

TOWARDS NON-RECURRENCE

Accountability Options for Trump-Era Transgressions

Protect
Democracy



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○ V We are grateful for the significant contributions to this paper from Over
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Z E accountability in building societal resilience to antidemocratic actions.
R O

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PREFACE 2022

When this paper was released one year ago, it acknowledged that American democracy had been in decline since well before the Trump administration. Various rankings have for some time been plotting the country's democratic backsliding. But against that backdrop, it also observed that the "wide-ranging misconduct at the most senior levels of government" during the past four years represented something "unrivaled in American history."

And that was before January 6th.

At the same time we were sending this paper to print, the former president and his allies were engaged in a multifaceted and systematic effort to subvert a national election.ⁱ Weeks later, the storming of the U.S. Capitol marked a final, violent attempt after preceding efforts had failed.

Those efforts principally sought to nullify states' election results through filing dozens of lawsuits predicated on fictitious claims; coercing and possibly criminally soliciting state and local officials to commit election fraud; attempting to enlist the Justice Department in a campaign to overturn results; urging state lawmakers to "decertify" results themselves; pressuring the then-vice president to delay or block the counting of electoral votes by Congress; and petitioning a Supreme Court Justice to delay certification in the event the vice president would not.ⁱⁱ As certification approached, the former president assessed how he might declare martial law in order to seize voting machines and "redo" the election. Then, he and allies incited a violent mob to ransack the Capitol.ⁱⁱⁱ Threading these efforts together was the Big Lie: the former president's Orwellian claim that *others* had in fact corrupted the election, and that he was its victim.

One year has passed; and in the wake of the torrent of transgressions surrounding the election alone—nevermind those of the four years that preceded it—not a single political leader has been held to account. Unsurprisingly, those leaders and their enablers appear emboldened.

Today, at the behest of the former president and his allies, lawmakers across dozens of states are rewriting statutes that would empower them to discard certain votes and overturn results, while others are normalizing fringe legal doctrines that purport to give state legislators the constitutional cover to do so.^{iv} Election officials who reject the Big Lie are being driven from office—including through threats of violence—or stripped of their nonpartisan authorities, while politicians who reject it are being summarily exiled from the Republican Party and stripped of their leadership positions.^v The share of Americans who believe in the Big Lie continues to increase—including a now overwhelming majority of Republican voters.^{vi}

As 100 leading democracy scholars recently observed, “radical changes to core electoral procedures... are transforming several states into political systems that no longer meet the minimum conditions for free and fair elections.”^{vii}

We developed this paper in late 2020 not to recommend a specific set of accountability schemes for the Trump era’s various and grave abuses of power, but to introduce a framework for making informed decisions: a kind of analytical guide for navigating difficult questions about accountability in service of preventing a recurrence of past abuses. Accountability for what, exactly, and for whom? Accountability by whom? Accountability by what means? But in the course of our research, we also returned to a recurring, basic insight from scholarship and international experience: pursuing accountability generates all sorts of risks, but *avoiding* accountability is riskier still. While important to assess the challenges and tradeoffs of various approaches, we posited that in light of the consequences otherwise, the pursuit of accountability for serious wrongdoing must be a given.

Absent accountability, false narratives perpetuated by political leaders harden, warping the public’s understanding of recent history. Wrongdoers, newly emboldened, recruit and mobilize others to adopt similar tactics. Some inevitably regain positions of power and repeat worse versions of past offenses. Democratic norms give way to more permissive prescriptions of acceptable political behavior. And a retreat from the rule of law predictably weakens the rule of law, legitimizing past transgressions. The absence of accountability is not neutrality, but affirmation: an invitation to wrongdoers to escalate wrongdoing and for others to follow suit.

What does it mean to hold wrongdoing to account? The paper defines accountability expansively as a *process of working towards non-recurrence*: one that “constructs a full record of wrongdoing; pursues deterrence through consequences for wrongdoing; rebuilds prescriptive norms of acceptable political behavior; and generates shared narratives.” Efforts across these dimensions would, it argues, add up to something comprehensive and self-reinforcing. If evaluated against this framework, the national response to January 6th and the campaign that preceded it suggests limited successes alongside profound failures. Consider at least three basic means of accountability.

First, while efforts to construct a comprehensive historical record are still, by and large, in their infancy, they mark an essential piece of the accountability puzzle driven by both congressional and nongovernmental fact-finding. In only a matter of months, the House January 6th Select Committee's inquiry has deposed more than 300 witnesses and obtained over 35,000 records as part of a broad inquiry into the facts and causes of the insurrection.^{viii} The investigatory work has been aided by publicly available information as a result of sustained and substantial investigations by the national press and academic and civil society groups.^{ix}

Such comprehensive fact-finding and truth-telling can combat disinformation and work towards creating a more shared reality; lay the political groundwork for institutional reforms; and generate support for other critical accountability measures, such as criminal prosecutions. Of course, progress on these dimensions is precarious. Numerous Republicans in Congress are propagating disinformation about the attack and attempting to undermine the investigation, while the former president and his allies are engaged in a legal effort to keep facts hidden from the public.^x Both the current administration and federal courts will determine whether the former president succeeds in handicapping a comprehensive accounting.

Second, criminal investigations and prosecutions have been inadequate to date. While more than 700 individuals have been charged with crimes related to January 6th, not one is a political leader responsible for mobilizing or inciting the throngs of foot soldiers who laid siege to the Capitol, or who orchestrated the attempts to subvert the election prior.^{xi} To borrow the paper's lexicon, none are "executive decision-makers" or "enablers"—only low-level "implementers." Pursuing accountability for only the latter obscures the origins of wrongdoing, entrenches a sense of impunity for the most powerful, and signals permission to other emerging political leaders to replicate offenses. There are currently no known investigations by federal law enforcement of former senior officials, despite potential wide-ranging violations of various federal statutes criminalizing seditious conspiracies, insurrection and rebellion; while the only pending criminal probe of the former president is by state prosecutors in Georgia.^{xii} Despite an ongoing national campaign of terror threats against hundreds of election workers, less than half a dozen individuals have been arrested by law enforcement.^{xiii}

Although no substitute for criminal prosecution, various civil suits have been filed against the former president and other former officials seeking compensatory and punitive damages for the January 6th insurrection's victims, as well against other nongovernmental entities that potentially violated the law in their quest to undermine the election.^{xiv}

Evidence from other countries' experiences is clear. Investigations and, if warranted, prosecutions of political leaders for grave misconduct deter similar behavior in the future (and disincentivize such actors from running for office). Particularly in countries with strong judicial systems, like ours, prosecutions reaffirm rule of law norms that govern political behavior, drawing bright lines that delineate what's acceptable from what's not. Their absence also, of course, broadcasts certain messages: mainly, that elite criminality is rewarding. As one former trial attorney with the Justice Department observed in the wake of the 2009 financial crisis: "A petty thief that evades prosecution has virtually no impact on the rule of law, but a CEO that evades prosecution ... is an advertisement."^{xv}

Third, rebuilding prescriptive norms of acceptable political conduct requires that nongovernmental parties also play a proactive role. Various professional communities across academia, business, journalism and law can refuse to rehabilitate the professional reputations of wrongdoers, financially reward transgressions, or otherwise normalize dangerous conduct. On this front, the general track record in the wake of January 6th is troubling. Of the hundreds of major American companies that pledged to suspend campaign contributions to members of Congress who voted to overturn the election, only 38 to date have done so; the rest have reneged.^{xvi} Likewise, the nation's largest law firms have contributed half a million dollars to these members alone since January 6th, including firms that pledged not to.^{xvii} Meanwhile, only one implicated lawyer's license has been suspended (though other complaints are outstanding).^{xviii}

That the former president and his consiglieres are publicly laying new groundwork for further election subversion nationwide—without any apparent fear of consequence—itself indicates a distressing failure of accountability.^{xix} Recurrence, and worse, seems likely.

January 6th continues to capture national attention. But pursuing accountability for abuses of power that may have faded from public consciousness is no less an imperative, lest we invite the next would-be autocrat to do the same. The Trump administration spied and retaliated against the press;^{xx} spied upon, interrogated, fired, and defamed its own officials suspected of being insufficiently loyal to the former president;^{xxi} politicized and weaponized independent institutions such as law enforcement and career scientists;^{xxii} used government to propagate a deluge of disinformation;^{xxiii} assumed the constitutional powers of other branches for itself;^{xxiv} inflicted grievous harm on vulnerable communities;^{xxv} condoned and incited political violence;^{xxvi} exploited access to government for extraordinary personal and financial gains;^{xxvii} and, of course, embarked on a national campaign to corrupt elections.

Not only do these represent gross violations of democratic and rule of law norms; they also constitute a vast catalogue of likely criminal misconduct among senior officials and the former president himself.^{xxviii} As more than 1,000 former federal prosecutors stated nearly three years ago in the wake of the Mueller investigation: “Each of us believes that the conduct of President Trump described in Special Counsel Robert Mueller’s report would, in the case of any other person... result in multiple felony charges.”^{xxix} None, of course, have been brought.

To be sure, accountability efforts alone will not prevent further democratic decline. For instance, the prior administration revealed the scope and gravity of longtime institutional features across the federal government vulnerable to the ambitions of a would-be autocrat, from the decades-long aggrandizement of executive power to the statutory loopholes of electoral certification by Congress.^{xxx} Equally ambitious institutional reforms will be decisive in structuring the probability of recurrence. Though even here, accountability efforts play a supportive role: exposing institutional weaknesses, illustrating their consequences, and generating support for new policies. On this front, too, the record is worrying. While packages of historic reforms have been passed by the House this year, none have been made into law.^{xxxi}

* * *

Soon after January 6th, House Republican leader Kevin McCarthy argued that “everybody across this country” shared in the blame for what happened that day.^{xxxii} He pointed to Democratic opposition to the Trump administration, social media, and a botched public safety response.

The comment suggests at least one path forward for the nation. Rather than apportioning responsibility among individuals for grave misconduct and holding that misconduct to account, responsibility can be diffused and obscured: more the result of unfortunate trends and system failures than the actions of particular actors. In a Senate investigative report on January 6th issued last June, various bureaucratic failings are examined at some length: failings across the Capitol Police, intelligence agencies, the Department of Defense, the FBI, and so on.^{xxxiii} Conspicuously absent is any assessment of any senior officials who sought to subvert the election. This conveniently obviates the need for much accountability, particularly through mechanisms that enforce consequences on specific individuals.

Hannah Arendt, in *Personal Responsibility Under Dictatorship*, regarded this diffusion of responsibility as “the quintessence of moral confusion... a highly effective whitewash of all those who had actually done something, for where all are guilty, no one is.” This method of reckoning with wrongdoing, Arendt argues, comes mostly from a place of fear: a fear of “passing judgment, of naming names, of fixing blame.” (In Mr. McCarthy’s case, likely a fear of retribution by the former president.) Of course, Arendt was less than sympathetic to it. She regarded the approach as little more than “desperate intellectual maneuvers.”

