

## Changing the First Lady's Mystique: Defining the First Lady's Legal Role and Upending Gender Norms

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# **Changing the First Lady's Mystique: Defining the First Lady's Legal Role and Upending Gender Norms**

Ashlee A. Paxton-Turner

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## **ABSTRACT**

This Article explores the lack of formal guidelines governing the First Lady by first considering the history of the role and how the three branches of government have typically dealt with the role. Attention is also given to the possible intersection with the anti-nepotism statute when and if the First Lady acts as an advisor to the President. This Article then goes on to suggest that this lack of formality has allowed gender norms to govern the role. In an era where women's rights have resurfaced as a central theme in political discourse, this Article concludes by suggesting some possible guidelines that may displace the gender norms that have been governing the role for far too long. Upending these gender norms from the White House would send a message that not only redefines the First Lady's role but also redefines gender roles for the American public.

## **AUTHOR NOTE**

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## I. INTRODUCTION

Behind every President has been an unelected, unpaid woman.<sup>1</sup> In 1789, Martha Washington became the first First Lady.<sup>2</sup> Forty-four presidencies later,<sup>3</sup> each President has always had a woman by his side to attend to ceremonial duties of coordinating state dinners and floral arrangements.<sup>4</sup> In more recent years, this woman has also publicly focused on some traditionally feminine cause—literacy or childhood obesity, to name two.<sup>5</sup>

According to Jackie Kennedy, who remains one of the most beloved First Ladies, “[p]residents’ wives have an obligation to contribute something.”<sup>6</sup> But what that “something” is tends to vary greatly from First Lady to First Lady and is likely to be “something” radically different when the country has its first First Gentleman. That “something” looks like it will be different during President Trump’s time in office as both his wife, Melania Trump, and his daughter, Ivanka Trump, may take on different aspects of the First Lady’s role. Although Ivanka Trump has dismissed taking on any of the First Lady’s duties officially, she has taken up an office in the West Wing.<sup>7</sup>

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<sup>1</sup> This unelected, unpaid woman, however, has not always been the President’s wife. For nine presidents, their wives were not the First Lady, and for four presidents, someone else “assisted [their wives] as [their] hostess.” But, in all cases, the First Lady was a woman. Although it is only a matter of time before the country has its first First Gentleman. *See* CARL SFERRAZZA ANTHONY, VOLUME II: FIRST LADIES: THE SAGA OF THE PRESIDENT’S WIVES AND THE POWER, 1961–1990 19–20 (1991).

<sup>2</sup> *Id.* at 17.

<sup>3</sup> Although there have been forty-four presidencies, only forty-three individual people have been sworn in as President because Grover Cleveland served two non-consecutive terms.

<sup>4</sup> *See supra* note 1 and accompanying text.

<sup>5</sup> *A Brief History of First Ladies and Their Causes*, TIME [http://content.time.com/time/photogallery/0,29307,1962281\\_2053870,00.html](http://content.time.com/time/photogallery/0,29307,1962281_2053870,00.html) (last visited Oct. 7, 2017) [<http://perma.cc/X5ZR-MAJD>].

<sup>6</sup> ANTHONY, VOLUME II, *supra* note 1, at 27.

<sup>7</sup> *See* Associated Press, *First Daughter Ivanka Trump Gets West Wing Office*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/aponline/2017/03/20/us/politics/ap-us-trump-ivanka.html> [<https://perma.cc/QD82-T789>]; *see also* Maria Puente, *Ivanka Trump: The One Constant Amid the Turbulence*, USA TODAY (Feb. 17, 2017, 12:30 PM), <http://www.usatoday.com/story/life/people/2017/02/17/ivanka-trump-role-in-donald-trump-presidency/97948246/> [<https://perma.cc/FF2T-XQUB>] (“It was expected the first daughter would be at her father’s side more

Of course, President Trump would certainly not be the first President to have someone other than his wife fulfill some of the First Lady's duties.<sup>8</sup>

But what should that "something" be? Leaving that "something" undefined is problematic for three reasons: (1) the First Spouse may exercise influence domestically and abroad in such a way that she<sup>9</sup> improperly shapes policy as an unelected individual or gains inappropriate and unfettered access to information;<sup>10</sup> (2) the First Spouse, for fear of public outcry and bruising her husband's administration and reputation, may not maximize the use of her own talents and expertise either for her own benefit or that of the country;<sup>11</sup> and (3) the lack of a formal definition only perpetuates these gender

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than first lady Melania Trump; what's unexpected is she's been there almost as much as her husband, senior advisor Jared Kushner, who's actually working there."). Ivanka Trump also attended joint press conferences, and a "conference on women in business." *Id.*

<sup>8</sup> See *supra* note 1 and accompanying text.

<sup>9</sup> This Article uses the feminine pronouns when referring to the First Spouse. Although the country came very close to having its first First Gentleman in 2016, the role of First Spouse has always been occupied by a woman and will continue to be occupied by a woman for at least the next four years. This Article also generally refers to the role as the First Lady when discussing past and present examples and issues. When discussing the future, hypotheticals, and general issues and changes to the office itself, this Article sometimes uses the term "First Spouse."

<sup>10</sup> This question is even trickier if the First Spouse's role is being performed, even if informally, by the President's daughter as well as his wife. See Puente, *supra* note 7.

<sup>11</sup> Of course, history has revealed that even the most innocuous causes, such as getting children to eat their vegetables and exercise, can still become political. See Jay Newton-Small, *Michelle Obama Bites Back at Critics of Her Healthy School Lunch Standards*, TIME (May 27, 2014), <http://time.com/120611/michelle-obama-school-lunches/> [<http://perma.cc/Q6FE-ZRDP>] (discussing how "Republicans on the House Appropriations Committee [considered] strip[ping] whole grain requirements and competitive food restrictions in their 2015 funding bill" and how it led to Michelle Obama giving one of her most "overtly political speeches"). As it turned out, Republicans ended up compromising with Democrats by "eas[ing] whole-grain requirements and sodium limits while preserving fruit and vegetable standards and keeping junk food off menus [in public schools]," thus giving "major food companies" some benefits while maintaining a general focus on healthier school lunches. See Alan Bjerga & Erik Wasson, *Michelle Obama's School Lunch Legacy Survives Republican Assault*, BLOOMBERG POLITICS (Jan. 19, 2016, 3:59 PM), <https://www.bloomberg.com/politics/articles/2016-01-19/michelle-obama-school-lunch-legacy-survives-republican-assault> [<http://perma.cc/DEA7-X6LG>].

norms that have informally defined the position.<sup>12</sup> Because “[s]o much is expected of these women while so little is defined about the role they play,”<sup>13</sup> it can be difficult for the First Spouse to determine what exactly she should do. Most problematic, though, is that the lack of any definition leaves the role (and the office) largely governed by gender norms.

With time, the position of First Lady has evolved. First Ladies such as Edith Wilson, Eleanor Roosevelt, and Hillary Clinton have reshaped the office from one focused exclusively on ceremonial duties to more formal policymaking and advising of the President.<sup>14</sup> When First Ladies have branched out of the traditional realm of ceremonial duties and conventional domestic and feminine causes, the public and even some White House officials have voiced concern.<sup>15</sup> Eleanor Roosevelt, despite being now widely admired, was criticized for getting involved in politics—something at least some commentators believed the First Lady “should have . . . left alone.”<sup>16</sup> Many Americans reacted unfavorably to Hillary Clinton’s Health Care Task Force, viewing it as too much policymaking for the country’s unelected First Lady and responded by not voting for the Democrats in the mid-term election in 1994.<sup>17</sup> Hillary Clinton adapted this response to her policymaking efforts, and in her husband’s second term, she

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<sup>12</sup> See ANTHONY, VOLUME II, *supra* note 1.

<sup>13</sup> KATE ANDERSON BROWER, *FIRST WOMEN: THE GRACE AND POWER OF AMERICA’S MODERN FIRST LADIES* 4 (2016).

<sup>14</sup> See generally *id.*; ANTHONY, VOLUME II, *supra* note 1; CARL SFERRAZZA ANTHONY, VOLUME I: *FIRST LADIES: THE SAGA OF THE PRESIDENTS’ WIVES AND THEIR POWER, 1789–1961* (1990).

<sup>15</sup> One famous example of public outcry involves the failure of Hillary Clinton’s Health Care Task Force and the subsequent Democratic losses in the House and the Senate midterm elections in 1994. BROWER, *supra* note 13, at 17. But Hillary Clinton is not the only one who engendered disapproval for her unconventional role. See *id.* (“Eleanor caused a member of FDR’s administration [to tell her] she should stay out of her husband’s business and ‘stick to her knitting.’”). Eleanor Roosevelt was also “accused of stimulating racial prejudices, of meddling in politics, talking too much, traveling too much, being too informal and espousing causes critics felt a mistress of the White House should have . . . left alone.” *Mrs. Roosevelt, First Lady 12 Years, Often Called ‘World’s Most Admired Woman*, N.Y. TIMES (Nov. 8, 1962), <http://www.nytimes.com/learning/general/onthisday/bday/1011.html> [<https://perma.cc/593W-UQ5D>].

<sup>16</sup> See *Mrs. Roosevelt, First Lady 12 Years*, *supra* note 15.

<sup>17</sup> See BROWER, *supra* note 13, at 17.

returned to traditional duties and causes, avoided Washington, D.C. as much as possible by leaving town,<sup>18</sup> and reframed her role in healthcare policymaking as an ally inside the White House to Senators Ted Kennedy and Orin Hatch for the State Children's Health Insurance Plan (SCHIP), rather than as the director of those efforts.<sup>19</sup> There have been missed opportunities for these women to make the most of their talents and expertise, particularly as they try to balance their own abilities without overshadowing their husbands or tarnishing his reputation.<sup>20</sup> For example, Michelle Obama specifically wanted to avoid following in the footsteps of Hillary Clinton given the negative reaction to many of Hillary Clinton's less than traditional acts as First Lady.<sup>21</sup>

There is a broader and more troubling concern with keeping the First Spouse's role undefined. Keeping First Ladies tasked with traditionally feminine duties has led to a tacit acceptance of certain gender norms—that women do housework, care for their children and husbands, and are not paid for it.<sup>22</sup> In many ways, it is a persistent

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<sup>18</sup> See *id.* at 239–41.

<sup>19</sup> See Jeff Guo, *The Surprising Upside of Hillary Clinton's Biggest Failure*, WASH. POST (Aug. 2, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/08/02/the-unintended-consequences-of-hillary-clintons-favorite-law/?utm\\_term=.b66a5a2b86a9](https://www.washingtonpost.com/news/wonk/wp/2016/08/02/the-unintended-consequences-of-hillary-clintons-favorite-law/?utm_term=.b66a5a2b86a9) [https://perma.cc/8QDD-R2NW] (“Most accounts say that Hillary Clinton mostly worked within the White House to secure the support of the administration. Bill Clinton was initially wary of the CHIP proposal because he thought it would upset his ongoing budget negotiations with the Republicans.”); see also Brooks Jackson, *Giving Hillary Credit for SCHIP*, FACTCHECK.ORG (Mar. 18, 2008), <http://www.factcheck.org/2008/03/giving-hillary-credit-for-schip/> [https://perma.cc/H445-5LSZ]. Others have even framed Hillary Clinton's role in SCHIP's enactment “to being a largely hidden cheerleader at the White House, rather than a public advocate who directly worked with lawmakers in both parties.” *Id.* (quoting Glenn Kessler). But see STUART ALTMAN & DAVID SHACTMAN, *POWER, POLITICS, AND UNIVERSAL HEALTH CARE* 173–74 (2011) (“Hillary turned out to be instrumental in convincing the president to support a new version of the bill.”). See *infra* notes 151–53 and accompanying text (discussing more completely Hillary Clinton's role in SCHIP).

<sup>20</sup> For example, many things that the First Lady may do can tarnish the President's reputation such as Nancy Reagan's decision to consult astrologers. BROWER, *supra* note 13, at 306–07.

<sup>21</sup> See *id.* at 171 (“There was never any debate about whether Michelle Obama wanted to play a role in the West Wing—she made it crystal clear from the start that she did not want to follow in Hillary Clinton's footsteps.”).

<sup>22</sup> The First Lady is an unpaid position.

endorsement of the separate spheres understanding of gender that was supposedly rejected decades ago.<sup>23</sup> Specifically, under this view of gender, the home was a woman's "proper sphere."<sup>24</sup> As such, public displays of housework—selecting china and flowers, for instance—and traditionally feminine concerns like caring for children only reinforce this now outdated idea that a woman's role is in the home. These gender norms are at least partly responsible for the lack of a formal definition and clear guidelines for this role in the first place. By relying on the First Lady only to do things like support her husband, pick out wallpaper and china, and advocate for children, the country has had little reason to do anything more formal, and gender norms keep the First Lady in her place or so it would seem.<sup>25</sup> But all of this might be changing.<sup>26</sup>

So, just how is the First Lady's role categorized? In the 1990s, courts weighed in on the matter of whether the First Lady was indeed a government official or employee.<sup>27</sup> The short answer was yes; the First

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<sup>23</sup> In the mid-1800s, Alexis de Tocqueville remarked on how "America is the one country where the most consistent care has been taken to trace clearly distinct spheres of actions for the two sexes and where both are required to walk at an equal pace but along paths that are never the same." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA* 697 (Gerald E. Bevan trans., Penguin Books 2003). But this view was later criticized and rejected by feminists like Betty Friedan in her work, *THE FEMININE MYSTIQUE*, and others even before her like Simone de Beauvoir in her work, *THE SECOND SEX*, among others.

