

## THE ROLE OF NORMS IN MODERN-DAY GOVERNMENT ETHICS

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### ABSTRACT

*Many scholars, policymakers, advocacy groups, members of the media, and citizens-at-large are lamenting the perceived decrease in adherence to norms and ethics by certain government officials over the past few years. Informal mechanisms—whether they be norms, ethics, customs, or a “gentleman’s word”—have long been relied upon to ensure certain standards of behavior within all aspects of society. The American government is no exception. From America’s founding, the rule of law created the backstop for its governmental processes, but the virtue of its leaders remained a constant component of its success. To be fair, the country has seen more than its fair share of dark times; times of great discord, dispute, and division. And when these dark times occur, the questions confronting America are why have her leaders failed her and what should be done in response?*

*This Article seeks to respond, at least in part, to these two questions. It begins by acknowledging that America is in the midst of a crisis of leadership as a result of a failure by government officials to adhere to basic norms and accepted ethical standards. The Article argues that the country’s current predicament is attributable, at least in part, to the failure of stigma to rein in—or serve as a check—on government officials’ behavior. The (i) rise of social media (ii) paired with an increasingly politically polarized environment has crippled the power of social norms to serve as an effective mechanism for encouraging certain types of behavior in government officials. As a result, this Article argues that it is necessary to look for other mechanisms that can be used to fill the gaps left by the failure of social norms to rein in officials’ behavior. This Article discusses three: (i) the adoption of formal legal interventions to shore up and restore certain expectations of acceptable behavior for government officials, (ii) a renewed commitment to the notion that the proper role of the lawyer is that of a professional whose role is to pursue the public good, and (iii) the role of private pressure to facilitate certain expectations of acceptable conduct. When adherence to norms and appeals to ethics fail, it suggests it may be time for law, lawyers, and the public to intervene.*

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## INTRODUCTION

Today, when one starts to talk of about the erosion of norms and ethics within America, people immediately think of former President Donald Trump.<sup>1</sup> Even before he was inaugurated, concerns were raised about how he and his administration would test the limits of democratic norms within America.<sup>2</sup> These concerns continued, increasing in both volume and tenor throughout his presidency.<sup>3</sup> Whether it was his refusal to regularly interact with a free and independent press,<sup>4</sup> his unconventional selections for the Presidential Medal of Freedom,<sup>5</sup> his grant of pardons for those who had engaged in blatant corruption,<sup>6</sup> his assault on the legitimacy of American elections,<sup>7</sup> or his alleged incitement of what many are calling an insurrection,<sup>8</sup> it is clear that the enduring impact of his legacy<sup>9</sup> will be debated for years, if not centuries. And yet, there are a variety of reasons to question whether Trump was the cause or simply the

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1. See David Montgomery, *The Definitive List of the 20 Presidential Norms Trump Broke – and How Joe Biden Can Restore Them*, WASH. POST (Nov. 10, 2020), <https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/>; Ailsa Chang, *How President Trump Pushes the Boundaries of Norms in Office*, NPR (Aug. 20, 2020, 4:04 PM), <https://www.npr.org/2020/08/20/904383253/how-president-trump-pushes-the-boundaries-of-norms-in-office>.

2. See, e.g., Clare Foran, *An Erosion of Democratic Norms in America*, ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508469/>.

3. See, e.g., Katerina Wright, *Norms Watch: Tracking the Erosion of Democratic Traditions*, JUST SECURITY (Jan. 20, 2017), <https://www.justsecurity.org/36569/norms-watch-tracking-erosion-democratic-traditions-jan-13-20/>.

4. See Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUM. JOURNALISM REV. (May 25, 2017), <https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php>.

5. See, e.g., E. Fletcher McClellan, Christopher Devine & Kyle C. Kopko, *What Trump's Picks for The Presidential Medal of Freedom – Like Rush Limbaugh and Antonin Scalia – Say About Him*, CONVERSATION (Feb. 6, 2020, 4:45 PM), <https://theconversation.com/what-trumps-picks-for-the-presidential-medal-of-freedom-like-rush-limbaugh-and-antonin-scalia-say-about-him-131362>.

6. See, e.g., Philip Bump, *With His Last Pardons, Trump Makes Clear His Position on Political Corruption*, WASH. POST. (Jan. 20, 2021, 9:02 AM), <https://www.washingtonpost.com/politics/2021/01/20/with-his-last-pardons-trump-makes-clear-his-position-political-corruption/>.

7. See Chris Morran, *The Government Donald Trump Left Behind*, PROPUBLICA (Jan. 27, 2021, 3:36 PM), <https://www.propublica.org/article/the-government-donald-trump-left-behind>.

8. See, e.g., C. Scott Peters, *Trump and Support for Trump Pose a Continuing Threat to Democracy*, DES MOINES REG. (Jan. 9, 2021, 5:01 AM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2021/01/09/trump-threat-democracy-urgent-action-needed-restore-norms/6592467002/>.

9. See generally Matt Spetalnick, Andrea Shalal, Jeff Mason & Steve Holland, *Trump's Legacy: A More Divided America, A More Unsettled World*, REUTERS (Jan. 20, 2021, 12:48 AM), <https://www.reuters.com/article/usa-trump-legacy-analysis-int/analysis-trumps-legacy-a-more-divided-america-a-more-unsettled-world-idUSKBN29P0EX>.

effect of an erosion of norms and adherence to ethical standards by government officials.

For example, even before Trump truly entered the political scene, some critics questioned whether President Barack Obama appropriately invoked executive privilege in response to a congressional investigation,<sup>10</sup> and whether his use of executive power set up “the possibility of executive overreach” during the Trump administration.<sup>11</sup> Additionally, Hillary Clinton violated federal records rules when she failed to route her electronic communications through official State Department channels.<sup>12</sup> James Comey, while investigating Clinton’s use of emails, violated “long-standing” Department of Justice guidance<sup>13</sup> when he announced that he was reopening an investigation into Clinton’s emails shortly before the 2016 U.S. presidential election.<sup>14</sup> There are, of course, rebuttals to these examples. George W. Bush also used executive power expansively,<sup>15</sup> and Colin Powell “failed to preserve government-related emails when he was secretary of state.”<sup>16</sup> And yet, the point remains, that a failure to adhere to accepted norms and ethical standards did not originate with the Trump administration; although it was certainly exacerbated by it.

America’s gradual erosion towards relying on the innate virtue of public officials faced its tipping point with the Trump administration and headed toward a full-scale emergency during the Administration’s last weeks in power. The threats on democracy illustrate how America’s leaders failed her. And now the question is: What must she do to heal?

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10. See, e.g., Richard A. Serrano, *Obama Invokes Executive Privilege Over Fast and Furious Documents*, L.A. TIMES (June 20, 2012), <https://www.latimes.com/archives/la-xpm-2012-jun-20-la-pn-obama-invokes-executive-privilege-over-fast-and-furious-documents-20120620-story.html>; Kimberly Breedon & A. Christopher Bryant, *Executive Privilege in a Hyper-Partisan Era*, 64 WAYNE L. REV. 63, 87–90 (2018).

11. Erin Hawley, *Obama’s Curtain Call: A Look Back on a Legacy of Executive Overreach*, HILL (Dec. 24, 2016, 8:00 AM), <https://thehill.com/blogs/pundits-blog/the-administration/311608-obamas-curtain-call-a-look-back-on-a-legacy-of>; see also Peter Baker, *Trump Adopts Obama Approach While Seeking to Undo a Legacy*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/us/politics/trump-obama-executive-orders.html>.

12. See, e.g., Ken Dilanian, *Clinton Broke Federal Rules with Email Server, Audit Finds*, NBC NEWS (May 25, 2016), <https://www.nbcnews.com/news/us-news/clinton-broke-federal-rules-email-server-audit-finds-n580131>.

13. Carrie Johnson & Philip Ewing, *Report Condemns FBI Violations in 2016 Clinton Probe but Finds No Political Bias*, NPR (June 14, 2018, 5:00 AM), <https://www.npr.org/2018/06/14/612387464/report-expected-to-condemn-fbi-violations-in-2016-clinton-email-investigation>.

