Supporting and Defending the Constitution

A DOJ attorney's guide to upholding ethical obligations and the rule of law

DECEMBER 2024

Protect Democracy

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This publication is available online at:
www.protectdemocracy.org/work/supporting-and-defending-the-constitution

Suggested citation: Protect Democracy, *Supporting and Defending the Constitution: A DOJ attorney's guide to upholding ethical obligations and the rule of law* (December 2024).

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This document is not intended as legal advice and should not be relied on as such.

Introduction

Department of Justice attorneys[1] have always had to navigate the laws, rules of conduct, and internal policies that govern the exercise of prosecutorial discretion — that's part of the job of a federal prosecutor. But increasing public discourse on the "weaponization" of government is focusing new scrutiny on the Department of Justice generally, and in particular on the selection of targets for both civil and criminal investigation.

Growing alongside this increased focus on DOJ ethics are concerns about accountability for government officials who abuse their power. On the one hand, the Supreme Court ruled that the president is immune from criminal prosecution for certain "official acts," including certain acts meant to direct DOJ's investigative and prosecutorial decision-making.[2] On the other hand, former federal officials (and other lawyers) are facing criminal and civil liability for recent alleged misconduct — particularly in connection with the last election — including at least one top DOJ attorney who has been criminally indicted[3] and faces the potential suspension of his law license.[4] DOJ attorneys now work within a system in which the head of the executive branch enjoys a special level of immunity for rulebreaking, but they do not.[5]

Under these circumstances, DOJ attorneys understandably may have heightened concerns about navigating their ethical obligations.[6] As every DOJ attorney knows, they take an oath to "support and defend the Constitution," not to follow orders from their chain of command without question.[7] DOJ's rules and regulations also set high standards for ethical behavior, in many places protecting against even the appearance of conflict or bias. And, of course, like all

[1] This guide uses the term "DOJ attorneys" to refer to attorneys employed to litigate, or advise on litigation, on behalf of the United States. This includes, for example, Main Justice trial attorneys, AUSAs, and Office of Legal Counsel attorneys. It excludes, for example, attorneys for the Federal Bureau of Investigation or Bureau of Prisons. Though FBI and BOP attorneys are sometimes involved in litigation, because statutes and regulations sometimes treat these types of federal employees differently, this guide is not specifically addressed towards them. Nonetheless, many of the same ethical principles likely apply to government lawyers more broadly, even if the precise rules do not.

[2] *Trump v. United States*, 603 U.S. ––, 144 S. Ct. 2312, 2335 (2024) (holding that presidents have absolute immunity from prosecution for crimes committed using their "core constitutional powers," have "presumptive" immunity for other crimes involving "official acts," but lack immunity for any crimes committed as "private" or "unofficial acts").

[3] Lisa Mascaro, *EXPLAINER: The Last-Ditch Plan to Have Pence Stop Biden Win*, AP News (June 16, 2022), https://tinyurl.com/3ews9bjk.

[4] Rebecca Beitsch, *Jeffrey Clark Cites Removal from Trump Indictment in Bid to Keep Law License*, The Hill (Aug. 29, 2024), https://thehill.com/homenews/4854010-jeffrey-clark-trump-law-license/; *see also* Alison Durkee, *Giuliani Disbarred In D.C.: Here Are All The Other Ex-Trump Lawyers Now Facing Legal Consequences*, Forbes (Sept. 26, 2024), https://tinyurl.com/4577wcv3.

[5] Zachary S. Price, *Even if the President is Immune, His Subordinates are Not*, Yale Journal on Regulation (July 11, 2024), https://tinyurl.com/38j56ztp.

[6] For a more thorough discussion of navigating sticky ethical situations as a government attorney, *see* David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, Georgetown Law Faculty Publications and Other Works, 2368 (2021), https://scholarship.law.georgetown.edu/facpub/2368.