<sup>24</sup> LINDA K. KERBER, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, *TOWARD AN INTELLECTUAL HISTORY OF WOMEN: ESSAYS* 159, 162 (1997).

<sup>25</sup> After all, gender norms kept other women across America in their place: the home. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 61 (1997) ("[T]his mystique of feminine fulfillment became the cherished and self-perpetuating core of contemporary American culture. . . . Their only dream was to be perfect wives and mothers. . . ."). Why should the First Lady be any different? Surely, this same feminine mystique must have affected her, too.

<sup>26</sup> See Alyssa Rosenberg, *The Case for Ivanka Trump as First Lady*, *WASH. POST* (Dec. 13, 2016), [https://www.washingtonpost.com/news/act-four/wp/2016/12/13/the-case-for-ivanka-trump-as-first-lady/?hpid=hp\\_no-name\\_opinion-card-f%3Ahomepage%2Fstory&utm\\_term=.186c884b991e](https://www.washingtonpost.com/news/act-four/wp/2016/12/13/the-case-for-ivanka-trump-as-first-lady/?hpid=hp_no-name_opinion-card-f%3Ahomepage%2Fstory&utm_term=.186c884b991e) [<https://perma.cc/N59H-2ZKK>] (discussing why it is time to change what we expect of the First Lady and how Ivanka Trump might "accidentally" do just that).

<sup>27</sup> See generally *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).



Lady was a de facto government official or employee,<sup>28</sup> or at least a special advisor to the President.<sup>29</sup> But, aside from a few judicial opinions citing the First Lady as a de facto government official or employee—never specifying which—and a brief mention in the U.S. Code providing her with assistance whenever she assists the President,<sup>30</sup> the office continues to be largely informally defined and regulated. This leaves the First Lady—the unelected icon of American femininity and domesticity if she limits and camouflages her contributions in the traditional way—with tremendous influence and access and little accountability and oversight.

While journalists,<sup>31</sup> historians,<sup>32</sup> and bestselling authors<sup>33</sup> have written at length about the First Lady and her contributions, the legal scholarship is scant on what her role is and what it should be. This Article fills a gap in the literature by suggesting that a clear set of guidelines for the Office of the First Spouse<sup>34</sup> could address these problems and, in doing so, displace, or at least counteract, the gender norms that have been governing this role for decades. These guidelines would add formality to the role and provide an opt-out should the First Spouse choose to eschew her role and keep working. There is much to be gained from formality in an era where classic separate spheres are no longer sufficient to govern the role. To that end, formalizing the role also clarifies just what the First Lady should and can be doing both in the eyes of everyday Americans and of Washington insiders.

This Article proceeds in three parts before concluding. Part I provides a brief history of the evolution of the First Lady's role, including the use of gender norms to govern the role and how the different branches of government have come to understand the role. Part II establishes the risks and lost opportunities associated with

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<sup>28</sup> *Id.* at 904–05.

<sup>29</sup> *See* *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 933 (8th Cir. 1997) (“As a ‘member of the President’s inner circle’ of advisors, Mrs. Clinton is precisely the type of organizational ‘representative’ the attorney-client privilege would ordinarily cover.”).

<sup>30</sup> 3 U.S.C. § 105(e) (2012).

<sup>31</sup> *See, e.g.*, Julie Hirschfeld Davis, *The Closer*, N.Y. TIMES, Nov. 5, 2016, at ST1 (discussing Michelle Obama’s contributions to Hillary Clinton’s presidential campaign).

<sup>32</sup> *See, e.g.*, ANTHONY, VOLUME II, *supra* note 1.

<sup>33</sup> *See, e.g.*, BROWER, *supra* note 13.

<sup>34</sup> And one day, maybe sooner rather than later, this office might indeed be the Office of the first First Gentleman.

keeping the First Spouse's role undefined and reliant on gender norms. Part III proposes some possible guidelines to create a clear definition and set of expectations to check the First Spouse's influence and access, maximize her ability to make meaningful contributions to the country, and upend gender norms. These guidelines include a minimal, yet gender-neutral, expectation of what the First Spouse should do. An opt-out from the role of First Spouse is included, however, should the First Spouse want to continue in her separate career. Additionally, they detail some accountability measures to check the First Spouse's influence and access.

## II. HER STORY: HISTORICAL, CONGRESSIONAL, JUDICIAL, & EXECUTIVE PERSPECTIVES

The benefits of formalizing the First Lady's role are best understood by first considering the evolution of that role throughout history and the influence of gender in its shaping, but history is only a starting point. Part I then describes the existing statutory, judicial, and executive understandings of her role.

### A. Historical and Gendered Understanding of the First Lady's Role

Although the First Lady's role has evolved, it has been consistently and tightly intertwined with gendered expectations and understandings.<sup>35</sup> In fact, even as women's rights have advanced and gender norms have frayed, the First Lady's role has continued to reflect what many would consider outdated understandings of gender.<sup>36</sup>

#### 1. The Short Version of a Long History: Martha to Mamie

When Martha Washington became the first First Lady in 1789,<sup>37</sup> she was known as Lady Washington,<sup>38</sup> and her role was as the nation's

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<sup>35</sup> See, e.g., Lisa M. Burns, *First Ladies as Political Women: Press Framing of Presidential Wives 1900 – 2001* (2004) (unpublished Ph.D. dissertation, University of Maryland) (on file at <http://drum.lib.umd.edu/bitstream/handle/1903/1968/umi-umd-1918.pdf;sequence=1>) (“[T]he first lady is a gendered role . . .”).

<sup>36</sup> See, e.g., Scarlet Neath, *What's the Point of a First Lady?*, THE ATLANTIC (Oct. 6, 2014) <https://www.theatlantic.com/politics/archive/2014/10/whats-the-point-of-a-first-lady/380753/> [<https://perma.cc/8LX3-MK73>].

<sup>37</sup> ANTHONY, VOLUME II, *supra* note 1, at 17.

<sup>38</sup> ANTHONY, VOLUME I, *supra* note 14, at 37.

hostess.<sup>39</sup> Lady Washington's main complaints about her new role had to do with the limitations it placed on her ability to "return social calls to prominent women"<sup>40</sup> or even "dine at private homes."<sup>41</sup> Her successor, Abigail Adams, broke with the precedent that Lady Washington had set and "thought herself less 'Lady' and more co-president."<sup>42</sup> John Adams even wrote of his wife, "[she] shine[d] as a Stateswoman."<sup>43</sup> In fact, Abigail Adams was often referred to as "Mrs. President."<sup>44</sup> Years later, when President Taft was in office, his wife, Nellie Taft, expertly camouflaged her political influence in her social role, particularly in her support of suffrage.<sup>45</sup> Nellie Taft's influence and support would ultimately help pave the way to women's suffrage,<sup>46</sup> which would fundamentally change the nature of politics.<sup>47</sup> Of course, it would not be until much later that a more formal break with this tradition of the First Lady as the Nation's social hostess would occur, and even then, the need to disguise influence and advice in social and ceremonial roles would never completely disappear—in no small part thanks to the ever-present expectations of women.

As Abigail Adams opened the possibility of expanding the role beyond a merely social one, even believing that "as president's wife she had a responsibility to help the needy,"<sup>48</sup> Dolley Madison firmly established expectations for the role that would become precedent for future First Ladies and became the first First Lady referred to as

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<sup>39</sup> See Patricia Brady, *Martha Washington Creates the Role of First Lady*, HIST. NOW: THE J. OF THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-by-era/early-republic/essays/martha-washington-creates-role-first-lady> (last visited Oct. 7, 2017) [<https://perma.cc/G7VP-BSST>].

<sup>40</sup> ANTHONY, VOLUME I, *supra* note 14, at 42.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 60.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 63.

<sup>45</sup> ANTHONY, VOLUME II, *supra* note 1, at 17.

<sup>46</sup> See ANTHONY, VOLUME II, *supra* note 1, at 17–18; see also CARL SFERRAZZA ANTHONY, *NELLIE TAFT: THE UNCONVENTIONAL FIRST LADY OF THE RAGTIME ERA 284–85* (2005).

<sup>47</sup> After all, by 1996, women voters were influencing elections in significant proportions. See FRIEDAN, *supra* note 25, at 32 (citing *In Historic Numbers, Men and Women Split Over Presidential Race*, WALL ST. J., Jan. 11, 1996).

<sup>48</sup> ANTHONY, VOLUME I, *supra* note 14, at 62.

such.<sup>49</sup> Over time, the role continued to evolve as First Ladies provided influential counsel to their husbands, though doing so perhaps a bit more quietly than Abigail Adams had done decades earlier.<sup>50</sup> For example, Sarah Polk was (quietly) President Polk's main advisor,<sup>51</sup> and Edith Wilson effectively took over when President Wilson had a stroke,<sup>52</sup> meeting with President Wilson's Cabinet and other officials and carrying (some) of their messages back to President Wilson.<sup>53</sup> In fact, some accounts even have Edith Wilson "demand[ing] her husband remain President so that [he] would rely on her to carry out his duties,"<sup>54</sup> although others have her merely passively agreeing to take on the responsibility of being her husband's "emissary."<sup>55</sup>

All of this advice and influence, even when camouflaged by the role of hostess, ultimately led to one of the most notable breaks with tradition: Eleanor Roosevelt.<sup>56</sup> Eleanor Roosevelt openly broke with many of the traditions her predecessors had established by holding press conferences,<sup>57</sup> openly working to help the less fortunate as a crusader for civil rights,<sup>58</sup> and traveling to places like the Caribbean without the President on what became "her trademark 'eyes and ears' inspection tours."<sup>59</sup> Although Eleanor Roosevelt borrowed existing

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<sup>49</sup> ANTHONY, VOLUME II, *supra* note 1, at 17.

<sup>50</sup> See ANTHONY, VOLUME I, *supra* note 14, at 62.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 18.

<sup>53</sup> Carl David Wasserman, *Firing the First Lady: The Role and Accountability of the Presidential Spouse*, 48 VAND. L. REV. 1215, 1228 (1995).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Maurine Beasley, *Eleanor Roosevelt as First Lady*, HIST. NOW: THE J. OF THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-by-era/new-deal/essays/eleanor-roosevelt-first-lady> (last visited Oct. 7, 2017) [<https://perma.cc/UB8Z-9U7A>].

<sup>57</sup> See ANTHONY, VOLUME I, *supra* note 14, at 454–57. Her cousin, Alice, even teased her, "Out with the old, in with the radical!" when Eleanor accidentally broke a vase in the Monroe Room, cleaned up the mess, and went on "rearranging" rather than continuing to worry if "she had broken a delicate historic object." *Id.* at 454. Likewise, Eleanor Roosevelt hardly spent a long time worrying if she had "broken" the delicate history of the First Lady's role when she held the first First Lady press conference just forty-eight hours after FDR's inauguration. *Id.* at 455.

<sup>58</sup> *Id.* at 454, 479–82.

<sup>59</sup> *Id.* at 460.

“traditional components of a volunteer role,”<sup>60</sup> she turned that volunteer role into a “job” in its own right.<sup>61</sup> In doing so, she made significant contributions to the country that also began to reshape gender roles. In fact, Eleanor Roosevelt held the first press conferences limited to women reporters<sup>62</sup> and continued to write and lecture, making her own money and “affirming by example the right of married women to make money.”<sup>63</sup> Yet despite all of her efforts to avoid “pouring tea,” the gendered expectations survived.<sup>64</sup> In fact, by the time Mamie Eisenhower became First Lady, the role had clearly become an example of American domesticity.<sup>65</sup> Mamie was matronly and ostensibly just what an American housewife in the 1950s should aspire to be.<sup>66</sup>

When Mamie Eisenhower was First Lady and even into the early 1960s, there was a pervasive belief that American women were not interested in politics, at least not outside of how politics related to the issues many assumed American women cared about—“romance, pregnancy, nursing, home furnishings, clothes.”<sup>67</sup> As one social psychologist at the time explained, “[American women] may have the vote, but they don’t dream about running for office.”<sup>68</sup> Similarly, at Smith College’s 1955 graduation, Adlai Stevenson, “the spokesman for democratic liberalism,” reminded the Smith graduates that their

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<sup>60</sup> *Id.* at 455. Recall that Abigail Adams, for instance, also believed that the President’s wife should help those in need. See ANTHONY, VOLUME I, *supra* note 14, at 62.

<sup>61</sup> ANTHONY, VOLUME I, *supra* note 14, at 455.

