vote?

**PA:** I think it makes a big difference. I quote in the report a senior Democratic politician who said to me, 'you show me one of my colleagues who is really reaching out to try to get the votes of the poor.'

Professor Alston spoke to Jennifer Sadler-Venis, IBA Content Editor, about poverty in the UK, holding the government to account for continued inaction and the potential impact of Brexit on the country's poorest.



Anti-austerity campaign organisation The People's Assembly dump stacks of food opposite Downing Street, London © REUTERS/Simon Dawson

**JSV:** What is the impact of the focus on employment as a cure for poverty and what should the focus be instead?

**PA:** For a serious programme to eliminate or greatly reduce poverty, there needs to be a wide range of social services available to people who are not able to take advantage of work opportunities. The wages that are paid need to be adequate, and those who are not earning enough through work need to have access to the social security benefits that used to be available before the austerity programme started systematically chopping them down.

**JSV:** The UK government has said they're going to end austerity. How much difference will that make now?

**PA:** I don't think austerity can be ended. What they may do is enable benefits to rise with inflation, they might take some of the caps off, but austerity is really the great harm that has been done to the social fabric of the UK over the past ten years. Ending austerity in that sense would require a whole range of measures to restore the capacities of local councils, for example, to provide the full gamut of services that people desperately need. And there's no proposal that I've seen that intends to do that. So the term 'ending austerity' is close to misleading advertising.

**JSV:** How can we hold legislators accountable for their lack of political will to tackle poverty?

**PA:** Only politically. We need to expose the responsibility of governments for the outcomes we're seeing. The link between the very deliberately planned austerity policies and social misery in the UK needs to be spelled out. I'd like to see the opposition parties taking poverty more seriously.

I think the tragedy of Brexit has been that every other issue has been drowned out and that may be a convenient outcome for some groups that simply want to push ahead with the neo-liberal agenda and not focus on any of these deep social challenges that are going to transform 21st century Britain.

**JSV:** As Prime Minister, Boris Johnson seems to be propelling the country to a no-deal Brexit, and the government recently released the Yellowhammer document, which outlines its no-deal assumptions. The document states that 'low income groups will be disproportionately affected' by food shortages and that 'providers of adult social care could fail'. Are you more concerned now about Brexit's impact?

**PA:** It was always apparent from the various Treasury estimates that those who are not well off would be the hardest hit. The Operation Yellowhammer document confirms part of that, but I don't think it gives anything like a full picture. The real problem is that as far as I know nothing is being done to shield those people. So there will be a significant percentage of people – maybe the poorest 20 per cent or so – who will be extremely hard hit by a no-deal Brexit and the government apparently has no plans to soften those blows.

**JSV:** What role should the legal profession play in tackling poverty?

**PA:** Lawyers have an obligation to be promoting justice and a fair society. Lawyers haven't stood idly by in response to the cuts to legal aid but I think they should be speaking out more strongly and exposing the extent to which justice is increasingly only available to the wealthy. As a profession, if law is not able to promote justice then we need to ask ourselves what we're really about.

I don't think there's any of them because they don't think these guys are either going to be able or be willing to vote. So they're not part of the political priority.'

The extent to which there's been what I call overt and covert disenfranchisement is really quite staggering. For a country that prides itself on being one of the original democracies and really having a thriving democratic culture, that's increasingly less true because of all the steps that have been taken to exclude millions of voters.

**MG:** A lot has changed since your tour in December 2017 and the report in June 2018. What new developments do you find the most discouraging?

**PA:** The enormous storm cloud that hovers over the US is the consequences of the gigantic tax cut that took place at the time of my visit. The President is now talking about further tax cuts, while anyone who's looking at the state of the economy says this is all completely unsustainable. There's going to need to be major cuts or major increases in taxes. We know that the agenda is to set the stage for saying 'we can't afford the welfare system we have'.

The next step will certainly be an even more concerted effort – not just by the President, which has taken place for the last two or three years anyway – but soon by the Republicans in Congress who have been relatively quiet on a lot of these issues. Having secured massive tax cuts, they will say 'we have no choice but to cut back on whether it's Medicare or Medicaid, whether it's food stamps, we just have to cut radically'. And that's going to lead to much greater poverty in the country.



A homeless woman sits in downtown Indianapolis © REUTERS/Zohra Bensemra

**MG:** You allude to the plight of the middle class in your recommendations – is middle-class insecurity a human rights issue that deserves more attention?

**PA:** If we look at the rise of populism around the world, a lot of people would say that it is linked to basic economic insecurity on the part of those who are not living in poverty but are at risk. The statistic that something like 40 per cent of Americans couldn't afford a \$400 emergency expense without plunging into poverty, or without having to take out a loan that they can't afford, indicates that there's a large percentage of people who are living on the edge.

“ The US is different in the sense that it doesn't recognise social rights – it doesn't accept a right to healthcare, for example, let alone the right to housing

I think if you take a holistic view, what a society should be doing is providing a basic but assured safety net. So if people do fall through the net, there really will be a full range of different forms of assistance to help them to get back on their feet. That's just not the case in the US. We've seen the Trump administration each year proposing drastic cuts that Congress hasn't so far accepted, but food stamps are being cut back, Medicare eligibility is being made more difficult. What does exist of a social safety net is being chipped away at a pretty significant rate.

**MG:** You wrote, soon after President Trump's inauguration, about the challenge posed to human rights by his distinct approach to governance, which you suggested combines elements of unilateralism and deregulation with inequality and a drift toward authoritarianism. What are the human rights implications of that toxic mix?

**PA:** There's both the domestic and the international. International implications, which are perhaps of the least importance to the American people, are an assault on the UN, an assault on multilateralism, a refusal to cooperate with other states, a refusal to take up a lot of the most pressing human rights issues unless they fit a very narrow ideological position. Domestically, I think what we've seen is a pretty dramatic move away from the various protections against discrimination that exist in the country.

We've seen a downgrading of a lot of the institutions that were set up to try to keep a check on ensuring respect for people's rights. A lot of the deregulation removing regulations against use of toxic chemicals, against environmental pollution and various other things, are clearly an assault on the rights of the poor.

It's staggering to be in Puerto Rico, for example, in some of the poor areas and see giant mountains of coal ash, completely unprotected, just waiting for the next strong wind to come and blow them around the neighbourhood and for people to be breathing them in.

**MG:** What events since your official visit do you find heartening?

**PA:** This is perhaps a self-centred comment, but the degree of attention that the report received. It received very extensive media coverage, it's been taken up by a lot of civil society groups and so on. I think there is a growing awareness of the fact that the existing poverty levels not only are not acceptable in their own right, but more importantly, that they have serious human rights implications. So even if you don't care about the economics of it, if you just care about the civil rights dimension of the US, then poverty has to be addressed.

**MG:** If you look at the agenda of the Democratic presidential hopefuls, it's remarkable how much it tracks the rest of your policy recommendations. The month after your report, California took your first recommendation and ended cash bail. How encouraged are you by these ideas?

**PA:** It is very encouraging. There are two things that are going on that I see. One is actually just a return to a longstanding American concern with the poor. Whether we go back to Franklin D Roosevelt's 'New Deal' or to Lyndon B Johnson's grand assault on poverty, this is not a new set of issues in the US. It's just that the country has lost sight of them over the last 30 years or so.

The second thing that's going on is not just what some would see as a great revival of the left, but is the realisation even from the right, that in fact a lot of these initiatives would be economically productive. So you have the IMF, for example, coming out and saying extreme inequality is very bad for growth. It's not sustainable. It is not the best economic move.

A lot of these programmes can actually be justified in terms of increasing productivity, giving every kid a decent education, providing more pre-school care. That's purely an economic



A man walks past a boarded up home in South Bend, Indiana, US © REUTERS/Joshua Lott

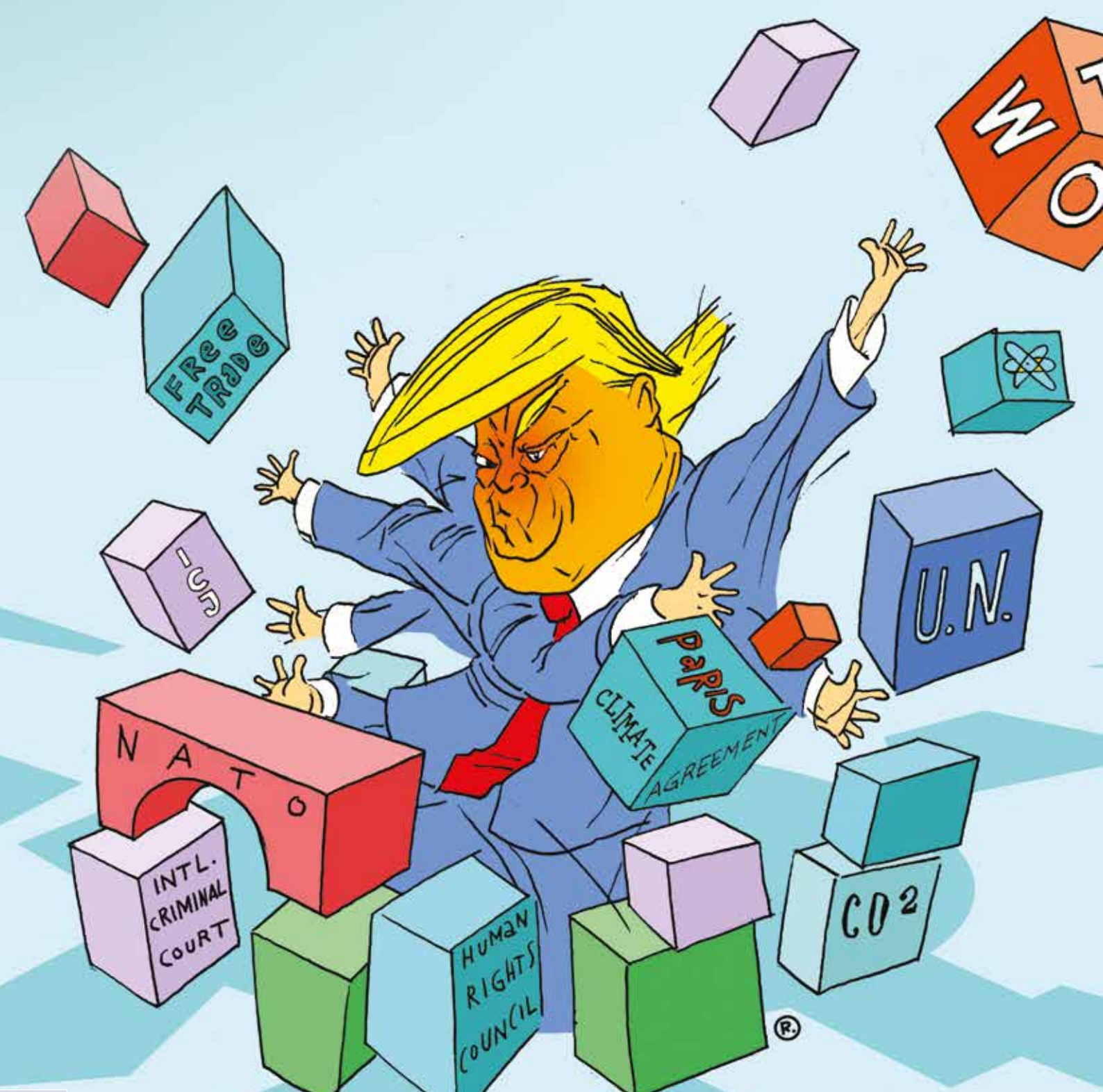
investment in a smarter society; one that's able to have higher-quality jobs and more employment. Healthcare can be seen in the same terms. The costs of not having healthcare are huge. It's all shuffled off to the police and then to the emergency rooms of hospitals. The costs are infinitely greater in those settings than they would be if people were receiving regular preventive care from some sort of national scheme. I find the current debate very encouraging but I think it's important for conservatives to also see that there's a lot in this just in terms of, to use the awful phrase, 'making America great again'.

**MG:** Is it possible that we will someday look back and say that the Trump era will be remembered for bringing social democracy back to America?

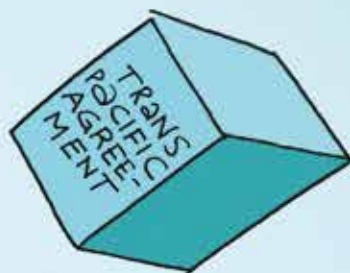
**PA:** It's certainly provoking a lot of thought and a lot less complacency. Democracies around the world have been highly complacent. The current experience has made it clear that a lot of institutions are not working, that there's too much opportunity to skew things in favour of the very wealthy and that that's not in the interests of the overall society. So what might have been seen even five years ago as 'no, that would be a socialist move' is now increasingly being seen as 'no, that would be in the interests of the broader community'. And I think that is a potential silver lining in what we're currently going through. ☒

The full interview with Professor Philip Alston is available on the IBA website at [ibanet.org](http://ibanet.org)

# Present at the



# destruction



The Trump administration was clear from the outset that it would put America first and retreat from the cooperative, rules-based world order. Three years into Donald Trump's presidency, *Global Insight* assesses the damage.

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**W**hen Donald Trump entered the Oval Office, he found a note from Barack Obama imploring him 'to sustain the international order... upon which our own wealth and safety depend'. The new President set about doing exactly the opposite. To a surprising degree, he has succeeded in dismantling the rules-based world order that took seven decades to build.

At first, even the wisest observers accepted the soothing false narrative that the President is too unserious or incompetent to cause much harm in foreign policy. After all, this is a man who confused Kurds with the Iranian Quds Force, and asked a Rohingya refugee: 'Where is that exactly?' In 2017, Charlene Barshefsky, who had welcomed China into the World Trade Organization (WTO) as US Trade Representative, regarded 'this talk about trade war' as 'so much bravado'. She predicted his trade policy would be 'scattershot but tweetable'. Harold Koh, who served as Legal Adviser in the Obama State Department, described President Trump as 'someone who doesn't have the skill to actually dismantle the system [and whose] attention span is extremely limited. He frankly doesn't care about most of these things; he wants to be able to say he did something without actually doing something.'

Jack Goldsmith, who served as Assistant Attorney General under George W Bush, may have been the first to see the new President's 'onslaught on international law and institutions' for what it was, in a March 2017 essay of that name. But even Goldsmith echoed the reassuring thesis that the President's 'malevolence' would be tempered by incompetence. 'There is a quiet way to pull back from international law and institutions and a loud way,' noted Goldsmith. '[T]he Trump team will prefer a loud approach with high symbolic impact to policy achievement'.

Looking back, the more apt lesson is that malevolent goals, even if often pursued incompetently, may be achieved if they are pursued relentlessly. President Trump spoke a rare truth when he observed in 2017: 'Foreign policy is what I'll be remembered for.'

## **'The big stupid bully'**

*The Empty Throne: America's Abdication of Global Leadership* is the first book chronicling the Trump administration's assault on the international order. Co-author Ivo Daalder, who served as the Obama Ambassador to NATO, makes a convincing case that, in foreign affairs, President Trump is animated by a set of consistent core principles.

Trump's entry on the world stage was a 1987 full page advertisement in major US newspapers – brashly demanding that we make our allies 'pay for the protection we extend'. Within a minute of declaring for President three decades later, Candidate Trump returned to the theme that America is 'being ripped off by everybody in the world'. Asked about foreign policy during the campaign, he reiterated that America is 'the big stupid bully and we were systematically ripped off by everyone'. The implication was that strong nations who bully weaker nations are smart and admirable, while strong nations who don't are stupid and laughable. The premise was that cooperation is a fool's game, because even among allies, every deal has a winner and loser, usually measured in dollars. Foreign policy is strictly transactional.

## “ Foreign policy is what I'll be remembered for

President Donald Trump

Candidate Trump revealed that '[his] primary consultant is [him]self' in foreign affairs. The so-called adults in the room were doomed to frustration, says Daalder, because they were 'trying to mould a guy who's unmouldable'. During his first summer in office, then Defense Secretary James Mattis assembled the joint chiefs of staff to tutor the President on the mutual benefits of the rules-based postwar international order. 'This is exactly what I don't want,' Trump muttered, 'it's not working at all.' A few weeks later, the President was at a meeting convened by his then Chief of Staff John Kelly and Chief Economic Advisor Gary Cohn. 'I know there are some globalists in the room [and] they don't want the tariffs,' the President said, 'but I'm telling you, I want tariffs.' Little wonder that the adults soon left the room.

Trump's speechwriters and ideologues hit the same notes in a loftier key. 'We will no longer surrender this country,' declared Candidate Trump, 'to the false song of globalism.' Former National Security Council spokesman Michael Anton scorned the 'foreign policy establishment' as a 'priesthood' operating a liberal world order that 'no longer serves America's interests'. Venturing into the lion's den, the President told the United Nations General Assembly: 'We will never surrender America's sovereignty to an unelected, unaccountable global bureaucracy.' Perhaps most tellingly, the President explained in his speech renouncing climate diplomacy: 'The Paris Agreement handicaps the US economy in order to win praise from the very foreign capitals and global activists that have long sought to gain wealth at our country's expense.'

In the 'Trumpian' belief system, all of America's historic global agreements played it for a sucker by making other nations richer at America's expense. Every deal not negotiated by President Trump is a bad deal, never mind the actualities. The world is divided into 'Us' and 'Them'; and 'They' are screwing 'Us'. Both friends and foes screw us by running trade surpluses and sending us their 'worst people'. If anything, our allies screw us more because they also fail to share burdens. That America's allies fall into the category of 'Them' is shown by two outrageous asides. The President minimised the risks of nuclear brinkmanship in the Korean peninsula by saying, 'If thousands die, they're going to die over there.' Likewise, he dismissed the risk of ISIS foreign fighters fleeing Syria by observing, 'they're going to be escaping to Europe'.

Recent news only confirms *The Empty Throne's* thesis. The US withdrawal from any Kurdish area of Syria lacking oil reflects the President's belief that 'there's nothing in it for us' unless we can 'get the oil'. Moreover, Daalder notes that 'in the same week Trump walked away from the Kurds in Syria because he saw no direct benefit to the US, he sent 2,000 troops to Saudi because they're paying us. How much more transactional can you get?'

The transactional nature of the President's Ukraine policy is even more evident, except the return on America's investment was allegedly for his personal political benefit. After all, 'quid pro quo' is essentially Latin for art of the deal. The President's surrogates could only explain their Ukraine policy to the regular diplomats as a cheque-writing transaction.

## “ Rhetoric and actions are demoralising human rights activists around the world and damaging the cause of freedom

David Kramer

*Assistant Secretary of State for Democracy, Human Rights, and Labor under George W Bush*

Events in Syria and Ukraine also confirm the President's disregard for any expert other than himself, and perhaps strongmen he admires. It was Turkish President Recep Tayyip Erdoğan who suggested the Syria withdrawal, and Hungarian Prime Minister Viktor Orbán who stoked Trump's hostility to Ukraine. Vladimir Putin is a prime beneficiary of the President's policy in both regions.

President Trump admires strongmen who flex their muscles and disdain niceties. As a citizen, he praised Putin's invasion of Crimea as 'so smart' and mused that Iraq was better off under Saddam Hussein. As President, he congratulated Putin for rigging Russian elections, Erdoğan for purging his opposition, and Chinese President Xi Jinping for abolishing the succession principle. He marvelled at the 'unbelievable job' President of the Philippines Rodrigo Duterte did of gunning down drug dealers in the street, and called Egyptian President Abdel Fattah al-Sisi 'my favourite dictator'.

leaders noted that the Commission is dominated by clergy and religious freedom scholars hostile to gay rights. David Kramer, who served as Assistant Secretary of State for Democracy, Human Rights, and Labor under George W Bush, points out that his post still stood empty when the Commission launched. 'It is hard to take the administration seriously on human rights when it doesn't fill the top position responsible for [human rights],' writes Kramer. The Trump team's 'rhetoric and actions are demoralising human rights activists around the world and damaging the cause of freedom. No advisory commission is going to

## “ Can it really be taken seriously that an administration headed by an individual so hostile to human rights... is leaving the Human Rights Council because there are autocrats on it?