[7] 5 U.S.C. § 3331; *see also* Alberto R. Gonzales, *Opinion: Former Attorney General Alberto Gonzales Will Support Kamala Harris*, Politico (Sept. 12, 2024), https://tinyurl.com/bvv4r3w7.

attorneys, DOJ attorneys are constrained by the professional conduct rules of their state bars and any courts in which they appear.

DOJ attorneys generally seek to discharge their duties ethically and in good faith, most taking pride that their job is to ensure that "justice shall be done."[8] They appreciate that they wield significant power and also have a specific and defined role in our system of government — that it is not up to them to write new laws or advance their own policy views, but instead to defend and enforce the Constitution and laws enacted by Congress and (where consistent with the Constitution and laws) the policies set by the president. But what happens when DOJ attorneys are expected to do something that conflicts with their oath of office or their legal and ethical obligations?

In some cases the conflict may be obvious, but in others it may not. And the scope or scale of the potential violation may vary. A criminal prosecutor may suspect a target was chosen because of his political speech. An affirmative civil enforcement attorney may observe colleagues conducting an investigation in a manner that departs from applicable policies and procedures. A civil defense attorney may be instructed to omit a document from an administrative record, or to make a representation in a court filing that he believes to be false.

In these cases and others like them — whatever the magnitude of the potential ethical violation — DOJ attorneys remain bound by their professional rules of conduct, their oath to the Constitution, and a number of laws, regulations, and policies. But in some cases compliance with these strictures may mean making difficult personal and professional choices, and navigating available options will not always be easy. While there may be consequences for questioning colleagues or opposing the chain of command, there may also be consequences for failing to do so and thus compromising the duty to follow the law and serve the interests of justice — and the consequences for the latter sometimes may be more significant.

This guide will provide an overview of the sources of authority that govern DOJ attorneys, options for reporting suspected misconduct, and possible consequences for failing to comply with ethical obligations. It first discusses the constitutional, statutory, and regulatory rules that may govern DOJ attorneys' decision-making, then turns to the DOJ policies and norms that historically have guided ethical DOJ behavior, and finally highlights applicable rules of professional conduct. The guide then provides an overview of options for responding to ethical breaches, including internal reporting and reporting outside of the executive branch. At the end, the guide offers additional resources.

* * * * *

Together with law enforcement agents and other dedicated professionals, DOJ attorneys do the work of one of the nation's most important government institutions — one that, if abused, can undermine the American people's faith in government and inflict significant harm on our democracy. It is critical that the Department of Justice continue to be staffed by attorneys of good faith who do their best to honor their oaths of office, support and defend the Constitution and laws of the United States, and serve the higher cause of justice. In addition to carrying out

[8] *Berger v. United States*, 295 U.S. 78 (1935).

the important day-to-day work of the agency, those attorneys can serve as a critical bulwark against abuses of power, and so there is enormous value for our democracy in ensuring that they are able to remain in their positions — so long as they can do so consistent with their legal and ethical obligations.

The guide is meant to orient DOJ attorneys and others to those obligations as they work to uphold the Constitution and the rule of law. ***It is not intended to offer legal advice***.

If you're unsure about a course of action, ask:

1. Could it be an ethical violation?

Identify relevant sources of authority and whether they have been violated:

- **Constitutional constraints on DOJ decision-making**
- **Departmental or executive branch ethics statutes and regulations**
- **Justice Manual and other statements of departmental policy**
- **Rules of professional conduct**
- **Longstanding departmental norms**

Do not personally participate in wrongdoing.

2. If yes, is a specific response required?

YES

Report the violation internally to OSC, OIG, or OPR according to applicable rules.

NO

You may take additional action, including:

Seek advice from PRAO or an outside attorney.

Ask for explanations and advocate internally for misconduct to stop.

Report the violation externally.

Refuse an order or resign.

See page 34 for a list of resources on knowing your rights and protecting yourself.

Ethical Constraints on DOJ Attorneys: Laws, Rules, And Norms

There are numerous sources of authority that govern DOJ attorneys — from Constitutional provisions, to rules of professional responsibility, to DOJ's internal norms and policies. This section will provide an overview of those authorities; the next section will explain the serious risks associated with violating them.