<sup>62</sup> See *id.* at 456–57. (observing that “Eleanor specifically banned male reporters” from these Green Room press conferences).

<sup>63</sup> See Beasley, *supra* note 56.

<sup>64</sup> See, e.g., Neath, *supra* note 36 (discussing how Michelle Obama “played it cautious” and “[stuck] to the traditional women’s and children’s-interest advocacy role”).

<sup>65</sup> See, e.g., FRIEDAN, *supra* note 25, at 100 (discussing the pervasive image of the “American woman” as a housewife). Mamie Eisenhower presented herself as America’s housewife by explaining that Ike was her “career.” BROWER, *supra* note 13, at 11.

<sup>66</sup> See FRIEDAN, *supra* note 25, at 100 (“But by then the new image of American woman, ‘Occupation: housewife,’ had hardened into a mystique, unquestioned and permitting no questions, shaping the very reality it distorted.”).

<sup>67</sup> *Id.* at 101.

<sup>68</sup> *Id.* But oh how times have changed! In 2016, a woman was the Democratic nominee for President, and many women hold political office at the local, state, and federal levels.

role in politics was in their duties as wife and mother.<sup>69</sup> Stevenson explained that:

*far from the vocation of marriage and motherhood leading [women] away from the great issues of [the] day, it brings [them] back to their very center and places upon [them] an infinitely deeper and more intimate responsibility than that borne by the majority of those who hit the headlines and make the news . . . .*<sup>70</sup>

Mamie Eisenhower certainly spread that message from the East Wing as well, stating that “she had ‘only one career, and his name is Ike.’”<sup>71</sup> For many women during the Eisenhower years, “[p]olitics . . . became Mamie’s clothes and the Nixons’ home life.”<sup>72</sup> At that time, many women’s magazines would not run political pieces unless they were tied to domestic life.<sup>73</sup> For example, one magazine considered a piece entitled, “How to Have a Baby in an Atom Bomb Shelter” because the editors believed women might have an interest in “having a baby in a bomb shelter, but never in the abstract idea of the bomb’s power to destroy the human race.”<sup>74</sup>

## 2. The Modern First Lady

The Office of the First Lady is an old institution under new pressures—particularly as women’s rights have continued to evolve. By the time John F. Kennedy was elected, educated women had been suffering from what Betty Friedan called “the problem that has no name.”<sup>75</sup> Jackie Kennedy was a young, educated woman who carefully straddled the line between familiar American domesticity (emphasizing the importance of family and children) and celebrity. Although the American people were more preoccupied with her looks and whether she learned to Twist,<sup>76</sup> Jackie Kennedy was incredibly intelligent and talented—often helping President Kennedy during

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<sup>69</sup> *Id.* at 112.

<sup>70</sup> *Id.*

<sup>71</sup> BROWER, *supra* note 13, at 11.

<sup>72</sup> FRIEDAN, *supra* note 25, at 100.

<sup>73</sup> *Id.* at 101.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 57.

<sup>76</sup> ANTHONY, VOLUME II, *supra* note 1, at 78.

especially difficult times like the Cuban Missile Crisis.<sup>77</sup> In fact, during the Cuban Missile Crisis, President Kennedy had “an intensely serious conference on nuclear war” with Lord Harlech, British Ambassador to the United States, and the only other person who attended the conference was Jackie Kennedy, who took notes.<sup>78</sup> Additionally, Jackie Kennedy’s efforts to restore the White House encouraged states and locales across the country to take up their own historic preservation efforts.<sup>79</sup>

In the fifty years since, the tension between the changing role of women and attention to physical appearance has never loosened its hold on the First Lady. That focus on her appearance has sometimes impeded her ability to making meaningful contributions or be remembered for those contributions that she did make.<sup>80</sup> For example, Jackie Kennedy’s contributions to the White House preservation efforts are lasting, but she may best be remembered for her looks.<sup>81</sup> From Jackie Kennedy forward, the modern First Lady must take up properly feminine and domestic causes and look properly feminine while doing so. Unlike anyone else in the White House, Congress, or the Judiciary, the American public scrutinizes the First Lady’s appearance: Is she feminine enough? Is she showing too much skin? Hillary Clinton’s pantsuits and the slight amount of cleavage her shirt revealed while speaking in 2007<sup>82</sup> were closely scrutinized just as

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<sup>77</sup> *Id.* at 80–81.

<sup>78</sup> *Id.* at 81. Although taking notes seems gendered on its face, it is important that in such a serious moment, the only person President Kennedy would include in the conversation was his wife. Such is a testament to how much he valued her insights.

<sup>79</sup> *See id.* at 34 (“[Jim Ketchum] said, ‘More and more, we heard about Governors’ Mansions and State Houses which were doing research, and restoring the old structures accurately.’”).

<sup>80</sup> *See, e.g.,* ANTHONY, VOLUME II, *supra* note 1, at 20, 44; *see also* Mia Tramz, *Decoding Jackie O’s Signature Style*, TIME (May 19, 2014), <http://time.com/104581/jackie-onassis-style-icon/> [https://perma.cc/ULB3-HXNG].

<sup>81</sup> *See, e.g.,* ANTHONY, VOLUME II, *supra* note 1, at 44 (“[Jackie’s] image had little to do with her work. Few gave attention to the person who had goals to accomplish.”); *see also id.* at 20 (“[T]he press and public focus on [Jackie’s] ‘style,’ [but] her substance is quite formidable, albeit largely unreported.”). And Jackie is often remembered for what she wore, particularly her pill box hats, and her image as a fashion icon. *See, e.g.,* Tramz, *supra* note 80.

<sup>82</sup> *See, e.g.,* Megan Garber, *Why the Pantsuit?*, THE ATLANTIC (Aug. 2, 2016), <http://www.theatlantic.com/entertainment/archive/2016/08/youre-fashionable-enough-hillary/493877/> [https://perma.cc/KS33-ZRG9].

Michelle Obama's arms were scrutinized and discussed at length.<sup>83</sup> If the First Spouse were a man, then would the American people pay as much attention? Likely, not. To be sure, President Lincoln "mocked his own appearance,"<sup>84</sup> and President Kennedy's fashion and looks are sometimes commented on in ways similar to those of his wife's.<sup>85</sup> Notwithstanding these examples, there is a real preoccupation with how the First Lady looks that can disrupt her ability to effect meaningful change. Performance artist Karen Finley might capture these concerns best in her piece, *The Jackie Look*:

*What all of this is about is, it's about a woman's place, a woman knowing her place. Michelle is very clever in having a space/place to allow for the criticism—a woman can't be too perfect. But her arms are perfect and a distraction from the larger concerns of today. Instead the subtext is: Who does Michelle think she is?*<sup>86</sup>

Looks are not the only pressure the modern First Lady must address. The modern First Lady must also navigate social responsibilities, independent causes, advising, and (sometimes) policymaking—all while never seeming too masculine or too much like a 1950s housewife. In the 1960s, Jackie Kennedy and Lady Bird Johnson handled these roles in different ways. Jackie Kennedy tried to project her image as "above" or "outside" politics,<sup>87</sup> while Lady Bird Johnson exerted her influence in a subtler way, but making no secret at

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<sup>83</sup> See, e.g., Imaeyen Ibanga, *Obama's Choice to Bare Arms Causes Uproar*, ABC NEWS (Mar. 2, 2009), <http://abcnews.go.com/GMA/story?id=6986019> [<https://perma.cc/U769-XWK8>].

<sup>84</sup> Harold Holzer, "I Look Too Stern": *Mary Lincoln and Her Image in the Graphic Arts*, in *THE MARY LINCOLN ENIGMA: HISTORIANS ON AMERICA'S MOST CONTROVERSIAL FIRST LADY* 281, 307 (Frank J. Williams & Michael Burkheimer eds., 2012).

<sup>85</sup> See, e.g., Kate Betts, *The Lessons of J.F.K.: The Cool Factor*, TIME (June 21, 2007), [http://content.time.com/time/specials/2007/article/0,28804,1635958\\_1635999\\_1634962,00.html](http://content.time.com/time/specials/2007/article/0,28804,1635958_1635999_1634962,00.html) [<https://perma.cc/TPP6-KY7Y>].

<sup>86</sup> KAREN FINLEY, *The Jackie Look*, in *THE REALITY SHOWS* 227, 252 (2011).

<sup>87</sup> See, e.g., ANTHONY, VOLUME II, *supra* note 1, at 52–53 ("That [Jackie] was in fact avidly interested in JFK's goals, programs, and speeches remained a well-kept secret. While working with her, Arthur Schlesinger perceived that the First Lady was curious about politics, but that she tactfully refrained from discussing issues.").



least about her plans to advance LBJ's programs.<sup>88</sup> Additionally, she was able to push for a conservation bill, referred to as "Lady Bird's Bill," not by "arm-twist[ing]" or merely lobbying Congressional wives, but lobbying members of Congress directly.<sup>89</sup> Rosalynn Carter took things further by sitting in on Cabinet meetings<sup>90</sup> and visiting Latin American countries as an official U.S. representative rather than merely visiting on a goodwill mission.<sup>91</sup> She inquired about drug trafficking, human rights, and Americans who were held as prisoners as well as one specifically who had been kidnapped.<sup>92</sup>

The pinnacle, however, came with Hillary Clinton, and the infamous slogan, "Two for the Price of One."<sup>93</sup> There was no secret about her political influence and policymaking, though it was somewhat dialed back after the failure of the Health Care Task Force, at least in how she used her influence, even if her ambitions remained the same.<sup>94</sup> Here, there was clear public outcry—her approval rating was just 48 percent in July 1994—in response to her unconventional actions such as her decision to have an office in the West Wing.<sup>95</sup> The failure to get Congress's approval of her healthcare plan and the

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<sup>88</sup> Memorandum on Mrs. Johnson's Duties as First Lady (on file with the Lyndon B. Johnson Library and Museum) (discussing Lady Bird Johnson's duties but without much reference to her limitations).

<sup>89</sup> ANTHONY, VOLUME II, *supra* note 1, at 136.

<sup>90</sup> BROWER, *supra* note 13, at 227.

<sup>91</sup> ANTHONY, Volume II, *supra* note 1 at 273–74. In fact, Rosalynn Carter even recognized that she "could get away with a lot of things another representative of [the U.S.] government could never do." *Id.* at 274.

<sup>92</sup> *Id.*

<sup>93</sup> See Anne E. Kornblut & Alec MacGillis, *Hillary Clinton Embraces Her Husband's Legacy*, WASH. POST (Dec. 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/21/AR2007122102588.html> [<https://perma.cc/RZ4Y-7YJ5>] ("Bill Clinton's controversial statement during the 1992 campaign that voters would get 'two for the price of one' if they elected him."); see also Maureen Dowd, *The 1992 Campaign: Candidate's Wife; Hillary Clinton as Aspiring First Lady: Role Model, or a 'Hall Monitor' Type?*, N.Y. TIMES (May 18, 1992), <http://www.nytimes.com/1992/05/18/us/1992-campaign-candidate-s-wife-hillary-clinton-aspiring-first-lady-role-model.html?pagewanted=all> [<https://perma.cc/VBF9-MMZ4>] (mentioning the slogan).

<sup>94</sup> See *supra* note 19 and accompanying text.

<sup>95</sup> BROWER, *supra* note 13, at 240.

Democrats' loss of the 1994 midterm election only made things worse.<sup>96</sup>

The presidency was not the first time Hillary Clinton's independence had affected her husband's political ambitions and success. For example, some speculated that Hillary Clinton's refusal to take her husband's last name had in part cost Bill Clinton the governorship.<sup>97</sup> It was not until she referred to herself as Hillary Rodham Clinton that he won the governorship again after losing it in 1980.<sup>98</sup> This simple gesture of changing her name suggests just how important the public views gender roles as well as how the First Lady maintains a different type of democratic accountability—the public makes no secret of when it approves or disapproves of her, her fashion, her causes, or her actions.<sup>99</sup> It is important to point out that it was not until the failed task force that the judiciary considered what the First Lady's role ought to be and commentators switched to considering seriously what being First Lady really means in terms other than America's housewife. Why not earlier? Maybe because wives were just there to help their husbands—even a Presidential wife.

During President Clinton's reelection campaign, his opponent's wife brought to the table an independent and successful career of her own,<sup>100</sup> much like Hillary Clinton had. It was speculated that if Bob Dole won, Elizabeth Dole would have continued her work with the Red Cross.<sup>101</sup> Although the Red Cross would still fit within the traditional sphere of domestic interests, it was clear by 1996 that “it was [no longer] possible to hide the new image of marriage between equals coming from the White House . . . .”<sup>102</sup> The First Couple sends a message about marriage, just like the First Lady sends a message about a woman's role. To the extent that conceptions of marriage were changing, the First Couple would display those changes, whether President Clinton won reelection or Bob Dole won the 1996 election because both had independent, intelligent, and successful wives. But

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<sup>96</sup> *See id.*

<sup>97</sup> *See id.* at 159–60.

<sup>98</sup> *See id.*

<sup>99</sup> *See, e.g.,* Ibanga, *supra* note 83.