14. See *id.*

15. See Scott Shane, *Behind Power, One Principle as Bush Pushes Prerogatives*, N.Y. TIMES (Dec. 17, 2005) <https://www.nytimes.com/2005/12/17/politics/behind-power-one-principle-as-bush-pushes-prerogatives.html> (noting former President George W. Bush’s “sweeping assertion of the powers of the presidency” as the leading principle behind “nearly every major initiative in the Bush administration’s war on terror”).

16. Dilanian, *supra* note 12.

The Biden administration—still in its infancy—has indicated a desire to return to normalcy<sup>17</sup> and to make a hard break with the perceived corruption of the Trump administration.<sup>18</sup> This Article, however, questions whether the Biden administration can rely on its own innate virtue to restore the norms and ethical standards that were once accepted by those engaged in government service. Indeed, while such attempts by the current administration may assist the process of finding the lost ethical floor, this Article argues that the country's current predicament is attributable, at least in part, to the failure of stigma to rein in—or serve as a check—on government officials' behavior. As a result, other mechanisms must be pursued to fill in the gaps that the departing power of stigma and social norms once filled.

This Article proceeds in four parts. Part I details the abandonment of norms and provides two examples for why this abandonment occurred: (i) the raw pursuit of power, and (ii) failures of arrogance. Part II discusses the importance and role of social norms in serving as a mediating influence over government officials. Part III puts forth the thesis of this Article and argues that the failure of social norms and stigma to rein in the behavior of government officials has contributed to the country's current crisis of leadership, necessitating the adoption of other mechanisms to provide the function once provided by social norms. This Article discusses three: (i) the adoption of formal legal interventions to shore up and restore certain expectations of acceptable behavior for government officials, (ii) a renewed commitment to the notion that the proper role of the lawyer is that of a professional whose role is to pursue the public good, and (iii) pressure from private parties.

## I. THE ABANDONMENT OF NORMS

There appear to be many reasons for why norms have ceased to be followed by so many of America's governmental officials. As is true of all historical events of significance, it is likely the result of a confluence of various factors. Yet, it would be naïve, and perhaps dangerous, to put the blame solely on the shoulders of former President Trump. This Part will demonstrate that the current rejection of norms, while perhaps exacerbated by the actions taken by certain members of the Trump administration, has other potential causes. In particular, this Part focuses on how (i) the raw pursuit of power and (ii) failures of arrogance have prompted—and continues to further—the abandonment of,

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17. See, e.g., Joe Garofoli, *Biden Promises a Return to Normalcy. Is America Ready to Go There?*, S.F. CHRON. (Jan. 20, 2021, 10:57 AM), <https://www.sfchronicle.com/politics/article/Biden-promises-a-return-to-normalcy-Is-America-15883179.php>; Carol E. Lee, Mike Memoli & Elyse Perlmutter-Gumbiner, *Biden Puts the 'Daily' Back Into the Administration's Intelligence Briefings*, NBC NEWS (Jan. 25, 2021), <https://www.nbcnews.com/politics/white-house/biden-puts-daily-back-administration-s-intelligence-briefings-n1255554>; Letter to the Editor, *Press Briefings Signal Biden's Return to Truth*, ORLANDO SENTINEL (Jan. 24, 2021), <https://www.orlandosentinel.com/opinion/letters/os-op-letters-biden-press-briefings-20210124-nayh7owlufhhtdpgwrodcvd2qy-story.html>.

18. See Jesse Wegman, *Biden Can Heal What Trump Broke*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/opinion/biden-inauguration-trump.html>.

and adherence to certain norms and ethical standards that were once accepted by government officials.

### *A. Pursuit of Power*

The pursuit of power has long been known to be a potentially corrupting influence within the lives of all individuals—not just those of government officials. And yet, it is understood by many that if you want to test a man's character, you give him power.<sup>19</sup> It appears that concerns about power—and more specifically, a desire for power—have outweighed some officials' commitment to consistently adhere to certain principles, thus giving rise to the current abandonment of norms we see today.<sup>20</sup>

Take, for example, Senator Mitch McConnell. When Justice Antonin Scalia suddenly passed away in February 2016, and while other senators were sending out condolences to the family, Senator McConnell released a statement indicating that the “Senate should not confirm a replacement” until after the 2016 election.<sup>21</sup> To be fair, one could contend that there did not appear to be a true set of principled norms in the Senate with regard to what to do when a vacancy occurred,<sup>22</sup> so McConnell created his own. McConnell's justification was that “[t]he American people should have a voice in the selection of their next Supreme Court Justice.”<sup>23</sup> Scalia's passing was roughly nine months before the next Presidential election, leaving a rather large period of time for the Supreme Court to function without a ninth justice. McConnell's stance was criticized as “an historic rebuke of President Obama's authority and an extraordinary challenge to the practice of considering each nominee on his or her individual merits.”<sup>24</sup> And yet, the stance could be defended. President Obama would not be the next president and the American people were in the

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19. People often attribute this sentiment to Abraham Lincoln, but this is disputed. See *A Brief Bit of Bob's Eloquence*, DECATUR-HERALD DISPATCH, Jan. 27, 1882, at 6; see also Robert G. Ingersol, *Lecture on Abraham Lincoln*, in 3 THE WORKS OF ROBERT G. INGERSOL 172 (Dresden Publ'g Co., 1909) (“Nothing discloses real character like the use of power . . . But if you wish to know what a man really is, give him power. This is the supreme test. It is the glory of Lincoln that, having almost absolute power, he never abused it, except on the side of mercy.”).

20. The pursuit of power has long been a corrupting influence for government officials, and this Article is not suggesting that this is a new phenomenon. Instead, this Article is suggesting that some of the social norms that have helped restrain that pursuit of power have changed or stopped functioning as effectively due, in part, to the rise, use, and abuse of social media today.

21. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM), <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

22. See BARRY J. McMILLION, CONG. RSCH. SERV., IN11514, SUPREME COURT VACANCIES THAT OCCURRED DURING PRESIDENTIAL ELECTION YEARS (1789–2020) (Oct. 1, 2020) (noting the differences in final actions on nominations); BARRY J. McMILLION, CONG. RSCH. SERV., IN11519, FINAL ACTION BY THE SENATE ON SUPREME COURT NOMINATIONS DURING PRESIDENTIAL ELECTION YEARS (1789–2020) (Oct. 20, 2020).

23. Everett & Thrush, *supra* note 21.

24. *Id.*

process of selecting that individual. McConnell prevailed and Obama's nominee to the Court was never brought for a confirmation vote.

Fast-forward, however, to September 2020, less than two months before yet another presidential election, and the death of Justice Ruth Ginsburg created yet another vacancy on the Court. In this instance, McConnell had no qualms with the Senate's consideration of a Supreme Court nomination during an active presidential election campaign.<sup>25</sup> Indeed, his story changed. Instead of adhering to the norm he espoused with his 2016 stance, arguing that it would be inappropriate to confirm a Supreme Court justice during a presidential election, McConnell attempted to justify his new position by explaining that the distinction between 2016 and 2020 was that both Congress and the presidency were controlled by the same party.<sup>26</sup> The distinction he made was barely passable in covering what many perceived to be the real rationale for his decision—power.<sup>27</sup> McConnell was willing to seat a Supreme Court justice that he perceived to be in line with his own policy preferences, but blocked the one he considered to be against them. His pursuit of power, therefore, allowed any means to justify his preferential ends.

### *B. Plain, Old Arrogance*

In addition to pursuits of power, one can also find examples of government officials failing to comply with certain norms and ethical standards due to what appears to be a posture of arrogance, which results in the official believing their personal decision-making preferences should outweigh the conflicting standards set forth by the institution. Take, for instance, former FBI Director James Comey. On more than one occasion, Comey failed to comply with a Department of Justice (DOJ) policy because he believed it would be better to take a different path.

