

“THIS IS NOT NORMAL”:
THE ROLE OF LAWYER ORGANIZATIONS IN PROTECTING
CONSTITUTIONAL NORMS AND VALUES

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Lawyer organizations in the United States perform a range of functions. Some are essentially social clubs that provide networking opportunities for lawyers. Others help their members stay up to date on changes in the law and provide other educational and material benefits.¹ Through these efforts, lawyer organizations often serve as a site where lawyers learn the norms and values of the legal profession.² Some lawyer organizations also perform more outward facing functions, working through lobbying and litigation to maintain lawyers’ status and protect their economic interests. Others pursue even broader goals, working to enhance the functioning of the courts, provide access to justice, and improve the law. Some of these organizations seek to advocate on a broad range of social issues and advance the rule of law.³ (As they define that contested term.) But what role do lawyer organizations actually play in protecting constitutional norms and values in the twenty-first century?

The events surrounding Donald Trump’s presidency offer an opportunity to examine this question. For many observers, Trump presented unprecedented challenges to civil discourse, respect for the courts, the

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1. See, e.g., Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194, 197, 202–03 (2011).

2. Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 185–87 (Robert L. Nelson et al. eds., 1992).

3. See, e.g., *About the ISBA*, ILL. STATE BAR ASS’N, <https://www.isba.org/about> [<https://perma.cc/3P9X-KFA8>] (stating that the organization engages in many activities such as “supporting the courts and the rule of law”); *About*, CLEVELAND METRO. BAR ASS’N, https://www.clemetrobar.org/?pg=Bar_Association [<https://perma.cc/8VL9-B5QQ>] (stating that part of its mission is to promote the rule of law); *Our Mission*, VT. BAR ASS’N, <https://www.vtbar.org/> [<https://perma.cc/X32P-H6E2>] (stating that association “fosters understanding and respect for the rule of law”).

independence of the U.S. Justice Department, ordinary notions of morality, and constitutional norms. As one federal court judge observed following President Trump's repeated attacks on the judiciary, "This is not normal."⁴ This Article looks at what some lawyer organizations did to urge adherence to certain norms and values during this turbulent period.⁵ It also considers why these organizations acted, what impact their actions may have had, and what lessons can be learned from this experience.

Lawyers have long played an important role in defining and maintaining constitutional values in the United States. After all, many of the men who crafted and signed the U.S. Constitution were lawyers.⁶ But there is nothing inherent about being a lawyer—a representative of clients—that demands lawyers assume some responsibility for preserving the existing form of government or government institutions. Indeed, in some countries, lawyers view their responsibilities to be exclusively to their clients or may actually work to oppose the courts and the state.⁷ So where did the notion originate that American lawyers bear some responsibility to support and defend the U.S. Constitution and democratic norms?

It is possible that the origins can be found in lawyers' oaths, taken at the time of bar admission. After the American Revolution, a few states adopted attorneys' oaths that included a vow to support the laws and constitutions of the state and federal government.⁸ The oath requirement reportedly conveyed to lawyers a serious obligation because it implicated both an appeal to God and the lawyers' personal sense of honor.⁹ New York's 1848 Field Code, which was emulated in several states, codified lawyers' duties

4. C. Ryan Barber, 'This is Not Normal': US Judge Denounces Trump's Attacks on Judiciary, NAT'L L.J. (Nov. 7, 2019), <https://www.law.com/nationallawjournal/2019/11/07/this-is-not-normal-us-judge-denounces-trumps-attacks-on-judiciary/> (reporting on statement by senior U.S. District Court Judge Paul Friedman).

5. "Lawyer organizations" is used here to include both conventional bar organizations—such as state and local bar associations—and other voluntary organizations that charge dues and are comprised exclusively of lawyers, law students, and other legal services providers.

6. *Signers of the Constitution*, NAT'L PARK SERV. (July 29, 2004), https://www.nps.gov/parkhistory/online_books/constitution/introh.htm#:~:text=Other%20members%20of%20the%20group,and%20James%20Monroe%20of%20Virginia.

7. See, e.g., Reza Banakar & Keyvan Ziaee, *Iran: A Clash Between Two Legal Cultures*, in *LAWYERS IN 21ST-CENTURY SOCIETIES: NATIONAL REPORTS* 581, 587–88, 597–98 (Richard L. Abel et al. eds., 2020); Nathalie Bernard-Maugiron & Menna Omar, *Egypt: The Long Decline of the Legal Profession*, in *LAWYERS IN 21ST-CENTURY SOCIETIES*, *supra*, at 578–79.

8. Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 *GEO. J. LEGAL ETHICS* 3, 22 (2009).

9. *Id.* at 25.

to include support of the U.S. Constitution.¹⁰ In 1908, when the American Bar Association (“ABA”) adopted a model lawyers’ oath, it stated: “I will support the Constitution of the United States and the Constitution of the State.”¹¹ Today, all but three states’ lawyers’ oaths require lawyers to swear they will uphold the U.S. Constitution, and eleven states also require lawyers to “defend” it.¹²

This conception of lawyers’ civic responsibilities is echoed in their state professional codes of conduct and was subsequently extended to include protection of the judicial system, democratic values, and civil society. Alabama’s 1887 Code of Ethics, which later became the basis for the ABA’s *Canons of Ethics*, identified a lawyer’s first duty to be to “support the constitution and laws of this State and the United States.”¹³ In 1908, the ABA’s *Canons of Ethics* further espoused the view that the integrity of the justice system was of critical importance to the maintenance of the republic and stressed the role lawyers played in this regard.¹⁴ It also stated in the Preamble: “The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied.”¹⁵ The claim about lawyers’ civic role became more explicit in the ABA’s 1969 *Model Code of Professional Responsibility* which stated: “Lawyers, as guardians of the law, play a vital role in the preservation of society.”¹⁶ By 1983, the ABA’s *Model Rules of Professional Conduct* stated that lawyers were “officer[s] of the legal system” with a “special responsibility for the quality of justice” and that a lawyer “should further the public’s understanding of and confidence in the rule of law and the justice system because legal

10. *Id.* at 31–32.

11. COMMITTEE ON CODE OF PROFESSIONAL ETHICS, FINAL REPORT TO THE AMERICAN BAR ASSOCIATION 575 (1908).

12. *See Oaths of Admission for All Fifty States*, <https://cdn.ymaws.com/www.inbar.org/resource/resmgr/litigation/Oaths.pdf> [<https://perma.cc/GC8Z-4FSM>].

13. ALA. CODE OF ETHICS (1887).

14. This idea that lawyers have some responsibility for the functioning of the courts may have also come, in part, from Alabama’s original Code of Ethics, which stated in its first paragraph that “[t]he purity and efficiency of judicial administration, which under our system, is largely government itself,” depend as much upon attorneys as the courts. ALA. CODE OF ETHICS (1887).

15. ABA CANONS OF PRO. ETHICS PREAMBLE (1908).

16. MODEL CODE OF PRO. RESP. Preamble (AM. BAR ASS’N 1969). By “society” it meant a “free and democratic society.” *Id.*

institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”¹⁷

Of course, part of the reason for this claim about lawyers’ special role was to enhance the legal profession’s status and justify its continuing efforts to self-regulate. Indeed, self-regulation, the ABA’s *Model Rules of Professional Conduct* contend, helps maintain independence from government domination and “is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”¹⁸ The organized bar’s messages regarding lawyers’ special role in supporting the courts and ensuring the continuation of our constitutional democracy are taught in law school, reinforced by lawyers’ oaths, and repeated by lawyer organizations. Regardless of the reasons for the organized bar’s claims, these messages seemingly resonate with many lawyers.¹⁹

Before proceeding, it is important to distinguish among lawyer organizations. The ABA is the country’s largest voluntary lawyers’ organization, with more than 400,000 lawyer and non-lawyer members.²⁰ It plays an outsized role in lawyer regulation and lobbying on behalf of the legal profession, even though only about 22% of all U.S. lawyers belong to the organization.²¹ Every state also has a state bar organization. In thirty-one jurisdictions and the District of Columbia there are mandatory organizations to which all lawyers must belong, while the rest have voluntary state bar associations.²² There are also hundreds of other

17. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS’N 1983).

18. *Id.*

19. See, e.g., W. West Allen, *We Are the Guardians of the Constitution*, FED. BAR ASS’N (Oct. 1, 2020), <https://www.fedbar.org/blog/presidents-message-we-are-the-guardians-of-the-constitution/> [<https://perma.cc/6SE7-BJFZ>].

20. See *Consumer FAQs*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/consumer_faqs/ (last visited May 12, 2022). The ABA’s members include paralegals, law students, and lawyers who are not admitted to practice in the United States. See *Dues & Eligibility*, AM. BAR ASS’N, https://www.americanbar.org/membership/dues_eligibility/ (last visited May 12, 2022).

21. See Molly McDonough, *ABA Executive Director Urges Increased Efforts to Reverse Decline in Paid Membership*, A.B.A. J. (Feb. 5, 2018), https://www.abajournal.com/news/article/aba_midyear_meeting_jack_rives_membership [<https://perma.cc/9YK7-9LR8>].

22. See Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf. [<https://perma.cc/7U5L-32ZC>]. A few states with mandatory

voluntary lawyer organizations. These are typically composed of lawyers who work in the same geographic area (e.g., the Los Angeles County Bar Association), practice setting (e.g., the Association of Corporate Counsel), or specialty (e.g., the National Association of Criminal Defense Lawyers). There are also voluntary lawyer organizations composed of lawyers who share an affinity based, *inter alia*, on gender, sexual identity, ethnicity, or religion.²³ Some voluntary lawyer organizations are composed of like-minded lawyers who share common political, ideological, or human rights goals.²⁴

Two further points about bar organizations deserve mention. Since the first mandatory state bars were formed in the 1920s, some lawyers have been deeply unhappy about being compelled to belong.²⁵ To address constitutional objections to mandatory bars based on constitutional freedom of speech and association claims, the United States Supreme Court held in *Keller v. State Bar of California* that dues collected by the mandatory state bars can be used for activities pertaining to regulating the legal profession and improving the quality of legal services, but cannot constitutionally be used to “fund activities of an ideological nature which fall outside of those areas of activity.”²⁶ Lawyers may be able to obtain a partial dues refund if state bars stray into political or ideological activities.²⁷ Thus, many state bars have limited their public statements and other advocacy to issues directly affecting the legal profession or improving the quality of legal services.²⁸ In a 2018 decision, the U.S. Supreme Court expressly overruled

bars also have voluntary state bar organizations. *See, e.g., About NCBA*, N.C. BAR ASS’N, <https://www.ncbar.org/about> [<https://perma.cc/64VV-4TEG>].

23. Examples include the Women’s Bar Association, the National LGBT Bar Association, the Hispanic National Bar Association, and the Catholic Bar Association.

24. Examples include the Republican National Lawyers Association and the National Lawyers Guild. *See About the RNLA*, REPUBLICAN NAT’L LAWS. ASS’N, <https://www.rnla.org/about-rnla> (last visited May 12, 2022) (stating that association “builds the Republican Party goals and ideals through a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates”); *About*, NAT’L LAWS. GUILD, <https://www.nlg.org/about/> [<https://perma.cc/B4GJ-8WKK>] (stating its mission is to use law “as an effective force in the service of the people by valuing human rights . . . over property interests”).

25. DAYTON D. MCKEAN, *THE INTEGRATED BAR* 42 (1963); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 2–3.

26. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

27. *See, e.g., Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748, 752 (5th Cir. 2021).

28. *See, e.g., ARIZ. SUP. CT. R. 32(c)(9)* (2021) (member who objects to particular State Bar lobbying activities may request refund of portion of annual dues allocable to those activities); RULES

the case on which *Keller* was based,²⁹ encouraging a spate of lawsuits by lawyers challenging state bar activities and the constitutionality of mandatory state bars.³⁰ This may have caused state bars to become even more cautious about issuing statements that can be viewed as political or ideological.

Although voluntary bars are not legally limited in their ability to speak out on controversial issues, there are still some practical limits because the organizations typically include members with a wide range of political views and personal values. These organizations may find it hard to agree on whether to publicly advocate on issues that diverge from their traditional remit, which is primarily concerned with lawyers' interests and secondarily with improvement of the administration of justice.³¹ While lawyers, as a group, are left-leaning,³² many individual lawyers are most decidedly not. Heterogeneous lawyer organizations may be constrained from speaking out on issues due to concerns about losing members.³³ This concern may be particularly salient in recent years, when membership in many voluntary bar organizations is declining.³⁴

This Article looks at lawyer organizations' efforts to preserve and defend certain norms and values from the time of Donald Trump's presidential campaign in 2016 through the aftermath of the 2020 presidential election. Its focus is not on what role lawyers *should* play in defending constitutional norms and values or which values these

REGULATING THE FLA. BAR 2-9.3(c) (2018) (same); N.H. BAR ASS'N CONST. Art. I (limiting the activities of mandatory bar "to those matters which are related directly to the administration of justice; the composition and operation of the courts; the practice of law and the legal profession").

29. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018). In *Janus*, the Supreme Court overruled *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), which the Court had previously relied on to conclude that mandatory bar dues could constitutionally be used to fund activities germane to the goals of a mandatory state bar. *See Keller*, 496 U.S. at 13–14.

30. *See, e.g., Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021); *Schell v. Chief Just. & Justs. of Okla. Sup. Ct.*, 11 F.4th 1178 (10th Cir. 2021); *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021); *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021); *Fleck v. Wetch*, 937 F.3d 1112 (9th Cir. 2019).

31. *See, e.g., About Us*, KAN. BAR ASS'N, <https://www.ksbar.org/page/aboutus> [<https://perma.cc/9SX2-R3V6>].

32. *See Adam Bonica et al., The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 292 (2016).

33. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 231–32 (1996).

34. *See, e.g., Dean Martinez, Bar Associations Are Outdated: It's Time to Reinvent*, BLOOMBERG L. (Apr. 28, 2021), <https://news.bloomberglaw.com/us-law-week/bar-associations-are-outdated-its-time-to-reinvent> [<https://perma.cc/QTG9-CWJM>].

organizations should defend. Rather, it considers how lawyer organizations actually responded to Trump’s challenges to certain constitutional norms and values and which ones they chose to defend.³⁵ The term “constitutional norms and values” is used here to mean those emanating, at least in part, from the U.S. Constitution as the lawyer organizations defined them. They include, *inter alia*, the idea that individuals are entitled to equal protection and due process under the law, government discrimination based on race or national origin is unacceptable, and the judiciary, as a co-equal branch of government, should be independent from the executive and entitled to some measure of respect. They also include the idea that presidential elections should be determined by the voters, the outcome of these elections should result in the peaceful and orderly transition of power, and the results of these elections should be confirmed according to state laws and the terms of the U.S. Constitution.

This Article begins in Part I by looking at the role bar organizations historically have played in protecting the courts and certain constitutional values. This history sheds light on why some lawyer organizations were particularly engaged in the defense of constitutional norms and values during the Trump years. Part II looks at how lawyer organizations responded—or failed to respond—to the challenges presented to certain constitutional norms and values during that period. It focuses on four situations that garnered significant attention: the President’s attacks on judges, his immigration policies, racial violence during his presidency, and his efforts to overturn the results of the 2020 presidential election. The Article looks at which lawyer organizations spoke out, what they said, and the reasons why they said it. It also identifies new lawyer organizations that emerged when some attorneys viewed existing lawyer organizations as insufficiently vocal. Part III asks when and why lawyer organizations will speak out to defend constitutional norms and values. It describes the reasons some organizations will advocate for change and suggests that those reasons help to explain lawyer organizations’ advocacy during the Trump era. It also considers why certain lawyer organizations could speak out while others would not—or could not do so. Some of the answers can be found in the organizations’ histories, their internal characteristics, their relationship to the state, and their self-interest. This Part also identifies to whom the lawyer

35. For example, notwithstanding the implications for democracy of President Trump’s sustained attacks on journalists, this was not a topic on which most bar organizations spoke out.

organizations were speaking and who—beyond the organizations’ members—may have actually heard their statements. The Conclusion raises questions for future research and considers a few lessons that can be learned from this experience.

I. A BRIEF HISTORY OF U.S. LAWYER ORGANIZATIONS

Bar associations as we know them today did not begin to emerge until the 1870s.³⁶ The first was the Association of the Bar of the City of New York (NYCB),³⁷ which elite lawyers founded in 1870 “in response to revelations of widespread political and judicial corruption in New York City.”³⁸ Other elite and exclusive local bar associations followed, including the Bar Association of San Francisco (1872), the Chicago Bar Association (1874), the Boston Bar Association (1877), the Los Angeles County Bar Association (1878), and the ABA (1878).³⁹ Voluntary state bar associations began to appear in 1876, starting with the New York State Bar Association.⁴⁰ By the turn of the twentieth century, there were forty state bar associations, although some had few members.⁴¹

Herbert Harley, a lawyer and newspaper editor, viewed low state bar membership as a problem. After learning about the Law Society of Upper

36. A few lawyer associations formed in the colonies even before the American Revolution. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 315 (2d ed. 1985); GERARD W. GEWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 12 (1979); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 278, 285 (1950); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 169–70 (1953). In the early years of the republic, lawyer associations formed for “social, library, or disciplinary purposes.” HURST, *supra*, at 285; *see also Our History*, PHILA. BAR ASS’N, <https://philadelphiabar.org/page/AboutHistory?appNum=2> [<https://perma.cc/7E35-HAPJ>] (stating that Philadelphia Bar Association was originally formed by lawyers “who gathered together to share law books and professional resources”). These associations mostly disappeared from 1830s-1860s, due in part to popular beliefs during this period that a “profession” with special status seemed undemocratic. *See, e.g.*, TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES AND PROFESSIONAL EMPOWERMENT* 61–62 (1987); POUND, *supra*, at 191–205, 244–45.

37. *See* HALLIDAY, *supra* note 36, at 64–65.

38. MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 6 (1988).

39. *See* RICHARD L. ABEL, *AMERICAN LAWYERS* 44–45 (1989); HALLIDAY, *supra* note 36, at 64–65; *About the Los Angeles County Bar Association*, L.A. CNTY. BAR ASS’N, <https://www.lacba.org/about-us-menu/about-us> [<https://perma.cc/C82M-U6WF>].

40. POWELL, *supra* note 38, at xiv; Marvella C. Webber, *Origin and Uses of Bar Associations*, 7 A.B.A. J. 297 (1921).

41. ABEL, *supra* note 39, at 46.

Canada, which included all Ottawa lawyers, he began a crusade in 1914 to gain acceptance of the idea of an “integrated” state bar.⁴² He envisioned a unified, self-governing body to which all lawyers would be required to pay dues and belong.⁴³ Harley believed a compulsory statewide association, well-financed from dues and possessing the power to discipline members, could influence state legislatures far better than a voluntary, financially weak bar organization.⁴⁴ In 1921, North Dakota’s legislature created the first mandatory state bar.⁴⁵ Some lawyers bitterly objected to compelled membership in state bars and litigated their legality from the outset.⁴⁶ Nevertheless, many states established mandatory bars in the next three decades through statutes or court orders.⁴⁷

Meanwhile, the ABA sought to maintain itself as an exclusive organization. In 1911, after it inadvertently admitted three Black members, the ABA allowed these members to remain but required future applicants to identify themselves by race.⁴⁸ It did not adopt a non-discrimination policy with respect to membership until 1943 and required applicants to identify their race until 1956.⁴⁹ Some other state and local bar associations also excluded Black lawyers, leading to the formation of small Black lawyer organizations in a few states starting around 1900.⁵⁰ Black lawyers formed the Cook County Bar Association in 1914 and the National Bar Association in 1925.⁵¹

In the early twentieth century, the ABA and some other bar organizations began to work to create more demanding admission standards

42. MCKEAN, *supra* note 25, at 21, 30–31, 33–35. The Law Society of Upper Canada also formulated standards for admission, discipline, and legal education. *Id.* at 33; Schneyer, *supra* note 25, at 9, 18.

43. MCKEAN, *supra* note 25, at 22.

44. *See id.* at 36.

45. *Id.* at 23.

46. *Id.* at 85.

47. Court-ordered mandatory bars had the advantages (for the bar) that the associations were “set up where it was untouchable by executive or legislative action or by popular initiative” and its funds were in no danger of being captured by either branch. *Id.* at 48.

48. *See* Edward J. Littlejohn & Donald L. Hobson, *Blacks Lawyers, Law Practice, and Bar Associations—1844 to 1970: A Michigan History*, 33 WAYNE L. REV. 1625, 1679 (1987); *see also* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 66 (1976).

49. Littlejohn & Hobson, *supra* note 48, at 1679; *see also* AUERBACH, *supra* note 48, at 65–66.

50. Littlejohn & Hobson, *supra* note 48, at 1680.

51. *Id.*; *History*, COOK CNTY. BAR ASS’N, <https://cookcountybar.org/about-us/history> [<https://perma.cc/9DAL-3U53>].

as part of the professional project.⁵² The professional project aimed to raise lawyers' public image and social status.⁵³ As Richard Abel explains, "[a]n integral part of the professional project was the attempt to construct an image of the lawyer as a professional by defining who could become lawyers and by shaping their behaviors."⁵⁴

During World War I, lawyers as a group were largely supportive of the war effort.⁵⁵ After the war, however, differences among lawyer organizations began to appear. In 1920, the NYCB sought to defend five socialist members of the New York State Legislature who the Legislature suspended in its opening session.⁵⁶ In contrast, the ABA was seemingly "addicted to xenophobic patriotism."⁵⁷ The ABA formed a committee on American citizenship in 1922 "to stem the tide of radical, and often treasonable, attacks upon our Constitution, our laws, our courts, our law-making bodies, our executives and our flag."⁵⁸ In 1927, following criticism of the bar's silence after the controversial conviction of Italian anarchists Sacco and Vanzetti,⁵⁹ the ABA's president responded in his annual address, a few days after their execution, that the ABA's policy was to remain aloof from "controversial matters of a political nature."⁶⁰

Over time, new lawyer organizations emerge when existing organizations fail to meet some lawyers' needs. This can be seen in the formation of Black affinity bars and in the emergence of bar associations with more open membership policies in the early twentieth century.⁶¹ Likewise, when ABA members who represented corporate interests

52. ABEL, *supra* note 39, at 46–47, 54, 69; POWELL, *supra* note 38, at 36.

53. ABEL, *supra* note 39, at 163.

54. *Id.* at 158. For some bar leaders, the project involved an effort to make it more difficult for eastern European immigrants—predominantly Italians and Jews—to become lawyers. *Id.* at 69, 71, 85–87.

55. See AUERBACH, *supra* note 48, at 103–05.

56. *Bar Association Upholds Socialists*, N.Y. TIMES, Jan. 13, 1920; *Defending Everyone to Defend Democracy*, N.Y. CITY BAR, <https://digital.nycbar.org/44thstreetnotes/150thanniversary/defending-everyone-to-defend-democracy/> [https://perma.cc/QF6P-YTPX].

57. AUERBACH, *supra* note 48, at 131.

58. *Id.*

59. *Id.* at 145.