Keith Harper

*Former US Representative, Human Rights Council*

The President's fondness for rights abusers is reflected in doctrine and policy. In May 2017, then Secretary of State Rex Tillerson proclaimed that human rights should not obstruct US interests. In a leaked memo, Senior State Department Policy Advisor Brian Hook made the caveat that, actually, human rights is still useful for castigating our enemies. In this spirit, the administration has largely ignored historic abuses by China, Russia and Saudi Arabia, while condemning Cuba, Iran and Venezuela. 'It's human rights a la carte,' says Ted Piccone of the World Justice Project. The President defends universal values, says Piccone, only when it pleases a constituency like Cuban-Americans, Jews whose views align with the Likud party, or evangelical Christians. In China, such an approach might be called 'human rights with Trumpian characteristics'.

In July, the US State Department inspired much global laughter by rebranding human rights as 'unalienable rights' – and creating a new commission to divine them. 'As human rights claims have proliferated, [international institutions] have drifted from their original mission,' intoned Secretary of State Mike Pompeo. 'We must therefore be vigilant that human rights discourse not be corrupted or hijacked or used for dubious or malignant purposes.'

'Unalienable rights' may be code for opposing abortion and same-sex marriage. An open letter from civil society

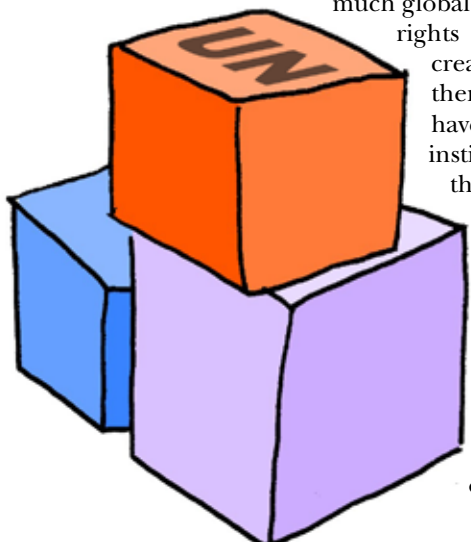
fix that.' Nor will a narrowcast Commission take back the systemic attack on global institutions witnessed over the past three years.

### The anti-globalist toolkit

António Guterres began as Secretary-General of the UN the same month Donald Trump entered the White House. Their paths have intersected several times since. In June 2017, Guterres voiced 'major disappointment' over the US' vow to leave the Paris Climate Agreement. In May 2018, he expressed 'deep concern' over America ending the Iran nuclear deal. In August 2019, he voiced 'deep regret' for the US pulling out of the Intermediate-Range Nuclear Forces Treaty (INF).

In June 2018, the US withdrew from the UN Human Rights Council, on the pretext that it's 'a cesspool of bias'. Two days later, UN Special Rapporteur on extreme poverty and human rights Philip Alston told the Council that, as America bids fair 'to become the most unequal society in the world', it should be more concerned with the literal cesspools in its citizens' backyards. 'Can it really be taken seriously that an administration headed by an individual so hostile to human rights, an advocate of torture, is leaving the Human Rights Council because there are autocrats on it?' asked ex-US Representative to the Council Keith Harper. 'It doesn't pass the straight face test.'

In early autumn 2018, America withdrew from a pair of treaties subjecting it to the authority of the UN's International Court of Justice (ICJ). The US left the Optional Protocol to the Vienna Convention on Diplomatic Relations in response



to Palestine's suit over America moving its Israeli embassy to Jerusalem. At the same time, the US left its Treaty of Amity with Iran in response to the World Court's acceptance of the Iran nuclear deal case. Ironically, the US had invoked the Vienna Convention when it sought the ICJ's protection in the 1979 Iran hostage crisis. 'The hostage case was a major step in international law because the US signalled a commitment to act consistently with the rules we've all agreed to as a community of states,' notes the ex-State

Department Legal Counsellor Scott Anderson. 'Now the US is stepping back and saying "we simply won't subject ourselves to this scrutiny".'

America sadly celebrated the 70th anniversary of the Universal Declaration of Human Rights at



Perhaps the crudest anti-globalist tactic was the vow by then National Security Adviser John Bolton to target judges or prosecutors in The Hague with US sanctions and criminal law if they opened an investigation against the US or its allies. The US amazingly followed through in April 2019 by revoking the visa of International Criminal Court (ICC) Chief Prosecutor Fatou Bensouda, who had urged the Court to investigate potential US war crimes in Afghanistan. A week later the ICC judges declined to investigate – and suffered no consequence. The leading ICC scholar Alex Whiting takes their ruling at face value, but not every observer will be so generous. Threatening the bench is a self-evident peril to both the appearance and reality of an independent judiciary.

“ In the same week Trump walked away from the Kurds in Syria because he saw no direct benefit to the US, he sent 2,000 troops to Saudi because they're paying us. How much more transactional can you get?

Ivo Daalder

Co-author, *The Empty Throne: America's Abdication of Global Leadership*

the end of 2018 by leaving the UN Educational, Scientific, and Cultural Organisation, and by voting against a Global Migration Compact adopted by 164 nations. 'Eleanor Roosevelt would be crying,' says Jessica Neuwirth, Director of the Human Rights Program at the Roosevelt House Public Policy Institute in New York. 'What on earth is going on? We should be building on the Universal Declaration, not trying to tear it down! We're really like an outlaw. We can't go around the world talking about rule of law and undermine the international system that we were so much a part of creating.'

Of course, withdrawal isn't the only way to undermine a system. To advance the anti-globalist agenda of favoured constituencies, America also likes to dilute new legal norms, or to defund institutions it dislikes. Last year, the US zeroed out its funding for the UN's Relief and Works Agency for Palestine Refugees and pressured other nations to follow suit. The US routinely denudes UN documents of the word 'gender' so as to avoid providing a basis for transgender rights. In April, America brazenly used the threat of a veto to gut a Security Council resolution against rape as a weapon of war – by deleting all mention of abortion. 'We basically said rape victims shouldn't have access to reproductive health services,' says Neuwirth. 'It's a new low for the US government at the UN, and it takes my breath away.'

But, arguably, nothing is more corrosive of law than to flout a norm you still formally accept. When the US recognised Israel's annexation of the Golan in March, it scoffed at not only Security Council Resolution 497 – but the UN Charter itself. The 're-emergence of the acquisition of territory by force... is a violation of what many consider to be the most basic law or norm of international relations,' says Council on Foreign Relations President Richard Haass.

'Ignoring the UN Charter on Golan stands out because otherwise the US hasn't openly defied the system,' says Anderson. 'From the standpoint of public international law it was ludicrous and shocking.'

Widen the lens to human rights or humanitarian law – especially immigration or trade – and it's not hard to find other examples of the US openly defying global norms. When the US announced in July that it would resume executions on federal death row, it placed the federal government flagrantly at odds with the most basic consensus on the right to life. When President Trump directed US troops in Syria to 'take the oil' in October, it's likely he ordered them to commit pillage (though it seems the Pentagon didn't take the order literally, and won't keep the revenue). Pillage is a war crime under the Lincoln-era Lieber Code, the Geneva Conventions, the Hague Regulations, the Nuremberg Charter and the Rome Statute.

‘Pillage is a longstanding part of the American Law of War,’ says former judge advocate and scholar Rachel VanLandingham. ‘I cannot believe we’re talking about pillage in 2019.’

Anyone who does commit a war crime can rest easy in Trump’s America. In May 2019, with no modern precedent, the President pardoned Lieutenant Michael Behenna after he was convicted of murdering an Iraqi detainee. ‘In addition to harming the structure of international law,’ says VanLandingham, ‘it’s also incredibly dangerous to the morality, morale, discipline and efficacy of US soldiers.’ Then the President flirted with a preemptive pardon of all Americans under indictment for war crimes. ‘The news that President Trump is even considering such action is [unprecedented] in modern history,’ VanLandingham wrote in an open letter with the former US Navy Judge Advocate Generals Donald Guter and John Hutson (a Republican). ‘[T]he danger it poses to the Rule of Law is staggering.’ Though the President pulled up short, he hinted broadly that it was ‘very possible’ he would pardon the accused war criminals after trial.

### A vicious assault on refugee protection

If there’s any international right President Trump has undermined relentlessly it’s asylum. The President calls asylum an immigration law ‘loophole’, even though the right lies at the core of the UN Refugee Convention and Protocol. ‘It’s difficult to overstate what an all-out and vicious assault on principles of refugee and humanitarian protection this administration is waging,’ says Refugees International President Eric Schwartz. ‘[The] tragic thing is... the White House has gotten more sophisticated... [T]heir malevolence is not as burdened with incompetence.’

The infamous early strategy of family separation was quickly enjoined by the US courts, as was the ban on asylum between ports of entry. Trump administration lawyers have provisionally fared better with the current strategies, known as ‘Remain in Mexico’ and the Third Country Transit rule.

Under the ‘Remain in Mexico’ policy, launched in January 2019, America will turn back all asylum seekers at Southern ports of entry to await further proceedings, unless they volunteer that they fear returning and are deemed ‘more likely than not’ to be persecuted. In practice, asylum officers say they’re under heavy pressure to return all migrants to Mexico, or be overturned.

Under the Third Country Transit rule, issued in July, the US will generally turn back at the Mexican border any refugee from Central America who passed through a nation that’s

signed the Refugee Convention, and didn’t seek asylum there. Now asylum seekers who have passed through Guatemala or El Salvador may be returned there under ‘Safe Third Country Agreements’ signed by those nations with the US in July and September. ‘What is so grotesque,’ says Schwartz, ‘is that they are taking a mechanism that aims to protect people and turning it on its head, by pretending that these countries are safe when they have among the highest murder rates in the world and almost no capacity to process asylum seekers.’ The UN Refugee Agency says that the Third Country Transit rule unduly restricts the right to apply for asylum, and raises the burden of proof for asylum seekers beyond the international legal standard.

“ What on earth is going on? We should be building on the Universal Declaration, not trying to tear it down!

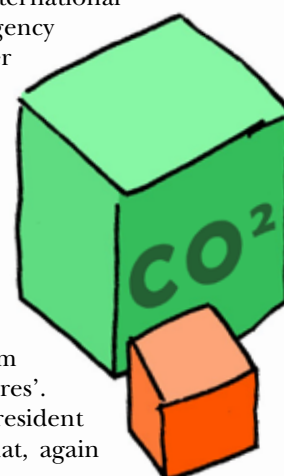
Jessica Neuwirth

Director, Human Rights Program,  
Roosevelt House Public Policy Institute, New York

Whether refugees are forced to ‘Remain in Mexico’ or ‘Go back to Guatemala’, the most fundamental complaint is that America is sending asylum seekers where they fear for their lives. If the courts agree, then the US is violating the principle of ‘non-refoulement’. Enshrined in both the Refugee Protocol and the Torture Convention, non-refoulement holds the status of *jus cogens* under customary international law.

The US Attorney General (AG) has repeatedly squeezed the grounds for asylum narrower than international law. In *Matter of A-B-* (2017) and *Matter of L-E-A-* (2019), the AG declared that neither domestic violence nor persecution of a family member may form the basis for asylum. For Central American refugees who hope to enter the US, that’s very bad news. Yet, as Yael Schacher of Refugees International notes, multiple UN Refugee Agency guidelines affirm that gender and family may establish membership in a particular persecuted social group.

Putting aside the legal problems with each strategy, how can this policy arc be reconciled with international law? The UN Committee against Torture clarified in 2017 that states can’t drive away asylum seekers with ‘dissuasive measures’. Rights advocates charge President Trump with doing precisely that, again



and again. ‘[W]hat’s the subtext for all of these moves?’ asks Judy Rabinovitz of the American Civil Liberties Union. Her answer: “We’ll do what we can to keep people from coming.”

### A death blow for the WTO?

Free trade is another international principle that President Trump has relentlessly undermined. On his third day in office he withdrew from the Trans-Pacific Partnership (TPP), which had been grandly conceived as the bridge to a 21st-century trade system. Michael Froman negotiated the deal during the Obama administration, and spoke to *Global Insight* in 2017, the year Trump entered the White House and backed out of the deal. ‘The decision to pull out of the TPP was a terrible mistake,’ said Froman, ‘and I think historically will be seen as a self-inflicted wound of the first order.’

Many would date the end of the ‘adults in the room’ myth to March 2018, when the US imposed steel and aluminum tariffs. To justify such a move, the US invoked the WTO’s untested national security exception. This was absurd on the face of it, as US military needs form only a sliver of the market and are satisfied countless times over by the domestic and allied sources that dominate the US market after years of Chinese trade tensions.

“ We’ve already seen a lot of damage to our alliances, the reputation of the US, to US leadership, to our institutions and particularly to the State Department and diplomacy

John Bellinger

*Former Legal Adviser to the US Secretary of State under George W Bush*

The EU and 29 trading nations have challenged America’s national security rationale. In a similar test case in April, a WTO panel held that a legitimate security rationale must objectively relate to an ‘emergency in national relations’ – and whether it does is a question for the judges. Nations, it pointedly noted, have a good faith duty not to end-run the WTO by spray-painting trade interests as national security interests. Clearly, America is heading for an embarrassing loss – unless something bad happens to the WTO Appellate Body first.

Amid the chaos, it’s easy to miss the significance of the President blocking all new appointments to the WTO Appellate Body. As of 12 December 2019, the Appellate Body will lack a quorum – and the supreme court of world trade will be closed

for new business. America ‘is singlehandedly taking down a legal system that the other 163 countries in the WTO desperately want,’ says the former WTO Appeals Judge Jennifer Hillman.

‘At first the international community couldn’t believe what Trump was doing,’ says the former Appellate Body Chair James Bacchus. ‘Now it’s widely recognised that he’s perfectly content to put the world trade system in legal deep freeze.’ The President simply thinks he can win more through bullying than litigating, says Bacchus: ‘[He] believes in the rule of power rather than the rule of law.’

### The future of the liberal world order

Daalder argues that America’s allies should maintain the global order until the Trump era ends. To a point, that’s what they’re doing. German Chancellor Angela Merkel responded to the US quitting the Paris Agreement with the statement: ‘We are more determined than ever to make it a success.’ When America quit the Iran deal, Britain, France and Germany stated: ‘We stand committed.’ Soon after America’s TPP withdrawal, Australia’s leader reached out to his counterparts, and Chile’s foreign minister invited the remaining nations ‘to persist in the opening up of the world’. What resulted was the ‘TPP-11’ pact, signed the day Trump imposed steel tariffs in March 2018.

In a lesser-known example, the EU and Canada have modelled a clever way to unfreeze the world trade system. On 25 July, they agreed to resolve all mutual trade disputes through a process of arbitration that will mimic an Appellate Body appeal, rooted in Article 25 of the WTO’s Dispute Settlement Understanding. ‘This is a way of keeping the Appellate Body on life support until rationality returns,’ says Hillman. ‘The EU and Canada are among those stepping into the void as the US abdicates international leadership, and they deserve to be commended.’

Bacchus agrees: ‘The time has come for the other 163 [WTO] members to stand up to Trump’s bullying,’ rather than ‘watch as [he] destroys the rules-based world trading system.’

A coalition of democracies has also stepped up at the Human Rights Council, says Piccone. Over Chinese opposition, last year’s Council adopted resolutions on Myanmar, Saudi Arabia and Venezuela, while renewing mandates in Burundi and Cambodia.

At the same time, China has been stifling any attempt to scrutinise its own behaviour, Piccone says. And although it is not yet succeeding, China is for the first time introducing resolutions to narrowly redefine human rights in terms of economic development. Former Ambassador Harper fears the US ‘has surrendered multilateralism to autocratic hostile powers’.

Daalder believes China is 'too unloved' to take up America's mantle. At the same time, other Western powers lack the capacity to fill America's leadership void for more than a few years. That raises the question as to what will happen if President Trump is reelected. Most immediately, America's withdrawal from the Paris Agreement will take effect the day after the 2020 election. But, what other pillars of the global order would topple in a second Trump term?

One answer is the New Strategic Arms Reduction Treaty (New START), which expires in February 2021. The President has derided New START as 'just another bad deal' struck by President Obama with Russia. It covers long-range arms, as opposed to the intermediate missiles covered by INF. 'If we lose New START on top of INF,' warns Michael Krepon, co-founder of the Stimson Center, 'then we're back to the Eisenhower or Kennedy administration, when there were no constraints on strategic offenses as well as defenses... If INF and New START both die, it would be the first time in five decades there is no treaty limiting US and Russian nuclear weapons.'

What matters even more for nonproliferation, Daalder says, is the endurance of our alliances. If our allies don't feel safe, they will build their own nuclear weapons, and spark new arms races. Unfortunately, President Trump has done little on this front. In June 2018, he entertained a crowd with a shifting account of his conversation with European leaders at a NATO summit. They asked: "Would you leave us if we don't pay my bills?" They hated my answer. I said, "Yeah, I would consider it."... So I said, "Yes, I will leave you." (In the same spirit, he warned that summer: 'If they don't shape up, I would withdraw from the WTO.')

Can a President, acting on his own without Congress, unsign a treaty (as opposed to an executive agreement like the Paris climate pact or a political commitment like the Iran nuclear deal)? This remains very much an open legal question. To be safe, Anderson has helped to draft a bipartisan Senate bill that purports to ban Trump from leaving NATO. And that raises its own set of legal uncertainties.

Whatever President Trump might or might not try in a second term, Daalder predicts 'the rest of the world will simply disengage from

the US.' The decline of the American-led security and trade regime would make America and the world less free, rich and peaceful. Above all, it would mean 'a return to geopolitical competition,' he says, 'and we know all too well how that ends.'

John Bellinger is the former Legal Adviser to the US Secretary of State under George W Bush, now front and centre in the Trump impeachment proceedings as the lawyer for Bill Taylor, the top American diplomat in Ukraine.

“ It's difficult to overstate what an all-out and vicious assault on principles of refugee and humanitarian protection this administration is waging

Eric Schwartz

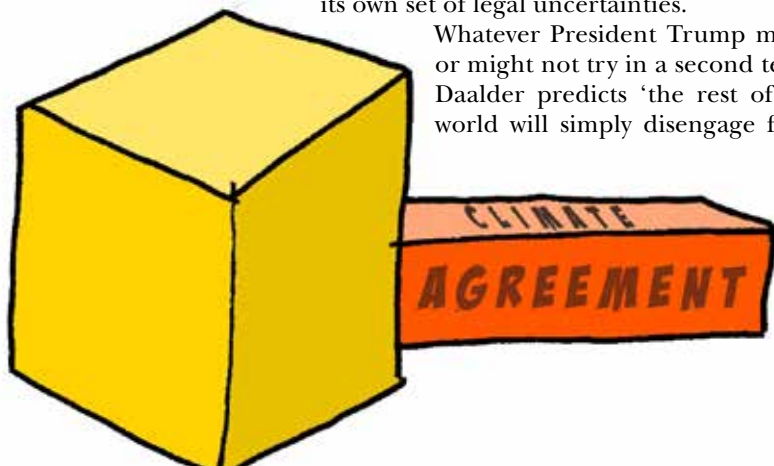
*President, Refugees International*

Even if the President leaves office by January 2021, he says, 'we've already seen a lot of damage to our alliances, the reputation of the US, to US leadership, to our institutions, and particularly to the State Department and diplomacy... I'm concerned about the damage to the institutions that we may have permanently withdrawn from. I'm concerned about the US reputation as a reliable ally. And I'm concerned about the US reputation for commitment to human rights and the rule of law. I think in some ways this could be the most important... The US has really lost the leverage to be able to raise human rights issues around the world.'

'One of most damaging things he has done,' says Anderson, 'is to open the door to repressive activities that would have come under extreme scrutiny before. Actors like China see a limited window for action.' Perhaps President Trump's abandonment of human rights created the opportunity for China to build a gulag for the Uighur people.