For example, less than two weeks before the 2016 presidential election, Comey announced that the FBI was reviewing Hillary Clinton's emails for potential misconduct. "This disclosure, 11 days before the presidential election, is now routinely blamed for her narrow loss . . . ."<sup>28</sup> Moreover, the

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25. The concern expressed in this section is limited to the actions of Senator McConnell and his failure to comply with his own stated standard regarding the confirmation of Supreme Court justices. President Trump made no such claim, so this section is not suggesting that the then President's decision to nominate a replacement to fill the open seat was against any stated norms or expectations. Indeed, one might argue that President Trump was fulfilling certain promises he made when campaigning for the presidency.

26. Marianne Levine, *McConnell Fends Off Accusations of Hypocrisy Over Holding Supreme Court Vote*, POLITICO (Sept. 22, 2020, 7:36 AM), <https://www.politico.com/news/2020/09/21/mcconnell-pushes-back-hypocrisy-supreme-court-419569>.

27. See, e.g., Robert Reich, *Rushing to Replace Ruth Bader Ginsburg, McConnell Shows Power Trumps Principle*, GUARDIAN (Sept. 20, 2020, 1:00 AM), <https://www.theguardian.com/commentisfree/2020/sep/19/ruth-bader-ginsburg-mitch-mcconnell-donald-trump>.

28. Aaron Blake, *James Comey's Fateful Decision on Hillary Clinton's Emails is Slowly Coming into Focus*, WASH. POST (Jan. 31, 2018, 7:00 AM),

announcement was found to have violated the Department of Justice's own protocols advising against the disclosure of investigations close to an election.<sup>29</sup> Comey believed, and others have supported this view, that he was placed in an impossible situation. By staying quiet, Comey might have raised questions about whether the FBI was attempting to sway the election in Clinton's favor. By choosing disclosure, Comey was ensuring transparency, but was risking impacting the outcome of the presidential election.<sup>30</sup> And yet, despite the backlash he received for his personal judgement pertaining to official business, this would not be the last time that Comey would violate DOJ and FBI norms and ethical standards. Comey was later found to have "violated Justice Department and FBI policies in his handling of memos documenting conversations with President Trump . . ."<sup>31</sup> Indeed, Comey was chastised after-the-fact by the DOJ's Office of Inspector General for failing to comply with the commonly accepted norms and ethical standards expected of members of the FBI and DOJ.<sup>32</sup>

Throughout the myriad scenarios from 2015 to 2017 involving Comey's decisions not to comply with DOJ and FBI policy, his arrogance is apparent. Comey expressed a belief that he was a government official in an impossible situation. But the fact remains that the standards were in many ways a means to provide guidance on what to do if an impossible situation were to arise. Indeed, when the DOJ set a policy against commenting on investigations before an election, the exact dilemma Comey found himself in already had an answer. Therefore, Comey's dilemma regarding the disclosure of the investigation was not unique—it was an entirely predictable occurrence, which is why the protocols had been put into place. What was unique, however, was Comey's

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<https://www.washingtonpost.com/news/the-fix/wp/2018/01/31/james-comeys-fateful-decision-on-hillary-clintons-emails-is-slowly-coming-into-focus/>.

29. *Government Ethics Outline*, U.S. DEP'T OF JUST.: JUST. MGMT. DIV. (July 5, 2017), <https://www.justice.gov/jmd/government-ethics-outline>.

30. Some might argue, however, that Comey's conduct was not only antithetical to the norms, but also irregularly applied. For example, while Comey made public statements about the ongoing nature of the Clinton email case, he, at the same time, chose to remain silent regarding the FBI's investigations into Trump's ties to Russia despite the fact that such investigations were initiated that same summer. See Judy Woodruff, *How the FBI Began Investigating a Trump Campaign Adviser in 2016*, PBS (May 3, 2019, 6:45 PM), <https://www.pbs.org/newshour/show/how-the-fbi-began-investigating-a-trump-campaign-adviser-in-2016>; see also Kristine Phillips, *Timeline: The Events that Led to the Inspector General's Report on the Origins of the Russia Probe*, USA TODAY (Dec. 18, 2019, 6:50 AM), <https://www.usatoday.com/in-depth/news/2019/12/09/horowitz-fisa-report-timeline-fbis-russia-probe-carter-page-surveillance/2623350001/> (noting that FBI investigations into the Trump campaign occurred as early as July 2016).

31. Dan Mangan & Kevin Breuninger, *Ex-FBI Director Comey Violated DOJ Policies in Handling Trump Memos, Inspector General Says*, CNBC (Aug. 29, 2019, 3:21 PM), <https://www.cnbc.com/2019/08/29/ex-fbi-director-james-comey-violated-fbi-policies-and-employment-pact.html>.

32. See *id.*

decision to elevate his own opinions and views over those of the directives in the policy.

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These are just two of the countless examples illustrating how government officials have failed to adhere to widely accepted norms and ethical standards. Indeed, other contributions to this symposium volume detail additional examples of this phenomenon. The suggestion that government officials should adhere to certain norms and ethical standards does not appear to be a controversial claim. It is crucial, however, not to place the sole blame of the current state of affairs upon the Trump administration. To do so both (i) fails to accurately present the depths of the problem and (ii) risks taking a naïve view when crafting responses now that Trump has left office. The upshot is that government officials' adherence to certain norms and ethical standards has been eroded in numerous ways both by the Trump administration and by others with longer tenures in government service.

## II. THE IMPORTANCE AND LIMITATIONS OF SOCIAL NORMS

Whether it was the atypical activities of former President Trump and those within his administration or the behavior of other political actors, as outlined in Part I, many have found themselves questioning why it appears as though so many government officials are failing to adhere to the norms and ethical standards that traditionally restrained their conduct.<sup>33</sup> It was, of course, never perfect. There have always been individuals engaged in government service who put the needs of themselves over those of the public.<sup>34</sup> Yet, as 2020 came to a close and 2021 began, the sheer scope of the rejection of traditional norms and explicit refusal to adhere to certain ethical standards by governmental officials were, to many, both stunning and unprecedented.

The question is why? Why have the traditional social norms and standards that kept the conduct of government officials in check failed so dramatically over the past several years? The answer—as is true with all big, existential questions—is not a simple one. Scholars from a variety of disciplines—law,

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33. See E.J. Dionne, Jr., Norm Ornstein & Thomas E. Mann, *How the GOP Prompted the Decay of Political Norms*, ATLANTIC (Sept. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/09/gop-decay-of-political-norms/540165/>.

34. See Richard L. Berke, *Fellow Senators Vote to Denounce Durenberger*, 96-0, N.Y. TIMES, July 26, 1990, at A1 (noting the U.S. Senate's censure of Senator David Durenberger for ethics violations that allowed him to bypass speaking fee limits and collect illegal reimbursements on travel expenses); John E. Yang & Helen Dewar, *Ethics Panel Supports Reprimand of Gingrich*, WASH. POST., Jan. 18, 1997, at A1 (stating that Newt Gingrich's violation of federal tax law through his "use of tax-deductible money for political purposes and inaccurate information supplied to investigators represented 'intentional or . . . reckless' disregard of House rules"); Peter Dreier, *HUD Secretary Alphonso Jackson's Resignation — A Window Into Bush Administration's Corruption, Indifference, and Incompetence*, HUFFINGTON POST: BLOG (Apr. 10, 2008), [https://www.huffpost.com/entry/hud-secretary-alphonso-ja\\_b\\_94787](https://www.huffpost.com/entry/hud-secretary-alphonso-ja_b_94787) (noting a "corruption/indifference/incompetence trifecta" pertaining to the actions of former Department of Housing and Urban Development Secretary Alphonso Jackson while in office).



philosophy, history, political science, social psychology, and beyond—will be interrogating this moment in America’s history for decades. This Article argues that the country’s current predicament is attributable, at least in part, to the failure of stigma and social norms to rein in—or serve as a check—on government officials’ behavior, requiring the adoption of new interventions to fill the gaps left when the power of social norms diminished.

This Part begins by briefly outlining some insights from the literature on law and social norms. This Part then turns to the ways in which (i) the rise of social media (ii) paired with an increasingly politically polarized environment has neutralized the power of social norms to serve as a mediating influence over officials’ conduct. Specifically, ensuring adherence to social norms often requires some sort of condemnation or ostracization or stigma to function as a norms-influencing mechanism, but in today’s environment there are often just as many individuals praising certain types of conduct as there are those condemning it. Additionally, social norms cannot function properly when political rewards are being granted to government officials in exchange for blatant non-adherence to those norms and ethical standards. Finally, there is evidence that stigma has at times been weaponized against those who have tried to wield its power—further eroding its ability to restrain the behavior of certain government officials.