60. *Id.*

61. For example, the New York County Lawyers Association was founded in 1908 "by lawyers who disapproved of the clublike atmosphere and the exclusive membership policies" of the NYCB and felt "they had no authentic voice or organized influence in matters so deeply affecting their vital interests." POWELL, *supra* note 38, at 29.

vehemently opposed many aspects of President Franklin Roosevelt’s New Deal,⁶² some lawyers formed the National Lawyers Guild (NLG) in 1937. The NLG’s leaders saw a need for a progressive organization to champion workers’ rights and civil liberties and believed the ABA could not be reformed.⁶³ Specialty bars such as the American Immigration Lawyers Association (AILA) also began to emerge in the 1940s, in part because members felt that existing bars were not meeting their needs.⁶⁴

During World War II, lawyer organizations supported the war effort.⁶⁵ Following the war, the ABA continued with its anti-communist agenda, adopting a resolution in 1948 that any lawyer who provided assistance to the world communist movement was unworthy of ABA membership.⁶⁶ The ABA also recommended that lawyers be required to take a loyalty oath and that lawyers who had once been a member of the Communist Party should be investigated to determine their fitness to practice law.⁶⁷ According to one ABA leader, the ABA “has taken the leadership in attempting to remove communist lawyers from the practice of law.”⁶⁸ The NYCB publicly opposed the ABA’s loyalty oath proposal.⁶⁹

During this period of intense anti-communist anxiety, a few bar associations sought to protect individual rights. In 1947, the NLG “took sharp issue” with the President’s loyalty program for federal employees, claiming it constituted an “unwarranted investigation of employees’ legal political associations and beliefs.”⁷⁰ In 1948, when Congress considered expanding the loyalty program to all Americans, the NLG appeared before Congress and spoke out against it.⁷¹ A few other bar associations also spoke

62. AUERBACH, *supra* note 48, at 191–93. According to Auerbach, many of these lawyers feared that the New Deal threatened the very fabric of government. *Id.* at 191–92.

63. *See id.* at 199; *History*, NAT’L LAWS’ GUILD, <https://www.nlg.org/about/history/> [https://perma.cc/2D6A-AT5F].

64. *See* Levin, *supra* note 1, at 201.

65. Even the NLG was silent on the issue of Japanese internment. *See As the Rule of Law Erodes, ABA Forum Points to Perils When Lawyers Stay Silent*, AM. BAR ASS’N (2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/as-the-rule-of-law-erodes--aba-forum-points-to-perils-when-lawye/> [https://perma.cc/C4NN-7Q8N].

66. AUERBACH, *supra* note 48, at 233–34.

67. *Id.* at 238.

68. *Id.* at 253.

69. POWELL, *supra* note 38, at 236–37.

70. Bob Bailey, *The Lawyers Guild through the Eyes of the FBI*, 34 GUILD PRAC. 117, 119 (1977).

71. *See* A HISTORY OF THE NATIONAL LAWYERS’ GUILD 1937-1987, at 26 (1987).

out to a limited extent. The NYCB issued a report in 1948 recommending due process protections for individuals whose loyalty was the subject of Congressional investigations.⁷² That same year, the Chicago Bar Association's (CBA) Civil Rights Committee published guidelines addressing some of the excesses of the Army-McCarthy hearings and maintained that judicial rules of procedure should be followed.⁷³ In 1954, the CBA and NYCB opposed proposed legislation that would erode the civil rights of individuals appearing before congressional committees and expand the government's ability to wiretap individuals.⁷⁴

The 1960s and 1970s was a period of increased social activism by a few lawyer organizations. In 1963, President John Kennedy met with bar leaders to encourage them to take a more active role in civil rights issues.⁷⁵ The Lawyers' Committee for Civil Rights Under Law was created following that meeting.⁷⁶ In the mid-1960s, the NYCB strongly supported the Civil Rights Act of 1964 and provided a platform for Martin Luther King, Jr. to speak to its members.⁷⁷ In 1970, members of the Bar Association of San Francisco (BASF) voted to intensify its community-oriented activities and to concern itself with issues such as poverty, racism, the environment, social conflict, and crime prevention.⁷⁸ In 1973, the Boston Bar Association (BBA) took on a greater commitment to civil rights by assuming responsibility for the

72. POWELL, *supra* note 38, at 236.

73. HALLIDAY, *supra* note 36, at 228. But the CBA leadership "demurred" when the committee suggested that the guidelines be sent to a wider audience such as the press, other bar associations, and Congress. *Id.* at 229. For a detailed discussion of the tension within the CBA over these issues, see Terence C. Halliday, *The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era*, 1982 AM. B. FOUND. RES. J. 911.

74. HALLIDAY, *supra* note 36, at 230–33.

75. During that meeting, President Kennedy urged the lawyers "to move the struggle for the protection of civil rights from the streets to the courts." The 244 lawyers who attended included fifty Black lawyers and leaders of state bars and the ABA. *History, LAWS. COMM. FOR CIVIL RIGHTS*, <https://www.lawyerscommittee.org/history/> [<https://perma.cc/E3QV-S6KA>].

76. *Id.*

77. *Dr. Martin Luther King, Jr. at the New York City Bar Association*, N.Y. CITY BAR (2015), <https://www.nycbar.org/media-listing/media/detail/dr-martin-luther-king-jr-at-the-new-york-city-bar-association> [<https://perma.cc/NT6Z-PT77>]; POWELL, *supra* note 38, at 50, 101. In the late 1960s, the NYCB elected as president Francis Plimpton, who was a "dove" on the Vietnam war. Plimpton is credited with expanding the purview of the NYCB to include a broad range of social issues. POWELL *supra* note 38, at 95–96.

78. KENNETH M. JOHNSON, *THE BAR ASSOCIATION OF SAN FRANCISCO: THE FIRST HUNDRED YEARS 1872-1972*, at 142 (1972).

Boston Lawyers’ Committee for Civil Rights.⁷⁹ In the mid-1970s, the BBA’s president called for the association to take more stands on controversial issues, and the BBA responded accordingly.⁸⁰

The ABA also began to shift toward more liberal causes by the 1970s, partly due to changes in its membership. In 1978, it supported federal funding of abortion, gun control measures, and a federal act that would have abolished the death penalty.⁸¹ In the 1980s, it urged a special counsel investigation of the Iran-Contra affair, which implicated President Ronald Reagan’s administration.⁸² In 1990, its House of Delegates voted to support a resolution opposing governmental interference with a woman’s decision to terminate a pregnancy.⁸³ Fifteen hundred members resigned in protest.⁸⁴ The ABA House of Delegates also passed a pro-choice resolution in 1992, contributing to the loss of 840 members in the next two weeks.⁸⁵

This move to the left by some lawyer organizations was not lost on conservative lawyers. In 1982, conservative law students founded the Federalist Society. By 1985, it was not only opening chapters at law schools, but was creating its first lawyers’ division in Washington D.C.⁸⁶ It currently claims to have more than 60,000 lawyer, law faculty, and law student members.⁸⁷ The Federalist Society focuses primarily on reform of the legal order to align with conservative principles, rather than—as is typical of most bar associations—the legal profession or the practice of law.⁸⁸ It attempts to

79. Mark S. Brodin, *A History of the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association*, BOS. BAR J., Jan-Feb. 1988, at 9, 10.

80. DOUGLAS LAMAR JONES ET AL., *DISCOVERING THE PUBLIC INTEREST: A HISTORY OF THE BOSTON BAR ASSOCIATION* 126 (1993). Its first foray was to actively support desegregation efforts through bussing at that time. *Id.*

81. David M. Leonard, Note, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J. L. & PUB. POL’Y 537, 548 (1993).

82. *Id.* at 549.

83. Peter Carbonara, *Setting a Tone for the ABA*, AM. LAW., May 1991, at 78, 80.

84. *Id.* at 80.

85. Leonard, *supra* note 81, at 552–53. Some of those resignations may have been due instead to the appearance of Hillary Rodham Clinton as the keynote speaker at a luncheon honoring Anita Hill at the ABA’s annual meeting and the admission of the National Gay and Lesbian Law Association to the House of Delegates. *Id.* at 553.

86. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 138, 142, 145 (2010).

87. *About Us*, FEDERALIST SOC’Y, <https://fedsoc.org/about-us> [<https://perma.cc/6JSJ-C543>].

88. It does, however, have fifteen practice groups, that examine substantive law subjects and perform many of the same functions as traditional bar associations such as networking, CLE, and websites to keep members up to date on the law. TELES, *supra* note 86, at 170–71; *see also Practice Groups*, FEDERALIST SOC’Y, <https://fedsoc.org/practice-groups> [<https://perma.cc/D3FM-Z8S5>].

attract lawyers to conservative ideas by hosting debates, facilitating networking among conservative lawyers, identifying opportunities for activism (outside the organization), and influencing judicial selection.⁸⁹ It deliberately avoids policy proposals and direct advocacy to maintain a broad tent for its members,⁹⁰ but it has publicly criticized the ABA for its “liberal bias,” arguing that a professional organization that purports to represent the legal profession should not take positions.⁹¹

Since the 1990s, the ABA has been involved in advocacy on a wide range of domestic and international issues.⁹² A few state and local bar organizations—primarily on the east and west coasts—have continued to speak out on mostly progressive social, political, and human rights issues (such as climate change, discrimination, and international human rights).⁹³ Affinity bars that are based on personal characteristics (e.g., the Hispanic National Bar Association) rather than political beliefs (e.g., the NLG),⁹⁴ tend to limit their advocacy to issues concerning their common interests.⁹⁵ Likewise, specialty bars tend to speak out on issues that directly affect their practice specialty or their clients, although some will, on occasion, speak out on broader issues.⁹⁶

89. TELES, *supra* note 86, at 144, 146, 155–56, 164.

90. *Id.* at 152–54.

91. *Id.* at 167, 169.

92. The ABA conducts much of its advocacy by issuing statements, adopting resolutions, filing amicus briefs, and writing letters to Congress and other officials. See *Advocacy & Initiatives*, AM. BAR ASS'N, <https://www.americanbar.org/advocacy.html> (last visited Feb. 23, 2022).

93. See, e.g., *PA House of Delegates Approves Resolution for Government Action on Climate Change*, PA. BAR ASS'N (Nov. 25, 2015), <https://www.pabar.org/public/news%20releases/pr112515.asp> [<https://perma.cc/9BTQ-6PAN>]; *Statement from The Bar Association of San Francisco President Kelly Dermody Regarding President Obama's Announcement About Same-Sex Marriage*, BAR ASS'N OF S.F. (May 9, 2012), https://www.sfbar.org/wp-content/uploads/2021/01/2012-05-09_Statement-from-BASF-President-Kelly-Dermody-Regarding-President-Obamas-Announcement-About-Same-Sex-Marriage.pdf [<https://perma.cc/6S86-5W6D>].

94. Although the NLG refers to itself as the country's oldest and largest progressive bar association, its membership includes “jailhouse lawyers” and it focuses primarily on advocacy. *About*, NAT'L LAWS. GUILD, *supra* note 24. It does not offer CLE and some of the other benefits traditionally associated with bar organizations.

95. See, e.g., *Announcements*, COOK CNTY. BAR ASS'N, <https://cookcountybar.org/announcements> [<https://perma.cc/2X2D-XFZX>].

96. See, e.g., *Calling for the End of the Use of Fusarium to Destroy Coca Plants*, NAT'L ASS'N OF CRIMINAL DEF. LAWS. (Nov. 4, 2000), [https://www.nacdl.org/Content/BoardResolution~11-04-2000\(4\)](https://www.nacdl.org/Content/BoardResolution~11-04-2000(4)) [<https://perma.cc/J35X-22L3>].

II. LAWYER ORGANIZATIONS’ ADVOCACY IN THE TIME OF TRUMP

This section examines lawyer organizations’ efforts to defend constitutional norms and values during the period from Donald Trump’s presidential bid in 2016 through the end of his presidency. It does not attempt to catalogue all advocacy by these organizations, but instead focuses on four issues that prompted responses from several lawyer organizations. The discussion concentrates mostly on the activities of the ABA, state bar associations, and large local bar associations, but also considers the activities of affinity bars and specialty bars where relevant. As discussed below, midway through Trump’s presidency, when it did not appear to some lawyers that established lawyer organizations were adequately speaking out in defense of constitutional norms and values, new lawyer organizations emerged.

A. *Attacks on Judges and the Administration of Justice*

From the time of his candidacy for president, Donald Trump made it clear he was not going to observe certain norms of civility, such as showing respect for political candidates and their families, parents of soldiers killed in battle, or persons who disagreed with him.⁹⁷ This attitude extended to judges who ruled on cases in ways with which he disagreed. In one early episode, then-candidate Trump aimed his remarks at Judge Gonzalo Curiel, a California district court judge who was hearing two class actions involving Trump University. Trump’s remarks about the judge began in late February

97. Mr. Trump routinely demeaned candidates by attaching monikers to them such as “Lyn’ Ted,” “Mini Mike,” “Sleepy Joe,” and “Crazy Bernie.” See Kevin Quealy, *The Complete List of Trump’s Twitter Insults (2016-2021)*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/interactive/2021/01/19/upshot/trump-complete-insult-list.html> [https://perma.cc/5Z5P-GNRD]. He also made negative comments about Senator Ted Cruz’s wife and father. Jessica Hopper, *Donald Trump Targets Ted Cruz’s Wife on Twitter Again*, ABC NEWS (Mar. 24, 2016), <https://abcnews.go.com/Politics/donald-trump-targets-ted-cruzs-wife-twitter/story?id=37889421> [https://perma.cc/2KY7-FYVQ]; Maggie Haberman, *Donald Trump Accuses Ted Cruz’s Father of Association with Kennedy Assassin*, N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/politics/first-draft/2016/05/03/donald-trump-ted-cruz-father-jfk/> [https://perma.cc/7B2J-TN88]. He shocked some observers when he attacked a “gold star” family whose son was killed in Iraq. Scott Detrow, *GOP Criticism Mounts As Trump Continues Attacks On Khan Family*, NPR (Aug. 1, 2016), <https://www.npr.org/2016/08/01/488213964/gop-criticism-mounts-as-trump-continues-attacks-on-khan-family> [https://perma.cc/BVC6-BEEM].

2016 when he referred to Judge Curiel, who was born in Indiana, as being “extremely hostile to me” and added the judge was “Hispanic.”⁹⁸ The president of the Hispanic National Bar Association called on Trump to apologize to the judge for his “reckless rhetoric,”⁹⁹ but other bar associations were silent.

In late May 2016, after Judge Curiel ruled that Trump University must disclose hundreds of documents sought in the class actions,¹⁰⁰ Trump attacked him again, suggesting Judge Curiel should recuse himself and be investigated. At a rally in San Diego (where Judge Curiel presides) on May 27, 2016, Trump segued into a twelve-minute diatribe in which he stated Judge Curiel was a “hater of Donald Trump” who “happens to be Mexican.”¹⁰¹ He continued, “I think Judge Curiel should be ashamed of himself. I think it’s a disgrace that he’s doing this.”¹⁰² He also stated in a *Wall Street Journal* interview on June 2, 2016, that Judge Curiel had “an absolute conflict” in presiding over the lawsuit given that he was of “Mexican heritage” and a member of a Latino lawyers’ association.¹⁰³ Trump noted, “I’m building a wall. It’s an inherent conflict of interest.”¹⁰⁴ In an interview with Jake Tapper on CNN the following day, Trump again stated, “[w]e are building a wall. He’s a Mexican. We’re building a wall

98. *Trump Makes Race an Issue in University Suit*, DAILY POST (Palo Alto, CA), Feb. 29, 2016, at 1; Suzanne Gamboa, ‘Bigotry’: Trump’s Escalating Attacks on Judge Rile Latino Legal Experts, NBC NEWS (June 3, 2016), <https://www.nbcnews.com/news/latino/bigotry-trump-s-continued-attacks-judge-rile-latino-legal-experts-n585471> [<https://perma.cc/YTE3-45RZ>]; Maureen Groppe, *What Trump Has Said About Judge Curiel*, INDY STAR (June 11, 2016), <https://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/> [<https://perma.cc/7Z9B-WPXE>].

99. Mike Sacks, *Bar Wants Trump Apology*, NAT’L L.J., Mar. 7, 2016, at 21.

100. Ben Rosen, *Judge Orders Trump University Documents Released*, CHRISTIAN SCI. MONITOR (May 29, 2016), <https://www.csmonitor.com/USA/2016/0529/Judge-orders-Trump-University-documents-released> [<https://perma.cc/V4J5-8CAH>].

101. *Id.*; Matt Ford, *Trump Attacks a ‘Mexican’ U.S. Federal Judge*, ATLANTIC (May 28, 2016), <https://www.theatlantic.com/politics/archive/2016/05/trump-judge-gonzalo-curiel/484790/> [<https://perma.cc/4R33-UXFJ>].

102. *See Trump: Judge’s Actions ‘A Total Disgrace,’* USA TODAY (June 1, 2016), <https://www.usatoday.com/story/opinion/2016/06/01/donald-trump-university-judge-gonzalo-curiel-editorials-debates/85258886/> [<https://perma.cc/FRH5-8HK8>].

103. Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL STREET J., (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> [<https://perma.cc/Z55A-FQQD>].

104. *Id.*

between here and Mexico . . . he is giving us very unfair rulings, rulings that people can't believe.”¹⁰⁵

Even before Trump had concluded his attacks on Judge Curiel, ABA President Paulette Brown responded by stating, “levying personal criticism at an individual judge and suggesting punitive action against that judge for lawfully made decisions crosses the line of propriety and risks undermining judicial independence.”¹⁰⁶ She did not mention Trump by name.¹⁰⁷ The mandatory state bar in California, where the judge presided, was silent. Indeed, the only state bar association that stepped into the fray was the voluntary New York State Bar Association (NYSBA), whose president called the attack on the judge's impartiality and integrity based on his ethnicity “improper” and stated, “We must reject and speak out against an argument that would undermine our independent judicial system and the rule of law.”¹⁰⁸

Some of the large northeastern bar associations such as the NYCB and the BBA were uncharacteristically silent, but the 12,000-member Philadelphia Bar Association stated, “It is appalling that a presidential candidate would criticize a judge based upon the judge's ethnicity and reveals a true disrespect for our justice system.”¹⁰⁹ Local California lawyer associations also spoke out, including the 7,500 member BASF. It released an op-ed “in support of independence of the judiciary in response to Donald Trump's statements” and sharply criticized his comments about Judge Curiel, calling on Trump to withdraw his statements.¹¹⁰ Likewise, the

105. Harper Neidig, *Trump Doubles Down on Judge Attacks: 'He's a Mexican. We're Building a Wall,'* THE HILL (June 3, 2016), <https://thehill.com/blogs/ballot-box/presidential-races/282172-trump-doubles-down-on-judge-attacks-hes-a-mexican-were> [https://perma.cc/H8AE-Z8QK].

106. Debra Cassens Weiss, *Trump Suggests Possibility of Civil Case Against Federal Judge; What About a Recusal Motion?*, A.B.A. J. (June 2, 2016), https://www.abajournal.com/news/article/trump_suggests_possibility_of_civil_case_against_federal_judge_what_about_a [https://perma.cc/L6A5-6YPV].

107. *Id.*

108. See Melissa Daniels, *Post Trump, NY Bar Chief Calls Attacks on Judges Improper*, LAW360 (June 9, 2016), <https://www.law360.com/articles/805630>.

109. *Statement of the Philadelphia Bar Association Chancellor Gaetan J. Alfano on Unjust Criticism of the Judiciary*, PHILA. BAR ASS'N (June 6, 2016), <https://www.philadelphiabar.org/page/NewsItem?newsItemID=1001560> [https://perma.cc/VS92-EFLH]. The statement further noted that when a candidate criticizes a judge based on the judge's background, “it calls into question that candidate's commitment to our fundamental constitutional principles.” *Id.*

110. *BASF Issues Statement Regarding Donald Trump's Comments About Judge Curiel*, BAR ASS'N OF S.F. (June 8, 2016), https://www.sfbar.org/wp-content/uploads/2021/01/2016-06-08_BASF-

16,000 member Los Angeles County Bar Association (LACBA) and some of its past presidents called on Trump to withdraw his “appalling and intemperate remarks.”¹¹¹ The president of the San Diego County Bar Association wrote a letter to the “citizens of San Diego County,” referring to Trump’s comments as “awful” and “distorted,” and defending the San Diego Law Raza Lawyers Association, which was facing attacks.¹¹² The board of the San Diego chapter of the Federal Bar Association published a letter in the local newspaper defending Judge Curiel and stating that Trump’s statements were “a threat to the very independence and impartiality of our courts.”¹¹³ National and local affinity bar associations also spoke out, including the Hispanic National Bar Association, which participated in a press briefing with other Latinx organizations.¹¹⁴ The National Asian Pacific American Bar Association issued a statement denouncing Trump’s remarks and calling his statements “dangerous.”¹¹⁵ A few national specialty

Issues-Statement-Regarding-Donald-Trumps-Comments-About-Judge-Curiel.pdf
[<https://perma.cc/3TLG-9PBJ>].

111. *LACBA Responds to Donald Trump’s Comments on U.S. District Judge Gonzalo Curiel*, L.A. CNTY. BAR ASS’N, <https://www.lacba.org/news-and-publications/lacba-news/articles/lacba-responds-to-donald-trump-s-comments-about-u-s-district-judge-gonzalo-curiel> [https://perma.cc/FYT5-887E].

112. Letter from Heather S. Riley, President, San Diego Cnty. Bar Ass’n (June 13, 2016), <https://www.sdcba.org/?pg=Letterhead-Page> [https://perma.cc/7P52-XERY]. The letter noted that “to stay true to our mission as the voice of San Diego’s legal community and as a champion of diversity in all aspects of the law, it is our responsibility to address these attacks.” *Id.* The letter was publicized up by a local radio station. *San Diego Lawyers Call Trump’s Attack on Judge ‘Racist,’* KPBS (June 8, 2016), <https://www.kpbs.org/news/2016/jun/08/san-diego-lawyers-call-trumps-attack-on-judge/> [https://perma.cc/3EMQ-8PK5].

113. Ryan Stitt, *Attorneys: Call for Curiel Recusal Unfounded*, SAN DIEGO UNION-TRIB. (June 10, 2016), <https://www.sandiegouniontribune.com/opinion/commentary/sdut-curiel-attorneys-trump-2016jun10-story.html> [https://perma.cc/MRZ5-S3VG].

114. *See National Latino Leaders Denounce Donald Trump’s Attacks on Judge Curiel*, TARGETED NEWS SERV. (June 8, 2016). For some of the local affinity bar organizations that made statements, see *The Hispanic Bar Association of New Jersey Condemns Donald Trump’s Attacks on Judge Gonzalo Curiel*, HISP. BAR ASS’N OF N.J. (June 8, 2016), <https://njhba.org/page-647227/4064866>; *Statement of Hispanic Bar Association of Orange County on Judicial Independence*, HISP. BAR ASS’N ORANGE CNTY. (June 8, 2016), <https://ochba.org/widget/news/4064313> [https://perma.cc/38MN-533G] (stating that Trump’s claim that Judge Curiel is biased and should recuse himself “solely on the basis of Judge Curiel’s Mexican heritage is a blatant attack on our judiciary and Latinos throughout this country”).