'My view is we're on the precipice of irreversible damage,' says Piccone. 'If Trump wins a second term we'll see a splintering of the human rights regime. The whole field of public international law will get weaker and weaker.' ☒

Michael Goldhaber is the IBA US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



## US Presidency: Ukraine scandal triggers impeachment inquiry

MICHAEL GOLDHABER, IBA US CORRESPONDENT

Throughout the Mueller investigation, Democratic leaders resisted calls for impeachment of President Trump. Then the President's Ukraine scandal emerged. By mid-October, 228 of 235 Democrats in the United States House of Representatives endorsed the impeachment inquiry launched by Speaker Nancy Pelosi on 25 September.

Professor Frank Bowman, author of *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump*, agrees with Congressional Democrats that pressing Ukraine to investigate his rival Joe Biden's son is by far the most impeachable thing President Trump has done.

'The President of the US leveraged his authority over military and diplomatic affairs to pressure a foreign state to provide dirt for his personal political use,' says Bowman. 'That's pretty easy to understand.' In particular, it's easier to understand than unsuccessfully obstructing a controversial indeterminate investigation into some murky coordination with Russia by his pre-Presidential advisers. 'There's no question that obstruction was legally impeachable,' Bowman argues, 'but politically it couldn't get traction.' And in contrast to the underlying Russia conspiracy, the Ukraine scandal doesn't require a contestable statutory determination. Rather than to invite hairsplitting under election or corruption law, Bowman urges Congress to invoke a broad historic principle: abuse of power.

'Abuse of power means using legitimate authority for an illegitimate purpose,' says Bowman. 'Trump is the commander-in-chief and the chief diplomat – and he used both baskets of authority to extort a personal political favour. That's abuse of power plain and simple.' What's even worse, says Bowman, the President sought a political favour from a national rival – exactly the sort of conduct the 'founding fathers' feared.

The precise favours the President sought from Ukraine strike David J Kramer as ironic at many levels. Kramer served under George W Bush as both Assistant Secretary of State for Democracy, and Deputy Assistant Secretary for European and Eurasian Affairs, responsible for Russia and Ukraine, among others.

Most controversially, President Trump pushed Ukraine to probe the claim that

Joe Biden engineered the 2014 firing of Prosecutor-General Viktor Shokin because Shokin was supposedly pursuing corruption at a company where Hunter Biden served on the board. (Per the call transcript: 'I heard you had a prosecutor who was very good and he was shut down... There's a lot of talk about Biden's son, that Biden stopped the prosecution and a lot of people want to find out about that.')

secret payments and secretly lobbying on behalf of the Ukrainian President, who looted tens of billions and violently suppressed democracy before fleeing to Russia in 2014. Echoing Manafort's defence, Trump lawyer Rudy Giuliani accuses the anti-corruption campaigner Serhiy Leshchenko of fabricating the ledger documenting secret payments to Manafort (and setting the Mueller probe in motion) out of enmity to Trump

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“ How can we promote the rule of law when our President asks their President to meet with his personal lawyer and the Attorney General as if there's no distinction between the two?

David Kramer

*Assistant Secretary of State for Democracy; Deputy Assistant Secretary for European and Eurasian Affairs under President George W Bush*

In reality, the entire Western establishment called for Shokin's removal exactly because he was too lax on corruption. Kramer called for Shokin's ouster as then-President of the nonprofit Freedom House. 'Shokin was bad news absolutely,' he recalls. 'It wasn't just Americans who had this position. It was the IMF, the Europeans, across the board.'

The President also pushed for a probe of the dizzying claims that Ukrainians triggered Robert Mueller's 'witch hunt' of the Trump campaign by falsely accusing Trump campaign manager Paul Manafort of corruption; and that the forensic investigators at a supposedly Ukrainian firm called CrowdStrike framed Russia for the 2016 email hack of the Democratic National Committee. In the President's words: 'I would like you to find out what happened with this whole situation with Ukraine, they say CrowdStrike... I guess you have one of your wealthy people... The server, they say Ukraine has it... [T]hat whole [Mueller] nonsense... they say a lot of it started with Ukraine.'

The CrowdStrike tale has been traced back to the Russian military intelligence hacking avatar Guccifer 2.0. In reality, CrowdStrike is a Silicon Valley firm whose co-founder emigrated from Russia at age 13, and whose findings were ratified with high confidence by all 17 US intelligence agencies.

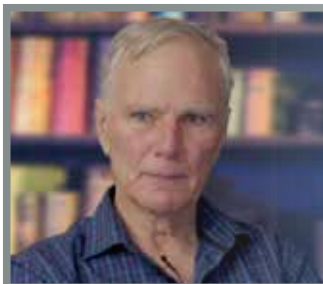
As for Manafort, after a US jury found him guilty of bank fraud, he fully admitted to avoiding taxes on \$13m in

and America. Kramer retorts: 'I know Leshchenko and saw him soon after. He was outraged and alarmed that Manafort was paid with Ukrainian money by an incredibly corrupt pro-Russian leader who has blood on his hands. That's why he disclosed the secret ledger.'

One lesson of the Manafort trial is that a nation controlled by oligarchs is attractive to kleptocrats of every nationality. As Mark Hays of Global Witness put it: when the boundary between the public and private sector erodes, individuals can 'exploit the infrastructure of state and set it up as a looting mechanism.'

Hunter Biden may have broken no laws (and if he did, Joe Biden's actions would only have placed him at greater risk), but there's no explanation for Hunter's lucrative board seat except that his company, Burisma, craved political influence. Burisma's co-founder is accused of awarding himself oil and gas licences when he served as Minister of Ecology and Natural Resources under Manafort's favourite Ukrainian President. But the US can hardly preach probity given, for example, the report that President Trump's own Energy Secretary, Rick Perry, tried to place two Republican Texan donors on the three-man board of Ukraine gas champion Naftogaz.

'We were trying to advise Ukrainians to root out corruption,' says Kramer. 'We aren't helping them by intermingling government business with private business, or by engaging in and facilitating corrupt activities.'



### Film: UN Special Rapporteur on poverty and human rights, Philip Alston

Over the past few years, Philip Alston, UN Special Rapporteur on extreme poverty and human rights (June 2014 – April 2020), has challenged governments around the world on their lack of political will to address poverty. In October 2019, he spoke to the IBA US Correspondent, Michael Goldhaber, about the injustice of wealth inequality in the United States.



Click on the podcast, article or film title to open it

### NEWS ANALYSIS ONLINE



#### The trials of Paul Manafort

March 2019

### PODCAST



#### America's border crisis

February 2019

President Trump's controversial 'asylum ban' and his relentless push to build a wall are part of an increasingly hostile policy towards immigration that threatens to undermine fundamental rights.

### PODCAST



#### Making America Global Again

September 2020

The US presidential election in November 2020 presents an opportunity to take stock of the last four years and the Trump administration, which many agree has been characterised by a destructive approach to the international liberal order.

In this podcast, foreign affairs experts Charlene Barshefsky, US Trade Representative under Bill Clinton; John Bellinger, US State Department Legal Adviser under George W Bush; and Richard Haass, US State Department Director of Policy Planning under George W Bush, give their views on how the United States should reengage and rebuild in 2021.

A scenic view of a forested mountain range under a cloudy sky. In the foreground, a railway track runs diagonally across the frame, with a gravel bed and a metal rail. The background shows rolling hills covered in dense green trees, with a body of water visible in the distance.

# The USA's assault on environmental protection

As the world faces up to the scale of the climate emergency, *Global Insight* assesses just how far the Trump administration has gone in undermining America's ability to show environmental leadership.

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**



A train loaded with coal sits on the tracks inside the now-bankrupt mining company Blackjewel's former Black Mountain mining complex, while striking miners blockade the tracks a mile away in protest of unpaid wages, in Cumberland, Kentucky, US, 12 August 2019. REUTERS/Charles Mostoller

**R**ecord-breaking temperatures and months of severe droughts have sparked massive fires across Australia, burning 10 million hectares of land and killing at least 30 people. With dozens of these fires still burning, United States President Donald Trump stood in front of an audience of the world's business elite at Davos towards the end of January, and suggested that this is a time for optimism on climate change. He also attacked environmental activists, with the most prominent of them, Greta Thunberg, later pointing out that the world 'in case you hadn't noticed, is currently on fire'.

This was perhaps the most overt manifestation of a war waged against those seeking to protect the environment throughout the first three years of the Trump administration. 'This administration has in many ways undermined if not abandoned the mission of the US Environmental Protection Agency [EPA],' says Avi Garbow, former General Counsel (GC) of the EPA. The *New York Times* has identified 95 environmental rules that have been in the firing line, and while 37 have not yet been entirely wiped out, many of the rest are the subject of court proceedings.

'The scale of deregulatory action under the Trump administration is unprecedented,' adds Caitlin McCoy, who tracks each move for the Environmental and Energy Law Program at Harvard Law School. No ecological insult seems too petty to restore, from high-flush toilets in the home to plastic water bottles in national parks. At the same time, no ecological resource seems too vast to degrade, from the shelf of a continent to the tropospheric layer of the earth.

What's most extraordinary, says Garbow, is that these rollbacks 'don't seem to be pegged whatsoever to the strength of the science, but are instead tied to the interests of select industries'. Intriguingly, this is actually a source of optimism for green litigators. Undue influence of lobbyists, coupled with an unhealthy disdain for science, may give environmentalists a chance to limit the damage.

Matt Leopold, the current EPA GC, takes issue with the notion that the story is simply one of deregulation. 'That narrative is not at all what's happening at the EPA,' he says. 'We are moving forward with key environmental protections. We believe you can have both environmental protection and a healthy and strong economy.' Among many proposals he's proud of, says Leopold, are the new Chemical Contaminant Rules, as well as the Lead and Copper Rule envisioned as an answer to the Flint drinking water crisis. More broadly, Leopold notes that the US energy sector's carbon and methane emissions continued to fall, bucking the global trend. He also touts the US–Mexico–Canada Agreement for its cutting-edge rider, animated by green critiques of the NAFTA.

'Part of our agenda is working on deregulation where it makes sense in order to energise our

economy,' says Leopold. 'And that's 'something accepted in the developed world.' He argues that the regulatory budget under the Trump administration – directing agencies to rescind two rules for every new one – resembles the one-for-one regulatory policies embraced by the United Kingdom, Canada and Australia.

Deregulation is often driven by the 'rule of law,' in Leopold's view. The Obama EPA routinely 'over-read vague laws' to dictate what they saw as good policy that Congress wouldn't enact. But 'the Supreme Court has said clearly that you can't find an elephant in a mousehole. Some of the rules we're rolling back are elephants in mouseholes. We're committed not only to protecting health and the environment, but also to following the

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“ Even if none of the regulatory rollbacks have any durability whatsoever, we've still lost four years of environmental leadership on climate action

Avi Garbow

*Former General Counsel, Environmental Protection Agency*

laws and limits Congress has placed on us.'

Agency critics find Leopold's softer remarks unconvincing. Christopher Sellers is Professor of History at Stony Brook University and Director of the Center for the Study of Inequalities, Social Justice, and Policy. He testified at the House Energy and Commerce Subcommittee on Oversight and Investigations hearing on the EPA's troubling enforcement record under the Trump administration. 'Despite their rhetoric of caring about the environment, all their behaviour points toward deregulating,' he says. Their lodestar is: 'How far can we push to get the law off the backs of industry?'

### The Fossil Fuel Protection Agencies?

The President has followed the same pattern with all three cabinet-level environmental positions. He initially chose a trio of politicians long funded by the energy industry: Oklahoma Attorney General Scott Pruitt to head the EPA, Montana congressman Ryan Zinke to head the Interior Department, and Texas Governor Rick Perry to head the Energy Department – with a corporate lobbyist riding shotgun in each agency. Each came unstuck with scandal, much like President Reagan's first EPA administrator. But, in 1983, a Democratic Senate and moderate big business pushed for an environmentalist to replace the disgraced hard-liner. By contrast, in 2018–2019, a Republican Senate replaced each with their lobbyist deputies, while the most

responsible multinationals stayed silent, and smaller, more radical industries cheered.

New EPA administrator Andrew Wheeler lobbied for the notorious coal miner Murray Energy at Faegre Baker Daniels. New Interior Secretary David Bernhardt lobbied for the Independent Petroleum Association of America (IPAA) at Brownstein Hyatt Farber Schreck. New Energy Secretary Dan Brouillette lobbied in-house at Ford Motor Company. They are only three of 281 lobbyists tapped by President Trump in his first two years. Legions more were employed as either political staffers or at think tanks, with close financial ties to the fossil fuel industries.

In 2019, a recording was leaked of a 2017 meeting where the CEO of the IPAA lobby boasted to a gleeful room of fracking executives that the guy who headed their effort to weaken the Endangered Species Act 'is now the No. 2 at Interior. So that's worked out well.' The group's political director added: 'We know him very well, and we have direct access to him, have conversations with him about issues ranging from federal land access to endangered species.' The executives chortled as the CEO described EPA staffers who hung on his every word as the Administrator gave him a personal tour, saying, 'Write that down, write that down'. '[W]e have unprecedented access to people that are in these positions who are trying to help us,' he said, and it's 'very helpful'. Presumably it's even more helpful now that the fracking lobby's guy has been promoted to No. 1 at Interior.

By the time Bernhardt began as Interior Secretary, the inspector general had already

received seven complaints about conflicts of interest while he was Deputy, with more complaints to come. In December, the department's watchdog concluded that the Assistant Secretary for Oceans had violated ethics rules by meeting with the Koch-funded think tank where he used to work (his job was to make 'the forgotten moral case for fossil fuels'). The Assistant Secretary then emailed his old colleague, 'Keep fighting.'

Observers aim to link specific lobbies to new policies, which sometimes verge on self-parody. Our *Global Insight* feature in 2018, 'Scott Pruitt versus the EPA', highlighted the influence of Murray Energy, for example. The IPAA achieved their longtime goal when Bernhardt's Interior watered down the Endangered Species Act Rules in 2019. Listing decisions must meet a tougher scientific standard for endangerment. Economic factors may now be taken into account – but climate change can't be.

Also in 2019, Interior relaxed the Well Control Rule, which formed its main response to BP's Deepwater Horizon spill in the Gulf of Mexico. As it eased up on measures to prevent similar offshore rig blowouts, the agency referred to American Petroleum Institute standards available on a member website.

In 2018, Interior declared open season on birds by effectively removing penalties under the century-old Migratory Bird Treaty Act. Industrial bird killing is now legal so long as a company is not in the business of hunting birds. This change topped the wish list of the Western Energy Alliance, perhaps because millions of birds are sickened in fracking wastewater ponds.

Destroyed cars are seen next to burnt bushland in the village of Mogo, Australia, 8 January 2020. REUTERS/Alkis Konstantinidis



In 2017, Interior lifted the public land moratorium on coal leases and created a (short-lived) advisory body on royalties. With members drawn from fossil fuel companies like Cloud Peak Energy, the royalty panel blessed a new rule letting coal miners set their own rates.

In a similar spirit, Interior transformed its Advisory Council on Wildlife Trafficking into

mounted an all-out assault on climate science.’ In her group’s 2018 survey of federal scientists, 47 per cent at the National Park Service and 35 per cent at the EPA reported being asked not to use the term ‘climate change’. Following an executive order last June to cut the number of advisory bodies by a third, the administration killed panels on invasive species and electric grid innovation.

## “ If Trump is re-elected, agencies will be gutted by departures. No one wants to work at a place where science is not valued

Gretchen Goldman

*Research Director, Center for Science and Democracy, Union of Concerned Scientists*

the International Wildlife Conservation Council. ‘It essentially became a “Safari Club” meeting space,’ says Joel Clement, who formerly ran the department’s Office of Policy Analysis. ‘There’s always been a certain amount of regulatory capture at Interior. But it was never so explicit. It’s almost as if the people coming in are trained in crossing ethical lines rather than public service.’

At the Federal Energy Regulatory Commission (FERC) – a traditionally nonpartisan agency that controls the electric grid – President Trump skipped straight to putting a lobbyist in charge. The Trump-era FERC Chair Neil Chatterjee lobbied for the coal-dependent National Rural Electric Cooperative Association, and advised Senator Mitch McConnell from the coal state of Kentucky. Green NGOs say that a technical FERC rule from the end of 2019 – forcing renewable energy companies to sell electrical capacity at artificially high prices in many of their biggest markets – is a crucial hidden subsidy to the coal sector.

Back at the EPA, Sellers reports that emboldened polluters are now pushing back against inspectors by threatening to go to their allies in the EPA brass. Across government, ‘we’re seeing a huge experiment in what happens when you bring the fox in to rule the henhouse,’ says Sellers. Agency leaders only ‘care about the regulated community,’ and above all the fossil fuel sector.

‘We reject that outright,’ responds GC Leopold. ‘We’re not captured. Our primary motivation for the regulatory decisions we make is the benefit of the American people. We’re not for any one energy type. We’re for economic growth including fossil fuels.’

### Roll over Galileo

‘This administration is openly hostile to science,’ says Gretchen Goldman, Research Director of the Center for Science and Democracy at the Union of Concerned Scientists. ‘They have systematically ignored, cast aside and manipulated science. They’ve gutted advisory bodies. And they’ve

Interior has defunded research centres on habitat loss and wildfire management. The EPA has defunded children’s health centres that helped justify regulation of ozone and pesticides (two areas where the Trump EPA suffered early court losses).

Richard Revesz, a cost-benefit scholar who directs the New York University (NYU) Institute for Policy Integrity, calls the administration an outlier in its disdain for both science and economics. In some cases – most notably in its new plan for coal power plants – the EPA’s own analysis shows foregone health benefits vastly greater than any cost savings to industry. Trump regulators seem to forget that the point of the exercise is to maximise net benefits. The Office of Information and Regulatory Affairs (OIRA), says Revesz, ‘knows how bad the analysis is,’ but ‘Trump has hollowed out the institutions,’ like OIRA, whose role it is to push for good analysis.

Many had feared that the same would be true of the EPA’s Science Advisory Board, after the President packed it with scientists who have ties to industry. But this New Year’s Eve, the Board released draft reports highly critical of the analysis underpinning EPA proposals to vastly shrink the extent of wetlands protection, lower standards for auto fuel efficiency, and undermine limits on air toxics emissions from fossil fuel power plants. The Board politely rejected the tailpipe rule’s central economic assumption as ‘implausible’, and gently noted the scientific fact that watershed systems are inter-connected. As a layman might put it, the EPA forgot that water flows.

Sellers expresses relief that even industry-friendly scientists have integrity. Clement argues more cynically that they often don’t, so the slanted advisory panels will usually help industry. In any event, this Science Advisory Board also rebuked the EPA for its Science Transparency Rule – which Goldman sees as the Trump administration’s most fundamental attack on the field.

Under the Science Transparency proposal, the EPA will only rely on scientific studies with public

data. That may sound nice, but big studies with private data are the standard way to track chronic exposure to toxins. As the EPA's scientific advisers note, such studies are usually required by law or protocol to be done anonymously – and that has never troubled peer reviewers. 'The EPA is using the rhetoric of transparency to torpedo the gold standard study design in environmental health,' says Sellers.

'This rule is an abomination,' says Revesz, 'because it claims to embody the practices of the scientific community, while scientific leaders say that's not at all what we do.'

Goldman says the 'secret science' canard has been pushed for over 20 years by dirty industries, because anonymous studies help underpin regulation of particulate matter. 'Particulate matter kills people, so protecting people from it is cost-effective,' she says. 'That fact is very inconvenient if you want to roll back environmental regulation.' As it happens, a proud climate science denier, and former coal executive, named Steven Milloy helped pioneer

of damage along the way because he didn't move forward where he should have. There's been an enormous loss of expertise. But in terms of actual regulatory initiatives, he will have very little to show at the end of four years.'