#### *A. Non-Legal Means of Restraint*

Formal legal intervention creates various incentives for people to act in certain ways, but a robust literature on the role of social norms has long-demonstrated that formal legal intervention works in tandem with a variety of other mechanisms that direct people’s behavior toward certain standards of acceptable conduct. In short, law is necessary, but not sufficient at ensuring a well-ordered and properly functioning society.

For instance, Professor Richard McAdams has argued that “law has expressive powers independent of the legal sanctions threatened on violators and independent of the legitimacy the population perceives in the authority creating and enforcing the law.”<sup>35</sup> Specifically, McAdams explains that while law deters certain types of behavior, it “also coordinates and informs.”<sup>36</sup> The law is powerful not just because it provides a mechanism of sanction, and thereby deterrence, but because it also serves an expressive function that provides information and coordination about what sorts of behavior are or are not acceptable. Consequently, behaviors of government officials have traditionally been restrained by the information and coordination that the law provides regarding what is and is not acceptable conduct, even when those laws were not commonly enforced against lawmakers.<sup>37</sup>

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35. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 6–7 (2015) (emphasis omitted).

36. *Id.* at 7 (emphasis omitted).

37. See Tim Stelloh, *Freshman Rep. Katie Hill Resigns Amid Allegations of Affair with Staffer*, NBC NEWS (Oct. 28, 2019, 5:58 AM),

But even beyond the expressive function that law provides, regardless of whether it has been used for formal legal interventions, there are various additional ways in which behavior is shaped by other, more informal means. For example, Professor Robert Ellickson pursued a theory that would “illuminate in what social contexts and with what content informal norms emerge to help people achieve order without law.”<sup>38</sup> Ultimately, he hypothesized that “members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.”<sup>39</sup> One could imagine that government officials might utilize this sort of close-knit group dynamic to enforce certain understandings of acceptable behavior.<sup>40</sup>

Additionally, Professor Eric Posner, while focused on the “relationship between law and . . . ‘nonlegal mechanisms of cooperation’”<sup>41</sup> has discussed the role that stigma plays in ensuring that individuals comply with certain social norms. He noted the challenges that can arise when “legislatures and courts deal with phenomena like stigma and ostracism, social norms, reputation, symbolism, and the numerous other sources of order that exist outside the laws of the state[.]”<sup>42</sup> He maintained skepticism of the ability of social norms to influence behavior, arguing that “[w]hat distinguishes social norms from other behavioral regularities is that departure from them provokes sanctions, but again the sanctions emerge endogenously as a consequence of people acting in their rational self-interest.”<sup>43</sup> But Posner also notes that government officials typically do not press against social norms and, indeed, government officials “are far more likely to conform to social norms than to violate them . . . .”<sup>44</sup>

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<https://www.nbcnews.com/politics/congress/freshman-rep-katie-hill-resign-amid-allegations-affair-staffer-n1072611>; Brian Naylor & Domenico Montanaro, *Conyers Resigns Amid Sexual Harassment Allegations*, NPR (Dec. 5, 2017, 10:49 AM), <https://www.npr.org/2017/12/05/567160325/conyers-resigning-amid-sexual-harassment-allegations> (discussing the end of a House Ethics Committee inquiry of Rep. John Conyers’ following his decisions to resign amidst allegations that he engaged in “verbal abuse, inappropriate touching and groping [that occurred] over decades”).

38. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 123 (1991).

39. *Id.* at 167 (emphasis omitted).

40. See, e.g., Standards for DCCC Political Vendors, DEMOCRATIC CONG. CAMPAIGN COMM., <https://action.dccc.org/sign-up/political-vendors> (last accessed Feb. 28, 2021) (“DCCC will not conduct business with, nor recommend to any of its targeted campaigns, any consultant that works with an opponent of a sitting Member of the House Democratic Caucus.”); Catie Edmondson, *House Democratic Campaign Arm Nears War with Liberals Over Primary Fights*, N.Y. TIMES (Apr. 7, 2019), <https://www.nytimes.com/2019/04/07/us/politics/democrats-liberals-tension.html>; Daniel Marans, *DCCC Promises to Blacklist Firms That Work with Candidates Challenging Incumbents*, HUFFINGTON POST: POLITICS (Mar. 22, 2019), [https://www.huffpost.com/entry/dccc-promises-to-blacklist-firms-that-work-with-candidates-challenging-incumbents\\_n\\_5c95126ae4b01ebee0ec3ae](https://www.huffpost.com/entry/dccc-promises-to-blacklist-firms-that-work-with-candidates-challenging-incumbents_n_5c95126ae4b01ebee0ec3ae).

41. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 3–4 (2002).

42. *Id.* at 3.

43. *Id.* at 8.

44. *Id.*

This insight explains, to a certain extent, our traditional ability to rely on norms to restrain the behavior of government officials.

The literature on the interplay between law and non-legal mechanisms like social norms is both robust and extensive. This Part provides a very brief overview of a portion of that scholarship. And yet, even despite the brevity of this overview, the work of these scholars can help to understand some of what may have caused government officials to abandon their traditional adherence to certain social norms and ethical standards.

### *B. The Limits of Social Norms to Restrain Government Officials Today*

This Part focuses on the way the rise of social media, paired with increasing political polarization, has inhibited the functioning of social norms as it applies to government officials today. Social media has been transformative—both in positive and negative ways—for individuals all over the world. It has sparked revolutions<sup>45</sup> and spread misinformation.<sup>46</sup> It has birthed entire industries and segments of the economy,<sup>47</sup> while at the same time empowering a cancel culture with the power to threaten people's livelihoods. Government officials have not been immune to either its power or its perils. This Article focuses on the narrow issue of how the rise of social media has neutralized certain restraining impacts of traditional social norms.

#### 1. Lack of Condemnation

As noted above, McAdams's work has discussed the expressive powers that law provides even when formal legal interventions are not pursued.<sup>48</sup> The expressive power of law has proven to be incredibly important in a variety of areas, but its ability to rein in conduct when applied to social media, has proven to be lacking in many respects. This Part will focus on one example, but there are others.<sup>49</sup>

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45. See Sam Gustin, *Social Media Sparked, Accelerated Egypt's Revolutionary Fire*, WIRED (Feb. 11, 2011, 2:56 PM), <https://www.wired.com/2011/02/egypts-revolutionary-fire/>.

46. See Elizabeth Dwoskin, *On Social Media, Vaccine Misinformation Mixes with Extreme Faith*, WASH. POST (Feb. 16, 2021, 6:00 AM), <https://www.washingtonpost.com/technology/2021/02/16/covid-vaccine-misinformation-evangelical-mark-beast/>; Kurt Wagner, Sarah Frier & Mark Bergen, *Social Media's Election Report Card*, BLOOMBERG (Nov. 5, 2020), <https://www.bloomberg.com/news/newsletters/2020-11-05/social-media-s-election-misinformation-report-card>.

47. See Sam Sanders, Anjali Sastry & Alexander McCall, *"The New Celebrity:" The Rise of Influencers — And How They Changed Advertising*, NPR (Sept. 10, 2019, 3:00 AM), <https://www.npr.org/2019/09/09/759127302/the-new-celebrity-the-rise-of-influencers-and-how-they-changed-advertising>; Adam Uzialko, *Shopping on Social Media: The Future of Social Commerce*, BUS. NEWS DAILY (Oct. 10, 2017), <https://www.businessnewsdaily.com/6318-future-of-social-commerce.html>.

48. See MCADAMS, *supra* note 35, at 6–7.

49. The most extreme example, perhaps, is the way in which President Donald Trump comported himself on Twitter prior to having his account suspended.