<sup>100</sup> *See* Sara Krausert, *From Baking Bread to Making Dough: Legal and Societal Restrictions on the Employment of First Ladies*, 5 U. CHI. L. SCH. ROUNDTABLE 243, 264 (1998).

<sup>101</sup> *Id.*

<sup>102</sup> FRIEDAN, *supra* note 25, at 31.

what did not change was how the First Lady would display her independence, intelligence, and success, still confining it in whatever way she could to something familiarly feminine. In fact, even in the 2016 Presidential election, with the first woman as a major party's nominee, Hillary Clinton reminded the nation that she was a champion for children and families.<sup>103</sup>

It is a somewhat circular problem—does the First Lady influence American domesticity or is it the other way around? The inextricable link between how Americans imagine femininity and domesticity and what the First Lady is expected to do (and not do) is undeniable. In fact, even as American women engage in “their own political and economic participation and empowerment,”<sup>104</sup> they do so by “expressing in the public sphere some of the values that used to be expressed or allowed only in the private nurture of the home.”<sup>105</sup> So, it should come as no surprise that the First Lady expresses her political influence in similarly domestic ways, focusing on families, children, and women. Even as recently as 2016, this trend continues. For example, Michelle Obama, who is highly educated and previously had an independent career before becoming the First Lady, channeled her political influence into one of these traditionally domestic spheres by encouraging children to eat their vegetables.<sup>106</sup>

Although women have found a place in politics outside of their duties as wives and mothers, the American people still uniquely insist that their First Ladies take up causes that are properly domestic and

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<sup>103</sup> Of course, focusing on women and children was considered a good political strategy by some because it was “a topic that [had] yet to be as boldly embraced by any prior presidential candidate [and] . . . could resonate with women voters who decided the outcome of the 2012 presidential race . . . .” Estelle Erasmus, *Hillary Should Play Up Her Feminine Side*, NEWSWEEK (Nov. 4, 2015, 10:49 AM), <http://www.newsweek.com/hillary-should-play-her-feminine-side-390584> [<https://perma.cc/Y7SD-89UF>] (excerpted from *LOVE HER, LOVE HER NOT: THE HILLARY PARADOX* (Joanne C. Bamberger ed., 2015)). And these were the same issues that were more palatable causes for her to champion as First Lady. After all, SCHIP was more successful than the full the healthcare reform, and that is probably because of a combination of factors like Hillary Clinton's more reserved role, people like to help children, and people are comfortable with a woman wanting to help children.

<sup>104</sup> FRIEDAN, *supra* note 25, at 26.

<sup>105</sup> *Id.*

<sup>106</sup> *See generally Let's Move!*, LETSMOVE.COM, <https://letsmove.obamawhitehouse.archives.gov/> (last visited Oct. 7, 2017) [<https://perma.cc/2CP5-MHGF>].

feminine. As such, all of the causes that First Ladies have taken up—even in the Modern era— have been properly domestic and feminine, or at least cast that way.

## **B. How the Branches of Government Understand the First Lady's Role**

Before analyzing the different branches' understanding of the First Spouse's role, it is also important to mention that there may be a constitutional argument that the First Spouse is a civil officer.<sup>107</sup> Namely, although the First Spouse may satisfy “the tenure, duration, and continuous duties requirements,” whether she “exercise[s] significant governmental authority” remains debatable.<sup>108</sup>

### 1. Congress

Congress's primary involvement with defining the role of the First Lady is established in 3 U.S.C. § 105(e), enacted in 1978:

*Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities. If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.*<sup>109</sup>

Here, Congress grants the First Spouse funds when she assists the President in carrying out his duties.<sup>110</sup> Additionally, it provides that if the President is unmarried, then he may select another relative to fill this role.<sup>111</sup> Interestingly, it does not specify the gender of the relative or of the President for that matter. Most importantly, this provision contemplates filling the position even if the President is unmarried.<sup>112</sup> The First Spouse is more than a mere relative as far as Congress is

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<sup>107</sup> Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENTARY 479, 481–84, 490–93 (1998).

<sup>108</sup> *Id.* at 491–93.

<sup>109</sup> 3 U.S.C. § 105(e) (2012).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Broyde & Schapiro, *supra* note 107, at 494.

concerned because no other relative is provided for in this way with the exception of the Vice President's spouse.<sup>113</sup> It is important that this statute effectively grants the First Spouse not only funds but also a staff, and it may be worth mentioning that Congress has used nearly identical language to provide for the Second Lady, the Vice President's wife, in the same way.<sup>114</sup>

This statute is also somewhat in tension with the anti-nepotism statute,<sup>115</sup> which prohibits a public official, including the President, from “appoint[ing], employ[ing], promot[ing], advanc[ing], or advocat[ing] for employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official.”<sup>116</sup> Enacted after President Kennedy appointed his brother, Bobby Kennedy, as his Attorney General,<sup>117</sup> the statute could have caused problems if applied to Hillary Clinton and her task force. So, although the President cannot make his spouse a Cabinet member, the First Spouse likely holds as much, if not more, influence as those in the Cabinet. In fact, the D.C. Circuit navigated this tension in *Association of American Physicians & Surgeons v. Clinton* by suggesting that although Cabinet appointments would be off-limits, other roles such as “special assistant” might not be, reasoning that Congress likely did not intend to prevent the President from appointing a relative to a staff role because White House staff positions would not be heads of agencies over which the President has control.<sup>118</sup> Even though the President has control over his White House staff, the staff do not head agencies per se, but this question remains open.<sup>119</sup> If the

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<sup>113</sup> 3 U.S.C. § 106(c) (2012).

<sup>114</sup> *Id.*

<sup>115</sup> 5 U.S.C. § 3110 (2012).

<sup>116</sup> *Id.* § 3110(a)-(b).

<sup>117</sup> See Wasserman, *supra* note 53, at 1239–40; see also Ailsa Chang, *Jared Kushner and the Anti-Nepotism Statute That Might Keep Him from the White House*, NPR (Nov. 18, 2016, 6:46 PM), <http://www.npr.org/2016/11/18/502637785/jared-kushner-and-the-anti-nepotism-statute-that-might-keep-him-from-the-white-h> [<https://perma.cc/NS3E-JGUM>] (describing how the anti-nepotism statute may have been directed at both President Kennedy's nomination of his brother as Attorney General and at Congressmen who were “hir[ing] their wives to work in their offices”).

<sup>118</sup> *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993).

<sup>119</sup> Chang, *supra* note 117.

White House does count as an agency, the anti-nepotism law may indeed prevent staff appointments, too.<sup>120</sup>

At the very least, the First Spouse is a quasi-public official in ways the President's Chief of Staff is not. For example, the Chief of Staff does not take up causes and champion them around the country. That role is more obviously confined to assisting the President. The First Spouse, in contrast, is financially provided for as she assists the President and takes up a somewhat independent identity as another government official, even if Congress only formally recognizes this role as it relates to assisting the President.<sup>121</sup>

## 2. The Judiciary

As the controversy around Hillary Clinton's Health Care Task Force swelled, the judiciary was confronted with determining the scope of the First Lady's role—was she a government official? A government employee? Merely the President's wife? In that case, the D.C. Circuit decided that the First Lady is a *de facto* government official or employee, though it never specified which.<sup>122</sup> Additionally, a few years after the fallout of Hillary Clinton's Task Force, the D.C. District Court added that the First Spouse was a special advisor,<sup>123</sup> and executive privilege similarly was extended to the First Lady during the Monica Lewinsky scandal.<sup>124</sup>

## 3. The Executive

The Executive branch has provided some evidence of how certain administrations treated particular First Ladies in memoranda. For example, in a memorandum to East Wing staffers during President Johnson's term, Lady Bird Johnson's duties were described as ceremonial, first and foremost.<sup>125</sup> Indeed, the first sentence of the memorandum reads that "Mrs. Lyndon B. Johnson, as wife of the President of the United States, is hostess at all social functions at the

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<sup>120</sup> *Id.*

<sup>121</sup> 3 U.S.C. § 105(e) (2012).

<sup>122</sup> *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 904–05.

<sup>123</sup> *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 27–29 (D.D.C. 1998).

<sup>124</sup> Broyde & Schapiro, *supra* note 107, at 482; *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997), *cert. denied*; *Office of the President v. Office of Independent Counsel*, 521 U.S. 1105 (1997) (finding that Hillary Clinton was an official representative of the White House).

<sup>125</sup> Memorandum on Duties as First Lady, *supra* note 88.

White House.”<sup>126</sup> From there, Lady Bird Johnson’s duties include arranging and attending events for “younger people” and one of her “primary duties” is listed as advancing President Johnson’s War on Poverty.<sup>127</sup> Her final duty includes “answer[ing] a large volume of mail daily.”<sup>128</sup> Within that memorandum, there is discussion of advising the President, but the focus is on ceremonial and traditionally feminine duties. There is no mention of any other expectations beyond the traditionally social ones with the exception of advising President Johnson, and there is no mention of anything that would exclude the First Lady from any classified subject or domestic and foreign policymaking. In short, nothing was off limits. In an era where the First Lady was primarily expected to be a social hostess and answer mail, maybe those concerns were not as strong.

In contrast to that memorandum is a letter to Lady Bird Johnson from Jackie Kennedy, wherein Jackie Kennedy describes the finer details of continuing the preservation efforts that she had started.<sup>129</sup> Jackie Kennedy explains in this letter that the most important thing for Lady Bird Johnson to do is “write a letter to the Head of the White House Historical association—praising them for their work [and] exhorting them to maintain their vigilance over the [White House] through the ages.”<sup>130</sup> Additionally, Jackie Kennedy writes that saving the Fine Arts Committee should not be Lady Bird Johnson’s priority because it was really just a group of some of Jackie Kennedy’s friends and would not advance the White House preservation efforts.<sup>131</sup> Jackie Kennedy also points out that “[she] can’t stand ladies committee meetings—they never accomplish anything,”<sup>132</sup> perhaps in an effort to encourage Lady Bird Johnson to focus on working with people who might be more effective in the White House restoration project. Regardless of Jackie Kennedy’s motivations for including this

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Letter from Jackie Kennedy to Lady Bird Johnson (Dec. 1, 1963) (on file with the Lyndon B. Johnson Library and Museum). Jackie Kennedy explained that “[she] will be remembered as the person who start[ed] restoring the White House—but [Lady Bird Johnson] will be remembered as the one who PRESERVED it—and made sure for all time it would be cared for.” *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

particular detail, the letter is an example of concrete advice from one First Lady to another about how to ensure the success of a particular task—the White House’s continued preservation as a historical symbol.

As times have changed, relying on what seems appropriately feminine to govern the First Lady’s role remains largely unhelpful, undermines her ability to perform meaningful service to the country, and flies in the face of what women have worked so hard to accomplish in finding a place for themselves outside of the home.

### III. THE PROBLEM WITH BEING UNDEFINED

This Part addresses the problems associated with a lack of a formal definition and clear guidelines for the First Lady’s role by discussing the risks that are associated with an unelected official in such an influential position. These risks include those associated with access to information as well as domestic and foreign policymaking. Additionally, although the First Spouse is democratically accountable in some ways, the position lacks the accountability measures that often accompany other executive positions.<sup>133</sup> This Part also considers the lost opportunities that arise from leaving the First Lady’s role largely undefined before turning to a third and particularly troubling problem: an undefined role tacitly accepts and thus perpetuates certain gender norms. As long as the First Lady’s duties are regulated by implicit understandings of gender, the nation will continue to have as a significant role model for women and girls someone who stops her career to be a social hostess, engages in traditional household duties, and focuses on issues that are considered properly feminine—women, families, children, and education.

#### A. Some Practical Risks that Accompany an Undefined Government Office

Government officials and employees can often find some limits on the scope of their duties in the U.S. Code,<sup>134</sup> in official memoranda,<sup>135</sup>

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<sup>133</sup> Broyde & Schapiro, *supra* note 107, at 503.

<sup>134</sup> *See generally* 3 U.S.C. § 105(e) (2012) (describing broadly positions that assist and serve the President, including that of the First Spouse); *see also* 18 U.S.C. § 201 (2012) (describing federal bribery laws).

<sup>135</sup> *See, e.g.*, First Draft Memorandum from Chief of Staff Hamilton Jordan on Administration Review Goals & Priorities: Constituents Plan (Dec. 1977), [https://www.jimmycarterlibrary.gov/digital\\_library/cos/142099/33/cos\\_142099\\_](https://www.jimmycarterlibrary.gov/digital_library/cos/142099/33/cos_142099_)



and, of course, in prudential limitations that have developed over time.<sup>136</sup> Moreover, under the Impeachment Clause of the Constitution, many executive officials can be impeached in extreme circumstances if necessary.<sup>137</sup> As such, the Impeachment Clause is the ultimate layer of accountability. Congress, however, has only once impeached a subordinate executive official.<sup>138</sup> The First Spouse, however, lacks many of these formal limits on the scope of her role, though memoranda and prudential limitations do appear from time to time.<sup>139</sup> Notwithstanding these less formal ways of trying to restrict the First Spouse, the role is largely undefined, which is problematic because of the risks that can occur without clearer guidelines. Specifically, there are two primary risks for leaving this role without clear guidelines: (1) access to information and (2) influence over domestic and foreign policymaking.