Leopold says the NYU study is skewed by losses over deadlines and defences of Obama rules. Excluding those, he claims a success rate near the historical norm. When it comes to the merits, he says, 'We're winning on a large majority of Trump environmental actions.'

But there's a reason the agencies would like to forget all the early administrative procedure cases they lost. 'We saw a lot of really sloppy legal work,' says Harvard's McCoy. 'A failure to provide notice. A failure to give opportunity for comment. It was the basics.'

Litigation over methane typified the pattern. In early 2017, the EPA and Interior abruptly suspended strict Obama-era rules limiting the flaring or leakage of natural gas at wells on (respectively) private and public land. Later in the year, the DC and Ninth Circuits slapped down the agencies for violating administrative procedure. In late 2018, after going through the arduous rulemaking process, the EPA proposed, and the Interior finalised, much-weakened replacement rules. Controlling this mighty greenhouse gas will depend on litigating the merits of the Trump rules in the years ahead.

In some cases, delay is especially meaningful. In 2017, the Interior opened large swathes of public land and waters to fossil fuel exploration. In March 2019, federal district judges in Alaska and Wyoming blocked the opening of the Arctic until Congress acts, and halted exploration on public lands until the government considers the cumulative climate impact. The vast programmes to sully public land and waters are shrouded in uncertainty pending appeals. Meanwhile, offshore drilling in the Atlantic has met resistance from Republican governors.

In terms of human health, environmentalists scored their biggest early victory against 'glider trucks'. By mounting a dirty old engine atop a new chassis, a glider truck spews up to 40 times more pollutants than other lorries. A 2017 EPA proposal to uncap their production would have resulted in up to 21,000 extra deaths annually. The EPA abandoned its plan in July 2018 after the DC Circuit granted an emergency stay in favour of the non-profits who challenged the rule.

Some green litigators feel triumphant, but delaying harmful rules is a limited strategy. The agencies have lost forward motion. Litigators can't force good new rules. Yet, good new rules are desperately needed to fight the climate crisis. Meanwhile, the agencies have seen an erosion in both enforcement and expertise. At the EPA, the number of civil cases closed just saw their three lowest years for at least a quarter-century. The number closed in 2019 was less than half the

## “ We're not captured... We're not for any one energy type. We're for economic growth including fossil fuels

Matthew Leopold

*General Counsel, Environmental Protection Agency*

the 'secret science' strategy for the tobacco industry. Milloy served on the Trump EPA's transition team (directed by another climate science denier), and openly claims credit for the EPA's initiative.

Leopold, the EPA's GC, nonetheless rejects the charge that the EPA aims to politicise science. 'What we're trying to do is simply allow public transparency,' he says. 'In order for regulatory science to support enforceable legal obligations, it needs to be public and reproducible.'

### Environmental rollbacks, 2017–2019

By most counts, those seeking to protect the environment and arrest the climate crisis have done remarkably well in litigation during the first three years of the Trump administration. In 36 challenges to environmental deregulation, the administration has prevailed only once, according to the NYU Institute for Policy Integrity. That makes the government success rate an anemic three per cent, compared with an historical norm of 69 per cent in 11 studies reviewed by the Brookings Institution.

'If Trump is a one-term President, he will have very few successes to point to on the regulatory front,' says Revesz. 'There's been lots



historical average from 1994 to 2016. Congress has stopped the President from slashing the EPA's budget by over 30 per cent each of the past three years. But staffing is still at a 20-year low. Headcount at the Office of Enforcement and Compliance Assurance in DC has fallen 40 per cent. The stars who haven't left are eyeing the exits. 'If Trump is re-elected, agencies will be gutted by departures,' says Goldman. 'No one wants to work at a place where science is not valued.'

The green strategy – to run out the clock in court – will only work for most Trump-era rules if Democrats return to power in 2021. If Trump wins re-election, then all of his challenged rules will reach court on the merits. Either way, a few key rules – easing up on coal power plants, and preempting California's zero-emission vehicle programme – may reach the merits this year. 'The phase of litigating over delay tactics is over,' says McCoy. 'Now we have a lot of proposed rules lined up. So we're about to move into real substantive litigation. The stakes are higher.'

### Environmental rollbacks, 2020 and beyond

Will green litigators sustain success as their cases reach the merits? EPA GC Leopold likes his odds better: 'On appellate review we're confident our legal theories and policy rationales will be relied on.' It doesn't hurt that the share of Trump appointees on circuit courts is 25 per cent, and soaring. Environmentalists fear the Supreme Court is hostile, particularly since the appointment of Justice Brett Kavanaugh.

Nevertheless, Republican appointees have ruled against Trump regulators in seven of their eight environmental cases in NYU's database. 'Especially on questions of regulatory analysis, the courts are not nearly as political as you think,' an impassioned

Revesz argues. 'It doesn't matter who appointed the judge, the institution of the judiciary is working well. We haven't corrupted every institution yet and that's not something that's going to happen. There's some resilience in this country.'

The best case for green optimism on the merits rests on the Trump agencies' shocking disregard for science and economics. In a nutshell, 'All their bad analysis will doom their deregulatory efforts,' says Revesz.

'The Science Advisory Board's draft statements show that this administration's rationales are bogus,' agrees Gerrard. 'They will be Exhibit A.'

But what if the quality of Trump regulation is improving? Many greens worry that the current crop of lobbyist-regulators are savvier than the political appointments the President made first. McCoy shares this concern up to a point. She agrees that Scott Pruitt was easy to beat during the first wave of cases, because the EPA was wildly incompetent on his watch. 'Now under Andrew Wheeler things have changed,' she says. 'Not to say they're doing robust, intellectually honest legal work on par with past administrations – but it's certainly far more sufficient and thorough.'

Revesz amusingly contests this conventional wisdom. According to his empirical work, the EPA run by a corporate lobbyist has been just as hapless as the EPA run by a political appointee. And it is still suffering the consequences in court. As a lifelong student of regulatory rationales, Revesz is especially heartened by the terrible analysis in the rule replacing the Obama Clean Power Plan.

The 2019 Affordable Clean Energy (ACE) rule aims to keep America's fleet of coal power plants open. To justify this, the EPA slashed its social cost of carbon from \$50 per ton to as low as \$1 per ton, by placing no value on costs outside US borders, and an absurdly low value on the costs to future generations. But never mind the climate

US President Donald Trump gestures as he leaves a news conference at the 50th World Economic Forum in Davos, Switzerland, 22 January 2020. REUTERS/Jonathan Ernst

effects. The EPA's own numbers show that the health costs from particulate matter – up to \$75bn – will vastly outweigh the \$6.4bn savings to the power industry. In human terms, the EPA projects up to 1,400 extra premature deaths annually from its handiwork, not to mention 48,000 cases of aggravated asthma. The difficulty

(the SAFE Vehicles Rule); the federal challenges to California's tough rival plan for auto emissions; and the collective methane rules (covering landfills, and new and old energy facilities on public and private land). The Science Transparency Rule belongs on this list to the degree it weakens the justification for stricter regulation of power plants and vehicles.

## “ Despite their rhetoric of caring about the environment, all their behaviour points toward deregulating

Christopher Sellers

*Director, Center for the Study of Inequalities, Social Justice, and Policy*

of defending this in court explains why the EPA is so desperate to pretend that particulate matter is harmless, by smearing classic epidemiological studies as ‘secret science’.

Green litigators have an outstanding record of challenging deregulation in the first three years of the Trump Presidency. They face good prospects of continued success if appeal courts focus on the agencies' dubious rationales, rather than restrictive interpretations of the governing statutes. President Trump has pursued the goal of deconstructing the regulatory state with as much zeal as dismantling the rules-based world order. Thanks to the maturity of US law and courts, environmental advocates have many more levers available to them in order to resist.

### An environmental impact statement for the Trump administration

In January 2020, Secretary Bernhardt hailed his proposed new rules on environmental impact statements as the administration's most consequential regulatory rollback. Under the old system, a court could block a major project like the Keystone XL pipeline based on analysis of its environmental effects. A court did exactly that in 2018, and President Trump called the ruling a disgrace. But the Keystones of the future won't face such challenges. Privately financed projects will be wholly exempt from the National Environmental Policy Act of 1970. Publicly financed projects needn't fret about effects that are ‘remote in time, geographically remote, or the product of a lengthy causal chain’. Legally, the US now considers climate impacts ‘insignificant’.

In the real world, any assessment of environmental impact in 2020 must prioritise the climate crisis. Power plants, vehicles and methane emissions account for nearly half of US greenhouse gases. That gives preeminence to the new weak power sector plan (the ACE); the new weak auto fuel efficiency standards

Carbon regulations may also have an immediate health impact by reducing particulate matter. According to an October 2019 study by the National Bureau of Economic Research, US levels of fine particulate matter, after falling nearly a quarter during the Obama era, rose by 5.5 per cent between 2016 and 2018 – a rise associated with nearly 10,000 extra premature deaths per year.

On global heating, the Trump administration has pursued its goals with characteristic creativity, and to great effect. The Energy Department is weakening efficiency standards for industrial equipment, home appliances and light bulbs. Interior has sought to open the public domain to fossil fuel exploration, and exempt most fossil fuel projects from environmental review, while jeopardising the development of offshore wind by requiring supplemental environmental review. The FERC is using an obscure price rule to protect coal, and deprive renewables of their natural price advantage. The State Department has helped to torpedo the December 2019 United Nations climate talks in Madrid, and taken climate off the agenda of this year's G7 summit in Miami. Withdrawal from the Paris Agreement is gleefully promised for the day after the presidential election.

It's conceivable that environmentalists will either defeat much of this agenda in court or reverse it by executive action when there's a change of President. But, says Garbow, ‘even if none of the regulatory rollbacks have any durability whatsoever, we have still lost four years of environmental leadership on climate action. The best hope we have is the continuation of private-sector and state-level momentum, hopefully to be joined by renewed effort at the federal and international levels.’

More pessimistically, Gerrard imagines what the world would be like if President Trump remains in office for another five years. ‘In the short term,’ he says, ‘states would have to pick up the slack even further. But every year the life of coal power plants is extended means more greenhouse gases in the atmosphere; they'll stay there for a century. In the long term we'll have to spend a lot more money on sea walls and the like. The desperate situation that Australia is facing now will become more common in a number of different ways.’

Michael Goldhaber is the IBA US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)

# Laboratory of

With the 2020 Presidential election fast approaching, *Global Insight* assesses the precarious state of democracy in the US, where aggressive tactics to gain and retain power abound, from redistricting to voter suppression.

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

Louis Brandeis, who served as Associate Justice of the US Supreme Court from 1916 to 1939, described the US states as ‘laboratories of democracy’. In their 2018 book *How Democracies Die*, renowned Harvard academics and professors of government Daniel Ziblatt and Steven Levitsky wrote that, in recent years, ‘laboratories of autocracy’ might be considered more apt. Their foremost example was North Carolina.

The State has a population and economy equivalent to Sweden, but to say the similarities don’t extend to electoral best practice would be an understatement. In 1988, state Democrats disempowered Lieutenant Governor Robert B Jordan so a Republican, James G Martin, could enter office for a second term, and in 2007, former Democratic Speaker of the House Michael P Decker went to prison for campaign fraud. ‘Republicans were oppressed around here for a long time,’ says North Carolina General Assembly Representative Chuck McGrady, who is the leading Republican reformer.

In 2010, the Republicans won the state legislature of North Carolina for the first time in 120 years. Since then, ‘they have used every aggressive tactic imaginable to make their power more permanent’ says Bob Hall, former Executive Director of a non-partisan group Democracy North Carolina.

Bob Phillips has been Executive Director of Common Cause North Carolina – a nonprofit and nonpartisan organisation that aims to encourage citizen participation in democracy – since 2001. He says ‘both parties are guilty of gerrymandering’ – the act of altering an electoral constituency’s boundaries to favour a certain party or class.

But in recent years, the major issue has been voter suppression say non-partisan reformer groups. After a series of landmark trials culminating this autumn, ‘North Carolina Republicans have ultimately lost on every issue of voter rights,’ says Phillips. This is the story of how lawyers and judges saved representational democracy in the State where it has been most blatantly attacked.

## A laboratory for expanding democracy

From the Reconstruction era that followed the American Civil War until the Voting Rights Act 1965,

Southern Democrats enforced a one-party rule by suppressing the black vote through lynch mobs, poll taxes and literacy tests, while also barring ex-felons from voting. ‘These regimes were oligarchies,’ Hall says frankly. And because of their legacy, voter participation in the South has long lagged behind the rest of the US.

Civil society in North Carolina mobilised in the late 1990s and 2000s to push through effective reforms. New laws which allow early voting and same-day registration – along with church moves to drive ‘souls to the polls’ on Sundays – boosted North Carolina voter participation from being 43rd to 11th in the nation. Black voter participation neared the level of white voter participation.

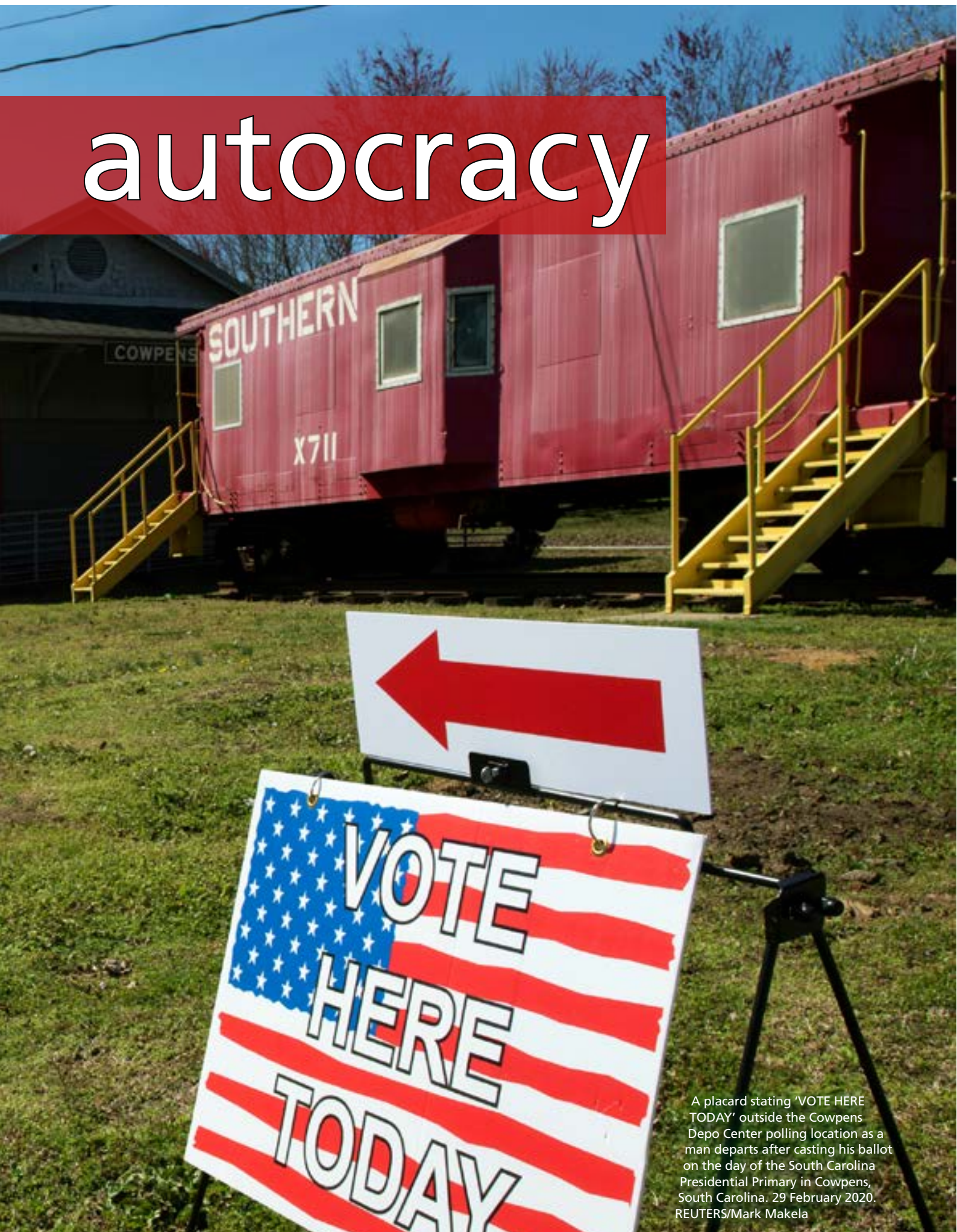
“ *Shelby County v Holder* (2013) gutted our systems to monitor voter rights, detect violations early, and fix them swiftly before a tainted election can be held

*Justin Levitt Deputy Assistant Attorney General, US Department of Justice Civil Rights Division, 2015-2017*

In a model for the nation, reformers won public financing for all judicial election campaigns – with bipartisan support from the last 12 heads of the North Carolina Bar Association. In a similar spirit, the legislature removed partisan labels from ballots when electing appellate judges. Unsurprisingly, judges elected with public financing became more independent and moderate. These were the types of experiments Justice Brandeis had in mind.

In 2008, a Democratic presidential candidate – Barack Obama, later the US President – won North Carolina for only the second time for the past half century, by 0.3 per cent. Obama drove record turnout among African-Americans, who approach 40 per cent of the State’s Democratic electorate,

# autocracy



A placard stating 'VOTE HERE TODAY' outside the Cowpens Depo Center polling location as a man departs after casting his ballot on the day of the South Carolina Presidential Primary in Cowpens, South Carolina, 29 February 2020. REUTERS/Mark Makela



Voters wait in line at night for a polling station to open in Durham, North Carolina, October 2016. REUTERS/ Jonathan Drake

and the diverse educated elites of the Research Triangle and Charlotte's banking centre all surged to the polls. Then came the backlash. 'You've got a large and closely divided place with changing demographics,' says Tomas Lopez, a Yale Law School graduate who relocated to take the reins of Democracy North Carolina from Hall. 'That has raised the stakes for holding onto power by any possible means.' The State's story is vital to tell because the same holds true for the US as a whole.

### A laboratory for eroding democracy

North Carolina is an epicentre of voter rights disputes because the power structure sees itself as threatened, argues Justin Levitt, who served as Deputy Assistant Attorney General in the US Department of Justice Civil Rights Division from 2015 to 2017. "Uppity minorities" clamouring for deserved representation' is how he describes it. 'Some of it is partisan, some it is racial and some of it is both.'

By winning in 2010, Republicans were able to draw voter maps for the next decade with the benefit of modern software. The US' system of single-member winner-take-all districts makes the lines between districts all-important. The goal is to pack enemy voters into a handful of districts (so as to 'waste' their votes), while spreading your own partisans efficiently (so as to deliver many small safe victories). Maps that ghettoised black people and Democrats have enabled Raleigh Republicans to convert a slim popular majority into a state legislative supermajority (as in 2012) and a solid majority (as in 2018). In Congress they gave a purple state a deep red delegation.

But North Carolina legislators had bigger ideas, and the US Supreme Court unleashed them. *Shelby County v Holder* (2013) struck down the part of the Voting Rights Act requiring federal pre-clearance of electoral rules in states with a history of suppressing black voters. 'Our country has changed,' Chief Justice John Roberts serenely proclaimed. In dissent, Associate Justice Ruth Bader Ginsburg argued that the abeyance of electoral racism proved the effectiveness of the Voting Rights Act, rather than the end of racism. 'Throwing out preclearance because it has worked,' she wrote, 'is like throwing away your umbrella in a rainstorm because you are not getting wet.'

As a blow to democracy, experts regard *Shelby County v Holder* on a par with the infamous

*Citizens United v Federal Election Commission* case on campaign finance. Nationally, Levitt says, 'it gutted our systems to monitor voter rights, detect violations early, and fix them swiftly before a tainted election can be held.' Locally, Phillips says, 'it gave lawmakers a free pass to do bad things. They went about suppressing voter rights in ways we'd never seen, and they did it without shame.' Levitt thinks '*Shelby* aged badly from the second it was written.'