115. *NAPABA Denounces Donald Trump’s Racist Attacks on Judges*, NAT’L ASIAN PAC. AM. BAR ASS’N (June 7, 2016), https://www.napaba.org/page/curiel_statement [https://perma.cc/Y8TT-NJL3]. One of the few local non-Latinx affinity bars that spoke out was the Women’s Bar Association of New York. *See WSBNYS’s Response to Call for the Recusal of Judge Gonzalo Curiel*, WSBNYS, https://www.wbasny.org/post_news/wbasnys-response-to-calls-for-the-recusal-of-judge-gonzalo-curiel/ [https://perma.cc/X4YT-RP5J].

bar organizations, such as the American Association for Justice and the International Academy of Trial Lawyers, also spoke out about Trump’s statements.¹¹⁶

While it is one thing to chastise a presumptive presidential nominee, it is another to rebuke a new President. Yet bar associations did so a little more than two weeks after Trump took office. On February 3, 2017, a federal district court judge in Washington state, James L. Robart, temporarily enjoined Trump’s executive order banning immigrants from seven Muslim-majority countries from entering the United States. The next morning, Trump tweeted: “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”¹¹⁷ Later that day, Trump tweeted a few more times about the decision, including one tweet that said: “Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision.”¹¹⁸ The following day, Trump tweeted: “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”¹¹⁹ Due in part to these remarks, Judge Robart received 40,000 threatening messages, with 1,000 deemed sufficiently serious that the U.S. Marshals set up camp around his home.¹²⁰

ABA President Linda Klein promptly replied to the tweets. In remarks at the mid-year House of Delegates meeting, which coincidentally occurred the Monday after the President’s tweets, she stated:

116. *Bar Groups Blast Trump Remarks About Judge*, AM. LAW. (June 9, 2016), <https://www.law.com/sites/almstaff/2016/06/09/bar-groups-blast-trumps-remarks-about-judge/>.

117. @RealDonaldTrump, TWITTER (Feb. 4, 2017, 8:12 AM); Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/>.

118. @RealDonaldTrump, TWITTER (Feb. 4, 2017, 4:44 PM).

119. @RealDonaldTrump, TWITTER (Feb. 5, 2017, 3:39 PM). Minutes later he tweeted, “I have instructed Homeland Security to check people coming into our country VERY CAREFULLY. The courts are making the job very difficult!” @RealDonaldTrump, TWITTER (Feb. 5, 2017, 3:42 PM).

120. See Madison Hall, *The Judge Who Blocked Trump’s First Travel Ban Said He Received 40,000 Threatening Messages, Forcing US Marshals to Guard His Home*, BUS. INSIDER (Feb. 22, 2021), <https://www.msn.com/en-au/news/world/the-judge-who-blocked-trump-s-first-travel-ban-said-he-received-40-000-threatening-messages-forcing-us-marshals-to-guard-his-home/ar-BB1dUJhp>

[<https://perma.cc/A9C2-N488>]; Philip Rucker, *‘If Something Happens’: Trump Points His Finger in Case of a Terrorist Attack*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/politics/if-something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882_story.html [<https://perma.cc/BLP5-FCYY>].

There's been a lot of talk about protecting our borders. Let me tell you what the most important border is: It's our Constitution and the rule of law it embodies. We as lawyers are called upon to protect it. . . . Make no mistake, personal attacks on judges are attacks on our Constitution. Let us be clear. The independence of the judiciary is not up for negotiation.¹²¹

She continued by calling on lawyers to lead “by promoting and protecting the rule of law.” Klein stated, “There are no ‘so-called judges’ in America. There are simply judges—fair and impartial. We must keep it that way.”¹²² She concluded by noting “We protect the rule of law. We defend the Constitution. We are lawyers. We took an oath and these are our values. We will never give in. Never, never, never.”¹²³ Her remarks were reportedly met with a standing ovation.¹²⁴

Comments from other bar organizations were more restrained. That same day, the president of the American Board of Trial Advocates, an association of trial lawyers and judges whose mission includes “preserving the independence of the judiciary,”¹²⁵ stated, “We respectfully urge President Trump to extend to the judicial branch and its members the same degree of dignity and respect that he would expect our citizens to show to the executive branch of our government.”¹²⁶ Without naming President

121. Linda A. Klein, President, Am. Bar Ass'n, Address to the ABA House of Delegates (Feb. 6, 2017).

122. *Id.* at 2.

123. *Id.*

124. See *ABA President Rails Against Trump Tweets Attacking Judge Who Blocked Ban*, LAW.COM (Feb. 6, 2017), <https://www.law.com/dailybusinessreview/almID/1202778503087/ABA-President-Rails-Against-Trump-Tweets-Attacking-Judge-Who-Blocked-Ban&curindex=6/?sreturn=20220110180755> [<https://perma.cc/SRJ7-NUWM>]. The ABA House of Delegates did not pursue a resolution on the issue, possibly because of the short notice or because it was already considering a resolution concerning the underlying executive order. See *infra* notes 182–84 and accompanying text.

125. *About, AM. BD. OF TRIAL ADVOCS.*, https://www.abota.org/Online/About/Who_We_Are/Online/About/About_Us.aspx?hkey=1c6875ef-d7c0-49ae-b3ed-3564b76ee419 [<https://perma.cc/MND5-FVZU>].

126. *ABOTA Defends Federal Judge James L. Robart from Attacks by President Trump*, AM. BD. OF TRIAL ADVOCS. (Feb. 6, 2017), https://www.abota.org/Online/News/2017_News/ABOTA_defends_federal_Judge_James_L._Robart_from_attacks_by_President_Trump.aspx/ [<https://perma.cc/R7L7-L4B3>]. Lawyers from the Federal Bar Council, which is composed of judges and lawyers who practice in the Second Circuit, also issued a statement condemning the remarks in equally temperate language. See Nathan Tempey, *Trump Draws*

Trump, the NYSBA issued a statement noting that “[p]ersonal denigration of judges is improper and demeans the respect for the co-equal third branch of the government that our constitution requires.”¹²⁷ The president of the voluntary Ohio State Bar Association explained:

When the judiciary is unfairly attacked, as occurred last weekend when Judge (James) Robart was labeled a “so-called judge,” the affected judge is, by rule, unable to respond publicly. It often is incumbent on bar associations, then, to make public statements explaining the role of courts in our government. It is for that reason we issue this statement.¹²⁸

The president of the voluntary Illinois State Bar Association also issued a “Statement on Judicial Independence” which noted that questioning the legitimacy of an independent judge is “inappropriate.”¹²⁹ The only mandatory bar that addressed it was the State Bar of Wisconsin, which referred to the statements as “ill-considered.”¹³⁰ The mandatory State Bar of

Condemnation from Bar Association Popular with Federal Prosecutors & Judges, GOTHAMIST (Feb. 10, 2017), <https://gothamist.com/news/trump-draws-condemnation-from-northeastern-bar-association-popular-with-federal-prosecutors-judges> [<https://perma.cc/6LXU-X4LS>]. They stated, in part, “The Executive has every right to disagree with the ruling of a court, and to seek appellate review when the president believes that a judge has erred. When a president questions the legitimacy of a judge who disagrees with him, however, it undermines the rule of law and the propriety and authority of judicial review.” *Id.*

127. Claire P. Gutekunst, President, N.Y. State Bar Ass’n, *Judicial Independence and the Rule of Law* (Feb. 4, 2017), <http://readme.readmedia.com/JUDICIAL-INDEPENDENCE-AND-THE-RULE-OF-LAW-STATEMENT-BY-NEW-YORK-STATE-BAR-ASSOCIATION-PRESIDENT-GUTEKUNST/14550974/print> [<https://perma.cc/BNM6-A2Q8>].

128. Randy Ludlow, *The Daily Briefing: Ohio State Bar Association Objects to Trump Attack on Judiciary*, COLUMBUS DISPATCH (Feb. 8, 2017), <https://www.dispatch.com/story/news/columns/the-daily-briefing/2017/02/08/the-daily-briefing-ohio-state/22499673007/> [<https://perma.cc/8KTW-A4X7>]. This view was echoed by federal district court judge Paul Friedman at an ABA panel the following month. Seemingly referencing the judicial ethics rules, he said. “It’s very hard for judges to go out and defend themselves. The bar has to do it for us.” Jody Godoy, *Attorneys Must Defend Judiciary From Trump Attacks, Judges Say*, LAW360 (Mar. 9, 2017), <https://www.law360.com/legalethics/articles/900284>.

129. *Statement on Judicial Independence by ISBA President Vincent F. Cornelius*, ILL. STATE BAR ASS’N (Feb. 7, 2017), <https://www.isba.org/barnews/2017/02/07/statement-judicial-independence-isba-president-vincent-f-cornelius> [<https://perma.cc/7WZ3-H2CJ>].

130. *State Bar Board Urges Respect for Independent Judiciary*, STATE BAR OF WIS. (Feb. 10, 2017), <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=25403> [<https://perma.cc/7BYF-56AM>].

Georgia did not issue a statement, but almost 650 Georgia lawyers sent a letter to their senators imploring them to seek to restrain Trump.¹³¹

Most statements, like the one by the Philadelphia Bar Association, focused on the independence of the judiciary and separation of powers.¹³² LACBA stated, “we stand together with the judiciary who are the vital check against abuses of power by other branches of government.”¹³³ A few lawyer organizations, like the BBA, claimed it was the association’s “obligation to speak out on matters important to the public interest.”¹³⁴

It is also worth noting some of the lawyer organizations that did not speak out. Although the decision related directly to an important immigration issue, AILA did not issue a statement.¹³⁵ Even though the statements concerned a federal judge in Washington, the mandatory Washington State Bar Association and the Kings County Bar Association in Seattle also declined to speak out. Except for the Hispanic National Bar Association, the national affinity bars were largely silent.¹³⁶

Trump again criticized a federal judge in November 2018 when Judge Jon S. Tigar, who sat in San Francisco, issued a temporary restraining order against Trump’s new asylum policy and ordered the administration to continue to accept asylum claims regardless of where the migrant entered

131. *Georgia Lawyers to Senators: Restrain Trump*, SAVANNAH NOW (Mar. 6, 2017), <https://www.savannahnow.com/opinion/opinion-columns/2017-03-06/georgia-lawyers-senators-restrain-trump> [<https://perma.cc/LX9A-PC9H>]. They justified their efforts in part by stating, “We are also guided by the State Bar’s Aspirational Statement on Professionalism, which calls on us to . . . comment ‘publicly upon our laws’ and strive ‘to improve our laws and legal system.’” *Id.*

132. *Statement of Philadelphia Bar Association Chancellor Deborah R. Gross on Judicial Independence*, PHILA. BAR ASS’N (Feb. 6, 2017), <https://www.philadelphiabar.org/page/NewsItem?appNum=4&newsItemID=1001646> [<https://perma.cc/A547-TJD9>]; see also *supra* notes 125, 127 and accompanying text.

133. *LACBA President’s Statement on Judicial Independence*, L.A. CNTY. BAR ASS’N (Mar. 8, 2017), <https://www.lacba.org/news-and-publications/lacba-news/articles/lacba-president-s-statement-on-judicial-independence> [<https://perma.cc/F2VY-FYZ7>]. Like the statements of several other lawyer organizations, LACBA’s statement did not directly refer to the president. *Id.*

134. *Statement by BBA President Carol Starkey on Judicial Independence and the Rule of Law*, BOS. BAR ASS’N (Feb. 8, 2017), <https://bostonbar.org/membership/publications/news-release?ID=351> [<https://perma.cc/RV74-M6BY>]. Likewise, the Ohio State Bar Association explained, “When the importance of judicial review and the independence of the judiciary is challenged, even by the president of the United States, we feel compelled and uniquely positioned to provide perspective.” Ludlow, *supra* note 128.

135. This may have been because AILA was more focused on dealing with the executive orders that prompted the lawsuit, on which it did speak out. See *infra* notes 176–79 and accompanying text.

136. See *HNBA President Condemns Pattern of Attacks on the Federal Judiciary*, HISP. NAT’L BAR ASS’N (Feb. 6, 2017), <https://us4.campaign-archive.com/?u=df9a27c10b6d6ba38ba001440&id=102a4f2b4d> [<https://perma.cc/AE3N-5DEZ>].

the United States.¹³⁷ Trump called the decision a “disgrace,” and complained about his administration’s lack of success in the Ninth Circuit.¹³⁸ He added, “The Ninth Circuit, we’re going to have to look at that. This was an Obama judge. And I’ll tell you what, it’s not going to happen like this anymore.”¹³⁹ This provoked an unusual rebuke from Supreme Court Chief Justice Roberts, who responded to an inquiry by the Associated Press stating, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.” He continued, “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.” Roberts concluded, “[t]he independent judiciary is something we should all be thankful for.”¹⁴⁰ This elicited a quick Twitter response from Trump. “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’” Mr. Trump wrote, “and they have a much different point of view than the people who are charged with the safety of our country.”¹⁴¹ He also tweeted, “It would be great if the Ninth Circuit was indeed an ‘independent judiciary,’”¹⁴² but then argued that it was not, that many of its decisions were overturned, and that it was “a terrible, costly and dangerous disgrace. It has become a dumping ground for certain lawyers looking for easy wins and delays.”¹⁴³

Without mentioning Trump by name, the ABA and BASF issued short statements supporting the Chief Justice’s statement and judicial independence.¹⁴⁴ The American College of Trial Lawyers, which describes

137. Adam Liptak, *Trump Takes Aim at Appeals Court, Calling it a ‘Disgrace,’* N.Y. TIMES (Nov. 20, 2020), <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html>.

138. Brian Naylor & Nina Totenberg, *Chief Justice Roberts Issues Rare Rebuke; Trump Fires Back*, NPR (Nov. 21, 2018), <https://www.kuow.org/stories/chief-justice-roberts-issues-rare-rebuke-to-trump-trump-fires-back>.

139. *Trump Attacks Roberts. Transcript: 11/21/18, 11th Hour with Brian Williams*, MSNBC, <https://www.msnbc.com/transcripts/11th-hour-with-brian-williams/2018-11-21-msna1168696>.

140. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84>.

141. @RealDonaldTrump, TWITTER (Nov. 21, 2018, 3:51 PM).

142. @RealDonaldTrump, TWITTER (Nov. 21, 2018, 4:09 PM).

143. @RealDonaldTrump, TWITTER (Nov. 21, 2018, 5:17 PM).

144. *Statement by Bob Carlson, ABA President, Re: Being Thankful for Judicial Independence*, AM. BAR ASS’N (Nov. 21, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson--aba-president-re--being-thankful-for-j/>; *BASF Supports Statement of Chief Justice Roberts Affirming the Importance of an Independent Judiciary*, BAR ASS’N OF S.F. (Nov. 26, 2018), https://www.sfbar.org/wp-content/uploads/2021/01/2018-11-26_BASF-Supports-Statement-of-Chief-Justice-John-Roberts-Affirming-the-Importance-of-an-Independent-Judiciary.pdf.

itself as “the preeminent organization of trial lawyers in North America,”¹⁴⁵ stated it “considers such an attack as a direct assault on judicial independence, the backbone of our constitutional democracy.” It further stated it was “wrong for the Chief Executive of the Executive Branch to politicize a decision by the judiciary in this way.”¹⁴⁶ The NYCB tweeted to its members the following day, which was Thanksgiving, that it was “thankful for the Chief Justice’s statement.”¹⁴⁷ Other bar organizations did not issue statements, perhaps because of the events’ proximity to the holiday or because of pessimism that Trump could be silenced.¹⁴⁸

In February 2020, President Trump attacked the impartiality of another federal district court judge, Amy Berman Jackson in the District of Columbia. She had presided over the criminal trial of Trump associate Roger Stone and was sentencing Stone later that month for his conviction for obstructing a congressional investigation, lying to Congress, and witness tampering.¹⁴⁹ On February 11, 2020, Trump tweeted: “Is this the Judge that put Paul Manafort in SOLITARY CONFINEMENT, something that not even mobster Al Capone had to endure? How did she treat Crooked Hillary Clinton? Just asking!,” and then shared an additional tweet naming Jackson as the judge who sentenced Manafort.¹⁵⁰ That same day, Trump had tweeted about the Justice Department’s recommendation that Stone be sentenced to prison for 87 to 108 months stating, “This is a horrible and very unfair situation. The real crimes were on the other side, as nothing happens to

145. AMERICAN COLLEGE OF TRIAL LAWYERS, <https://www.actl.com/> [<https://perma.cc/76S4-99NW>].

146. *ACTL Issues Statement in Support of Response by Chief Justice Roberts to Remarks by President Trump Concerning Federal Judiciary*, AM. COLLEGE OF TRIAL LAWS. (Nov. 21, 2018), <https://www.actl.com/detail/news/2018/11/21/actl-issues-statement-in-support-of-response-by-chief-justice-john-roberts-to-remarks-by-president-trump-concerning-federal-judiciary> [<https://perma.cc/6B2K-LUEG>].

147. @NYCBarAssn, TWITTER (Nov. 22, 2018, 5:20 PM).

148. The following year, however, the BBA issued a report detailing threats to judicial independence that used the attack on Judge Tigar as one example. See BOSTON BAR ASSOCIATION, JUDICIAL INDEPENDENCE: PROMOTING JUSTICE AND MAINTAINING DEMOCRACY 9–10 (Aug. 2019), https://bostonbar.org/docs/default-document-library/judicialindependence_aug2019.pdf?Status=Temp&sfvrsn=2.

149. Ann E. Marimow, *Trump Takes on Judge Amy Berman Jackson Ahead of Roger Stone’s Sentencing*, WASH. POST (Feb. 12, 2020), https://www.washingtonpost.com/local/legal-issues/trump-takes-on-judge-amy-berman-jackson-ahead-of-roger-stones-sentencing/2020/02/12/753e2a6e-4db6-11ea-bf44-f5043eb3918a_story.html [<https://perma.cc/6SGU-AP3C>].

150. *Id.*; @RealDonaldTrump, TWITTER (Feb. 11, 2020, 8:47 PM).

them. Cannot allow this miscarriage of justice!”¹⁵¹ Later that day, the Justice Department filed an extraordinary second sentencing memorandum which stated the memorandum filed the day before “[d]oes] not accurately reflect the Department of Justice’s position on what would be a reasonable sentence in the matter” and that a lesser sentence was appropriate.¹⁵² In response, the four line prosecutors pulled out of the Stone case.¹⁵³ After Judge Jackson sentenced Stone on February 20, 2020, to more than three years in prison,¹⁵⁴ Trump continued to tweet about the case, suggesting both the judge and the jury’s forewoman were biased.¹⁵⁵

The 1,500 member National Association of Assistant U.S. Attorneys, which is “dedicated to promoting, protecting and serving the common interests of this nation’s front-line criminal and civil attorneys,”¹⁵⁶ issued a statement that the career prosecutors handling the Stone case properly exercised their discretion in making their initial sentencing recommendation.¹⁵⁷ They further stated, “These recommendations are, and should be, made impartially and without the political influence of elected officials.”¹⁵⁸ A few specialty bar associations with close connections to federal practice also spoke out. For example, the American College of Trial Lawyers decried the “predictable and dangerous consequences” of Trump’s statements and noted “the President’s assertion of bias by the jury member in the Stone trial exposes that individual to personal risks that have no place

151. Morgan Chalfant, *Trump Criticizes ‘Very Unfair’ Sentencing Recommendation for Roger Stone*, THE HILL (Feb. 11, 2020), <https://thehill.com/homenews/administration/482471-trump-criticizes-very-unfair-sentencing-recommendation-for-roger>.

152. See *All Four Roger Stone Prosecutors Resign from Case After DOJ Backpedals on Sentencing Recommendation*, NBC NEWS (Feb. 11, 2020), <https://www.nbcnews.com/politics/politics-news/doj-backpedalling-sentencing-recommendation-trump-ally-roger-stone-n1134961>.

153. *Id.*

154. Ryan Lucas, *Roger Stone Sentenced to More than Three Years Amid Furor Over Trump and DOJ Cases*, NPR (Feb. 20, 2020), <https://www.npr.org/2020/02/20/807099176/roger-stone-sentenced-to-3-years-amid-furor-over-trump-involvement-in-doj-cases> [https://perma.cc/HDW2-6MMC].

155. Trump retweeted a tweet that stated, “Roger Stone judge’s bias may have jeopardized entire trial.” @RealDonaldTrump, TWITTER (Feb. 25, 2020, 8:12 AM). He also tweeted about the forewoman on the jury: “Look at her background. She never revealed her hatred of ‘Trump’ and Stone. She was totally biased, as is the judge. Roger wasn’t even working on my campaign. Miscarriage of justice. Sad to watch!” @RealDonaldTrump, TWITTER (Feb. 25, 2020, 3:01 PM).

156. *History*, NAAUSA, <https://www.naaua.org/history> [https://perma.cc/MK7M-VF6W].

157. C. Ryan Barber, *‘Nothing Wrong or Improper’: Roger Stone Prosecutors Defended by Advocate for Career DOJ Lawyers*, NAT’L L.J. (Feb. 13, 2020), <https://www.law.com/nationallawjournal/2020/02/13/nothing-wrong-or-improper-roger-stone-prosecutors-defended-by-advocate-for-career-doj-lawyers/?slreturn=20220410164203>.

158. *Id.*

in our nation's reliance on citizen-jury service."¹⁵⁹ The Federal Bar Association issued a statement reminding Americans of the importance of judicial independence and also observed, "the preservation of public confidence in the rule of law is associated with the longstanding recognition of the Attorney General of the United States as the nation's chief law enforcement officer and the legal representative of the nation as a whole, not any government official, agency, party or person."¹⁶⁰

These events occurred in the run-up to the 2020 presidential election—when many lawyer organizations were striving for non-partisanship—and only a few of the largest bar associations issued statements. The day after the Justice Department changed its sentencing recommendation, the ABA's president issued a brief statement expressing its steadfast support for judicial independence and "sound exercise of prosecutorial discretion."¹⁶¹ She further stated, without naming the President, "[p]ublic officials who personally attack judges or prosecutors can create a perception that the system is serving a political or other purpose rather than the fair administration of justice."¹⁶² That same day, the NYCB wrote a letter to Congressional leaders and the Department of Justice's Inspector General expressing "deep concerns about the impartial administration of justice in connection with the prosecution of Roger Stone" and calling for an "immediate investigation into the unusual and troubling events."¹⁶³ The BBA also issued a statement noting "the last minute intervention by the

159. *American College of Trial Lawyers Issues Statement Opposing Attacks on Judiciary*, AM. COLLEGE OF TRIAL LAWS. (Feb. 14, 2020), <https://www.actl.com/detail/news/2020/02/14/actl-issues-statement-opposing-attacks-on-judges/> [<https://perma.cc/GBJ6-PJL4>].

160. *Statement on the Rule of Law and an Independent Judiciary*, FED. BAR ASS'N (Feb. 19, 2020), <https://www.fedbar.org/blog/statement-on-the-rule-of-law-and-an-independent-judiciary/>.

161. *Statement of ABA President Judy Martinez Re: Judicial Independence and Sound Exercise of Prosecutorial Discretion*, AM. BAR ASS'N (Feb. 12, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/statement-of-aba-president-judy-perry-martinez-re-fair-and-imp/>.