### 1. Access to Information

Marital confidences are valued in this country.<sup>140</sup> But notwithstanding those marital confidences, what exactly should the First Spouse know? What exactly can she know? The President is trusted with nearly all of the most highly classified information, and perhaps a fair starting point is that the First Spouse should not have access to classified intelligence. But that is a low bar. How about Cabinet meetings?

Rosalynn Carter famously attended Cabinet meetings and had lunches with her husband to keep her apprised of the latest developments.<sup>141</sup> When the American people elected Carter, did they

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Administration\_Review\_Goals\_&\_Priorities\_First\_Draft\_of\_December\_1977\_Memo\_Constituents\_Plan\_Memo\_1978\_Charts.pdf [https://perma.cc/TTB2-PXA4].

<sup>136</sup> For example, even though the anti-nepotism statute is concerned with only certain appointments, Presidents, for example, tend not to employ their other family members in even non-Cabinet positions. Of course, President Trump is set to buck that trend and disregard these prudential limitations. *See* Chang, *supra* note 117.

<sup>137</sup> U.S. CONST. art. II, § 4.

<sup>138</sup> Broyde & Schapiro, *supra* note 107, at 489 (discussing the impeachment of President Grant's Secretary of War, William W. Belknap).

<sup>139</sup> *See, e.g.*, Memorandum on Duties as First Lady, *supra* note 88.

<sup>140</sup> *See* FED. R. EVID. 501 (providing one example of the way in which the confidences between spouses are protected).

<sup>141</sup> BROWER, *supra* note 13, at 227–28.

expect his wife to sit around the table and also learn of pressing issues facing the nation in a way that most people do not? To be sure, maybe it is fine for First Spouses to attend such meetings and learn about what is discussed. After all, it would be hard to ensure that the President did not simply tell her about the conversations later.

What stops a First Spouse from leaking information she gathers simply by virtue of being married to the President? Imagine a First Spouse who starts leaking information to a newspaper or accidentally lets something slip at a luncheon. The damaging consequences are not hard to fathom, and with all of the luncheons and ostensibly social events that the First Lady attends, the possibilities of a casual slip are endless.

Or imagine something less sinister. By virtue of her position, she may wish to be able to speak candidly with certain people, much like the President needs to be able to speak candidly with advisors, and yet nothing protects her conversations. So, she learns something, wants to speak freely about it with a trusted confidant, and then that conversation goes public, revealing information that has far reaching consequences. Currently, executive privilege may only extend to her in limited situations. Given what she knows and the situations in which she may find herself, the First Lady does not share the same protections as the President when it comes to certain conversations. Some have also argued that there may be reasons to extend immunity to her on a more limited basis than the President's current absolute immunity.<sup>142</sup>

## 2. Domestic & Foreign Influence & Policymaking

No one would argue that the First Spouse wields influence within the United States. History has shown time and time again that the First Lady has influenced American citizens to take up certain projects, care about certain causes, or even develop certain fashion styles.<sup>143</sup> And

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<sup>142</sup> T. Natasha Patel, *First Lady, Last Rights? Extending Executive Immunity to the First Lady*, 25 HASTINGS CONST. L.Q. 585, 585 (1998).

<sup>143</sup> See, e.g., Denver Nicks, *From Eleanor to Michelle: The Inside Scoop on First Lady Fashion*, TIME (Oct. 2, 2014), <http://time.com/3433216/obama-fashion-first-lady/> [<https://perma.cc/LSE7-9BUX>]; see also ANTHONY, VOLUME II, *supra* note 1, at 77–78 (discussing Jackie Kennedy's influence on pop culture and on fashion styles for American women). Indeed, “[a] Gallup poll said 7 percent of America’s women got a bouffant hairdo because of Jackie.” *Id.* at 77. And “the Jackie Look” even started replacing the “dumb blonde” with the “brainy brunette” in Hollywood. *Id.* Take Laura Petrie, played by Mary Tyler Moore, on *The Dick Van Dyke Show* for instance with her “Capri pants and flat

history has also shown that the First Lady has influenced domestic policymaking. Lady Bird Johnson's conservation work is a poignant example, as the Highway Beautification Act was even referred to as Lady Bird's bill.<sup>144</sup>

The contrast between Lady Bird Johnson's conservation work and Hillary Clinton's policymaking is a helpful starting point, and it raises the issue of how First Ladies can successfully influence domestic policy as long as they are quieter about it, which hints at a gendered understanding of the role.<sup>145</sup> Lady Bird Johnson supported her husband's War on Poverty by working on the Head Start program, which rather traditionally focuses on children and education.<sup>146</sup> But Lady Bird Johnson did not stop with traditional causes. Lady Bird Johnson was formerly a businesswoman, and she carried that experience with her to Washington and brought "high-powered businesswomen together" for her monthly "Women Do-ers" luncheons.<sup>147</sup> Perhaps Lady Bird Johnson's most successful influence over domestic policy came in her work as an environmentalist. The Highway Beautification Act limited billboards along highways and promoted landscaping efforts along the highways.<sup>148</sup> More impressively, Lady Bird Johnson had a hand in most of the 200 environmental laws enacted during her husband's presidency.<sup>149</sup>

In contrast, though, to Lady Bird Johnson's more discrete or less publicized influence is Hillary Clinton's notable involvement with healthcare policy. It was no secret that President Clinton's wife was going to be involved with policy decisions. His "Two for the Price of One" campaign slogan said it all. It was not long after his inauguration that President Clinton appointed his wife to head the Health Care Task Force. However, the appointment was not received well by the American public, despite the task force making significant contributions to healthcare reform in this country, including expanding access to healthcare for children. Additionally, Hillary Clinton

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shoes and . . . flip-curl bouffant." *Id.* And as far as this author is concerned, *The Dick Van Dyke Show* just would not have been the same if Mary Tyler Moore had played a "dumb blonde."

<sup>144</sup> ANTHONY, VOLUME II, *supra* note 1, at 137.

<sup>145</sup> *See infra* III.C.

<sup>146</sup> BROWER, *supra* note 13, at 150.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

curtailed much of her activity by her husband's second term, including no longer occupying an office in the West Wing. Unlike Lady Bird Johnson, Hillary Clinton was seen as overstepping her bounds, even though both took an active role in influencing domestic policy.

Hillary Clinton was able to play an important role in domestic policy in the end through her work on the State Children's Health Insurance Plan (SCHIP). This time Hillary Clinton worked with senators, including Senator Ted Kennedy, to develop the law and used her position to put pressure on Congress and influence her husband to sign SCHIP into law, all without making it her own exclusive project by shutting out other Washington insiders.<sup>150</sup> She then further supported the law by helping get qualifying children insured after the law was enacted through the "Insure Kids Now" drive.<sup>151</sup> Unlike the Health Care Task Force, Hillary Clinton pressured Congress to do its job from "the other end of Pennsylvania Avenue," as Senator Ted Kennedy put it, without taking on the role of ostensible head of the project as she had previously done with healthcare.<sup>152</sup>

Make no mistake—the First Spouse is not elected. Yet, she remains democratically accountable, and when the People disapprove of her, she can cost her husband (or his party) an election.<sup>153</sup> Nevertheless, there may still be a question regarding her influence on policy as an unelected official in ways that other unelected official positions do not raise. At the core of American democracy is an understanding that the People elect the President—indeed he is the only official (alongside the Vice President, but the Vice President is selected by the Presidential candidate) in whose election the whole country participates. Different constituents elect members of Congress

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<sup>150</sup> See *infra* note 151 and accompanying text.

<sup>151</sup> Brooks Jackson, *Giving Hillary Credit for SCHIP*, FACTCHECK.ORG (Mar. 18, 2008), <http://www.factcheck.org/2008/03/giving-hillary-credit-for-schip/> [<https://perma.cc/QJ2Z-LETZ>].

<sup>152</sup> *Id.*

<sup>153</sup> For example, at least some speculate that Hillary Clinton's refusal to take her husband's last name was partly to blame for his 1980 loss of the governorship. BROWER, *supra* note 13, at 159. Similarly, some speculate that Hillary Clinton's Health Care Task Force and her unconventional decisions such as having an office in the West Wing played a role in the Democrats' loss of the 1994 midterm election. See Erin C.J. Robertson, *When Dems Lost in the 1994 Midterms, Hillary Clinton Took the Blame #TBT*, WASH. POST (Nov. 6, 2014), [https://www.washingtonpost.com/news/reliable-source/wp/2014/11/06/when-dems-lost-in-the-1994-midterms-hillary-clinton-took-the-blame-tbt/?utm\\_term=.dfe3e1b50e93](https://www.washingtonpost.com/news/reliable-source/wp/2014/11/06/when-dems-lost-in-the-1994-midterms-hillary-clinton-took-the-blame-tbt/?utm_term=.dfe3e1b50e93) [<http://perma.cc/4N3V-BHUX>].

to ensure through this balancing that the policies and laws are (at least in theory) reflective of the American people's concerns and desires.<sup>154</sup> It is thus not unreasonable to argue that allowing an unelected official to wield this much influence is undemocratic. This is where the First Lady's accountability to the public becomes crucial. In fact, public outcry usually limits the extent of her power. Hillary Clinton's Health Care Task Force is a prime example. Of course, sometimes the extent of the influence is not wholly known. Lady Bird Johnson's conservationist agenda and her influence over policy were less apparent, but she was still an unelected individual, making important decisions about how best to preserve the American landscape—something that theoretically should be reflective of the whole country, and something President Obama recently said should “reflect the story of all Americans.”<sup>155</sup>

The concerns with the First Lady's influence on foreign policy are similar to those discussed above regarding domestic influence and policymaking. But again, the influence is not always clear. Although public outcry may limit some of what the First Spouse accomplishes in the foreign arena, the extent of the influence is not always readily apparent. Jackie Kennedy and Rosalynn Carter are helpful examples.

Jackie Kennedy's popularity abroad<sup>156</sup> led to significant international influence,<sup>157</sup> but the public admired her all the more for it.<sup>158</sup> She appeared as the President's young and cultured wife, an

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<sup>154</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (“In a representative democracy, value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office.”). But Ely goes on to explain that sometimes this process may systematically work to the disadvantage of minority interests, and it is at this point that judges and judicial review can be beneficial for protecting those interests. *Id.*

<sup>155</sup> *On Equal Pay Day, President Obama to Designate National Monument Honoring Women's Equality*, OFF. OF PRESS SEC'Y (Apr. 11, 2016), <https://www.whitehouse.gov/the-press-office/2016/04/11/fact-sheet-equal-pay-day-president-obama-designate-national-monument> [http://perma.cc/9CKL-9APA].

<sup>156</sup> ANTHONY, VOLUME II, *supra* note 1, at 41 (“By the third month of her husband's term, Jackie Kennedy had become a modern-day Cleopatra conquering nations.”).

<sup>157</sup> *Id.* at 41–43 (“[Jackie's] social role had a political impact.”). In fact, “*The New York Mirror* said Mrs. Kennedy established ‘a new mass response’ to America.” *Id.*

<sup>158</sup> *Id.* at 43–44 (“Just before her return [to the States], the American press rushed to claim [Jackie] as their own, but not just as First Lady.”).

image that became “larger-than-life” and yet that public image often ignored her intellect.<sup>159</sup> Similarly, Rosalynn Carter went abroad on what was more than simply a goodwill trip to Latin American countries and was instead an action that initially was well-received by many Americans.<sup>160</sup>

Additionally, some of Nancy Reagan’s efforts are clear examples of another type of risk with the potential to influence domestic and foreign concerns. Namely, she significantly influenced who was in Reagan’s administration and successfully persuaded her husband to remove certain people, including his Chief of Staff, Don Regan.<sup>161</sup> Nancy Reagan, however, was certainly not the first First Lady to influence the President’s hiring and firing decisions.<sup>162</sup> This influence over who is included in the President’s administration can have far-reaching effects both domestically and abroad. The question becomes how far can and should that influence reach?

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<sup>159</sup> *See id.* at 44 (“Few gave attention to the person who had goals to accomplish, regardless of whether or not she was popular. In fact, the adulation was often insulting to her intelligence.”).

<sup>160</sup> *Id.* at 274 (“The Senate sent a unanimous congratulatory message, and a national poll gave her a 74 percent approval rating as ‘ambassador,’ 72 percent considering the Ladyship a better source of diplomatic information for the president than the State Department.”). When questioned that “she was neither confirmed by the Senate nor elected to office, she shot back, “I am the person closest to the President of the United States and if I can explain his policies and let the people of Latin American know of his great interest and friendship, I intend to do so!” *Id.* But Rosalynn Carter’s decision to attend Cabinet meetings was more controversial. BROWER, *supra* note 13, at 227.

<sup>161</sup> *See* BROWER, *supra* note 13, at 235.