Take, for example, Kellyanne Conway, a former government official during the Trump administration.<sup>50</sup> During her tenure as a government official, Conway's social media use, in particular her use of Twitter, resulted in what was widely believed to be over fifty violations of the Hatch Act,<sup>51</sup> a "federal act [that] prohibits executive branch employees from using their official positions to influence elections."<sup>52</sup> As Professor Ann Ching notes in her contribution to the symposium, when Conway was confronted about her alleged violations of the Hatch Act, her response was: "Let me know when the jail sentence starts."<sup>53</sup>

If the expressive power of law was functioning in the space, one might have expected Conway's alleged violations of the Hatch Act to cease once they were reported upon or brought to her attention. Instead, she continued to engage in the activity—both on Twitter and in other forums.<sup>54</sup> And, importantly, the failure of a formal legal intervention, in some ways, seemed to embolden the activity, as evidenced by the above quotation. Moreover, it appears that Conway had both political and personal incentives to violate the law that likely outweighed any restraint that the expressive function of law might provide. For example, many of the tweets that violated the Hatch Act were related to her attempts to speak out against Democratic candidates and in support for the reelection of President Trump.<sup>55</sup> Conway's own professional aspirations were in many ways tied to those of President Trump. His success was her success. As such, even if the Hatch Act did indeed, as the Office of Special Counsel determined,<sup>56</sup> prohibit much of Conway's conduct online, the law's expressive function was not strong enough to restrain her behavior.

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50. See Michael D. Shear & Maggie Haberman, *Trump Rewards Kellyanne Conway with a Top White House Staff Slot*, N.Y. TIMES (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/us/politics/trump-picks-gop-veterans-for-white-house-posts.html> (noting Conway's appointment to the White House as "counselor to the president").

51. See, e.g., Donald K. Sherman, *Kellyanne Conway Eclipses 50 Hatch Act Violations on Twitter*, CITIZENS FOR RESP. AND ETHICS IN WASH. (Oct. 21, 2019), <https://www.citizensforethics.org/reports-investigations/crew-reports/kellyanne-conway-eclipses-50-hatch-act-violations-on-twitter/>.

52. Jessica Kwong, *Kellyanne Conway Violated Hatch Act on Twitter 50 Times, "Could Warrant the Suspension" of Account: Watchdog*, NEWSWEEK (Oct. 18, 2019), <https://www.newsweek.com/kellyanne-conway-hatch-act-twitter-suspension-1466348>. Conway's violations of the Hatch Act were not limited to Twitter. Indeed, there were several instances where Conway violated the Hatch Act during more standard interviews with media outlets. Letter from Henry J. Kerner, U.S. Office of Special Counsel, to Donald J. Trump, U.S. President (June 13, 2019), [https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20\(HA-19-0631%20&%20HA-19-3395\).pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20(HA-19-0631%20&%20HA-19-3395).pdf) (providing a report detailing the instances where Conway repeatedly violated the Hatch Act).

53. Ann B. Ching, *Taking A Positive Approach to Government Ethics*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 753 (2021).

54. Kwong, *supra* note 52.

55. See, e.g., Sherman, *supra* note 51.

56. See *supra* note 52, Letter from Henry J. Kerner.

Importantly, Conway's conduct was not uniformly condemned by her close-knit circle of government officials.<sup>57</sup> Instead, her actions were praised by former President Trump, and the White House counsel issued a letter requesting that the Office of Special Counsel withdraw a recommendation that Conway be removed from her position.<sup>58</sup> Additionally, the audience for her tweets was quite expansive, as she has consistently had hundreds of thousands, if not millions, of Twitter followers throughout her tenure as a government official.<sup>59</sup> Thus, her capacity to reach individuals far beyond her close-knit circle on issues that mattered to her may have diminished the deterrent effect of the condemnation from the Office of Special Counsel and others.

The upshot is that the social norms that should have deterred Conway from engaging in behavior that violated legal requirements failed in their entirety. At the same time as she was subject to formal condemnation from the Office of Special Counsel and watchdog groups, she was receiving attention and popularity on social media while being emboldened by those within her tight-knit circle. There was, it seems, no effective way to utilize social norms to incentivize her to adhere to accepted social norms of conduct and ethical standards for government officials.

## 2. Political Rewards

One of the insights of Posner's work on social norms is related to how social norms are changed and the challenges confronting government officials who might want to move norms in one way or another. He explains:

Although social norms are constantly changing as a result of decentralized, undirected interactions, the only way for individuals to self-consciously change them in a direction they seek is to violate them. Not just to violate them, but to violate them in a public and decisive way. Many people engage in this highly risky norm entrepreneurship, but government officials, who do not stand outside the social world, are in a particularly vulnerable position. They are far more likely to conform to social norms than to violate them.<sup>60</sup>

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57. See Steve Vladeck, *The Trump White House Defense of Kellyanne Conway's Hatch Act Violations is Fooling No One*, NBC NEWS (June 14, 2019, 4:48 AM), <https://www.nbcnews.com/think/opinion/trump-white-house-defense-kellyanne-conway-s-hatch-act-violations-ncna1017471> (noting former White House Deputy Press Secretary Steven Groves' and former White House Counsel Pat Cipollone's formal statements and efforts to defend Conway's actions).

58. See John Wagner & Michelle Ye Hee Lee, *Trump Says He Won't Fire Kellyanne Conway Over Hatch Act Violations*, WASH. POST (June 14, 2019, 11:46 AM), [https://www.washingtonpost.com/politics/trump-says-he-wont-fire-kellyanne-conway-over-hatch-act-violations/2019/06/14/76f31a94-8e9f-11e9-adf3-f70f78c156e8\\_story.html](https://www.washingtonpost.com/politics/trump-says-he-wont-fire-kellyanne-conway-over-hatch-act-violations/2019/06/14/76f31a94-8e9f-11e9-adf3-f70f78c156e8_story.html).

59. See Joe Concha, *Kellyanne Conway Says She Meant "No Disrespect" with Question About Reporter's Ethnicity*, HILL (July 16, 2019), <https://thehill.com/homenews/media/453358-kellyanne-conway-says-she-meant-no-disrespect-with-question-about-reporters> (noting that in July of 2019, Conway had at least 2.8 million Twitter followers).

60. Posner, *supra* note 41, at 8.

Posner's insight about government officials was, in part, related to government officials' attempts to change social norms through the passage of legal rules, but it does appear the calculus for government officials has shifted in the age of social media. A decision by government officials to buck social norms, a decision that may have at one time been perceived as one that would prompt stigma from one's colleagues and constituents, might actually result in some sort of political reward today. Indeed, there are countless examples of government officials receiving a variety of political rewards in exchange for their decisions not to adhere to certain norms.<sup>61</sup>

Take, for example, Senator Lindsey Graham. Before the era of Trump, Graham was perhaps best known for his rather moderate positions. As one reporter put it: "Graham's rush to Trump's side is particularly baffling because not long ago, he was best known for his bipartisan deal-making on issues like climate change and immigration. He subscribed, at least theoretically, to the country-over-party credo . . . ."<sup>62</sup> Indeed, a former Democratic senior staffer remarked, "it was always worth asking where [Graham] was going to be on a particular issue, because he wasn't completely beholden to party orthodoxy."<sup>63</sup> The reason for Graham's move from perceived moderate senator to being characterized as a Trump loyalist is unknown, although a variety of theories have been posited.<sup>64</sup>

One of those theories is related to Graham's desire to remain in power and his belief that to do so required courting the Trump base of voters. A "South Carolina political consultant who worked for Graham in his 2020 reelection campaign and once chaired the state party," explained that "Graham's posture is simple: he wants to align himself with the party's most popular figure."<sup>65</sup> Graham has maintained his loyalty to Trump, and reaped the political rewards for doing so over the past few years. Indeed, Graham's 2020 victory was seen

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61. See Ramsey Touchberry, *Ted Cruz and Josh Hawley Face Few Repercussions from Corporate Donors Jumping Ship*, NEWSWEEK (Jan. 16, 2021, 8:00 AM), <https://www.newsweek.com/ted-cruz-josh-hawley-face-few-repercussions-corporate-donors-jumping-ship-1562063>; Brian Schwartz, *GOP Rep. Marjorie Taylor Greene's Donors Largely Stick with Her After House Ousts Her from Committees*, CNBC (Feb. 8, 2021, 1:38 PM), <https://www.cnbc.com/2021/02/08/marjorie-taylor-greene-donors-stick-with-her-after-house-ousts-her-from-committees.html>; Ben Nadler & Russ Bynum, *Punished by Democrats, Greene Consolidates Support at Home*, ASSOC. PRESS (Feb. 9, 2021), <https://apnews.com/article/conspiracy-theories-marjorie-taylor-greene-georgia-media-social-media-d8b4903fe78f0587d613b5a39286b072>.