162. *Id.*

163. *New York City Bar Association Sends Letter to Congressional Leaders and Department of Justice Inspector General Regarding the Prosecution of Roger Stone and Related Actions by the Department of Justice*, N.Y. CITY BAR (Feb. 12, 2020), <https://www.nycbar.org/media-listing/media/detail/prosecution-of-roger-stone-and-related-actions-by-the-department-of-justice>. This was not the first time it had written to Congress to express its concerns about Barr's conduct. See Alison Frankel, *'Not Just Standing By': NY City Bar May be Barr's Most Persistent Critic*, REUTERS (June 14, 2020), <https://www.reuters.com/article/us-otc-nycbar/not-just-standing-by-nyc-bar-association-may-be-ag-barrs-most-persistent-critic-idUSKBN23V30X>. As the headline notes, Reuters subsequently described the NYCB as possibly Barr's most "persistent critic." *Id.*

Attorney General—after the Department of Justice had already publicly filed a formal sentencing memorandum and following so closely on the heels of the President’s public statement condemning the sentencing recommendation—is extraordinary and to our knowledge, unprecedented.”¹⁶⁴ It called on Attorney General William Barr to “provide full details about, and a reasoned explanation for, his direct involvement in the Stone sentencing process and his instruction to revise the Department’s sentencing recommendation.”¹⁶⁵ The Philadelphia Bar Association issued a statement after Trump’s post-sentencing attacks on Judge Jackson, which did not name the President, but stated that “[r]ecently, we have seen a course of conduct, including communications meant to exert undue influence on the judiciary, that seems intent on undermining the rule of law and disrupting the system of checks and balances.”¹⁶⁶ It further stated, “[s]uch attacks are dangerous in the extreme” and called “for all Americans to speak up in defense of the Constitution and our democratic principles.”¹⁶⁷

Rather than attack Trump for his statements about Judge Jackson, the NYSBA’s president stated that the “intervention by senior Department of Justice officials in the sentencing of Roger Stone is an assault on a bedrock principle of the rule of law—the apolitical administration of justice.”¹⁶⁸ He also commended the four prosecutors for resigning. The other state and affinity bar associations were silent. In March 2020, Lawyers Defending American Democracy (LDAD), a lawyers’ organization that had formed in late 2018 “to defend and uphold the rule of law” in response to some of the

164. *Boston Bar Association Statement on Maintaining Public Trust in the Justice System*, BOS. BAR ASS’N (Feb. 14, 2020), <https://bostonbar.org/membership/publications/news-release?ID=441> [<https://perma.cc/YYG9-4R2U>].

165. *Id.*

166. Madison Alder, *Unwarranted Attacks on Judges Decried by Philadelphia Bar*, BLOOMBERG L. (Feb. 26, 2020), <https://news.bloomberglaw.com/us-law-week/unwarranted-attacks-on-judiciary-condemned-by-philadelphia-bar>.

167. *Philadelphia Bar Association Calls for End to Unwarranted Attacks on U.S. Judiciary*, PHILA. BAR ASS’N (Feb. 26, 2020), <https://www.philadelphiabar.org/page/NewsItem?newsItemID=1001907>.

168. *Statement Regarding Department of Justice Intervention in Roger Stone Case*, N.Y. STATE BAR ASS’N (Feb. 13, 2020), <https://nysba.org/february-13-2020-statement-regarding-department-of-justice-intervention-in-the-roger-stone-case/> [<https://perma.cc/363Y-Q9PS>].

Trump administration's actions,¹⁶⁹ called for Barr's resignation due in part to his handling of the Roger Stone sentencing.¹⁷⁰

B. Immigration Policies

Immigration was hotly debated during the 2016 Presidential campaign, with candidate Trump repeatedly pledging to build a wall between Mexico and the United States to curb the flow of illegal immigration.¹⁷¹ During the first week of his presidency, he signed an executive order to build a southern border wall and require states and localities to engage in immigration enforcement to supplement federal efforts.¹⁷² The executive order indicated that "sanctuary cities" that did not cooperate with federal immigration enforcement efforts would risk losing federal grant funding.¹⁷³ Two days later, on January 27, 2017, President Trump signed another executive order banning entry by people from seven Muslim-majority countries for ninety days, halting the admission of refugees from Syria indefinitely, and establishing requirements for "extreme vetting" of visa applicants.¹⁷⁴ Litigation to enjoin what became known as the "Muslim ban" swiftly followed.¹⁷⁵

169. *About*, LAWS. DEFENDING AM. DEMOCRACY, <https://ldad.org/about> [<https://perma.cc/G8NB-PD7U>].

170. *Lawyers Defending American Democracy, Open Letter Calling for the Resignation of U.S. Attorney General William Barr*, MEDIUM (Mar. 24, 2020), https://medium.com/@press_69355/open-letter-calling-for-the-resignation-of-u-s-attorney-general-william-barr-48ffbe065dce.

171. See, e.g., Jason Carroll, *Donald Trump Says He'd Build a Wall Along the Mexican Border. We Tried to Figure Out How*, CNN (Feb. 17, 2016), <https://www.cnn.com/2016/02/17/politics/donald-trump-mexico-wall/index.html> [<https://perma.cc/PMN4-F46G>]; Nolan D. McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO (Aug. 31, 2016), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-arizona-227612> [<https://perma.cc/YMW6-QZQG>].

172. Exec. Order 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

173. See *President's Border and Immigration Enforcement Policies Will Undermine Rights and Weaken Public Safety*, AM. IMMIGR. LAWS. ASS'N (Jan. 25, 2017), <https://www.aila.org/advocacy/press-releases/2017/presidents-border-and-immigration-enforcement> [<https://perma.cc/7PF5-F8BP>].

174. Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Sabrina Siddiqui, *Trump Signs 'Extreme Vetting' Executive Order for People Entering the US*, GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/us-news/2017/jan/27/donald-trump-muslim-refugee-ban-executive-action>.

175. See Raya Jalabi & Alan Yuhas, *Federal Judge Stays Deportations Under Trump Muslim Country Travel Ban*, GUARDIAN (Jan. 28, 2017), <https://www.theguardian.com/us-news/2017/jan/28/federal-judge-stays-deportations-trump-muslim-executive-order> [<https://perma.cc/3MMM-GKVT>]. So did efforts by lawyer groups to assist immigrants who were

AILA immediately denounced the first executive order, focusing largely on due process and humanitarian concerns.¹⁷⁶ Its sometimes harshly worded statement observed: “Now that he is President, rather than jumping the gun with misguided and poorly vetted policy announcements, he should take the time to learn about the realities of our immigration system”¹⁷⁷ AILA also swiftly opposed the second executive order, stating it was “based on the false premise that banning Muslims and refugees from coming to America will make us safer” and noting the delays it would cause for people coming to the United States.¹⁷⁸ AILA also appealed to American values, stating “discrimination is anathema to the principles upon which our nation is founded, is contrary to the principles of the Constitution, and has no place in a just and free society.” It argued that rather than “slamming the door, we should be welcoming [refugees] and offering protection which America has historically provided as the beacon of light to the world.”¹⁷⁹

The ABA initially issued a more measured statement on January 31, 2017—eleven days into Trump’s presidency—noting it was “concerned by significant portions of the immigration-related executive orders” and acknowledging that while every nation has the right to secure its borders, “enforcement efforts must avoid sweeping bans based on religion or national origin.”¹⁸⁰ It stated that the ABA “has an interest and responsibility to protect the rights guaranteed by the Constitution and to ensure the sanctity of the rule of law.”¹⁸¹ The ABA also collaborated with the NYCB to co-author a report and resolution urging the President to withdraw the January

detained and denied entry. *See, e.g., Statement by The Bar Association of San Francisco Regarding the Executive Order on Immigration*, BAR ASS’N OF S.F. (Feb. 1, 2020), https://www.sfbar.org/wp-content/uploads/2021/01/2017-02-01_Statement-by-The-Bar-Association-of-San-Francisco-Regarding-the-Executive-Order-on-Immigration.pdf [<https://perma.cc/6WSW-9XAG>]; *Statement by BBA President Carol A. Starkey on President Trump’s Executive Order on Immigration*, BOS. BAR ASS’N (Jan. 30, 2017), <https://bostonbar.org/membership/publications/news-release?ID=347> [<https://perma.cc/F272-N386>].

176. *See President’s Border and Immigration Enforcement Policies Will Undermine Rights and Weaken Public Safety*, *supra* note 173.

177. *Id.*

178. *Targeting Muslims and Refugees Betrays American Values and Will Not Make Us Safer*, AM. IMMIGR. LAWS. ASS’N (Jan. 27, 2017), <https://www.aila.org/advo-media/press-releases/2017/targeting-muslims-refugees-betrays-american-values> [<https://perma.cc/2RT3-KPMD>].

179. *Id.*

180. *Statement of Linda A. Klein, ABA President, Re: Recent Executive Orders on Immigration*, AM. BAR ASS’N (Jan. 31, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/01/statement_of_lindaa/.

181. *Id.*

27 executive order based on constitutional and human rights concerns.¹⁸² After the ABA president's speech at the ABA's February 2017 mid-year meeting, during which she stated that both executive orders "jeopardize fundamental principles of justice, due process and the rule of law,"¹⁸³ the ABA House of Delegates adopted the resolution with amendments.¹⁸⁴ The ABA also subsequently submitted amici briefs in support of maintaining the injunction of the travel ban in lower courts and in the Supreme Court.¹⁸⁵

Only a few voluntary state bar associations weighed in on the issue, and they did so gently. The Connecticut Bar Association, without mentioning Trump, called on Congress to "pass legislation to mandate that refugees" get an "appropriate individualized assessment in a timely fashion," including those from the seven Muslim-majority countries targeted by Trump's executive order.¹⁸⁶ The Illinois State Bar Association joined other lawyer and business associations in a press conference to address the negative effects of the executive order.¹⁸⁷ The Pennsylvania Bar Association's president issued a careful statement applauding "lawyers for their herculean efforts to safeguard the rights of those individuals currently in need of protection" and added that "[a]t this time, our association is determining what constructive steps we can take" in relation to the executive orders.¹⁸⁸

182. John Kiernan, *City Bar's Response to Travel Ban and Attacks on the Judiciary*, N.Y. CITY BAR (Feb. 12, 2017), <https://www.nycbar.org/media-listing/media/detail/city-bars-response-to-travel-ban-and-attacks-on-the-judiciary-by-john-s-kiernan> [<https://perma.cc/BQH2-ECAH>]; *ABA Resolution & Report*, AM. BAR ASS'N (Feb. 2017), <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf>.

183. Remarks of Linda A. Klein, *supra* note 121.

184. See *ABA Resolution & Report*, *supra* note 182.

185. *ABA Urges Appeals Courts to Uphold Rulings that Halted Revised EOs*, AM. BAR ASS'N (Apr. 19, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/04/aba_urges_appealsco/; *ABA Urges U.S. Supreme Court to Reject Trump Administration's Revised Travel Ban*, AM. BAR ASS'N (Sept. 18, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/09/aba_urges_u_s_supre/.

186. Cedar Attanasio, *Connecticut Lawyers Urge Congress to Act Following Trump Immigration Actions*, CONN. POST (Feb. 1, 2017), <https://www.ctpost.com/local/article/Connecticut-lawyers-urge-congress-to-act-10901782.php> [<https://perma.cc/6BC2-BQUW>].

187. See Judy Wang, *Chicago Muslim and Arab American Organizations Speak Out Against Trump Travel Ban*, WGN9 (Feb. 6, 2017), <https://wgntv.com/news/chicago-muslim-and-arab-american-organizations-speak-out-against-trump-travel-ban/> [<https://perma.cc/5G7M-MGZ4>].

188. *Statement on Executive Orders*, PA. BAR ASS'N (Feb. 1, 2017), <https://www.pabar.org/site/News-and-Publications/News/News-Releases/2017/Feb/Statement-on-Executive-Orders> [<https://perma.cc/2TKN-XBEY>].

A few large local bar associations issued more pointed statements. BASF’s statement decried the executive order, stating that denying “immigration and safe harbor based upon country of origin and religion is cruel and intolerable, and likely unlawful.”¹⁸⁹ It further stated that the detentions of travelers “are reminiscent of dark times in our nation’s history wherein immigrants were held at Ellis Island and Angel Island, and denied equal access to justice.”¹⁹⁰ The Boston Bar Association also issued a statement expressing its “unequivocal opposition to any effort to create a separate and more onerous admission standard for immigrants based solely on their country of origin” and referring to concerns about due process, equal protection, and anti-discrimination values.¹⁹¹ It pointed to the BBA’s “long history of strong opposition” to discriminatory proposals and continued, “this practice speaks to the heart of who we are as an organization of lawyers—to preserve access to justice for all of us—not just a few of us.”¹⁹² The Chicago Bar Association’s president also attended a press conference with other lawyer organizations to condemn the travel ban.¹⁹³

Some of the most impassioned statements came from affinity bar associations, such as the Cook County Bar Association, which “vehemently oppose[d] the President’s action as an act of racism, Islamophobia, and xenophobia.”¹⁹⁴ Echoing the words of Martin Niemoller, it continued, “If first they come for the Muslims and we do not speak out, who will be next?”¹⁹⁵ The National Asian Pacific American Bar Association (NAPABA) and the South Asian Bar Association of North America issued

189. *Statement by The Bar Association of San Francisco Regarding the Executive Order on Immigration*, *supra* note 175.

190. *Id.*

191. *Statement by BBA President Carol A. Starkey on President Trump’s Executive Order on Immigration*, *supra* note 175.

192. *Id.*

193. See *supra* text accompanying note 187; Emily Donovan, *Local Bar Groups United Against Travel Ban*, CHI. DAILY L. BULL. (Feb. 7, 2017), <https://www.chicagolawbulletin.com/archives/2017/02/07/bar-groups-travel-ban-2-7-17> [<https://perma.cc/G5DP-X3FL>].

194. *CCBA Statement on President Trump’s Immigration Ban*, COOK CNTY. BAR ASS’N (Jan. 31, 2017), <https://cookcountybar.org/announcements/ccba-statement-president-trumps-immigration-ban> [<https://perma.cc/V459-ZUQ3>].

195. *Id.*

a joint statement condemning the executive order.¹⁹⁶ The Muslim Bar Association of Chicago also issued a statement noting candidate Trump's earlier "knee-jerk and xenophobic" statement suggesting Muslims be banned from the United States, "offered as red meat to his political base, has now become policy."¹⁹⁷ Affinity bar associations in Dallas and Hawaii also came together to issue press releases or make statements opposing the travel ban.¹⁹⁸

Later in February 2017, different immigration-related concerns surfaced when Immigration and Customs Enforcement (ICE) agents started arresting immigrants in courthouses.¹⁹⁹ This prompted objections from some state supreme court justices²⁰⁰ and lawyer organizations. Uncharacteristically, the mandatory Washington State Bar Association was the first to respond by writing a letter to the Secretary of the Department of Homeland Security (DHS). The letter stated that the presence of ICE agents "impedes the fundamental mission of our courts: to ensure due process and access to justice for everyone regardless of their immigration status."²⁰¹ This statement was connected to the administration of justice and therefore

196. See Press Release, *NAPABA and SABA Condemn the President's Exclusion of Refugees and his "Muslim Ban,"* NAT'L ASIAN PAC. AM. BAR ASS'N (Jan. 27, 2017), https://www.napaba.org/general/custom.asp?page=refugee_muslim_ban [<https://perma.cc/C24D-DWNV>]. Eighteen other bar associations, including the Japanese American Bar Association, local NAPABA affiliates, and other local affinity bars signed on to the statement. *Id.*

197. *Statement on President Trump's Executive Order Banning Muslims from the United States*, MUSLIM BAR ASS'N OF CHI. (Feb. 2, 2017), <https://www.muslimbar.org/muslimlawyers/2017/02/muslim-bar-association-of-chicago-responds-to-executive-order-banning-muslims-from-united-states-chicago-il-feb-2-2017.html>.

198. See *Press Release*, DALL. HISP. BAR ASS'N (Feb. 2, 2017), <http://www.dallashispanicbar.com/news/4584774> [<https://perma.cc/RK7W-6BL4>]; Debra Lordan, *Groups Issue Joint Statement Opposing Trump Immigration Orders*, BIG ISLAND NOW (Feb. 3, 2017), <https://bigislandnow.com/2017/02/02/groups-issue-joint-statement-opposing-trumps-immigration-orders/> [<https://perma.cc/3E4T-XWCH>].

199. Debra Cassens Weiss, *Woman in Courthouse to Obtain Protective Order is Arrested by ICE Agents*, A.B.A. J. (Feb. 2017), https://www.abajournal.com/news/article/woman_in_courthouse_to_obtain_protective_order_is_arrested_by_ice_agents [<https://perma.cc/HL3P-VUVF>].

200. See, e.g., S.P. Sullivan, *N.J.'s Chief Justice Asks ICE to Stop Arresting Immigrants at Courthouses*, N.J.COM (Apr. 19, 2017), https://www.nj.com/politics/2017/04/nj_top_judge_asks_ice_to_stop_arresting_immigrants.html [<https://perma.cc/YV4P-FA9Q>].

201. Amy Roe, *Washington Lawyers to Trump: Keep Immigration Agents from Stalking Our Courthouses*, ACLU WASH. (June 15, 2017), <https://www.aclu-wa.org/story/washington%E2%80%99s-lawyers-trump-keep-immigration-agents-stalking-our-courthouses> [<https://perma.cc/WC5C-4H45>].

within the WSBA’s remit, but it was still unusual for a mandatory bar to speak out on a politically sensitive issue in this fashion.²⁰² The Massachusetts State Bar Association subsequently sponsored a resolution—adopted by the ABA House of Delegates in August 2017—calling on Congress to add courthouses to the list of “sensitive locations” where immigration authorities could not make arrests except in emergency situations.²⁰³ The NYSBA also adopted a resolution calling on ICE to treat courthouses as “sensitive locations” and calling on Congress to pass legislation codifying this approach.²⁰⁴ It subsequently urged passage of state legislation to protect immigrants in courthouses.²⁰⁵ Large local bars that advocated on the issue included BASF, the BBA, the NYCB, and the

202. In contrast, in Oregon, where ICE arrests in courthouses began in 2017, the mandatory Oregon State Bar did not speak out although approximately 800 members of the state bar eventually signed a letter to Oregon’s chief justice supporting a court rule that would preclude ICE agents from making arrests in the courthouse. *See* Letter from Oregon State Bar members to Martha L. Walters, Chief Justice, Oregon Supreme Court (Sept. 3, 2019), https://aclu-or.org/sites/default/files/field_documents/letter_to_chief_justice_walters_re_ice_enforcement_activity_in_oregon_co.pdf [<https://perma.cc/4A64-FEQ6>].

203. Lee Rawles, *Courthouses Should Not Be Used for Routine Arrests, ABA House Says in Resolution*, A.B.A. J. (Aug. 15, 2017), https://www.abajournal.com/news/article/2017_annual_meeting_resolution_10c [<https://perma.cc/U3BR-C4SG>]; *Massachusetts Bar Association Resolutions on Mandatory Minimums, ICE Detentions Adopted Nationally*, MASS. BAR NEWS (Aug. 16, 2017), https://www.massbar.org/docs/default-source/press-releases/2017/august/08-16-17-massbar-resolutions-on-man-mins_ice-detentions-adopted-nationally.pdf [<https://perma.cc/VSV4-Q6CP>].

204. *See New York State Bar Association Resolution* (Jan. 28, 2018), <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Immigration%20Report%20and%20Resolution.pdf> [<https://perma.cc/RAK3-XFUM>].

205. *See Memorandum in Support*, N.Y. STATE BAR ASS’N (June 5, 2018), <https://nysba.org/NYSBA/Advocacy%20and%20Leadership/Governmental%20Relations/Legislative%20Memoranda/17-18%20Legislative%20Memos/17-18NYSBA38.pdf>.

Philadelphia Bar Association.²⁰⁶ National affinity and specialty bars were mostly silent.²⁰⁷

Additional concerns about Trump's immigration policies arose in November 2017 after the news media reported immigrant children were being separated from parents who were seeking asylum at the southern U.S. border.²⁰⁸ The following month, AILA and some immigrant rights organizations announced they had filed a complaint with DHS on behalf of forcibly separated families.²⁰⁹ In May 2018, *Politico* reported on the administration's new policy to prosecute any immigrants who appeared to cross the border illegally, which would result in the separation of even more children from their families.²¹⁰ AILA's president immediately responded, "It is a gross injustice that DOJ and DHS intend to deny humanitarian protection to people arriving at our borders through a systematic plan to separate families . . ." ²¹¹ He continued, "The Attorney General's strident

206. See, e.g., *BBA Requests a Full Bench Review of Petition to Ban Ice Arrests in Courthouses*, BOS. BAR ASS'N (Mar. 30, 2018), <https://bostonbar.org/membership/publications/news-release?ID=378> [<https://perma.cc/A9J3-ARL8>] (describing letter to Massachusetts Supreme Judicial Court); Andrew Denney, *City Bar Calls on N.Y. Chief Judge to Issue New Rules on ICE Courthouse Arrests*, N.Y. L.J. (July 11, 2018), <https://www.law.com/newyorklawjournal/2018/07/11/city-bar-calls-on-ny-chief-judge-to-issue-new-rules-on-ice-courthouse-arrests/> [<https://perma.cc/8QA6-YD6Q>]; Press Release, *ICE Continues to Make Arrests, Undermining Safe Access to Justice*, BAR ASS'N OF S.F. (Mar. 9, 2020), <https://www.sfbar.org/jdc/jdc-newsroom/03092020-courthouse-arrest/> [<https://perma.cc/J3XT-WV7H>]; *Philadelphia Bar Association Statement on ICE Arrests within Courthouses*, PHILA. BAR ASS'N (Mar. 9, 2020), <https://www.philadelphiabar.org/page/NewsItem?appNum=3&newsItemID=1001910> [<https://perma.cc/392N-QZTS>].

207. For one exception, see *HNBA Urges Trump Administration to Revisit Immigration Enforcement Priorities*, HISP. NAT'L BAR ASS'N (Apr. 20, 2017), <https://us4.campaign-archive.com/?u=df9a27c10b6d6ba38ba001440&id=2fde0af442> [<https://perma.cc/2QJW-DLB3>].

208. Lomi Kriel, *Trump Moves to End 'Catch and Release', Prosecuting Parents and Removing Children Who Cross Border*, HOUS. CHRON. (Nov. 25, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php> [<https://perma.cc/PV6M-4L5R>].

209. See *Joint Complaint Filed with DHS on Behalf of Families Forcibly Separated in CBP Custody*, AM. IMMIGR. LAWS. ASS'N (Dec. 11, 2017), <https://www.aila.org/advo-media/press-releases/2017/joint-complaint-filed-with-dhs-behalf-of-families> [<https://perma.cc/QPD7-SV63>].

210. Ted Hesson, *Trump Administration to Step Up Family Separation at the Border*, POLITICO (May 7, 2018), <https://www.politico.com/story/2018/05/07/trump-administration-family-separation-border-519220> [<https://perma.cc/5QD8-AX2E>].