Caution and forbearance should certainly underline any efforts to pursue accountability for the Trump era’s alarming abuses of power. We hope this paper offers practical insights into the challenges, risks, and trade-offs of those efforts, and how they might be thoughtfully managed. But fear of recurrence—not accountability—should ultimately animate our own reckoning.

January 6th, 2022



EXECUTIVE SUMMARY

Countries emerging from periods of autocratic abuses of power, despite the diversity of their experiences, grapple with a common question: what measures can be taken to fortify against the specter of history repeating itself?

Both the histories of other countries and our own point towards an expansive and complex set of answers: ranging from institutional reforms such as those that rein in executive power and protect an independent judiciary, to robust investments in civil society and civic infrastructure.¹ Among the common approaches to guarding against recurrence is the pursuit of accountability.

While American democracy has been steadily de-consolidating since well before the Trump administration,² the severity of transgressions in recent years is qualitatively distinct: including wide-ranging misconduct at the most senior levels of government, some of which may have violated criminal laws; systematic violations of democratic and rule of law norms across government; and the use of government power to inflict grievous harms on specific communities. Taken together, the wrongdoing has functioned as a collective effort—unrivaled in American history—to undermine our representative, democratic form of government.

In light of the recent scope and scale of transgressions perpetrated by public officials, should the U.S. pursue accountability for wrongdoings?

The question suggests a host of others: What do we mean by accountability? Accountability for what, and for whom? Accountability by whom? Accountability by what means? This paper intends to serve as an analytical guide—clarifying the link between accountability and non-recurrence while distilling the various considerations and tradeoffs of different accountability schemes. It relies on research from both international and domestic experience, and benefited from interdisciplinary consultations with experts spanning law, political science, comparative politics, transitional justice, and conflict resolution, among other fields. Rather than prescribe a specific set of approaches, its goal is to equip policymakers, civil society leaders and citizens with a framework for making informed decisions about accountability efforts for Trump-era transgressions.

Specifically, it interrogates the following:

- **What do we mean by ‘accountability’?** In contrast to a narrow conception of accountability (e.g., only as punishing misconduct), accountability more broadly conceived is a *process* that: constructs a full record of wrongdoing; pursues deterrence through consequences for wrongdoing; rebuilds prescriptive norms of acceptable political behavior; and generates shared narratives. This broader definition offers an expansive framework for designing accountability schemes in service of non-recurrence.
- **How would accountability work towards non-recurrence?** Accountability efforts can work towards preventing a repeat of past transgressions through a variety of means. These include, for example, setting a constructive precedent for future administrations; rebuilding public trust in the rule of law and public institutions; preventing unaddressed grievances from being exploited to justify future transgressions; and ensuring wrongdoers are not reputationally rehabilitated such that they reenter government and recommit transgressions, or serve as a positive precedent for followers.
- **What are generalizable risks and limitations?** No matter the specific effort, accountability schemes generate common risks and are bound by common limitations. These include, for example, engendering mismanaged and unmet expectations; reinforcing notions among the public of an irredeemably “corrupt Washington”; and deciding some truths are more valid than others. Risks and limitations, while often unavoidable, can be anticipated and managed.

- **Which kinds of transgressions should be held to account?** Not all wrongdoing is the same; and the law may not adequately capture all misconduct that ought to be held to account. For instance, violations of democratic norms may not constitute criminal misconduct—but are also not necessarily *less* deserving of scrutiny and accountability. Further, different transgressions require different approaches to accountability. For instance, normative violations imply different tools than criminal misconduct. Transgressions should thus be qualitatively distinguished from one another.
- **Which actors should be held to account?** Individuals contribute to transgressions differently. Accountability efforts should distinguish between and respond differently to various types of wrongdoers—i.e., executive decision-makers may direct transgressions, but others are responsible for enabling and implementing those decisions. How best to prevent future wrongdoing by executives may be different than among their enablers. Non-recurrence therefore requires holding different types of actors responsible, and in different ways.
- **Which instruments are available to generate accountability?** There is a wide variety of both formal and informal instruments available to effectuate accountability—ranging from commissions of inquiry and prosecutions to lustration and public apologies. Each has distinct benefits, risks, and limitations, explored here. While these instruments are intended to promote accountability, they can also lay the groundwork towards other efforts that likewise work towards non-recurrence, like institutional reforms.
- **Who are the appropriate parties to pursue accountability?** Just as there is a wide range of mechanisms to effectuate accountability, there is an equally broad set of parties, formal and informal, who can wield these instruments—ranging from law enforcement and victims’ groups to religious figures and private sector entities. Different actors are often better positioned to employ certain accountability tools than others. No one institution or group has a monopoly on the capabilities or responsibilities to pursue accountability.
- **Who must legitimize an accountability scheme with their support?** Popular support for accountability processes—especially in a deeply polarized society—is rarely a reasonable expectation. Nor is it always necessary to make meaningful progress towards non-recurrence. Various accountability measures do not require broad-based support to accomplish their goals, but rather support from very specific constituencies. Legitimacy for accountability efforts should therefore be construed narrowly in terms of support for particular instruments wielded by particular parties.

As referenced above, accountability efforts unavoidably generate an assortment of risks. This paper aims to acknowledge and distill them. It also posits, however, that *avoiding* questions of accountability carries even steeper risks. Although the below does not offer prescriptive answers to the above questions, it does suggest that bypassing accountability altogether is unlikely to “move the country forward” in a way that effectively protects against future transgressions.³ Accountability measures, while by themselves insufficient, are a necessary dimension to democratic recovery and reform. The final section of this paper offers **eight guiding principles**, drawn from the research distilled below, to consider in the design of accountability schemes aimed at preventing a recurrence of transgressions.

Finally, this paper rests on the premise that in liberal democracies, accountability does not only happen at the ballot box. Elections are not the only means by which the public holds its officials to account. A range of formal and informal institutions—from independent law enforcement agencies and legislative oversight to professional associations and media actors—play necessary roles in generating accountability. In a diversity of forms, accountability is a lynchpin of democratic practice. The operative question, then, is not whether a democracy ought to hold its public officials to account, but how to do so in a way that best works towards non-recurrence.

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INTRODUCTION

The past four years have witnessed widespread and protracted lawbreaking and violations of democratic norms by those in government—ranging from public corruption and purges of government personnel to attacks on oversight bodies and the press, to the aggressive spread of disinformation and dangerous rhetoric.⁴ In some cases, as at the southern border, abuses may extend to gross violations of human rights.⁵

What measures can be taken now to lessen the likelihood that history will repeat itself? Despite their recent severity, these transgressions are both an expression and an accelerant of long-running institutional vulnerabilities and democratic erosion within the United States.⁶ Non-recurrence will be the result of a wide variety of foundational changes in American politics, from executive and legislative branch reforms to the rebuilding of a center-right political party. Forward-looking reforms are called for. But working

towards non-recurrence may also involve, at least in part, efforts to unearth the full scope of state-sanctioned harms and their resultant damage, and to hold those responsible to account. Plotting a better future and reckoning with the past are intertwined.

However, accountability efforts of almost any kind would unfold in a deeply polarized country currently grappling with a raging pandemic, an economic recession, escalating climate disasters, and systemic racism. Pursuits of accountability would likely be criticized as distracting from other policy priorities, punishing political disagreement and government service, spurring a downward spiral of political retribution, and coming at the expense of rebuilding the nation's social fabric. Indeed, countries uniformly face an uphill battle when attempting to reckon with their histories. Accountability efforts in most any form are messy, expensive, and time-consuming. They are also risk-laden. National accountability programs almost inevitably leave some feeling disappointed and disillusioned, risking a deepening of political cynicism. Some turn the accused into martyrs, accelerating partisan conflict. And some pave the way for even more radical candidates to enter politics.⁷

Yet history also reveals that the costs of *not* addressing serious transgressions can be even steeper. Implicated officials often maintain or regain positions of power, repeating past offenses; a sense of impunity takes hold that encourages others to follow suit; institutional vulnerabilities that permitted or facilitated the wrongdoings compound; and the rule of law and public trust therein erodes. Absent accountability, the public also loses a critical opportunity to unite around a shared understanding of “what happened,” its impact on communities across the country, and a commitment to its non-recurrence. Polarized narratives about the period entrench. While it may be tempting to leave culpability judgments to future generations, history has proven to have a short and forgiving memory.⁸ Thus, accountability, particularly when conceived of broadly—one focused on restoration and non-recurrence rather than retribution—may be instrumental in creating societal resilience to the dynamics that facilitated and characterized this period.

Given the stakes, the pursuit of accountability should be guided by a careful articulation of its goals, a consideration for the full menu of possible approaches, and an assessment of their attendant risks. **Any effort to systematically hold wrongdoers to account raises a series of questions that should be grappled with in advance.** For instance, for which kind of transgressions should officials be held accountable? Who, exactly, warrants being held accountable, and how? Who is responsible for generating accountability? What does it mean to hold people accountable?

No matter their form, accountability efforts of any kind should be driven by informed perspectives on these foundational questions, such that efforts work towards their intended goals and avoid unintended consequences. Of course, there are seldom approaches that come without meaningful downsides. This merely means that difficult choices must be made. To be sure, declining to consider accountability altogether after a period of serious abuses is also a choice—for instance, adopting a “look forwards and not backwards” policy—that carries serious risks.⁹ An analysis of options should be favored over avoidance.

This paper seeks to elucidate various approaches to pursuing accountability, drawing insights from previous U.S. and international experiences. We identify important challenges and imperfect tradeoffs that arise in such efforts. We explore the spectrum of mechanisms and actors best positioned to ensure accountability for various transgressions—and how accountability mechanisms can be wielded in ways

that responsibly manage risks. An undercurrent in this discussion is what Americans would compromise in failing to address the country's unfolding history at this juncture.

We specifically explore the following directional questions:

1. **Why accountability?**
2. **Accountability for what?**
3. **Accountability for whom?**
4. **Accountability how?**
5. **Accountability by whom?**
6. **Accountability supported by whom?**

Through each question, this paper intends to distill the various considerations that should inform the design and implementation of an accountability scheme in a deeply polarized country facing sustained autocratic threats. **The aim of the discussion is not to prescribe answers to these questions or to advocate for a particular approach. Instead, the menu of questions is intended as an analytical guide.** Our purpose for doing so is to help others generate a broad array of informed ideas rather than proposing a limited set ourselves.

A NOTE ON SCOPE

Pursuing accountability is but one piece in a larger framework of measures to address serious wrongdoing by public officials and subsequent democratic erosion.

Repairing democratic institutions and sustaining them against threats may also include reparations schemes for those who have suffered as a result of abuses of power, as well as institutional reform packages, such as to curb executive aggrandizement. Accountability measures can interact with these other efforts. For example, measures to foster truth-telling and assemble a full historical record may be essential prerequisites to reparations; and working towards a shared narrative of “what happened” can generate public support for reforms. However, these complementary measures fall outside our conception of accountability as detailed below (*I. Why Accountability?*) and are not exhaustively addressed here.