While *Shelby* was still pending, North Carolina legislative aides secretly researched the racial breakdown of early voters, voters who lack drivers' licences, and voters with student ID cards. The day after the *Shelby* ruling, the Republican caucus announced an omnibus voting bill, HB 589, which Hall lastingly dubbed the 'Monster Law.'

The 'Monster Law' passed on straight party and racial lines. Among many other things, it ended same-day voter registration and out-of-precinct voting. It cut early voting by half and removed preregistration for teens in civics classes. It forbade keeping polls open late if lines were long. Most importantly, it required forms of voter ID that black people often lacked (such as drivers' licences), while rejecting forms of ID that they often had (such as student ID and welfare cards). Perversely, it required no voter ID for absentee ballots, which were favoured by Republicans and prone to fraud. Reverend William Barber, Chair of the Legislative Political Action Committee of

“ It was almost a feeling of helplessness to see everything we had accomplished on voting rights and getting big money out of politics totally demolished

Bob Phillips Executive Director, Common Cause North Carolina

the National Association of the Advancement of Coloured People (NAACP), called it 'the worst attack on voting rights we've seen since Jim Crow'. 'It was almost a feeling of helplessness to see everything we had accomplished on voting rights and getting big money out of politics totally demolished,' says Phillips. 'I wasn't sure there were brighter days ahead.'

The skies briefly cleared on the eve of the 2016 election, when the courts thwarted a brazen voting purge. Republican operatives tried to strike about 4,500 mostly black voters in three counties from the rolls, simply because they had moved, and their mail was returned as undeliverable. This move was justified as preventing voter fraud, even though a report by the state election board found only two cases of in-person fraud out of 40 million votes cast. 'You didn't hear about fraud in North Carolina until black people started voting in large numbers,' Barber says. The NAACP sued,

and the federal district judge said it ‘sounds like something that was put together in 1901.’ On 4 November the judge ordered the restoration of voting rights to the purged citizens.

But dark days followed in the weeks ahead, as the state legislature made a sweeping power grab. On Election Day 2016, North Carolina voters restored a Democrat to the Governor’s mansion, and a Democrat majority to the State Supreme Court. Fearful of the electorate, the legislature called a special session in December, and passed a law before the Governor could take office and veto it. The legislature re-introduced partisan labels on the ballot for the State Supreme Court and stripped the Governor of the right to name over 1,000 office holders. Most importantly, they removed the State Board of Elections from the Governor’s control and installed a Republican Chair during election years. In a charade of neutrality, the new law let a Democrat chair the board in odd-numbered years when no important elections are held. In practice, Democrats couldn’t oversee the vote and election procedures are the tools of voter suppression.

Republican county election boards proceeded to limit Sunday voting and cut the number of precincts in counties with a large percentage of black people. A 2019 report by the Leadership Conference of Civil and Human Rights found that Republican officials secretly pressured county election boards to shorten early voter hours and close early voter sites. When a Republican county election chair opened a Sunday voting site convenient to black churchgoers, other Republican county election chairs emailed to denounce him as a ‘traitor.’

Over time, the North Carolina Republican party mounted a multipronged assault on representational democracy. It rigged control of the legislature by diluting the representation of rival voters through gerrymandering. This enabled it to suppress rival votes through laws that make it harder to vote, like the Voter ID bill. It also seized control of electoral boards by overhauling their structure and giving Republicans the chair in voting years, enabling suppression of rival votes through short voting hours and other practices.

Finally, North Carolina Republicans tried to give themselves an advantage in judicial elections, by eliminating public campaign funding and putting partisan labels on the ballot for all judges. This didn’t work as the State Supreme Court tended to remain Democratic. More importantly, both state and federal courts in North Carolina stayed relatively unpoliticised. ‘We’re fortunate to have a tradition of collegial courts,’ says Phillips. Unlike the legislators, ‘the justices will still eat lunch together at a restaurant in downtown Raleigh.’ It also helped that State and federal courts could serve as mutual backstops if one or the other grew timid. In the end, an independent two-level judiciary would foil the assault on voting integrity.



Women’s March event on Market Street in downtown San Francisco, California, January 2019.



Grace Bell Hardison, a 100-year-old woman mentioned by Barack Obama after attempts were made to remove her from the voter list, is seen with an election official after casting her ballot from a car in Belhaven, North Carolina, 2016. REUTERS/Jonathan Drake



Civil rights groups at a news conference outside the National Headquarters of the Republican National Committee, called to stop ‘voter suppression and intimidation activities directed against minority voters’, Washington, 2004. REUTERS/Larry Downing



Protesters hold signs saying that Trump lied and failed to uphold the Constitution during a March For Truth at Asheville, North Carolina, June 2017.



Voters stand in line during early voting at the Beatties Ford Library in Charlotte, North Carolina, 20 October 2016. REUTERS/Chris Keane



Children watch their mother vote during the US General Election in Greenville, North Carolina, 8 November 2016. REUTERS/Jonathan Drake

### A laboratory for preserving democracy

In packing black voters together, the Republican maps of 2011 were easily challenged as a racial gerrymander. During 2013–2015, that argument failed repeatedly at every tier of the North Carolina courts. But the federal case law on racial redistricting was stronger. In 2016 and 2017, the federal courts found both the State and congressional maps were racially tainted and sent the legislature back to the drawing boards. That's when things started to get interesting.

During the new map debate, Republican leaders were only concerned about appearing racist. North Carolina General Assembly Representative David Lewis made a fateful confession when he said, 'I think electing Republicans is better than electing Democrats' and also 'so I drew this map to help foster what I think is better for the country.' And why would his map result in an evenly split State sending ten Republicans and three Democrats to Congress? Sadly, he explained, the software was simply unable 'to draw a map with 11 Republicans and two Democrats.' Lewis, who didn't respond to the IBA's inquiries, has always maintained that his map nonetheless honoured traditional redistricting criteria.

Voting reformers argued in *Rucho v Common Cause* that a gerrymander is unconstitutional even if it's strictly designed for partisan (rather than racial) advantage. But this was a novel legal theory. Associate Justice of the Supreme Court Anthony Kennedy, who'd long hinted he might support the theory, retired with the case on appeal. In June 2019, the US Supreme Court broke the reformers' hearts, and ruled that a partisan gerrymander 'presents political questions beyond the reach of the federal courts.'

Some reformers had not placed excessive faith in the Supreme Court. Law firm Arnold & Porter saw state law as more promising given that 30 state constitutions guarantee free elections. The firm's Stanton Jones and Daniel Jacobson persuaded the Pennsylvania Supreme Court to kill a partisan gerrymander in 2018. 'Our team always anticipated state court would be key,' says Jacobson. That's why they also sued Lewis in North Carolina, on behalf of Common Cause. *Common Cause v Lewis* was always bound to be a colourful trial due to Lewis's gaffe; then Common Cause got a call from Stephanie Hofeller.

### The Michelangelo or Machiavelli of mapmakers?

Stephanie Hofeller was a progressive drifter and blogger, as well as the estranged daughter of the nation's leading Republican map guru. *The New York Times* hailed Tom Hofeller as 'the Michelangelo of the modern gerrymander.' Stephanie thought 'Machiavelli' was more like it. After her father died, she found four hard drives in his Raleigh home and 18 USB flash drives, including one

labelled ‘NC Data’. ‘How could I proceed?’ she later mused, ‘I was an ordinary citizen – free from the naïveté that Tom Hofeller had ever been an honest man.’ Stephanie needed estate advice and, distrusting any local lawyer friendly with her father, she telephoned Bob Phillips at Common Cause for North Carolina. ‘I figured she was calling to vent,’ says Phillips. ‘I remember her saying something along the lines that she didn’t agree with her father’s work. I don’t know if my head was spinning but I had enough sense not to hang up.’

Within a week, Common Cause subpoenaed Tom Hofeller’s old hard drives. Caught by surprise, Lewis’ lawyers missed their chance for a timely objection. Once they got a glimpse of the files, the lawyers labelled them all ‘highly confidential,’ called Stephanie a thief, and impugned Arnold & Porter’s ethics. The Court shrugged, and admitted many Hofeller files into evidence. ‘The trial,’ says Phillips, gave ‘a view behind the curtain of a master gerrymanderer.’

The defendants were caught in several big lies; in 2017 they’d delayed a special election on the pretext of needing time to draw new maps, when Hofeller’s maps were already complete. They claimed they had never had racial data on the new districts, yet Hofeller had racial data on all of them.

“ I think electing Republicans is better than electing Democrats, so I drew this map to help foster what I think is better for the country

David Lewis *Republican Representative of the North Carolina General Assembly*

Arnold & Porter’s Jones argued that Hofeller’s files proved ‘that partisan gain was his singular objective.’ The mapmaker colour-coded the partisan leaning of every area down to the neighbourhood level. He was constantly calculating partisanship scores for each district, and weighing the favourability of each scenario for Republicans. Mathematicians asserted that only one out of every 100,000 maps would be better for Republicans than the final version.

At the trial’s conclusion, Common Cause and common sense prevailed. The State Court found a partisan gerrymander of the State legislature, and ruled it unconstitutional. The judges ordered the legislators to re-draw their map publicly as a result of their lies.

Meanwhile, a congressional partisan gerrymander claim was refiled in state court under *Harper v Lewis*. The judges said they were likely to find the map unconstitutional, and invited legislators to quickly re-draw it.

By the time Arnold & Porter had finished Stephanie Hofeller’s digital discovery, they realised the biggest bombshell in the Hofeller files had little to do with North Carolina. Arnold & Porter was also coincidentally co-counsel in the



Voters queue on the first day of early voting at a community centre in Raleigh, North Carolina, October 2018

Supreme Court when the Secretary of Commerce reinstated the question of citizenship in the 2020 national census, and Tom Hofeller advised the Trump administration to put this question on the census form.

Experts from the Census Bureau projected it would deter nine million, mostly Latino, residents from filling out forms for fear that they, or their relatives, might be deported. Among other malign effects, nine million vanished souls could wildly distort US electoral maps.

For eighteen months the Trump administration proclaimed that the citizenship question was designed to promote enforcement of the Voting Rights Act. This was an entertaining contention as President Trump has currently brought no new cases on voting rights. Despite this, a majority of the Supreme Court nonetheless showed every sign of accepting the pretext until the Hofeller files were uncovered. Hofeller recommended that the Census Bureau ask about citizenship, with the aim of drawing congressional districts based on the number of each state’s citizens, as opposed to residents. The beauty of this approach, he wrote, is that it ‘would be advantageous to Republicans and non-hispanic whites.’

In a single breath, Hofeller had admitted to plotting a gerrymander on both partisan and racial grounds, while exposing the Trump administration’s proffered rationale. The files also showed that Hofeller had helped ghostwrite a letter from the Justice Department to the Commerce Department, pretending that a citizenship question would promote voting rights.

The next month, Chief Justice Roberts surprised court watchers by ruling against the Trump administration in the census case. Jacobson thinks the opinion reads as if it were written to reach the opposite conclusion and was changed at the last moment. Phillips concurs: ‘I absolutely think the citizenship question case flipped because of Stephanie.’

### Slaying the Monster Law

North Carolina’s adventures in voter suppression fared no better than its gerrymanders. In both sets of litigation, the State found trouble by saying the unsayable out loud. In the Monster Law case, its lawyers told the trial court that North Carolina cut Sunday voting because ‘counties with Sunday voting in 2014 were disproportionately black’ and



Trump supporters wait alongside protesters for his visit to Charlotte, North Carolina on 7 February 2020.

‘disproportionately Democratic.’ As a violation of equal protection, the US Court of Appeals for the Fourth Circuit (Fourth Circuit) called this ‘as close to a smoking gun as we are likely to see in modern times.’

The decision in *North Carolina State Conference of the NAACP v McCrory* (2016) was direct and forceful as the Fourth Circuit denigrated HB 589 as ‘the most restrictive voting law North Carolina has seen since the era of Jim Crow.’ No state legislature, it reckoned, ‘has ever done so much, so fast, to restrict voter access.’ Five provisions of the law ‘target African-Americans with almost surgical precision,’ the Court concluded, and ‘impose cures for problems that did not exist.’ It was no coincidence that ‘the General Assembly enacted them in the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history.’

Specifically, the Court removed the State’s requirement that voters present photo ID, restored voters’ ability to vote early, and to register on Election Day or as teenagers. Finally, it re-enfranchised voters who mistakenly wander into the wrong polling station.

But if the Monster Law was a vampire, the Fourth Circuit ruling was not a stake through the heart. In November 2018, voters approved a ballot measure in favour of the Voter ID bill. Though Republicans lost their veto-proof supermajority in the same election, they quickly passed the Voter ID law and overrode the Democratic Governor’s veto before the end of the lame duck session.

With the 2020 vote looming, the Southern Coalition for Social Justice has challenged the new Voter ID law in federal and State court, and it has won a pair of injunctions pending trial. Federal district judge Loretta Biggs reasoned that ‘racial discrimination and racial polarisation have historically pervaded North Carolina’s political climate – and still do.’

### Undoing the ‘Power Grab’

In *Cooper v Berger* (2018), the North Carolina Supreme Court struck down the 2016 law that restructured election boards in order to strip the incoming Democratic governor of his ability to regulate elections. The Court held that the power-stripping law violated the constitutional separation of powers. The ruling ensured that partisan electoral boards can’t suppress the vote through

manufacturing long lines of voters by creating a scarcity of polls and voting booths in black areas.

North Carolina’s boundary-pushing, racial and political gerrymanders, the ‘Monster Law’ and the ‘Power Grab’ did not survive court scrutiny. However, champions of democracy have mixed reactions. ‘The sad news is all this is still happening,’ says Levitt, ‘the good news is the lawyers and courts eventually did what they’re supposed to do, tremendously bolstered by civil society. Our systems to protect voting rights are still working.’ At the same time, anti-democratic forces are legally creative, and politically persistent.

Will North Carolina’s norm-breaking be regarded as an outlier or a model? It’s not a good sign that the Michigan and Wisconsin legislatures tried their own power grabs in 2018, and that the national Republican Party has picked North Carolina as the site for this summer’s convention to re-nominate President Trump.

### On the frontlines of democracy

Ziblatt and Levitsky identify the top two warning signs of democratic decline as a disdain for the contending party’s legitimacy, and a disrespect for moderating norms. In interviews with *Global Insight*, Representative Chuck McGrady and Democratic State Representative Graig Meyer say these attitudes are rampant in the North Carolina General Assembly.

On 11 September 2019, Republican lawmakers assured their colleagues they wouldn’t miss any votes while attending a ceremony for the victims of 9/11. Republicans then held a surprise vote to override the Governor’s veto of a budget bill that didn’t expand Medicaid. One of the few Democrats in attendance cried, ‘this is a travesty of the process,’ only to have her microphone cut off. ‘That broke trust in a way that felt like a new level,’ Meyer recalls.

Both legislators think it all comes back to the gerrymander. ‘In a gerrymandered seat,’ explains McGrady, ‘you’re not worried about November, but you are worried about the primary. You play to your base which is extreme. So there are no moderate legislators left in either party. That makes it very difficult for us to compromise or move incrementally in terms of public policy on every issue.’

Each is pushing bills for independent redistricting. McGrady believes there is a bipartisan majority in favour – but the Republican leadership is blocking his bill from coming to a vote. It’s exactly the sort of norm-breaking that Ziblatt and Levitsky find so concerning. However, McGrady may not be the best bellwether of the Republican party as he is retiring and he says his children probably voted in the Democratic primary. But McGrady hasn’t given up on democracy. The redistricting committee promised to mark up his bill in the spring, and he plans to hold them to it. 🗳️

Michael Goldhaber is the IBA US Correspondent and can be contacted at [Michael.Goldhaber@int-bar.org](mailto:Michael.Goldhaber@int-bar.org)



# A state of emergency for US democracy and rule of law

▲ A healthcare worker takes a break at the Tulane Medical Center in New Orleans, US, 14 April 2020. REUTERS/Carlos Barria

**As the United States enters election season in a state of Covid-induced emergency, *Global Insight* assesses the dangers of President Trump abusing the vast emergency powers – 123 of them – at his fingertips.**

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**T**he foundational fear of the United States Constitution is a President who commences as a demagogue and ends as a tyrant. Alexander Hamilton first warned against dangerous ambition lurking behind a President's mask of right for the people in *The Federalist Papers*. University of Chicago Law professor Eric Posner defines a demagogue as a charismatic narcissist who gains power by appealing to public fears rather than advancing public good, undermining expert institutions with contempt for rules, norms and basic civility. President Donald Trump qualifies as a demagogue for Posner. But the question remains, as the presidential election approaches in a state of emergency, has this President ended as a tyrant?

When asked in the 2016 final debate whether he'd accept the outcome of the election, candidate Trump replied, he'd keep the American people 'in suspense.' We still don't know how President Trump would react to an Electoral College loss. He has never accepted his popular vote loss – always repeating the lie

that millions of Democrats voted illegally. When President of the People's Republic of China Xi Jinping jettisoned term limits in 2017, President Trump gushed: 'He's now president for life, I think it's great. Maybe we'll have to give that a shot someday.' Now President Trump enters the 2020 election season behind in the polls, with vast emergency powers at his fingertips. Will he assent to a peaceful democratic transition? We're still in suspense.

Elizabeth Goitein, Director of Brennan Center for Justice's Liberty & National Security Program, has continuously cautioned that the President's emergency authority lies about 'like a loaded weapon.' Upon declaring a health emergency in mid-March, President Trump gained access to 123 statutory powers. Secret Presidential Emergency Action Documents, first developed during the Cold War, are executive orders and messages to Congress which are quietly updated by each administration. In the 1970s, the Documents allowed the White House to keep a list of subversives, suspend *habeas corpus*

and declare martial law. And there are the scarily broad powers Congress has openly granted. The Insurrection Act of 1807, which the President has already threatened to invoke in response to the nationwide police brutality protests, allows the President to deploy troops to quell ‘domestic violence’ or ‘conspiracy.’ Section 706 of the Communications Act, enacted in the heyday of radio in 1934, allows a president to take control of any facility for wire communication – potentially allowing an internet shut-down today.

Although the National Emergencies Act of 1976 provides for congressional review of emergency powers every six months, Congress has debated only one of 64 declared emergencies, and failed to halt it. Most still remain in effect, reviewed only by a President’s devotion to democracy.

President Trump often casts doubt on his devotion to democracy. He congratulated

Oh, they go crazy when you say it. When you say to them five more years, so it’s five, but you then say maybe nine, maybe 13, maybe 17, maybe 21. Let’s do this. Let’s term limit ourselves at 25 years. No more than 25 years.’ In each instance, the crowd met the President’s musings with cheers and applause.

Political scientist Yascha Mounk has cataloged the moves of authoritarian populists. By his reckoning, President Trump has used five of the six: spreading disinformation; scapegoating minorities; assailing his critics; politicising institutions; and strengthening the executive. The only play left in the demagogue’s playbook is corrupting elections. Goitein predicts gravely: ‘If the President’s back is against the wall when the election comes, he will do whatever he thinks he needs to do to exploit the Covid-19 pandemic to make sure he wins.’

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“ If the President’s back is against the wall when the election comes, he will do whatever he thinks he needs to do to exploit the Covid-19 pandemic to make sure he wins

Elizabeth Goitein

*Director, Liberty & National Security Program, The Brennan Center for Justice*

Turkish President Recep Tayyip Erdoğan for consolidating autocracy by holding an irregular vote during an emergency. He congratulated Russian President Vladimir Putin on an obviously fraudulent re-election, with briefing papers that read ‘DO NOT CONGRATULATE.’ President Trump called North Korean Supreme Leader Kim Jong-Un ‘a pretty smart cookie’ for winning a power struggle with his uncle – whom he executed. That such a primitive method of succession impresses President Trump is especially troubling given that he’s repeated the myth that Kim publicly displayed his uncle’s severed head.

