Law

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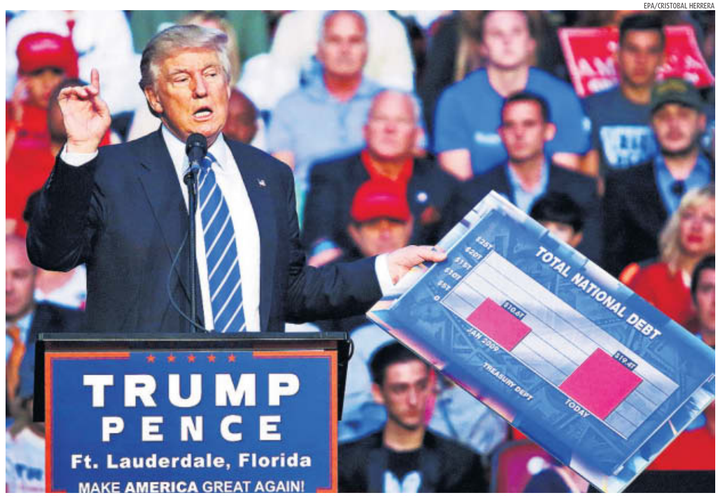

Donald Trump wants a justice who will not vote to abolish the Second Amendment — the right to keep and bear arms

How Trump will shape the US Supreme Court

America's highest court is likely to become even more politically partisan as the president-elect looks to fill the vacant ninth seat, writes **James Zirin**

The US election result will determine the future of the country's Supreme Court. Now ideologically deadlocked at 4-4 since the death in February of the rock-ribbed conservative Justice Antonin Scalia, the justice who fills the ninth seat will tip the balance.

Accepting the nomination as Donald Trump's running-mate, Mike Pence said: "Americans should know that while we are filling the presidency for the next four years, this election will define the Supreme Court for the next 40."

God, gays and guns are the hot-button issues coming up before the court. Throw in campaign finance and abortion, and the justices' work is cut out for them. Court watchers speculate that three other vacancies may soon occur by reason of death or retirement.

Before the justices of the US Supreme Court go into conference, each shakes the hand of the other eight. The ritual is supposed to signify a shared commitment to the constitution and the rule of law. But over the past 15 years the justices have been deeply divided, making partisan decisions in cases left and right by 5-4 and 6-3 votes.

Now the judiciary looks set to become even more politicised. The president-elect wants to appoint justices of "similar views and principles" to Justice Scalia, who will not vote to abolish the Second Amendment, which guarantees certain gun rights.

Trump's first list consisted of six federal appeals court judges appointed by the Republican president George W Bush and five state supreme court justices appointed by Republican governors. All are white, and eight of the 11 are men. They were recommended by various conservative think tanks.

Trump had said that it "will be a horrible day if Hillary gets to put her judges in", implying that the right-wing future of the court hangs in the balance. Clinton, in turn, wanted to appoint justices who will pursue a liberal agenda on abortion rights and campaign finance reform.

Neither candidate pledged to appoint only justices of vast experience

'The hot issues are God, guns and gays, campaign finance and abortion'

and deep engagement with the law.

Presidents of both parties tend to appoint US Supreme Court justices who share their politics. But presidents are sometimes surprised by their choices. Earl Warren's liberal performance on the bench as chief justice famously disappointed Dwight D Eisenhower. David Souter surprised George HW Bush. Franklin D Roosevelt wanted to reward the Dixiecrats for their support in the 1936 election so he appointed Hugo Black, an ardent New Dealer.

Roosevelt was confident as to how Black, who had served in the Senate for a decade, would come out on his social and economic programs. He overlooked the fact that Black was a former Ku Klux Klan member, who had spoken out against the Catholic Church at Klan meetings throughout Alabama. On the bench, Black turned out to be a staunch protector of constitutional rights and one of the most influential 20th-century justices.

The court's modern partisan divide began when Ronald Reagan appointed Justice Scalia in 1986. Scalia, unanimously confirmed by the Senate, was determined to push a right-wing agenda. He became the unabashed leader of the conservative wing. In the most politically partisan of cases, he cast the deciding vote in Bush v Gore, effectively electing the president.