Constitutional and Legal Constraints

First Amendment, Equal Protection Clause, and Due Process Clause Protections

Knowingly proceeding with a prosecution that lacks probable cause is improper and a violation of a DOJ attorney's basic duty to pursue the interests of justice, regardless of who the defendant is or how he was selected. But this is not the only scenario DOJ attorneys should be concerned about. Even if it is possible to articulate some basis for an investigation or prosecution — as will often be the case — the selection of a particular target can violate various provisions of the Constitution if that selection is based on the target's identity or lawful conduct.[9] And that is true whether the selection was made by a line prosecutor, an investigating agency, or DOJ leadership. These cases are sometimes referred to as "political prosecutions" and are one way in which DOJ could be "weaponized" against perceived political enemies or disfavored groups. And although commentators and case law tend to focus on criminal prosecution, these principles generally apply to civil matters as well.[10]

"[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."[11] This means that an investigation or prosecution may run afoul of the First Amendment "if the reason for selecting the particular person charged was to chill the exercise of that person's First Amendment rights."[12] Indeed, the Supreme Court recently affirmed that the "First Amendment prohibits

[9] *See* Robert H. Jackson, *The Federal Prosecutor: An Address*, The Second Annual Conference of United States Attorneys (Apr. 1, 1940) ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."), https://tinyurl.com/yzpspkmr.

[10] *See, e.g., United States v. AT&T, Inc.,* No. 18-5214 (D.C. Cir. 2019), https://tinyurl.com/wmt5vy2w.

[11] *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

[12] *United States v. Vazquez*, 145 F.3d 74, 82 n.5 (2d Cir. 1998).

government officials from wielding their power selectively to punish or suppress speech"— for example, by even threatening an enforcement action.[13]

The Equal Protection Clause also bars DOJ from singling out an individual for differential treatment without a justification that is considered at least rational under the law — which includes singling them out because they belong to a particular class of persons, or simply because decision-makers at DOJ have a "desire to harm" that person.[14]

Prosecutions that are not initially motivated by impermissible bias may nonetheless become constitutionally infirm due to governmental misbehavior. In addition to requiring a "disinterested prosecutor," due process requires that the powers of the government be wielded in a "rigorously disinterested fashion."[15] If a government official involved in a specific prosecution or civil enforcement matter pursues a personal interest aside from seeing justice served, that alone may violate the Due Process Clause.[16] In addition, regardless of the motivations of the prosecution team, certain conduct by other government actors during an ongoing prosecution may violate the Due Process Clause. This includes public pronouncements of guilt by government officials, vindictive threats of increased punishment, or proceeding based on false or perjured evidence.[17]

Finally, if the president interferes in a case involving a specific person or entity, such interference may run afoul of both the Due Process Clause (as explained above) and the Take Care Clause (as explained below).

[13] *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 187 (2024).

[14] *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

[15] *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987).

[16] *See, e.g.*, *Young*, 481 U.S. at 811; *United States v. Siegelman*, 786 F.3d 1322, 1329 (11th Cir. 2015) ("*Young* categorically forbids an interested person from controlling the defendant's prosecution…") (emphasis in original); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967).

[17] Protect Democracy, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matter* (March 2018), at 17-18, https://tinyurl.com/2c363746.

DECIDING TO INVESTIGATE OR PROSECUTE

Impermissible considerations

- Any non-individualized consideration, including membership in an identity group—even if that group is not an explicitly "protected category."
- An individual's public criticism of the administration or its policies.
- A state or local leader's opposition to federal policies, even if DOJ believes that opposition is not grounded in law.
- A "desire to harm" the individual, whether for personal or political reasons, or for no reason at all.

