

# THE ROLE OF NORMS AND 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 has her leaders failed her and what should be done in response?*

*This Essay seeks to respond to 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 Essay argues that the country’s current predicament is attributable, at least in part, to the failure of stigma to reign in—or serve as a check—on government official’s behavior, requiring the adoption of new interventions to fill the gaps left when the power of stigma diminished. The rise of social media, accompanied by an explosion of misinformation, paired with an increasingly politically polarized environment, has crippled the power of stigma to serve as an effective mechanism for encouraging certain types of behavior in government officials. As a result, it is time for policymakers to consider formal, legal interventions that can fill the gaps revealed and widened during the last presidential administration. When adherence to norms and appeals to ethics fail, it is often time for law to intervene.*

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## INTRODUCTION

Today, when one starts conversations 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> And the concerns continued, increasing in volume and tenor throughout his presidency.<sup>3</sup> Whether it was his refusal to interact regularly 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> his legacy<sup>9</sup> will live in infamy for decades, if not centuries. And yet, there a variety of reasons to question whether Trump was the cause or the effect of an erosion of norms and adherence to ethical standard by government officials.

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<sup>1</sup> *The Definitive List of the 20 Presidential Norms Trump Broke*, Wash. Post (Nov. 10, 2020); *How President Trump Pushes the Boundaries of Norms in Office*, NPR (Aug. 20, 2020), <https://www.npr.org/2020/08/20/904383253/how-president-trump-pushes-the-boundaries-of-norms-in-office>.

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

<sup>3</sup> 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/>.

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

<sup>5</sup> 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* (Feb. 6, 2020), <https://theconversation.com/what-trumps-picks-for-the-presidential-medal-of-freedom-like-rush-limbaugh-and-antonin-scalia-say-about-him-131362>.

<sup>6</sup> *With His Last Pardons, Trump Makes Clear His Position on Political Corruption*, Wash. Post. (Jan. 20, 2021), <https://www.washingtonpost.com/politics/2021/01/20/with-his-last-pardons-trump-makes-clear-his-position-political-corruption/>

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

<sup>8</sup> C. Scott Peters, *Trump and Support for Trump Pose a Continuing Threat to Democracy*, Des Moines Register (Jan. 9, 2021), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2021/01/09/trump-threat-democracy-urgent-action-needed-restore-norms/6592467002/>.

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

For example, some questioned whether President Barack Obama appropriately invoked executive privilege in response to a congressional investigation,<sup>10</sup> and whether his view on executive power set-up “the possibility of executive overreach” during the Trump administration.<sup>11</sup> Additionally, Hillary Clinton violated federal records rules when failed to route her electronic communication 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 as 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, and Colin Powell “failed to properly preserve government-related emails when he was secretary of state.”<sup>15</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.

The slow march America has been on—where one can rely less and less on the innate virtue of its leaders—was at a tipping point throughout the Trump Administration and, unfortunately, crossed over into a full-scale emergency during its last’s weeks in power. America’s leaders have failed her. And now the question is what must she do to heal.

The Biden Administration—still in its infancy—has indicated a desire to return to normalcy<sup>16</sup> and to make a hard break with the perceived corruption

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<sup>10</sup> 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>.

<sup>11</sup> See, e.g., Erin Hawley, *Obama’s Curtain Call: A Look Back on a Legacy of Executive Overreach*, The Hill (Dec. 24, 2016), <https://thehill.com/blogs/pundits-blog/the-administration/311608-obamas-curtain-call-a-look-back-on-a-legacy-of>.

<sup>12</sup> Ken Dilanian, *State Dept. Report Criticizes Clinton’s Email Practices*, NBC News (May 25, 2016), <https://www.nbcnews.com/news/us-news/clinton-broke-federal-rules-email-server-audit-finds-n580131>.

<sup>13</sup> Carrie Johnson, *Report Condemns FBI Violations in 2016 Clinton Probe But Finds no Political Bias*, NPR (June 14, 2018), <https://www.npr.org/2018/06/14/612387464/report-expected-to-condemn-fbi-violations-in-2016-clinton-email-investigation>.

<sup>14</sup> Sarah N. Lynch & Mark Hosenball, *Report Rebukes Comey, But Says No Bias in Clinton Email Case*, Reuters (June 14, 2018), <https://www.reuters.com/article/us-usa-congress-fbi/report-rebukes-comey-but-says-no-bias-in-clinton-email-case-idUSKBN1JA0D4>.

<sup>15</sup> Dilanian, *supra* note 12.

<sup>16</sup> Joe Garofoli, *Biden Promises a Return to Normalcy*, S.F. Chronicle (Jan. 20, 2021), <https://www.sfchronicle.com/politics/article/Biden-promises-a-return-to-normalcy-Is-America-15883179.php>; Carol E. Lee, Mike Memloi, & Elyse Perlmutter-Gumbiner, *Biden Puts the ‘Daily’ Back into the Administration’s Intelligence Briefings*, NBC News (Jan. 22, 2021), <https://www.nbcnews.com/politics/white-house/biden-puts-daily-back-administration-s-intelligence-briefings-n1255554>.

of the Trump Administration.<sup>17</sup> This Essay, however, questions whether the Biden Administration can rely on its own innate virtue to restore the accepted norms and ethical standards that were at one time accepted by those engaged in Government Service. The Essay argues that the country's current predicament is attributable, at least in part, to the failure of stigma to reign in—or serve as a check—on government official's behavior. As a result, other mechanisms must be pursued to fill in the gaps that the departing power of stigma once filled.

This Essay 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 of and role of stigma in serving as a mediating influence over individual's adherence to norms, and its modern-day demise. Part III puts forth the thesis of this essay, and argues that the failure of stigma to reign 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 stigma. This Essay urges in favor of the adoption of formal legal interventions to shore up and restore certain expectations of acceptable behavior for government officials. Part IV addresses additional questions raised by this Essay's argument

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<sup>17</sup> 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>.