62. Mark Leibovich, *How Lindsey Graham Went from Trump Skeptic to Trump Sidekick*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/magazine/lindsey-graham-what-happened-trump.html>.

63. Mark Binelli, *How Lindsey Graham Lost His Way*, ROLLING STONE (Jan. 6, 2020), <https://www.rollingstone.com/politics/politics-features/lindsey-graham-senate-trump-928948/>.

64. See *id.*

65. Josh Dawsey, *Lindsey Graham Said 'Count Me Out' After the Capitol Riot. But He's All in with Trump Again*, WASH. POST (Feb. 20, 2021, 4:27 PM), [https://www.washingtonpost.com/politics/lindsey-graham-donald-trump/2021/02/20/178afc0a-72ca-11eb-a4eb-44012a612cf9\\_story.html](https://www.washingtonpost.com/politics/lindsey-graham-donald-trump/2021/02/20/178afc0a-72ca-11eb-a4eb-44012a612cf9_story.html).

by many as a narrow win, after he faced the most competitive Senate campaign race of his career.<sup>66</sup> Graham is believed to have won in part “by defending his close relationship with Trump, describing it as beneficial to his constituents.”<sup>67</sup>

Graham’s loyalty to Trump continued even after he purported to break from Trump after the attack on the Capitol on January 6, 2021.<sup>68</sup> Importantly, Trump’s actions surrounding and throughout the events of January 6th were widely seen to be in contravention of the strong norm and tradition of peaceful transitions of power within the United States;<sup>69</sup> a notion that Republicans have expressed near-uniform support for.<sup>70</sup> Graham initially condemned Trump’s actions publicly and fervently, but he did an about-face within weeks. Indeed, Graham went so far as to serve “as an informal adviser to Trump’s defense team during his [second] Senate impeachment trial . . . .”<sup>71</sup> Graham’s continued support, reportedly, “comes after the four-term senator said he reviewed polling in South Carolina and across the country that shows Trump’s enduring strength among Republicans, even after the Jan. 6 insurrection that resulted in five deaths.”<sup>72</sup>

While the exact motivations for Graham’s inconsistent perspectives are unknown, there are a variety of indicators that suggest that ingratiating himself with former President Trump enabled him to collect a variety of political rewards. The normal stigma that would attach for failing to adhere to one’s principles has, importantly, been levied against Graham. Whether from the media or from his colleagues in his Senate, he has been widely criticized for his support for the former President. And yet, the social norms that would normally encourage Graham to maintain consistency with his stated positions and maintain loyalty with his colleagues in the Senate do not appear to have been strong enough to overcome the political rewards Graham has collected as a result of his alliance and loyalty to former President Trump.

### 3. Backlash

As noted above, one of the insights from the social norms literature as observed by Ellickson was that “members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that

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66. See, e.g., Andrew Desiderio, *Graham Fends off Harrison in South Carolina Senate Race*, POLITICO (Nov. 3, 2020), <https://www.politico.com/news/2020/11/03/south-carolina-senate-election-results-2020-433581>.

67. *Id.*

68. See e.g., Dawsey, *supra* note 65.

69. See, e.g., David S. Cloud & Eli Stokols, *Trump is Throwing a Wrench into What is Usually a Seamless Transfer of Power*, L.A. TIMES (Jan. 20, 2021), <https://www.latimes.com/politics/story/2021-01-20/trump-disrupts-seamless-transfer-of-power>.

70. See Marianne Levine, Andrew Desiderio & Burgess Everett, *Republicans Break with Trump Over Peaceful Transition of Power*, POLITICO (Sept. 24, 2020), <https://www.politico.com/news/2020/09/24/gop-peaceful-power-transfer-421025>.

71. Dawsey, *supra* note 65.

72. *Id.*

members obtain in their workaday affairs with one another.”<sup>73</sup> For attorneys at the Department of Justice, one long-standing norm is for an attorney with a potential or perceived conflict of interest to recuse themselves from an investigation.<sup>74</sup> This general norm is consistent with the conduct of attorneys generally as a result of certain rules regarding conflicts of interest within various states’ rules of professional conduct. And, importantly, attorneys will often recuse themselves even if they are not legally required to do so.<sup>75</sup>

This norm was followed by then Attorney General Jeff Sessions when he recused himself “from any investigation into charges that Russia meddled in the 2016 presidential election.”<sup>76</sup> When meetings Sessions had with the Russian Ambassador became publicly known, he was pressured by both Democrats and Republicans alike to recuse himself from the investigation.<sup>77</sup> In situations like this, recusals often follow—even if not legally required—to ensure the investigation and findings are not tainted when released to the public. Sessions’ recusal, however, was met with significant amounts of backlash from one whom he had developed a close and seemingly loyal relationship with—former President Donald Trump. As a result, Sessions was subject to large amounts of backlash for adhering to a relatively innocuous norm for attorneys. Indeed, as one news outlet reported it: Trump “brutally attacked Sessions for years for the then-attorney general’s decision to recuse himself from overseeing the Russia investigation.”<sup>78</sup> Additionally, Trump opposed Sessions’ primary run to reclaim his seat in the Senate and, ultimately, lost to a candidate who was endorsed by Trump.<sup>79</sup>

Importantly, Trump’s expressions of extreme displeasure at Sessions’ decision to recuse himself may have worked toward changing the social norms on recusal for the attorney general—at least temporarily. When many within

73. ELLICKSON, *supra* note 38, at 167 (emphasis omitted). This is consistent with others’ work in the private ordering space. See also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1730 (2001).

74. 28 C.F.R. 45.2 (U.S. Dep’t of Just., 1996); *Government Ethics Outline*, *supra* note 29.

75. The ABA formally abandoned a canon of ethics that required members of the bar to avoid even the “appearance of impropriety,” but the general notion still remains in some segments of the bar. See Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 701–02 n.13 (1998).

76. Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself from Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>. See also Press Release, U.S. Dep’t of Just., Attorney General Sessions Statement on Recusal (Mar. 2, 2017) (on file with author).

77. See Landler & Lichtblau, *supra* note 76.

78. Greg Sargent, *What Jeff Sessions Can’t Say Out Loud*, WASH. POST (July 14, 2020), <https://www.washingtonpost.com/opinions/2020/07/14/what-jeff-sessions-cant-say-out-loud/>.

79. See, e.g., Clare Foran, *Jeff Sessions Loses Alabama GOP Senate Runoff to Trump-Backed Tommy Tuberville*, CNN (July 14, 2020, 11:17 PM), <https://www.cnn.com/2020/07/14/politics/alabama-republican-senate-primary-results/index.html>.



the political<sup>80</sup> and legal<sup>81</sup> world insisted that Sessions' successor—William Barr—recuse himself from the DOJ's investigations of potential misconduct within the Ukraine, he refused and FOIA requests suggest he did not actively consider the matter.<sup>82</sup>

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This Part recounts a few instances where social norms were not complied with by government officials—either due to the rise of social media or the increased political polarization facing the country. The upshot, however, is that the status quo appears to have shifted in important and meaningful ways with regards to what is and is not acceptable conduct from government officials. Whether that shift will be more temporary or permanent is left to be seen. This Article hopes to contribute to efforts aimed at helping the pendulum swing back toward an era where government officials adhere to legal rules, social norms, and ethical standards.