211. *DOJ and DHS Decide to Forcibly Separate Families and Prosecute Asylum Seekers*, AM. IMMIGR. LAWS. ASS'N (May 8, 2017), <https://www.aila.org/advo-media/press-releases/2018/doj-and-dhs-forcibly-separating-families> [<https://perma.cc/JPQ8-KZ9N>]. AILA later issued a policy paper on the issue, with instructions to AILA members to circulate it on social media. See AILA POLICY BRIEF: NEW BARRIERS AT THE BORDER IMPEDE DUE PROCESS AND ACCESS TO ASYLUM (June 1, 2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border> [<https://perma.cc/7QUM-JHP9>].

and misinformed claims that lawyers are ‘coaching’ asylum seekers reveal his disrespect of the fundamental principles of our judicial system which guarantee due process and the right to seek legal counsel.”²¹²

After the news media published disturbing reports about the effects of the new policy, other bar organizations began to respond. The ABA president spoke out against the policy in late May 2018, referencing “basic standards of human decency,” “grave harm to children,” and concluding that forcibly separating families “not only violates due process, it is antithetical to the very human values on which this country was founded.”²¹³ She also sent a letter on June 12, 2018, to the U.S. Attorney General and the Secretary of DHS expressing strong opposition to the increasing separation of children from their parents at the border.²¹⁴ The BBA’s Council endorsed the ABA’s letter a week later, with the BBA’s president noting, “What’s happening right now on our border is difficult for us to witness—not only as lawyers who care about due process and access to justice, but also as human beings.”²¹⁵ The NYCB also wrote to the Attorney General calling for an end to systematic criminal prosecutions that led to family separation.²¹⁶ The Hispanic National Bar Association’s president issued a statement noting that more than 2,000 immigrant children had been forcibly separated from their parents at the border over a six week period.²¹⁷ She stated, “Make no

212. *DOJ and DHS Decide to Forcibly Separate Families and Prosecute Asylum Seekers*, *supra* note 211.

213. *Statement of Hilarie Bass, ABA President, Re: Separating Immigrant Children from Parents at the Border*, AM. BAR ASS’N (May 30, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/statement_of_hilarie/ [https://perma.cc/4QGC-RLX9]. Ms. Bass was obviously not considering the treatment of enslaved families at that time.

214. *ABA Letter Hilarie Bass Sends Letter to DOJ, Homeland Security Opposing Separation of Children*, AM. BAR ASS’N (June 12, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/06/aba_president_hilari0/.

215. *BBA Council Unanimously Endorses Letter Opposing Family Separation*, BOS. BAR ASS’N (June 20, 2018), <https://bostonbar.org/membership/publications/news-release?ID=388> [https://perma.cc/Z3C8-4M8R].

216. *Criminal Prosecution, Detention, and Separation of Families Seeking Asylum*, N.Y. CITY BAR (June 6, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/criminal-prosecution-separation-and-detention-of-families-seeking-asylum> [https://perma.cc/7JCG-9LAC]. BASF’s Justice and Diversity Center also issued a statement. *See Separation of Families at the Border Lacks Legal and Moral Justification*, BAR ASS’N OF S.F. (June 15, 2018), https://www.sfbar.org/wp-content/uploads/2021/01/2018-06-15_Separation-of-Families-at-The-Border-Lacks-Legal-and-Moral-Justification.pdf [https://perma.cc/5ZGS-BNS2].

217. *HNBA: The Trump Administration Must End Its Cruel Family Separation Policy*, HISP. NAT’L BAR ASS’N (June 19, 2018), <https://us4.campaign-archive.com/?u=df9a27c10b6d6ba38ba001440&id=0be3ac9622> [https://perma.cc/63K3-Q7HL].

mistake: the current humanitarian crisis occurring at the U.S.-Mexico border is a manufactured one,” created by the “Administration’s sudden and drastic changes to immigration enforcement policy,” and called on members to contact their Congressional representatives to ask them to sponsor legislation to protect migrant families.²¹⁸ Faced with mounting public criticism of the policy from many sources, Trump signed an executive order reversing the policy on June 20, 2018.²¹⁹

This did not end the advocacy by lawyer organizations. Four voluntary state bar associations advocated on behalf of the immigrant families. The Minnesota State Bar Association and the Minnesota Women’s Lawyers Association sent a resolution to the President and Congressional leaders calling for federal legislation to ensure the policy of separating minor children from their parents not be reinstated and for children who had been separated to be reunited with their parents.²²⁰ The New Jersey State Bar Association and some New Jersey affinity bars wrote to government officials expressing “vehement opposition” to the administration’s policies concerning families seeking to enter the United States.²²¹ The Pennsylvania Bar Association’s statement noted its “long tradition” of advocating to protect children and the legal rights of the poor and declared, “The separation of children from their families as an act of deterrence to entering the country is in violation of due process and equal protection, as well as contrary to the rule of law. It is also morally wrong.”²²² The following year,

Likewise, NAPABA issued a statement decrying the policy on the same day that it was revoked. *See NAPABA Condemns the Separation of Children and Parents at the U.S. Border*, NAT’L ASIAN PAC. AM. BAR ASS’N (June 20, 2018), https://www.napaba.org/page/618_border_stmnt.

218. *HNBA: The Trump Administration Must End Its Cruel Family Separation Policy*, *supra* note 217.

219. *Trump Reverses Course, Signs Order Ending His Policy of Separating Families at the Border*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/powerpost/gop-leaders-voice-hope-that-bill-addressing-family-separations-will-pass-thursday/2018/06/20/cc79db9a-7480-11e8-b4b7-308400242c2e_story.html [<https://perma.cc/GV32-5S8H>].

220. *Resolution and Position Statement Regarding Family Separations at U.S. Border*, MINN. WOMEN LAWS. (July 5, 2018), <https://mwlawyers.org/news/407829/Resolution-and-Position-Statement-Regarding-Family-Separations-at-U.S.-Borders.htm> [<https://perma.cc/5KKC-8LCP>].

221. Letter from John E. Keefe Jr., NJSBA President, et al., to Jeff Sessions, U.S. Attorney General & Kirstjen Nielson, DHS Sec. (June 26, 2018), <https://tcms.njsba.com/personifyebusiness/LinkClick.aspx?fileticket=BagsLPENwAI%3d&portalid=0> [<https://perma.cc/Z5DX-SZKR>].

222. *PBA Issues Statement on Separation of Children from Families at the U.S.-Mexico Border*, PA. BAR ASS’N (June 22, 2018), <http://www.pabar.org/site/News-and-Publications/News/News-Releases/2018/June/Immigration-Statement> [<https://perma.cc/7RKA-3YM9>].

after reports emerged that some children were still separated from their families and housed in inhumane conditions, the NYSBA called on the U.S. government to reunite the children with their parents, provide children in custody with medical care and other basic necessities, and urged the state to enact a right to counsel in immigration proceedings.²²³

Although the specialty bars other than AILA were largely silent,²²⁴ some national and local affinity bars—typically those composed of women or Latinx lawyers—continued to denounce the policy and call for family reunification.²²⁵ A few local bar associations also continued to issue statements.²²⁶ These statements typically referenced due process, but were also filled with moral outrage, using terms such as “abhorrent,” “inhuman,” and “shocks the conscience” to describe their views of the policy.

223. *State Bar Association Calls on U.S. Government to End Inhumane Treatment of Detained Immigrant Children*, N.Y. STATE BAR ASS'N (July 1, 2019), <https://nysba.org/july-1-2019-state-bar-association-calls-on-u-s-government-to-end-inhumane-treatment-of-detained-immigrant-children/> [<https://perma.cc/PAW3-YSB7>].

224. The only other national specialty bar that issued a statement was the National Association of Counsel for Children. *See NACC Call to Action Regarding the Separation of Immigrant Families at the U.S. Border*, NAT'L ASS'N OF COUNSEL FOR CHILDREN (June 26, 2018), <https://www.naccchildlaw.org/news/406509/NACC-Call-to-Action-Regarding-the-Separation-of-Immigrant-Families-at-the-U.S.-Border.htm>.

225. *See, e.g., An Open Letter Regarding Child Separation*, CUBAN AM. BAR ASS'N (July 12, 2018), <https://cabaonline.com/2018/07/13/an-open-letter-regarding-child-separation/> [<https://perma.cc/H83T-H95Z>]; *MNAPABA Joins With Other Minnesota Affinity Bar Associations to Oppose the Separation of Families Crossing Our Borders*, MINN. ASIAN PAC. AM. BAR ASS'N (June 28, 2018), <http://www.mnapaba.org/news/6347366> [<https://perma.cc/FMN6-SJFF>]; *WBA President Issues Statement on Immigration Policy*, WOMEN'S BAR ASS'N, <https://wbawbf.org/content/wba-president-issues-statement-immigration-policy> [<https://perma.cc/FRJ2-DCR6>]; *WBA Releases Issue Statement on Family Unity*, WOMEN'S BAR ASS'N OF D.C., https://wbadc.org/wp-content/uploads/2020/02/WBA_RTB_2018-2019_Issue3_Fall2018_Final.pdf [<https://perma.cc/8K7K-DBWK>]; *Statement on Family Separation Policy*, OR. HISP. BAR ASS'N (June 29, 2018), <http://www.oregonhispanicbar.org/news/statement-on-family-separation-policy>; *NMHBA Statement on 'Zero Tolerance' Family Separation Policy*, N.M. HISP. BAR ASS'N, <https://www.newmexicohispanicbar.org/single-post/2016/05/08/beyond-bucks-10-ways-to-make-a-difference> [<https://perma.cc/8JMH-4K8B>].

226. *See, e.g., New York County Lawyers Association Statement on the Detention of Immigrant Children*, N.Y. CNTY. LAWS. ASS'N (June 28, 2019), <https://www.nycla.org/pdf/NYCLA%20Statement%20on%20the%20detention%20of%20immigrant%20children.pdf> [<https://perma.cc/H6CZ-TL7L>].

C. Charlottesville and George Floyd's Death

There were several times during the Trump presidency when racism garnered focused national attention. One occurred in connection with events in Charlottesville, Virginia on August 12, 2017, where white nationalists, Ku Klux Klan members, and others organized a “Unite the Right” rally to protest Charlottesville’s decision to remove a Confederate war monument.²²⁷ Protestors clashed violently with counter-protestors and the event “exploded into racial taunting, shoving and brawling, prompting the governor to declare a state of emergency and the National Guard to join the police in clearing the area.”²²⁸ Before peace was restored, James Fields deliberately drove a car into a group of counter-protestors, killing one woman and injuring nineteen others.²²⁹ Mr. Trump’s comments that day did not condemn the white nationalists by name, and some observers believed he did not condemn racism strongly enough.²³⁰ In a statement a few days later that further infuriated many people, Trump said not all of the protestors were neo-Nazis and that “you also had people that were very fine people, on both sides.”²³¹ He also stated, “there is blame on both sides” and expressly pointed at the “alt-left.”²³²

The ABA and many other bar associations espouse concerns about promoting diversity in the legal profession and non-discrimination generally.²³³ Not surprisingly, some quickly responded to the events in

227. Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> [<https://perma.cc/NH7C-48QP>].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Full Text: Trump's Comments on White Supremacists, 'Alt-left' in Charlottesville*, POLITICO (Aug. 15, 2017), <https://www.politico.com/story/2017/08/15/full-text-trump-comments-white-supremacists-alt-left-transcript-241662> [<https://perma.cc/8A93-CWN2>].

232. Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville, Again Blames 'Both Sides,'* N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> [<https://perma.cc/D5DL-BYDB>].

233. *See, e.g., Our Origins and Principles*, AM. BAR ASS'N, https://www.americanbar.org/advocacy/rule_of_law/about/origin_principles/ (last visited May 12, 2022) (stating that one of its core principles is that it will work “to eliminate bias and to ensure that marginalized groups have access to justice and public participation”); *Mission Statement*, PA. BAR ASS'N, <https://www.pabar.org/site/About-PBA/Mission-Statement> [<https://perma.cc/S4QS-GPHF>] (stating that mission includes promoting “a diverse and inclusive system of justice”).

Charlottesville. On August 13, 2017, the ABA’s president issued a statement declaring the “American Bar Association abhors the violence and crimes committed in Charlottesville, Va. this weekend” and mourns the loss of life.²³⁴ She further stated, “The ABA knows the principles that govern our country—respect for the rule of law, tolerance for the beliefs and freedoms of others, and a deep dedication to uphold the Constitution—are strong and will prevail over the forces of hate and racism.”²³⁵ The National Lawyers’ Guild also denounced what occurred in Charlottesville, adding, “the hateful rhetoric and policies of Donald Trump and his administration have emboldened racists to assert their ‘right’ to hate speech and violence.”²³⁶

Only a few state bar associations issued statements. The president of the mandatory Virginia State Bar, where the events occurred, issued a short statement that included a quote from Nelson Mandela and concluded, “We support the Constitution and the rule of law, and we condemn any organization or group that doesn’t.”²³⁷ The Pennsylvania Bar Association stated, “we condemn the actions of the white supremacists and Ku Klux Klan members who spoke with hate and acted in violence last week in Charlottesville, Virginia.”²³⁸ In a statement released five days after the events in Charlottesville, the NYSBA president stated she was “sickened by the hatred and violence” but also “deeply disturbed” by calls to restrict speech.²³⁹ The mandatory Washington State Bar Association issued a

234. *Statement of ABA President Linda Klein, Re: Violence in Charlottesville, Va.*, AM. BAR ASS’N (Aug. 13, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/statement_of_abapre1/.

235. *Id.*

236. *Continuing the Fight Against White Supremacy After Charlottesville*, NAT’L LAWS. GUILD (Aug. 14, 2017), <https://www.nlg.org/continuing-the-fight-against-white-supremacy-after-charlottesville/> [https://perma.cc/PT8J-PWMH].

237. *VSB President Doris Henderson Causey’s Statement on Charlottesville, VA*. STATE BAR (Aug. 15, 2017), https://www.vsb.org/site/news/item/vsb_president_doris_henderson_causeys_statement/ [https://perma.cc/5FD6-GZMK].

238. *Pennsylvania Bar Association Issues Statement about Violence and Crimes by Hate Groups in Charlottesville*, PA. BAR ASS’N (Aug. 14, 2017), <https://www.pabar.org/site/News-and-Publications/News/News-Releases/2017/Aug/Charlottesville-Virginia-Statement> [https://perma.cc/SPA8-S2DZ].

239. *NYS Bar Association President Gerstman Condemns Hatred and Efforts to Restrict Free Speech*, N.Y. STATE BAR ASS’N (Aug. 17, 2017), <https://nysba.org/august-17-2017-nys-bar-association-president-gerstman-condemns-hatred-and-efforts-to-restrict-freedom-of-speech/> [https://perma.cc/H7L5-4H5N].

statement six weeks later about the “reprehensible acts of violence at the hands of an emboldened white nationalist movement” in Charlottesville.²⁴⁰ After observing that “the Washington State Minority Bar Association community has been an important partner with the WSBA,” and in an apparent effort to justify its statement, it noted, “We share a duty with government leaders to speak up when injustice occurs in order to reassure our communities, including those communities that are minority or historically disadvantaged, that we will use all resources at our disposal, including legal resources, to protect the rights and safety of everyone.”²⁴¹

The few local lawyer organizations that spoke out came closer to subtly rebuking the President for his failure to call out white nationalists. The BASF condemned “the acts of hate, intimidation and violence” in Charlottesville and stated “that the hate speech and acts by white supremacists, neo-Nazis, the alt-right and the Ku Klux Klan on the streets of Charlottesville are despicable, and require prompt and focused repudiation by federal and state officials.”²⁴² The New York County Lawyers Association, which has a historic commitment to inclusion, also condemned the “horrific violence” and “vile racism” and urged all Americans to “speak out against the hateful bigotry of white supremacists and other extremists.”²⁴³

The messages from affinity bars were even more pointed. The National Bar Association stated that its members:

are alarmed by the sheer depravity of the actions of white supremacists at the rally in Charlottesville yesterday. The injuries and loss of life are heartbreaking and are sadly

240. *WSBA Statement Denouncing Recent Acts of Violence and Reaffirmation of Equity and Inclusion Principles*, WASH. STATE BAR ASS'N (Sept. 29, 2017), https://www.wsba.org/docs/default-source/about-wsba/governance/resolutions/wsba-statement-denouncing-recent-acts-of-violence.pdf?sfvrsn=b2703af1_2 [https://perma.cc/M869-FEY3].

241. *Id.* Several months after the events in Charlottesville, the mandatory Oregon State Bar also issued a statement condemning the violence in Charlottesville and the racially motivated attacks on Portland's MAX train. See *Statement on White Nationalism and Normalization of Violence*, OR. STATE BAR (Feb. 23, 2018), https://www.osbar.org/_docs/diversity/2018NonviolenceStatement.pdf [https://perma.cc/PLC4-VEGR].

242. *BASF Statement on Violence in Charlottesville*, BAR ASS'N OF S.F. (Aug. 15, 2017), https://www.sfbar.org/wp-content/uploads/2021/01/2017-08-15_BASF-Statement-on-Violence-in-Charlottesville.pdf [https://perma.cc/K6PC-8EUT].

243. *New York County Lawyers Association Statement on the Charlottesville, Virginia Tragedy*, N.Y. CNTY. LAWS. ASS'N (Aug. 14, 2017), <https://www.nycla.org/pdf/Charlottesville%20statement.pdf> [https://perma.cc/2VBV-HLLL].

emblematic of the injuries to notions of justice and the rule of law that have been suffered since the beginning of the Trump Administration. . . .

President Trump’s unfortunate statement, which appeared to suggest a moral equivalency between the acts of Neo-Nazis and peaceful counter demonstrators, is beneath the office and is a violation of trust. The civil and human rights of American citizens have been abrogated and it is the responsibility of the President of the United States to clearly decry such violations and restore confidence in justice and the rule of law.²⁴⁴

NAPABA observed, “Leaders do not equate individuals who support ideologies of hate with those who stand defiantly in support of diversity and inclusion, in support of our nation’s ideals. There is no moral equivalence between bigotry and tolerance.”²⁴⁵ The Cook County Bar Association stated:

these hatemongers and thugs now find comfort in the office of the erstwhile leader of the free world who, instead of unequivocally decrying these acts, instead chooses to baselessly malign “many sides.” But there is only one wrong side in this horrible tragedy. And one righteous side. Real leadership must know and state the difference.²⁴⁶

A joint statement by Washington’s minority bar associations stated, “Given President Trump’s failure to unequivocally condemn racist and white separatist groups after the incidents in Charlottesville, it is now more important than ever that we as members of the legal profession step in to fill

244. *The National Bar Association’s Statement on Charlottesville Rally*, DC NITELIFE (Aug. 14, 2017), <https://dcnitelife.com/national-bar-association-statement-charlottesville-rally/> [https://perma.cc/28EQ-8S83].

245. *A Message to NAPABA Members After Charlottesville*, NAT’L ASIAN PAC. AM. BAR ASS’N (Aug. 19, 2017), https://www.napaba.org/page/cville_member_stmnt [https://perma.cc/7BZX-CKTX].

246. *CCBA Statement on Terrorist March and Attack in Charlottesville, VA*, COOK CNTY. BAR ASS’N (Aug. 14, 2017), <https://cookcountybar.org/announcements/archive/2017-08> [https://perma.cc/GCX6-4E8W].

the void.”²⁴⁷ Some other local affinity bar organizations also issued statements,²⁴⁸ but the specialty bars were silent.

In 2020, the topic of racism garnered even greater national attention. In mid-May 2020, the national media were reporting on the police killing of Breonna Taylor, a Black woman who was shot in her Louisville home during a botched search.²⁴⁹ The media also reported that Georgia prosecutors had failed to bring murder charges against two white men for killing Ahmaud Arbery, a Black man, months earlier while he was jogging.²⁵⁰ Then, video captured on May 25, 2020, depicted George Floyd, an unarmed Black man, being killed by a Minneapolis police officer who applied a knee to Floyd’s neck during an arrest as Floyd pleaded “I can’t breathe.”²⁵¹ This sparked nationwide protests against police misconduct and racial inequality that continued for weeks, and in some places, for months.²⁵²

247. *Joint Statement of Washington Minority Bar Associations Regarding Events in Charlottesville*, <https://www.q-law.org/resources/Documents/MBA%20Joint%20Statement%20Final.pdf> [https://perma.cc/4SLK-YHKP].

248. For example, the Asian American Bar Association of San Francisco stated, “We are horrified by the hatred, bigotry, and violence demonstrated at a white nationalist rally in Charlottesville. AABA calls upon President Trump to condemn the hate groups in unequivocal terms.” *AABA Statement on Charlottesville Tragedy*, ASIAN AM. BAR ASS’N OF GREATER BAY AREA (Aug. 14, 2017), <https://www.aaba-bay.com/press-releases/5028165> [https://perma.cc/XY4W-6X2D]. See also *Statement Re: Charlottesville*, S. ASIAN BAR ASS’N OF N.Y. (Aug. 21, 2017), https://www.sabany.org/files/advocacy/SABANY_Statement_re_Charlottesville.pdf [https://perma.cc/G3JF-GX7S]; *HBA-DC Denounces White House’s Response to White Supremacist March in Charlottesville*, HISP. BAR ASS’N OF D.C. (Aug. 16, 2017), https://cdn.ymaws.com/www.hbadc.org/resource/resmgr/advocacy_letters/2017.08.16_HBA-DC_Charlottes.pdf [https://perma.cc/DS9R-XDYQ].

249. See, e.g., *‘Get Your Damn Story Straight’: What We Know About Louisville Woman Breonna Taylor’s Death*, USA TODAY (May 14, 2020), <https://www.usatoday.com/story/news/nation/2020/05/14/breonna-taylor-what-know-louisville-ent-killed-police/5189743002/> [https://perma.cc/XE9A-BA5Q].

250. The failure to bring charges in the February 2020 shooting did not garner significant national attention until May. See Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES (May 17, 2020), <https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html> [https://perma.cc/T8FH-BS2C].

251. A bystander filmed these images, which were then widely disseminated. Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others are Policing the Police*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> [https://perma.cc/48YY-JZ4T].

252. See, e.g., *Portland Protests Resume, 11 Arrested in Unlawful Assembly*, KOIN.COM (Sept. 18, 2020), <https://www.koin.com/news/protests/smoke-clears-and-protests-resume-in-portland/> [https://perma.cc/AS6K-Q2F6]; *Chicago’s Summer of Looting and Unrest and How the City is Still Reeling*, CHI. TRIB. (Oct. 6, 2020), <https://www.chicagotribune.com/news/breaking/ct-cb-george-floyd-fallout-impact-chicago-20201006-lkndggmch5emjiefplywhcaeou-story.html>.