Since the Bush presidency, which resulted in the appointments of Samuel Alito and John Roberts, the court has often voted in partisan blocs, and the justices admit as much. "We [liberals] have made a concerted effort to speak with one voice in important cases," said Justice Ruth Bader Ginsburg last year.

Scalia exacerbated the situation in death as in life. With an eight-person bench, the potential for a 4-4 tie is a reality. In the seven months since his death, this has happened three times in important cases involving unions, immigration and voter registration in North Carolina. In all, Scalia's presence on the court would have probably changed or else reinforced the outcome. If changing judges changes law, we may ask what law is.

And whoever fills the Scalia seat, if the American public widely holds that the Supreme Court is but just another political branch of government, it will eventually abandon all trust in judicial decisions, and we will be well on the road to anarchy.

James Zirin is a former partner at the New York office of Sidley Austin and the author of Supremely Partisan — How Raw Politics Tips the Scales in the US Supreme Court (Roman & Littlefield)

Press freedom is too important to be subject to official regulation

David Pannick, QC

Next Tuesday the Investigatory Powers Bill returns to the House of Commons. There is one remaining issue: whether to retain a clause inserted by the House of Lords to put pressure on the press to accept regulation under the Royal Charter 2013. MPs should reject the Lords amendment and the Lords should cease holding up the passage of this important bill.

The bill will provide an improved framework for the use of investigatory powers by law enforcement, security and intelligence agencies. It strengthens, safeguards and enhances judicial oversight. The bill is vital to the protection of national security and combatting other serious crime.

There is an urgency about these matters because the existing (and inadequate) law — the Data Retention and Investigatory Powers Act 2014 — has a sunset clause and so expires at the end of this year. Lord West of Spithead told the House of Lords last week that his experience as chief of defence intelligence and minister for security and counterterrorism in the last Labour government persuaded him that the sooner the bill is enacted the better.

The passage of the bill has been delayed because the House of Lords is angry that Section 40 of the Crime and Courts Act 2013 has not been implemented. Section 40 would require a court hearing a libel, privacy or similar claim against a publisher of news-related material to apply a presumption as to costs. The claimant would normally be awarded costs if suing a newspaper which is not a member of a press regulator approved under the Royal Charter (even if the newspaper wins the case).

By contrast, the claimant would not normally be awarded costs (even if the claim succeeds) if the newspaper is a member of the approved regulator, which provides an arbitration scheme. The object of Section 40 is to put pressure on the press to join an approved regulator. The Lords amendment would add a similar provision to the Investigatory Powers Bill.

There are three reasons why the Commons should overturn the Lords amendment on this subject. First, because the Commons should reject the Lords' attempt to hold such an important bill hostage on issues of press regulation that are far from central to the bill's purposes.

The second reason is that the secretary of state for culture, media and sport, Karen Bradley, announced last week that there will be a ten-week consultation on whether Section 40 should be implemented. The merits and disadvantages of Section 40 can be argued in the consultation. Some critics of the press have complained about delay since 2013. But Section 40 does not apply until an approved regulator is recognised by the independent Press Recognition Panel. That occurred only on October 25 when Impress was approved.

The third reason why the Lords' amendment should be removed is that implementing Section 40 would make no sense. It was the product of a late-night deal by the coalition government and the Labour opposition after the Leveson Report into the appalling conduct by some journalists. But the landscape has changed since 2013.

Most national newspapers (including this one) have agreed to regulation by a new body, Ipso. Its chairman, Sir Alan Moses, is a robustly independent former Court of Appeal judge. Last month Sir Joseph Pilling (a distinguished former civil servant) published his review of Ipso, finding it effective and independent. By contrast, Impress, the official regulator, is an empress with no empire. No national newspapers and few local journals have signed up. An organisation that regulates *Your Thurrock*, but few others, and has no track record, cannot command confidence about the quality of the regulation it will provide.

Press freedom is far too important for the state to insist on such official regulation. If Section 40 were to be brought into force, newspapers would have a choice of agreeing to regulation by an, as yet, unimpressive Impress or facing costs risks that would, in practice, make it impossible for local and national newspapers to take the risk of publishing investigative journalism into the activities of litigious people, or doing other than settle their claims when proceedings are brought. And all because some newspapers carried out phone-hacking and other actions already unlawful in civil and criminal law.

