

# The Unofficial Federal Officer

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## Introduction

Most people can state who the first lady is, but no one can clearly explain what the First lady is.<sup>1</sup> Congresses, presidents, and courts have all avoided the question. As a result, the first lady has never had a clearly defined role except for that of the president's spouse. Statutory silence on the issue speaks volumes. Most courts, executives, and legislators who write on the subject have followed interpretive schemes that decline to apply a number of laws to the first lady of the United States. Her constitutional status is largely unclear. Until the mid-twentieth century, an ambiguously positioned First lady presented little concern because presidential spouses occupied roles typical for women of the era. In the modern era, however, such uncertainty is unsettling and ignores the First lady's power.

As compared to the sheer volume of ink devoted to first ladies in popular magazines, newspapers, fashion blogs, and history books, there is next to nothing written from a legal perspective. Legal scholarship on first ladies began and ended with the Clinton administration, which is no surprise: the Clintons billed themselves, at times, as a package deal.<sup>2</sup> The scandals that plagued the Clinton White House implicated both Bill and Hillary Rodham Clinton and gave rise to the only court cases that touch upon the legal status of the First lady. This fuzzy area of law has remained stagnant since the late 1990s despite steadily increasing media scrutiny. In 2016, the nomination of the first female major party candidate for president brought the role of first lady as close as it has ever been to being filled by a man. As

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1. Some social science scholarship now refers to the first lady as "first spouse," but, historically, only women have held the role. Although I acknowledge that the phrase is heteronormative and that this centuries-old status quo may soon change, this paper will refer to the first lady as such for clarity and ease of expression.

2. See, e.g., Peter W. Stevenson, *'Buy one, get one free': Bill Clinton's turn as his wife's presidential bonus*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/05/buy-one-get-one-free-bill-clintons-turn-as-his-wifes-presidential-bonus>.

American politics turn further toward personality politics, it is more important than ever to recognize the dangers in undefined roles and rules. Somehow, first ladies serve the nation most powerfully when they ask forgiveness rather than permission, leading them to operate in gray areas normally eschewed in a system that prides itself on transparency and democracy.

This paper explores how the evolution of first ladies has made the legal ambiguities in their status increasingly at odds with the expectations and work of the women who fill the role. First ladies must be both common and cultured; they lack a constitutional role but are expected to advise their husbands. “However, if they seem to be asserting themselves too strongly, they are chastised as ‘not having been elected.’”<sup>3</sup> Those who are able to walk the narrow line given to them are virtually unaccountable, presenting legal and political problems for our democracy.

Part I briefly discusses the relevant historical context and explains how first ladies’ roles in American life and politics became increasingly prominent. Part II explains the legal background and operative legal provisions that affect, or rather fail to affect, the role of the first lady. It analyzes the statutory framework governing the First lady,<sup>4</sup> the few judicial decisions addressing the first ladyship as a federal job,<sup>5</sup> and various legal memoranda from the Executive Office of Legal Counsel.<sup>6</sup> Part III builds on this information and argues that the First lady qualifies as a federal officer both by definition and by function. Formal analysis, however, presents a compelling counterargument that first ladies may not be regarded as officers. Part IV notes the consequences of the first lady’s ambiguous status, with a focus on nepotism, conflicts of interest, and lobbying, but acknowledges the potential benefits to a role with undefined limits. It permits the first lady to function as a jack of all trades and fill in as the president requires. This paper also touches on the gendered expectations of first ladies and the potential social and political problems that might arise when the role is filled by a man. The paper concludes with a reminder that first ladies’ privileges and powers are entirely extra-constitutional and the problems with making official the role of first lady.

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3. James G. Benze Jr., *Nancy Reagan: China Doll or Dragon Lady?*, 20 PRESIDENTIAL STUDS. Q. 777, 777 (1990).

4. 3 U.S.C. § 105(e).

5. *Ass’n of Am. Physicians & Surgeons v. Clinton*, 813 F. Supp. 82 (D.D.C. 1993), *rev’d on other grounds*, 997 F.2d 898 (D.C. Cir. 1993); *In re Grand Jury Subpoena Duces Tecum* 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 117 S. Ct. 2482 (1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998).

6. 5 U.S.C. § 3110; *see* 1 Op. Off. Legal Counsel 20 (1977); 41 Op. Off. Legal Counsel (Jan. 20, 2017).

## I. First Ladies through the Centuries

First ladies have been a fixture of American life for as long as there have been American presidents, but their role has evolved much more dramatically since the colonial period. The first First Lady, Martha Washington, established many of the characteristics that define the role today.<sup>7</sup> She occupied a more domestic sphere than modern first ladies, but she similarly hosted domestic and foreign visitors and took part in ceremonial occasions. In what can only be described as the inception of the “made in America” tradition continued by many first ladies, Washington even consciously wore homespun American clothing rather than importing European garments.<sup>8</sup> The women who follow her built on that foundation, each according to the times, their abilities, and their desires.

Gendered expectations of female behavior often forced first ladies’ advisory function, which is now commonly known if not accepted, from public view. Instead, first ladies lobbied their husbands privately, edited their speeches, and orchestrated their political careers through selective social gatherings.<sup>9</sup> Modern assumptions limiting colonial women to drawing rooms does them a disservice; their influence, when they wielded it, extended far beyond what is now the Red Room, penetrating the lives of ordinary Americans without leaving a trace. First ladies were not housewives but rather White House wives who transformed even ordinary events, like teas or a husband’s work problem, into an opportunity to exercise power and influence.

In the twentieth century, the role continued to evolve and modernize as the women who held it pushed themselves and its boundaries.<sup>10</sup> Edith Wilson briefly ran the country and Eleanor Roosevelt captured the hearts and minds of millions with her weekly newspaper column.<sup>11</sup> Roosevelt created the “legacy of first lady independence,” and no first lady after her looked back. First ladies campaigned alongside their husbands and alone, adopted

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7. Robert P. Watson, *The “White Glove Pulpit”: A History of Policy Influence by First Ladies*, 15 OAH MAG. OF HISTORY 9, 10 (2001).

8. See Watson, *supra* note 7, at 10. See, e.g., Vanessa Friedman, *What Michelle Obama Wore and Why It Mattered*, N.Y. TIMES (Jan. 14, 2017), [https://www.nytimes.com/2017/01/14/fashion/michelle-obama-first-lady-fashion.html?\\_r=0](https://www.nytimes.com/2017/01/14/fashion/michelle-obama-first-lady-fashion.html?_r=0).

9. Letter from Abigail Adams to John Adams (March 31, 1776). See Watson, *supra* note 7, at 11.

10. See JILL ABRAHAM HUMMER, *FIRST LADIES AND AMERICAN WOMEN: IN POLITICS AND AT HOME* (2017) (history of how modern first ladies evolved in tandem with women’s relationships with the state and family life as suffrage, feminism, and a backlash to feminism swept the United States).

11. BETTY BOYD CAROLI, *FIRST LADIES* 148 (2003). See also Betty Houchin Winfield, *Anna Eleanor Roosevelt’s White House Legacy: The Public first lady*, 18 PRESIDENTIAL STUDS. Q. 331, 337 (1988) (quoting Eleanor Roosevelt herself in one the first lady’s newspaper columns in 1935).

domestic projects, supported legislation, and took part in foreign diplomacy.<sup>12</sup> First ladies began to match or exceed the vice president in media coverage and occupied offices in the White House specifically set aside for their work well before the vice president had accommodations at 1600 Pennsylvania Avenue.<sup>13</sup> In so doing, first ladies created themselves as fixtures of American government as well as American life, but their ubiquity runs hand in hand with their opacity. Most people's marriages appear harmlessly mysterious to an outsider whereas a first lady's equally opaque—albeit heavily scrutinized—marital relationship affects domestic and international policy.

## II. Congress's Limitless Authorization of Power in 3 U.S.C. § 105(e)

The law establishing what is popularly called the Office of the first lady passed almost two centuries after the Constitution established the presidency as we know it. Congress slipped the law in question into the 1978 White House Personnel Authorization Act. Section 105 of Title III, the statutory provision offers no guidance, leaving only a sparse legislative history and case law to contour and limit the power available to first ladies. The Constitution ignores first ladies, statutes barely refer to them, and judges disagree on their most basic categorization. This legal landscape, fleshed out by a few judicial decisions, by and large leaves open a legal vacuum in which first ladies may operate with impunity. Even the Executive Branch, whose authority the first lady borrows, lacks a coherent statement on the subject.

### A. 3 U.S.C. § 105, Assistance and Services for the President

The statute that created what is called the Office of First Lady mentions neither the lady nor the office. Instead, it provides: “[a]ssistance and services . . . 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.”<sup>14</sup> A subsequent parallel statute uses identical language for the vice president's

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12. For example, Nancy Reagan convened an international summit on drug prevention with seventeen other first ladies from around the world. R. Gordon Hoxie, *About this Issue*, 20 PRESIDENTIAL STUDS. Q. 672, 674 (1990). Rosalynn Carter visited 16 countries in her first year and undertook a highly successful foreign policy tour of Latin America without President Carter. Faye Lind Jensen, *An Awesome Responsibility: Rosalynn Carter as first lady*, 20 PRESIDENTIAL STUDS. Q. 769, 769 (1990).

13. Karen O'Connor, Bernadette Nye & Lauren Van Assendelft, *Wives in the White House: The Political Influence of First Ladies*, 26 PRESIDENTIAL STUDS. Q. 835, 841–42 (1996).

14. 3 U.S.C. § 105(e) (2006).

spouse.<sup>15</sup> The plain meaning of the statute frames the first lady as one of the president's assistants, and her own staff's derives its existence based on the service that the first lady provides to the president.

The statutory language conflicts with the role of the first lady in the eyes of the public and, perhaps, in the eyes of the women who have held the position.<sup>16</sup> Modern first ladies have staffs, independent projects, and a headquarters in the East Wing of the White House. This aligns with the statutory reality of the position, but first ladies' diplomatic forays, involvement in policy, and outside power may not reflect legislative intent. Presumably, the president supports and appreciates the first lady's work as assistance in furthering his own policies, but the statute, on its face, does not account for situations in which the first lady is the prime mover. It also omits any system of accountability for the first lady when her assistance exceeds her authority. Her staff are White House personnel authorized only to assist her "in the discharge of the President's duties" but resides in the East Wing and under her direction. Ultimately, the president is the source of their funding and likely has the power to overrule the first lady on staffing decisions, but who has the authority to rule on the first lady herself? The statute fails to offer the guidance that the role demands. If the president has such authority, it is difficult to imagine that it could be exercised dispassionately.

The statute also limits who may fill the role of first lady, which compounds the problem of accountability. "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>17</sup> This ostensibly prevents the firing of a first lady from her official duties because, legally, there cannot be a replacement when the president has a spouse. Only if the president is a bachelor may he designate a replacement, and, even then, the stand-in must also be a family member.<sup>18</sup> The requirement that a relative fill the position presents the same issues of access and power as those presented by a spouse first lady, though perhaps to a lesser extent. It is

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15. § 105(e).

16. Public conception of first ladies is evident in their fictional counterparts who have been portrayed as having defined roles, clear objectives, and the power to get what they want. *See, e.g., The West Wing: The Women of Qumar* (CBS broadcast Nov. 28, 2001) (first lady Abigail Bartlet lobbies Deputy Chief of Staff Josh Lyman on women's rights; he obeys her directive and meets with a lobbyist); *House of Cards* (Netflix broadcasts 2015, 2017, 2018) (first lady Claire Underwood serves as Ambassador to the United Nations, helps pass a gun control bill, and becomes her husband's vice president, assuming the presidency after his resignation).

17. § 105(e).