### III. POTENTIAL INTERVENTIONS

Unfortunately, the last several years have demonstrated what can occur when America's leaders are no longer willing to put virtue<sup>83</sup> over their own interests—unmitigated corruption and chaos. In 2021, the corruption and chaos of the preceding years appear to have led to misinformation,<sup>84</sup> insurrection,<sup>85</sup> a

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80. See Veronica Stracqualursi, *Democrats Call on Barr to Recuse Himself from Ukraine Investigations*, CNN (Oct. 29, 2019, 9:30 AM), <https://www.cnn.com/2019/10/29/politics/democrats-attorney-general-barr-recuse-ukraine-hirono-cnn/index.html>; *House Judiciary Chief Call on Barr to Recuse Himself from Ukraine Probes*, REUTERS (Sept. 25, 2019), <https://www.reuters.com/article/us-usa-trump-whistleblower-barr/house-judiciary-chief-call-on-barr-to-recuse-himself-from-ukraine-probes-idUSKBN1WA24K>.

81. See Press Release, N.Y. City Bar Assoc., Attorney General Barr Should Recuse Himself from Department of Justice Review of Ukraine Matter (Oct. 23, 2019), <https://www.nycbar.org/media-listing/media/detail/attorney-general-barr-should-recuse-himself-from-department-of-justice-review-of-ukraine-matter>.

82. See, e.g., *The Justice Department Found No Records Indicating Barr Considered Recusing Himself from Ukraine Investigations*, AM. OVERSIGHT (May 8, 2020), <https://www.americanoversight.org/the-justice-department-found-no-records-indicating-barr-considered-recusing-himself-from-ukraine-investigations>.

83. The idea of America's reliance on government officials' own innate virtue is an opinion that has previously been expressed by Professor Franita Tolson while providing commentary on CNN relating to the 2020 election. *CNN Newsroom* (CNN television broadcast Jan. 6, 2021), <http://transcripts.cnn.com/TRANSCRIPTS/210106/se.02.html> ("But I think the main lesson here, Erin, is that our country requires our leaders to have a certain amount of virtue in order to work properly. And maybe that's a problem, right? We clearly need more safeguards.").

84. See Davey Alba & Sheera Frenkel, *Watch Out for this Misinformation When Congress Meets to Certify the Election*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/business/election-fraud.html>.

85. See Darrell M. West, *The Role of Misinformation in Trump's Insurrection*, BROOKINGS INST. (Jan. 11, 2021), <https://www.brookings.edu/blog/techtank/2021/01/11/the-role-of-misinformation-in-trumps-insurrection/>; Wayne Rash, *Disinformation Propelled by Social Media*

rise of white supremacy,<sup>86</sup> and a crisis within and throughout government.<sup>87</sup> The new administration is attempting to reset—to restore the regular order of American democracy.<sup>88</sup> But, in many ways, regular order has proved itself to be inadequate to respond to the crises of the present moment as certain norms appear to be irreparably broken. If the last few years have demonstrated anything, it is the existential damage that can be wrought when just one person, well-placed, refuses to adhere to the norms that America's democratic ideals rely upon.

And yet, there are actions that can and should be taken to fill in the gaps left by government officials' bucking of the social norms that have traditionally served to restrain their conduct. This Part will highlight three potential interventions that might be pursued in an effort to create a set of incentives for ensuring government officials act with integrity. First, this Part suggests that a move toward more formal legal interventions should be pursued. Second, this Part considers how refocusing on the role of lawyers as members of a profession who are meant to serve the public good might help restore certain norms of appropriate conduct for governmental officials. Third, this Part outlines some ways that private parties might engage in activity meant to incentivize certain types of conduct from government officials. Given the ways in which some government officials' have demonstrated a reluctance to adhere to traditional social norms and ethical standards, other mechanisms for restraining their behavior must be pursued.

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*and Conspiracy Theories Led to Insurrection*, FORBES (Jan. 19, 2021), <https://www.forbes.com/sites/waynerash/2021/01/19/disinformation-propelled-by-social-media-and-conspiracy-theories-led-to-insurrection/?sh=355677834e05> (arguing that “the continuous assertions that Trump actually won the popular vote led to a belief among Trump supporters that this was actually the case”).

86. See Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. FOR AM. PROGRESS (July 1, 2020), <https://www.americanprogress.org/issues/security/reports/2020/07/01/482414/white-supremacy-returned-mainstream-politics/> (discussing how “dehumanization” language used by political actors and government officials represents “a form of moral disengagement that allows people to abandon normal human sympathies toward oppressed minorities”); see also Laura Barrón-López & John Bresnahan, *Steve King Under Fire After Embrace of White Supremacy*, POLITICO (Jan. 11, 2019), <https://www.politico.com/story/2019/01/10/steve-king-white-supremacy-congress-1077665>.

87. See Mollie Simon, *Former Ethics Director Says Trump Is Causing A ‘Crisis;’ Calls for Reforms*, NPR (July 28, 2017), <https://www.npr.org/2017/07/28/540004069/former-ethics-director-says-trump-is-causing-a-crisis-calls-for-reforms>

88. See Inaugural Address, 2021 DAILY COM. PRES. DOC. 48 (Jan. 21, 2021) (“To overcome these challenges [of political extremism, White supremacy, domestic terrorism]—to restore the soul and to secure the future of America—requires more than words. It requires that most elusive of things in a democracy: unity.”); Arie W. Kruglanski & Robert B. Talisse, *Can Joe Biden ‘Heal’ the United States? Political Experts Disagree*, CONVERSATION (Dec. 22, 2020, 2:59 PM), <https://theconversation.com/can-joe-biden-heal-the-united-states-political-experts-disagree-150519>.

### A. Formal Sanctions & Legal Intervention

McAdams's work discusses how law has power even when it is not formally utilized, but Conway's statement suggests that she was not deterred by the Hatch Act, in part, because she knew the law was unlikely to be enforced against her. There are scores of examples of a reluctance to use formal sanctions against government officials.

Take, for example, the Senate Select Committee on Ethics. It has "refrained from issuing any disciplinary sanctions" for fourteen straight years.<sup>89</sup> Indeed, for the year 2020, the bipartisan committee "issued no letters of admonition and dismissed 119 of the 144 matters that the six-member, bipartisan committee received."<sup>90</sup> While it may technically be true that there have been no Senators who have engaged in behavior that warrants sanction for fourteen years, it, quite frankly, seems unlikely. Additionally, there are sometimes ways in which government officials are able to avoid potential investigations into misconduct by simply removing themselves from public office, thereby depriving the investigative body of jurisdiction to investigate the claim.<sup>91</sup> For instance, the House Ethics Committee "does not investigate former members."<sup>92</sup>

If, however, the expressive function of law is no longer functioning to curb the behavior of government officials, that suggests that it may be time to retreat back to the use of more formal legal interventions to shore up what has been lost. Interestingly, the United States is often seen as a leader in certain anticorruption spaces, one example being its passage and enforcement of the Foreign Corrupt Practices Act ("FCPA"), which bans corporations from bribing foreign officials in an effort to achieve business opportunities and advantages.<sup>93</sup> And yet, the FCPA does not apply to corporations' bribery of domestic officials. In the domestic context, the United States has adopted a network of public corruption laws, like the Hatch Act<sup>94</sup> and the Bribery Statute,<sup>95</sup> instead of one broad-based public corruption statute governing the actions of government officials.

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89. Chris Marquette, *Senate Ethics Has Not Sanctioned a Member in 14 Years*, ROLL CALL (Feb. 1, 2021, 7:03 PM), <https://www.rollcall.com/2021/02/01/senate-ethics-has-not-sanctioned-a-member-in-14-years/>.

90. *Id.*

91. I have written about this phenomenon in the context of investigations into potential judicial misconduct. See Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. U. L. REV. 953 (2020).

92. Naylor & Montanaro, *supra* note 37.

93. See Kevin E. Davis & Veronica Root Martinez, *Transnational Anti-Bribery Law*, in CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds.) (forthcoming 2021); Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

94. 53 U.S.C. § 7321.

95. See generally Lauren N. Vaca, Note, *Quid Pro No? The Bribery Statute's Failure to Capture the "Official Acts" of High-Ranking Public Officials*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 821 (2021).