James Madison, one of the US constitution's founding fathers, said that in matters of press freedom it is "better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits". The secretary of state should leave "luxuriant growth" to regulation by Sir Alan Moses.

The author is a practising barrister at Blackstone Chambers, a Fellow of All Souls College, Oxford, and a crossbench peer in the House of Lords. He has advised many newspapers on issues of regulation

Unpaid work — a 'crucial pillar of justice'

Jonathan Ames

Lawyers are providing more free advice than ever — even if many find they have no choice but to do so.

Drastic cuts to the civil legal aid budget four years ago have squeezed swathes of clients out of eligibility. Many now start self-financed social welfare claims, but run out of money before the case finishes. That leaves lawyers with a stark choice: drop the matter or go unpaid.

Speaking during the launch on Monday of the 15th annual National Pro Bono Week, researchers claimed that the problem of "involuntary pro bono" has worsened since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was enacted.

Twenty or even ten years ago, pro bono was a safety net top-up to the legal aid system. Now it has become a crucial pillar to providing access to justice for many, according to the coalition of groups backing the pro bono week in England and Wales (which includes the Law Society, Bar Council and the Chartered Institute of Legal Executives).

Vital projects are being provided by firms of all sizes across the jurisdiction, but the City of London giants have the most scope and biggest budgets. Last year, for example, Simmons & Simmons launched a "UK access to justice" programme, a collaboration of the biggest 30 law firms in the country to support advice for low-income individuals.

There is much debate over the form that pro bono should take and its function. Campaigners vehemently argue that governments should not view it as a means by which gaps in legal aid provision can be filled.

Yet governments of varying colours — National Pro Bono Week was launched in 2001 by Labour's then attorney-general, Peter Goldsmith, QC — have cut legal aid while making purring noises about the benefits of lawyers providing free advice. Lawyers may rail against pro bono being manipulated by ministers, but the evidence suggests that is what is happening.

Last year, when he was lord chancellor, Michael Gove created near panic in the Square Mile when he mooted the possibility of a levy on the country's wealthiest law firms, with the funds raised to prop up courts or the legal aid system. Gove was hastily invited to briefings with senior partners, but was diverted by the Brexit referendum then left government.

However, Martin Barnes, the chief executive of LawWorks, the pro bono co-ordinating body, says that "the issue of a potential levy has not gone away". Barnes acknowledges that the idea of a levy — imposed by the government or the legal profession regulators — has its attractions. Only two weeks ago *The Lawyer* magazine reported that 11 City law firms were paying equity partners £1 million each on average. A fraction of that profit would fund a few law centres.

There would be drawbacks, however, to a mandatory charge, warns Barnes. "I fear that a levy would cannibalise existing contributions from law firms. Imposing one would risk destroying existing projects financed by individual firms." The concern is that practices would simply pay the levy and take the view that it was "job done". Another City proponent of pro bono is Guy Beringer, the former senior partner at Allen & Overy, who chairs the charity the Legal Education Foundation. He too is unenthusiastic about a levy. "We need to move people away from the idea of a cash grab — it smacks of hypothecated taxation."

Nonetheless, Beringer is adamant that a more co-ordinated approach to pro bono is needed. He promotes the idea of a "national booking system for advice — a collaboration between, say, law firms, Google and advice agencies. We need to combine legal experience with strategic thinking."

Beringer moots another innovative idea: providing secondary specialisms for lawyers when training. Legal education has become increasingly specialised, with those destined for City practice having scant or no knowledge of social welfare law. "There is definitely an argument that we are training too many lawyers, but do we train enough housing and welfare benefit lawyers? We probably don't."

Others are cautious. "Secondary specialism training would work better when it comes to advising clients with narrow and discreet areas of need," says Paul Yates, the head of pro bono schemes at Freshfields Bruckhaus Deringer. "But that sort of training wouldn't work in relation to advising people who have a cluster of connected legal problems."

Some even sound alarm bells over events such as pro bono week. It is all well and good, they say, for City lawyers to get together, but there are still wide gaps in legal aid advice. "There is much good work being done, but there are still many lawyers at large commercial law firms not involved," says Simon Pollock, a partner at Berwin Leighton Paisner. "In many cases it is just that we have to find suitable projects for them."

Barnes agrees. There are pro bono projects in the capital, but outside London "the picture is much more variable."