The Take Care Clause

The Take Care Clause of Article II is worth noting here as well. As the head of the executive branch, the president is not empowered to make law, but instead must "take care" that federal laws are faithfully executed. U.S. Const. art. II § 3. Since its inception, the White House contacts policy adopted by every president since Nixon (and discussed in more detail below) has been understood as a means to ensure the president complies with this duty under the Take Care Clause. The president may set generally applicable law enforcement policies and priorities for DOJ, but singling out specific parties for enforcement for impermissible reasons is not consistent with the duty of faithful execution.[18] In fact, as noted above, due process demands a "disinterested prosecutor" that is not biased by a personal, professional, or financial interest in the prosecution.[19]

The Supreme Court's decision in *Trump v. United States* does not say otherwise. The majority opinion explains that there is no constitutional prohibition on a president "discuss[ing] potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed."[20] It also provides that the president has immunity from criminal prosecution for certain "official acts." It does *not*, however, go so far to say that it is constitutionally permissible for the president or anyone else to choose targets in ways that violate other provisions of the Constitution, including the First Amendment or Equal Protection Clause. And whatever immunity *Trump v. United States*

[18] *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (Blackmun, J., concurring); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) ("The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law.").

[19] *See* note 15, *supra*.

[20] *Trump v. United States*, 603 U.S. ——, 144 S. Ct. 2312, 2335 (2024) (quoting Art. II, § 3).

bestows on the president does not extend to a DOJ attorney ordered by the president (directly or indirectly) to undertake an unconstitutional investigation or prosecution.

For those interested in a more detailed analysis of how the Supreme Court's decision does and does not affect DOJ's traditional practices and policies, Protect Democracy's Paper "*Protecting the Department of Justice from Political Interference after Trump v. United States: The Constitutional Principles at Stake*" provides a more in-depth discussion.[21]

Additional Legal Considerations

DOJ line attorneys often have less than total or exclusive control over the matters they handle. They may not select the targets of investigations or prosecutions themselves, have varying degrees of influence over case strategy, and may be less likely (for example) to make public statements about a defendant than higher-level officials. Even so, line attorneys may violate the law and their personal ethical obligations simply by participating in a legally infirm matter.

For example, prosecutors' *Brady*/*Giglio* obligations may be implicated if they know of evidence or information that indicates the target was chosen because of membership in a protected class or to chill protected speech.[22] A DOJ attorney may be acting *ultra vires* if she participates in a matter which is not, in fact, "authorized by law."[23] And ordinary common investigatory tools may not be used in impermissible ways. For example, a civil investigative demand ("CID") issued in the course of an investigation that was brought for the purpose of harassing a target may run afoul of the CID's authorizing statute, making its issuance contrary to law.[24] All of these situations could put DOJ attorneys in precarious ethical positions in which they might violate professional responsibility rules even if they did not make the initial unethical decision to pursue the matter.

DOJ Ethics Rules, Regulations, and Statutes

DOJ attorneys are bound by a number of federal regulations and statutes aimed at ensuring that the law is enforced fairly and impartially. These include the Executive Branch Standards of Conduct, the DOJ Standards of Conduct, conflict of interest and financial disclosure statutes,

[21] For arguments against extending the Court's holding beyond the specific factual context of *Trump v. United States*, see Protect Democracy, *Protecting the Department of Justice from Political Interference after Trump v. United States: The Constitutional Principles at Stake* (Dec. 2024), https://tinyurl.com/5xddds25.

[22] "[D]ue process requires a prosecutor to disclose material exculpatory evidence to the defendant before trial." *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68 (2009); *see also Turner v. United States*, 582 U.S. 313, 324 (2017) ("[T]he Brady rule's overriding concern [is] with the justice of the finding of guilt." (internal quotations and citation omitted)). "[E]vidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States*, 582 U.S. 313, 324 (2017) (citation omitted); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (noting that prosecutorial misconduct before a grand jury is grounds for dismissing an indictment).

[23] 28 U.S.C. § 515.

[24] 31 U.S.C. § 3733(b)(1)(B) (incorporating by reference the prohibitions in the Federal Rules of Civil Procedure prohibiting harassing discovery practices).

the Hatch Act, and a variety of other regulations.[25] The full list of authorities is substantial. This guide will not touch on every ethical rule but will highlight some key provisions, particularly those that relate to impartiality and the duty to report suspected misconduct.