18. For example, Harriet Lane served as First Lady for her uncle, James Buchanan (1857-61), who remains America's only bachelor President. CAROLI, *supra* note 11, at 41.

difficult to imagine a sitting president acting as the requisite check to power by discharging his spouse from the formal demands of being first lady, let alone divorcing her while in office.

Section 105(e) devotes seventy-eight words to the legal status of someone who has the run of the White House yet no accountability to the American public. Its sparse definition gives rise to a number of questions, ranging from the applicability of executive privilege to immunity from criminal law. The legislative history further confuses the issue.

## **B. Legislative Interpretation of the First Lady's Status**

The 1978 White House Personnel Authorization bill included the provision authorizing assistance to the president's spouse, but Congress spent little time discussing the contours of "assistance and services" during hearings and debates on the bill.<sup>19</sup> Section 105(e) appears only a few times in the legislative history and most of those instances are recitations of the bill's text. Congressional intent for the role of the first lady remains hazy but the bill's underlying purpose sheds some light on the matter as does hearing testimony and a few choice statements included in the congressional record.

The main focus of legislative debate was responsible governance; legislators sought to increase transparency and begin the process of reforming a White House that seemed out of control after Watergate.<sup>20</sup> Legislators argued for requiring executive reports to Congress, reimbursement for detailees to the White House, and capping the number of certain officials and executive levels to address fears that the president would conceal the actual number of White House staffers through different classifications.<sup>21</sup> Representative Herbert Harris, one of the bill's sponsors, sought to address "the centralization of relatively unaccountable power in the White House at the expense of our Cabinet form of government."<sup>22</sup> Such fears over accountability and transparency permeate the House's legislative record. Concern over budget size and staff size operated as proxies for concern over an increasingly powerful "fourth arm of government," as one

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19. See *Fed. Firefighter Workweek and White House Pers. Authorization: Hearing on S.1163, H.R. 3161, and H.R. 11003 Before the Subcomm. on Civil Serv. and Gen. Servs. of the S. Comm. on Governmental Affairs*, 95th Cong. 2, (1978) (statement of Rep. Herbert Harris, sponsor of H.R. 11003) [hereinafter *White House Pers. Authorization Senate Hearing*].

20. *White House Pers. Authorization Senate Hearing*, *supra* note 19.

21. 95 CONG. REC. 8629 (1978) (statement of Rep. Harris).

22. *Id.*

supporter referred to the president's staff.<sup>23</sup> Senate debates likewise focused on White House expenditures.<sup>24</sup>

This context informs a reading of § 105(e) as encouraging transparency in the East Wing as much as in the West. But the glaring lack of discussion of the East Wing and the intense focus on presidential staff and personnel overlooks the first lady's staff entirely. There is no upper limit on East Wing staff discussed or provisions limiting their compensation. Most tellingly, no legislator specifically connects the first lady to the question of being more transparent or more accountable. It seems possible that § 105 was simply a convenient place to stash a provision that active first ladies, such as Rosalynn Carter, needed to assist the president properly.<sup>25</sup> The inclusion of the first lady here, however, could indicate that she is most likely categorized as a member of the White House staff. On the other hand, her role is otherwise limited to members of the president's family and there is no formal application process or background check. She is in the White House, but not necessarily of the White House.

Senator Bob Dole (R-Kan.) indicated his disapproval by inserting a *National Journal* article into the record.<sup>26</sup> The article, which referred to the bill as a “[f]at [s]taff [a]uthorization,” included a single prescient comment on § 105(e). “‘Authorization for the spouse is supposed to be in connection with their official duties,’ a committee staffer said. ‘But no one knows where their official duties end.’”<sup>27</sup> The article noted that both Rosalynn Carter and Joan Mondale, the wife of then Vice President Walter Mondale, each had staffs paid for with federal funds.<sup>28</sup> In fact, Edith Roosevelt began the tradition of first ladies having a dedicated staff in 1901 when she hired a social secretary.<sup>29</sup> From 1901 through 1978, first ladies had never been included in personnel authorization, although their staffs expanded in tandem with their roles.<sup>30</sup> Their inclusion in the statute without evidence of

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23. 95 CONG. REC. 8637 (1978) (statement of Rep. Patricia Schroeder).

24. See, e.g., 95 CONG. REC. 20896–98 (1978).

25. See, e.g., Jensen, *supra* note 12, at 769. Rosalynn was disappointed to learn that her staff had been restricted along with those of the other executive agencies. When she told the President she needed more assistants, he replied: “Anyone you talk to in the Government wants at least one more staff member.” Mrs. Carter replied: “But I’m not anybody—I’m your wife.” ROSALYNN CARTER, *FIRST LADY FROM PLAINS* 168 (1984).

26. 95 CONG. REC. 20901 (1978) (statement of Sen. Bob Dole).

27. *Id.* (citing Dom Bonafede, *The Lean White House Has a Fat Staff Authorization in the Works*, NAT’L J., (Apr. 1978)).

28. *Id.*

29. Carl Anthony, *The White House Staff of First Ladies*, NAT’L FIRST LADIES’ LIBR. (Aug. 24, 2016), <http://www.firstladies.org/blog/the-white-house-staff-of-first-ladies/>.

30. 95 CONG. REC. 20901 (1978).

congressional deliberation on their status as “White House personnel,” however, could indicate a lack of intent to change the status quo. First ladies were just lumped in with all the rest, which make even context clues difficult to rely on for interpretation of their legal status.

The final details about § 105(e) come from Harrison Wellford, a director of the Office of Management and Budget, who testified during subcommittee hearings. During the hearings, there was only one question about the provision. Wellford, responding, stated in full:

This provision makes explicit in the statutory authorization the historical practice of providing assistance and services for the spouses of the President and Vice President. The provision is not a grant of additional authority to each spouse but simply allows the spouse to share the authority granted to the President and Vice President. All staff and funds would come from those authorized to the President and Vice President. Such funds could only be used by the spouse for assistance rendered to the president or vice president in discharge of their duties and responsibilities.<sup>31</sup>

Wellford’s answer indicates that the statute merely codifies the power that first ladies already enjoyed, but this raises more questions. He notes that first ladies “share the authority granted to the President.”<sup>32</sup> As previously discussed, first ladies indeed enjoyed respect, prestige, and even some power as a result of their husbands’ presidencies, but codifying previously informal status gives that status the added weight of the law. First ladies, then, enjoy more than just respect—they derive and share authority from the popularly elected president. Unlike the president, however, the limits on exercising that authority and methods of accountability for misusing it are not codified.

Wellford echoes the statutory text in limiting the use of funds to “assistance rendered to the President . . . in discharge of [his] duties and responsibilities,” yet “assistance” also remains frustratingly undefined.<sup>33</sup> Historical precedent, which informs the writing of the statute, demonstrates that such authority and assistance can range from nonpartisan domestic causes to meetings with foreign leaders to contributing to substantive personnel and policy decisions.<sup>34</sup> This is more than any “assistance” a

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31. White House Pers. Authorization Senate Hearing, *supra* note 19, at 38 (statement of Harrison Wellford, Executive Associate Director for reorganization and management of the Office of Management and Budget).

32. *Id.*

33. *Id.*

34. O’Connor, Nye, & Van Assendelft, *supra* note 13, at 852–53.

president might be expected to receive from even a chief of staff. Somehow, though, all of these functions are embodied in this statute. The anonymous committee staffer perfectly captured this expansiveness when noting that § 105(e) grants the first lady endless authority.<sup>35</sup> In a checks-and-balances government, the first lady operates unconstrained. She can be checked only by her spouse for whom the resulting marital strife could not only be stressful, personally, but politically dangerous.

To summarize, § 105(e) and its legislative history codifies historical precedent that provides a modern first lady with next to no formal constraints on her activities. The delegation of Executive authority to the first lady augments her historical practice of providing advice and directing a staff in her own pursuits. The first lady's ambiguous role within the White House and the Executive Branch frustrates efforts to apply the law to her. As judges grapple with the first lady's status, there is no clear method by which she may be held accountable for abusing her statutory authority. Opponents of § 105(e) correctly forecast the resurrection of an "Imperial Presidency" when debating the bill; although an omnipotent empress was probably not the danger they had in mind.<sup>36</sup>

## C. Courts Decline to Define First Ladies' Legal Status

Since the 1978 passage of § 105(e), the courts have considered the first lady's status in just a few cases. Courts adjudicated each case during the Clinton Administration and explored both the first lady's legal status under § 105(e) and the limits of her authorized executive authority.

The first case to discuss the first lady's status arose in 1993 when the Association of American Physicians and Surgeons (AAPS) sued under the Federal Advisory Committee Act (FACA) to enjoin Hillary Rodham Clinton's participation in the President's Task Force on National Health Care Reform ("Task Force").<sup>37</sup> FACA restricts advisory committees and promotes transparency in government. The provision at issue here exempts "any committee which is composed wholly of full-time officers or employees of the Federal Government" from the requirements that all meetings be held in public and that records of those meetings be made publicly available.<sup>38</sup> As previously mentioned, she became deeply involved in policy matters during her husband's presidency and she focused on health

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35. See 95 CONG. REC. 20901 (1978).

36. 95 CONG. REC. 8637 (1978) (statement of Rep. Henry Hyde).

37. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d. 898, 901 (D.C. Cir. 1993).

38. 5 U.S.C. App. 1, §§ 3(2)(iii), 10(a).

care.<sup>39</sup> Hillary Rodham Clinton chaired the Task Force which consisted of a number of Cabinet secretaries and senior White House officials.<sup>40</sup> As chairperson, she nominally oversaw the working group, which consisted of federal employees, special agency employees hired for a limited time, and consultants, although she did not attend its meetings.<sup>41</sup> The plaintiff AAPS sought access to the Task Force meetings by arguing that Hillary Rodham Clinton, as first lady, was not a federal officer or employee. The government responded that the First Lady was a “*de facto* officer or employee” based on her marriage to the President and her traditional status.<sup>42</sup>

The district court agreed with plaintiffs that Hillary Rodham Clinton was neither officer nor employee based on their definitions in Title V, to which FACA is appended.<sup>43</sup> Under Title V, officers are appointed to the civil service, engaged in federal functions under the authority of law, and supervised in the performance of those functions by the president, a United States court, the head of an executive agency, a military secretary, or the Judicial Conference of the United States.<sup>44</sup> Under Title V, employees share the same requirement of appointment to the civil service, but members of Congress and a number of lesser ranking individuals, such as uniformed service members or the head of a government-controlled corporation, may appoint and supervise them.<sup>45</sup> Rodham Clinton was never appointed to the civil service and lacked all indicia of employment in her role as first lady, such as taking an oath of office, so the court held that FACA applied to the Task Force.<sup>46</sup>

The Circuit for the District of Columbia reversed, deploring the vagueness of § 105(e) and holding that, in light of the constitutional avoidance canon and respect for the separation of powers, Hillary Rodham Clinton was a “full-time federal officer or employee” for the purposes of FACA only.<sup>47</sup> To reach its holding, the majority selected a broader definition of officer as “any person authorized by law to perform the duties of the office” and invoked Congress’s will that the first lady be authorized to render

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39. CAROLI, *supra* note 11, at 303–04.

40. *Ass’n of Am. Physicians*, 997 F.2d at 900–01.

41. *See id.* at 901.

42. *Id.* at 903–04.

43. *Ass’n of Am. Physicians & Surgeons v. Clinton*, 813 F. Supp. 82, 86–7 (D.D.C. 1993). The court resorted to definitions used within the title because FACA left both terms undefined. *Id.* at 86.

44. 5 U.S.C. § 2104 (defining “officer”).

45. 5 U.S.C. § 2105 (defining “employee”).