These events prompted an outpouring of statements from lawyer organizations, with many directly acknowledging the continuing problem of racism in the United States. The ABA president stated that the ABA “is troubled and saddened by events in Minneapolis and other places that underscore the violence against people of color—including police brutality—that still plagues our country.”²⁵³ She further noted society relies “on the rule of law. But the law must be fairly applied and enforced.”²⁵⁴ Thirteen voluntary state bar associations spoke out, including several that do not usually do so such as state bar associations in Iowa, Kansas, Louisiana, and Vermont.²⁵⁵ In Minnesota, where Floyd was killed, the Minnesota State Bar Association, along with three local and specialty bars, called on the governor, public officials, and state law enforcement agencies “to actively confront the systems and cultures within their police departments that have repeatedly allowed people of color to be brutalized and killed.”²⁵⁶ The Tennessee Bar Association’s message advocated for the legal community to lead, noting, “Lawyers have always served as agents of reform and we have a responsibility and an opportunity to champion meaningful reforms to create systemic change.”²⁵⁷ The NYSBA announced the formation of the Task Force on Racial Injustice and Police Reform and its president stated, “George Floyd’s death at the hands of law enforcement and its aftermath were not aberrations; they were the culmination of a long history of racism and inequality that continues to plague our nation.”²⁵⁸

253. *ABA President Judy Perry Martinez Statement Re: Events in Minneapolis, Elsewhere and Equal Justice*, AM. BAR ASS’N (May 29, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/05/aba-president-judy-perry-martinez-statement-re--events-in-minnea/>.

254. *Id.*

255. *See Statements on George Floyd Death and Protests*, AM. BAR ASS’N, https://www.americanbar.org/groups/bar_services/resources/resourcepages/floydstatements/ (last visited May 12, 2022).

256. *Statement on George Floyd*, MINN. STATE BAR ASS’N (June 1, 2020), <https://www.mnbar.org/about-msba/announcements/2020/06/01/minnesota-state-bar-association-hennepin-county-bar-association-ramsey-county-bar-association-and-minnesota-chapter-of-the-federal-bar-association-statement-on-george-floyd/> [<https://perma.cc/XAF8-XFBZ>].

257. *TBA President Issues Statement on Recent Tragic Events*, TENN. BAR ASS’N (June 1, 2020), <https://www.tba.org/?pg=LawBlog&blAction=showEntry&blogEntry=55105> [<https://perma.cc/Y524-LRRF>].

258. *See Susan DeSantis, State Bar Association Creates Task Force on Racial Injustice and Police Reform*, N.Y. STATE BAR ASS’N (June 8, 2020), <https://nysba.org/state-bar-association-creates-task-force-on-racial-justice-in-response-to-george-floyds-death/> [<https://perma.cc/435H-AVDX>].

What was even more remarkable was the number of mandatory state bars that issued statements following Floyd's death.²⁵⁹ As noted, these bar associations are legally constrained in what they can say and are well-aware that some bar members resent compelled membership in the state bars, viewing it as a violation of their First Amendment rights.²⁶⁰ Nevertheless, sixteen of the mandatory state bars made statements.²⁶¹ They were often couched as statements directed to the members rather than the broader community.²⁶² In some cases, the mandatory bars' statements were prompted by members who believed there should be a public response. For example, the Florida Bar stated:

Some Bar members have asked if we will take an official position on the civil rights issues of the past week. As an arm of the Florida Supreme Court, we are prohibited from taking official positions on specific ideological or political issues. But we will honor our oath to support the causes of the oppressed or defenseless and will work to fulfill the purpose of The Florida Bar to serve the public and improve the administration of justice.²⁶³

It was also clear some of the statements were intended as much to express solidarity with bar members of color as they were a statement to the outside

259. See *Statements on George Floyd Death and Protests*, *supra* note 255.

260. See *supra* notes 26–28 and accompanying text.

261. See *Statements on George Floyd Death and Protests*, *supra* note 255. Even though other mandatory bars did not make statements, their bar presidents belong to the National Conference of Bar Presidents, which issued its own statement. *Statement by Nate Alder, NCBP President, Regarding the Tragic Death of George Floyd and Worldwide Protests for Justice*, NAT'L CONF. OF BAR PRESIDENTS (June 2, 2020), <https://ncbp.org/page/NCBPGeorgeFloydStatement-June22020> [<https://perma.cc/7RGB-73DQ>].

262. For example, the State Bar of South Dakota communicated its statement as a tweet to its members. See @StateBarofSD, TWITTER (June 9, 2020, 2:39 PM). Most did not issue their statements as a press release. See, e.g., *State Bar of Texas Statement on George Floyd and Equal Access to Justice*, STATE BAR OF TEX. (June 9, 2020), <https://blog.texasbar.com/2020/06/articles/state-bar/state-bar-of-texas-statement-on-george-floyd-and-equal-access-to-justice/> [<https://perma.cc/LB6J-JZXK>].

263. *President Stewart Reaffirms the Florida Bar's Commitment to Equal Justice*, FLA. BAR (June 4, 2020), <https://www.floridabar.org/the-florida-bar-news/president-stewart-reaffirms-the-florida-bars-commitment-to-equal-justice/> [<https://perma.cc/5T2T-66HH>]. Likewise, the president of the Washington State Bar Association noted at the outset of his letter to members that his "inbox has flooded these past few days with member concern about the events of the last week stemming from the killing of George Floyd . . ." Letter from Rajeev D. Majumdar, President, Wash. State Bar Ass'n, <https://www.wsba.org/docs/default-source/about-wsba/governance/civil-unrest.pdf> [<https://perma.cc/3RJ5-TKQ7>].

world. For example, the mandatory Alabama Bar stated, “The Alabama State Bar is committed to engaging, listening and learning from the experiences of all our members. It is often said that you cannot lead into the future until you acknowledge the past.”²⁶⁴ Likewise, the Louisiana State Bar Association, after noting that Blacks and other minorities have not received equal administration of justice, stated, “We support Louisiana lawyers and stand with you against inequities in the criminal justice system, racism and discrimination.”²⁶⁵

The state bars’ responses were often couched in terms of equal protection under the law, access to justice, and lawyers’ responsibilities to promote constitutional values.²⁶⁶ Some messages expressly referenced the lawyers’ oaths to support and defend the Constitution. The State Bar of Texas, while noting “constraints on its ability to take a stance on political or ideological issues,” continued, “[s]till, all lawyers who take the oath to defend the Constitution of this state and of the United States surely share a common pursuit of equality under the law.”²⁶⁷ Others, like the Georgia State Bar president, wrote, “As members of the State Bar of Georgia, we have a responsibility to uphold the [state and U.S. Constitution]. Our work to promote and protect the principles of democracy and the tenets outlined in the U.S. Constitution will continue.”²⁶⁸ Some mandatory bars implicitly

264. *An Important Message from the Alabama State Bar Condemning Racial Injustice*, ALA. STATE BAR (June 17, 2020), <https://www.alabar.org/news/an-important-message-from-the-alabama-state-bar-condemning-racial-injustice/> [https://perma.cc/C4SR-LUJF].

265. *A Statement from the Louisiana State Bar Association*, LA. STATE BAR ASS’N, <https://www.lsb.org/NewsArticle.aspx?Article=fe41b7c6-a604-4164-a45e-1edc2fa1809f> [https://perma.cc/T6V9-BFBC]; see also *A Statement from the South Carolina Bar*, S.C. BAR (June 3, 2020), <https://www.scb.org/bar-news/article/statement-south-carolina-bar/> [https://perma.cc/TK5D-YQDD] (same); *State Bar of Texas Statement on George Floyd and Equal Access to Justice*, *supra* note 262 (same).

266. For example, the Wisconsin State Bar’s president stated, “We must now work together to help rebuild the public’s trust and confidence in the rule of law while at the same time work to ensure that all Wisconsin residents have access to a fair and impartial system of justice.” Jill M. Kaster, *Change Does Not Happen When We are Comfortable or Complacent*, STATE BAR OF WIS. (June 2, 2020), <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=27782> [https://perma.cc/2CKP-U5V2]. See also *WV State Bar Statement on Social Justice*, W. VA. STATE BAR (June 12, 2020), <https://wvbar.org/wv-state-bar-statement-on-social-justice/> [https://perma.cc/2KZ3-WW8P] (“Now is an important time to remind ourselves of the responsibilities we have in the legal profession to promote and uphold access to justice for all citizens.”).

267. *State Bar of Texas Statement on George Floyd and Equal Access to Justice*, *supra* note 262. See also @StateBarofSD, *supra* note 262.

268. *A Message from the Bar: Safeguarding Equal Justice and the Rule of Law*, GA. STATE BAR, <https://www.gabar.org/message.cfm> [https://perma.cc/23R2-SJDP].

acknowledged the difficulty of issuing a statement about racial injustice that purported to speak for its members. The State Bar of Michigan's message stated that it "does not speak for all 46,254 Michigan lawyers, but through your actions we will always speak for the rule of law and equal justice for all."²⁶⁹ Likewise, the mandatory Missouri Bar's message concluded:

The Missouri Bar has many voices and many opinions among its membership, and each voice should be heard as we address the issues facing our state and our nation. However, our unified voice is and shall always be in support of the rule of law and equal justice for all.²⁷⁰

More than ten national affinity bar associations issued statements, including the Hispanic National Bar Association, the National Bar Association, NAPABA, the National Conference of Women's Bar Associations, and the National LGBT Bar Association.²⁷¹ Some national specialty bar associations also made statements, including AILA, the American College of Trial Lawyers, the Association of Corporate Counsel, the Federal Bar Association, and the National Legal Aid and Defender Association.²⁷² Several large local bar associations that had previously spoken out on social issues did so, including the BASF, BBA, NYCB, and the Philadelphia Bar Association. So, too, did large city bar associations that did not typically make statements, such as the bar associations in Atlanta, Austin, Chicago, and Cleveland and at least thirty smaller city and county bar organizations.²⁷³

269. *Officers' Message*, STATE BAR OF MICH., <https://www.michbar.org/eBlasts/officersmessage> [<https://perma.cc/9UN6-QEMF>].

270. *The Missouri Bar Supports the Rule of Law and Equal Justice for All*, MO. BAR (June 9, 2020), <https://news.mobar.org/the-missouri-bar-supports-the-rule-of-law-and-equal-justice-for-all/> [<https://perma.cc/36F9-ALG5>].

271. *Statements on George Floyd Death and Protests*, *supra* note 255; *Statements Regarding Protests for Social Justice*, NAT'L CONF. OF BAR PRESIDENTS, https://ncbp.org/page/Social_Justice_Statements (last visited May 12, 2022). Some local affinity bar associations also issued statements.

272. *See Statements on George Floyd Death and Protests*, *supra* note 255; *Statements Regarding Protests for Social Justice*, *supra* note 271.

273. *See Statements on George Floyd Death and Protests*, *supra* note 255.

D. Attacks on the Presidential Election Results and the Capitol

During the period running up to the 2020 presidential election, President Trump and some others raised concerns about the integrity of mail-in ballots and other voting procedures.²⁷⁴ Pre-election rhetoric became so incendiary that some feared there would be post-election violence.²⁷⁵ On November 3, 2020, the night of the election, Mr. Trump was leading in several battleground states, but many mail-in votes had not yet been counted.²⁷⁶ Early on November 4, when it began to appear Joseph Biden was making up ground, Trump started to claim election fraud.²⁷⁷ The Trump campaign soon began to assert there had been massive, organized voter fraud and quickly brought lawsuits in Michigan and Pennsylvania over vote counting procedures. On November 6, 2020, the Republican National Lawyers Association (RNLA) issued a “Statement on the 2020 Election” that applauded “both the Trump campaign and our Republican lawyer colleagues around the country who are fighting to ensure the integrity and finality of the election.”²⁷⁸ The statement condemned “reports from Democratic-controlled areas” of election observers being excluded from the counting of ballots and of voters being disenfranchised but was focused on ensuring that “all legal votes are counted” and that “we have a result that all Americans can accept, regardless of party.”²⁷⁹

274. Courtney Weaver, *Trump Warns of Fraud as Americans Vote Early in Record Numbers*, FIN. TIMES (Nov. 2, 2020), <https://www.ft.com/content/35c0ed72-3576-46cc-9db2-9a0c83dcd1d6> [<https://perma.cc/DH8E-SKLZ>].

275. Marc Fisher, *With Election Day Looming, an Anxious Nation Hears Rumbblings of Violence*, WASH. POST (Oct. 31, 2020), https://www.washingtonpost.com/politics/fear-of-election-violence/2020/10/30/5b4f5314-17a3-11eb-befb-8864259bd2d8_story.html [<https://perma.cc/M9PY-GEP8>].

276. In some jurisdictions, including Georgia, Pennsylvania, and Wisconsin, state law provided that absentee ballots could not be counted until Election Day. See Matt Breuninger & Hannah Miao, *Election 2020: Here’s When Swing States Will Start Counting Ballots*, CNBC (Nov. 1, 2020), <https://www.cnbc.com/2020/11/01/election-2020-when-key-swing-states-start-counting-ballots.html> [<https://perma.cc/TG4K-VANT>].

277. Trump tweeted: “We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Polls are closed!” @realDonaldTrump, TWITTER (Nov. 4, 2020, 12:49 AM); see also Christina Wilkie, *Trump Tries to Claim Victory Even as Ballots are being Counted in Several States—NBC Has not Made a Call*, CNBC (Nov. 4, 2020), <https://www.cnbc.com/2020/11/04/trump-tries-to-claim-victory-even-as-ballots-are-being-counted-in-several-states-nbc-has-not-made-a-call.html> [<https://perma.cc/8MQD-RG6A>].

278. *RNLA Statement on the 2020 Election*, REPUBLICAN NAT’L LAWS. ASS’N (Nov. 6, 2020), https://www.rnla.org/rnla_statement_on_the_2020_election [<https://perma.cc/AY9Y-N5NX>].

279. *Id.*

On November 7 major news outlets declared Joseph Biden the winner of the 2020 presidential election.²⁸⁰ Nevertheless, President Trump and his attorneys continued to press claims of voter fraud in the courts and in the media. That same day, at a press conference in Philadelphia, Rudolph Giuliani stated he was there on behalf of the Trump campaign and as the President's attorney.²⁸¹ He claimed that only voter fraud manufactured by Philadelphia's "Democratic machine" could have accounted for the erasure of Mr. Trump's initial lead of 800,000 votes. He also stated, "There are dead people voting. No question about it."²⁸² The next day, Giuliani repeated his claim on Fox News about dead people voting and voter fraud, stating "[t]here is strong evidence that this was an election that, in at least three or four states, and possibly ten, there—it was stolen. In other words, it was based on false votes."²⁸³ These sorts of claims by the President, Giuliani, and others continued for months.

For the first week after the election, apart from the RNLA's statement, lawyer organizations were silent. Finally, on November 10, 2020, at the LDAD's initiative, 1,000 attorneys, including some retired judges and state attorneys general, publicized an open letter criticizing the Trump administration for its baseless claims of widespread voter fraud and asking public officials and lawyers to stop making unfounded claims of fraud that undermined the election process.²⁸⁴ Nevertheless, and notwithstanding mounting losses in the courts, the President and his supporters continued to allege voter fraud and claim Trump had won the election.²⁸⁵

280. Stephen Battaglio, *How the Networks Decided to Call the Election for Joe Biden*, L.A. TIMES (Nov. 7, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-11-07/joe-biden-president-elect-television-news-networks> [https://perma.cc/26TC-KT5P].

281. AP Archive, *Four Seasons Total Landscaping Press Conference – Long Version*, YOUTUBE (Nov. 7, 2020), <https://www.youtube.com/watch?v=7QTRO9MG6z8> [https://perma.cc/C7XD-A2FM].

282. *Id.*

283. *Trump Legal Team to File New Ballot Lawsuits*, FOX NEWS (Nov. 8, 2020), <https://www.foxnews.com/transcript/trump-legal-team-to-file-new-ballot-lawsuits> [https://perma.cc/MPR2-TU9L].

284. *Open Letter Seeking Accountability for False Claims of Election Fraud*, LAWS. DEFENDING AM. DEMOCRACY (Nov. 10, 2020), <https://ldad.org/letters-briefs/open-letter-seeking-accountability-for-false-claims-of-fraudulent-election> [https://perma.cc/2R2T-NFC5].

285. For example, he tweeted: "There is tremendous evidence of wide spread voter fraud in that there is irrefutable proof that our Republican poll watchers and observers were not allowed to be present in poll counting rooms. Michigan, Pennsylvania, Georgia and others. Unconstitutional!!" @realDonaldTrump, TWITTER (Nov. 14, 2020, 6:07 PM).

In mid-November, one Trump campaign strategy that emerged was to persuade Republican-controlled state legislatures in battleground states to certify Trump electors rather than Biden electors.²⁸⁶ On November 16, the ABA’s president, Patricia Lee Renfo, issued a restrained but pointed statement noting, “Our democracy is built upon the rule of law,” which requires adherence to the laws established for elections. She also stated that “[i]f there are remaining legitimate questions, they should be litigated in court, but that disagreement does not affect the validity of the court’s decisions” and that the “rule of law also prescribes the peaceful transfer of power following an election.”²⁸⁷ On November 23, current and past presidents of the NYSBA issued a statement criticizing Trump’s attempts to block certification of the vote by encouraging state legislatures to appoint new electors,²⁸⁸ but the NYSBA made no official statement.

On December 7, 2020, LDAD issued another letter, signed by over 1,500 lawyers, calling for bar investigations of Trump’s campaign lawyers who they claimed engaged in dishonesty in connection with their election challenges.²⁸⁹ The letter stated that the campaign’s ongoing litigation was a “pretext for a campaign to undermine public confidence in the 2020 election, which inevitably will subvert constitutional democracy.”²⁹⁰ A few days later, Checks & Balances, a group of conservative and libertarian lawyers formed in 2018 to speak out against the President,²⁹¹ also issued a

286. Bob Christie & Nicholas Riccardi, *GOP Leaders in Four States Quash Dubious Trump Bid on Electors*, ASSOCIATED PRESS (Nov. 14, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-legislature-pennsylvania-b199b2debc87fbb20612a48835bc0dba>.

287. *Statement of ABA President Patricia Lee Renfo Re: Presidential Election*, AM. BAR ASS’N (Nov. 16, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/11/aba-president-s-statement-re-state-of-the-2020-presidential-elec/>.

288. Andrew Maloney, *What Law Firm Leaders Say About Trump’s Refusal to Concede*, NAT’L L.J. (Nov. 23, 2020), <https://www.law.com/newyorklawjournal/2020/11/23/what-law-firm-leaders-are-saying-about-trumps-refusal-to-concede/>.

289. *Over 1500 Attorneys Press Bar Authorities to Condemn and Investigate Trump’s Campaign Lawyers*, LAWS. DEFENDING AM. DEMOCRACY (Dec. 7, 2020), <https://ldad.org/wp-content/uploads/2021/05/Bar-Condemnation-Investigation-FINAL.docx.pdf> [<https://perma.cc/4GRB-TK5A>].

290. *Id.* Four days later, the BBA issued a more temperate statement, noting judges from both political parties had consistently rejected challenges to the election outcome and that lawyers who brought frivolous lawsuits could be sanctioned. *The Role of An Independent Judiciary in Upholding Election Integrity*, BOS. BAR ASS’N (Dec. 14, 2020), <https://bostonbar.org/membership/publications/news-release?ID=467> [<https://perma.cc/BE8L-ZC6U>].

291. Tucker Higgins, *Top Lawyers in the Federalist Society are Trying to Rally Fellow Conservatives to Speak Out Against Trump*, CNBC (Nov. 14, 2018),

statement. The group noted Trump “continued to abuse his White House platform to undermine national confidence in our election process and its results” and called on congressional Republicans to “speak out in public to oppose [Trump’s] abuse of public officials and the incitement of his followers to threaten their safety.”²⁹² On December 24, 2020, the NYCB issued a lengthy “call to action,” stating that “[p]rompt and visible action by our profession is necessary because lawyers have been prominently involved in causing the damage to our community’s respect for law and our Constitutional government.”²⁹³ After cataloguing some of the damage done by Trump’s post-election activities, the statement continued, “We call upon our fellow members of the bar to step up, to speak out and to act responsibly in the best traditions of our profession. If we fail to do so, there is no guarantee that our democracy, based upon the rule of law, will endure for future generations.”²⁹⁴

As the Trump campaign failed to persuade state legislators to change the outcome of the election, it began to float the idea that Vice President Pence could reject the electors’ votes when he sat as the presiding officer while Congress counted and certified the votes.²⁹⁵ In late December, President Trump called on supporters to rally in Washington, D.C. on January 6, 2021—the date Congress was scheduled to certify the presidential election—for a protest.²⁹⁶ Mr. Giuliani spoke for a little more than five minutes at the January 6 protest, arguing there was a legal basis

<https://www.cnbc.com/2018/11/14/top-lawyers-rally-fellow-conservatives-to-speak-out-against-trump.html> [<https://perma.cc/EB4M-SR2E>].

292. *Statement from Members of Checks & Balances, and Other Current and Former Republicans Who Have Served Prior Administrations*, CHECKS & BALANCES (Dec. 11, 2020), <https://checks-and-balances.org/statement-from-members-of-checks-balances-and-other-current-and-former-republicans-who-have-served-prior-administrations/> [<https://perma.cc/54MN-KTJ7>].

293. *New York City Bar Association Calls on American Lawyers to Support the Rule of Law*, N.Y. CITY BAR (Dec. 24, 2020), https://s3.amazonaws.com/documents.nycbar.org/files/2020823-ROLTF_CallToAction_FINAL_201224.pdf.

294. *Id.*

295. Joe Walsh, *Here’s Why Pence Can’t Overthrow Biden’s Win (Despite What Trump May Hope)*, FORBES (Dec. 6, 2020), <https://www.forbes.com/sites/joewalsh/2020/12/24/heres-why-pence-cant-overthrow-bidens-win-despite-what-trump-may-hope/?sh=25f0937b47d9>.

296. Jemima McEvoy, *‘President Trump Has Called’: Supporters Plan D.C. Rally to Overturn His Loss on Day Congress Certifies Election*, FORBES (Dec. 23, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/12/23/president-trump-has-called-supporters-plan-dc-rally-to-overturn-his-loss-on-day-congress-certifies-election/?sh=14e2dcd84c9b>.

for the Vice President to cast aside the electors’ votes.²⁹⁷ He then introduced John Eastman, a law professor, who briefly spoke in support of the theory.²⁹⁸ President Trump spoke next, telling supporters the election had been stolen and they needed to continue to fight.²⁹⁹ Some members of the crowd proceeded to the U.S. Capitol where they breached security, damaged the interior, and threatened the safety of Vice President Pence and members of Congress in a stunning event that was live-streamed to the American public.³⁰⁰

Within hours, the ABA’s president condemned “in the strongest terms today’s assault on the U.S. Capitol by protesters” and the effort to disrupt the counting of the electoral votes.³⁰¹ She stated, “The 2020 election was fairly conducted, and the results are accurate. The system worked. Claims of impropriety were thoroughly and openly investigated. Dozens of lawsuits challenging the election results were carefully considered by courts, including the U.S. Supreme Court. No evidence of any significant fraud was found.” She concluded, “All elected officials and others in positions of civic responsibility must now uphold their oath to defend the Constitution, support a peaceful transition of power, and thereby protect the rule of law.”³⁰² At least thirteen voluntary state bar associations condemned the violence,³⁰³ and at least eight mandatory state bars also issued statements.³⁰⁴

297. *Rudy Giuliani & Professor John Eastman*, C-SPAN, <https://www.c-span.org/video/?c4933578/user-clip-rudy-giuliani-professor-john-eastman> [<https://perma.cc/89YA-U84L>].