Further, many of the transgressions we consider here occurred alongside a reckoning with police use of force and racial injustice throughout the U.S., and numerous violations in related demonstrations at local levels. All are areas ripe for examination and potential accountability. To limit our scope, this paper is particularly concerned with abuses emanating from the executive branch of the federal government and related abuses that resulted in violations of the law, direct harms to people, and the erosion of democratic and rule of law norms. Using this principle, for example, we would not include deaths that occurred in state or local police custody but would include the federal militarized response to peaceful protests.

Relatedly, transgressions are time-bound to the Trump administration. This is not to suggest that the conditions which gave rise to them do not have long histories—such as America’s legacy of systemic racism, as well as aggrandizements of executive power by presidents of both parties predating Trump. They do. Nor does it suggest that certain accountability instruments explored below (e.g., commissions of inquiry) are not applicable to grappling with deep-rooted harms. They may be. To be manageably useful, however, this paper is intended for use by those considering accountability options for recent wrongdoings by those currently in power—and for when those officials exit government.

Finally, this is not a paper about prosecuting President Trump, but rather about the broad range of accountability options available and appropriate for addressing serious wrongdoings made possible and executed by officials in various positions across the federal government. While readers can apply these insights and considerations to the President, our hope is that the discussion illuminates the spectrum of possibilities for accountability beyond this singular focus.

I. WHY ACCOUNTABILITY?

What do we mean by accountability and why does it matter?

A. What do we mean by accountability? Narrowly, accountability for wrongdoing can be conceived only as assigning responsibility for wrongdoing, accepting responsibility on the part of wrongdoers, and enforcing consequences. This framing is evident in the escalating drumbeat in news media to consider investigations and prosecutions of Trump administration officials.¹⁰ However, we argue for a broader conceptualization. Accountability here is defined across four interacting dimensions as a *process* that:

1. Unearths the full scope of crimes, violations of democratic and rule of law norms, and direct harms that were facilitated by officials entrusted with the public welfare;
2. Apportions responsibility and repercussions for those transgressions in order to deter similar misconduct in the future;
3. Rebuilds public consensus around prescriptive norms that distinguish socially acceptable from unacceptable behavior in government; and
4. Lays the groundwork for building a long-term and shared narrative that facilitates a commitment to non-recurrence.

These dimensions—constructing a full record, pursuing deterrence, rebuilding prescriptive norms, and generating shared narratives—taken together offer a more expansive framework for imagining accountability schemes.

Accountability more narrowly construed may be less effective at ensuring non-recurrence. For instance, while numerous Nixon administration officials were jailed for their crimes, the U.S. may have fallen short in generating a shared narrative of the scale and seriousness of transgressions.¹¹ As one political scientist observes, most Americans associate Watergate with a break-in, but not with the full scope of criminality—from money laundering and kidnapping to war crimes and illegal surveillance of the press.¹²

Nor is there today a broad-based consensus on the severity of wrongdoing. A 2014 survey found that only 51 percent of Americans considered Watergate a “very serious matter” that exposed corruption, while 46 percent believed Watergate was “just politics—the kind both parties engage in.”¹³ For four decades, the Nixon Library referred to Watergate as a “coup” by his rivals.¹⁴ Various officials were sanitized of their transgressions and rehabilitated in the public eye, impairing the exercise of reestablishing norms that proscribe deleterious behaviors. An incomplete accountability scheme may have left U.S. democratic institutions vulnerable to continued erosion.

B. What purposes does accountability serve? First, working towards *non-recurrence of transgressions* may necessitate accountability for transgressions in some form, reestablishing that—especially for those imbued with state power and public trust—laws, norms, and public integrity matter. Public

officials that are not held accountable in some form for misconduct will likely transgress other legal and normative limits into the future, as evidence across other countries consistently suggests.¹⁵ Accountability arrangements for public officials meaningfully shape their decisions and actions, reinforcing and clarifying a constituent set of acceptable rules for political players.¹⁶ Actors know that their actions may be scrutinized by the public, and that such scrutiny may result in repercussions. This memo is chiefly concerned with this functional purpose—non-recurrence—of accountability.

Second, while accountability and national healing are sometimes framed as opposing goals, they may instead require one another. *Social restoration* requires rebuilding consensus around the prescriptive norms governing a democracy, such as the rule of law, and may benefit from the process of unearthing the full scope of transgressions and its impact on communities to construct a shared narrative around an otherwise deeply polarizing period.¹⁷ Restoration also implies addressing individual harms, as unaddressed grievances are ripe for future exploitation. Restoration may additionally have implications beyond U.S. borders, such as repairing moral credibility to condemn executive overreach and anti-democratic actions in other countries.¹⁸

Third, accountability can underscore the role and ultimate power of the public in self-government. *Public empowerment* through holding public officials to account is one remedy for combatting the political disillusionment, apathy, or powerlessness that disregard for laws and norms may have engendered. This is especially true with accountability schemes that directly involve disaffected communities. According to guidance from the U.S. government to other countries emerging from periods of abuses of state power, one of the chief benefits of accountability efforts includes “giving communities a voice in decisions that affect them,” providing a remedy for “the marginalization and disempowerment that are the root causes of... violations.”¹⁹ Accountability processes can create opportunities for citizens to exercise civic muscles and take proactive roles in strengthening the integrity of their government.

C. How would accountability work towards non-recurrence? A number of causal links tie accountability efforts to non-recurrence. Non-recurrence may be the ultimate goal of accountability efforts as envisioned here, but there exist *a variety of intermediate goals*. Any accountability program should determine which are important from the outset. Readers can think of the below as building blocks to construct a theory of change: how accountability efforts can support non-recurrence.

- **Setting a constructive and sustaining precedent for future administrations.** Accountability efforts can constitute a rejection of crimes and abuses of power committed by public officials.²⁰ They offer a signal to future administrations that their actions will not evade public scrutiny and consequence. *Weak* signals in the aftermath of evident and orchestrated lying by public officials across the Lyndon B. Johnson and George W. Bush administrations, for example, may have licensed similar transgressions by subsequent administrations.²¹ Indeed, current Trump officials have themselves cited the lack of consequences for Bush “warmongers” as proof that “even the most controversial Trump aides” will continue working in public roles.²² Ideally, accountability would also spur institutional reforms that internalize learnings to sustain constructive precedents, such as vetting processes, strengthened guardrails for institutional independence, new or expanded channels for intra-agency dissent, and so forth.

- **Rebuilding public trust in government.** In reaffirming that even the most powerful will not enjoy impunity, accountability processes can help to strengthen public trust in government, which continues to hit cross-partisan lows.²³ For example, accountability instruments can reconstruct the public perception that a single justice system impartially governs the conduct of all Americans, even those with substantial influence and wealth; and that service in government does not provide protections for lawbreaking that the general public does not enjoy. In the aftermath of the 2007–2008 financial crisis, for example, declination to pursue criminal misconduct among elite actors—carving out visible exceptions in the rule of law—served to diminish public confidence in government.²⁴ Given that political cynicism in democracies has been linked to increasing support for authoritarianism, rebuilding public trust can serve as a critical step in hedging against future autocratic threats.²⁵
- **Establishing a complete record and working towards a shared narrative.** Accountability processes may allow the U.S. to unearth a fuller scope of wrongdoings, the conditions that gave rise to wrongdoings, and the damage wrought. Such unearthing processes can work towards constructing shared narratives. Public engagement here may in turn help to prevent the U.S. from sleepwalking into similar situations into the future.²⁶ Additionally, record-setting and storytelling can help to mobilize support for otherwise unpopular but potentially important accountability measures, such as prosecutions.²⁷
- **Constructing consensus around prescriptive norms.** Accountability processes can help to rebuild consensus around democratic and rule of law norms, such that public officials and candidates who reject these principles would be similarly rejected by the public. Accountability efforts can also support norm-building within government. For instance, research suggests that the greatest opposition to torture has historically come from *within* the U.S. military and other federal agencies, such as the FBI, where an “honor-based ethic prevails”—and less so from the general public, whose opinions on torture have been mercurial.²⁸ State torture during the Bush administration was in part enabled by the collapse of intra-agency norms against the practice, suggesting that rebuilding norms may be most effective if focused internally.²⁹
- **Preventing unaddressed wrongs from being mobilized to justify future transgressions.** Actors or groups vying for power may invoke past grievances over unaddressed wrongs and feelings of disenfranchisement to justify retaliatory rhetoric, policies, and even violence.³⁰ Open wounds can be exploited to plunge the country into further political and social division and beget further crimes, democratic and rule of law norm violations, and direct harms to people by the “other side.” While accountability processes themselves can unintentionally instigate further partisan conflict (as reviewed below), they can also be used to *preempt* further conflict by preventing grievance exploitation.
- **Ensuring wrongdoers are not reputationally or professionally rehabilitated.** Accountability can break the revolving door of wrongdoers cycling in and out of power and recommitting offenses—using their time out of power to rehabilitate reputations. In the absence of accountability, history may favor glossing over the breadth and gravity of transgressions that occurred and create an environment amenable to reputationally rehabilitating wrongdoers. For example, various aides and other associates of President Nixon who had been implicated in

wrongdoings later made “comebacks.” Some, such as Roger Stone, would later be convicted for recommitting similar transgressions on behalf of future Presidents.³¹ Rehabilitation may not only allow wrongdoers to reenter influential positions and recommit transgressions, but may also signal to newcomers that law- and norm-breaking behavior is permissible.

SNAPSHOT: Accountability’s Absence and Professional Rehabilitation

Following the exposure of the Bush administration’s torture program—and the dubious legal and political rationalizations employed to justify it—various public and political commentators called for accountability. The *New York Times* Editorial Board demanded prosecutions, U.S. Senator Patrick Leahy advocated for the development of a truth commission, and numerous NGOs argued that some form of accountability was necessary for the U.S. to regain its moral credibility and to ensure that the conditions that gave rise to and helped conceal the torture program would not be legitimized, forgotten, or repeated.³² Nevertheless, following a thorough investigation into the unlawful practices, the Obama administration elected to “look forward and not backwards,” reasoning that accountability would distract from addressing the financial crisis and healthcare reform.³³

This option came at a cost. Various avenues for accountability—from civil and criminal suits to professional repercussions—were effectively blocked.³⁴ Key individuals responsible for architecting and validating the torture program evaded professional and criminal sanctions, and continued to serve in other public roles where they enabled similar abuses into the future.³⁵ Further, the broader institutional vulnerabilities that the torture practices and War on Terror exposed went largely unaddressed.³⁶ As one journalist observed, this may have “helped entrench a standard of accountability... in which breaking the law in the line of duty is unpunishable. By ‘looking forward,’ Obama has allowed Trump to look backward.”³⁷

D. Recognizing risks and limitations. Accountability efforts come with generalizable downsides. While there are risks and limitations specific to various accountability instruments (reviewed later), the below are generally constant across them. No matter the specifics of a particular effort, each of these risks and limitations may be applicable, and should therefore be considered in advance of pursuing any accountability scheme.