Public Trust and Impartiality

DOJ attorneys have an obligation to act ethically, honestly, and impartially in discharging their duties. Per the executive branch's Standards of Ethical Conduct, every attorney "has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain."[26] They are prohibited from engaging in "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government" by the regulation governing Employee Responsibilities and Conduct.[27] And, critically, the Standards of Ethical Conduct demand that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual."[28] Even conduct that gives the *appearance* of illegal or unethical behavior is forbidden.[29]

The Hatch Act is aimed at ensuring the public can trust that civil servants will discharge their duties impartially. It restricts DOJ employees from engaging in partisan political activity in certain situations, such as while on duty or while using federal property.[30] The statute includes very detailed and specific restrictions for employees that vary depending on their position, but it also includes a general prohibition that employees may not use their "official authority or influence for the purpose of interfering with or affecting the result of an election."[31] Penalties for violating the Hatch Act range from a reprimand to removal and a period of debarment from federal service.[32]

Duty to Report Misconduct

DOJ attorneys are bound by a number of duties to report actual or suspected misconduct to appropriate authorities. The Standards of Ethical conduct instruct that DOJ attorneys, like all executive branch employees, "shall disclose waste, fraud, abuse, and corruption to appropriate authorities."[33] As discussed below in the Responses to Misconduct section, DOJ attorneys can report misconduct to their supervisor or certain offices designated to receive such reports, including the Office of the Inspector General and the Office of Special Counsel.

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[25] The full list of ethical rules governing DOJ attorneys can be found on the Departmental Ethics Office's official website at: https://www.justice.gov/jmd/departmental-ethics-office.

[26] 5 C.F.R. § 2635.101(a).

[27] *Id.* § 735.203.

[28] *Id*. § 2635.101(b)(8).

[29] *Id*. § 2635.101(b)(14).

[30] 5 U.S.C. § 7323(a); 5 U.S.C. § 7324(a); *see also* U.S. Office of Special Counsel, *Federal Employee Hatch Act Information* (last accessed Dec. 19, 2024), https://tinyurl.com/mpkcu8vw.

[31] *Id.* § 7323(a)(1).

[32] *See id.* § 7326.

[33] 5 C.F.R. § 2635.101(b)(11).

The DOJ Employee Responsibilities regulation also contains a reporting requirement that includes an obligation to report general "serious misconduct" on the part of a DOJ employee,[34] as well as misconduct that "relate[s] to the exercise of the attorney's authority to investigate, litigate or provide legal advice."[35] The bar for what must be reported is relatively low: "Department employees shall report to their supervisor *any evidence or non-frivolous allegation* that a Department attorney engaged in professional misconduct."[36]

Finally, as executive branch employees, DOJ attorneys are also bound by the statutory obligation to report any information "relating to violations of Federal criminal law involving Government officers and employees."[37]

DOJ Policies and Norms

Internal DOJ guidance, policies, and norms do not carry the same force as the statutes and regulations detailed above. However, violations of internal policies and practices without good explanation may be highly suggestive of wrongdoing. For that reason, any conduct that deviates from internal guidance or ordinary practice should be closely scrutinized. The main source of internal policies and procedures is the Justice Manual, which guides DOJ attorneys in daily decision-making and is also publicly available.[38]

White House Contacts Policy

What is commonly known as the White House "contacts policy" is in fact a series of policies, laid out in memos ordinarily issued by presidential administrations early in their tenure, limiting and channeling any contacts between White House staff and DOJ officials.[39] These policies ordinarily cite the need for departmental independence and forbid substantive communications between most DOJ and White House personnel on specific matters.[40]

The goal of limiting communications and encouraging transparency is to prevent political direction of specific-party matters which, as discussed above, risks running afoul of a number

[34] 28 C.F.R. § 45.11.

[35] *See id. §* 45.12.