46. *Ass’n of Am. Physicians*, 813 F. Supp. at 87.

47. *See Ass’n of Am. Physicians*, 997 F.2d at 905–06, 911.

assistance to the president as manifested in § 105(e).<sup>48</sup> It would be paradoxical to deny the First Lady such official status because she is “supported by a substantial staff who are [sic] undeniably full-time government officers or employees.”<sup>49</sup> For the FACA exemption to prevent Clinton from serving as chairperson yet permit her chief of staff to fill the role would be, according to the court, “anomalous.”<sup>50</sup> Furthermore, the majority saw “no reason why a President could not use his or her spouse to carry out a task that the President might delegate to one of his White House aides.”<sup>51</sup> The court felt pushed to its decision to avoid the constitutional question of whether FACA was an impermissible legislative intrusion into executive power and ultimately limited its answer to the narrow FACA question before it.<sup>52</sup> Overall, the opinion is functionalist. The majority ignored clear statutory text to avoid deciding a constitutional question. Even though the court employed a valid method of statutory interpretation was used, their uncertainty and, perhaps, unease with the ultimate decision on the first lady’s status are evident in their refusal to even decide whether she is an officer or employee. The court merely states that she may be qualified to be an officer under FACA. In doing so, the only light they clarify that she is subject to laws and regulation only when the court and executive branch find it convenient.

A concurrence joined in judgment to make the holding on FACA’s applicability to the Task Force unanimous, but the concurring judge agreed with the lower court’s analysis of the first lady’s official status, namely, that she had none.<sup>53</sup> In addition to arguing that applicability of Title V definitions, Judge Buckley dwelt on the Constitutional requirements for officer status.<sup>54</sup> Section 105(e) authorizes assistance for the first lady, but only insofar as she assists her spouse—this is neither remunerative nor

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48. 1 U.S.C. § 1; *Ass’n of Am. Physicians*, 997 F.2d at 904 (majority explained away its decision to use the Title 1 language by stating that Congress never intended Title V definitions to apply to FACA. Legislative history indicates deleted FACA provisions that paralleled Title V officer and employee definitions and that FACA was temporarily appended to Title V rather than added permanently).

49. *Ass’n of Am. Physicians*, 997 F.2d at 904.

50. *Id.*

51. *Id.* at 905.

52. *Id.* at 906–11 (holding expresses “no view as to her status under any other statute,” including whether her task force role violated the Hatch Act, the Anti-Deficiency Acts, or any conflict-of-interest laws).

53. *Id.* at 916 (Buckley, J., concurring).

54. *Id.* at 917–20 (“At the outset I dismiss the possibility that Mrs. Clinton might be considered an employee . . . [a]n “unpaid employee” is an oxymoron, though an unpaid officer is not.”).

evidence of an official role extrinsic to spousedom.<sup>55</sup> The statute states no official duties and history demonstrates that first ladies remade the role in their own images. In Judge Buckley's eyes, the first lady's status so flummoxed the majority that it defied both precedent and traditional tools of statutory interpretation in order to adopt a rule that strained the plain meaning of a statute to a breaking point instead of confronting a constitutional question.<sup>56</sup>

To summarize, the first lady is neither appointed nor confirmed nor sworn in as required of officers by the Constitution; she has no statutorily created office and no statutory duties.<sup>57</sup> She is an officer or employee by dint of the constitutional avoidance canon but only in certain contexts. The lower court and concurrence's straightforwardness magnifies the hoops through which the majority leapt to bestow an official status on the first lady. Even then, their failure to lay down a firm ruling on the matter produced more judicial confusion on the question of the first lady's role.

*In re Grand Jury Subpoena Duces Tecum* broke new ground when deciding whether the White House could refuse to produce to a grand jury notes taken by the First Lady's counsel during the Whitewater investigation.<sup>58</sup> The lower court denied the motion to compel production of two sets of notes, each taken by Rodham Clinton's private counsel during meetings with Rodham Clinton, and the president's official counsel.<sup>59</sup> The district judge grounded her denial in part on the theory presented in *American Physicians* that the first lady is an officer or employee and "a member of the President's inner circle," entitling her to privilege as an organizational representative of the White House.<sup>60</sup> Reversing that decision, the Eighth Circuit panel majority noted that Rodham Clinton lacked attorney-client privilege with both Special Counsel to the President and Counsel to the President because she could not be viewed properly as the client of White House counsel.<sup>61</sup> The court stated that only the White House and the Office of the President could enjoy the attorney-client privilege with governmental

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55. See 3 U.S.C. § 105(e).

56. *Ass'n of Am. Physicians*, 997 F.2d at 922–23 (Buckley, J., concurring).

57. *Id.* at 920.

58. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913–14 (8th Cir. 1997), *cert denied sub nom.* Office of the President v. Office of Independent Counsel, 117 S. Ct. 2582 (1997) (hereinafter "In re Grand Jury SDT").

59. *In re Grand Jury SDT*, 112 F.3d at 914.

60. See *id.* at 933 (Knopf, J. dissenting); see also PROPOSED FED. R. EVID. 503 (stating federal common law includes representatives of governmental entities as clients for the purpose of attorney-client privilege).

61. *Id.* at 915.

lawyers.<sup>62</sup> This breaks with the *American Physicians* holding and the lower court's finding that the first lady was a member of the president's inner circle.<sup>63</sup> The Eighth Circuit decision equates to a judgment that the first lady is neither an employee nor officer of the White House and is at odds with § 105(e)'s extension of executive authority to the first lady. As a private citizen, the presence of government counsel during discussions waived her privilege. No other private citizen, however, shares in the power of the executive branch by decree of the legislative branch.<sup>64</sup>

When viewed in light of precedent, the Eighth Circuit created a curious no-man's-land, in which the official status of the first lady waxes and wanes with the factual context. Judge Knopf, dissenting from the *In re Grand Jury* holding, noted this paradox and found that the line drawn between the first lady and the White House was "factually and legally unsound."<sup>65</sup> Not only did the majority ignore Clinton's personal Fifth and Sixth Amendment rights to counsel and privilege, but it also ignored her "widely recognized role as an advisor to the President."<sup>66</sup> This uncertainty remains constant in subsequent decisions.

The District Court for the District of Columbia confronted the same question of whether the first lady qualified as a senior adviser to the president to determine whether her conversations with other high-level White House aides fell under executive privilege in a different case.<sup>67</sup> Citing and disagreeing with the Eighth Circuit opinion, *supra*, the court found that executive privilege exists for conversations between the first lady and other senior advisers.<sup>68</sup> The court subsequently held that privilege was not absolute in a federal grand jury case and that a sufficient showing could rebut the presumption of executive privilege.<sup>69</sup> The holding's implications starkly contrast with those of the Eighth Circuit by explicitly accepting the first lady's status as an integral member of the Office of the President and of the White House.<sup>70</sup> Indeed, the court found that §105(e) provides additional support for this unwritten rule because the statute serves as congressional

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62. *In re Grand Jury SDT*, 112 F.3d at 915.

63. *Id.*

64. *Id.* at 922.

65. *Id.* at 933 (Knopf, J. dissenting).

66. *Id.*

67. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 25 (D.D.C. 1998) (memorandum opinion).

68. *Id.* at 31–32 (Office of Independent Counsel did not attempt to argue that executive privilege did not include Hillary Clinton's conversations.).

69. *Id.* at 32–33.

70. *See, e.g., id.* at 27.

recognition of the first lady's role as "functional equivalent of an assistant to the President."<sup>71</sup>

## D. Executive Interpretation of the First Lady's Status is Cautiously Noncommittal

The judicial branch is not alone in hedging on the first lady's true status. The executive branch, through legal arguments and memoranda, demonstrates a similar unwillingness to commit to any particular definition for the first lady. Therefore, part of the blame for judicial confusion over the first lady's status in *American Physicians* and *In re Grand Jury* cases may be laid fairly and squarely at the feet of the executive branch. The record shows that the government first argued that Rodham Clinton was "the functional equivalent of a federal employee" at the district court level.<sup>72</sup> In its first appellate brief, however, the government instead "argued that she was either an officer or an employee" but failed to specify which.<sup>73</sup> The government adopted a new position again in their reply brief to claim that she was an officer; yet the government changed tack for a third time at oral argument and contended that she was either an officer or an employee.<sup>74</sup> Memoranda issued by the Office of Legal Counsel reveal that the only consistent executive answer on the issue is that there is no answer.

The Office of Legal Counsel issued a contemporary memorandum in 1977 that shines some light on the executive branch position regarding "special government employees" that uses the first lady as an example.<sup>75</sup> A "special government employee," defined in 18 U.S.C. § 202(a), is an officer or employee who performs temporary duties on behalf of the executive or legislative branches for no more than 130 days per year. The *American Physicians* court rejected the government's suggestion that this category might apply to the first lady, but the memo gives some idea as to how the executive branch understood the first lady's status and influence at the time.<sup>76</sup>

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71. *In re Grand Jury Proceedings*, 5 F. Supp. at 27 (citing *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 904 (D.C. Cir. 1993)).

72. *Ass'n of Am. Physicians*, 997 F.2d at 917 (Buckley, J., concurring).

73. *Id.*

74. *Id.*

75. 1 Op. Off. Legal Counsel 20 (1977) (written by acting Asst. Attorney General John Harmon to advise on an informal presidential advisor's status for the purpose of federal conflict-of-interest laws).

76. *Ass'n of Am. Physicians*, 997 F.2d at 915 (Title 18 definition of "special government employees" was dismissed as outside the scope of the inquiry into FACA's meaning under Title V).

The memo analyzes President James Carter's relationship with an anonymous "informal adviser" with regard to conflict-of-interest laws. The adviser spoke with the President "almost daily" but lacked formal appointment, employment, designation as an adviser, and official federal function.<sup>77</sup> His relationship with President Carter was "largely personal" and "based on mutual respect," and the memo dismissed the thought that the president exercised any degree of supervision or control over the adviser with regard to the regular advising phone calls.<sup>78</sup> Notably, for our purposes, the memo draws a comparison between the anonymous adviser and Rosalynn Carter, arguing that her daily discussions of governmental matters with the President were, in and of themselves, not sufficient to render her a special government employee.<sup>79</sup> The memo found that, instead, specific responsibilities for administrative activities, such as calling and chairing meetings attended by government employees, triggered categorization as a special government employee for the purpose of conflict of interest laws.<sup>80</sup>

Conflict of interest laws will be discussed in detail later on in this paper.<sup>81</sup> But the memo's more general delineation between informal and formal adviser implicates the first lady. Since the United States has had presidents, it has had spouses whispering advice, maneuvering political foes, and undertaking domestic and foreign projects.<sup>82</sup> Whether the president exercises the same "direction or supervision" over the first lady as he does over a special government employee is unlikely, but the analogy supports the government position and the majority opinion in *American Physicians*.<sup>83</sup> A typical first lady cannot be a "special government employee" within the meaning of Title 18 because she works more than 130 days within the calendar year, although a more reticent first lady might qualify as such. But this type of allowance demonstrates that our statutory framework is flexible enough to give official status of some kind to the first lady. Despite the limiting statutory language in § 105(e) and the constitutional bounds on who may qualify as an officer, reality shows that first ladies are informal advisers to presidents.

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77. 1 Op. Off. Legal Counsel at 20.

78. *Id.* at 21.

79. *Id.* at 22.

80. 1 Op. Off. Legal Counsel at 23.

81. *See infra* Part IV.C.

82. *See supra* Part I.

83. 1 Op. Off. Legal Counsel at 23.