- **Appearing politically motivated or as “victor’s justice.”** Accountability efforts will confront claims of being politically motivated or retributive. Partisan perceptions that undermine an effort’s legitimacy can fuel further division and turn the accused into martyrs, setting the scene for further conflict.³⁸ For example, a counteraction could effectively pave the way for the accused’s political comeback or for others to fashion themselves in the accused’s image.

- **Introducing a dangerous norm of retaliatory responses.** Various commentators have already charged that accountability for Trump-era transgressions (typically conceived of as investigations and prosecutions in news media) is the other side of the “lock her up” chant directed at Hillary Clinton.³⁹ Regardless of the actual independence of accountability efforts from partisan actors, such efforts could nonetheless be perceived as partial and spark an escalating series of retributive political actions, accelerating a breakdown in the norm of mutual tolerance.⁴⁰
- **Distracting from other policy objectives.** Accountability efforts may be criticized as a distraction from other legitimately pressing policy priorities, appropriating scarce political capital. Today, for instance, accountability efforts for Trump-era transgressions—especially through instruments that are wielded by government actors, such as federal investigations and prosecutions or government-run commissions of inquiry—may be in perceived conflict with addressing the Covid-19 pandemic, climate disasters, or an economic recovery.
- **Mismanaged and unmet expectations.** Accountability efforts will inevitably leave some factions feeling disillusioned and disappointed—for example, the perception that all wrongdoers were not fully or appropriately held to account, as has been well-documented in South Africa.⁴¹ Those who lead accountability efforts risk establishing ambitious goals that are unlikely to be met, failing to adequately satisfy the expectations of various constituencies and potentially reinforcing political cynicism.
- **Reinforcing notions of a “corrupt Washington.”** In exposing the breadth of transgressions, accountability processes can reinforce public perceptions of the federal government and public officials as irredeemably corrupt. New information that comports with pre-existing beliefs tends to reinforce those beliefs.⁴² Entrenching perceptions of an incorrigible government can in turn pave the way for “outsider” and antidemocratic actors to more easily enter into politics on platforms promising to disrupt the system, as was the case with President Bolsonaro in Brazil.⁴³
- **Deciding some truths are more valid than others.** Processes that seek to account for wrongdoing by establishing a full record will elevate some perspectives at the expense of others, prompting the question of “whose truth matters.” The truth can never be “full enough” to incorporate and reconcile divergent views of history (e.g., either a violent incident was a deliberate attempt to harm or it was a legitimate act of self-defense)—suggesting that reckonings will inevitably sideline some factions who feel their stories and worldviews are left unrepresented.⁴⁴ Today’s ecosystems of disinformation generate further opportunities for actors to “hijack discourse.”⁴⁵

As reviewed above, just as there are generalized benefits to pursuing accountability—means through which accountability efforts support non-recurrence, such as through rebuilding public trust in government and preventing the rehabilitation of wrongdoers—so too are there generalized risks and limitations. However, given the centrality of accountability in liberal democracies, including commitments to the rule of law,⁴⁶ the existence of risks and limitations should not be taken here as cause for dismissing such processes altogether. Instead, risks and limitations should be acknowledged, assessed, and managed.

Taken together, these risks and limitations suggest a variety of implications for the design of accountability schemes. For example, public education may help to manage expectations, guarding against disappointment when expectations are not fully met.⁴⁷ Or, mitigating the risk of reinforcing notions of a “corrupt Washington” likely requires that the public see their government taking proactive steps not only to reveal wrongdoing, but also to rectify it. We elaborate on these and other considerations in the sections below.

II. ACCOUNTABILITY FOR WHAT?

Which kinds of transgressions should be held to account?

Accountability efforts face the daunting task of sifting through a wide-ranging scope of wrongdoings.⁴⁸ Given their breadth, it would be impossible to seek accountability, in whatever form, for every transgression that occurred.⁴⁹ Promising to do so would also risk disappointment, disillusionment, and a sense of impunity when efforts inevitably fall short. Further, soaking the public with stories of transgressions can lead to vengeance and fuel calls for victor’s justice.

At the same time, focusing only on a narrow window of transgressions would obscure the scope and scale of what transpired, increasing the likelihood that the public narrative that develops is historically inaccurate and that those most responsible are reputationally rehabilitated. Public amnesia about transgressions can further entrench political apathy and harden perceptions of impunity, giving both wrongdoers and future political actors greater space to repeat offenses. Accountability must walk a tightrope between “too much memory” and “too much forgetting.”⁵⁰ Thus, historical reckonings benefit from selectivity.

Below is a **basic method for “sifting through” across three broad and overlapping buckets of transgressions: (1) crimes and other violations of the law, (2) violations of democratic and rule of law norms, and (3) direct harms to people.** These categories go beyond mere violations of criminal or civil law to also capture normative violations that, if left unaddressed, could further undermine democratic institutions into the future. Included is a sampling of different wrongdoings organized into these three overlapping categories (i.e., not mutually exclusive). This list is meant to be illustrative rather than exhaustive.

1. Crimes and other violations of the law.

These transgressions include actions found to be unlawful by formal judicial proceedings.

For example, these might include violations of law one makes while acting in one’s official capacity, such as obstruction of justice; the performance of

forced hysterectomies in federal facilities; militarized responses to protests that violate individual rights; violations of the Emolument Clause and Foreign Gifts and Decorations Act; and the destruction of presidential and other government records.⁵¹

Or they might include violations of law one makes while acting in one's personal capacity but might otherwise be shielded from accountability on account of one's public role or powerful perch, such as campaign finance violations, various financial crimes, or tortious or even criminal harms against another person.⁵²

2. Violations of democratic and rule of law principles.

These transgressions include actions that, even if not deemed unlawful, break with the informal rules (i.e., "norms") that govern political behavior in a democracy.

These might include lying to the public; attacks on journalists; abuse of the pardon power; the personalization of government; gutting of Inspectors General offices and other oversight bodies; abuse of the appointments process; political interference in law enforcement; categorical noncompliance with congressional oversight requests; amplifying conspiracy theories and misinformation; and sowing doubt in elections.⁵³

To be sure, various transgressions in this category may also constitute criminal misconduct, overlapping with the above. For instance, abuse of the pardon power that takes the form of self-protective pardons is certainly a violation of longstanding rule of law norms, but is unlikely to constitute a crime; whereas abuse that takes the form of pardons as a result of bribery may, in fact, be criminal.⁵⁴ Likewise, harassment of the press is certainly a violation of democratic norms, but only in certain circumstances might it also be unlawful.⁵⁵

3. Direct harms to people.

These transgressions include actions that, irrespective of any statutory basis, result in grievous injuries to certain individuals and communities.

These might include the conditions at U.S. border facilities and U.S. Immigration and Customs Enforcement camps; group-targeted and dangerous rhetoric and the violence it has facilitated, including amplification of and tacit support for the actions of white supremacists; and the deliberate refusal to provide aid to "Democrat states" or U.S. territories during various national disasters (e.g., COVID-19 and climate disasters).⁵⁶

Targeted harms to certain people or groups of people may also overlap with the above. Indeed, most of these harms would likely also be considered violations of democratic and rule of law norms, and some might also be unlawful. However, they are distinguished here for two reasons: first, because of the unique victim-centered nature of the harm (as opposed to, for example, the systemic harm of sowing doubt in elections), and second, because the law as it stands may not yet criminalize certain types of transgressions that society may nevertheless consider grave.

Broadly distinguishing various types of transgressions may be helpful not only in detailing the full scope of possible wrongdoing, but also in acknowledging that certain actions may be serious enough to warrant some form of accountability whether or not current statute technically prohibits them. For instance, it may not be the case that various actions taken at U.S. border facilities were in violation of the law. Nonetheless, society may be right to decide that they ought to be considered off-limits behavior—normative violations of democratic principles, including gross violations of basic human rights—and should be met with accountability in order to deter their recurrence.

The purpose of this organizing scheme is not to suggest that some transgressions are more important to address than others. Instead, creating a taxonomy of transgressions offers a starting point to qualitatively distinguish them. Some may be deemed more important to address than others for the sake of prioritization. But just as importantly, different transgressions suggest different accountability responses. What may be appropriate to prevent the recurrence of lawbreaking may not be the same as violations of democratic norms. Different instruments (sampled below, *IV. Accountability How?*) will be better suited to different kinds of wrongdoing.

III. ACCOUNTABILITY FOR WHOM?

Which actors should be held to account?

It may be neither desirable nor feasible to see every individual implicated in abuses held accountable—and certainly not in the same way across the board. Individuals engage differently in decision-making and action-taking with respect to various transgressions: from those who make decisions and give orders to those who enable and implement them.

Pursuing “uniform” or “maximum” accountability could also generate substantial downsides, such as obscuring different levels of responsibility and the magnitude of harms that occurred, fueling claims of vengeance against one broad group of people, gutting the federal government of institutional knowledge, and disincentivizing young talent from pursuing public service. These limitations suggest a need for distinguishing types of wrongdoers. We propose three basic and broad categories. (These categories are not mutually exclusive; one can, for example, both craft and implement a decision.)

1. **Executive decision-makers.** Those who design and oversee policies and orders. These are most likely officials at the most senior levels of government, or who enjoy broad discretion in their decision-making.
2. **Implementers.** Those who carry out policies and orders in conflict with ethical or other professional duties. Consider, for example, line prosecutors at the Justice Department or ICE and CBP agents who physically separated families and executed various abuses at detention centers.⁵⁷
3. **Enablers.** The broader circle of individuals who provide necessary support for transgressions (e.g., legislators, press surrogates, and so on), many of whom may privately acknowledge the institutional and individual harms unfolding but nevertheless abstained from condemnation or interference, or affirmatively provided public cover.⁵⁸

Given that transgressions are made possible by these categories of individuals acting together, accountability may best advance non-recurrence through mechanisms that ensure “executive decision-makers” are disincentivized from abusing their powers *and also* empower “implementers” and “enablers” to resist carrying-out or otherwise making possible transgressions.⁵⁹

Additionally, pursuing accountability only for executive decision-makers may seem tempting as the easiest or cleanest line to draw, but could obscure the sometimes substantial discretion that lower-level officials have in determining whether and how to implement a policy or order. At the same time, pursuing accountability only for “implementers” or “enablers” could obscure the origins of a policy or order, entrenching a sense of impunity for the most powerful. A complete picture of *accountability for whom* should give attention to each of these actor categories.