<sup>162</sup> Carl Sferrazza Anthony, *When a First Lady Battles a President’s Chief of Staff*, CARL ANTHONY ONLINE (Jan. 10, 2012), <http://carlanthonyonline.com/2012/01/10/when-a-first-lady-battles-a-presidents-chief-of-staff/> [http://perma.cc/T9XV-JE7F]. For example, Mamie Eisenhower was partly responsible for the removal of President Eisenhower’s Chief of Staff, Sherman Adams. *Id.* Similarly, Nellie Taft was partly responsible for the removal of Fred Carpenter, the equivalent of Chief of Staff to President Taft. *Id.* And of course, the conflict between Michelle Obama and President Obama’s first Chief of Staff, Rahm Emanuel, is no secret. *Id.* As the story goes, “[m]any a President has asked for the resignation of a Chief of Staff. None have divorced their wives.” *Id.*

## **B. The Lost Opportunities that Accompany an Undefined Government Office**

Although there are practical risks to leaving this office undefined, the lack of definition may also prohibit the First Spouse from making the most meaningful contributions to the country that she can. In fact, by leaving the role undefined, there may well be a chilling effect on what First Spouses choose to do lest they engender the anger and disapproval of the American people. For example, would Hillary Clinton have been able to accomplish even more during President Clinton's second term had her Task Force in his first term ended better?

Without clearer guidelines and expectations for the First Spouse the country may miss out on a valuable asset. Businesses across the country have struggled with this same problem when it comes to increasing the number of women in leadership roles. In fact, although much time is often spent on cultivating a certain image for women that balances just enough femininity with just enough masculinity, at least some researchers think that women should “focus on behaving in ways that advance the purposes for which they stand.”<sup>163</sup> The whole point is to encourage women to stop “defining themselves in relation to gender stereotypes.”<sup>164</sup> If this approach makes sense for women who are becoming CEOs, then surely it should make sense for the women who become First Ladies. Of course, there are significant differences between the First Lady and a CEO, but the analogy is helpful by providing a way to reject gender norms in a leadership context. America's First Ladies should also not have to define themselves and their role in gendered terms. Instead, the First Lady should be able to define her role in terms of what she will do while maintaining that office.

Additionally, some research suggests that at least one reason it can be difficult for women to take on leadership roles in business is that companies are simply not “ready to hire women for [top executive] positions.”<sup>165</sup> Similarly, are everyday Americans and those inside the White House simply not ready to view the First Lady as an official top

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<sup>163</sup> Herminia Ibarra, Robin J. Ely, & Deborah M. Kolb, *Women Rising: The Unseen Barriers*, HARV. BUS. REV. (Sept. 2013), <https://hbr.org/2013/09/women-rising-the-unseen-barriers> [<http://perma.cc/M2X6-YZDW>].

<sup>164</sup> *Id.*

<sup>165</sup> PEW RESEARCH CENTER, WOMEN AND LEADERSHIP: PUBLIC SAYS WOMEN ARE EQUALLY QUALIFIED, BUT BARRIERS PERSIST 31, 34–35 (2015).

White House position? After all, she is not hired but rather tasked with the position by virtue of her marriage. At least one journalist has argued that “[m]aking an official White House hosting position a job that ought to be filled by the person best-suited for the work, rather than the person who happens to be married to the president would accomplish a couple of important things”<sup>166</sup> like recognizing the importance of the work the First Lady typically performs and creating “distinct parameters . . . to clarify what the job is *not*.”<sup>167</sup> But rather than making the position necessarily open to someone other than the President’s spouse to solve this problem, formal guidelines would ensure that when the President’s spouse takes on this role that her work will be valued and confined within “distinct parameters” that protect her just as much as they protect the country from any abuse of this position.

In several early presidencies, some First Ladies chose to ignore even their social duties, requiring their husbands to find other women to assist them.<sup>168</sup> Additionally, other First Ladies have chosen to take on decidedly less controversial roles to ensure that they do not damage their husbands’ reputations. For example, Michelle Obama specifically chose to take up an innocuous cause and not get involved in policy decisions the way Hillary Clinton had, even though her campaign to get America’s children moving and eating healthfully became politicized.<sup>169</sup> Leaving the role undefined makes it unclear what the First Spouse is indeed expected to do, what actually is wholly appropriate for her to do, and what her causes can and should be. In the absence of clear boundaries, almost anything could have the appearance of being improper, even if the action were reasonable and appropriate.

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<sup>166</sup> Rosenberg, *supra* note 26.

<sup>167</sup> *Id.*

<sup>168</sup> See ANTHONY, VOLUME II, *supra* note 1, at 19. Presidents Taylor, Fillmore, Pierce, and Andrew Johnson all had someone else assist their wives as hostess. *Id.* For Presidents Taylor, Fillmore, and Andrew Johnson, their daughters helped in this role, and for President Pierce, it was his wife’s Aunt who assisted. *Id.*

<sup>169</sup> See BROWER, *supra* note 13, at 172 (explaining that although Michelle Obama’s Let’s Move Campaign is largely uncontroversial, it is not without its “critics who argue that she is acting like the food police and rigidly dictating what children should be eating”); see also Alec Torres, *Let’s Move? Fat Chance*, NAT’L REV. (Feb. 3, 2014), <http://www.nationalreview.com/article/370246/lets-move-fat-chance-alec-torres> [<http://perma.cc/A926-4H64>].



### C. A Tacit Acceptance of Gender Norms

Perhaps the most troubling aspect of leaving this role undefined is that its very lack of definition allows gender norms to continue to govern it. Just as gender roles governed what many American women chose to do with their lives,<sup>170</sup> it is not surprising that these same gender roles would govern how First Ladies have handled their role in the White House. Yet it remains troubling that many of those same gendered expectations of women continue to govern what the First Lady does in the White House in 2018. By never setting out any other expectations and guidelines, the White House and the American people have simply come to rely on gender norms to assess the First Lady's performance, and the First Lady has also come to rely on those norms for determining some of her actions. The American people often judge a First Lady's actions based on what they think a woman in that position should be doing, which can make it hard for First Ladies to garner public support if they do not seem feminine enough.<sup>171</sup> In the simplest of terms, domestic causes and activities are attractive to the public and even Washington insiders—domesticity, after all, is rather feminine.

Hillary Clinton has been accused of being too masculine<sup>172</sup> or at least not feminine enough because of her career ambitions, to which she once quipped “I suppose I could have stayed home and baked cookies and had teas, but what I decided to do was to fulfill my profession.”<sup>173</sup> After making this comment, Hillary Clinton “spent

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<sup>170</sup> See, e.g., FRIEDAN, *supra* note 25, at 85–95 (discussing the shift in how women's magazines portrayed career women in the late 1930s and early 1940s before switching around 1949 and emphasizing that happiness came from being a housewife). Friedan's point is to say that American women were led to believe that femininity was linked with fulfillment. See *id.* at 92 (“Fulfillment as a woman had only one definition for American women after 1949—the housewife-mother.”).

<sup>171</sup> Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENVER UNIV. L. REV. 709, 717 (2009) (“[P]eople do not like women who are too masculine.”).

<sup>172</sup> See SHAWN J. PARRY-GILES, *HILLARY CLINTON IN THE NEWS: GENDER AND AUTHENTICITY IN AMERICAN POLITICS* 139 (2014) (“Her comportment as first lady was routinely raised as a means by which to accent her ongoing violation of authentic woman ideals.”).

<sup>173</sup> Amy Chozick, *Hillary Clinton and the Return of the (Unbaked) Cookies*, N.Y. TIMES (Nov. 5, 2016), <http://www.nytimes.com/2016/11/06/us/politics/hillary-clinton-cookies.html> [http://perma.cc/B2UX-LWQR].

weeks apologizing.”<sup>174</sup> There is an implicit expectation that First Ladies stop their own careers and take up properly feminine causes. In doing so, this problem also affects the types of contributions to the country that First Spouses may ultimately make, and in some cases, it may prevent them from making their most meaningful contributions.<sup>175</sup> For example, contrasting Laura Bush’s use of the weekly presidential radio address and Hillary Clinton’s decision to have a West Wing office is useful. Laura Bush was “the first First Lady to deliver the weekly presidential radio address—she used it to draw attention to human rights abuses against Afghan women,” and shortly thereafter, Hillary Clinton’s deputy chief of staff commented that “Hillary *never* could have done that . . . all hell would have broken loose for Hillary. But people didn’t expect it out of Laura Bush.”<sup>176</sup> But why should this type of contribution be limited to First Ladies from whom it is least expected? Formal guidelines might have allowed Hillary Clinton similar use of something like the presidential radio address, which might have been particularly helpful with her healthcare reform efforts during her husband’s first term. Making the case for Afghan women’s “rights and dignity”<sup>177</sup> from the “bully pulpit of the presidency”<sup>178</sup> gave Laura Bush’s post-9/11 cause an additionally persuasive effect. Perhaps the case for healthcare reform could have also had a more persuasive effect from this same pulpit in 1992 had Hillary Clinton not been restricted by conventional femininity, with which she was already struggling.<sup>179</sup>

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<sup>174</sup> *Id.* In fact, “Mrs. Clinton would spend years trying to soften her image, to contort herself into the more traditional first lady persona of devoted wife and mother.” *Id.*; see also BROWER, *supra* note 13, at 240.

<sup>175</sup> See ANTHONY, VOLUME II, *supra* note 1.

<sup>176</sup> BROWER, *supra* note 13, at 278.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Hillary Clinton is no stranger to this phenomenon. In fact, she has been “most popular when conforming to traditional gender roles (working on women’s issues as first lady, sticking by her husband during the Monica Lewinsky scandal, loyally serving Barack Obama as secretary of state) and least popular when violating them (heading the health-care task force, serving in the Senate, running for president).” Peter Beinart, *Fear of a Female President*, THE ATLANTIC (Oct. 2016), <http://www.theatlantic.com/magazine/archive/2016/10/fear-of-a-female-president/497564/> [http://perma.cc/BSS8-RBUP].

Meaningful contributions should not be limited to how well the First Lady performs femininity.<sup>180</sup> In fact, it may have also helped that President Bush suggested that his wife use the President's weekly radio address to discuss her new cause because doing so made it seem less like Laura Bush was overstepping her bounds but rather that this was something her husband had approved of—that she was merely deferring to her husband's judgment about how best to raise awareness for Afghan women's rights. Contrast this use of one of the President's platforms with Hillary Clinton's decision to have an office in the West Wing.<sup>181</sup> That decision looked much less like deference to her husband but rather something Hillary Clinton independently chose to do. Similarly, this example reveals that Melania Trump may be able to make unexpected contributions and chip away at these norms if she takes the "presidential podium"<sup>182</sup> and uses it in a non-traditional way. But the type of contribution should not be limited in this way—to how well it is camouflaged in wifely deference and femininity.

Americans often look at the First Lady and consider—at least subconsciously—if her cause is properly feminine and if she is properly supporting her husband. But what happens when the First Spouse is a man? 3 U.S.C. § 105(e) confers no such restriction.

Rejecting this reliance on gender norms is tricky work. But doing so will have lasting effects for the First Spouse, for American women, and for American marriages. An easy and foreseeable starting point might be a First Lady who continues in her own career rather than dropping her own aspirations to be the nation's social hostess. Or, maybe the First Lady takes up an openly advisory role in an area where women have not typically served, which could raise anti-nepotism questions. More often than not, instead of grappling with the tension between 3 U.S.C. § 105(e) and the anti-nepotism statute, domesticity and femininity have been allowed to govern the role. But allowing such stereotypes to control is not a satisfying answer to this tension.

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<sup>180</sup> BROWER, *supra* note 13, at 278.

<sup>181</sup> *Id.* at 279.

<sup>182</sup> *Id.*

#### IV. A FLOOR & A CEILING (BUT NOT A GLASS ONE!): ADDRESSING THE LEGAL & GENDERED CONCERNS

This Part develops some possible guidelines that either or both Congress and the White House could adopt to recognize the First Spouse's role formally. Doing so would set clear boundaries for the First Spouse that would avoid both inappropriate access or influence and any appearance of impropriety, thus enabling the First Spouse to make meaningful contributions to the country. As such, the First Spouse would be less constrained by public opinion in choosing her causes. Finally, formal guidelines would fit within the existing constraints on the President and hierarchy of the Executive Branch<sup>183</sup> without relying on spousal subordination and thus would reject the gender norms that have been governing the role for decades.