### III. The First Lady is an Officer by Definition and by Function

In the absence of guidance from the other branches of government, reviewing the formal and functional aspects of the first lady's role could provide an answer as to whether or not she rightfully should be considered an employee or officer for the purposes of more than just FACA or attorney-client privilege. A number of factors bear on this analysis, and the role's malleability makes it difficult to establish a standard that suits the position, rather than the person holding it. The formal and functional aspects of the role provide a solid foundation on which to explore how the Constitution and fundamental separation of powers issues bear on making official the first lady's office.

#### A. The First Lady is More Like an Officer than an Employee According to Statutory Definitions

Though the *American Physicians* court held that the first lady was an employee or officer, it is clear that, if there is an official first lady position, it should be that of an officer and not an employee. Employees can be hired by any arm of government, whereas the Appointments Clause limits the power to appoint constitutional officers to the president, courts of law, and heads of departments.<sup>84</sup> Although the president designates rather than appoints a first lady under § 105(e), this distinction does not make it more likely that the first lady is an employee. Furthermore, the first lady can only be designated by the president and, notably, only if the president lacks a spouse.<sup>85</sup> A president's spouse automatically assumes the title and role of first lady. This essentially mandatory appointment hews much more closely to the Title V definition of an officer, who is "required by law to be appointed" as opposed to an employee, for whom there is no such requirement.<sup>86</sup> It is true, however, that the first lady is not appointed to her role within the meaning of the statute—most presidents propose to their spouses long before reaching the Oval Office or needing the Senate's advice and consent to the union.<sup>87</sup>

Part of the confusion in *American Physicians* derived from the lack of definition for officer and employee in § 105(e).<sup>88</sup> The D.C. Circuit chose a

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84. U.S. CONST. art. II, § 2, cl. 2.

85. See 3 U.S.C. § 105(e). The question of whether the first lady can be an officer without formal appointment will be explored *infra* Part III.B.

86. Compare 5 U.S.C. § 2104(a)(1) with 5 U.S.C. § 2105(a)(1).

87. Three presidents, John Tyler, Grover Cleveland, and Woodrow Wilson, married while in office. There is no evidence of Senate influence over their choice in spouse.

88. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d. 898, 904 (D.C. Cir. 1993).

broad Title I definition, thus narrowing FACA's reach, despite legislative history supporting narrower Title V definitions that would expand FACA's reach.<sup>89</sup> Even if one prefers the narrower Title V definition to govern, it becomes clear that the first lady is an officer rather than an employee.<sup>90</sup> The first lady's capacity for authority exceeds that of any employee. Employees can be appointed by a far greater range of officials and enumerated examples in the statute include United States Naval Academy launderers and cobblers.<sup>91</sup> Specific exemptions include certain military contractors and United States Postal Service workers.<sup>92</sup> In contrast, the first lady can be selected only by the president and is more similar to a cabinet secretary than to a Navy contractor. Both the narrow and broad definitions of officer, with support from the legislative history, better apply to the first lady than a definition of employee. The analysis cannot end here, however, because formal definitions of officer exclude the first lady.

## **B. The First Lady Functions as an Officer but is Formally Excluded from Office**

Supreme Court jurisprudence alternates between formal and functional approaches to address officer status. The Appointments Clause provides that the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers . . . in the President alone . . ."<sup>93</sup> At times, the Court will hold strictly to these requirements, rigorously analyzing the formal aspects of an office to ensure that its occupant observes constitutional separation of powers principles.<sup>94</sup> In other cases, the Court adopts a functional approach, interrogating whether an officer has violated separation of powers through the activities and powers delegated to that office.<sup>95</sup> For the first lady, this

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89. Cf. Anessa Abrams, *The first lady: Federal Employee or Citizen Representative Under FACA?*, 62 GEO. WASH. L. REV. 855, 879 (1994); *Ass'n of Am. Physicians*, 997 F.2d at 904.

90. See *supra* Part III.A.

91. 5 U.S.C. § 2105(b).

92. 5 U.S.C. §§ 2105(c), 2105(e).

93. U.S. CONST. art. II, § 2, cl. 2.

94. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (holding unconstitutional the legislative veto because it improperly intruded on executive powers); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding unconstitutional a statute that delegated executive power to an officer the Court determined to be under Congress's direct control due to its sole power of removal).

95. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (holding legislative delegation of power to appoint independent counsel did not violate Appointments Clause); *Mistretta v. United States*, 488 U.S. 361 (1989) (holding statute constitutional because Congress's delegation of legislative power to a commission was not excessive).

choice will be determinative. The first lady is formally excluded from being a federal officer, yet the first lady functions as one of the most powerful officers in the executive branch.

*i. Formalist Analysis Excludes the First Lady from Officer Status*

The first lady is not appointed, and the Senate has no right to give advice or consent. She neither takes an oath of office nor receives a presidential commission, both of which historically denote federal officers as able to exercise authority.<sup>96</sup> On the other hand, a first lady derives her power from marriage to the President, who swears an oath in a public ceremony in which the first lady participates only by holding a holy book. This surely falls short of the constitutional requirement of oath-taking. Instead, she is created first lady by the electorate as a byproduct of her spouse's electoral victory. Should the President lack a spouse and require a family member appointed, first ladies could be inferior officers strictly in the appointment power sense, but they lack other formalist trappings necessary to qualify. Congress's statutory restriction on the president's designation powers of who may serve as first lady might distinguish first ladies from even inferior officers.

Further distinguishing the First Lady from an officer, the First Lady is not salaried.<sup>97</sup> Section 105(e) allots "assistance and services" to the first lady only in the context of her assisting the president; it does not obligate the first lady to perform any duties.<sup>98</sup> The statutory structure also implies that a first lady who does not render assistance to the president would not be eligible for assistance herself. She serves as an additional conduit or proxy for the president.

This final idea of the first ladyship as presidential conduit reinforces the idea that the first lady derives her power and authority directly from her relationship with the president, which aligns with Harrison Wellford's hearing testimony.<sup>99</sup> The form of the first lady's "assistance and services," then, may be the sole formal aspect of her role that weighs in favor of officer status. If the sum total of her assistance to the president is merely as a conduit for information, then her formal role remains inconsequential and likely ineligible for officer status. If, however, the formal definition of a first lady's

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96. See *Dep't of Transportation v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1235 (2015) (Thomas, J., concurring) (citing Attorney General opinions and *Marbury v. Madison* as evidence that "those who have not sworn an oath cannot exercise significant authority of the United States.").

97. *But see* 41 Op. Off. Legal Counsel (Jan. 20, 2017) (indicating that a marital relationship with the president might not prevent the first lady from being employed in the White House).

98. 3 U.S.C. § 105(e).

99. White House Pers. Authorization Senate Hearing, *supra* note 19, at 38 ("The provision is not a grant of additional authority to each spouse but simply allows the spouse to share the authority granted to the President and Vice President.").

“assistance and services” encompasses operating as a presidential proxy and fulfilling delegated executive duties, then there is a formal argument for bringing first ladyship into the fold of federal offices. Though first ladyship exists outside the Appointments Clause and defies many of the formal requirements of federal offices, great weight should be attached to the first lady’s exercise of executive powers delegated to her.

*ii. Functional Analysis Demonstrates the First Lady Exercises Officer-Level “Significant Authority”*

History and a functionalist approach support the first lady being treated as an officer rather than an employee or civilian. Besides the narrower range of people who may create an officer, the main delineation between officer and employee is the position’s authority.<sup>100</sup> The *Buckley v. Valeo* court determined that an exercise of “significant authority” denoted constitutional officer status.<sup>101</sup> First ladies largely adapt the office to their preferences, but they have the opportunity to exercise significant authority if they so choose. On this metric, whether or not the opportunity to exercise significant authority is sufficient to meet the *Buckley* standard and the meaning of “significant” will determine the first lady’s status.

As a practical matter, the first lady’s opportunity to exercise such significant authority ought to be sufficient to meet the definition proposed by *Buckley*. Reevaluating the status of each first lady based on her stated policy goals would be a bureaucratic nightmare and could incentivize political manipulation of the first lady’s agenda or position in order to affect her official status. Additionally, first ladies’ initial goals vary, and the authority they exercise waxes and wanes with public opinion and presidential prospects.<sup>102</sup>

Case law fails to elaborate on what “significant authority” might be. In a dissent, Justice Breyer collected a number of Supreme Court cases holding certain functionaries to be constitutional officers.<sup>103</sup> They include “U.S. attorneys; federal marshals, military and administrative law judges; a district court clerk; departmental clerks in Executive departments including Treasury, Interior, and others; an assistant-surgeon and cadet-engineer” who

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100. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

101. *Id.* (“[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.”).

102. *See, e.g., Benze, supra* note 3, at 783–85 (during her first term, Nancy Reagan was seen as a socialite; during her second, she was suspected of affecting foreign policy and executive personnel decisions).

103. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010) (Breyer, J., dissenting).

were appointed by the Secretary of the Navy; and election monitors, among others.<sup>104</sup> Justice Breyer, joined by three others, found that the breadth of these formal definitions for officer could affect “thousands of high-level Government officials” who functionally qualify as officers yet do not fulfill the formal requirements to be a federal officer.<sup>105</sup> An even broader definition from the Department of Justice would include as an officer “anyone who holds a ‘continuing’ position and who is ‘invested by legal authority with a portion of the sovereign powers of the federal Government’”<sup>106</sup>

The degree of authority exercised by first ladies depends on the lady. First Ladies Edith Wilson, Eleanor Roosevelt, Rosalynn Carter, Nancy Reagan, and Hillary Rodham Clinton arguably exercised power on par with Cabinet Secretaries.<sup>107</sup> Indeed, some first ladies assisted in their husbands’ selections of those and other high-ranking personnel. Others took on less-discussed roles, making it difficult for the public to ascertain how much authority First Ladies Lady Bird Johnson, Betty Ford, Barbara Bush, Laura Bush, and Michelle Obama exercised behind the scenes.<sup>108</sup> Defining the role by the first ladies who restrain themselves would unfairly bind their successors who might choose to exercise the full breadth of available authority or even to push its limits. It is also clear, however, that even the more restrained first ladies rose at least to the level of authority of an election monitor or district court clerk, who themselves could be eligible for officer status.<sup>109</sup> Even less involved first ladies may fully participate in their husband’s presidencies through domestic projects and diplomacy inherent in foreign trips and state visits. United States Supreme Court precedent indicates this ought to be sufficient to qualify as “significant authority,” and

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104. See *Free Enter. Fund*, 561 U.S. at 514 (stating that a functionalist approach to defining “inferior officer” more properly upholds constitutional values because of the wide swath of positions that formally qualify as federal officers).

105. *Id.*

106. *Id.* at 539 (citing 31 Op. Off. Legal Counsel 74 (Apr. 16, 2007) (written by Steven G. Bradbury, Acting Assistant Attorney General)).

107. These women took active roles in governance, from unofficial gatekeepers to official chairwomen. They made policy recommendations, personnel recommendations, and were seen as deeply involved. See CAROLI, *supra* note 11, at 148; see also Hoxie, *supra* note 12; O’Connor, Nye, & Van Assendelft, *supra* note 13, at 846–47, 852–53.

108. While each of these first ladies was active and participated in different projects, they were less visible in a governmental sense. There is no evidence that they attended policy meetings, and only one, Laura Bush, testified before Congress. See O’Connor, Nye, & Van Assendelft, *supra* note 13, at 852–53; see also *Testimony of first lady Laura Bush, Early Childhood Education*, C-SPAN (Jan. 24, 2002), <https://www.c-span.org/video/?168354-1/early-childhood-education>.