One approach to apportioning responsibility across these categories could consider how responsibility varies according to both an individual’s orientation to a particular abuse (the “wrongdoers” categories in this section) and the nature of the resultant damage (the “wrongdoings” categories discussed in *II. Accountability for What?*). Consider the below schematic as a starting place for parsing distinctions among wrongdoers and the actions for which they may be held responsible.

Apportioning responsibility
(with examples)

		WRONGDOINGS		
		Crimes and other violations of the law	Violations of democratic and rule of law norms	Direct harms to people
WRONG-DOERS	Executive decision-makers	Violations by Secretary Wilbur Ross of criminal conflict of interest laws and prohibitions on certain false statements. ⁶⁰	Lying to the public by the President's press secretaries and chiefs of staff, and by other public officials. ⁶¹	Order by Attorney General William Barr to "disperse" peaceful protestors in Lafayette Park. ⁶²
	Implementers	White House and Department of Justice attorneys who facilitated potentially unlawful abuses of the President's pardon power. ⁶³	Department of Energy staff who advanced multi-billion dollar energy deals in support of Secretary Perry's friends and donors. ⁶⁴	Top Justice Department officials who were a "driving force" behind family separations at the U.S. border. ⁶⁵
	Enablers	Justice Department officials, including the Attorney General, who misrepresented the Special Counsel's findings of unlawful actions by the President. ⁶⁶	Federal and state public officials, including U.S. Senators, who propagated disinformation to delegitimize the 2020 election. ⁶⁷	Officials who were made aware of physical harms committed at border facilitates and did not intervene or provided misleading information to investigators. ⁶⁸

This schematic may be useful in generally mapping wrongdoings and those behind them. However, it does not give meaningful weight to differences in the nature of various wrongdoers' actions. For instance, if a wrongdoer violated a democratic norm, *how* did they violate it? Did they conspire to do so with others? Were they complicit in the violation?

Answers are surely predicated on the specific circumstances surrounding any particular transgression, but criminal law frameworks may be a useful starting place to provide more nuance on the specific nature of any individual's contributions to a harm. Even outside their traditional use in the formal legal system, criminal law frameworks can help to parse through qualitatively different actions. These frameworks, however imperfect, offer a pre-existing codification of how society understands responsibility for wrongful acts. Using them, we can examine the circumstances under which liability attaches to various offenses such as attempt, complicity, and conspiracy.

For instance, conspiracies suggest that two or more people agree to commit an unlawful act and take an "overt action" towards its completion. A conspirator can even be vicariously liable for the reasonably foreseeable subsequent acts of their co-conspirators.⁶⁹ The view of conspiracy in American law could allow those designing transgressive policies and orders ("executive decision-makers") and those more broadly involved to be liable for the downstream actions taken to implement or enforce those policies. An individual who abandons the conspiracy retains liability until they have completely and voluntarily renounced it and taken actions to thwart its success, e.g., exposed it to the relevant

authorities. (Studying the conditions of abandonment could be especially helpful in considering appropriate accountability for those who spoke out against transgressions.) Criminal law frameworks may thus be useful in refining perspectives on responsibility for wrongdoing, even if the transgressions in question are not unlawful.

Basic frameworks such as these, however, risk simplifying complex decision-making. They also risk being used to cast an inappropriately wide net of responsibility. For instance, a broad view of enablement could irresponsibly be used to assign guilt-by-association. Simply having served in a certain government administration does not itself imply wrongdoing. To the contrary, the actions of officials who persevere in protecting the integrity of their roles and institutions in the face of assaults should be affirmed.⁷⁰

IV. ACCOUNTABILITY HOW?

Which instruments are available to generate accountability?

Accountability can be effectuated broadly through formal instruments—such as government-facilitated commissions of inquiry, investigations and prosecutions by law enforcement, and vetting and lustration schemes—as well as a variety of informal ones, such as efforts by private entities to prevent the financial and reputational rehabilitation of wrongdoers.

In advanced democracies, there may be a bias to relegate accountability to formal processes carried out by the state. However, periods of abuses carried out by the state itself may decrease formal institutions' abilities to bear the weight of generating accountability alone; indeed, the public may not trust it to do so. Additionally, it may not be effective to look only to formal institutions regardless. Various other instruments are available and should be considered to support accountability processes.

A variety of instruments should be considered if an accountability scheme is to achieve any of the goals detailed earlier (*I. Why Accountability?*) in support of non-recurrence, including: (1) setting a constructive and sustaining precedent for future administrations; (2) rebuilding public trust in the rule of law and government; (3) establishing a complete record and shared narrative; (4) constructing consensus around prescriptive norms; (5) preventing unaddressed wrongs from being mobilized to justify future transgressions; and (6) ensuring wrongdoers are not reputationally or professionally rehabilitated. No single instrument will accomplish most.

A variety of instruments should also be considered given the differences in types of wrongdoings and those best positioned to address them. For instance, while law enforcement is appropriately positioned to wield certain tools (investigations and prosecutions) in service of certain transgressions (crimes and other violations of the law), they are not in a position to address most others, such as normative

violations. For those, non-governmental actors (e.g., professional associations, employers, and so forth) may have a formative role to play in sanctioning off-limits behavior.

We review investigations and prosecutions for those who violated the law (to reinforce a country's commitment to the rule of law and to deter future lawbreaking), truth-seeking initiatives (to unearth the full scope of what happened and work towards building shared narratives), vetting and lustration schemes (to ensure those responsible for wrongdoings do not maintain or reclaim public positions of power), and sanctioning efforts by private actors (to likewise prevent rehabilitation and to reconstruct or reinforce professional norms). This is by no means an exhaustive list. Instead, it is meant to introduce and illustrate a wider variety of mechanisms for effectuating accountability. We elaborate on each of these illustrative mechanisms below, highlighting the benefits and drawbacks for each.

COMMISSIONS OF INQUIRY

Rather than focusing on a single wrongdoing or perpetrator, commissions of inquiry seek to unearth the full scope and scale of wrongdoings, the individuals involved or responsible, and the societal patterns that gave rise to the transgressions.⁷¹ This broader focus enables commissions to address the systemic nature of wrongdoings and the sociopolitical dynamics underlying them.

Commissions can operate at the local and national levels. They can be formed pursuant to peace deals (e.g., Commission on the Truth for El Salvador), political agreements and related legislation (e.g., South Africa's Truth and Reconciliation Commission), executive decisions (e.g., Argentina's National Commission on the Disappeared or the U.S. Kerner Commission), executive-legislative cooperation (e.g., the 9/11 Commission), federal or state legislation (e.g., the Church Committee or the Rosewood, Florida Commission), or private efforts by NGOs (e.g., the Greensboro Commission) and religious communities (e.g., Commission of Inquiry: Brazil).⁷² However a commission is formed, that communities across the concerned country and political spectrum see themselves as represented in the mechanism is a through-line.⁷³

The South African experience is notable for offering amnesty in exchange for a full accounting of facts—premised on the notion that establishing a complete historical record, and ensuring victims and their families access to information they were previously denied, is more important than punishing all individual wrongdoers.⁷⁴ However, most investigative commissions have coupled their work with referrals to law enforcement for prosecutions, particularly for those deemed most responsible for serious crimes.⁷⁵

While commissions of inquiry are often associated with other countries' transitional or post-conflict periods, they also have a long and rich history in the U.S. At various junctures in American history, such commissions in various guises have sought to address social injustice, political malfeasance, and even foreign policy and national security issues.⁷⁶ Commissions in the U.S. have also been employed at all levels of government. At the national level, for example, Congress established the Commission on Wartime Relocation and Internment of Civilians to investigate the Franklin D. Roosevelt administration's internment and relocation of Japanese Americans and Japanese nationals. U.S. states

have also established comparable commissions.⁷⁷ Maryland’s Lynching Truth and Reconciliation Commission, which was established in 2019 by a bipartisan vote in the state’s legislature, conducts public meetings and regional hearings to investigate the state’s history of lynching.⁷⁸ At the municipal level, district attorneys in San Francisco, Philadelphia, and Boston have launched local commissions for victims of unjust policing.⁷⁹

Importantly, while commissions of inquiry are now a well-developed accountability mechanism globally—and included among the recommended approaches by the U.S. government itself when counseling other countries grappling with state-sanctioned abuses—they are of course not the only approach for constructing a full record of wrongdoings.⁸⁰ The U.S. in particular enjoys established formal mechanisms for assembling and publishing state records (although these mechanisms, such as through the U.S. National Archives, have their own shortcomings), as well as less formal but no less important approaches such as through a robust tradition of investigative journalism.⁸¹ Truth commissions have often been deployed in contexts lacking some of these established truth-telling institutions, thus providing an alternative. While some version or versions of a commission of inquiry may be useful as part of a modern U.S. accountability scheme, fortifying these other methods should also not be overlooked.

SNAPSHOT: The Rosewood Commission

In the 1990s, descendants of survivors of the Rosewood massacre teamed up with Holland & Knight, a law firm, to secure reparations for mob violence that had killed and displaced Black residents of Rosewood, Florida 70 years earlier.⁸² Recognizing that the state legislature was unlikely to touch a race-related reparations matter, they instead packaged the case as a property rights issue, focusing on the government’s failure to protect its citizens’ property from vigilante violence.⁸³

An investigation and report from Florida academics into the violence, public testimony from the survivors, and related media coverage helped convince the Florida state legislature to award \$2 million in compensation to the survivors and develop a scholarship fund for victims’ descendants.⁸⁴ The effort also gave rise to several NGOs dedicated to raising awareness about the massacre, now taught in textbooks. While the parties involved avoided calling the monetary distributions “reparations,” it is viewed today by some as a model for what reparation schemes might entail in the U.S. It may also carry lessons for methods of designing a multi-sector fact-finding and truth-telling process, contributing to the historical record, and working towards a shared public narrative.⁸⁵

Benefits of commissions of inquiry. Unlike various other instruments, commissions can be uniquely victim-focused when the transgressions under consideration are primarily characterized as direct harms to people, enabling those harmed to share their stories of abuse without the adversarial

backdrop or evidentiary standards of a trial. The act of truth-telling itself can help restore victims' dignity and communicate that they are deserving of acknowledgment and remedies. As one victim who was blinded by apartheid-era torture explained after testifying in South Africa's Truth and Reconciliation Commission (TRC), "I feel what has been making me sick all the time is the fact that I couldn't tell my story. But now...it feels like I got my sight back by coming here and telling you the story."⁸⁶

Further, commissions can help to establish a shared narrative around an otherwise polarizing period of history, driving the public to acknowledge uncomfortable truths that it might otherwise resist.⁸⁷ Here, televising or live-streaming hearings may be especially important to ensure testimonies reach a broad swath of the public. As a *New York Times* op-ed explained, the South African TRC's broadcast hearings "[were] therapeutic not only for the victims. The televised statements of victims and criminals...open[ed] the eyes of whites who ignored or justified apartheid's crimes, a crucial ingredient of reconciliation and for creating a democratic culture."⁸⁸