##### A. Congressional Authority

Congress's involvement would simply be to set out an explanation and basic guidelines for the First Spouse much as it has already done with executive officials. In fact, Congress would effectively just revisit and build on what it has already set out in 3 U.S.C. § 105(e) for the First Spouse. Just as Congress has already put some restrictions on whom the President can appoint to certain positions without abridging the executive's power through the anti-nepotism law,<sup>184</sup> Congress, too, could further develop 3 U.S.C. § 105(e), which already provides for the First Spouse when assisting the President.<sup>185</sup> For example, after President Kennedy named his brother, Bobby Kennedy, as Attorney General, Congress passed the anti-nepotism statute, which prevents a President from naming a relative to Cabinet positions and other official appointments.<sup>186</sup> Included in the definition of relative is spouse.<sup>187</sup>

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<sup>183</sup> See Terry M. Moe, *The New Economics of Organization*, 28 AM. J. OF POL. SCI. 739, 768 (1984) ("Most aspects of hiring, firing, and promotion are structured by formal career systems such as Civil Service and are manipulated only with difficulty. The president is in the best position in these regards, since he has authority to hire (with senatorial confirmation) and fire a few thousand political appointees . . ."). The President already has wide discretion to manage his staff, and it would be easy enough to incorporate guidelines for the First Spouse that define her role and maintain the President's existing discretion without relying on spousal dynamics.

<sup>184</sup> 5 U.S.C. § 3110 (2012).

<sup>185</sup> 3 U.S.C. § 105(e) (2012).

<sup>186</sup> 5 U.S.C. § 3110.

<sup>187</sup> See *id.* § 3110(a)(3) (naming "husband" and "wife").

Additionally, Congress has already referenced the First Spouse in 3 U.S.C. § 105(e) and provided that should a President be unmarried, he (or she!) may name another relative to fulfill those duties.<sup>188</sup> Of course, Congress has never specified just what those duties might be. As such, it would make sense for Congress to elaborate slightly in 3 U.S.C. § 105(e) on what is expected out of the person serving in that role. Congress's delineation could be non-exclusive for that matter, granting the First Spouse official support as she carries out these duties. For instance, such an addition to 3 U.S.C. § 105(e) could provide that Congress shall financially support the First Spouse in carrying out a cause or causes developed in consultation with the President. As such, if the First Spouse pilots a program to bring fresh fruit and vegetables to food deserts, then Congress will support her in that endeavor, even though that endeavor is not just about assisting the President.

### **B. White House Protocol**

The White House does, from time to time, set out expectations for the role of First Spouse in memoranda.<sup>189</sup> It would thus not be unreasonable to expect the White House to change the content of its memoranda assuming each administration issues such documents or to provide something slightly more formal like it does for other staff members in setting out rules of the road. For example, during President Carter's administration a memorandum from the Office of the Chief of Staff to other staff members was issued describing who should meet and when and the different tasks they would perform to "improv[e] coordination [and] communication" within the administration.<sup>190</sup> Certain members would prepare an agenda while others would draft status reports.<sup>191</sup> The Chief of Staff would specifically work on "improving communication."<sup>192</sup> But contrast this memorandum with the one describing Lady Bird Johnson's duties, which were first and foremost described as social and concluded with

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<sup>188</sup> 3 U.S.C. § 105(e).

<sup>189</sup> See Memorandum on Duties as First Lady, *supra* note 88.

<sup>190</sup> Memorandum on Administration Review Goals & Priorities: Constituents Plan, *supra* note 135.

<sup>191</sup> *Id.* For example, President Carter's Executive Assistant to the Chief of Staff, Rick Hutcheson, would draft a weekly status report for President Carter's Chief of Staff, Hamilton Jordan, to share with the President "on on-going efforts and problems." *Id.*

<sup>192</sup> *Id.*

opening mail. That memorandum was littered with gendered expectations that did not clarify what the bounds of her duties really were except insofar as her duties conformed to what was expected of a woman in 1960s America.

While other roles within the White House can suffer from a lack of an “appropriate and meaningful” definition,<sup>193</sup> (including that of the Vice President), they may benefit from memoranda; so too may First Ladies benefit from detailed memoranda outlining the parameters of their role. For example, Walter Mondale detailed his role as Vice President in Carter’s administration in seventy-four pages,<sup>194</sup> compared to the two pages from Lady Bird Johnson’s staff about her role.<sup>195</sup> Within those seventy-four pages, Mondale detailed what his relationship with President Carter and White House staff would be. Something similar would be useful for the First Lady herself to publish to ensure that the White House itself does not fall into the trap of issuing memoranda that only further entrenches gendered expectations.

### C. The Guidelines

Defining the First Spouse’s role involves a unique issue that none of the President’s other advisors face. Namely, although the President’s advisors are his subordinates, the First Spouse, who has always been a woman, has the shadow of female subservience to her husband in the background.<sup>196</sup> Possible guidelines could come from a combination of efforts from Congress and the White House. These guidelines would allow for the typical subordination of a President’s

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<sup>193</sup> Memorandum from Walter Mondale to Jimmy Carter on the Role of the Vice President in the Carter Admin. (Dec. 9, 1976) (“Defining an appropriate and meaningful role for the Vice-President has been a problem throughout the history of this country.”), [https://www.jimmycarterlibrary.gov/digital\\_library/sso/148878/3/SSO\\_148878\\_003\\_01.pdf](https://www.jimmycarterlibrary.gov/digital_library/sso/148878/3/SSO_148878_003_01.pdf) [<https://perma.cc/7YUJ-TYUN>].

<sup>194</sup> *Id.*

<sup>195</sup> Memorandum on Duties as First Lady, *supra* note 88.

<sup>196</sup> For example, American popular culture has promoted the role of female subservience with television shows like *Father Knows Best* that emphasized the husband’s wisdom, even if done in good humor. Old advertisements for household good likes Maxwell House coffee also supported this idea (“Mother, is Maxwell House the only coffee in the world? Well, your father says so, and your father knows best.”). Religion has also played a role in supporting this view. See Mary Rourke, *A Woman’s Place: What the Denominations Think*, L.A. TIMES, June 16, 1998, <http://articles.latimes.com/1998/jun/16/news/l6-60250> [<https://perma.cc/APJ9-AN6Y>].

advisor, but remove some of the gendered subservience that accompanies how marriages are perceived.<sup>197</sup> To be clear, the President would still maintain his general discretion, but some basic floors and ceilings would ensure greater consistency between administrations about expectations for the First Spouse, even if the President still had his discretion within those floors and ceilings to make adjustments. Without clearer and more formal guidelines, there remains an affirmation of gendered subordination. These guidelines are important whether the First Spouse is a man or a woman because when the First Spouse takes on the role of advisor and assistant, the country may reap more benefits when that advising and assisting are not considered through a gendered lens.<sup>198</sup>

### 1. The Floor and an Opt-Out

To help formalize the definition of the First Spouse's role and minimize reliance on gender norms for what she is expected to do, a floor that sets out a minimum form-based rather than content-based expectation would be beneficial. There are two parts to this formality: (1) formalizing the process of selecting a cause and (2) formalizing the independence of the First Spouse. A guideline that accounts for both of these concerns would be one that encourages a definition of the First Spouse's role in terms of purpose, as has been encouraged for women who are CEOs. This floor might incorporate this purpose by simply building on what Congress has already outlined in 3 U.S.C. § 105(e), and suggest the First Spouse advise the President (rather than assist, which sounds too much like a gendered expectation of a helpmate) and serve the country by taking up some independent cause. In the event that a First Spouse did not want to take up a cause, this floor would also include an opt-out provision that would allow her to continue working (with some caveats like compliance with the criminal conflict-of-interest statute which others have already addressed)<sup>199</sup> or maintain a quieter life. The importance, however, of including the First Spouse's ability to take up one or more causes—without reference to

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<sup>197</sup> FRIEDAN, *supra* note 25, at 179.

<sup>198</sup> Would people be upset if a First Gentleman simply worked in the garden? Would people say that wasn't manly enough? Would it be cause to speculate over his health, suggesting a weakness? Or do we expect him to do even more because he is the man and the woman needs the assistance, even when the titles are reversed?

<sup>199</sup> Krausert, *supra* note 100, at 252–53; *see also* Wasserman, *supra* note 53, at 1254–56.

the content of such a cause—would ease the public’s concerns that the First Spouse is still reined in in some capacity but is indeed empowered to take up independent and significant issues should she choose to do so. As an added accountability measure, this guideline should also include consultation with the President on the topic of the cause, but the consultation would simply be just that—consultation—and not decision-making by the President.

To help understand this floor, a hypothetical is instructive. Imagine a President who is married to a successful investment banker. Under this proposed guideline, this First Spouse would be expected to be involved with the ceremonial duties that accompany being First Spouse or direct that the East Wing staff handle social events. Additionally, this floor should anticipate that the First Spouse would advise the President—at least to the extent that spouses advise one another—and take up some type of cause, presumably related to her expertise and talents. Here, one can imagine that the cause might be financial literacy for low-income families in a traditional and still domestic sense, but the First Spouse—if she is a woman—would also have the freedom to pick a more “masculine” cause related to Wall Street regulation. Even if this cause were developed in consultation with the President, it would still be the First Spouse’s cause and mostly of her own choosing. Likewise, a male investment banker would have the freedom to choose a more “feminine” cause. In short, the investment banker will not be restricted by the limits of gender stereotypes. Additionally, should the investment banker want to continue working, then she can take the opt-out, and, provided that she complies with the various conflict-of-interest statutes, she should be free to continue working.<sup>200</sup>

Sooner or later, a First Spouse will want to keep working. After all, there was speculation in the 1990s that if Bob Dole had won the presidency, Elizabeth Dole would have continued working for the American Red Cross.<sup>201</sup> Additionally, Jill Biden continued working as an adjunct English professor at the Northern Virginia Community College while serving as America’s Second Lady.<sup>202</sup> She is the first Second Lady to continue working while her husband was Vice

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<sup>200</sup> See Wasserman, *supra* note 53, at 1250–54. See generally Krausert, *supra* note 100.

<sup>201</sup> See *supra* notes 100-101 and accompanying text.

<sup>202</sup> *Dr. Jill Biden Announces Plans to Continue Teaching*, OFF. OF PRESS SEC’Y (Jan. 27, 2009), <https://obamawhitehouse.archives.gov/the-press-office/dr-jill-biden-announces-plans-continue-teaching> [<https://perma.cc/CT3B-THTY>].



President.<sup>203</sup> A guideline that balances expectations of service and accommodates a First Spouse's desire not to assume any or all of those duties and further allows for the First Spouse to keep working should she choose to do so would help the First Spouse avoid the appearance of overstepping her bounds. Equally important, this floor allows the First Spouse to determine the best way in which she may serve the country without feeling constrained by the risk of damaging the President's reputation just because it looks like she is doing more than would ordinarily be expected. The public will understand that the First Spouse is in fact allowed to support certain causes and advise the President or continue working as the case may be.

But this opt-out might also work similarly to the screening-off process in corporations or law firms when one partner has a conflict with a case.<sup>204</sup> If the First Spouse wholly opts out, then she does not get access like she otherwise might have. Of course, some First Spouses might want a compromise—a partial opt-out. This can easily be handled with something like a Memorandum of Understanding explaining what she is still allowed to know and do, and what limitations will follow from her decision to minimize her role. In fact, this option seems particularly relevant for the Trump administration with the possibility that Ivanka Trump may effectively take over some of the responsibilities of First Lady.<sup>205</sup> As such, it might be just as important to have some ground rules for what is left for and expected of Melania Trump if her step-daughter manages many of the role's traditional (and maybe some not so traditional)<sup>206</sup> responsibilities. When the position is shared, then a clear understanding of the scope of each woman's responsibilities would be essential.

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<sup>203</sup> Robin Abcarian, *Hi, I'm Jill. Jill Biden. But Please, Call Me Dr. Biden*, L.A. TIMES (Feb. 2, 2009), <http://articles.latimes.com/2009/feb/02/nation/na-dr-jill-biden2> [<https://perma.cc/6N9N-7R6Y>].

<sup>204</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.10 (2016).

<sup>205</sup> See Alyssa Rosenberg, *The Case for Ivanka Trump as First Lady*, WASH. POST (Dec. 13, 2016), [https://www.washingtonpost.com/news/act-four/wp/2016/12/13/the-case-for-ivanka-trump-as-first-lady/?hpid=hp\\_no-name\\_opinion-card-f%3Ahomepage%2Fstory&utm\\_term=.186c884b991e](https://www.washingtonpost.com/news/act-four/wp/2016/12/13/the-case-for-ivanka-trump-as-first-lady/?hpid=hp_no-name_opinion-card-f%3Ahomepage%2Fstory&utm_term=.186c884b991e) [<https://perma.cc/4CKP-8QHB>] (discussing that "Ivanka Trump might end up serving as [Trump's] de facto first lady").

<sup>206</sup> See *id.*; see also Kate Anderson Brower, *Ivanka Trump Could Be the Most Powerful First Lady Ever*, WASH. POST (Dec. 16, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/12/16/ivanka-trump-could-be-the-most-powerful-first-lady-ever/?utm\\_term=.2d4befee37a4](https://www.washingtonpost.com/posteverything/wp/2016/12/16/ivanka-trump-could-be-the-most-powerful-first-lady-ever/?utm_term=.2d4befee37a4) [<https://perma.cc/68B5-J9TR>].

## 2. Ceilings (Not Glass Ones)

There should also be some guidelines to keep the First Spouse from gaining access to classified information or exerting undue influence on policymaking or the President's administration. These guidelines must also include some accountability measures to check the power of the First Spouse.