Was President Trump kidding when he said of autocracy, ‘Maybe we’ll have to give that a shot some day?’ If so, it’s a joke he finds deeply amusing and riffs on at his most unfiltered forums. ‘A lot of my critics say, “You know he’s not leaving,”’ he told a friendly crowd this December. ‘So now we have to start thinking about that because it’s not a bad idea.’ At a December rally in the rural State of Pennsylvania, the President joked that he’d maybe leave office in ‘five years, nine years, 13 years, 17 years, 25 years, 29 years.’ At a South Carolina rally, just before the lockdown, the President fondly recalled his 14-year-run as host of the reality show *The Apprentice*. He free-associated about his tenure as President: ‘Of course you want to upset them.

### Cancelling election day

The obvious way to fiddle with a democratic transition haunts the President’s opponent. ‘Mark my words,’ Democratic presidential candidate Joe Biden said in April, ‘he is going to try to kick back the election somehow – come up with some rationale why it can’t be held.’ The President shot that theory down the next day: ‘I’ve never thought of changing the date of the election. Why would I do that?’ His son-in-law and senior advisor, Jared Kushner, muddied the waters: ‘I’m not sure I can commit one way or the other to a date,’ but swiftly backed down. Whatever their intent, Biden needn’t worry. ‘There are no emergency powers,’ says Goitein, ‘that would allow the President to alter election procedures or change the date.’ Election day is fixed by federal statute as the first Tuesday in November. Voting rules are set by each state, and only Congress has the power to override them.

It would be feasible for a state to seize on an autumn wave of Covid-19 to cancel its direct popular election. This would allow the state legislature to directly appoint a slate of Electoral College electors. ‘It’s an obvious strategy we’re facing,’ says Harvard Law School Professor of Law and Leadership Lawrence Lessig – and it would be perfectly constitutional.

But the President opposes mail-in voting to Lessig's dismay. Luckily, according to a Brennan Center for Justice study, two-thirds of states already allow mail-in voting without requiring any excuse. The majority of the rest accept fear of Covid-19 as an excuse for voting by mail, or have friendly case law. Texas is the most worrying state – however, the Brennan Center for Justice recently won an injunction, pending appeal, that fear of Covid-19 must be accepted as an excuse for absentee voting in the state. Of the five states left, where elections might conceivably be halted (Kentucky, Mississippi, South Carolina, Tennessee, and perhaps Louisiana), none are presidential battlegrounds. 'In all the key states all voters already have a no-excuse mail-in option,' says counsel Max Feldman of the Brennan Center for Justice's Voting Rights and Elections Program.



▲ Masked White House staff listen to a presidential speech on pharmaceutical negotiations during the Covid-19 pandemic. Washington, US. 26 May 2020. REUTERS/Jonathan Ernst

### Pandemic voter suppression

Southern Democrats and modern Republicans have a long and dishonorable tradition of suppressing the vote, whether by lynch mob, literacy test, voter ID, propaganda or poll closures. But no more fiendish tool of voter suppression has ever been devised than the current coronavirus outbreak. President Trump, argues Goitein, knows that suppressing the vote is the only way he wins. And the best way to guarantee a low vote count is to create postal chaos amid a pandemic.

Before Covid-19, Goitein suggested all sorts of ways that the President might conceivably abuse emergency powers to suppress the vote. A few weeks before the 2018 vote, the Federal Emergency Management Agency texted a test 'Presidential alert' to 300 million US mobiles. Could the President hijack this new system to encourage fear and confusion on election day, or simply instruct all Americans to 'avoid crowds'? Could the President declare a voter fraud crisis and try to seize the assets of 'get out the vote' groups? Might the President use domestic unrest that he himself encourages by tweet as an excuse to mobilise the military or law enforcement in the hopes of intimidating immigrant or minority voters? It's illegal for law enforcement to be present at polls, but that didn't stop the President from tweeting before the 2018 elections: 'All levels of government and law enforcement are watching

carefully for VOTER FRAUD.' The night before election day, he again warned: 'Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING.'

With the distinct possibility of Covid-19 spiking this autumn in the Democrats' key urban strongholds, one needn't reach for fanciful scenarios of voter suppression. A primary election was held this spring in the mid-western State of Wisconsin while it underwent a relatively modest outbreak (4.2 deaths per 100,000 in mid-April). Republican officeholders refused to limit the election to mail-in ballots, sharply cutting the number of open polling places in cities, and fought against giving the election authorities flexibility to handle an unprecedented flood of mail-in ballots for which they were logistically unprepared. Thousands of Wisconsin voters were disenfranchised by the refusal of the US Supreme Court's conservative majority to let a federal judge extend the absentee ballot deadline past election day. Almost three-quarters of Wisconsin voters chose mail-in ballots over polling booths, and many still contracted Covid-19.

In Congress, Republicans are blocking a Democratic bill, co-sponsored by Senator for Minnesota Amy Klobuchar, that aims to make in-person voting safer and less scary amid the pandemic. Among other things, it would enlarge polling locations, sanitise the booths, outfit staff with protective gear and recruit younger poll workers. At the same time, Republicans in Congress are blocking Democratic efforts to require 'no-excuse' mail-in voting in every state. To date, Republicans have agreed to only a fraction of the funds Democrats have proposed to strengthen the states' mail-in capacity and bail out the US Postal Service.

“ Nine, maybe 13, maybe 17, maybe 21. Let's do this. Let's term limit ourselves at 25 years

US President, Donald Trump

When House Democrats initially tried to insert national vote-by-mail provisions in the \$2tn Covid-19 relief bill, the President refused. The President has spent a lot of energy discrediting mail-in voting as a 'terrible thing' rife with fraud. But he also let it slip that helping people vote would be 'extremely devastating to Republicans.' The President clarified: 'The things they had in there were crazy. They had things, levels of voting that if you'd ever agreed to it, you'd never have a Republican elected in this country again.'

In fact, the partisan tilt of voting-by-mail is historically unclear. This year it will depend mostly on the geographical pattern of Covid-19 on election day – and that’s unknowable. In the mail-dominated Wisconsin primary, the Democratic candidate won the main contest despite the chaos. The Democratic edge is attributed partly to a superior ‘get out the vote’ push, and partly to Democrats fearing the virus more according to surveys.

But Michael Steele, a former chairman of the Republican National Committee, writes that vote-by-mail only boosts overall turnout. It’s attractive to citizens who are elderly or rural – who lean Republican – or the politically disengaged. So ‘the idea that stopping mail will have a predictable partisan benefit is outlandish,’ says Feldman. Less obviously, Steele argues that more voting by the disengaged would be healthy for both parties. Low-turnout primaries stoke extremism because they’re dominated by ‘base voters.’ Improving ballot access for citizens who aren’t obsessed by politics would have a welcome moderating effect.

Giving every voter the right to vote by mail would be nice. But in the swing states, voters already have that right. The bigger worry is whether they’ll be able to exercise it. The frightening fact is that no swing state has experience handling mail-in ballots of this scale. The three states that decided the 2016 election – Michigan, Pennsylvania and Wisconsin – are especially at risk because they historically had low rates of absentee voting. America’s crucial election need in 2020 is to strengthen capacity to handle the coming flood of mail-in ballots.

‘The question is not whether states will allow mail-in voting,’ says Feldman. ‘The question is how prepared states will be for the inevitable surge.’ Election officials urgently need funds to print tens of millions of absentee ballots, buy high-speed scanners and pay postage. ‘Some states are facing an order of magnitude more absentee ballots than they are prepared to process,’ says Michael Morley of Florida State University College of Law, who studies election emergencies.

A registered Republican, Morley stresses that the virus is far likelier to suppress the vote through logistical chaos than through chicanery or fraud by either Democrats or Republicans. While mail-in ballots are relatively more prone to fraud, he says, the larger truth is that voter fraud of any kind is rare. ‘The voter fraud narrative,’ says Feldman, ‘has been disproven and discredited over and over again.’ State election officials from both parties know that, and despite the President’s entreaties, they’re busy ramping up their mail-in capacity. ‘The overwhelming majority of election officials from both parties, including ones elected on



▲ A family waiting for donated groceries from a food bank during the Covid-19 pandemic. Kentucky, US April 2020. REUTERS/Bryan Woolston

partisan tickets, are dedicated professionals devoted to fair elections,’ says Morley. The problem is they’re strapped for resources. As a banal instance of emergency chaos, he points to a New Jersey district, swamped by Superstorm Sandy in 2012, that used fax machines and ran out of ink.

As part of the giant relief Act in March, Congress approved \$400m for election preparation. But that’s only ten per cent of the need, according to the Brennan Center for Justice. House Democrats allotted an extra \$3.6bn in their new jumbo relief bill, but Senate Republicans greeted this as dead on arrival. It’s anyone’s guess if more election funding will materialise.

Devastated by the lockdown, the US Postal Service expects to be financially illiquid by 30 September – just in time for the deluge of mail-in ballots. ‘It’s unconscionable in this situation not to fund the postal service at a level that allows it to serve all Americans,’ says Feldman.

The post office has asked for \$75bn. The first big relief Act only included a \$10bn loan, which the President is using as leverage to control postal policy by imposing conditions. House Democrats also proposed an additional \$25bn outright as part of the May bill which was scorned by Senate Republicans. Under pressure in May, the post office picked a Trump donor who served as finance chair of the Republican National Convention, Louis DeJoy, as postmaster general. ‘For vote by mail,’ tweeted ‘NeverTrump’ Republican, *Weekly Standard* founder William Kristol, ‘this seems like putting a fox in charge of the hen house.’



▲ A single family-sized portion of donated food is seen at an emergency drive-through food and toilet paper distribution hosted by the San Diego Food Bank amid the coronavirus disease outbreak, in Chula Vista, California, US, April 2020. REUTERS/Bing Guan

### Disinformation and meddling Russia

Of course, America's voting system was vulnerable before Covid-19 jumped the species barrier. 'There's no rule that says you can only have one election emergency at a time,' notes Morley. On the contrary, the US is contending with cyber-attacks and disinformation while it's contending with the pandemic. Foreign actors with the requisite skills and a motive to meddle (whether for or against the President) include China, Iran, North Korea and Russia.

Former special counsel for the US Department of Justice Robert Mueller concluded in his report that Russia's interference in the 2016 US election was 'sweeping and systematic.' In November 2018, then-US Secretary of Defense James Mattis confirmed that Putin 'tried again to muck around in our elections and we are seeing a continued effort on those lines.' In July 2019, a bipartisan Senate Intelligence Committee report found that Russia tampered with election systems in all 50 states in 2016. The next day, Mueller testified that 'they're still doing it as we sit here.' But President Trump purports to disbelieve Mueller and the intelligence community. 'President Putin says it's not Russia,' he said at their Helsinki summit. 'I don't see any reason why it would be.' His son-in-law dismissed Russian social media posts reaching 126 million Americans by November 2016 as 'a couple of Facebook ads.'

In 2018, then-US Secretary of Homeland Security Kierstjen Nielsen tried to make 2020 election security a cabinet priority – but stalled out when the White House chief of staff Mick Mulvaney reportedly told her it 'wasn't a great subject' to bring up with the President. In 2019, bipartisan Senators pushed bills that would force Facebook to disclose the buyers of political ads, improve cyber-intelligence sharing by state election officials and incentivise states to adopt backup paper ballots. Senate Majority Leader Mitch McConnell blocked all action. Apparently stung by being dubbed Moscow Mitch, he then agreed to an extra \$250m in

election security funds, bringing the 2020 total to \$425m.

Despite this half-hearted national response, the US has made decent progress in electoral cyber-security at the state level. Only eight states still rely on paperless electronic voting machines. The key purple swing states of Florida and Michigan have made significant progress since 2016, according to the Brennan Center for Justice, as have the recently-purple states of Colorado, Nevada, Ohio and Virginia. Of the eight states that still have paperless polls, none are expected to be closely contested for President, except perhaps Texas (which would only be contested in a national landslide). Still, foreign meddlers could make plenty of mischief below the presidential level in Indiana, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, Tennessee and Texas.

“ The Covid-19 crisis makes the ground fertile for disinformation on when, where and how to vote

Michael Morley  
Assistant Professor, College of Law,  
Florida State University

The good news is that the virus-driven shift toward mail-in ballots makes elections less vulnerable to hacking – as Morley says, 'You can't hack paper.' The bad news is that voters using novel procedures are more vulnerable to disinformation. 'The Covid-19 crisis makes the ground fertile for disinformation on when, where and how to vote,' says Morley. For instance, in 2016, Russian Twitter and Facebook accounts suppressed the vote by encouraging gullible Democrats to 'text to vote' or 'vote at home' on election day (which were both impossible). It's by no means a stretch to envision foreign or domestic dirty tricksters planting news stories on election day about infection rates spiking, and the polls in Democratic precincts emerging as hot spots.

### The morning after election day

Unless the 2020 presidential race is a blowout, the winner won't be known on Wednesday morning. The swing states are ill-prepared for vote-by-mail and the Supreme Court ruled this April that votes postmarked 'election day' must be counted. The stage is set for the tally to drag on for days or weeks, while lawyers litigate every vote at the margin. In



▲ People gather at the entrance for the New York State Department of Labor offices, which closed to the public due to the coronavirus disease outbreak in the Brooklyn borough of New York City, US, March 2020. REUTERS/Andrew Kelly

the Wisconsin primary, Democratic lawyers pre-drafted affidavits for hundreds of voters who had requested mail-in ballots, and never received them. A highly plausible nightmare scenario, says Morley, is that the President leads in the tipping-point state throughout the television coverage on Tuesday evening, only to fall behind when mail-in ballots are fully counted. That's what happened in the 2018 Arizona Senate race, and the President pounced with accusations of voter fraud. 'We're already seeing significant efforts by the President and his allies to discredit mail-in ballots,' notes Feldman. 'They're spreading a false narrative of voter fraud to sow distrust in our election process.'

What's the endgame? Imagine the President tweeting nonstop that he's the 'VICTIM OF A COUP.' Imagine a post-election rally in the Florida Panhandle, where he rambles about 'all the tough guys' being on his side, and how 'people say they love the Second Amendment, but I'd never say that or I'd get in trouble, I'd never say that.' Russian trolls would create a viral meme on Facebook of President Trump hugging a US flag and mouthing the catchphrase of Charlton Heston clutching his shotgun: 'From my cold dead hands.' As historian Timothy Snyder has shown, it is Russia's avowed doctrine to harness 'the protest potential of the US population, and encourage Americans' tendency toward "destructive paranoid reflection". Facebook would discreetly appoint a panel to draft its contrite testimony during the second Trump administration.

It's chilling to imagine. But, even after surveying two centuries of US demagoguery, Posner is skeptical that President Trump or his admirers would go that far: 'Maybe I'm too optimistic but I simply don't believe he'll try to

create a civil insurrection. I don't believe that even his staunchest supporters would respond by taking up arms. There just isn't that tradition in the US. I don't think his hold on people is that powerful,' says Posner.

For her part, Goitein can see the President fomenting street protests while the outcome of the election hangs in the balance. But civil war would not be their goal. Rather, they would aim to pressure institutions to resolve a contested election in their favour, or else lay the groundwork for their movement's democratic return in 2024.

Goitein and Posner spoke before President Trump threatened to invoke the Insurrection Act to quell the protests following the police killing of George Floyd in Minneapolis, as this edition went to press. But there is comfort to be found in the broad-based outcry elicited by the President's military threat. Two retired chairs of the Joint Chiefs of Staff – as well as Trump's revered first Defense Secretary James Mattis – rebuked the President and his current Defense Secretary Mark Esper for speaking of the states as a 'battlespace' to be 'dominated.' Secretary Esper swiftly reversed gears, and announced that he opposes invoking the Insurrection Act.

When push comes to shove, Goitein expects that Congress and the Supreme Court will abide by the rule of law and – although she cannot rule it out – she does not expect President Trump to declare martial law. By almost any definition, President Trump has commenced a demagogue, and continued a demagogue. Yet even the Cassandra of emergency powers remains hopeful that he will not end a tyrant. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)



## US presidency: how Trump has exploited the Covid-19 crisis and how he hasn't

MICHAEL GOLDHABER, IBA US  
CORRESPONDENT

By declaring a Covid-19 emergency in mid-March, President Trump gained 123 special powers. Senate Minority Leader Chuck Schumer warned: 'The President must not overstep his authority or indulge his autocratic tendencies for purposes not truly related to this public health crisis.' In fact, if anything, the President has under-used the powers to address the health crisis.

The President has not moved to consolidate autocracy. Nevertheless, he ruthlessly enforces loyalty at the expense of democratic accountability. The ideologues in his cabinet have, meanwhile, used the crisis as a cover to advance their pre-existing agenda.

At least rhetorically, this President enjoys raising doubts about democracy. In a typical riff, at a pre-lockdown rally, he free-associated about his tenure as President: 'Let's term-limit ourselves at 25 years. No more than 25 years.'

Perhaps the President's most anti-democratic action came in April and May, when he purged three important independent voices in his administration, including Principal Deputy Inspector General of the Department of Defense Glenn Fine, who was poised to oversee Covid-19 relief.

On signing the \$2tn relief bill, the President vowed to disregard any oversight, because, he said, 'I'll be the oversight'. The House chairs protested that the President was 'retaliating against [the Inspectors General] for telling the truth' and 'following the law'. Walter

Shaub, who resigned as Director of the US Office of Government Ethics in 2017, tweeted grimly: 'This is a late-stage move in an authoritarian coup against the rule of law.'

But Aziz Huq, Professor of Law at the University of Chicago Law School and co-author of *How to Lose a Constitutional Democracy*, sees increased pushback by members of the President's own party, historically crucial in halting autocracy. Five Republican senators denounced the purge.

After the President claimed 'total' authority to end state lockdowns, he was rebuked by at least three Republican members of Congress and a Republican governor. Uncharacteristically, the President swiftly abandoned his claim of total authority.

Despite the President's rhetoric and personnel moves, the hallmark of his pandemic response has been passivity. Paradoxically, the President's default lockdown strategy has been to fob off all responsibility onto the states, even as he undermines the governors on policy, and cheerleads the protests against them. Indeed, the President has primarily been attacked for failing to use federal powers during the crisis. The President has made scant use of the Defense Production Act, which allows him to commandeer civilian industries. He has failed to build national capacity in testing and contact tracing, to produce or procure medical and protective equipment, therapeutics and vaccines.

'He very much wants to pass the buck, because things might go south, and he doesn't want to be held responsible coming into the election,'

says Elizabeth Goitein, Director of the Liberty & National Security Program at the Brennan Center for Justice. 'Instead he's blaming the governors. The situation is [not] without danger, because part of blaming the governors is an effort to foment political resistance and even foment violence.'

Eric Posner of the University of Chicago Law School, the politically moderate author of *The Executive Unbound*, makes a similar observation. 'Trump has not exercised the powers he's been given, and he seems to want to get the country back to economic status quo as soon as possible. He's doing a very bad job but he's not trying to destroy democracy. Contrast that with Viktor Orbán in Hungary, who used the crisis to obtain dictatorial powers and once the pandemic is over will still have those powers.'

The President has gone beyond neglecting the health crisis to pursue unresponsive policies. 'What you see throughout history is the exploitation of emergencies to push through other agendas,' says Goitein. 'The first question is, "Is this measure a public health measure to treat Covid-19?" If the answer is no, be very suspicious.'

A number of agencies have taken steps that seem to fail Goitein's test dramatically. The Occupational Safety and Health Administration agency has granted permission to 15 vast poultry processing plants to speed up their assembly lines – and reduce the space between workers – even as meatpacking facilities have emerged as notorious Covid-19 hotspots nationwide. The Environmental Protection Agency has broadly and indefinitely stopped enforcing all routine rules – regardless of their effect on respiratory health – so long as the regulated company can argue that its failure was 'caused' by the health crisis.

The Department of Health and Human Services has sealed America's land borders, ostensibly to protect the US from foreign germs. Yet when it pulled up the drawbridge, the US had nearly 500 times as many confirmed cases as Central America's Northern Triangle. The anti-immigration aide Stephen Miller reportedly wants the President to enforce border closure with the military under the 1807 Insurrection Act. Miller explained his thinking long before the pandemic gave him a pretext: 'The powers of the President to protect our country are very substantial – and will not be questioned.'