298. *Id.*

299. Peter Nickeas, *Pro-Trump Supporters Have Flooded DC to Protest President’s Election Loss*, CNN (Jan. 6, 2021), <https://www.cnn.com/2021/01/06/politics/pro-trump-supporters-dc-protest/index.html> [<https://perma.cc/7UAZ-67PY>].

300. *Chaos at the Capitol: Pro-Trump Mob Storms Complex*, MSN NEWS (Jan. 6, 2021), <https://web.archive.org/web/20210208175418/https://www.msn.com/en-us/news/politics/chaos-at-the-capitol-pro-trump-mob-storms-complex/ar-BB1cxsmc>.

301. *Statement of ABA President Patricia Lee Reno Re: Violence at the U.S. Capitol*, AM. BAR ASS’N (Jan. 6, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/01/statement-of-aba-president-patricia-lee-refo-re--violence-at-the/>.

302. *Id.*

303. The voluntary state bars in California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, and Virginia issued statements. See *Bar Association Statements on Capitol Attack*, NAT’L ASS’N BAR EXECS., <https://www.nabenet.org/page/capitolattackstatements> (last visited May 12, 2022).

304. *Id.* The mandatory jurisdictions were the D.C. Bar and state bars in Arizona, Montana, Nebraska, Nevada, South Carolina, Virginia, and Washington. *Id.* The National Conference of Bar Presidents also issued a brief statement supporting the ABA’s statement and condemning the violence. See *A Statement from NCBP President Aurora Austriaco on the Violence at the U.S. Capitol*, NAT’L

Large local bar associations, including in Atlanta, Boston, Chicago, Cleveland, San Francisco, and Philadelphia issued statements,³⁰⁵ as did several smaller local bar associations.³⁰⁶ A few national affinity bar associations issued statements, as did some local affinity bars.³⁰⁷ The RNLA did not issue a statement. One of the few national specialty bars to speak out was the Federal Bar Association.³⁰⁸

Many of the bar associations' statements condemned the attack on the Capitol, with some expressing sorrow.³⁰⁹ Some seemingly felt the need to

CONF. OF BAR PRESIDENTS (Jan. 6, 2021), <https://ncbp.org/news/546339/A-Statement-from-NCBP-President-Aurora-Austriaco-on-the-Violence-at-the-U.S.-Capitol.htm> [<https://perma.cc/TQ3K-F3Z9>].

305. See *Bar Association Statements on Capitol Attack*, *supra* note 303; see also *The Chicago Bar Association Condemns Violence at U.S. Capitol*, CHI. BAR ASS'N (Jan. 8, 2021), <https://www.chicagobar.org/chicagobar/CBA/CBA/About/News.aspx> [<https://perma.cc/WS69-CDXF>]; BASF Press Release, *BASF and JDC Strongly Condemn Violence at the U.S. Capitol, Call on Vice President and Congress to Take All Lawful Action to Constrain the President's Unlawful Conduct*, BAR ASS'N OF S.F. (Jan. 7, 2021), <https://www.sfbar.org/about-us/newsroom/01072021-condemnation-of-violence-at-the-us-capitol/> [<https://perma.cc/GD2V-HY4U>]. LACBA's president sent a very brief message to LACBA members, in which she did not condemn what happened, but referred to the "unfortunate events." Letter from Tamela C. Jehnsen, President, L.A. Cnty. Bar Ass'n, to LCCBA Members, https://www.lacba.org/images/default-source/news_photos/jan6-1.jpg [<https://perma.cc/JFR8-QKS7>].

306. See *Bar Association Statements on Capitol Attack*, *supra* note 303; see also *OCBA Statement on Capitol Attack*, ONONDAGO CNTY. BAR ASS'N REP. (Jan. 2021), <https://www.onbar.org/january-2021-bar-reporter/> [<https://perma.cc/L6DS-G3X6>]; *Allen County Bar Association Statement on the Inauguration: Rule of Law Prevails*, GREATER FORT WAYNE BUS. WKLY. (Jan. 21, 2021), https://www.fwbusiness.com/news/article_d46e7661-507d-53a6-ad95-5403b2399798.html [<https://perma.cc/7WYX-UFGQ>]; Marco Poggio, *NY Lawyers Condemn Storming of Capitol by Mob*, LAW360 (Jan. 7, 2021), <https://www.law360.com/pulse/articles/1342590/>.

307. The national affinity bars included NAPABA, the Hispanic National Bar Association, and the National Filipino American Lawyers Association. *Bar Association Statements on Capitol Attack*, *supra* note 303; see also *MuBANY Statement on Capitol Riots*, MUSLIM BAR ASS'N OF N.Y. (Jan. 13, 2021), <https://www.mubany.org/news/mubany-statement-capitol-riots>; Poggio, *supra* note 306.

308. *Bar Association Statements on Capitol Attack*, *supra* note 303.

309. See, e.g., *Statement of MSBA President Scurti Regarding Events of January 6, 2021*, MD. STATE BAR ASS'N (Jan. 7, 2021), <https://www.msba.org/statement-of-msba-president-scurti-regarding-events-of-january-6-2021/#0> [<https://perma.cc/VH7P-T9X5>] ("The horrific images and scenes of rioters that broke through one of our most sacred institutions made me sad, and more so, fearful."); *D.C. Bar Condemns Violence the at U.S. Capitol*, D.C. BAR (Jan. 7, 2021), <https://www.dcbbar.org/news-events/news/d-c-bar-condemns-violence-at-the-u-s-capitol> [<https://perma.cc/F4DM-PXPK>] (stating that the Board of Governors "condemn unequivocally the violence and damage" at the Capitol); *Boston Bar Association Statement on the Violent Assault on the U.S. Capitol*, BOS. BAR ASS'N (Jan. 7, 2021), <https://bostonbar.org/membership/publications/news-release?ID=469> [<https://perma.cc/Y9QD-DAWE>] (stating that "the Boston Bar Association is appalled and deeply saddened by the violence"); *CBA Condemns Violence at the U.S. Capitol*, CHI. BAR ASS'N (Jan. 8, 2021), <https://www.chicagobar.org/chicagobar/CBA/CBA/About/News.aspx> [<https://perma.cc/7MC4-JQWP>] (condemning and denouncing the attack).

explain why they were speaking out, emphasizing the importance of protecting the rule of law and lawyers’ responsibilities to preserve democratic values. For instance, the president of the voluntary Maryland State Bar Association stated, “Although we are fiercely apolitical as an organization, representing tens of thousands of attorneys who function as officers of the court, we are just as fiercely loyal to the concept of the importance of the rule of law.”³¹⁰ Likewise, the voluntary Minnesota State Bar Association’s president stated:

As officers of the legal system, lawyers have special responsibility to uphold the rule of law, defend the Constitution, and protect the independence of the judiciary. The peaceful transition from one presidential administration to the next is one of the fundamental principles of our democratic system. When our democracy is being threatened, it is our duty to speak out against those who encourage and are involved, both directly and indirectly, in encouraging seditious behavior and violence.³¹¹

Some bars were more circumspect, mostly condemning the attack and reminding lawyers of their responsibility to support the Constitution and the rule of law. For example, the president of the mandatory Arizona State Bar stated, “As lawyers we also are sworn to uphold and defend the

310. *Statement of MSBA President Scurti Regarding Events of January 6, 2021*, *supra* note 309; *see also Orange County Bar Association Statement on Takeover of the United States Capitol*, ORANGE CNTY. BAR ASS’N (Jan. 19, 2021), <https://www.orangecountybar.org/news/orange-county-bar-association-statement-on-takeover-of-the-united-states-capitol/> [<https://perma.cc/LF99-3X6M>] (“While we may not always agree, as members of the Bar, we are bound and professionally obligated to support and uphold the rule of law upon which our democratic republic is founded.”).

311. *MSBA Statement on Interference with Election Certification*, MINN. STATE BAR ASS’N (Jan. 13, 2021), <https://www.centralmnlegal.org/news/msba-statement-on-interference-with-election-certification/> [<https://perma.cc/C9GD-GKP8>]; *see also Boston Bar Association Statement on the Violent Assault on the U.S. Capitol*, *supra* note 309 (“As lawyers, we have a special relationship to the rule of law, and a special responsibility to persuade our fellow citizens of its importance and to continue to fight to ensure that it will not only survive, but prevail.”); *CBA Condemns Violence at U.S. Capitol*, *supra* note 309 (“As members of the legal community, we are committed to the Democratic process, defending the U.S. Constitution, and upholding and protecting the rule of law.”).

Constitution. I call on all members of the State Bar of Arizona to continue our commitment to strongly affirm and defend democratic principles.”³¹²

Only a few of the bar associations suggested or took action in the wake of the attack on the Capitol. Some called on Trump and members of Congress to denounce the attack.³¹³ A few called for the prosecution of the individuals who invaded the Capitol.³¹⁴ BASF called on Vice President Pence and Congress “to take all lawful action to constrain the unlawful conduct of the President, including as warranted the invocation of the 25th Amendment or immediate impeachment.”³¹⁵ Checks & Balances also called for Trump’s removal from office.³¹⁶ Likewise, the NYCB called for Trump’s impeachment and issued a report supporting its position.³¹⁷ The NYSBA called on Trump to “renounce his brazen and meritless attempts to

312. *State Bar of Arizona Condemns Violence at U.S. Capitol*, STATE BAR OF ARIZ. (Jan. 12, 2021), <https://www.azbar.org/news-publications/news-releases-articles/sba-condemns-violence-at-u-s-capitol/>; see also *A Statement from the South Carolina Bar*, S.C. BAR (Jan. 7, 2021), <https://www.sbar.org/bar-news/article/statement-south-carolina-bar-january2021/> [<https://perma.cc/2H7S-VGGX>] (reminding lawyers that the state constitution provides, “The purposes of the Bar shall be to uphold and defend the Constitution of the United States and the Constitution of the State of South Carolina; to protect, and maintain respect for, representative government”); *Statement of Virginia State Bar President Brian L. Buniva*, VA. STATE BAR (Jan. 7, 2021), https://www.vsb.org/site/news/item/buniva_statement_Jan7 [<https://perma.cc/GL3M-NF4D>] (stating “I hope all of you will join me in condemning violence and standing by our oaths to uphold our Constitutions.”).

313. See, e.g., *RCBA Statement Condemning Violence at the U.S. Capitol*, RICHLAND CNTY. BAR ASS’N (Jan. 7, 2021), https://www.twitlonger.com/show/n_1srhq11 [<https://perma.cc/763L-X257>] (stating that to “incite fear, hatred, and violence in the name of democracy is shameful and unconscionable and must be denounced by President Trump and our Congressional leaders”); *HNBA Statement on Violence in the U.S. Capitol*, HISP. NAT’L BAR ASS’N (Jan. 6, 2021), <https://mailchi.mp/hnba/hnba-statement-on-violence-in-the-us-capitol> [<https://perma.cc/7D3Q-Z95P>] (same).

314. See, e.g., *President’s Message: We Stand with Our Constitution*, MASS. BAR (Jan. 7, 2021), <https://www.massbar.org/mba-news/mba-news-article/2021/01/07/president-s-message-we-stand-with-our-constitution> [<https://perma.cc/YNQ6-HCYV>]; Rhys Saunders, *The Illinois State Bar Association Condemns the Rioting and Violence at the U.S. Capitol*, ILL. LAW. NOW (Jan. 7, 2021), <https://www.illinoislawyernow.com/2021/01/the-illinois-state-bar-association-condemns-the-rioting-and-violence-at-the-u-s-capitol/> [<https://perma.cc/5935-KM57>].

315. BASF Press Release, *supra* note 305.

316. *Statement by Members of Checks and Balances and Likeminded Constitutionalists on Need to Remove and Hold Donald J. Trump Accountable*, CHECKS & BALANCES (Jan. 7, 2021), <https://checks-and-balances.org/statement-by-members-of-checks-and-balances-and-likeminded-constitutionalists-on-need-to-remove-and-hold-donald-j-trump-accountable/> [<https://perma.cc/V3S4-3U8M>].

317. *Statement of the New York City Bar Association Calling for the Removal of Donald J. Trump as President*, N.Y. CITY BAR (Jan. 11, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/calling-for-the-removal-of-president-trump-election-fraud> [<https://perma.cc/9ZUE-YVWL>].

disenfranchise millions of voters”³¹⁸ and launched an inquiry into removing Giuliani from its membership.³¹⁹ LDAD filed a lawyer discipline complaint against Giuliani in New York and authored discipline complaints against other lawyers for their actions seeking to overturn the results of the 2020 presidential election.³²⁰

III. WHEN AND WHY WILL LAWYERS SPEAK OUT—AND WHO IS LISTENING?

This effort to canvass responses by lawyer organizations to Trump’s challenges to certain constitutional norms and values raises a number of important questions. This section only explores a few of them. First, *when* will lawyer organizations speak out to defend democratic and constitutional norms? Second, *why* were these organizations speaking out? Finally, who was their intended *audience* and were they actually *listening*? The following discussion suggests some tentative answers.

318. Susan DeSantis, *New York State Bar Association President Scott M. Karson Issues Statement Regarding U.S. Presidential Election Certification*, N.Y. STATE BAR ASS’N (Jan. 6, 2021), <https://nysba.org/new-york-state-bar-association-president-scott-m-karson-issues-statement-regarding-u-s-presidential-election-certification/> [https://perma.cc/BUE2-PCHR].

319. Susan DeSantis, *New York State Bar Association Launches Historic Inquiry Into Removing Trump Attorney Rudy Giuliani from Its Membership*, N.Y. STATE BAR ASS’N (Jan. 11, 2021), <https://nysba.org/new-york-state-bar-association-launches-historic-inquiry-into-removing-trump-attorney-rudy-giuliani-from-its-membership/> [https://perma.cc/QYE4-3UF6].

320. *See, e.g., Attorneys File Extraordinary Ethics Complaint Against Texas AG Paxton*, LAWS. DEFENDING AM. DEMOCRACY (July 21, 2021), <https://ldad.org/letters-briefs/ag-paxton-ethics-complaint> [https://perma.cc/PWV7-UTYU]; *infra* notes 391–93 and accompanying text.

A. *The When and Why Questions*

When will lawyer organizations publicly speak out in opposition to challenges to constitutional norms and values? The “when” question raised here does not attempt to address at which political moments lawyers’ organizations will speak out.³²¹ Rather, the “when” question considers which *issues* will move lawyer organizations to speak out as well as some of the factors that affect an organization’s *ability* to do so.

Roughly speaking, well-established lawyer organizations throughout the world will act to influence the law in four situations.³²² The first is to promote the legal profession’s own interests, such as to control the number of lawyers, protect their turf from non-lawyer competitors, and maintain their autonomy from the state (including the right to self-regulate).³²³ Second, lawyer organizations will act to influence the law to protect their clients, especially when those clients are vulnerable.³²⁴ Third, in many countries, lawyer organizations will act to improve the judicial system and protect courts from what they view as threats to the courts’ independence from the state or threats to their perceived legitimacy.³²⁵ Finally, in some countries, including the United States, lawyer organizations will act to promote human rights or other ideological and political issues.³²⁶

These broad and sometimes overlapping categories also help to explain when U.S. lawyer organizations spoke out to oppose Trump’s statements and policies. When the National Association of Assistant U.S. Attorneys issued its statement after the DOJ filed the second sentencing memo in Roger Stone’s case, it was acting, in part, to assert its members’ interests, i.e., independence from political interference. When AILA spoke out against the travel ban and family separation at the U.S.-Mexican border, it

321. As noted, there have been times in this country’s history when lawyer organizations have declined to speak out boldly when civil liberties and other values were under attack. *See supra* notes 57, 59–60, 66–68 and accompanying text. Any attempt to identify the political moments that move these organizations to advocacy would require a much deeper historical analysis.

322. Acting to influence the law includes efforts to promote or oppose change and attempts to affect law through mechanisms such as lobbying and mobilization for or against change. *See* Leslie C. Levin & Lynn Mather, *Beyond the Guild: Lawyer Organizations and Law Making*, 18 WASH. U. GLOBAL STUDIES L. REV. 589, 593–94 (2019).

323. *Id.* at 624.

324. *Id.* at 635.

325. *Id.* at 639. Conversely, lawyer organizations in some countries will act to oppose the courts when they view them as corrupt or overreaching. *Id.*

326. *Id.* at 650.

was protesting changes in the law affecting its members’ clients or potential clients.³²⁷ When lawyer organizations spoke out to defend judges who Trump was attacking, they were defending the courts and the integrity of the judicial process. When lawyer organizations issued statements on the mistreatment of immigrants, racism, efforts to undermine the election outcome, and the attack on the U.S. Capitol, they were commenting on moral, human rights, ideological, or political issues.

Historical institutionalism also helps to explain the actions and inaction of lawyer organizations. Institutions are carriers of ideas that guide action by shaping how individuals and organizations see the world, perceive their interests, and define their preferences.³²⁸ Historical institutionalists contend that to understand the actions of political players, it is necessary to “take cognizance of the historical development of the institution, and the original, distinct culture and problems in which it arose.”³²⁹ Put simply, the history of institutions helps to shape preferences and outcomes.³³⁰

It is possible to see how the history of some of the most vocal lawyer organizations informed their responses during the Trump years. The New York City Bar defended civil liberties in the face of communist scares and now seeks “to *mobilize* a diverse legal profession” to “uphold the rule of law.”³³¹ After deciding in 1970 to take a greater interest in social issues, BASF now sees itself as providing “a collective voice for public

327. Similarly, when the National Association of Criminal Defense Lawyers’s president issued a statement relating to the Roger Stone case, she noted with both members’ clients and defense of judges seemingly in mind, “The criminal defense bar will not tolerate attacks on the core institutions in the criminal justice system that were created to protect the individual from this type of overreach by the executive branch.” News Release, *Comprehensive NACDL Statement on President Trump’s Relentless Attacks on the Judiciary and the Judicial Process*, NAT’L ASS’N OF CRIM. DEF. LAWS. (Feb. 26, 2020), https://www.nacdl.org/newsrelease/Statement-Trump-Attacks-On-Judiciary?_zs=TTJgM1&_zl=hdc5 [https://perma.cc/9U4C-58AF].

328. Orfeo Fioretos, Tulia G. Falleti & Adam Sheingate, *Historical Institutionalism in Political Science*, in OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM (Tulia G. Falleti et al. eds., 2016).

329. Elizabeth Sanders, *Historical Institutionalism*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 1 (Sarah A. Binder et al. eds., 2008); see also Roy Suddaby et al., *Historical Institutionalism*, in ORGANIZATIONS IN TIME: HISTORY, THEORY, METHODS 100, 107 (Marcelo Bucheli & R. Daniel Wadhvani eds., 2013). Some scholars who use the methodology focus on formal rules and organizations while others look to informal rules and norms. Sven Steinmo, *Historical Institutionalism*, in APPROACHES AND METHODOLOGIES IN THE SOCIAL SCIENCES: A PLURALISTIC PERSPECTIVE (Donatella Della Porta & Michael Keating eds., 2008).

330. Steinmo, *supra* note 329.

331. *About Us*, N.Y. CITY BAR, <https://www.nycbar.org/about#:~:text=The%20City%20Bar's%20mission%20is,nation%2C%20and%20throughout%20the%20world> (last visited May 12, 2022) (emphasis added).

advocacy.”³³² Likewise, since the BBA decided to take stands on more controversial issues in the 1970s, it has continued to do so.³³³ While the ABA did not embrace social and political activism until somewhat later, it has become increasingly vocal about a wide range of issues.³³⁴ For other large local bars—like the Los Angeles County Bar Association—it was not part of their history or institutional culture to speak out on issues that do not directly affect lawyers’ interests³³⁵ and doing so was more difficult. Likewise, while some of the specialty bars—such as the American Association for Justice—have a history of lobbying and speaking out on issues directly aligned with their interests,³³⁶ they do not have a history of doing so on broader social issues.

The willingness and ability of lawyer organizations to speak out also depends on the organization’s internal characteristics.³³⁷ Advocacy requires resources. Typically, lawyer organizations’ leaders are volunteers who need significant administrative support and committee assistance if the organizations are going to advocate on a broad range of issues.³³⁸ This helps explain why larger and better-funded lawyer organizations may be more willing to engage in advocacy. These organizations also need *mechanisms* for formulating and stating their positions.³³⁹ This includes a process for adopting resolutions and issuing statements. For example, the ABA House of Delegates can adopt resolutions at their twice-a-year meetings, and the

332. *About Us*, BAR ASS’N OF S.F., <https://www.sfbar.org/about-us/> [<https://perma.cc/K4LK-8NYP>].

333. See *supra* note 80 and accompanying text; *BBA Public Policy*, BOS. BAR ASS’N, <https://bostonbar.org/public-policy/our-policy-positions> [<https://perma.cc/5BSZ-EJFW>].

334. *Civil Rights and Social Justice*, AM. BAR ASS’N, <https://www.americanbar.org/groups/crsj/> (last visited May 12, 2022).

335. The one history of Los Angeles lawyers does not describe LACBA as being consciously committed to social activism. KATHLEEN TUTTLE, *LAWYERS OF LOS ANGELES* (2020). Its website describes its members as contributing “the time, talent, and experience to better the legal profession, the judicial system, and themselves,” and unlike some other large lawyer organizations, does not include a tab for “advocacy.” See *About the Los Angeles County Bar Association*, *supra* note 39.

336. See *AAJ Advocacy*, AM. ASS’N FOR JUST., <https://www.justice.org/advocacy> [<https://perma.cc/756R-8VA5>].

337. Levin & Mather, *supra* note 322, at 654.

338. For example, the well-resourced NYCB worked together with the ABA to quickly draft a report and resolution for consideration by the ABA’s House of Delegates concerning the travel ban. See *supra* note 181 and accompanying text.

339. Levin & Mather, *supra* note 322, at 655.

ABA’s president can speak at any time for the organization.³⁴⁰ The NYCB typically has a ten-day waiting process for the release of committee reports, but the organization’s president can waive that requirement to release reports more quickly.³⁴¹ Mandatory bars, in contrast, have more cumbersome processes for endorsing policy proposals.³⁴² Without streamlined mechanisms for advocacy, it can be harder for lawyer organizations to reach agreement and react promptly.

The membership composition of the lawyer organization also affects its ability to act. Organizations with lawyers from different practice settings or with different political views tend to disagree about preferred directions of advocacy or whether to act at all. This helps explain why many voluntary state and local bar organizations declined to speak out on most issues during the Trump presidency. They were well-aware that advocacy beyond lawyers’ own interests could cost them members. When lawyer organizations fail to act, new organizations may emerge.³⁴³ This is what occurred during the Trump presidency when LDAD and Checks & Balances formed after concluding that lawyer organizations were insufficiently focusing on the challenges Trump presented to democratic institutions and constitutional norms and values.³⁴⁴

The relationship between lawyer organizations and the state also affects their ability to act.³⁴⁵ In the United States, this is most evident in the context of mandatory state bars which are constrained in their ability to engage in advocacy. The *Keller* Court held these bars may constitutionally charge

340. See AMERICAN BAR ASSOCIATION POLICIES AND PROCEDURES HANDBOOK 2021-2022, at 7, 18, https://www.americanbar.org/content/dam/aba/administrative/board_of_governors/greenbook/greenbook.pdf.