Commissions can also provide more avenues for public involvement than other mechanisms, particularly when local offices are established.⁸⁹ This can be instrumental in generating public support and buy-in for the commission specifically and the accountability process more generally. As one example of public outreach, the Peruvian Truth and Reconciliation Commission partnered with major universities across the country to recruit and train "Volunteers for Truth" who provided support for public hearings, helped victims to appear before the commission, and communicated information about the commission's work.⁹⁰

Finally, commissions can be less divisive than prosecutions and can come to fruition more quickly. Their findings can feed into other accountability processes and can even galvanize support for previously unpopular mechanisms, including reparations and prosecutions.⁹¹

Drawbacks and limitations of commissions of inquiry. While commissions are helpful in uncovering the broader context of transgressions, they can be disappointing to victims in the absence of other accountability mechanisms. In some post-conflict contexts, victims embraced commissions in part because perpetrators for the "most serious" crimes would still face prosecution at either national or international tribunals.⁹² Further, as in South Africa, where widespread amnesties were offered and only some cases referred for prosecution, significant prosecutorial delays and dropped cases can engender disillusionment among victims.⁹³

Additionally, it can be difficult to incorporate and reconcile so many divergent experiences into a single report or narrative.⁹⁴ For instance, the South African TRC's final report contained five volumes and still lacked sufficient space to record full testimonies, instead including only a short sentence from each of the 20,000 survivors who testified. This limitation is heightened in contexts where there are not clear "winners" and "losers." Indeed, some commissions of inquiry have gained momentum and legitimacy in post-conflict states where a clear majority can legitimize the process. In certain contexts, however, such as in Thailand, the lack of a clear and decisive end to a period of abuses (with a clear "winner") likely made commission attempts vulnerable to subversion.⁹⁵ Reconciling different and powerful factions' "truths" proved too difficult.

Finally, as a practical matter, commissions may fall short of being maximally comprehensive. But as a tougher matter altogether, commissions sideline some stories by design: by taking on the role of separating fact from fiction, and giving a platform to some but not to all, commissions assume the role of adjudicating whose truths are worth telling.⁹⁶

INVESTIGATIONS & PROSECUTIONS

Investigations and prosecutions by law enforcement are typically the most widely understood and expected form of accountability. They are vehicles for ensuring those responsible for crimes and other violations of the law are punished, and for deterring future would-be lawbreakers with the clear expectation of consequences. They also publicly reaffirm the principle that no one, including and especially those imbued with state power and public trust, is above the law.

While investigations and prosecutions may be the most expected or familiar mechanism, they are expensive, lengthy, and sometimes divisive. They are also heavily perpetrator-focused at the expense of victim involvement and, alone, cannot expose the broader context that gave rise to the concerned crimes.⁹⁷ Focusing narrowly on prosecutions would also fail to produce accountability for transgressions that were not clear violations of the law but were nonetheless serious transgressions (e.g., normative violations), or for which the evidence was made inaccessible or inadmissible in court.

At the same time, pursuing other forms of accountability in the absence of investigations and prosecutions (particularly within a process framed as seeking accountability) may entrench a sense of impunity, make it easier for those responsible to be rehabilitated and/or reclaim positions of power, and engender disappointment or disillusionment among the public.⁹⁸ Further, in contexts of human rights abuses elsewhere, victims have tended to find other accountability processes acceptable in part because those “most responsible” still faced prosecution; various instances where prosecutions were sidelined became sources of disappointment, resentment, and sometimes retaliation.⁹⁹

In many contexts, prosecutions are accepted as a necessary but certainly insufficient accountability instrument to work towards non-recurrence of transgressions.¹⁰⁰

Benefits of prosecutions. Prosecutions send potent signals that even the most powerful face repercussions on equal footing for their actions.¹⁰¹

There exists increasingly firm evidence from other countries’ experiences that prosecutions after periods of grave government misconduct deter similar behavior by future political leaders; and they possibly weaken incentives for those with nefarious objectives to run for office.¹⁰² The deterrent effects are especially pronounced in countries where the judicial infrastructure is well-developed.¹⁰³ Beliefs about the certainty of consequences (as opposed to the severity of punishment) shapes the likelihood that officials will engage in future lawbreaking.¹⁰⁴

Other evidence from contexts involving serious state-sanctioned abuses finds that evading prosecutions has long-term effects on the increased probability of recurrence.¹⁰⁵ Especially with elite criminal behavior, including in the U.S., not pursuing punishment works to undermine confidence in government by visibly carving out exceptions in the rule of law, and broadcasts to other powerful actors that criminality is rewarding.¹⁰⁶

Prosecutions also work to reaffirm social norms that govern political behavior, including the sanctity of the rule of law.¹⁰⁷ In this way, the benefits of prosecutions extend beyond their deterrent effects narrowly (i.e., disincentivizing certain officials from recommitting transgressions); they also change the normative environment more broadly, such that society generally, including other would-be lawbreakers, refrain from criminal behavior.

As the most widely understood form of accountability, prosecutions can also help to guard against the disillusionment, cynicism, and political apathy that a lack of accountability for brazen lawlessness might engender among the public. Finally, prosecutions and the media attention they garner may also help to ensure that the concerned wrongdoings are not forgotten and those responsible are not reputationally rehabilitated.

Drawbacks and limitations of prosecutions. While prosecutions may be the most anticipated form of accountability, they are also often the most controversial. If not well managed, they can appear politically motivated, exacerbate partisan division, turn the accused into martyrs, and risk a downward spiral of retaliatory political investigations. (However, while many commentators cautioning against prosecutions are specifically referring to President Trump, it remains plausible that the identified risks do not generalize to other public officials, particularly to other decision-makers, implementers and enablers who are largely unfamiliar to the public.)

Additionally, prosecutions alone focus on narrowly construed problems—the potentially unlawful actions of individual actors—rather than the broader contexts that permitted transgressions, particularly patterns of transgressions at great scale.¹⁰⁸ Prosecutions may help the public to ground transgressions in individual stories: to make them real. But they are still an incomplete solution to diagnosing and solving deeper social ills. Further, many investigations may not lead to verdicts of unlawful behavior, even if the behavior is evidently antidemocratic and a breach of long standing norms. A reliance on rule of law alone assumes that the law itself is fully reflective of democratic values to which we should hold ourselves accountable.

VETTING & LUSTRATION

Vetting and lustration involves screening government employees for their individual roles in executing or enabling past wrongdoings in order to make decisions about incorporating or dismissing such personnel in government. Vetting and lustration schemes (henceforth referred to as

“vetting”) focus on individual responsibility, but also work towards the broader goal of strengthening the real and perceived integrity and trustworthiness of public institutions.¹⁰⁹

Traditionally, vetting has often focused on rule of law institutions, such as the judiciary, law enforcement, and intelligence agencies. However, it can also more broadly span public institutions, semi-public positions (e.g., public universities or public media), and other positions of public trust. Ideally, vetting happens through tailored schemes that transparently assess individual responsibility judged against clear and impartial criteria, and provide opportunities for appealing decisions.¹¹⁰ Based on the outcome of a vetting scheme, individuals may be removed from their positions, blocked from assuming new positions, or encouraged to voluntarily resign or to confess to past wrongdoing as a form of accountability. Indeed, not all such schemes result in dismissals.¹¹¹ Some, such as those in post-communist Hungary and Poland, offered officials implicated in prior wrongdoings opportunities to continue in public service in exchange for truth.¹¹²

Vetting can be implemented in a variety of forms.¹¹³ It may occur through a review of sitting employees, a reappointment process whereby all must resign and reapply for their positions (during which their applications will be screened according to the relevant criteria), or a process limited to only new appointments. Vetting can also be wielded by a variety of actors. For example, it can occur through independent review agencies, intra-agency processes, or judicial review. Research finds that vetting is particularly effective when it not only addresses the top echelon of wrongdoers, but also “unknown collaborators” whose otherwise concealed involvement had been instrumental to transgressions and institutional erosion.¹¹⁴

Benefits of vetting. Most directly, carefully tailored vetting helps to ensure those responsible for wrongdoings are not positioned to continue effecting transgressive policies and orders, whether through maintaining their current positions or through claiming new ones in which they repeat past transgressions (or inspire others to do so).

Vetting schemes also aid in restoring public trust in government institutions, signaling an institutional break from prior policies and their architects and enablers.¹¹⁵ As the U.S. government recommends to other countries emerging from periods of autocratic abuses, vetting is “a way to build confidence in the public sector” and works towards “guarantees of non-recurrence.”¹¹⁶ Vetting schemes may also broadcast an important signal *within* government, shoring up trust among other public servants in the institutions they serve. Additionally, as with investigations and prosecutions, vetting can function as a deterrent for future misconduct, communicating to wrongdoers that they will pay professional and reputational consequences for their actions.

Drawbacks and limitations of vetting. Tailored vetting demands significant time and other resources, particularly given the volume of information needed for its thorough implementation.¹¹⁷ This suggests that wrongdoers may continue to hold positions of influence well into the future. In the U.S. context, the Trump administration’s repeated destruction of presidential and other federal records, as well as long-running information access issues stemming from a complex and burdened security classification system (including overclassification), might also present formidable obstacles in developing and implementing a tailored vetting scheme that relies on exhaustive and detailed information.¹¹⁸

Depending on its breadth, a vetting scheme may result in the loss of institutional expertise and could create a pool of well-trained but unemployed personnel.¹¹⁹ In the U.S., this could be particularly problematic for law enforcement given its expanding links with armed militia groups.¹²⁰ Additionally, in its most poorly managed form, vetting improperly dismisses individuals based on arbitrary criteria, like rank and affiliation (rather than past actions), fueling grievances and pushing well-trained professionals into alternative and radicalized lines of work, as was the case with de-Baathification in Iraq.¹²¹

In contrast to overly expansive and poorly managed vetting schemes, overly narrow ones—especially in the absence of other accountability mechanisms—could obscure the systemic nature of wrongdoings, depicting a “few bad apples” now removed from the government as wholly responsible for the concerned transgressions. This limitation underscores how, in exposing the broader context of transgressions, truth-seeking mechanisms could complement vetting efforts.

Finally, vetting schemes do not account for the previous exit of well-qualified, competent, and law abiding public officials. Given that abuses of power often include assaults on public institutions and purging of disloyal officials, efforts to strengthen those institutions may also require proactive efforts to *reenlist* public servants. Consider, for example, the many civil servants who left government service during the Trump administration—both voluntarily and forcibly.¹²² Institutions that require recovery from previous assaults and reforms to withstand future ones will necessitate more than vetting alone.

PUBLIC APOLOGIES

Public apologies involve public officials and institutions acknowledging wrongdoings that occurred, for which they take responsibility, and for the harm they caused.