109. See *Free Enter. Fund*, 561 U.S. at 514.

legislative history along with legal memoranda bolster the idea that first ladies traditionally serve as advisers to their presidents.<sup>110</sup>

*iii. No Removal Power Exists to Indicate Status or to Permit Formal Removal*

William Safire complained in the *New York Times* that First Lady Nancy Reagan had staged a coup. “Supported in her power playing by her bloated, expensive, East Wing staff, she is the costliest ‘volunteer’ in the budget. But taxpayers have no recourse, the First [L]adyship is the only Federal office from which the holder can neither be fired nor impeached.”<sup>111</sup> Safire was correct: The current state of the law, as endorsed by all three branches of government, excludes the first lady from any accountability for her actions. Section § 105(e) makes no provision for her termination, only for her absence.<sup>112</sup> Appointment power and removal power often go hand in hand, so understanding how the first lady might be removed and by whom could indicate who has appointment and supervisory power over her office. It should be no surprise that only the president has that authority, and presidential power to do so is tenuous at best.

Michael J. Broyde and Robert A. Schapiro, during the waning years of the Clinton administration, explored whether or not first ladies might be subject to impeachment as an additional method of accountability.<sup>113</sup> Broyde and Schapiro assumed, without evidence, that both resignation and discharge were already available methods of removal for the first lady with no explanation as to why such traditional methods should apply to a position that defies democratic tradition and republican values.<sup>114</sup> That aside, the authors examine the formal and functional aspects of the first ladyship to determine whether or not impeachment is feasible. They do not come to a clear solution, noting only that “[i]f impeachment is intolerable because of the high possibility of abuse, then perhaps, at a minimum, the courts should rethink the question of the First Spouse’s official status.”<sup>115</sup>

In reality, only two clear methods exist to remove the first lady. The first is for the first lady to withdraw voluntarily from traditional duties and

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110. White House Pers. Authorization Senate Hearing, *supra* note 19, at 38; 1 Op. Off. Legal Counsel 20 (1977); 1 Op. Off. Legal Counsel at 1 (Feb. 18, 1977).

111. Benze, *supra* note 3, at 788 (quoting William Safire, *The first lady Stages a Coup*, N.Y. TIMES, Mar. 2, 1987, at A17).

112. 3 U.S.C. § 105(e).

113. Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the first lady*, 15 CONST. COMMENT. 479 (1998) (noting that a first lady can resign or be discharged and arguing that whether or not she may be impeached informs whether she is an officer or not).

114. Broyde & Schapiro, *supra* note 113.

115. *Id.* at 509.

obligations of the role. A number of early first ladies avoided public appearances and, pleading illness, minimized their apparent involvement in their husband's work.<sup>116</sup> This might serve to end a first lady's public involvement, but it is unlikely to impact her informal advising of the president unless she chooses to refrain in private as well. This complicates the ceremonial role of first ladyship because § 105(e) prohibits designation of another family member as first lady unless the president lacks a spouse.<sup>117</sup> Should the first lady to recuse herself, then the country would be without a designated first lady, which has never before occurred. President James Buchanan, a bachelor, asked his niece to serve as first lady.<sup>118</sup> When President Andrew Jackson's wife Rachel passed away, for example, his niece Emily traveled to Washington to assume the role.<sup>119</sup> Rosalynn Carter delegated the first lady's social affairs responsibilities to a staffer in order to focus on policy initiatives, such as the Equal Rights Amendment and the Age Discrimination Act, yet she remained involved in the ceremonial and traditional aspects of her role.<sup>120</sup> In neither case was there an ex-first lady looming over them. While not an impossible state of affairs, there would be a number of questions regarding the mechanics of formal disentanglement from the White House, compounded by the fact that it would remain the first lady's residence, and she would continue, probably, to be the president's companion at state dinners and when greeting foreign heads of state and their spouses.

The more effective, but even less likely method to remove a first lady, is for the president to formally discharge her. Section 105(e) requires the president to "designate" his spouse as first lady.<sup>121</sup> It is possible that the power to designate implicitly includes the power to discharge.<sup>122</sup> If a first lady refused to voluntarily recuse herself, the president might choose to discharge her, though the most realistic context in which that might occur is a divorce.<sup>123</sup> Based on the statutory language, being unmarried is the only

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116. CAROLI, *supra* note 11, at 44–45.

117. § 105(e).

118. CAROLI, *supra* note 11, at 41.

119. *Id.*

120. Jensen, *supra* note 12, at 771.

121. § 105(e).

122. *See id.* Wasserman notes that the statute, because it does not "appoint" the first lady, may not grant the president the power to discharge the first lady because power of removal is derived from power of appointment. As such, designation may not carry with it a corresponding power of discharge. Wasserman, *infra* note 128, at 1246. On the other hand, this seems like an overly simplistic understanding.

123. A president could follow the lead of executives in Peru, Argentina, and South Africa, among other countries, who "fired" their spouses, but this seems unlikely given the nature of

way for the president to have a first lady who is not his spouse. There is minimal probability that a sitting president and first lady would divorce while in office. The political ramifications alone favor separate bedrooms until the president's term ends. Though Americans divorce more often and tolerate divorce more than in past generations, a divorce unfolding in the White House would explode in media scandal.<sup>124</sup> These consequences, coupled with the personal trauma of divorce, would be enough to foreclose this as an option for removal. Therefore, the only person who may remove the first lady from office and is politically able to do so is the first lady herself.

#### IV. The Legal Effects of Failing to Define the First Lady as a Federal Officer

Whether or not certain statutes can reach the first lady is an open question. If she shares in the president's authority or functions as an executive officer in any respect, then she arguably enjoys absolute immunity for acts taken in her official capacity.<sup>125</sup> Regardless of a formal or functional analysis, the law and the judicial record identify the first lady only as an officer or employee for the specific purposes of FACA, Title V statute. As a result, the first lady remains in legal limbo for other statutes, including criminal laws.<sup>126</sup> Scholars have suggested, in turn, that the first lady should receive qualified executive immunity only when acting as a representative of the federal government,<sup>127</sup> and that a first lady should qualify as a "public official" at least for conflict of interest purposes.<sup>128</sup> This patchwork of different statuses in different contexts is not a workable policy, but it is more than our current system provides.

The few academic analyses of the issue contradict each other, and the legal confusion over the first lady's status leaves her in no-man's-land—ignored by the law and so unconstrained by it. As a result, a first lady remains free to operate as she pleases. It is not even settled whether the few rules of the office move with the president's spouse or with the occupant of

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American political life and views on marriage. See Broyde & Schapiro, *supra* note 113, at 483 n.22.

124. Renee Stepler, *Led by Baby Boomers, divorce rates climb for America's 50+ population*, PEW RESEARCH CENTER (Mar. 9, 2017), <http://pewrsr.ch/2mFFTub> (noting that the divorce rate is climbing across all age groups).

125. *Clinton v. Jones*, 520 U.S. 681, 694 (1997).

126. See *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 911 n.10 (D.C. Cir. 1993).

127. T. Natasha Patel, Note, *first lady, Last Rights? Extending Executive Immunity to the first lady*, 25 HASTINGS CONST. L. Q. 585, 586 (1998).

128. Carl Wasserman, Note, *Firing the first lady: The Role and Accountability of the Presidential Spouse*, 48 VAND. L. REV. 1215, 1217 (1995).

the first lady's role. For example, a president without a spouse may designate another family member to fill the role.<sup>129</sup> Could a president's sister or daughter be the first lady? Precedent supports such a complete transmission of first lady status, as does the idea that the first lady is an informal adviser to the president.<sup>130</sup> If that "informal adviser" role is predicated on the president's personal relationships as the 1978 Office of Legal Counsel memorandum states, then it stands to reason that a non-spouse designee, like a sister or daughter, might lack the access and advisory capability that defines the first lady as a *de facto* officer.<sup>131</sup> Carl Wasserman assumes that a non-spouse designee could not be a *de facto* officer, but anyone designated "first lady" and fulfilling the modern role with regard to her domestic and foreign functions clearly has the same statutory authority and should be held accountable to the extent of the law.<sup>132</sup>

As the law stands now, officers of the federal government are subject to a host of ethics requirements that reflect our democratic values, such as holding public servants to a higher standard, reflective of the power they wield. Laws against nepotism and criminal provisions including conflict of interest laws protect Americans from abuses of power from the lowest level of federal employee to the president. The first lady, it appears, may be the sole exception to this foundational tenet.

## A. Nepotism in the White House

Congress passed the federal law prohibiting nepotism<sup>133</sup> in the wake of President John F. Kennedy's appointment of his younger brother to Attorney General of the United States. In the decades following its passage, the Office of Legal Counsel consistently advised presidents that their wives were included under the ban on appointing relatives.<sup>134</sup> Though not explicit in the act, academics concurred and argued that the Anti-Nepotism Act made first ladies ineligible to be an officer.<sup>135</sup> Judge Buckley agreed in *American*

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129. 3 U.S.C. § 105(e).

130. CAROLI, *supra* note 11, at 39 (noting that Presidents Jackson, Van Buren, Harrison, Tyler, Taylor, Fillmore, Buchanan, and Johnson all had daughters, nieces, and daughters-in-law serve as first ladies).

131. 1 Op. Off. Legal Counsel at 20–21.

132. See Wasserman, *supra* note 128, at 1244; see also Broyde & Schapiro *supra* note 113.

133. 5 U.S.C. § 3110.

134. The Justice Department released memos issued during the Nixon, Carter, Reagan, and Obama administrations indicating that 5 U.S.C. § 3110 prevented appointment of relatives. See Josh Gerstein, *DOJ releases overruled memos finding it illegal for presidents to appoint relatives*, POLITICO (Oct. 3, 2017), <https://www.politico.com/story/2017/10/03/justice-department-legal-memos-presidents-appoint-relatives-243395>.

135. Broyde & Schapiro, *supra* note 113, at 494.

*Physicians*, noting that holding the first lady to be an “employee or officer” conflicted with the overarching purpose of the prohibition against the president appointing or employing his spouse in an agency he controlled.<sup>136</sup> This formal ban, however, has had little to no impact on first ladies’ actual functioning.

In 2017, the Office of Legal Counsel reinterpreted the Anti-Nepotism Act to permit President Donald Trump’s daughter and son-in-law to take unpaid positions as senior advisers in the White House.<sup>137</sup> Prior interpretations drew largely on a Carter-era memorandum finding that Rosalynn Carter should not be named the Chairperson to the Mental Health Committee but could be its Honorary Chairperson.<sup>138</sup> This nominal difference is symptomatic of the official blind eye often turned to first ladies who deeply involve themselves in policy and governance—appearances tending to be valued more highly than substance. The 2017 interpretation bases its exemption to the Act in 3 U.S.C. § 105(a), which gives the president discretion to make White House office appointments regardless of any other regulations related to the employment or compensation of government employees and officers.<sup>139</sup>

The 2017 reinterpretation of the Anti-Nepotism Act, though focused on presidential offspring, is relevant to first ladies because it distances the White House more generally from statutory reach. Unlike presidential children, the first lady nearly always resides in the White House, which grants her ready and easy access to the Oval Office and the president. The Office of Legal Counsel memorandum invoked the president’s ability to ask relatives’ advice on government matters unofficially and contrasted it with the imposition of formal obligations that derive from White House employment or appointment.<sup>140</sup> The Deputy Assistant Attorney General argued for the positive ethical implications of appointing relatives, rather than consulting informally with them. In the same paragraph, however, he noted that the courts have so far declined to subject first ladies, the most entrenched ad hoc presidential advisers, to those conflict of interest laws and other legal restrictions.<sup>141</sup> The memorandum thereby endorses sharing power among the

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136. Wasserman, *supra* note 128, at 1239.

137. 41 Op. Off. Legal Counsel (Jan. 20, 2017) (discussing the application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office); *see also* Gerstein, *supra* note 134.

