
Between the End and the Beginning: Three Questions for American Criminal Justice After Trump and Before Biden

N. Prabha Unnithan, Colorado State University

Those familiar with the relatively quick pace from start to finish of polls in parliamentary democracies are often bewildered by the length and complicated nature of presidential elections in the US. The 2020 presidential season here commenced with the incumbent Donald Trump announcing his campaign for re-election immediately after his inauguration in January 2017. Other serious candidates began stating their intentions in late-2017. The election, which included provisions for early and mail-in voting, took place on November 3, 2020. It was won by Joseph Biden (for President; he had been Vice-President under Barack Obama from 2009 to 2017) and Kamala Harris (for Vice-President). The turnout rate was the highest since 1900. However, the interregnum between the election results being announced and the inauguration of the new President on January 20, 2021 was filled with unsupported allegations of fraud, dubious court challenges to the outcomes in various states, and a refusal to cooperate with the incoming administration by the incumbent. This tense atmosphere culminated in a violent assault on the Capitol in Washington, DC by rioters incited by Trump on January 6, 2021, resulting in five deaths and the trashing of the historic building. The rioters were targeting Congressional members who, with Vice-President Mike Pence presiding, had gathered to count and certify Electoral College votes confirming Biden and Harris's election. The House of Representatives responded to the attack by impeaching Trump for an unprecedented second time (within a year).

These recent incidents serve as a coda to four tumultuous, erratic years as "America under Trump became less free, less equal, more divided, more alone, deeper in debt, swampier, dirtier, meaner, sicker, and deader" according to George Packer writing in

The Atlantic. The “deader” comment refers to the tragic shadow of COVID-19 on all aspects of American life and has resulted in more than 360,000 deaths so far. The death toll is projected to reach a half million soon. This grim public health crisis, weary Americans hope, will end with the expansion of mass vaccination programs which will coincide with a new presidential administration.

Criminologists will no doubt be contemplating the possibility of political violence in the aftermath of the Capitol riot as threatened by right-wing groups in the near future. We will also be examining the destruction of norms, pervasive venality and continuing criminality characteristic of the Trump administration and its culture of impunity well into the future. Yet, the end of a regime and the beginning of a new era is also an appropriate time to assess American criminal justice in general. Here we take stock of the recent past and ponder what the short-term future holds for the system itself. Considering the lackluster cabinet officials of the past four years, it is comforting to learn of the qualified individuals who will now serve as the nation’s Attorney-General (heading the Department of Justice) and as Secretary of Homeland Security. However, in the US, the Federal government is less directly involved in everyday criminal justice operations. These fall mainly within the purview of the various state and local governments. Most of the former’s impact comes from the power of its example and direction and its ability to provide financial resources as well as technical assistance for the initiation and implementation of policy priorities. Unfortunately, the scandal-plagued, divisive and controversial (to say the least) tenure of the Trump administration leaves the US with a troubling legacy in all areas where the Federal government has any influence including criminal justice.

With the new administration it is expected that, at a minimum, the pervasive contempt for expertise and routine flouting of norms for official behavior will be replaced by a return to “normalcy” marked by formality and competence in policy formulation and implementation. It is also expected that divisive rhetoric and exaggerated bluster along with the shameless creation and acceptance of “alternative facts” will be replaced with the adoption of science, good faith and reasonableness in government officials. With this in mind, let’s turn to three currently contentious areas of criminal justice where the arrival of the Biden administration is expected to result in shifts. Given the fluid nature of events and circumstances, I pose these as questions about three possible directions rather than confident predictions.

A Return to Community Policing?

A President's Task Force on 21st Century Policing was initiated by the previous Obama administration in 2015. Among its major recommendations was the need to embrace community policing in terms of philosophy and strategy while also ensuring "fair and impartial policing" by specifically focusing on procedural justice. Unfortunately, and similar to a "playbook" left by the Obama administration for its successor to assist in dealing with pandemics, the Task Force's recommendations were ignored.

The summer of 2020 saw a wave of large-scale protests against systemic racism following well-publicized events that highlighted the shameful centuries-long trend of police violence against African Americans. These include, among many others, the following deaths: the shooting of Breonna Taylor at her home in Louisville, Kentucky, during a "no knock" police raid; the asphyxiation of George Floyd at the knee of a police officer in Minneapolis, Minnesota; and, the shooting of Rayshard Brooks who was running away from the police in Atlanta, Georgia. The largely peaceful protests of 2020 were met with higher levels of force by law enforcement than that used against the mob attacking the Capitol in 2021. There was also fear that an unending spiral of violence and counter-violence may have been unleashed. As Harvard University sociologist Joscha Legewie (2016) notes: "Incidents of extreme violence against police officers can lead to periods of substantially increased racial disparities in the use of police force". Subsequently, persistent calls to "defund the police", shorthand for shifting money spent on the police to other social services and community priorities, have arisen. American police agencies now, especially at the local level, must ensure that they do not perpetuate and add to the harms already being visited on the powerless. Given Biden's stated reluctance to literally 'defund the police', community policing is likely to make a reentry in American policing.

