

Go Gentle Into That Goodnight?

Following Joe Biden being elected the 46th president of the United States of America, a discussion has begun within the legal community concerning the now lame duck President Donald Trump. This debate is centred around the legal implications that hang over his head. Specifically, relative to the Southern District of New York (SDNY), which is building several cases around the President's actions over the last 4 years. But should the newly elected President Biden pardon him as he leaves the position, as has been done many times in the past?

In 1974, President Gerald Ford pardoned his disgraced predecessor Richard Nixon following his resignation after the Water Gate scandal. Although no charges were brought officially, the gesture of a "pre-emptive" pardon was issued, allowing the matter to be concluded. The case being made by President Ford, that it would draw a close to the matter and not affect the Office of the Presidency. Some legal scholars believe that to bring the office into disrepute through prosecution, would discredit the legitimacy in the public eye, of the power held by the occupier of the White House. A position that requires the public to believe in the integrity of the head of the nation.

However, the counter argument is that no man is above the law, and to allow any such illegal behaviour, sends the message to all future successful candidates, that the President is not subject to legal consequences. In 1973 the Office of Legal Counsel, (OLC) issued a memorandum that deliberated and concluded *"that all federal civil officers except the President are subject to indictment and criminal prosecution while still in office; the President is uniquely immune from such process"*. This memo went on to be cited on several occasions in Constitutional cases involving President Trump. Most fundamentally, by Special Prosecutor Robert Muller, who stated that after finding 10 counts of obstruction of justice by President Trump, it was not within his power to move forward with prosecution. Considering the OLC memo alongside the powers granted to him as special prosecutor, Mr Muller conceded there is no precedent of this previously, nor does the Constitution specifically give procedure to seeking and implementing legal charges against a sitting President. Instead, the power lies with Congress to consider the matter. This did not happen

at the time, as although House Speaker and head Democrat Nancy Pelosi did recognise the responsibility that lay within Congress to act, they instead seemed to follow the consensus made by head Republican Doug Collins, who stated *"relitigating...and reinvestigating the special counsel's findings will only further divide our country...it is time to move on"*

The Attorney General Bill Barr also refused to bring charges against the President, stating that he was in full agreement with the OLC memo, and therefore felt the President cannot break the law while he is in power. A perspective that has led many to believe that Mr Barr has failed in his role as the highest Law Officer in the United States, and that instead he has performed more as the President's lawyer, working to defend him on several contentious legal issues. A point that President Trump highlighted 26 days prior to the 2020 election, when he stated on Fox News that Bill Barr should indict his political opponent Joe Biden, because *"we got plenty, you don't need any more....Without an indictment we'll get little satisfaction....and I won't forget it!"* A request that Attorney General Barr declined to act upon.

However, it takes little logical analysis, to identify potential problems with the OLC's position. Through Article II, Section (2), of the Constitution, the President *"shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment"*. But if this power was allowed to be wielded by a sitting President, in a self-serving manner, then potentially he could murder his political opponent, and then pardon himself, therefore allowing his re-election without contest. Although an extreme example, this simple paradigm demonstrates the potential pit falls that accompany this level of power. No man can be above the law, a principle that the Constitution is based upon. The founders working to establish a government that would not be beholden to a Monarch, and would ensure a separation of Church and State, to ensure a fair and unbiased democracy at the foundation of the Republic, without enforcement of beliefs or reprisal for differing opinions.

President Trump's former lawyer Michael Cohen has just been released from a three year prison sentence, after pleading guilty for his participation in the misuse of campaign funds. Within the indictment, a co-conspirator named as "Individual 1" is identified, but no legal action has been taken against this person. That person has since been identified as President Trump by Mr Cohen, who has incriminated the President with several pieces of

testimony and evidence. So the legal apparatus is in place to make a prosecution, should the District Attorney feel it appropriate, or maybe should I say is allowed to prosecute by decision of the new incoming Attorney General. One that hopefully follows the actions of some exceptional Attorneys General, that upheld their positions as Americas legal protectors previously.

This, therefore, rather unusually informs and indicates to President Trump the case that could eventually be brought against him. Potentially one of many, according to the District Attorney of SDNY. Which is why there has been chatter amongst the current administration at the White House, about an alternative method of pardon for the outgoing President. Rather than allow the prosecutors to begin proceedings after President Elect Biden has been sworn in, President Trump instead resigns between now and 20th January 2021. Passing the Presidency to Vice President Mike Pence. Mr Pence then would have the power to pardon Mr Trump in a “pre-emptive” manner as previously described in the Nixon and Ford case. Could this be done? Again it is a contentious matter that is not clearly enshrined in the Constitution, instead only the consideration of accountability being applied through impeachment is stated by the founding fathers. However, if one applies President Fords thoughts at the time of making the pardon, he stated clearly that this was not an action that had resulted from or by a negotiation with Nixon for his resignation of the Presidency, as this would be considered a Quid Pro Quo. This could then be deemed as bribery for the pardon made, and therefore, would directly be in contravention to Article II of the Constitution. This would also apply if President Trump attempted to negotiate with President Elect Biden for his “agreement of a peaceful transfer of power”, following what President Trump is claiming to be a rigged election. A claim that is proving through both investigation and legal challenges in the State courts, to be falsely made.

So with the replacement of President Trump and his “legal protector” Mr Barr due in January, and with understanding of the difficulties highlighted through self-pardon, could this be the perfect time to create legal precedence regarding this currently inconclusive subject? I certainly hope so, but not because of any personal feelings I may have towards the outgoing President. No, instead, as previously stated, I feel that this matter is so important to resolve, especially at such a divisive partisan time. And as it often is with some

of the greatest and most underlying legal considerations and determinations, it is through necessity that formulation of the most fundamental laws are constructed.

Therefore, any person that successfully takes the Office of the President, and becomes arguably the most powerful person on the planet, must be aware that they are not above the law, and therefore their behaviour while in power will have significances, not just for the people that they govern, but for themselves. Striving to be worthy of the position they hold, while simultaneously recognising that they more than anyone, should endeavour to maintain a higher legal standard, whilst considering that any action they take may have legal consequential outcomes. Outcomes that would, can, and will be actioned upon by the other branches of Government that have both the responsibility and power to do so, should this creation of legal precedent be made through prosecution of President Trump before he leaves office in January 2021. Would this potential, actionable legal standing of reciprocity change how Presidents make decisions? That's unknown until implemented, but the absence of such law arguably has emboldened some questionable previous decisions. For any failings one may consider President Trump has, this could be one final and somewhat unintentional contribution from his Presidency, that may change the political landscape for the better in the United States.