138. 1 Op. Off. Legal Counsel at 1 (Feb. 18, 1977) (presenting a memorandum on whether Rosalynn Carter could be appointed as Chairman of the Commission on Mental Health under 5 U.S.C § 3110).

139. 3 U.S.C. § 105(a) (2006).

140. 41 Op. Off. Legal Counsel at 14 (Jan. 20, 2017).

141. *Id.*

president's family with no clear method of applying the legal restrictions Congress places on other federal officials. It also implicitly acknowledges the dangers in spreading presidential power among the president's nuclear family without exercising oversight and ethical constraints that would apply to federal officials.

While Jared Kushner and Ivanka Trump, as appointed federal officials are distinguishable from First Lady Melania Trump, a *de facto* officer for FACA purposes only, there is no clear method to check this expansion of Executive power. Increasing presidential authority in hiring to include his family members and planting a flag against congressional interference in that discretionary hiring further protects first ladies from accountability. By couching this as respect for the Executive, the interpretation actually creates a protective political penumbra around the president's nuclear family. It shields these federal officers from statutory reach; first ladies, merely *de facto* officers with unclear legal restrictions are correspondingly distanced even further from accountability.

## B. Criminal Laws

Similar confusion surrounds the applicability of criminal laws to first ladies. Laws prohibiting and regulating conflicts of interest and lobbying, for example, depend on the categorization of a person as a federal official. Because the first lady's statutory definition is at best, ambiguous, and at worst, nonexistent, it is an open question of whether any criminal laws prohibiting conflicts and corruption apply to her. The most likely scenario is that a first lady who violates these laws and is prosecuted could invoke the rule of lenity—functioning as a federal official, but not being one in name, may not be sufficient notice of the potential criminal penalties when the law is so determinedly vague.

### *i. Laws Prohibiting Conflicts of Interest*

Conflict of interest laws prohibit federal officials, including senior advisers, from holding outside employment and from personally and substantially participating in government decisions that bear on their families' financial interests.<sup>142</sup> Carl Wasserman argues that, because the first lady earns nothing for her work, she would be exempted from the prohibition on seeking outside employment even if she were a federal officer or employee.<sup>143</sup> Wasserman believes, however, that the first lady's access to the president and potential impact on policy justify applying the conflict-of-

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142. Ethics in Government Act of 1978, 5 U.S.C. §§ 101-505 (1988 and Supp. 1993).

143. Wasserman, *supra* note 128, at 1252.

interest provisions to her in the absence of formal office or employment.<sup>144</sup> After the *American Physicians* majority specifically declined to explain the first lady's legal status with regard to conflicts of interest, the Office of Governmental Ethics also refused to decide the issue.<sup>145</sup> The only hints of applicability come from the Carter administration's Office of Legal Counsel Opinion counseling that a person could be "regarded as an officer or employee in a particular case where the parties omitted [a formal appointment] for the purpose of avoiding the application of the conflict of interest laws."<sup>146</sup> This guidance does little since there is no formal appointment to be omitted for a first lady.

This loophole enables first ladies to become involved in policies that have a financial impact on themselves and on their spouses. It permits lobbying and money-making at the highest levels with little oversight and no accountability. Ponds Cosmetics paid Eleanor Roosevelt \$3,000 to sponsor thirteen of her radio programs.<sup>147</sup> Roosevelt donated the majority of the funds but retained \$500 for personal expenses and to pay her agent.<sup>148</sup> Her personal profits were not reported to the public. Hillary Rodham Clinton, while deeply involved in White House health policy, maintained a nearly \$100,000 investment in a money management fund that made profits from short-selling drug stocks.<sup>149</sup> In the latter case, the White House disclosed her investment and a number of legislators requested an ethics investigation of whether Rodham Clinton had broken the law by profiting from the declining value of drug stocks even as she made public statements about health care.<sup>150</sup> The congressmen were out of luck. These laws apply to officers and employees, and since Rodham Clinton was officially neither, she faced no legal consequences. The disclosure may have been in the spirit of transparency in government, but transparency is of limited value when it cannot curb corruption. A magazine scolded Nancy Reagan for accepting the loan of a number of designer gowns because such behavior "violated the spirit of the Government Ethics Act of 1977."<sup>151</sup> Such a rebuke is the greatest sanction available when a first lady acts unethically.

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144. Wasserman, *supra* note 128, at 1254.

145. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 911 n.10 (D.C. Cir. 1993); *see also* Letter from Stephen D. Potts, Director, Office of Government Ethics, to Congressman Christopher Cox 1, 6 (May 3, 1994) (referring to the initial requests for an investigation) (available on file at OGE).

146. 1 Op. O.L.C. at 21.

147. MAURINE H. BEASLEY, ELEANOR ROOSEVELT AND THE MEDIA 113 (1987).

148. *Id.*

149. Wasserman, *supra* note 128, at 1253 n.170.

150. *Id.*

151. Benze, *supra* note 3, at 781.

After President Trump won the presidential election, newspaper editorials and advisers urged him to divest—sell his assets, and place his business holdings and other investments into a blind trust for the duration of his presidency.<sup>152</sup> Trump took limited steps to do so and critics complained that it was all “smoke and mirrors,” even though the president is exempt from conflict of interest laws that govern other public officials.<sup>153</sup> Melania Trump is similarly exempt. In fact, if the assets were hers, there would have been even less impetus to divest because not only is she not personally elected as first lady, but first ladies hold no formal office within the executive branch. Public opinion and, arguably, the Emoluments Clause pushed President Trump to take the steps he did.<sup>154</sup> One hopes that the same would be true for any future first lady who is otherwise insulated from the political consequences of such holdings while able to enjoy all of the benefits of encouraging financially favorable policies.

Judge Buckley states that the *American Physicians* majority passed on the issue of conflict of interest laws because the question was not properly before the court.<sup>155</sup> Such a limitation has not stopped courts before and it did not stop Judge Buckley from opining that congressional intent would have included first ladies in conflict of interest provisions’ statutory reach.<sup>156</sup> This would be sound, protective reasoning in furtherance of democratic values, yet it will not succeed in further litigation. We live in a textualist age with a Supreme Court wary of any attempts to divine congressional intent, and the lone purposivist statement explaining § 105(e) grants the first lady a share of the president’s authority as she has historically exercised.<sup>157</sup> Eleanor Roosevelt, whose first ladyship long preceded such laws, demonstrates that historical precedent is no constraint at all.<sup>158</sup> Judge Buckley’s brethren in the majority further undermine his position by specifically dismissing the

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152. Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. TIMES (Feb. 3, 2017), [https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html?\\_r=0](https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html?_r=0).

153. CONG. RESEARCH SERV., CRS LEGAL SIDEBAR, CONFLICTS OF INTEREST AND THE PRESIDENCY (Oct. 14, 2016).

154. See e.g., *Blumenthal v. Trump*, No. 1:17-cv-01154, (D.D.C. 2017); see also *Citizens for Responsibility and Ethics in Washington v. Trump*, No. 1:17-cv-00458, (S.D.N.Y. 2017); *District of Columbia and Maryland v. Trump* No. 8:17-cv-01596, (D. Md. 2017).

155. *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 922 (D.C. Cir. 1993).

156. *Id.* (“To put it another way, could Congress have intended that Mrs. Clinton, alone of the twelve members of the Task Force and 340 members of the Working Group, would be entirely exempt from the reach of ethics laws that Congress has imposed on the President himself? I think not.”).

157. White House Pers. Authorization Senate Hearing, *supra* note 19, at 38 (statement of Harrison Wellford).

158. See BEASLEY, *supra* note 1487, at 113.

government's suggestion that the first lady is a "special government employee"—a definition drawn directly from the criminal conflict of interest provisions.<sup>159</sup> The dismissal was dictum, but it is symptomatic of the court's refusal to classify the first lady as a true public official or federal officer.

### *ii. Laws on Formal Lobbying*

While Ellen Wilson was dying, Congress passed legislation that she had publicly supported.<sup>160</sup> Though recorded as fulfilling a deathbed wish, it began the tradition of modern first ladies publicly wielding political influence over elected representatives other than their husbands. Besides the generally nonpartisan domestic projects that served as a hallmark of first ladies' tenures, four first ladies waded into the political fray by testifying before Congress: Eleanor Roosevelt, Rosalynn Carter, Hillary Rodham Clinton, and Laura Bush.<sup>161</sup> This modern comfort with public lobbying hints at the influence first ladies wield privately over elected officials and members of the private sector. President Harry Truman consulted his wife Bess on "every major decision he ever made," including dropping atomic bombs and launching the Marshall Plan.<sup>162</sup> The National Security Adviser during Iran/Contra suspected Nancy Reagan, well-known for involving herself in executive branch personnel decisions, of limiting the government's policies in response to the scandals.<sup>163</sup> The influence they wield over their spouses is immense, and this translates into the ability to wield power over those may hope to use the first lady to curry favor with her, with the president, or other White House aides. This power is unlike any held by other senior officials, except perhaps the White House chief of staff.

While in office, people tend to tell the first lady, "yes." There are a number of examples, but none more troubling or fascinating than Edith Wilson's minor coup d'état. When Woodrow Wilson suffered a stroke in late 1919 Edith stepped in to steer the Executive Branch and the country.<sup>164</sup> Though she recorded in her memoir that her "stewardship" involved only managing the president's communications, Edith was the gatekeeper for all

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159. *Ass'n of Am. Physicians*, 997 F.2d at 915 (dismissing 18 U.S.C. § 202(a) definition of "special government employees" as outside the scope of the inquiry for defining a Title V term).

160. CAROLI, *supra* note 11, at 152.

161. O'Connor, Nye, & Van Assendelft, *supra* note 13, at 846; *see also Forum on Early Learning: Investing in Our Children, Investing in Our Future Before the Senate Committee on Health, Education, Labor, and Pensions*, 107th Cong. 2 (2002) (Laura Bush testified before the Senate on early childhood education.).

162. O'Connor, Nye, & Van Assendelft, *supra* note 13, at 837.

163. *See Benze*, *supra* note 3, at 783; O'Connor, Nye, & Van Assendelft, *supra* note 13, at 836.

164. CAROLI, *supra* note 11, at 148.

information.<sup>165</sup> She issued executive memos in her own name, and, for a time, Woodrow's signature was so unrecognizable that rumors of forgery spread.<sup>166</sup> A housekeeper called Edith, the "Assistant President," and a senator bemoaned the "petticoat government," yet no one dared remove her.<sup>167</sup> Instead, politicians and officials alike acquiesced to her control and began requests to the president with "Dear Mrs. Wilson."<sup>168</sup> We only have Edith's word that she never made a substantive decision.<sup>169</sup> Her title paved the way for her and simultaneously froze Cabinet members, legislators, and the American public from reasserting democratic control of the presidency.<sup>170</sup>

This is the degree of power that first ladies control. Marriage, through which they acquire power, survives their spouse's term in office, as does their corresponding power to influence. For example, Nancy Reagan and Rosalynn Carter both recommended and rejected nominees for their husbands' Cabinets.<sup>171</sup> Each First Lady continued to wield influence after leaving the White House, too. Nancy Reagan publicly lobbied in support of stem cell research funding,<sup>172</sup> and Rosalynn Carter testified before the House Aging Committee in support of improved mental health services.<sup>173</sup> Federal law, however, prohibits federal employees in the Executive Branch from exerting their influence over the government.<sup>174</sup> This includes other officers

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165. CAROLI, *supra* note 11, at 149. In a modern parallel, *The Wall Street Journal* reported that first lady Melania Trump has also become a gatekeeper for the president. Internal conflict over access to the president apparently led "an informal group of confidants outside the White House . . . to call Melania Trump and ask her to pass messages to her husband, according to two people familiar with the matter." Michael C. Bender, *Trump Finds Loopholes in Chief of Staff's New Regime*, WALL ST. J. ONLINE (Dec. 5, 2017), <https://www.wsj.com/articles/trump-finds-loop-holes-in-chief-of-staffs-new-regime-1512302400>. The East Wing dismissed the idea that the first lady funnels information to President Trump; the White House did not comment. *Id.*

166. CAROLI, *supra* note 11, at 149. It bears noting, however, that the President had suffered a paralytic stroke. *Id.*

167. *Id.*

168. *Id.*

169. *See id.*

170. The Twenty-fifth Amendment, passed in 1967, established a hierarchy for the transfer of power in case of the President's incapacitation, death, or removal from office. This half-century gap implies that Americans largely accepted Edith Wilson's arguably autocratic behavior. *Cf.* CAROLI, *supra* note 11, at 152.

