



October 31, 2019

Anthony Silberfeld
Director, Transatlantic Relations
+1.202.384.1993
anthony.silberfeld@bfna.org

Trick or Treat:

The Rule of Law Comes Knocking

By Anthony Silberfeld

In a week dominated by ghouls, goblins, and the forces of darkness, there is some reason for optimism on the streets of Washington and London. For the better part of three years, President Trump has sidelined norms and legal precedent to further his stated objective to “make America great again.” Across the Atlantic, U.K. Prime Minister Boris Johnson vowed to leave the European Union by Halloween, and “would not be deterred by anybody.” Both men, however, are now being haunted by their own pronouncements, as the rule of law arrived on the doorsteps of the White House and Number 10 in recent weeks.

Whistling Past the Graveyard

On August 12, 2019, a whistleblower filed a complaint with the inspector general of the American intelligence community alleging, in short, that the President of the United States had conditioned aid to the Ukrainian government on its willingness to dig up dirt on former Vice President Joe Biden and his family. Despite efforts by the Trump administration to obfuscate, conceal, and deny any wrongdoing in this episode, the Whistleblower Protection Act – enacted by Congress in 1989 to establish a procedure for reporting abuse of power (among other violations) – provided a pathway to push back, and with it a morale boost for the rule of law in America. In an attempt to limit the damage, the White House released the “transcript” of a call between Trump and Ukrainian President Zelensky to demonstrate that nothing untoward had occurred. Congressional oversight committees came to the opposite conclusion and began to ramp up their investigation. Spooked by increasing pressure, Trump responded with a predictable counterattack: “I want to know who’s the person who gave the whistleblower the information because that’s close to a spy,” Trump said. “You know what we used to do in the old days when we were smart? Right? With spies and treason, right? We used to handle them a little differently than we do now.”

House Speaker Nancy Pelosi, for her part, launched a formal impeachment inquiry – an authority afforded to the House under Article I section 2 of the U.S. Constitution – citing violations of the president’s oath of office by putting his own interests ahead

Stay connected:



Twitter
@BertelsmannFdn



YouTube
Bertelsmann Foundation



Facebook
Bertelsmann Foundation

of the U.S. national security interest. The combination of the whistleblower procedures being followed to the letter – thereby insulating it from partisan attacks – and Congress bolstering that action with its oversight authority has provided a powerful check on the executive branch not often seen in recent years.

Silencing Ghosts

A highly visible campaign to have Donald Trump's personal and corporate tax returns released to the public has existed since the 2016 U.S. presidential campaign. Until last month, those efforts had repeatedly failed as Trump argued that he was unable to release returns that are under audit by the Internal Revenue Service. In September, however, the Manhattan District Attorney's office issued a subpoena to the president's accounting firm as part of an ongoing criminal investigation into Trump, demanding the release of eight years of Trump's tax documents, to determine if the Trump Organization had falsified documents to cover up hush payments to one of the President's mistresses. In response to the subpoena, Trump's legal team argued that the accounting firm was under no obligation to release the documents since "virtually all legal commenters agree that a sitting president of the United States is not subject to the criminal process while he is in office." A federal judge was not persuaded, ruling that "this Court cannot endorse such a categorical and limitless assertion of presidential immunity."

The court's decision was a step in the right direction towards transparency, but an appeal to the 2nd Circuit has resulted in a stay for the time being. The outcome may not ultimately satisfy all, but the fact that the judicial process is operating as intended is, at least, a small victory.

Creepy and Crawly

In the spirit of this B|Brief, U.K. Supreme Court Judge Lady Hale donned a massive spider-shaped brooch on September 24th, as she read the ruling against Boris Johnson's attempt to suspend Parliament last month – an arguably desperate attempt to prevent the U.K. legislative body from stymieing his scheme to push through a no-deal Brexit. The Johnson government argued that proroguing (suspending) Parliament for five weeks to prepare for the Queen's Speech – the monarch's annual address to Parliament setting out the government's agenda – was valid and entirely based on past precedent. Outrage in the halls of Westminster reached a boiling point, with members from across the political spectrum asserting that the prime minister was undermining democracy by preventing the people's representatives from exercising their rightful authority in a crucial stage of the Brexit debate. Legal action was taken throughout the country producing conflicting outcomes, and so the issue landed in the country's Supreme Court. In the

end, the 11-judge Supreme Court ruling was unanimous and offered a damning rebuke which stated, "The Court is bound to conclude, therefore, that the decision to advise Her Majesty to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification."

Lady Hale's coup de grace underscored the stakes by declaring: "The effect on the fundamentals of our democracy was extreme." To the prime minister's credit, he was prepared to accept the result, but vehemently disagreed with the outcome.

For Whom the Benn Tolls

Boris Johnson's attempt to circumvent Parliament in the Brexit process served as a catalyst for MPs to find a legislative antidote to this impasse. Labour MP Hilary Benn took the initiative by proposing a motion (later known as the Benn Act) that would require the prime minister to have a Brexit deal approved by Parliament before the U.K. would be allowed to leave the EU on October 31. If no such agreement were in place by October 19, the prime minister would be required to ask Brussels for an extension until January 31, 2020, while Parliament continued to find a solution to an orderly Brexit. The measure was approved by members across the partisan divide, including 21 Tories (whom the defeated Prime Minister subsequently stripped of their party affiliation). Nevertheless, the Benn Act had the effect of tying the hands of Boris Johnson, who had promised his supporters that the U.K. would leave with or without a deal. The rule of law and democratic institutions passed a crucial stress test, constraining a government which aimed to breach the fundamental norms of the U.K. Parliamentary system.

Spooked but Still Stirring

Donald Trump and Boris Johnson continue to stir their respective cauldrons that simmer in Washington and London. While the contents of each pot may differ, both leaders are playing with fire. From scandals large and small to abusing power to varying degrees, it has been the relative strength (or weakness) of the American and British institutions that have determined if – and to what extent – the rule of law will prevail. In these particularly volatile times, it is worth taking a moment to remind ourselves to enjoy the sweets while we can. There are certainly more tummy aches ahead.