# Age next the

As President Trump  
*Insight* assesses wh  
MICHAEL GOLDHA

# Agenda for the Next President of United States

Trump's four years in office comes to a catastrophic end, *Global Insight* outlines the agenda that needs to change for the sake of America and the world.

By David L. Forster, IBA US CORRESPONDENT

In a friendly sit-down interview this summer, Fox News prodded the President to name his 'top priority items for a second term.' The President's reply was worthy of a beauty contest parody: 'One of the things that will be really great – the word experience is still good, I always say talent is more important than experience, I've always said that – but the word experience is a very important word. It's a very important meaning.' He eventually rambled into attacks on his political enemies, without ever hinting at a single priority.

One obvious policy agenda would be for the next President to reverse this administration's systematic attacks on the environment, immigration and internationalist diplomacy. But, an ambitious forward-looking agenda is imaginable too. Democrat candidate Joe Biden has invoked Franklin D Roosevelt, proclaiming that the 'moment has come for our nation to deal with systemic racism – to deal with the growing economic inequity that exists in our nation.'

Economists who focus on inequality see a real opportunity in this unique moment. 'Today's confluence of nightmares has made the country open to bolder change,' says Dr Irwin Garfinkel, Director of the Columbia University Center on Poverty and Social Poverty. 'There may be an opportunity next year to fundamentally start solving the persistent problems of the past 40 years,' says Michael Linden, Executive Director of the Groundwork Collaborative and a fellow at the Roosevelt Institute. 'The priorities will have to be police accountability, combined with an economic package laying big foundations for sustainable growth.'

## Repairing the destruction

President Trump has passed just one piece of major legislation, the 2017 tax cut, which Joe Biden has pledged to undo should he be the next US President. As for executive and regulatory action, the Trump regime has been hyperactive. As *Global Insight* has documented, it has focused obsessively on immigration, the environment and foreign policy. (See 'Trouble at the Border', *Global Insight*, June/July 2019; 'The USA's

US President Donald Trump talks with US Border Patrol Chief Rodney Scott while touring a section of recently constructed US–Mexico border wall in San Luis, Arizona, US, 23 June 2020. REUTERS/Carlos Barria



Homeless people sleep under the awning of the boarded-up Macy's Herald Square store, as protesters rally against the death of George Floyd in Minneapolis police custody, in New York City, New York, US, 3 June 2020. REUTERS/Andrew Kelly



assault on environmental protection', *Global Insight*, Feb/March 2020; 'Present at the destruction', *Global Insight*, Dec/Jan 2019). The Migration Policy Institute counted over 200 immigration tweaks in the first half of President Trump's term, and the pace has since accelerated. *The New York Times* tallies 100 environmental rollbacks. President Trump has never met an existing treaty he likes. (See 'Trump's treaty undoing project', *Global Insight*, Feb/March 2017; 'America's withdrawal from human rights', *Global Insight*, Aug/Sept 2018).

In an ideal world, says Sarah Pierce, a policy analyst at the Migration Policy Institute, the next President would reverse Trump-era changes legislatively – 'to prevent policy from turning into a swinging pendulum.' More realistically, she continues, 'We're in the midst of a public health pandemic, economic crisis and coming to terms with deep racial inequities. Anything else is at best a fourth priority.' The good news is that 'Trump did everything without Congress, so everything can be undone without Congress.'

To be sure, revisiting rules will provoke legal challenges that are the mirror image of today's. But judges have a soft spot for agencies that try to fulfill their mission, rather than undermine it. In a good faith review of Trump-era rules, both 'the science and the law will clearly point in the direction of different results,' says Avi Garbow, who was the chief lawyer at the Environmental Protection Agency (EPA) under Obama. 'Directing agencies to actually follow their statutory mandate – for instance, to protect

“ There may be an opportunity next year to fundamentally start solving the persistent problems of the past 40 years

Michael Linden  
Executive Director, Groundwork Collaborative and  
a fellow at the Roosevelt Institute

health and the environment – is not political pandering.' Executive orders, while faster than rule changes, will be vulnerable to court challenges in some cases.

The regulatory state will transform itself on day one by simply resuming enforcement, which had abated before the pandemic, and has since been shamelessly suspended. On the environmental front, the most impactful changes have been those that spike carbon emissions – hastening global warming and causing thousands of premature deaths a year attributed to particulate matter. Among the highest profile of the EPA's anti-climate measures are the Affordable Clean Energy Plan; the Safer Affordable Fuel-Efficient Vehicles Rule; the hypocritical effort to preempt California's tough rival plan for auto pollution; the 'Science Transparency Rule' (disregarding state-of-the-art studies that justify carbon regulation); and several rules that spike emissions of methane. But the war on climate is a whole-of-government effort. The US Department of Energy has lowered efficiency standards for industrial



equipment, home appliances and light bulbs. The US Department of the Interior has opened the public domain to fossil fuel exploration, hindered the development of offshore wind by requiring supplemental reviews, and promoted fossil fuel development by excluding climate from Environmental Impact Statements. The Federal Energy Regulatory Commission has used an obscure price rule to protect the coal sector from renewable rivals.

On immigration, the Trump administration's obsession with an obsession is asylum. Frustrated when courts wouldn't let it cage children, the White House has churned through ways to deter asylum seekers. A significant change would be to halt the pandemic practice of simply expelling applicants at the border; to stop the preexisting practice of manufacturing long waits at the border, stop making applicants remain in Mexico to await hearings; rescind the rule requiring Central Americans to first seek asylum in Mexico; reverse the rule against applicants working; and roll back the regulation that heightens evidentiary burdens, narrows legal standards and creates routine grounds to deny asylum.

Beyond asylum, top priorities ought to include lifting the 'immigrant ban' (suspending green cards and work visas during the pandemic); restoring legal immigrants' access to social services; and cancelling the wealth test (also known as the public charge rule). In addition, the President's challenger has proposed to lift refugee admissions from the paltry levels of 18,000 in 2019 and 6,000 in 2020, to a more respectable 125,000.

That leaves the three flash points richest in symbolism. The wall: not building it; protecting 'Dreamers' (and giving them Obamacare); and lifting the travel ban that galvanised the resistance. These moves might necessitate the recruitment of a patient Solicitor General and a thick-skinned social media director!

### Present at the reconstruction?

Destroying the world order appears to be among President Trump's preoccupations, and destruction invites reconstruction. At the top of the agenda for 2021 should be signalling to America's democratic allies that it's back, and that alliances and partnerships matter. The unfortunate reality is that America's 'capacity for exercising a global leadership role has collapsed,' according to Ivo Daalder, the ex-US Ambassador to the North Atlantic Treaty Organization (NATO). To reassert it, says the former State Department Legal Adviser John Bellinger, the US will first need to restore a strong State Department (and functional National Security Council).

Yet the work of rebuilding US diplomatic institutions 'will take a generation,' cautions Council on Foreign Relations president Richard Haass. Recovering their reputation may be impossible. America is 'a country whose convening

power has substantially eroded,' laments former US Trade Representative Charlene Barshefsky. 'We can't just go out and expect our allies will love us again,' concurs Daalder. 'The rest of the world looks at us and says the fact that you could elect someone like Donald Trump and 40 per cent of you still like him means you're a different country and we can't rely on you.'

## “ America's capacity for exercising a global leadership role has collapsed

Ivo Daalder

Former US Ambassador to NATO

The US is set to exit the Paris Agreement the day after Election Day, in November. After that, Haass and Bellinger think the most urgent treaty to engage with is New START (Strategic Arms Reduction Treaty), which expires in February 2021. 'The last thing we need is new round of nuclear competition with Russia,' says Haass. Next, there's a consensus that the US must swiftly reverse its withdrawal from World Health Organization (set to take effect in July 2021). A final move that might be reversed easily is the shrinking of the US military presence in Germany. Reinforcing our commitment there 'would send a powerful signal to both Europe and Russia,' argues Haass.

Then comes a long parade of more fraught issues. While the next President is likely to reengage with Iran, even its fans see little point in simply resurrecting a nuclear deal whose restrictions begin to expire in October. And though most Democrats and Never-Trumpers yearn for US leadership on human rights, some remain conflicted about rejoining the United Nations Human Rights Council, or aiding the International Criminal Court's Afghan prosecution. Other moves, like the US embassy's relocation from Tel Aviv to Jerusalem, may prove to be *faits accomplis*.

To the extent the US can reconstitute a larger world order is debatable. 'There's no question of restoring the old order because US supremacy is gone,' says Daalder. 'Global institutions are near, if not in, collapse.' His preferred platform for a new world order would be a Group of Eleven (G11), including the Group of Seven (G7) plus Australia, the European Union, NATO and South Korea. Barshefsky generally likes the idea of building cooperative structures with likeminded democracies. She dreams of the US leading the nations of Europe and an expanded Trans-Pacific Partnership into a multilateral agreement on tougher world trade rules, which in the long run the World Trade Organization would

accept. Haass isn't hung up on any institutional architecture. 'It's really a matter of who's relevant, willing and able to be in the room on each issue,' he says. A forum for public health, for example, might bring the Gates Foundation and Big Pharma to the table.

But, even the most confirmed internationalists know that pride of place must be given to domestic policy. For the challenges of 2021 will resemble those of 1918 more than 1919, and 1933 more than 1945. 'Job one will be to get Covid-19 under control,' according to Tony Blinken, who is a senior foreign policy adviser to the Biden campaign, and a potential National Security Adviser.

Ambassador Barshefsky believes that America must prioritise domestic policy more broadly for strategic reasons. 'For the US, job number

of abusive police officers and end qualified legal immunity for police officers.

Racial justice needs to be part of a broad economic response to Covid-19, covering poverty, education, healthcare and the environment 'We need an inclusive economic Bill of Rights that is antiracist instead of racist,' says Hamilton. 'What better time to enact one than when we are collectively reeling from a pandemic that is eating into the fabric of our public health and economy?'

In a series of addresses this summer, Biden put forward an immense jobs and investment programme. Trumpeting the formation of a caregiving workforce and a post-Covid-19 industrial policy, he proposed over \$150bn a year for ten years to subsidise childcare, eldercare and universal preschool; high-tech research and

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“ We need an inclusive economic bill of rights that is antiracist instead of racist. What better time to enact one than when we are reeling from a pandemic that's eating into the fabric of our public health and economy?

Darrick Hamilton

*Director, Kirwan Institute for the Study of Race and Ethnicity*

one, two, three, four and five is to get its own act together,' she says. 'Plans for infrastructure buildout, labour, environment, technology and innovation, education – these kinds of elements are the single most important thing that must be done, because if we are not economically successful at home, we will not counter China. All of these different elements of domestic policy, including immigration, these are the number one jobs. First you strengthen yourself, because China is the single greatest challenge that the US faces.'

### Serious economic reform

The key to strength is unity, and in order to achieve that, what's required, perhaps more than ever at this moment, is racial awareness. 'Anyone who doesn't see the linkages between our political economy and race hasn't been paying attention,' says Darrick Hamilton, Director of the Kirwan Institute for the Study of Race and Ethnicity. 'When we see the killing of George Floyd by state action, when we see the disproportionate impact of Covid-19 on African Americans and Latinx peoples, it indicates the devaluation of the most vulnerable groups in our society.'

The most direct response to the protests would be to enact the George Floyd Justice in Policing Act. Introduced by Senator Kamala Harris and Representative Karen Bass, this House-passed bill would ban chokeholds, create a national registry

development; and federal purchases of products 'made in America.' But the big ticket item is a green stimulus.

The President's challenger wishes to invest \$500bn each year on clean energy and infrastructure – upgrading a million green buildings a year, and pushing toward an emission-free power sector by 2035. Biden's job plan is similar to the Green New Deal, without the absolutist goals. Its strategy is to wrap climate policy in pandemic policy – using the crisis of 2020 to respond to the crisis of the century.

Beyond the creation of new jobs, a number of bold anti-poverty ideas are being contemplated. The simplest would double the minimum wage by 2024, giving 33 million Americans a raise. Among the most effective would be to give rent vouchers to all who are eligible for the existing programme. In one stroke, the number of Americans with subsidised housing might quadruple. Columbia's Center on Poverty predicts it would reduce US child poverty by a third – at a time when evictions and homelessness are poised to soar.

But, in the fight on inequality, 'baby bonds' are the favourite idea of both Hamilton and Garfinkel. The wealth gap between Black and white people between 18 and 25 now stands at a shocking ratio of 16 to one. Baby bonds would nearly close this gap, according to a Columbia Center on Poverty study. One version, promoted by Hamilton and Senator Cory Booker, would offer all American newborns \$1,000,



A pedestrian pushes a stroller as people wait in line outside to buy supplies at the Martin B Retting, Inc gun store amid fears of the global growth of Covid-19 cases, in Culver City, California, US, 15 March 2020. REUTERS/Patrick T Fallon



Members of United Auto Workers Local 6000 picket the state of Michigan office building to protest the state's plan to drop more than 12,000 families from the welfare rolls. Detroit, Michigan, US, June, 2020. Alamy Stock Photo/Jim West

and add up to \$2,000 annually for low-income children. 'It would send an incredible message to poor children of every race that you're going to have capital,' says Garfinkel. 'It very much meets the moment because there's a racial justice dimension.'

Students of US inequality policy find themselves in a state of intellectual ferment, and unfamiliar hope. At the same time, they're painfully aware that all of these ideas are nonstarters if Republicans control the Senate, or retain the filibuster.

Another forward-looking policy priority for most Americans, of all races, is the prevention of gun violence. This summer has seen a high death toll in several cities, and it's only a matter of time before the next Parkland. The likeliest reforms to be enacted fast are those that have already passed the House of Representatives: instituting a universal background check, requiring it to be completed before any gun sale, and closing the 'boyfriend loophole' for a restraining order against convicted stalkers. If the Senate gets rid of the filibuster, then Washington's response won't stop at hopes and prayers. Of course, that's a big 'if.'

### Serious democratic reform

To achieve progress with these sorts of ambitious agendas will require significant democratic reform. Whoever is President in 2021, they will immediately face a set of structural

democratic reforms that Congress has put at the front of the line. After Democrats captured the House of Representatives in 2018, their first move was to pass a jumbo democracy bill known as HR-1. On voting rights, HR-1 responds to the reality that US elections often fail to register the people's will. On ethics and campaign finance, HR-1 responds to the perception that officials put self-interest and donor interest before the public.

Though HR-1 was born in response to the flaws of the 2016 election, it remains very much of the moment. 'The reason we are seeing an outpouring of frustration on the streets is because the anti-Trump majority have felt unable to make their voices heard at the polls,' says Daniel Weiner, Deputy Director of the Brennan Center for Justice's Election Reform Program. At a deep level, Linden argues that the protesters' grievances flow from the democratic crisis. After all, if not for its long history of disenfranchisement, America would not have so much structural racism in criminal justice and public health, nor such a patchy safety net. Linden concludes: 'The last few months strengthen the case for both serious democratic reform, and serious economic reform.'

HR-1's first virtue is to acknowledge Russian election meddling. It would deter foreign hackers by retiring paperless polls, regulating poll vendors and auditing electronic results. It would deter foreign trolls by forcing Facebook et al to disclose

all advertisers, banning voter deception and requiring corrective information. It would deter foreign donors by forcing ‘dark money’ groups to disclose their donors – and by unfreezing the Federal Election Commission. A total redesign aims to shake the Commission from its paralysis, so it can resume enforcing the foreign donor ban, along with the rest of election law. (See ‘How US election law logged off,’ *Global Insight*, April/May 2018).

Perhaps even more importantly, the House hopes to end racialised voter suppression, and expand voter access. ‘Frankly, the concerted effort to keep Black and brown people from voting accounts for much of the Trump era’s rancor,’ says Weiner. (See ‘Laboratory of autocracy,’ *Global Insight*, April/May 2020). If the President and Senate enact HR-1 next year, over three million ex-felons will be able to vote. Up to 50 million citizens would be registered automatically at motor vehicle, social services and college offices. Early voting and an election holiday would make it easier for them to follow through at the polls. A companion bill (to be passed again in the John Lewis Voting Rights Act), restores supervision of voting districts with a racist history. That would overrule *Shelby v Holder*, where the Chief Justice suggested that racism is no longer a concern in American society. Parting ways with the Supreme Court on a second key question of democracy, HR-1 would ban partisan gerrymanders. (See ‘Gerrymandering: Does the road to autocracy run through Wisconsin?’, *Global Insight*, Oct/Nov 2017). Instead it would form independent redistricting commissions for all 50 states – or rather, all 51. For the House recently voted to make majority-minority Washington DC the 51st state, in the suitably named HR-51.

President Trump has pursued an agenda openly pushed by big campaign donors, Weiner says, while spurning public opinion. Consider the 2017 tax cut, Obamacare repeal, and climate deregulation. (See ‘Scott Pruitt vs. the Environmental Protection Agency’ *Global Insight*, June/July 2018). HR-1 would weaken the sway of money in politics by generously matching public funds to small donations. True, Citizens United won’t let Congress limit ‘independent’ political spending. But by unleashing the FEC, the House hopes to police coordination between the campaigns and the ‘super political action committees’ that funnel plutocratic cash.

By any account, the Trump Presidency has revealed that federal ethics rely heavily on custom rather than law. HR-1 would require future Presidents to divest problematic assets – and to show the public their tax returns. It would address cabinet conflicts and



“ First you strengthen yourself, because China is the single greatest challenge that the US faces

Charlene Barshefsky  
Former US Trade Representative

Residents affected by the economic fallout caused by the Covid-19 pandemic, line up in vehicles to collect groceries during a San Antonio Food Bank distribution in San Antonio, Texas, US, 17 July 2020. REUTERS/Adrees Latif

obstruction by giving the Office of Government Ethics final say on recusals and waivers, and insulating it from presidential control.

For all its sweep, HR-1 overlooks vital structural reforms. In the latter half of his term, President Trump has pushed the bounds of his emergency powers (building the Mexican border wall) and war powers (assassinating Qasem Soleimani), while compromising bureaucratic integrity and independence by purging Inspectors General. Liz Hempowicz, Director of Public Policy at the Project for Government Oversight, urges Congress to fortify these post-Watergate restraints on the executive. Alas, she suggests weakening the Presidency will be low on any President’s agenda.

But by far the biggest barrier to popular will is beyond the House’s reach. The Senate filibuster rule allows a mere 41 Senators – representing an even smaller percentage of the US population – to block any law save one budget measure a year. ‘The filibuster is the chief obstacle to a party that controls the presidency accomplishing their goals in Congress,’ says political scientist David Faris of Roosevelt University. ‘They can’t do anything else unless they abolish the filibuster.’ They certainly couldn’t pass HR-1. ‘The list of to dos is very long,’ says Linden. ‘That’s part of the reason we need to start with filibuster reform and voting reforms. One whack at the apple is not acceptable. The moment requires more than that.’

Michael Goldhaber is the IBA’s US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)

# The US Bar **vers**

**Accused of politicising justice, Attorney General William Barr has pushed United States lawyers to the barricades.**

**MICHAEL GOLDHABER, IBA US CORRESPONDENT**

**W**hen the history of periods of upheaval like the last few years is written, the historians will be justified in asking, “Where were the lawyers?” says the former New York City Bar President John Kiernan. ‘[Many lawyers] have been remarkably active in trying to attach a positive answer to that question.’

During Donald Trump’s fourth year in office, the NYC Bar, in lockstep with an army of Department of Justice alumni, has veritably revolted against Attorney General William Barr. Although pushback by other segments of the US legal profession has been sporadic, it too has focused on the Department of Justice. In advancing the President’s political interests

– above all, to discredit the Mueller Report – Barr has provided endless opportunities for outrage.