Apologies may be a function of other accountability measures, including commissions, vetting, or prosecutions. In practice, however, public apologies are often delivered after significant periods of time have passed given that they “sometimes mark either the commencement or the culmination of a long, sometimes divisive period of debate and reflection in a society”—as with David Cameron’s public apology for the Bloody Sunday massacre that had occurred 38 years earlier.¹²³ Likewise, in the U.S., the Commission on Wartime Relocation and Internment of Civilians led to a public apology from Congress over 30 years after the abuses.¹²⁴

Individual apologies for harms to others may certainly play a productive role in broader efforts towards social restoration. However, atonement is likely most effective when it reflects a systemic reckoning with the past, helping to explain what has been learned and how past violations will be prevented from recurring. Thus, apologies need not only come from individual wrongdoers, but also from institutions. For example, in 2008, the Canadian government issued a formal apology for a policy that began in the late 1800s of separating indigenous children from their families as part of a

forced assimilation scheme.¹²⁵ (Of note, various other accountability instruments also featured in Canada’s efforts to reckon with this past, including a truth commission and legal settlements.)¹²⁶

In various countries, public apologies have been made by heads of state, heads of the police and intelligence services, as well as local officials.¹²⁷

Benefits of public apologies. Public apologies signal a break with a period of state-sanctioned abuses and establish that such conduct was wrong and caused harm to victims and the country. Ideally, they mark a “before and after,” helping a country to move forward without ignoring its past.¹²⁸

As public apologies, especially those on behalf of public institutions, typically contain an acknowledgement of the facts surrounding the concerned transgressions, they can help to instigate or perpetuate a national dialogue around a period that might otherwise be used to fuel partisan recriminations. This may help to construct a shared narrative (a “communal reckoning”) as part of a broader accountability process. Apologies themselves can become memorialized as a way to ensure a country continually reflects on past wrongdoings well into the future.¹²⁹ For instance, in Australia, the government’s 2008 formal apology to the “stolen generation” of Aboriginal children separated from their families is today marked by National Sorry Day, a national day of remembrance.

Apologies are considered “symbolic reparations” that, though individually insufficient to account for wrongs, can also help mobilize support for other measures, like material reparations and institutional commitments to non-recurrence.

Drawbacks and limitations of public apologies. Particularly in contexts of direct harms to people, public apologies are insufficient to restore trust with victim communities and address the long-term harm caused absent other reparative measures. Indeed, absent the latter, they risk being dismissed as hollow. Apologies may also be ineffective when there has been limited engagement with victims’ groups to ensure the apology adequately addresses the harms suffered, the parties responsible, and how recurrence will be prevented.¹³⁰

Additionally, public apologies decoupled from other actions can be a low-cost way for governments to “give lip service” to accountability while abdicating responsibility for pursuing other difficult accountability processes—such as truth-finding and truth-telling efforts, investigations and prosecutions, and so forth.¹³¹ Further, depending upon their timing and other contextual features, public apologies by individuals may appear insincere or driven by ulterior motives, such as a lighter prison sentence or laundering of one’s professional reputation.¹³²

PROFESSIONAL SANCTIONS

“Sanctioning” is the exercise of enforcing group-norms by ostracizing or otherwise punishing members who violate them. Sanctioning can represent a less formal but no less effective effort to work towards non-recurrence of wrongdoing.

Sanctioning efforts effectively expand public sector vetting into the private realm. They help to prevent those responsible for transgressions from reaping financial, professional, and/or other reputational rewards on the backs of the harms caused. Sanctioning can be expressed through a variety of means, such as naming and shaming campaigns, lobbying various entities such as professional organizations to address ethics violations and promulgate hiring recommendations responsive to ethics rules, and backchannel lobbying to companies or other entities that typically hire former public officials. For instance, among those implicated in the Watergate burglary and subsequent cover-up efforts were sixteen lawyers, some of whom were disbarred by the American Bar Association (ABA).¹³³

Sanctioning may also lay the groundwork for forward-looking reforms that establish new or clearer professional obligations and duties. In response to Watergate, the ABA promulgated significant revisions to its ethics rules, establishing new standards of expected conduct that govern the legal profession (and the licensing of lawyers).¹³⁴ The ABA also mandated that law schools teach legal ethics in order for graduates to qualify for admittance to state bars.

Importantly, and in contrast to other instruments such as investigations and prosecutions, these efforts are wielded “from within.” Sanctioning efforts, by definition, represent communities wrestling with their *own* standards and methods of enforcing them—not external standards enforced by outside parties. They therefore require that in-group members engage in difficult conversations and make difficult decisions in relation to their peers in order to establish or reinforce normative boundaries. We use the example of private sector sanctioning below.

Benefits of professional sanctioning. Private sector sanctioning ensures those responsible for transgressions are not able to financially or reputationally benefit from or in spite of their actions. Limiting lucrative or prestigious private sector career opportunities provides a constraint on career prospects for wrongdoers, preventing rehabilitation and, ultimately, the reentering of government or other influential positions such that transgressions are recommitted.

Sanctioning can also send potent signals to the broader professional community about what constitutes acceptable behavior by its members, and can thus have significant deterrent value for similar actions by other would-be transgressors. Indeed, just as prosecutions can serve this broader normative function, so too can sanctioning by private entities.

Finally, depending upon the public profile of the wrongdoer in question, sanctioning may also send a powerful signal to the public that, regardless of the fate of prosecutions and other legal mechanisms, there are consequences for one’s actions within one’s professional community. This may be especially

true when the transgressions in question are violations of democratic and rule of law norms, rather than violations of the law.

Drawbacks and limitations of professional sanctioning. Entities must assume the role and responsibility of enforcing old or constructing new group-norms; and they may opt not to.

Especially in the absence of a regular practice of doing so, sanctioning by private entities may be perceived as overzealous and disproportionately retributive. For instance, such efforts may be viewed as “blacklisting” individuals and further stoking partisan retribution. Sanctioning may also be construed as punishing and ultimately disincentivizing public service. Most commonly, perhaps, sanctioning efforts may be viewed as turning otherwise supposedly apolitical private entities into perceived political tools.

Additionally, sanctioning may risk crowding-out other forms of accountability, such as spaces for public apologies or other forms of atonement. Indeed, it may not be desirable to categorically prevent individuals who have committed wrongdoings from being rehabilitated. Sanctioning efforts and providing avenues for redemption may thus be in tension with one another and require resolution.

Given these risks and limitations, it may be helpful to consider certain principles here: for instance, encouraging sanctioning only for those most responsible for the design of particularly egregious or harmful policies or orders, rather than categorically sanctioning anyone implicated in the actions of a prior administration; establishing clear and transparent standards for sanctioning to avoid perceptions of arbitrariness or retribution; and ensuring that the relevant private entities develop and manage such accountability efforts internally, with professional community buy-in to legitimize and sustain them.

* * *

As suggested in this paper’s introduction, working towards non-recurrence will require more than accountability efforts alone, as materialized through the sampling of instruments above. However, accountability efforts can also provide important and complementary support for *other* approaches used to hedge against the recurrence of transgressions, including institutional reforms.

Impartial prosecutions, for instance, are an essential instrument used to deter future lawbreaking; and in this way, directly contribute to non-recurrence. But through the process of gathering and revealing evidence, prosecutions can also highlight for lawmakers and the public where guardrails are especially weak and need strengthening. Similarly, truth-telling efforts can work towards a shared narrative—and in this way, again, directly contribute to non-recurrence. But they can also through their storytelling generate popular support for reform ideas.

For example, in the post-Watergate era, commissions of inquiry and prosecutions, among other instruments, clarified the scope of wrongdoing and vulnerabilities in current systems, and in turn prompted far-reaching institutional reforms—such as those that reined in executive power.¹³⁵ The above instruments may be used to pursue accountability; but they may also provide support for other approaches to democratic recovery and reform.

V. ACCOUNTABILITY BY WHOM?

Who are the appropriate parties to pursue accountability?

Just as there is a wide range of mechanisms to effectuate accountability, there is an equally broad set of actors who can wield these instruments.

This implies a need to engage a variety of groups at the local and national levels to formally and informally play a role in accountability processes. Beyond government, this could include affected communities, community organizations, former government officials, religious and moral authorities, professional associations, and private sector actors. Rather than considering who is legally entrusted or *traditionally responsible* for pursuing accountability, we should consider who is *best positioned* to effect accountability and who would find that accountability most valuable. Various parties are capable of wielding various accountability instruments in service of accountability's manifold goals.

Below is a short summary intended to illustrate the variety of possible parties to consider; it is certainly not exhaustive.

Public officials & civil servants. While government actors themselves are expected parties when wielding certain instruments (e.g., investigations and prosecutions; vetting and lustration), it may be useful to conceive of their roles more broadly. For example, civil servants within institutions that have suffered a serious erosion of integrity enjoy disproportionate knowledge of events. They can therefore also meaningfully contribute to truth-telling, helping to construct a truthful chronicling of history and work towards a shared narrative. Additionally, given their insider positions, they can be instrumental in suggesting and contributing to reforms. Accountability efforts should consider methods to elevate the voices of public officials *within* institutions, including those who have not necessarily been responsible for transgressions but have borne witness and may be a reservoir of constructive ideas.

Victims' groups & affected communities. Particularly regarding transgressions that constitute direct harms to people, representatives from affected communities and victims' groups can play a central role in informing the design and implementation of relevant accountability mechanisms.¹³⁶ More broadly, measures that only elevate elite voices may not only fail in being responsive to victims' priorities and concerns, but they may also fail in building the public case for the measures in question.

Religious figures & other moral authorities. Religious leaders and other moral authorities can play a role in both overseeing certain mechanisms and galvanizing public support for and participation in the relevant processes. In South Africa, Archbishop Desmond Tutu and other religious figures helped to oversee the Truth and Reconciliation Commission, contributing to the commission's legitimacy from the outset.¹³⁷ Faith communities were also heavily involved in its design.¹³⁸ Moral authorities need not only be religious, but can include figureheads that are trusted to speak on difficult issues. These may include media personalities and former government officials.

Local and national media. Media can play a key role in publicizing and ultimately shaping public opinion surrounding accountability efforts. However, media of course engages different social spheres. For instance, various elite editorial boards have advocated for certain accountability measures in the past, such as prosecution for the architects of the Bush administration’s torture program.¹³⁹ This may have been appropriate to speak to elite audiences; but it was unlikely to have shaped public opinion more broadly. Moreover, media should not only be understood as broadcasting stories and opinions. Media can also support public outreach and engagement efforts as part of an accountability scheme, as they do with town halls and debates throughout elections.

Private sector & professional societies. The private sector and other prominent professional groups such as bar associations can play a role in ensuring those most responsible for the concerned abuses are not reputationally rehabilitated and/or financially rewarded for their actions.¹⁴⁰ Where formal instruments by government actors stop, informal instruments used by such parties can begin. For example, lustration and vetting may prohibit officials’ return into government, but not elsewhere. Thus, in addition to refusing to launder reputations, various non-governmental institutions (including professional associations, civil society groups, and so forth) may play a role in deterring future misconduct by enforcing repercussions and reinforcing norms of socially acceptable behavior.