171. Benze, *supra* note 3, at 783, 785.

172. Vicki Kemper, *Reagan's Death May Stir Debate on Stem Cell Research*, L.A. TIMES (June 8, 2004), <http://articles.latimes.com/2004/jun/08/nation/na-stemcell8>.

173. Tamara Henry, *Former first lady Rosalynn Carter and Ohio Gov. Richard . . .*, UPI (Mar. 2, 1988), <https://www.upi.com/Archives/1988/03/02/Former-first-lady-Rosalynn-Carter-and-Ohio-Gov-Richard/2302573282000/>.

174. Wasserman, *supra* note 128, at 1254.

whose roles are defined in § 105 during and for varying lengths of time after leaving their federal posts.<sup>175</sup> As a legal ambiguity, the first lady is exempt. She may continue to lobby and exercise her influence using special information from her time in office to benefit future employers or other favored groups despite a return to private citizenship.<sup>176</sup> The first lady is a liability whether she is in the White House or not. Lobbyists may target her as a known confidante of the president or try to curry favor by helping further her projects. The first lady may also lobby government officials for her own causes or those of others. Furthermore, as her authority is not predicated on “insider knowledge” that might grow stale, it is exponentially more powerful than the knowledge or connections of a lesser official.

The first lady’s status denotes a level of authority far greater than that wielded by officers who are subject to “revolving door” provisions; if Congress actually intends to prevent “influence peddling,” then it must define the first lady as a federal official, a special government employee, or a public official subject to these ethical rules and regulations.<sup>177</sup> Failure to do so keeps the first lady outside the reach of conflict of interest laws, lobbying provisions, and even statutes prohibiting public officials from accepting bribes.<sup>178</sup>

### **C. Consequences of the First Lady’s Mismatched Form and Function**

The litany of criminal and other laws that do not apply to the first lady until Congress grants her officer status goes on, but there are distinct advantages to permitting an officer’s formal definition to overrule clear function. First ladies have the name recognition of the vice president but the sparkling sheen of someone above the political fray. As such, they serve a dual function: shouldering part of the expansive executive burden and managing aspects of the presidency better suited to someone other than the president. On the other hand, Americans prefer first ladies who adopt a traditional role rather than a policy one and the gendered expectations of what it means to be first lady are ill-suited to a male presidential spouse.

#### *i. The First Lady as a Second Vice President*

As executive power and the administrative state has grown, the prospect of the first ladyship converging with the vice presidency in terms of function

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175. Wasserman, *supra* note 128, at 1254.

176. *Id.* at 1255 (citing Archibald Cox’s fears justifying anti-lobbying measures to be applied to high level federal employees after leaving the government).

177. *Cf. id.* at 1255–56.

178. *Id.* at 1251–56.

is not only conceivable but potentially necessary to meet the demands placed on the executive. Although presidential power can be cyclical and checked by Congress, “executive power is more general and open-ended than other powers in the Constitution.”<sup>179</sup> The institutional presidency, in which the president manages a complex White House network full of specialized staffs, has both drained power from non-White House actors and increasingly centralized executive branch power within the president himself.<sup>180</sup> Such power can and must be delegated, but delegation must be to one whom the president trusts and whom the public respects as worthy of the task. In a monarchy, plenty of aristocrats would have fulfilled those requirements. In a democracy, the choices are constrained by supply as well as by law. Vice President and first lady are historically and socially well-placed to shoulder the additional burden.

First Lady Edith Roosevelt enjoyed her own office space in the White House as early as 1901.<sup>181</sup> The East Wing was constructed in 1942, and First Lady Rosalynn Carter claimed it as the Office of the First Lady.<sup>182</sup> Around the same time Rosalynn Carter formalized the First Lady’s office space, Vice President Walter Mondale became the first vice president to have an office on the White House grounds.<sup>183</sup> Before, vice presidents maintained only an office in the Senate, though vice presidents since Lyndon Baines Johnson had occupied offices in the neighboring Executive Office Building.<sup>184</sup> That vice presidents lacked regular and easy access to the president until 1978 gives weight to the number of quotations circulating about the relative worthlessness of the office. The Office of the Vice President has been compared to a “warm pitcher of spit,” “[living] in a kind of coffin, and a “cataleptic state.”<sup>185</sup> But the vice presidency has expanded in power in response to the administrative state’s increased demands placed on the single executive.<sup>186</sup> The first ladyship has expanded along with it. First Lady

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179. JOHN YOO, *CRISIS AND COMMAND* 400, 403 (2009).

180. See ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT’S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMATION* 158 (2002).

181. O’Connor, Nye, & Van Assendelft, *supra* note 13, at 852.

182. *East Wing of the White House*, THE WHITE HOUSE MUSEUM (last accessed Jan. 6, 2017), <http://www.whitehousemuseum.org/east-wing.htm>. A historical tidbit ripe for gender and political metaphors, what is now the Office of the first lady was originally built in 1942 to conceal a new underground bunker to protect the President in case of emergency. *Id.*

183. O’Connor, Nye, & Van Assendelft, *supra* note 13, at 852.

184. *Id.*

185. PAUL LIGHT, *VICE-PRESIDENTIAL POWER* 12 (1984).

186. LIGHT, *supra* note 186, at 67–78.

Hillary Rodham Clinton, one of the best examples of a powerful First Lady, had more aides than Vice President Al Gore.<sup>187</sup>

There are a number of superficial and substantive similarities between the first lady and the vice president. The first lady was an institutionalized part of the executive branch long before the vice presidential shift from legislative to executive branch under Vice Presidents Richard Nixon and Walter Mondale.<sup>188</sup> Neither position has significant prescribed duties; more specifically, each shares the same main obligation—to wait until the president needs assistance. Much as vice presidents have grown stronger through their physical and status proximity, first ladies are poised to continue expanding their purview. As mentioned, first ladies have already involved themselves in Cabinet meetings, spearheading legislation and lobbying before Congress, undertaking foreign trips, and otherwise representing the president along the campaign trail.

One might argue that vice presidents are formal Constitutional officers, elected by the people and sworn in. Their election, however, is better framed as a byproduct of the people's selection of the president.<sup>189</sup> The selection process for a first lady is slightly different—without vetting or national speculation—but they are as much a part of the ticket as the presidents' running mates.<sup>190</sup> Some studies have shown that presidential candidates' spouses may have “an independent influence on . . . vote choice.”<sup>191</sup> Formal trappings of office, such as oaths and constitutional roles, technically separate vice presidents from first ladies, but their absence did not impede the growth of first ladies' power while vice presidential power remained stunted well into the twentieth century. Those formal trappings, however, are inescapable reminders of the vice president's political role, something which affects first ladies less.

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187. Brojde & Schapiro, *supra* note 113, at 482.

188. See Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 833–35.

189. Randy Yeip, *Picking a Partner: How a Presidential Candidate's Choice of Running Mate Influences the Election*, WALL ST. J. (July 15, 2016), <http://graphics.wsj.com/elections/2016/vice-presidential-picks/> (“[O]verwhelming majorities have said a candidate's choice of running mate has no effect on their vote for president.”).

190. Historical research conducted in 1996 indicates that forty percent of first ladies had political blood in their families when they married. O'Connor, Nye, & Van Assendelft, *supra* note 13, at 839. It is plausible that these women, especially those whose husbands had begun careers in politics before their marriages, anticipated at least the possibility of higher office and may have even relished the opportunity it presented them. *Id.*

191. Barbara Burrell et al., *From Hillary to Michelle: Public Opinion and the Spouses of Presidential Candidates*, 41 PRESIDENTIAL STUDS. Q. 1, 158 (March 2011). Studies of Barbara Bush, Elizabeth Dole, and Hillary Rodham Clinton in the 1992 and 1996 presidential elections, respectively, found that Rodham Clinton was less favorably rated by the public but “had a more substantive positive impact on her husband's overall vote totals than the other spouses had on their husbands' totals. *Id.*”

*ii. The First Lady as an Apolitical Presidential Proxy*<sup>192</sup>

Vice presidents are usually inveterate politicians. They run on political tickets, make political speeches, break ties on votes often cast along party lines, and serve their presidents in their political capacity. First ladies are a different breed. Their deep connection to their presidents enables them to function as apolitical presidential proxies even while furthering the presidents' political agendas.

First Lady Michelle Obama, for example, regularly appeared on television and around the country to promote her "Let's Move!" campaign to fight childhood obesity.<sup>193</sup> Her speeches advocated for children's health, local farmers, and improving school lunches. Simultaneously, they invoked Barack Obama's presidential campaign, namely the power of ordinary people to achieve great things, i.e., to say, "Yes, we can," in the face of adversity.<sup>194</sup> Though restrained by gendered stereotypes when it comes to baldly exercising power, the same stereotypes enable them to make subtle political statements, as Michelle Obama did. The "Let's Move!" campaign attracted bipartisan support and brought nonprofits and corporations together to make healthier American food products.<sup>195</sup> Though one can only speculate on whether President Obama could have done the same thing, his chilly relationship with Congress and devotion of political capital to other issues implies that only the First Lady had the presence, visibility, and political neutrality to accomplish the task.

First ladies may be presidential proxies abroad, too. Much as a vice president might be dispatched to attend a foreign head of state's funeral, a first lady may represent the United States abroad in the president's place. Such an appearance may be blatantly substantive, like Rosalynn Carter's Latin America tour. First ladies' visits may also serve more subtle political purposes, such as Michelle Obama's visit to China to address education and poverty issues.<sup>196</sup> Though Michelle Obama's agenda could be political, she

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192. One could argue that a first lady is equally if not more intimately identified with the president than the vice president, but "apolitical" as it is used in this paper refers more to the political process of governance. A first lady is apolitical in that the power she tends to exercise domestically, internationally, and even publicly at media and social events is diplomatic and symbolic rather than legislative or executive *per se*.

193. MARYANNE BORELLI, *THE POLITICS OF THE PRESIDENT'S WIFE* 188 (2011).

194. *Id.* at 189.

195. Krissah Thompson & Tim Carman, *A healthful legacy: Michelle Obama looks to the future of 'Let's Move'*, WASH. POST (May 3, 2015), [https://www.washingtonpost.com/lifestyle/food/a-healthful-legacy-michelle-obama-looks-to-the-future-of-lets-move/2015/05/03/19feb42c-b3cc-11e4-886b-c22184f27c35\\_story.html?utm\\_term=.508074538a3d](https://www.washingtonpost.com/lifestyle/food/a-healthful-legacy-michelle-obama-looks-to-the-future-of-lets-move/2015/05/03/19feb42c-b3cc-11e4-886b-c22184f27c35_story.html?utm_term=.508074538a3d).