### **Enter Barr, stage right**

At the start of the Trump era, civic-minded lawyers rushed to the airports to resist the xenophobic policies of the President’s first Attorney General. Few imagined that they’d recall Jeff Sessions fondly. But Sessions respected institutions enough to recuse himself from the probe into Russian campaign interference. This act of professionalism enraged President Trump, who openly pined for a fixer in the same mould as his disgraced personal lawyer Roy Cohn. ‘The saddest thing is, because I’m the President

US Attorney General William Barr is sworn in ahead of testifying before the House Judiciary Committee on Capitol Hill, in Washington, DC, July 2020. Chip Somodevilla/Pool via REUTERS

# us William Barr

of the United States, I am not supposed to be involved in the Justice Department,' he tellingly complained in 2017. 'I'm not supposed to be doing the kind of things that I would love to be doing and I'm very frustrated by it.'

Watching loudly from the sidelines, private citizen Barr was frustrated too. From the Reagan White House through his stint as Attorney General under George H W Bush, Barr has favoured a strong executive. As President Trump encouraged chants of 'Lock her up' – and pushed the US Department of Justice to investigate Hillary Clinton – Barr offered the lonely opinion that there was 'nothing inherently wrong' with that. As Robert Mueller assembled a team to probe Russia's ties to the

Trump campaign, Barr said he risked looking like 'an entirely political operation to overthrow the President'. When Mueller asked if the President was obstructing him, Barr called the question 'asinine' and took it upon himself to advise the White House. Firing or pressuring an FBI Director couldn't obstruct justice, Barr volunteered, because it fell within a President's powers. Then Deputy Attorney General Rod Rosenstein – who was 'supervising Mueller because of Sessions' recusal' – coldly responded that Barr didn't know all the details. Constitutionalists scorned Barr's memo as a dangerous outlier. Politicos saw it as a shrewd audition.

Delighted with his demonstrated tolerance for politicised justice, the President installed Barr



as Attorney General in February 2019, just in time for the Special Counsel's filing in March. The new Attorney General initially released only a short misleading summary – concluding that the President had not obstructed justice – which distorted the media narrative, and let the President claim exoneration. After Barr finally showed the public the report a month later, over 1,000 Department of Justice alumni wrote a letter that captured its spirit more faithfully. The conduct described by Mueller would surely support multiple obstruction charges, they wrote – if not for the Department of Justice policy against indicting a sitting President.

### Rolling back Mueller

Though Mueller exited the stage without doing the terminal damage to the Trump administration that some thought he might, the Attorney General remains determined to discredit him. In autumn 2019, the Department of Justice Inspector General was set to report whether the FBI had reason enough to probe the Trump campaign's ties to Russia. Evidently fearing an unacceptable answer, Barr preemptively tapped prosecutor John Durham

– pre-judging their own investigation of the Russia probe.

But how could the Russia probe be baseless if National Security Adviser Michael Flynn had pleaded guilty of lying about his private meetings with Russia's ambassador? How could it be unjustified when a jury found that Trump ally Roger Stone had secretly dealt with WikiLeaks as a conduit for Russia, and convicted him of crimes with a guideline sentence of seven to nine years in prison? These awkward realities became alterable when Barr pushed out the US Attorney for the District of Columbia, Jessie Liu, who supervised both the Stone and Flynn cases, and handpicked her successor as opposed to elevating her deputy.

Unbeknown to Barr and the President, the Department of Justice requested the standard guideline sentence for Stone on 10 February. On learning of it late that night, the President tweeted: 'This is a horrible and very unfair situation.... Cannot allow this miscarriage of justice!' The Sessions Department of Justice had ignored similar tweets on its failure to probe Hillary Clinton. But Barr's Department of Justice jumped, asking for a 'far lower' sentence in a terse superseding memo the next day. All four Stone prosecutors resigned from the case. Lead prosecutor Aaron Zelinsky later told the House Judiciary Committee that there was 'pressure from the highest levels of the Department of Justice to cut Stone a break' due to 'his relationship to the President', and because the US Attorney was 'afraid of the President'. One supervisor, Zelinsky, testified and warned the prosecutors they could be fired if they resisted.

On 7 May, the Department of Justice took the utterly unprecedented step of dropping its criminal case against Flynn – 30 months after he pleaded guilty. Barr's team argued that Flynn's lie to the FBI about his Russia contacts was not 'material', because the FBI at the time had no legitimate basis for a counterintelligence investigation against Flynn. Observers were left to wonder how a lie could not be material if it exposed the National Security Adviser to blackmail by Russia.

Ultimately, the President would commute Stone's sentence altogether in mid-summer. In the Flynn case, the flabbergasted judge appointed an amicus to oppose the Department of Justice's motion for withdrawal. After a hiccup on first appeal, the US Court of Appeals for the District of Columbia Circuit ruled *en banc* at summer's end to let the Flynn case proceed in this unprecedented fashion.

### Backlash in the legal profession

Undoing the results of the Mueller probe prompted even the consensus-driven American Bar Association (ABA) to speak out. A week after



William Barr testifies before the House Judiciary Committee in the Congressional Auditorium at the US Capitol Visitors Center, Washington, DC, July 2020. Chip Somodevilla/Pool via REUTERS

to criminally investigate the very same question. Then, to ensure that he'd control the story in 2020, Barr issued a new policy requiring his approval to probe a presidential campaign, or its foreign financial support.

In a 434-page report, drawing on a million documents and 100 witnesses, the Inspector General concluded that the Russia probe was justified and unbiased (at the same time, he identified and condemned errors in the FBI's wiretap applications). Barr and Durham each took the extraordinary step of stating that the Inspector General's main conclusion was wrong and the FBI had acted without justification

Barr intervened in the Stone sentencing, ABA President Judy Perry Martinez told her House of Delegates: ‘No one, no one should interfere with the fair administration of justice.’ After the President commuted Stone’s sentence, she stated that the ABA was ‘deeply troubled’, and that the pardon power should only be used via an orderly process with careful consideration given to the Rule of Law, rather than to undermine justice.

Swathes of the Bar moved into open rebellion. Over 2,000 Department of Justice alumni joined an open letter to protest the shift on Stone’s sentence. Over 2,500 joined an open letter to protest the abandonment of Flynn’s guilty pleas. ‘The numbers of Department of Justice alumni signing on to these letters are extraordinary,’ says Ben Berwick of Protect Democracy, who helped organise the alumni. ‘The vast majority are apolitical career civil servants.’ Ex-prosecutor Dianne Sanford emailed: ‘Those of us who signed those letters believe that the freedom of the Department of Justice from political influence, whether from the right *or* the left, is foundational for the future of democracy in America.’

The Department of Justice alumni went back to the basics. In their Stone letter, they cited the Justice Manual’s imperatives that legal decisions be ‘insulated from political influence’ – and prosecutions ‘free from partisan consideration’. Politicised prosecution is ‘anathema to the Department’s core mission,’ they noted. Yet the Attorney General had ‘openly and repeatedly flouted this fundamental principle.’

Both the Stone and Flynn letters called on Barr to resign as Attorney General. In the Stone letter, the alumni also urged current Department of Justice lawyers to resist unlawful directives, and implored the other branches to shield those lawyers from retaliation. In the Flynn letter, they also beseeched Congress to censure Barr ‘for his repeated assaults on the rule of law in doing the President’s personal bidding.’ Democracy, they explained, ‘depends on a Department of Justice that acts as an independent arbiter of equal justice, not as an arm of the president’s political apparatus.’ As both letters underscored: ‘Governments that use the enormous power of law enforcement to punish their enemies and reward their allies are not constitutional republics; they are autocracies.’

The accusations of politicised justice went well beyond the Mueller cases. In late June, the Department of Justice’s Antitrust Chief of Staff told Congress that the Antitrust Division pursued ten baseless full-scale reviews of small cannabis mergers last year (about a third of its caseload) – simply because the Attorney General didn’t like their business. The cannabis scandal renews suspicions that the Antitrust Division has favoured the Trump-friendly Facebook and Fox Broadcasting Company, while hindering

Amazon (whose Chief Executive Officer owns the *Washington Post*) and Time Warner (parent of CNN).

Perhaps the most spectacular account of politicisation at the Trump Department of Justice came from ex-National Security Adviser John Bolton. In his memoir, Bolton relates that Turkey’s President Recep Tayyip Erdoğan asked President Trump to halt the investigation of Turkey’s Halkbank for evading US economic sanctions. According to Bolton, President Trump replied that ‘he would take care of things’ after placing ‘his people’ at the Manhattan US Attorney’s office. In fact, Barr abruptly pushed out the US Attorney in Manhattan on 19 June. Geoffrey Berman told Congress that Barr tried mightily to handpick his successor (as with the US Attorney in DC).

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“ The saddest thing is, because I’m the President of the United States, I am not supposed to be involved in the Justice Department

President Donald Trump

But Berman refused to resign unless his deputy took over his investigations. With jurisdiction over global financial institutions – not to mention the Trump Organization and the 2016 Trump campaign – the Southern District of New York has countless potential cases of interest.

In fact, Barr abruptly pushed out the US Attorney in Manhattan on 19 June. Geoffrey Berman told Congress that Barr tried mightily to handpick his successor (as with the US Attorney in DC). But Berman refused to resign unless his deputy took over his investigations. With jurisdiction over global financial institutions – not to mention the Trump Organization and the 2016 Trump campaign – the Southern District of New York has countless potential cases of interest.

For starters, it is reportedly investigating Trump ally Rudy Giuliani for soliciting a Ukrainian probe of the Biden family in return for US aid. Indicted Giuliani associate Lev Parnas publicly accused Giuliani of directing him to do so after meeting with the President, which might implicate all three in a bribery conspiracy. Barr has denied political motives, saying that ‘even if one were interested in trying to influence a case you wouldn’t do it by removing the head of the office.’

Before Barr backed off his demand to handpick Berman’s replacement as US

Attorney, leading New York lawyers were prepared to mobilise, quite literally. David W Rivkin, former IBA President and a partner at Debevoise & Plimpton, says that he and two former NYC Bar presidents, Roger Maldonado and John Kiernan, discussed mounting a ‘lawyers’ march’ on the US courthouse in Foley Square, New York, on the model of the Lawyer’s Movement march mounted by Pakistani lawyers to protest President Pervez Musharraf’s purge of Pakistan’s Chief Justice in 2007.

of the Mueller investigation. He wrongfully interfered in the day-to-day activities of career prosecutors, and continues to do so, bending the criminal justice system to benefit the President’s friends and target those perceived to be his enemies. He participated in the forcible removal from public space of peaceful protesters, exercising their First Amendment rights of speech and assembly.’

But the most comprehensive and morally authoritative reply came from the 24,000-strong New York City Bar. Astonishingly, it was the sixth

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“ These actions form an overwhelming public impression of an Attorney General whose primary loyalty is to the President who appointed him, not to the American public or the rule of law

President of the NYC Bar and Chair of its Task Force on the Rule of Law

Also in June, the Attorney General enraged civil libertarians by reportedly playing a leading part in clearing Lafayette Square of protests, to make way for a Presidential photo op at a church near the White House. Barr, however, denies giving the tactical order. This was the last straw for over 100 bipartisan members of the US Supreme Court Bar, who have collectively argued 650 high court cases. Echoing the call for Barr’s resignation, they concluded in a public letter that the Attorney General ‘violated his oath by overseeing violence against peaceful protesters exercising their First Amendment rights’.

June’s drama triggered still more damning indictments. Over two dozen leading DC attorneys – including four ex-presidents of the DC Bar Association and four legal ethics professors – petitioned the DC Bar to discipline the Attorney General. In a 40-page letter, they concluded that Barr had violated his ethical duties to uphold the Constitution; and to avoid dishonesty, deceit, misrepresentation or serious interference with the administration of justice. Most pointedly, they concluded that the Attorney General had breached his duty to zealously represent his client’s interests – because his ‘client is the United States, and not the President’. The former DC Bar presidents stressed Barr’s role in clearing Lafayette Park, his critique of the Inspector General report and his mischaracterisation of Mueller.

At about the same time, 80 per cent of the faculty at Barr’s alma mater, George Washington Law School, called on the Attorney General to resign. Their recitation of Barr’s sins reads like the liturgy for the Day of Atonement: He ‘misled the American public about the results

time in six months that the Attorney General earned a public rebuke from the nation’s leading city bar. On 23 June, the President of the NYC Bar and the Chair of its Task Force on the Rule of Law wrote to Congress saying that Barr is ‘unfit’ for his position – and called on him to resign. Among other incidents, they noted Barr’s distortion of Mueller, his meddling in Stone’s sentencing, his attempt to drop the Flynn case, the dispersal of protesters at Lafayette Park and the apparent purge of US Attorney Berman. ‘Each of these actions,’ they concluded, ‘raised serious concerns about Mr Barr’s stewardship of the Department of Justice. Cumulatively, they form an overwhelming public impression of an [Attorney General] whose primary loyalty is to the President who appointed him, not to the American public or the rule of law.’

### Barr doubles down

The Attorney General has responded to this barrage of criticism pugnaciously. On Fox News in April, Barr called the Russia probe ‘one of the greatest travesties in American history’ – launched ‘without any basis’ and aiming ‘to sabotage the presidency’. In Senate testimony on 29 July, he called ‘Russiagate’ a ‘bogus’ scandal. Barr denied ‘interfering’ in any US District Court for the Southern District of New York cases, while admitting that he had ‘raised questions about certain matters’. As for the Stone and Flynn cases, he had intruded only to ensure that each received ‘equal treatment’ before the law. (Much like fair and balanced news, equal justice is in the eye of the beholder).

In private life, Barr had noted with dismay ‘the increasing use of the criminal justice process as a political weapon’. He had returned to his beloved Department of Justice to rescue her from politics – because he believed his ‘independence’ would allow her to ‘enforce the law even-handedly without partisan considerations’. Ironically, Barr invoked rule of law only to condemn the ‘anarchy’ that he associated with racial justice protests – conflating ‘rule of law’ with ‘law and order’.

Since his Senate testimony, Barr has compulsively politicised the Department of Justice in the name of depoliticising it. He began investigating four Democratic governors, including New York’s Andrew Cuomo and Michigan’s Gretchen Whitmer, for spreading Covid-19 in nursing homes. The President empowered the Attorney General to designate any locality as ‘anarchic’ based on its restraint in policing, or other factors he ‘deems appropriate’ and to strip ‘anarchic jurisdictions’ of federal funding. (The memo cited no legal authority and named four Democratic cities that the President loves to vilify). The Department of Justice took over the President’s personal defence in the defamation case brought by the columnist E Jean Carroll, on the remarkable rationale that the President was performing executive duties when he denied having raped her. Finally, in advance of the election, Barr removed the longstanding Deputy Assistant Attorney General who serves as the watchdog for counterintelligence, and replaced him with



Special Counsel Robert Mueller

an inexperienced political appointee. Ryan Goodman of New York University School of Law, who edits the Just Security blog, perceives a ‘highly-orchestrated plan to deploy the Department of Justice’ as a weapon in the 2020 presidential campaign.

Is Barr saving Durham’s critique of the Russia investigation for an October surprise?

The Department of Justice traditionally honours a ‘rule of forbearance’ before elections. But Barr interprets it mainly as tying his hands from indicting a candidate before Election Day. In connection with Durham’s probe of the probe, Barr said on 13 August that ‘we’re not going to do anything for the purposes of affecting an election, but we

“ No one, no one should interfere with the fair administration of justice

Judy Perry Martinez  
*American Bar Association President*

are trying to get some things accomplished before the election’. The next day he clarified that Durham’s disclosures would be dictated by ‘developments in the case’. That day, Durham charged an FBI lawyer with a false statement and forgery for altering a CIA email to expedite an application to wiretap Carter Page, a foreign policy adviser to the Trump campaign. This is certainly chargeable misconduct. But it had already been revealed by the Inspector General. It does not support a ‘deep state’ conspiracy, nor does it make Russiagate a hoax.

### A fuller Russia story begins to emerge

The extent of Russiagate became clearer a few days later, with the publication of a 1,000-page report by the Republican-chaired Senate Select Committee on Intelligence. The searing Senate report is a rare model of bipartisanship (marred only by irrelevant duelling appendices on the semantics of ‘collusion’). It vividly reaffirms that Russia coordinated with the Trump campaign.

The Senate’s report pushes well beyond Mueller’s. It concludes without hedging that Konstantin Kilimnik – the professional alter ego of Trump campaign chair Paul Manafort – is a Russian spy. Manafort owed millions to the Kremlin-tied oligarch Oleg Deripaska, and signaled through Kilimnik that he’d use the campaign to make himself valuable again. Manafort spoke with Kilimnik almost daily during the campaign, and bought a pay-as-you-go phone to keep speaking even after they were indicted. During the campaign, Manafort shared with Kilimnik confidential polling data and discussed the Upper Midwest as the path to victory. Kilimnik was possibly tied to the well-targeted election interference campaign that ensued. Kilimnik used Manafort to spread the

mutually-convenient lie that the Ukraine was the election meddler. The Senate reveals that Roger Stone arranged for WikiLeaks to post the Democratic National Committee emails after learning that Trump's 'Access Hollywood' scandal was imminent. The Senate report finds that Trump spoke with Stone about WikiLeaks (one of 34 points where the President's memory failed him in response to Mueller's queries). So much for Barr's 'bogus' scandal.

about Russia. That's precisely why he was appointed Attorney General.

### The duty to speak out

When the justice system becomes politicised, 'lawyers and bar associations have a special obligation to speak out,' says Rivkin. 'The fact that our Justice Department appears simply to be doing the President's bidding undermines

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“ The fact that our Justice Department appears simply to be doing the President's bidding undermines the ability of lawyers to fight for impartial justice around the world

David W Rivkin  
Former IBA President

That we learn so much from the Senate report is a reprimand to Mueller, who by both direction and inclination confined himself to legal questions; and to the narrow prosecutions that followed. (See *Global Insight October/November 2018, Trump's Presidency: the trials of Paul Manafort*). As the Senate report justly notes, electoral interference is 'inherently a counter-intelligence matter and not one well-suited to criminal prosecution'.

Bipartisan or not, the right-wing infosphere dismisses the Senate report as a second-order hoax. President Trump is champing at the bit for Barr to release the Durham Report and back his own narrative before the election. When Fox News asked him about the Durham Report's release, the President answered none-too-subtly: 'Bill Barr can go down as the greatest Attorney General in the history of our country. Or he can go down as just an average guy. We'll see what happens.'

The President's remark (reminiscent of his carping about his first Attorney General's recusal) may suggest that Barr is belatedly resisting some political demands. At the same time, it makes a mockery of Barr's testimony that the President has never 'pressured me to do anything in a criminal case'. Like 'collusion', the word 'pressured' lends itself to obfuscation because it's legally undefined. Barr can sincerely swear that his criminal decisions are 'my own', because, at least until now, he has always agreed with the President

the ability of lawyers to fight for impartial justice around the world. When the shining model of impartial justice becomes simply a pawn of the President, it's hard to explain to other countries that they need to behave differently.'

The serial norm violations of the Trump era have sooner or later prompted an outcry in many professional communities, perhaps most consequentially in the military after Lafayette Square. This year's pushback by the legal profession has been extraordinary, yet far from universal, with the American Bar Association lagging far behind the NYC Bar, and most bar groups remaining conspicuously silent.

'The questions get harder when there is no consensus within an organisation about how to proceed,' says Kiernan, but 'when behaviour becomes clearly inconsistent with the rule of law, informed people should individually and collectively speak out'.

Ambassador Charlene Barshefsky, Senior International Partner at WilmerHale goes so far as to argue that, in general, 'bar associations, have not been vocal enough'. As Chair of the NYC Bar's Task Force on the Rule of Law, Stephen Kass has been perhaps the single most vocal exception. 'I do hope,' he says, 'that we can provide a responsible lead for other bar associations'. ☒

Michael Goldhaber is the IBA's US Correspondent. He can be contacted at [michael.goldhaber@int-bar.org](mailto:michael.goldhaber@int-bar.org)