Given the actions of government officials over the past several years—from both sides of the political aisle—it appears that now is the time for scholars, policymakers, and the public-at-large to discuss whether it may be appropriate to pass a more comprehensive federal statute aimed at combatting public corruption within and throughout the government and by government officials. Any legal intervention that attempts to regulate the behavior of government officials *ex ante* will have gaps; no law will be able to take into account every conceivable manner in which corruption might present itself. And yet, given the failure of government officials to adhere to certain social norms and ethical standards and, indeed, to flaunt their lack of adherence to legal requirements in a public manner, it appears that formal, legal interventions may be needed to better restrain the conduct of government officials going forward.

### *B. Doubling Down on the Public Good*

This Article relies on the conduct and treatment of a number of government officials to demonstrate its claims. Most of these individuals have an important characteristic in common; they are lawyers. Obama. Clinton. Comey. McConnell. Conway. Graham. Sessions. Barr. They are all lawyers, which means that they are, or were, not just government officials—they are members of a profession that was originally meant, at least in part, to serve the public good.<sup>96</sup>

Professor Rebecca Roiphe has examined professionalism throughout America's history, and has identified an older form of professionalism that “conceive[d] of the professions as groups of individuals who have mastered an area of knowledge through special training” and who “gain[ed] their power through knowledge—not wealth or political prestige . . . .”<sup>97</sup> This enabled those older professionals “to ascertain what is best for the public as a whole and to suppress their own immediate interests in achieving it.”<sup>98</sup> As she has explained: “Professionals would be able to negotiate the interests of the people with that of the state without being subsumed by either the destructive forces of the market or the corrupting nature of state power.”<sup>99</sup> Roiphe also, however, explains that this older notion of professionalism was lost and, instead, “the vast majority of practitioners and commentators have embraced a market understanding of the lawyer's role . . . .”<sup>100</sup> This market understanding of the role of the lawyer retreated in many ways from the idea that the lawyer was meant to serve the public good. This retreat has had a variety of deleterious impacts, most of which

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96. See Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649 (2016). See also Sherrilyn A. Ifill, *Lawyers Enabled Trump's Worst Abuses*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/opinion/politics/trump-lawyers.html#click=https://t.co/e9pByAc5SN>.

97. Roiphe, *supra* note 96, at 651.

98. *Id.*

99. *Id.* at 651–52.

100. *Id.* at 652.

are outside the scope of this Article, but one of the negative effects of a failure to see the role of the lawyer as a professional meant to serve the public good is that it changed many lawyers' conceptions about what their proper role is within society.

It may be time for a set of renewed conversations about the appropriate role of the lawyer within American society. It is striking that multiple members of the legal profession have engaged in behavior that includes, failure to (i) comply with legal, regulatory, and departmental requirements; (ii) maintain consistency in policy pronouncements; and (iii) put safety and security of the country over the pursuit of power. In other words, it is of particular note that so many members of the legal profession have failed to prioritize the public good, even when engaged in roles as government officials who are, quite literally, meant to serve the public.

Any scholarly conversation about how to restore order—about how to incentivize government officials to adhere to certain social norms and ethical standards—should include an assessment and critique about how the legal profession has contributed to the current state of affairs. Many have praised the legal system as stopping many of former President Trump's attempts to erode certain democratic principles.<sup>101</sup> Indeed, at a certain point, members of the profession largely stepped away from Trump; their professional obligations stopping them from taking on the sort of representation he requested.<sup>102</sup> But the reality is that many of the government officials whose conduct has eroded some of the principles and norms the public expects those officials to comply with, are lawyers. It seems important to think through how these lawyers—these members of a profession—were able to justify conduct that is not in alignment with social norms, ethical standards, or the public good.<sup>103</sup>

### C. Private Pressure

After a mob attacked the Capitol on January 6, 2021, “a handful of Republican senators and more than 100 Republican representatives” voted

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101. See Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020), [https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html).

102. See, e.g., Tom Schoenberg, Jennifer Jacobs & Jordan Fabian, *Trump Struggles to Find Lawyers as Impeachment Trial Nears*, BLOOMBERG (Jan. 14, 2021), <https://www.bloomberg.com/news/articles/2021-01-14/trump-struggles-to-build-legal-team-as-impeachment-trial-nears>.

103. Before her passing, Deborah Rhode dedicated much of her work to the role of lawyers as leaders. See DEBORAH L. RHODE, *LAWYERS AS LEADERS* (2013). One of the concerns she articulated was the failure of law schools to provide leadership training and examination within their curriculums. Given how often the country, public, and even private industry rely on the leadership of lawyers, it does seem odd that the topic of leadership is not more robustly considered within legal education.

against the certification of the 2020 presidential election results.<sup>104</sup> This was less than the estimated number of votes in opposition to the certification and reflected a change in position by many Members of Congress in response to the insurrection. Following the vote, a number of companies announced their decisions to suspend contributions to members of Congress who did not vote in favor of certifying the election results.<sup>105</sup> Those companies that announced their intention to suspend contributions included Morgan Stanley, Marriott, AT&T, and The Coca-Cola Company, amongst others.<sup>106</sup>

The debate about whether corporations should be permitted to contribute money toward political ends is an inherently fraught issue with wide reaching opinions and critiques from all perspectives.<sup>107</sup> This Article takes no position on that larger debate. Nevertheless, it is worth noting that the private pressure created by losing—even temporarily—large sources of campaign funds may have created pressure for Members of Congress to condemn the actions and activities that led up to January 6, 2020. To a certain extent, part of what needs to happen to shore up current understandings of what is and is not acceptable adherence to social norms and ethical standards by government officials is to have strong incentives to push the pendulum back from the direction it moved to under former President Trump. The effort to reestablish what is and is not acceptable conduct will need to come from a variety of sources. One powerful set of incentives could, potentially, come from the ways in which private parties, like corporations, seek to prioritize their use of political giving.<sup>108</sup>

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This Part has suggested three potential interventions that might be pursued in an effort to fill the gaps created by the failure of social norms to restrain government officials' behavior in light of the rise of social media and an environment of increased political polarization. These suggestions are preliminary and require more scholarly debate and rigor. The basic point, however, is that there are a variety of efforts that could be undertaken, perhaps simultaneously, to create a set of incentives for government officials to act in accordance with certain social norms and ethical standards. Only time and experimentation will prove what the most effective routes might be, but the

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104. Jenny Gross & Luke Broadwater, *Here are the Republicans Who Objected to Certifying the Election Results*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/07/us/politics/republicans-against-certification.html>.

105. See, e.g., Lauren Hirsch, *Big Companies Pause Their Political Contributions*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/business/banks-citigroup-goldman-sachs-politicians.html>.

106. See *id.*

107. See, e.g., Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>; Scott Casleton, *It's Time for Liberals to Get Over Citizens United*, VOX (May 7, 2018), <https://www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries>.

108. See generally Bernard W. Bell, *Administrative Adjudicators' Extrajudicial Statements*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617 (2021).

general effort should be undertaken and assessed by scholars, policymakers, and the public in an attempt to create the right mix of legal and non-legal interventions necessary to ensure the conduct of government officials meets societal expectations.

#### CONCLUSION

Many people of goodwill are engaged in an effort to think through how to restore the principles needed to ensure faith in government officials and the proper functioning of government. Indeed, that is the very basis of the symposium for which this piece has been written.<sup>109</sup> This Article contributes to that effort by discussing ways in which the rise of social media and increased political polarization have contributed to an erosion of the ability of social norms to restrain the conduct of government officials.

In particular, this Article argues that it is necessary to look for mechanisms that can be used to fill the gaps left by the failure of social norms to rein in officials' behavior. This Article discusses three: (i) the adoption of formal legal interventions to shore up and restore certain expectations of acceptable behavior for government officials, (ii) a renewed commitment to the notion that the proper role of the lawyer is that of a professional whose role is to pursue the public good, and (iii) the role of private pressure to facilitate certain expectations of acceptable conduct. But this symposium discusses many more potential interventions. When taken together, the hope is that this Article, as well as the other participants' contributions, might help spark debate about what actions are necessary going forward to ensure the American experiment continues to thrive for another 243 years.

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109. See generally Symposium Introduction, *The Ethics of Government Service*, 35 NOTRE DAME J. L., ETHICS & PUB. POL'Y 521 (2021).