196. See Peter Grier, *Michelle Obama to Visit China. Do first ladies often travel solo abroad?*, THE CHRISTIAN SCIENCE MONITOR (Mar. 3, 2014), <https://www.csmonitor.com/USA/Politics/decoder2014/0303/Michelle-Obama-to-visit-China.-Do-first-ladies-often-travel-solo-abroad>.

deftly framed it as a human interest visit, writing to students on her White House blog and pitching the visit as an opportunity to tell Chinese students “about America and the values and traditions we hold dear.”<sup>197</sup> Though the visit probably involved intense political planning, its public face was one of cultural sharing and symbolism. This soft power, available to first ladies, cannot be exercised by vice presidents precisely because their offices make them political animals. Power perceived to be apolitical, or at least less politically charged, can soften the United States’ image abroad and remains a valuable tool precisely because first ladies are available and ready to serve as apolitical presidential proxies.

### *iii. Navigating Gendered Expectations and the First Gentleman*

In the 2016 presidential election, the United States came as close as it has ever been to having a female president when Hillary Rodham Clinton won the popular vote.<sup>198</sup> Had she won, America would have been faced with not only a first gentleman but also a former president occupying the East Wing. The idea was so strange that *The Washington Post* published an article suggesting that it would be more proper for Hillary Rodham Clinton’s daughter rather than husband to occupy the role of first lady.<sup>199</sup> In the United States, a first lady has never held a paid position while in the White House.<sup>200</sup> Precedent would require, then, that America’s First Gentleman similarly relinquish his professional career.

Such unemployment carries with it several issues. First ladies who venture too far into their husbands’ work are often rebuked. Rosalynn Carter never enjoyed the same levels of popularity as her predecessors despite her well-received Latin American diplomatic tour and other work.<sup>201</sup> After criticism for “socialite”-like behavior, Nancy Reagan was criticized for overcorrecting and becoming too involved in politics and White House

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197. First Lady Michelle Obama, *First Lady Michelle Obama Travels to China and Invites Young People to Participate*, THE WHITE HOUSE BLOG (Mar. 3, 2014), <https://obamawhitehouse.archives.gov/blog/2014/03/03/first-lady-michelle-obama-travels-china-and-invites-young-people-participate>.

198. TRIBUNE NEWS SERVICES, *Clinton wins popular vote by nearly 2.9 million*, CHICAGO TRIB. (Dec. 22, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-clinton-popular-vote-20161222-story.html>.

199. Colby Itkowitz, *Does an unmarried president still need a first lady?*, WASH. POST (June 10, 2015), [https://www.washingtonpost.com/news/powerpost/wp/2015/06/10/does-an-unmarried-president-still-need-a-first-lady/?utm\\_term=.164896091694](https://www.washingtonpost.com/news/powerpost/wp/2015/06/10/does-an-unmarried-president-still-need-a-first-lady/?utm_term=.164896091694).

200. *Id.* See also Valerie A. Sulfaro, *Affective Evaluations of First Ladies: A Comparison of Hillary Clinton and Laura Bush*, 37 PRESIDENTIAL STUDS. Q. 3 486, 489 (2007). In 2004, a majority of respondents to a *USA Today* poll “did not want the first lady to be a paid or unpaid adviser to the president.” *Id.*

201. Benze, *supra* note 3, at 785.

machinations. Hillary Rodham Clinton was a lightning rod with some speculating on her potential indictment during her husband's scandal-ridden administration.<sup>202</sup>

Eleanor Roosevelt noted that first ladies must be “helpmates and constant inspiration,” but prevent any suspicion that “they are running the administration.”<sup>203</sup> This societal expectation of managing such a delicate balance is one not unfamiliar to women. Extrapolating from a 2013 Pew Research Center survey on families and employment, a majority of American respondents prefer stay-at-home mothers to stay-at-home fathers, indicating a preference for men to be breadwinners and women to remain home with children.<sup>204</sup> Given these social stereotypes, a first gentleman is unlikely to be able to pull off Michelle Obama's homey and clever framing of her role as “Mom-in-Chief.”<sup>205</sup> Furthermore, Bill Clinton's role would have defied what many Americans still imagine to be the appropriate role for a man.<sup>206</sup> Whereas Americans might and do expect first ladies to hover in the background and advise her spouse, they might be less at ease with a first gentleman doing the same. With work outside the White House absolutely foreclosed and work within the White House unpaid and tenuous, a first gentleman will have little recourse.

Americans expect first ladies to dedicate themselves to representing the United States. This contrasts with other Western states with female leaders whose partners maintained their careers.<sup>207</sup> It is difficult to imagine,

202. Benze, *supra* note 3, at 783, 785; see also Broyde & Schapiro, *supra* note 113, at 483.

203. Winfield, *supra* note 11, at 336.

204. Gretchen Livingston, *Growing Number of Dads Home with the Kids*, PEW RESEARCH CENTER (June 5, 2014), <http://www.pewsocialtrends.org/2014/06/05/growing-number-of-dads-home-with-the-kids/>.

205. Robin Givhan, ‘Michelle: Her First Year as first lady’ excerpt: *The mom-in-chief effect*, WASH. POST (Jan. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011405324.html?noredirect=on>.

206. Livingston, *supra* note 204.

207. German Chancellor Angela Merkel's husband, Joachim Sauer, stays out of the spotlight and works as a physical chemist. Justin Huggler, *The man behind Merkel: Meet the German chancellor's professor husband who loves opera and stays firmly out of the limelight*, TELEGRAPH (Sept. 24, 2017), <https://www.telegraph.co.uk/news/2017/09/24/man-behind-merkel-meet-german-chancellors-professor-husband/>. The United Kingdom has had two female prime ministers: Margaret Thatcher, whose husband Denis was a businessman, and Theresa May, whose husband Phillip, is a banker. Gordon Rayner, *Margaret Thatcher: Sir Denis 'contemplated divorce' after he suffered a nervous breakdown in 1960s*, TELEGRAPH (Apr. 23, 2013), <https://www.telegraph.co.uk/news/politics/margaret-thatcher/10011297/Margaret-Thatcher-Sir-Denis-contemplated-divorce-after-he-suffered-a-nervous-breakdown-in-1960s.html>; Kalyeena Makortoff, *Who is Britain's new 'first husband'?*, CNBC (July 12, 2016), <https://www.cnb.com/2016/07/12/who-is-britains-new-first-husband.html>; Burton Shipley, husband to New Zealand's first female prime minister, is a businessman who oversees his family's development company. *President*, FIBA, <http://www.fiba.basketball/oceania/president> (last visited Nov. 4, 2017); Julia Gillard, Prime

however, Americans accepting the first gentleman putting his career before the country as Chancellor Merkel's husband did when he failed to meet Queen Elizabeth II at a state visit because he was "at work."<sup>208</sup> Gendered expectations and fear of undue influence problematize a man's presence in this role without clear legal constraints and accountability. Some might portray the gowns and trappings of first ladyship as constricting, but they conceal the power and influence that first ladies wield. When one looks past the accoutrement to reveal policy interests and involvement in governance, one also finds the roots of popular criticism and dislike.<sup>209</sup> Seventy percent of Americans rated Rosalynn Carter's Latin America trip as "excellent or good," yet she never enjoyed the levels of popularity as prior first ladies did.<sup>210</sup> First ladies who confine themselves to apolitical issues, at least in public, better maintain their popularity than those who wade into "harder issues."<sup>211</sup> These expectations confront the first gentleman who might find his ability to make an impact severely restricted by social expectations, polling data, and the role's indefiniteness.

This is not to say that a first gentleman would be unwilling or unable to shoulder the role's responsibilities. It is to say that for any first gentleman to succeed in the eyes of the public, which is almost necessary for a spouse to assist the president, American biases and stereotypes must be managed and defused. A better definition of the role could help in this regard by giving structure to the role, formally de-gendering the title, and defining expectations for its holder. These steps would also make the president more effective. If his or her spouse's involvement is viewed as fulfilling statutory duties rather than grabbing for power or asserting dominance, Americans' associated gender stereotypes might be diminished if not destroyed entirely.

## Conclusion

Eleanor Roosevelt, often credited with laying the foundations for modern first ladies, knew the power of her role: "Many a woman in her drawing room by a judiciously dropped word has made or broken a man's life and there is no question but what the public official has more to gain from the right kind of wife than has a man in almost any other walk of life.

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Minister of Australia, is unmarried, but her domestic partner is a hairdresser. *Gillard's partner Tim Mathieson 'bubbly'*, SYDNEY MORNING HERALD (June 24, 2010), <https://www.smh.com.au/national/gillards-partner-tim-mathieson-bubbly-20100624-z1o2.html>.

208. Huggler, *supra* note 207.

209. *Cf.* Benze, *supra* note 3, at 777.

210. *Id.* at 785; Jensen, *supra* note 12, at 770.

211. Benze, *supra* note 3, at 785.

She can make friends for him and oh, how she can make enemies for him.”<sup>212</sup> Eleanor’s analysis of a political marriage marks the power that every first lady since Martha Washington has wielded, but it fails to predict the independent power that first ladies would claim over time. Perhaps not even Congress understood the extent of the authority they granted to first ladies in § 105(e).

Crowds hailed Martha Washington much in the way that they might have honored royalty. In some ways, the first ladyship as currently undefined is more suitable to a monarchical system. She is inherited with the choice of president, engages in charity work but has ready access and influence over elected officials, and her ceremonial duties often distract the public from her political and diplomatic involvement. She can involve herself in affairs of state with impunity, and only she may remove herself from office. From this perspective, the accountability problem is a constitutional question that probes the heart of our democracy.

A possible resolution is to bring the first lady within the existing statutory framework so that Congress does not control her office and the president need not be relied upon for her removal. Instead, the first lady could be assigned clear statutory office within the federal government for the purposes of all laws so that there can be public accountability and adjudication of abuses. Public shame or criticism is not a sufficient deterrent to a woman determined to exploit the power of first lady, and it is no adequate safeguard for our constitutional values.

Another potential resolution is slightly more limited in scope but no less fraught. Though it could be a bureaucratic nightmare, disaggregating first ladies’ functional and formal roles could enable first ladies participate in more substantive political processes without the level of lawlessness that exists now. Strictly cabining the subject area in which a first lady may act and publicly announcing certain constraints on her behavior with respect to that activity, like conflict of interest statutes, would resolve some of the issues highlighted here. A limited disaggregation, however, still opens up the first lady to political attack because the most likely enforcers of such constraints will be the opposing political party. Furthermore, any such official announcement could raise nepotism concerns and official roles beg the question of salary and accountability. This leads the first lady directly back into the morass of noncommittal government statements on her status, abilities, and role.

The continued refusal of the branches of government to do so is alarming, but a predictable reaction to what could become a political third

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212. Winfield, *supra* note 11, at 337.

rail. Further legislation regulating the first ladyship could be seen as the government intruding into marriage or the Executive's prerogative to select advisers. The political aspect of this particular marriage contributes to the danger of passing additional legislation. Any position-specific removal tools could become political weapons, as Broyde and Schapiro noted.<sup>213</sup> Confirming that the president's power to designate has a related power of removal is of no use, because the president and most members of the executive branch will be too close to the first lady to be trusted and burdened with such responsibility. These solutions are unsatisfactory, but eliminating the role of first lady altogether would foolishly sacrifice the soft power that she can wield on behalf of the United States government. Both at home and abroad, the first lady can be a presidential surrogate who appears less partisan than her husband while carrying with her more prestige and attention than even the vice president.<sup>214</sup> As it stands, a first lady's freedom to shape her role without legal interference magnifies the natural power of her position.

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213. Broyde & Schapiro, *supra* note 113, at 509.

214. See O'Connor, Nye, & Van Assendelft, *supra* note 13, at 841–43.

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