### a. Access to Information

Access to information is tricky because there is no real way to enforce what the President does and does not tell the First Spouse, and marital confidences have long been held as privileged.<sup>207</sup> Notwithstanding the sanctity of marital confidences, some guidelines may be valuable to reduce the risk of improper access or at least the appearance of such. For example, it may be wise to include a guideline that allows the First Spouse to have weekly briefings by the President (or staff) on current issues, as Rosalynn and Jimmy Carter did during their weekly lunches,<sup>208</sup> but it may be wise to limit the First Spouse's presence at Cabinet meetings. Although there may be exceptions depending upon the presence of an issue on which the President wants the First Spouse's advice, a general guideline might foreclose the possibility of a First Spouse's regular attendance at Cabinet meetings—something Rosalynn Carter regularly did.<sup>209</sup> Despite the President's wide discretion to share information, external limits would at the very least ensure some consistency among Presidents so that the First Spouse's access is not wholly different from one administration to the next, but is instead an established ground rule for all First Spouses.

As to the risks associated with access to information, additional accountability measures may be the most persuasive and successful here. The investment banker as First Spouse is again a helpful hypothetical. With added accountability measures in place, should the investment banker learn of classified or sensitive information that might ultimately disadvantage her former colleagues on Wall Street if known in advance of public dissemination, she would have an extra incentive not to help them avoid some of the regulations from the President's plan because if she did disclose such information to them, then she might be subject to added oversight, limited involvement in

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<sup>207</sup> See, e.g., FED. R. EVID. 501.

<sup>208</sup> BROWER, *supra* note 13, at 227–28.

<sup>209</sup> *Id.* at 227.

related issues, or even removal. Certainly, her discharge and removal seem possible whereby she would no longer host state dinners or involve herself with causes as First Lady.<sup>210</sup> At the most extreme, some scholars have suggested that she could be impeached, though the political and social backlash following such a decision would likely make it never worth pursuing.<sup>211</sup> Other more routine accountability measures are perhaps the most attractive. These would include, for example, limiting her ability to involve herself with issues related to Wall Street or added oversight of her activities.

#### b. Inappropriate Influence

To avoid inappropriate influence either domestically or abroad or the appearance of such, other guidelines and accountability measures would prove beneficial. To start, a First Spouse should be allowed to advise but not directly manage a task force as Hillary Clinton tried to do in the early 1990s.<sup>212</sup> Given the political and public backlash to Hillary Clinton's efforts, it may assuage the fears of the public to know that the First Spouse, while providing advice, is not independently in charge of coordinating and developing policy. Keeping the First Spouse in a strictly advisory capacity when it comes to policy serves an important objective. Specifically, this restriction would remove the concerns that an unelected and unconfirmed individual, who is consequently harder to remove, is developing policy. In fact, history supports this guideline and suggests that it would actually enable First Spouses to be more successful in their projects. For example, Jackie Kennedy's White House restoration efforts and Rosalynn Carter's mental health work as the honorary chairperson of the Mental Health Commission are notable examples of success,<sup>213</sup> whereas Hillary Clinton's Health Care Task Force is a notable example of an unsuccessful project.<sup>214</sup> This does not mean that

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<sup>210</sup> See Broyde & Schapiro, *supra* note 107, at 479 (discussing that "resignation and discharge" likely are possible ways of removing the First Spouse).

<sup>211</sup> See *id.* at 505 ("The political fallout [of impeaching and convicting the First Spouse] would likely be great . . ."); see also *id.* at 509 ("Because the practical consequences would be slight and the perils of partisan politicking great, impeaching the First Spouse in any circumstance might be a very bad idea.").

<sup>212</sup> See BROWER, *supra* note 13, at 239–40. In fact, it appears as though Hillary Clinton originally wanted to be President Clinton's domestic policy chief. *Id.* at 239.

<sup>213</sup> See *id.* at 196, 230.

<sup>214</sup> See *id.* at 240.

the First Spouse cannot engage in shaping domestic and foreign policy, but it ensures that another official, who can more easily be fired or removed, is also part of the project as its head. The inclusion of another official would serve as an additional layer of accountability.

Consider Ivanka Trump. She advises her father, lives full-time in Washington, and was the closest approximation of a First Lady while her stepmother remained in New York.<sup>215</sup> The story only gets better, though. Ivanka Trump also has business interests that would typically run afoul of the federal conflict-of-interest laws if she were officially First Lady or in some other official role.<sup>216</sup> Instead, Ivanka Trump occupies a new space in many ways because she is neither just the President's daughter nor his acting First Lady. This puts Ivanka Trump in a unique position to exercise significant (and inappropriate) influence that would be even more unchecked than a traditional First Lady's influence. The ceilings could be particularly useful with the shifting role of the First Lady's duties between Ivanka Trump and Melania Trump during the Trump presidency. Namely, the ceilings could clearly demarcate the limits of each woman's influence.

As to the First Spouse's influence over foreign relations, it may be important to limit her visits to goodwill visits rather than sending her as an official representative as Carter did with his wife.<sup>217</sup> She is unelected and unconfirmed and would be very hard to remove.

A final hypothetical is useful. Imagine a President who is married to a General in the United States Army. Any risk of inappropriate access or undue influence is cabined by not being able to chair a military task force or be the one to make the final military decisions. Additionally, the General cannot go abroad and represent the United States single-handedly. The ceiling also, however, would minimize the public's concerns when the General does engage in advising the President on military issues. With safeguards in place, at the very least, the appearance of inappropriate influence is avoided.

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<sup>215</sup> See, e.g., Jeremy Diamond, *Ivanka Trump Stepping into Powerful Role as First Daughter*, CNN (Jan. 27, 2017), <http://www.cnn.com/2017/01/16/politics/ivanka-trump-first-daughter/> [<https://perma.cc/6LMA-H27R>].

<sup>216</sup> See, e.g., Kate Taylor, *Ivanka Trump Has Been Hit with One of the Biggest Criticisms Plaguing Her Father*, BUS. INSIDER (Nov. 28, 2016, 2:15 PM), <http://www.businessinsider.com/ivanka-trumps-conflicts-of-interest-2016-11> [<https://perma.cc/84VJ-NGD9>].

<sup>217</sup> ANTHONY, VOLUME II, *supra* note 1, at 273–74.

#### D. Rejecting Gender Norms

If the guidelines are specific enough yet still leave room for the First Spouse to use her talents and expertise, then gender norms will no longer be necessary to imagine what she should or should not do, as the case may be. Additionally, such definitions and rules of the road set out some broad expectations that go beyond mere ceremonial duties. As such, she can be respected as an equal advisor rather than stifled by America's obsession with how she looks and if she is doing properly feminine things. It will be clear that she is indeed supposed to do *something* and that something does not have to be within the domestic sphere.

Additionally, although Hillary Clinton lost the 2016 election, a woman will eventually be President, and assuming she is married to a man, there will be a unique opportunity to upend these norms. By having a man as the First Spouse, the public's expectations of the role will likely also shift. Of course, there is an undeniable irony that it might require a man in the role to shift the gendered expectations of the role, and so this Article urges each new First Lady to take up the charge to upend these norms as much as she can without waiting on a man to occupy that office. If the people relied on traditional gender norms for men, then doing so would likely open the first First Gentleman, whomever he may be, up to more power than has been traditionally allocated to a First Lady. That reason in and of itself might be another clue that reliance on gender to govern the role is particularly dangerous when it is not always the "gentler" gender in that role.<sup>218</sup>

Returning to the hypothetical investment banker and General as First Spouse is helpful for understanding how these guidelines would indeed reject the gender norms that have been governing the role for so long. The investment banker as First Spouse could also freely engage in causes of her choice and actively and openly help the President when it comes to developing policy to regulate Wall Street. With clarity from Congress or even the White House, the General would no longer feel restrained in her choice of causes or her ability to openly advise the President on military concerns. Most importantly, the General—whether a man or a woman—would not be left to fit his or

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<sup>218</sup> See FRIEDAN, *supra* note 25, at 145 ("To give women equal rights would destroy that 'milder gentler nature,' which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life" (quoting a New Jersey Senator in 1866)).

her role into gender norms. Those norms would no longer dictate what the General can do. Military expertise may seem more masculine, but the General, if a woman, would not be expected to reframe that expertise as a cause of helping military families. Similarly, the General, if a man, would be free to take up the cause as one of helping military families, if he so chose. After all, this person obviously would have extensive knowledge of military operations and could be a huge asset when it came to the military and related policymaking. Assuming this General were a woman, then history and gender norms related to being First Lady would suggest that she would make her cause about something innocuous and feminine like military families. These guidelines would give the General freedom to frame her cause however she chose.

What of Melania Trump, who was a model and, in many ways, does not seem to be interested in stepping far outside of the existing (and even outdated) gender norms? Although some would argue that Melania Trump exists as a sex object, this Article argues that Melania Trump is in even more of a powerful position to upset the stereotypes of what the First Lady and, more broadly, what women should do. With many Americans feeling the true force of sexism with Hillary Clinton's defeat in the 2016 presidential election, now is the perfect opportunity for the First Lady to upend these gender norms. A powerful message is sent when someone many Americans least expect to reject gender norms does so, and Melania Trump can do this by taking a more active role as First Lady than many expect her to take. She has mentioned an interest in taking up cyberbullying as her cause,<sup>219</sup> and if Melania Trump champions her cause in ways Americans are not expecting, then it sends at least a subtle message that the choice between activism and femininity is a false one. Getting to the point where the First Lady can meaningfully help upend existing gender norms for American women begins with the more formal legal guidelines that create a basic purpose for the role beyond social hostess and set ceilings (or maybe walls) to prevent any inappropriate access and influence on domestic and foreign policymaking. There is work to be done, but Melania Trump could start that movement by taking a more active stance on an issue of her choosing.

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<sup>219</sup> Tessa Berenson, *Melania Trump Says She'll Fight Cyber-Bullying as First Lady*, TIME (Nov. 3, 2016), <http://time.com/4556902/melania-trump-donald-first-lady-social-media/> [https://perma.cc/P36P-V4TT].

## V. CONCLUSION

In the last chapter of *The Feminine Mystique*, Betty Friedan tried to “giv[e] a solution to ‘the problem that has no name,’ suggesting new patterns . . . whereby women could use their abilities fully in society . . . without at the same time renouncing home, children, love, their own sexuality.”<sup>220</sup> Similarly, the First Spouse should be able to use her abilities fully in contributing to the country without having to limit her contributions to how well they align with traditional femininity. Friedan also realized, though, that sometimes “[we] . . . have to say ‘no’ to the old way before [we] can begin to find the new ‘yes’ [we] need.”<sup>221</sup> But identifying the problem is not always enough,<sup>222</sup> and even Friedan realized that.<sup>223</sup> That is where this Article has picked up—identifying the problem of leaving the First Spouse’s role undefined and then beginning to address how to solve it.

There is no doubt that the risks of leaving the First Lady’s role undefined are real—on practical, political, and sociological levels. The formal guidelines that this Article proposes are just a starting point to rejecting or, at least, counteracting the gender norms that have been governing the role for far too long. It is time to update the role.<sup>224</sup> If taken to the logical extreme, gender norms could likely grant a male First Spouse more power (and perhaps even put more expectations on him) than any other First Spouse to date. As such, the prospect of the first First Gentleman makes developing these guidelines all the more urgent. But similarly, the current issue of having the power shared between two women makes the guidelines equally urgent for demarcating the boundaries of the role that Ivanka Trump and Melania Trump effectively share. The First Spouse is an important and valuable asset to the country. It is not unreasonable to define that role and develop relevant guidelines and expectations for the First Spouse, and

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<sup>220</sup> FRIEDAN, *supra* note 25, at 514.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Others are also beginning to share this sentiment. *See, e.g.*, Adelia Moore, Letter to the Editor, *A Dated Idea of a ‘First Lady’*, N.Y. TIMES (Feb. 8, 2017), [https://www.nytimes.com/2017/02/08/opinion/a-dated-idea-of-a-first-lady.html?WT.mc\\_id=2016-KWP-MOBILE-AUD\\_DEV&WT.mc\\_ev=click&ad-keywords=MOBILEFULLPAGE&kwp\\_0=335508&r=0](https://www.nytimes.com/2017/02/08/opinion/a-dated-idea-of-a-first-lady.html?WT.mc_id=2016-KWP-MOBILE-AUD_DEV&WT.mc_ev=click&ad-keywords=MOBILEFULLPAGE&kwp_0=335508&r=0) [https://perma.cc/P36P-V4TT].

it is also not unreasonable to pay her for her work. At the very least, the social hostess role the First Spouse also takes on should be regarded as real work and not just an incidental cost associated with being married to the President.<sup>225</sup> Until the gender norms that govern the First Spouse's duties are abandoned, there is little hope that the country will overcome its attachment to gendered households and stereotypes. Upending these norms starting in the White House would send a message that not only redefines the First Spouse's role but also redefines gender roles for the American public.

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<sup>225</sup> See Rosenberg, *supra* note 26.