International actors. Foreign governments and international organizations have often played both tangential and central roles in various other countries’ accountability processes. Non-domestic institutions can lend expertise and institutional support in contexts where certain resources are lacking; but can also apply pressure to push for accountability, or even pursue their own accountability efforts in the absence of domestic initiatives (or insufficient ones).¹⁴¹ This could involve efforts among international NGOs, the Inter-American Human Rights System, the United Nations, and foreign governments.¹⁴²

Different parties will be more or less adept at wielding different accountability instruments and in service of different goals. This paper has argued for a more expansive perspective along each of these dimensions: goals that support non-recurrence, the mechanisms available, and the parties involved. We lastly turn to the question of the legitimacy of accountability processes.

VI. ACCOUNTABILITY SUPPORTED BY WHOM?

Who must legitimize an accountability scheme with their support?

Absent support, an accountability process may appear politically motivated and risk entrenching division, distrust, and disillusionment. Findings may be discounted as corrupt or irrelevant, and efforts may fall short in consensus-building around what happened and why it must be prevented from

recurring. Accountability processes may backfire, turning the accused into martyrs and legitimizing the very types of behavior they sought to deter.

While these are real risks, it is also unlikely that an accountability process will ever enjoy anything close to universal popularity.¹⁴³ Especially in deeply polarized societies, such an expectation would be unreasonable. Further, while in some countries emerging from periods of state-sanctioned abuses there are clear “winners and losers,” in many others there is no such distinction, complicating the ability to garner broad-based support for most accountability efforts. For instance, in both post-conflict Lebanon and Thailand, social polarization and the political strength of various factions remained largely unchanged.¹⁴⁴ Accountability processes could not be a popular exercise of one faction adjudicating the wrongs of another.

Moreover, accountability processes may be valuable not despite enduring polarization, but rather because of it. Efforts to open new dialogues and confront controversial histories are perhaps *most* important in societies defined by deep social cleavages.¹⁴⁵

A. Construing legitimacy narrowly. Despite some of the risk dynamics referenced above, it is not a given that broad-based support is in fact a necessary criterion for the effectiveness of every accountability instrument.

For instance, investigations and prosecutions by law enforcement, even if generally unpopular, can still effectively deter future misconduct.¹⁴⁶ Sanctioning programs within certain professional communities may also, by definition, not require broad-based support. Professional law, business, or other societies that may choose not to welcome wrongdoers back into their ranks may need the support of their *own* in-group members—but not necessarily the public generally. Vetting and lustration schemes may narrowly require the support of the civil service to accomplish the goal of rebuilding the integrity of public institutions.¹⁴⁷ And so forth.

This suggests that “legitimacy” be conceived of more precisely: who exactly needs to support which efforts in order to make them successful, beyond “society” generally?

B. Generating legitimacy over time. Various instruments *through the process of being used* can also generate legitimacy. Accountability efforts that engage in public exercises of truth-seeking and truth-telling, for instance, can broaden support for themselves. For example, through the process of finding and producing evidence, support for prosecutions may change over time. Indeed, public approval of any instrument, including high-profile investigations and prosecutions, are dynamic; as they progress, public attitudes change (see, *Snapshot: Support for Prosecution in Peru*). This is not to suggest that the evolution of support is one-directional; support may also erode. But legitimacy should be understood as a dynamic rather than a static factor.

Certain accountability efforts, such as truth-telling efforts managed by respected parties (e.g., through commissions of inquiry), can also build popular support for *other* instruments. In various countries, truth commissions—through the uncovering of evidence, direct public engagement, and public storytelling—have facilitated greater public support for referral of criminal misconduct to law

enforcement for prosecutions.¹⁴⁸ Accountability instruments may interact to produce support for each other over time.

SNAPSHOT: Support for Prosecution in Peru

Former President of Peru Alberto Fujimori, who had dissolved the legislature and politicized the judiciary upon assuming office in 1990, garnered popularity for ruling by decree in the face of years of legislative gridlock.

In 2008, when a special tribunal in Peru sentenced Fujimori to 25 years in prison for human rights violations, two-thirds of polled Peruvians said they approved of his time in office.¹⁴⁹ In 2003, the Peruvian Congress had authorized criminal charges and prosecutions of Fujimori, lifting the immunity enjoyed by former presidents. The former President claimed that the investigations were “politically motivated.” Majorities in both rural and urban areas of the country disagreed with the court’s ruling, siding with the President; majorities also favored pardoning him.¹⁵⁰

Fujimori’s legacy, and the political party he led (Popular Front), have changed significantly since. While still competitive, the party—now led by his daughter—has weakened and no longer holds its once “unbreakable majority” in Congress.¹⁵¹ Center-right parties have made inroads as an alternative to the right-wing Popular Front.¹⁵² Other institutions that were formally politicized and corrupted under Fujimori, while still troubled, have been strengthened, including a more independent judiciary.¹⁵³ While Fujimori’s legacy remains unsettled, and polarization in Peru runs deep, the once broad-based support for the former President has given way to a more complicated and changing political environment.¹⁵⁴

With instruments that may require significant public support, approaches are available to generate it. Public engagement and education campaigns, including strategic communication campaigns, can play a key role.¹⁵⁵ They can explain a processes’ goals and guiding principles and the individuals overseeing an effort, and manage concerns or questions in real-time. Where appropriate, outreach can also provide avenues for the public to weigh in on the scope and design of a particular mechanism. While these efforts may never popularize accountability, they can demystify it, broadening its understanding and acceptability among the public, inoculating against misinformation and conspiracy theories, and benefiting a process’ design and implementation along the way.

PRINCIPLES

This paper has aimed to pose operative questions. We have erred on the side of providing a resource to generate and improve accountability ideas, rather than simply offering our own.

A variety of parties across government, civil society, media, and the private sector, among others, will necessarily face the kind of questions presented here. No one organization (ours included) has a full view into the universe of effective accountability options to repair and strengthen democratic institutions. Therefore, this paper presents a framework for asking and analyzing questions in support of those many potential parties.

While we do not offer prescriptive answers, some **general principles emerge for the design of accountability schemes** from our analysis above. These principles reflect key observations from the research summarized here. Indeed, these are only general principles—they would not hold in every circumstance. But given the analysis above, we nonetheless believe these may be useful considerations as the U.S. confronts difficult choices after a period of systematic transgressions by public officials.

While certainly not the *only* relevant considerations, the below are eight principles to consider in the design of any U.S. accountability scheme working towards non-recurrence.

- 1. Assessing and managing risks is more desirable than avoiding accountability efforts altogether.** Given the risks and limitations associated with accountability schemes, the bias towards inaction may feel justified. However, the risks of *not* pursuing accountability can be even steeper. A general policy of “moving on” is likely to leave the U.S. more vulnerable to a repeat of similar transgressions. Risks should therefore be carefully identified, analyzed, and managed.
- 2. Investigations and prosecutions are a necessary but insufficient accountability instrument to guard against recurrence.** Evidence is robust that prosecutions for unlawful misconduct can effectively deter future lawbreaking, including at the highest levels of government, while making exceptions for powerful political actors can increase the likelihood of future lawbreaking. At the same time, prosecutions are only relevant in circumstances where there is sufficient, admissible evidence that there have been violations of the law; they do not account for various other transgressions, including violations of democratic and rule of law norms, or the propagation of direct harms that may not be outside the bounds of the law.
- 3. Non-recurrence requires employing a broad menu of complementary, not competing instruments.** Unearthing a full and truthful record of wrongdoing, rebuilding robust social norms governing acceptable political behavior, and constructing a shared narrative may be just as important as enforcing consequences for transgressions. Thus, mechanisms ranging from commissions of inquiry to public apologies and

professional sanctioning of dangerous behavior should be considered as part of broader accountability schemes working towards non-recurrence. These mechanisms should be viewed as self-reinforcing rather than competing.

4. **Types of transgressions should be distinguished from each other, and in turn approached differently.** Abuses of power do not only come in the form of lawbreaking. Democratic and rule of law norms can be violated in ways that still may comport with the law. While these transgressions should be approached differently, they warrant equal scrutiny given that all contribute to democratic erosion.
5. **Types of wrongdoers should be distinguished from one another, without focusing on some at the expense of others.** Transgressions are made possible not only by executive decision-makers, but also by those who enable and implement transgressions. Preventing future transgressions requires that different categories of wrongdoers be evaluated for their contributions to wrongdoings. Only focusing, for instance, on high-level decision-makers and not on lower-level implementers and enablers can obscure a complete picture of responsibility, as can only focusing on enablers and implementers at the expense of those ultimately directing wrongdoing.
6. **Non-governmental and informal institutions should be engaged as parties responsible for generating accountability.** Institutions ranging from business to academia to professional associations can enforce their own rules of appropriate conduct by condemning wrongdoing and communicating clear expectations of permissible behavior. Some, like bar associations, may also enforce and/or update their own codes of conduct. These institutions, although lacking the force of government, can nonetheless promote powerful prescriptive norms that govern political behavior.
7. **Accountability efforts do not universally need to be “popular” to be effective.** The real or perceived lack of support for certain accountability efforts should not alone preclude them. Various instruments may not require general public support to accomplish their goals. For example, that investigations and prosecutions may be unpopular among some may not diminish their deterrence effect; or that vetting and lustration schemes may be viewed negatively by some may not impair their effectiveness at ensuring wrongdoers do not maintain or regain positions of power. Legitimacy for any particular accountability effort should therefore be construed narrowly and precisely.
8. **Accountability efforts can lay the groundwork for other approaches to non-recurrence, like institutional reforms.** Accountability is one avenue among many to protect against the recurrence of transgressions by officials vested with public trust. Other approaches, like institutional reforms, can find support from accountability efforts. For instance, prosecutions and commissions of inquiry can build a body of evidence and corresponding narratives that generate support for certain reforms, like limiting executive power or shoring up the integrity of elections and other weakened public institutions.



CONCLUSION

An expansive understanding of accountability—not as retributive, but as a process that works towards non-recurrence by constructing a full record, deterring misconduct, rebuilding prescriptive norms, and generating shared narratives—suggests that reckoning with wrongdoing and national healing are not invariably at-odds. More likely, they are interdependent. Accountability processes can rebuild trust in the integrity of public institutions and public officials, and their capacity to do their jobs in service of the general welfare.

Certainly, there are real risks and unavoidable costs associated with accountability efforts. This paper reviews both generalizable risks and limitations as well as those associated with distinct instruments. But there are also serious risks and costs to inaction. Any analysis that raises the former should also contend with the latter.

Finally, reversing democratic backsliding cannot be the job of accountability processes alone. But as this paper has suggested, especially as the U.S. government is near to changing executive hands, amnesia is an ineffective remedy to abuses of government power. To fortify U.S. institutions and the public against the specter of recurrence, accountability options are deserving of full and careful consideration.

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