[36] Justice Manual 1- 4.300, *Reporting Attorney Professional Misconduct and Related Law Enforcement Misconduct to the Office of Professional Responsibility (OPR*), U.S. Department of Justice (last accessed: Dec. 19, 2024), https://tinyurl.com/bdhryb7r (emphasis added). DOJ attorneys must also cooperate with internal audits and investigations of misconduct. *See* 28 C.F.R. § 45.13 (2006).

[37] 28 U.S.C. § 535(b).

[38] Justice Manual, U.S. Department of Justice, https://www.justice.gov/jm/justice-manual (last accessed Dec. 19, 2024).

[39] Eric Holder, *Memorandum: Communications with the White House and Congress*, Office of the Attorney General (May 11, 2009), https://tinyurl.com/rubrywr8; Donald F. McGahn II, *Memorandum: Communication Restrictions with Personnel at the Department of Justice*, The White House (Jan. 27, 2017), https://tinyurl.com/44zzv2dd; Merrick Garland, *Memorandum: Department of Justice Communications with the White House*, Office of the Attorney General (July 21, 2021), https://tinyurl.com/4znbmtac. These policies also usually cover contacts between the White House and Congress.

[40] Merrick Garland, *Memorandum: Department of Justice Communications with the White House* (July 21, 2021), https://tinyurl.com/4znbmtac.

of constitutional provisions, including a target's due process and equal protection rights.[41] Attorney General Griffin Bell, who originated the idea of the contacts policy, explained that the exercise of independent professional judgment by DOJ lawyers was the surest way to assist the president in executing his duties under the Take Care Clause.[42] Most recently, Attorney General Merrick Garland defended the policy in constitutional terms, asserting that the "only way" for DOJ lawyers to fulfill their oath to uphold the Constitution is "to adhere to the norms that have become part of the DNA of every Justice Department employee since Edward Levi's stint as the first post-Watergate Attorney General."[43]

Pursuant to the contacts policy, only certain high-level officials in the White House and within DOJ are permitted to communicate about specific matters, and they may designate others to communicate but must closely monitor those communications. The policy also generally directs that when it wants a legal opinion, the White House must go to the Office of Legal Counsel ("OLC") or its superiors, and requires reporting of attempts to improperly influence OLC's opinions.

Though there are examples of the contacts policy being violated in the past, the memos have been issued continuously since the Watergate scandal, and were part of a series of bipartisan reforms reflecting agreement that it is an abuse of executive power for the president to seek to influence particular DOJ enforcement matters for personal or political reasons.[44] Over the 50 or so years since then, the policy of limited communication between the White House and DOJ on specific matters has hardened into a norm, critical to ensuring the impartiality and integrity of the Department of Justice.[45] White House intrusions on DOJ's independence in specific enforcement matters — including violations of the contacts policy — historically have generally been met with public and Congressional outrage.[46]

Communication between the White House and DOJ attorneys risks violating some of the ethical provisions discussed above, in addition to violating the contacts policy itself. Political direction of a specific-party matter may violate the rule that DOJ attorneys act impartially.[47] And even if it does not, prosecuting a target because of political pressure almost certainly gives the

[41] Protect Democracy, *Protecting DOJ from Political Interference after Trump v. United States: The Constitutional Principles at Stake* (Dec. 2024), at 7, https://tinyurl.com/5xddds25.

[42] *An Address by the Honorable Griffin B. Bell Attorney General of the United States Before Department of Justice Lawyers,* at 5 (Sept. 6, 1978), https://tinyurl.com/5bzwhvz2.

[43] Office of Public Affairs, *Attorney General Merrick Garland Addresses the 115,000 Employees of the Department of Justice on His First Day,* U.S. Dep't of Justice (Mar. 11, 2021), https://tinyurl.com/m4hf44cs.

[44] Andrew Kent, *The Man Who Should Be Merrick Garland's Role Model,* The Atlantic (May 9, 2021), https://tinyurl.com/3n5a8ssz.