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As legal aid is cut, too few lawyers are trained in advice on housing and welfare

Lawyer of the week Richard Kovalevsky, QC

Richard Kovalevsky, QC, of 2 Bedford Row chambers, acted for *The Sun* journalist Anthony France, the only reporter found guilty of paying public officials in the Metropolitan police's £12.4 million Operation Elveden, and who was cleared in the Court of Appeal.

What were the main challenges in this case? Mr France was convicted in May 2015 and had his first application to the Court of Appeal rejected. I was asked to represent him and renew his application for leave to appeal. The case focused on complex issues concerning public interest — the biggest challenge was demonstrating that the trial judge, while trying to be fair, had misdirected the jury.

What's the best decision you've taken as a lawyer? To focus on defence work. It has been a rewarding journey and I have been fortunate to meet remarkable people including Adrian Kerridge, the ground breaking owner of Lansdowne Recording Studios, and Sir David Jones, who brought Next back from the brink of bankruptcy.

Who has inspired you in your career? Without doubt my pupil-master, Jonathan Turner, QC. His unique blend of down-to-earth northern humour and fierce intellect made him an admirable advocate mentor.

What's the oddest thing that has happened to you? The courtroom is a serious place, but occasionally it erupts into pure theatre. One trial was delayed because a juror refused to come out from under a table; and I was swept up into a bizarre hamster conversation while cross-examining the prosecution witness Freddie Starr.

What's the best advice you've received? Take the case and your client seriously, but don't take yourself too seriously.

Which three qualities should a lawyer have? An inquisitive mind, the ability to listen and consider the ideas and experiences of your team and an aptitude to go without sleep.

What law would you enact? I would amend the Bribery Act to include a public interest defence; it would rarely be used but be important in cases evidenced by the use of a very old offence, "misconduct in public office", to prosecute journalists.

How would you like to be remembered? As a devoted father, a dependable friend, an enthusiastic (if hopeful) skier and someone who made a difference to society through the lives of those I have represented.

Linda Tsang
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Law Diary Edward Fennell

Trump rules

"We're going to make America great again — I'm so happy!" said the phone volunteer at the Trump victory celebration. What that means remains to be seen, but what is the impact of this "vote against the established order" on the legal world globally?

"I would hope that a Trump victory assists the UK in Brexit trade negotiations with the US," said **Lord Gold of Westcliff-on-Sea**, formerly the senior partner of **Herbert Smith Freehills** and highly respected by the American authorities for his expertise in global anti-corruption matters. "Mrs Clinton expressed some negative ideas about the UK negotiating separately with the US once we leave the EU, but hopefully Mr Trump will be more receptive. His victory may also be a wake-up call to EU leaders, who I suspect are shocked at the result. This may encourage them to be more supportive to a soft Brexit."

This view was confirmed by the Europe-watcher and economist **Julian Chisholm**, formerly with **BP**, who said: "The chances of a soft Brexit are improved because the EU may be more favorably disposed to the UK in the wake of Trump's isolationism."

Meanwhile, an encouraging interpretation of the Trump result was also provided by the US/UK dual-qualified **Geoffrey Kertesz** of **Bircham Dyson Bell,** who said: "Rumours of the end of the world have been greatly exaggerated. In terms of the effect on Americans in the US and overseas, the president-elect has signalled possibly ending citizen-based taxation, reforming the Foreign Account Tax Compliance Act and repealing US estate tax, any of which would carry significant implications. His isolationist approach likely translates into a short-term, bumpy ride in terms of US foreign policy and the global economic outlook, but inevitably there will be a degree of recovery."

Peter Cohen-Millstein, a US corporate partner at **Linklaters,** emphasised the need for stability. "The president should work to ensure that US capital markets remain the deepest and most transparent in the world and that US regulation continues to attract investors and capital seekers."

And there was a calming tone from **Paul Rawlinson**, the global chairman at **Baker & McKenzie**. "Our firm's decades of advising clients navigating the global economy means we are used to dealing with volatility. President elect Trump's views on trade is one area that our clients will want us to watch closely, but it is too soon to say what the impact will be on the North American Free Trade Agreement or other agreements. However, we hope we don't see a retreat into an overtly protectionist America."

The ride into the unknown starts here.

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