341. See Association Bylaws 5.4(6), N.Y. CITY BAR (May 19, 2020), https://www.nycbar.org/about/governance/association-by-laws#_ednref8 [<https://perma.cc/5KC5-N8UE>].

342. See, e.g., State Bar of Michigan Bylaws Art. VIII, §§ 2–5 (describing detailed process for Board of Commissioners to consider endorsing section and committee proposals).

343. See Levin & Mather, *supra* note 322, at 655.

344. See Higgins, *supra* note 291 (describing founding of Checks & Balances). LDAD explains:

At its inception, Lawyers Defending American Democracy might well have been called Lawyers should be Defending American Democracy. For four years, there was a dearth of voices from bar associations, law schools, and other leaders of the legal profession willing to sound the alarm at the normalization of falsehoods and attacks on the rule of law.

Lawyers, Stand Up!, LAWS. DEFENDING AM. DEMOCRACY (Feb. 19, 2021), <https://ldad.org/letters-briefs/lawyers-stand-up> [<https://perma.cc/3WSJ-WA8F>].

345. Levin & Mather, *supra* note 322, at 655–56.

mandatory dues to “fund activities germane” to “the purpose[s] for which compelled association was justified,” i.e., “regulating the legal profession and improving the quality of legal services.”³⁴⁶ But these bar organizations cannot constitutionally use mandatory dues to “fund activities of an ideological nature which fall outside of those areas of activity.”³⁴⁷ As a result, mandatory state bars rarely spoke out during the Trump years. In the final year of Trump’s presidency, some issued statements after George Floyd’s death, but those statements were often intended exclusively for their members.³⁴⁸ Likewise, some mandatory state bars issued statements after the attack on the Capitol, but they were careful and comparatively muted.³⁴⁹ Within six months, some of the statements had been removed from the state bars’ websites. The majority of mandatory bars were silent.

Even when lawyer organizations are *able* to act to engage in advocacy, other factors affect *why* they do so. Lawyer organizations are self-interested actors.³⁵⁰ As previously noted, when the National Association of Assistant United States Attorneys spoke out in connection with the Roger Stone case, it was to protect its members’ interests. AILA was the only specialty bar to speak out on immigration issues, suggesting that other specialty bars did not view the treatment of immigrants as an issue of concern to most of their members. In contrast, some affinity bars’ statements on immigration and racial equality reflected their members’ personal interests. It is telling that aside from the Hispanic National Bar Association and National Asian Pacific American Bar Association, no other national affinity bar issued statements denouncing Trump’s attacks on Judge Curiel.³⁵¹ Yet when

346. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

347. *Id.* at 14.

348. *See supra* note 262 and accompanying text.

349. For instance, the Montana State Bar stated:

The State Bar of Montana’s Executive Committee encourages and supports all Americans to express their First Amendment rights through peaceful protest. But the committee strongly condemns any threat of violence directed toward public officials, including the security breach at the U.S. Capitol today. As lawyers, we believe we must stand for both principles at once, but we must never turn our back on the rule of law. We express solidarity with public servants of all ideologies. . . . They must be able to do the important work of governing our nation in safety.

Executive Committee Condemns Violence at U.S. Capitol, STATE BAR OF MONT. (Jan. 6, 2021).

350. Levin & Mather, *supra* note 322, at 657.

351. *See supra* notes 99, 114–15 and accompanying text. With the exception of the HNBA, the affinity bars were also silent when Trump attacked other judges. *See supra* notes 136, 148 and accompanying text.

Trump issued his Muslim travel ban, the HNBA was silent and it was primarily the national affinity bars with Muslim members that issued statements.³⁵² The affinity bars that spoke out about family separation at the southern border were primarily the Latinx lawyer associations and women’s bars.³⁵³ The predominantly Black National Bar Association only spoke after the events in Charlottesville and after George Floyd’s death.³⁵⁴ By the time of Charlottesville in August 2017, a broader array of minority affinity groups were issuing statements, but they may have come to see Trump’s refusal to speak out on white nationalism as more personally concerning.³⁵⁵

Likewise, when lawyer organizations defended the judiciary when it was under attack, their reasons were not altogether selfless. Lawyers’ professional standing depends heavily on the courts’ legitimacy, so lawyer organizations have a vested interest in maintaining the independence and integrity of the judiciary. In addition, courts in the United States protect lawyers from legislative regulation.³⁵⁶ Ensuring the independence of the courts from the other political branches and preserving the judiciary’s reputation serves lawyers’ interests. Moreover, letting the courts know that lawyers will step up to defend them strengthens the relationship between those actors. Self-interest may also help explain why some state and local lawyer organizations defended the courts and why the specialty bars that issued statements to defend federal judges—the American College of Trial Lawyers, the American Board of Trial Advocates, the Federal Bar Association, and the Federal Bar Council—were composed of lawyers who appeared before those courts.³⁵⁷

Yet self-interest is only a partial explanation. When lawyer organizations speak out to defend constitutional norms and values, those statements also reflect their shared norms and ways of seeing the world. Mutual ideals—rooted in institutional culture—help explain the actions of

352. See *supra* notes 194–97 and accompanying text.

353. See *supra* notes 217–18, 225 and accompanying text.

354. See *supra* notes 244, 271 and accompanying text. I was unable to find any predominantly Black bar association that spoke out after the Capitol attack.

355. This could reflect the increasing tendency for affinity bars to jointly issue statements. Alternatively, it could indicate isomorphic diffusion, which is the idea “that over time, organizations in a common field adopt characteristics that make them appear similar to each other” for social reasons such as legitimacy. See Suddaby et al., *supra* note 329, at 111–12.

356. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 113, 115–20 (2011).

357. See *supra* notes 125, 145–46, 159–60 and accompanying text.

these lawyer organizations.³⁵⁸ Whether it is due to lawyers' oaths, code preambles, bar mission statements—or something else—some lawyer organizations have come to embrace the idea that U.S. lawyers and their organizations have responsibilities that transcend their own interests. Within these organizations, it has become taken for granted that defense of constitutional norms and values is among those responsibilities.³⁵⁹

This does not mean that official statements reflect the views of all rank-and-file members. Indeed, the NYCB lost some members due to its advocacy during Trump's presidency.³⁶⁰ The mandatory Oregon State Bar's "Statement on White Nationalism and Normalization of Violence," which condemned the violence in Charlottesville, Virginia, resulted in the partial refund of some bar dues to objecting members.³⁶¹ Leaders of both mandatory and voluntary lawyer organizations need to be able to gauge the likely member support for their public statements as a matter of organizational maintenance.

B. *Who Was the Audience and Who was Listening?*

Who was the audience for all of this advocacy? Some answers can be gleaned from the organizations' statements. In some instances, the statements were seemingly meant exclusively for the organizations' members. This could be seen in the messages lawyer organizations sent to their members in email blasts or published in bar journals but did not further publicize.³⁶² The language of some statements also indicated the comments were directed to their own members.³⁶³ Other organizations' statements were intended for the larger legal community. The ABA attempts to speak

358. Levin & Mather, *supra* note 322, at 657.

359. *See, e.g., supra* notes 270, 311–12 and accompanying text.

360. E-mail from Arlene Bein, Sr. Dir., Membership & Customer Relations, N.Y. City Bar to author (Dec. 14, 2021, 5:13 PM) (on file with author).

361. *See* Phil Wright, *Oregon State Bar Sparks Concerns With Statement Critical of Trump*, EAST OREGONIAN (May 9, 2018), https://www.eastoregonian.com/news/local/oregon-state-bar-sparks-concerns-with-statement-critical-of-trump/article_21a0f135-e66e-5f9b-a5b1-38ad834d9512.html [<https://perma.cc/8C84-V3QK>].

362. *See, e.g., id.* (describing statement in state bar periodical).

363. *See, e.g., Statement of Virginia State Bar President Brian L. Buniva, supra* note 312 ("I hope all of you will join me in condemning the violence and standing by our oath to uphold our Constitution.").

for (and to) all lawyers.³⁶⁴ Some large local lawyer organizations regularly issued press releases announcing their statements, which were reported in the legal press.³⁶⁵ LDAD issued “open letters” with calls to the larger legal profession to join its efforts.³⁶⁶

Some messages were also, at least on their face, intended for Donald Trump. During his candidacy, some lawyer organizations attempted to make him aware that his criticism of judges violated certain norms of behavior expected of candidates for elected office.³⁶⁷ Early in his presidency, some lawyer organizations issued relatively restrained statements expressing disapproval of his comments about the “so-called” judge.³⁶⁸ Around the same time, the ABA and the NYCB called on Trump to reconsider his executive orders regarding immigration,³⁶⁹ although most other lawyer organizations simply condemned his actions. By August 2017, most of the bar associations that spoke out concerning Trump’s failure to respond more forcefully to the events in Charlottesville did not urge him to issue a stronger statement.³⁷⁰ Over time, most organizations turned away from expressly calling on Trump to change his behavior.³⁷¹

Instead, some bar organizations directed their advocacy toward other government officials. For example, they asked Congress, the U.S. Attorney General, and DHS to reverse the Trump administration’s immigration policies through public statements, resolutions, letters, and policy papers.³⁷² The NYCB wrote to congressional leaders and the DOJ’s Inspector General calling for immediate investigation into the handling of the Roger Stone case.³⁷³ A few called on state officials to act after George Floyd’s death.³⁷⁴

364. See, e.g., *Statement of ABA President Patricia Lee Renfo Re: Presidential Election*, *supra* note 287 (stating that the ABA is the “national voice of the legal profession”).

365. See, e.g., *Media & Publications*, N.Y. CITY BAR, <https://www.nycbar.org/media-listing/media> (last visited May 12, 2022).

366. See, e.g., *Open Letter to American Lawyers*, LAWS. DEFENDING AM. DEMOCRACY (Oct. 19, 2020), <https://ldad.org/letters-briefs/open-letter-to-american-lawyers>.

367. See, e.g., *supra* note 109 and accompanying text.

368. See *supra* notes 125–27 and accompanying text.

369. See *supra* note 182 and accompanying text.

370. For one exception, see *supra* note 248.

371. Nevertheless, the ABA president’s December 2020 statement, while not directly addressed to Trump, may have been an effort to persuade him to accept the results of the presidential election. See *supra* note 287 and accompanying text.

372. See, e.g., *supra* notes 185, 201, 203–05, 209, 214 and accompanying text.

373. See *supra* note 163 and accompanying text.

374. See, e.g., *supra* note 256 and accompanying text.

Following the 2020 presidential election, some bar organizations' statements were also directed to Congress or Vice President Pence.³⁷⁵

In some cases, judges were part of the intended audience. In a few instances, there were direct appeals to courts in the form of amicus briefs or letters supporting court rules banning ICE arrests in courthouses. More frequently, even though the organizations' messages were not expressly addressed to the courts, judges were part of the intended audience. This was especially evident when local lawyers' organizations defended individual judges and when specialty bars comprised of litigators spoke out about the importance of an independent judiciary.³⁷⁶

Some of the lawyer organizations' statements were also directed to the public.³⁷⁷ Those efforts reflected the view that the legal profession—and lawyer organizations—have a responsibility to educate the public about the justice system and the rule of law.³⁷⁸ This could be seen, for example, when lawyer organizations issued press releases and published letters in the mainstream media explaining the importance of an independent judiciary.³⁷⁹ The organizations may have also wanted to persuade the public in an effort to defend constitutional norms and values. In addition, the organizations may have wanted to enhance lawyers' public image by conveying the message that the profession supports certain values such as racial equality, due process, and access to justice.

375. For example, Checks & Balances called on Congressional Republicans “to speak out publicly to oppose [Trump’s] abuse of public officials and his incitement of his followers to threaten their safety.” See *Statement from Members of Checks & Balances, and Other Current and Former Republicans Who Have Served Prior Administrations*, *supra* note 292; see also *supra* note 316 and accompanying text.

376. See, e.g., *supra* notes 110–13, 357 and accompanying text.

377. See, e.g., *Statement on the Rule of Law and an Independent Judiciary*, *supra* note 160 (calling on “all Americans and elected leaders” to remain mindful of the importance of judicial independence).

378. As previously noted, this responsibility is asserted in the ABA’s Model Rules of Professional Conduct. See *supra* note 17 and accompanying text. The responsibility to educate the public is also found in bar mission statements. See, e.g., *Our Mission*, STATE BAR OF TEX., <https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm> [<https://perma.cc/FR7T-6MP2>] (stating that the mission of the State Bar includes to “educate the public about the rule of law”).

379. See, e.g., Stitt, *supra* note 113 (stating that on behalf of the board of the bar association, “I wanted to share with the public our collective observations of Judge Curiel and underscore the importance of civility and decorum in our courts by lawyers and litigants, alike.”); see also Ludlow, *supra* note 128 (explaining that because judges could not respond to attacks it is often “incumbent on bar associations, then, to make public statements explaining the role of courts in our government”).

The question of who was *listening* is even more difficult to answer. Members of the lawyer organizations heard the statements. Some were angered and others applauded the efforts.³⁸⁰ Judges saw the advocacy in the form of amicus briefs and rule proposals relating to ICE arrests and were presumably aware of organizations’ statements defending judicial independence.³⁸¹ It is not clear whether administration officials, members of Congress, or state legislators heard much of the advocacy unless—as occurred in some cases—the statements, letters, or policy papers were sent directly to them.³⁸² Trump may have been aware of some of the organizations’ advocacy but he did not directly respond,³⁸³ and whether he heard about it at all is not clear.

It is also far from clear that the public heard about most of the lawyer organizations’ statements or other advocacy. Most of the statements received little to no coverage in the mainstream media, with most of the limited coverage being local.³⁸⁴ Very rarely, leaders of the organizations

380. E-mail from Arlene Bein, *supra* note 360 (describing members’ reactions); *Statement on Judicial Independence* by ISBA President Vincent F. Cornelius, *supra* note 129 (displaying members’ comments on statement).

381. The judges not only belonged to some of the bar associations that made statements but could read about the statements in the legal press.

382. For example, the NYCB wrote to Congressional leaders calling for an investigation of William Barr. *See supra* note 163. It is unclear, however, who saw the letter and whether it contributed to the decision to conduct the investigation that ensued.

383. While the Trump administration advised the ABA in March 2017 that it would not receive early access to the names of federal court nominees for the purposes of vetting nominees’ qualifications, this was also a position taken by President George W. Bush. *See* Adam Liptak, *White House Ends Bar Association’s Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html?msclkid=442e486ad16411ecbe12696824e281be> [<https://perma.cc/9EA8-6S33>]. There was no explicit indication that the move was due to the ABA’s criticism of the President.

384. For examples of the coverage, see Attanasio, *supra* note 186 (describing resolution by Connecticut Bar Association); Ludlow, *supra* note 128 (reporting on Ohio State Bar Association’s objection to attack on judiciary); Stitt, *supra* note 113 (reporting on San Diego chapter of the Federal Bar Association’s response to attack on Judge Curiel); *San Diego Lawyers Call Trump’s Attack on Judge ‘Racist,’ supra* note 112 (reporting on San Diego La Raza lawyers’ response to remarks about Judge Curiel). For one of the few stories in a national news publication, see Kevin Johnson & Dennis Wagner, *‘Angst, Anger and Disappointment’: Roger Stone Intervention Stokes Uncertainty Across Federal System*, USA TODAY (Feb. 20, 2020), <https://www.usatoday.com/story/news/politics/2020/02/19/dojs-reversal-roger-stone-sentencing-worries-prosecutors-judges/4805363002/> [<https://perma.cc/VEW6-SJ2R>] (reporting on statement by National Association of Assistant United States Attorneys).

wrote opinion pieces.³⁸⁵ Even the statements by the ABA, NYSBA, and NYCB received sparse coverage by the mainstream media.³⁸⁶ The LDAD was the most effective organization in garnering national media attention, especially in the post-election period.³⁸⁷ It is conceivable that some of the organizations' press releases influenced journalists in their coverage of larger stories.³⁸⁸ The extent to which any of the lawyer organizations' efforts permeated the public's consciousness is simply not known.

CONCLUSION

This effort to broadly canvass lawyer organizations' efforts to defend certain constitutional norms and values leaves many open questions. For example, what caused some of the organizations that did not historically engage in advocacy to issue statements and to craft their statements as they did? What did the lawyer organizations hope to accomplish through their efforts? How did the networks form among the organizations that resulted in joint advocacy and what accommodations were necessary for them to act jointly? How did these statements—which often reaffirmed common values or reiterated lawyers' responsibilities to defend those values—affect the rank-and-file members? And perhaps most importantly: Did any of it matter? Closer study of individual organizations would be needed to understand their institutional cultures and the dynamics within the organizations that led to their decisions to speak out or remain quiet, the

385. See, e.g., Linda A. Klein, *ABA Will Protect the Rule of Law*, MIAMI HERALD (Feb. 8, 2017), https://account.miamiherald.com/paywall/subscriber-only?resume=131553474&intcid=ab_archive; Lauren Stiller Rikleen, *The History Lesson Congress Must Teach Our Children*, N.Y. DAILY NEWS (Jan. 11, 2021), <https://www.nydailynews.com/opinion/ny-oped-the-history-lesson-congress-must-teach-our-children-20210111-owdk256s7rapff5gpo5r6yomta-story.html>; Stitt, *supra* note 113.

386. See, e.g., Alexandra Hutzler, *American Bar Association Slams Trump for His Attack on 9th Circuit Court in Thanksgiving Message*, NEWSWEEK (Nov. 22, 2018), <https://www.newsweek.com/american-bar-association-slams-trump-independent-judiciary-thanksgiving-1228397> [<https://perma.cc/TV6X-HHTV>]; Frankel, *supra* note 163. The NYSBA's actions received the most national coverage when it announced it was considering expelling Giuliani from the organization. See, e.g., Neil Vigdor & Azi Paybarah, *The Many Entities Cutting Ties with Trump*, N.Y. TIMES, Jan. 12, 2021, at B5.

387. See *In the News*, LAWS. DEFENDING AM. DEMOCRACY, <https://ldad.org/news-feed> [<https://perma.cc/6ZUQ-KXD7>].

388. For example, the statement by the National Association of Assistant U.S. Attorneys may have helped highlight for journalists the unusual nature of the second sentencing memo in the Roger Stone case, but the resignation of the line prosecutors also alerted the media to this issue. See, e.g., Johnson & Wagner, *supra* note 384.

themes they chose to emphasize, and the extent to which those statements reflected organizational self-interests and the members’ views. Further study would also be needed to determine what impact (if any) these actions had on members’ views about their relationship to the lawyer organizations or their thoughts about their own roles in protecting democratic norms and values.

Even if the messages from some of the lawyer organizations affected lawyers’ views about their responsibilities to defend constitutional norms and values, it is worth pausing to note that these messages rarely came from the thirty-two mandatory bars. As noted, those bars are very reluctant to make statements that might be considered “ideological.” Even though the purpose of the mandatory state bars often includes improving the administration of justice,³⁸⁹ the mandatory bars uniformly failed to issue statements in defense of an independent judiciary. Only one advocated on immigration policy, and only in the context of ICE arrests within courthouses.³⁹⁰ While some mandatory bars commented following Charlottesville, George Floyd’s death, and the attack on the Capitol, the statements were often brief and sometimes equivocal.

The one area in which lawyer organizations’ advocacy seems to have had tangible effects is in their efforts to see some of Trump’s attorneys subjected to lawyer discipline. New York’s disciplinary authorities responded to separate, detailed complaints brought by LDAD and former New York State Bar presidents, among others, by suspending Rudy Giuliani from practice.³⁹¹ LDAD and former presidents of the State Bar of Texas

389. See, e.g., TEX. GOV’T. CODE § 81.012 (1) (stating that one of the purposes of the state bar is “to aid the courts in carrying on and improving the administration of justice”); *The Mission of the Louisiana State Bar Association*, LA. STATE BAR ASS’N, <https://www.lsba.org/BarGovernance/LSBAMission.aspx> [<https://perma.cc/7QZZ-PVY8>] (stating that the mission of the bar association includes to “aid in the administration of justice” and “uphold the honor of the courts”); *Mission*, OR. STATE BAR, https://www.osbar.org/_docs/resources/OSBMissionStatement.pdf [<https://perma.cc/D9TZ-JP7Z>] (“Our goal is to protect and advance the quality, integrity, and impartiality of the judicial system.”).

390. See *supra* note 201 and accompanying text.

391. Jonathan Stempel, *Giuliani’s Law License Suspended Over False Trump Election Claims*, REUTERS (June 24, 2021), <https://www.reuters.com/world/us/rudolph-giuliani-is-suspended-law-practice-new-york-state-2021-06-24/>. The D.C. Bar’s Disciplinary Counsel, however, declined to pursue a disciplinary complaint that was organized by LDAD against former Attorney General William Barr for other alleged misconduct. See Jacqueline Thomsen, *An Ethics Complaint Against Bill Barr Was Rejected, and It Has Lawyers Worried*, NAT’L L.J. (June 9, 2021), <https://www.law.com/nationallawjournal/2021/06/09/an-ethics-complaint-against-bill-barr-was-rejected-and-it-has-lawyers-worried/> [<https://perma.cc/277C-T9T9>].

brought a complaint against Texas Attorney General Ken Paxton for his frivolous litigation on behalf of the State of Texas seeking to overturn the results of the 2020 election.³⁹² In addition, LDAD brought discipline complaints against former Assistant Attorney General Jeffrey Clark, who they claim improperly sought to use his position to overturn Trump's election defeat, and John Eastman, who worked with Giuliani and others to overturn the election results.³⁹³ These efforts—especially when they are successful—may inform lawyers' views of the limits of permissible lawyer advocacy in the political sphere and illustrate one effective way for lawyers to defend democratic norms and values.

Finally, lawyer organizations would do well to carefully consider their methods if they wish to protect constitutional norms and values. If lawyer organizations are simply seeking to reach an internal audience through their statements, then perhaps the organizations are doing all they need to do. But if they want to reach lawmakers or educate the public, they will need to do more to make their voices heard. They would need to act more strategically to ensure their words and actions are reported by the mainstream news media. They would also need to identify ways to educate the public about why those norms and values are important. In other words, it is not enough for lawyers to swear—or proclaim—that they have a responsibility to protect constitutional norms and values. Lawyer organizations will need to consider how they can effectively fulfill that responsibility.

392. Brenda Sapino Jeffreys, *High Profile Group of Lawyers Seeks to Suspend or Disbar Texas AG Ken Paxton*, TEX. LAW. (July 21, 2021), <https://www.law.com/texaslawyer/2021/07/21/high-profile-group-of-lawyers-seeks-to-suspend-or-disbar-texas-ag-ken-paxton/> [https://perma.cc/7S9X-3G6C].

393. John Kruzel, *Group Asks DC Court Panel to Investigate DOJ Official Who Peddled False Election Claims*, THE HILL (Oct. 5, 2021), <https://thehill.com/regulation/court-battles/575284-group-asks-dc-court-panel-to-investigate-doj-official-who-peddled?rl=1> [https://perma.cc/TMP2-LT8Z]; *LDAD Files Ethics Complaint Against John Eastman*, LAWS. DEFENDING AM. DEMOCRACY (Dec. 16, 2021), <https://ldad.org/letters-briefs/ldad-files-ethics-complaint-against-former-assistant-john-eastman> [https://perma.cc/J3GR-VX6T].