Many police departments in the US first adopted community policing in the late-1980s and 1990s when Federal grants were available. After homeland security became an abiding law enforcement concern following the terrorist attacks of September 11, 2001, there was a decline in the emphasis on community policing. Unfortunately, the rhetoric and resources associated with the homeland security paradigm (e.g., the acquisition of armored tanks and other paraphernalia being disposed of by the military; the

establishment of regional task forces and fusion centers for collecting and sharing intelligence reports, etc.) led to the “rise of the warrior cop” mentality and greater militarization of the police. The primacy of the community policing model was reiterated by the 2015 President’s Task Force which also supported training that reimagines officers as culturally competent guardians responsive to the issues and problems of their jurisdictions and the various groups who live there. The attack on the Capitol may result in a resurgence and monopolistic dominance of internal security thinking. However, it is also likely that community policing’s value for promoting homeland security and social justice (along with fighting traditional crime) will be better understood and acted upon. Developing partnerships, utilizing community resources, and solving problems in a concerted, proactive effort to reduce the level of crime while earning the trust and cooperation of those who the police serve will likely regain importance in the next four years.

An End to Capital Punishment?

Biden has announced that he is against the death penalty and will work to end it. Around 2500 individuals are currently on death rows across the US (including 55 Federal prisoners), but the pace of executions being actually carried out has slowed. Most of those convicted of crimes under Federal statutes that resulted in the death penalty being imposed await their fates at the Federal Correctional Complex in Terre Haute, Indiana. The usually slow pace of Federal executions has increased during the Trump years. The Death Penalty Information Center notes that, “The Federal government has already carried out more executions in 2020 than in any other year since capital punishment resumed in the U.S. in the 1970s”. Five Federal death row convicts were slated to die by lethal injection in December 2020 and January 2021.

This Federal trend runs counter to what has been happening in the states and in terms of public support for capital punishment. Since 1847 when Michigan first abolished capital punishment there have been movements back and forth. However, 21 states, the District of Columbia, and Puerto Rico have done the same; the latest being Colorado in 2020. Six other states are actively examining abolition. National public opinion support for capital punishment has declined from 80% in 1994 to 55% in 2020. Given the above and Biden’s promise, in the next few years, along with the Federal

system there will likely be a majority of states where life sentences are the most serious form of punishment available to courts. This may mean that the US will finally join “more than 70% of the world's countries [which] have abolished capital punishment in law or practice” (Death Penalty Information Center, 2020).

Greater Scrutiny of Clemency and Pardons?

The President of the US can exercise the almost unlimited power of clemency granted by the Constitution to commute sentences and pardon individuals implicated in crimes. Governors of most of the fifty states have similar powers although in others this may be shared with a state board or given over completely to the latter. In the case of pardons that occur before sentencing as happened with Michael Flynn, Trump’s first National Security Adviser, the individual accepting the pardon is agreeing that legally, he or she committed the crime. Previous executives have used the powers of pardon and commutation of sentences with Obama issuing 212 pardons and 1715 commutations, many for non-violent drug offenders. More controversially, in 2012, Governor Haley Barbour of Mississippi pardoned 208 offenders, which included 14 murderers, with almost all of the latter having worked in the governor’s mansion.

Clemency and pardons are viewed as acts of grace, mercy and redemption for those deemed to be deserving because they have been rehabilitated. A major criticism of Trump’s use of criminal pardons is that they have been abusive of these tenets especially when viewed along with his controversial and entirely untested claim that he has the power to pardon himself for any crimes he may have committed. Jack Goldsmith, a Harvard University law professor who examined 45 cases of those pardoned in the last four years, finds that 40 of those have been “self-serving” to Trump. It is also not clear how many of the 45 cases were vetted, as would ordinarily happen, by the Office of the Pardon Attorney in the Department of Justice.

The number and nature of pardons that may be issued in the waning days of the Trump administration are up in the air at the moment. Biden himself has also promised not to pardon Trump for any crimes committed. This new and closer scrutiny of executive clemency may help challenge perceptions about the process and uncover the politics that underlies this often-neglected area of American criminal justice. There needs to be much more public and scholarly discussion about whether such extra-judicial and

expansive powers are warranted and whether they ought to be circumscribed through regulation and rigorous oversight.

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N. Prabha Unnithan was born and brought up in Malaysia. He studied Criminology in India and after moving to the US, received a PhD from the University of Nebraska-Lincoln. Unnithan has been a member of the faculty of the Department of Sociology at Colorado State University since 1987 and was named a John N. Stern Distinguished Professor in 2019. He is currently the Immediate Past President of the Academy of Criminal Justice Sciences.