[45] Jennifer Rubin, *Opinion: Biden Has Reestablished the Separation Between the White House and Justice Department. Good.*, The Washington Post (July 22, 2021), https://tinyurl.com/yfmxjkfa; *see also* Isaac Arnsdorf, *Priebus Request to FBI Violated Norms, If Not Rules*, Politico (Feb. 24, 2017), https://tinyurl.com/33rj9wy9.

[46] Jane Chong, *White House Interference with Justice Department Investigations? That 2009 Holder Memo*, Lawfare (Feb. 22, 2017), https://tinyurl.com/5n6w8h9f; Dan Eggan and Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, The Washington Post (May 14, 2007), https://tinyurl.com/5n8rhhb3; Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163, 1202 (2013).

[47] *Supra* note 28.

appearance of impartiality, which violates the rule that DOJ attorneys should "avoid any actions creating the appearance that they are violating the law or . . . ethical standards."[48]

It is possible that a new administration will break with modern practice and decline to reissue the contacts policy, or that it will issue a new memorandum that softens the policy in some way. If so, it is important to remember that this policy has essentially been a prophylactic guardrail: It has prohibited things that aren't inherently improper (i.e., certain contacts between DOJ and the White House) in order to protect against the occurrence of things that *are* improper — such as involvement by DOJ attorneys in a matter where they have a statutorily-defined conflict,[49] or the improper selection of a target for investigation. If the guardrail is removed, the risk of improper behavior still remains. Thus, any violation of what has historically been the White House contacts policy (even if the traditional policy is not in force) should prompt questions about whether there are legal or ethical violations happening.

Election-Related Norms and Guidance

DOJ also has a series of policies, enshrined in memos from attorneys general, aimed at ensuring that DOJ does not interfere with — or appear to interfere with — elections.[50] These memos forbid the consideration of partisan politics in DOJ decision-making and urge special sensitivities around the time of elections. They also generally cite to Justice Manual provisions that govern election-related criminal investigations and prosecutions.[51]

The Justice Manual provides that "[f]ederal prosecutors and agents may never select the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election. . . ."[52] It also instructs that the "Department should not engage in overt criminal investigative measures in matters involving alleged ballot fraud until the election in question has been concluded, its results certified, and all recounts and election contests concluded."[53] In addition to these substantive policies, the Justice Manual requires additional procedural steps for certain actions taken around an election.[54] For example, it requires consultation with DOJ leadership — the Public Integrity Section first, and senior leadership if that section requires escalation — if an attorney or agent wishes to take a step that "raise[s] an

[48] *Supra* note 29.

[49] *See* 18 U.S.C. § 208.

[50] Eric Holder, *Memorandum: Election Year Sensitivities*, Office of the Attorney General (March 9, 2012), https://tinyurl.com/pumcmm4h; William Barr, *Memorandum: Election Year Sensitivities*, Office of the Attorney General (May 15, 2020), https://tinyurl.com/mu52a7h6; Merrick Garland, *Memorandum: Election Year Sensitivities,* Office of the Attorney General (May 25, 2022), https://tinyurl.com/57zbezfc.

[51] Justice Manual 9-85.300, 9-85.500, 9-85.210, *Protection of Government Integrity*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/4dmxk8jn.

[52] Justice Manual 9-85.500, *Actions that May Have an Impact on an Election*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/muv2ky52.

[53] Justice Manual 9-85.300, *Non-Interference in Elections When Conducting Federal Criminal Investigations Involving Ballot Fraud*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/55eptjd6.

[54] Justice Manual 9-85.210, 9-85.500, *Protection of Government Integrity*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/4dmxk8jn.

issue or the perception of an issue" that DOJ is making decisions for the purpose of interfering in an election.[55]

Election sensitivity memos also typically remind DOJ employees about their responsibility to comply with the Hatch Act, which (as noted above) forbids an employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election."[56]

Specific Guidance for Criminal Prosecutors

The Principles of Federal Prosecution, which is found in Title 9 of the Justice Manual, sets forth additional guidance for DOJ criminal prosecutors. The Principles are intended to "contribute to the fair, evenhanded administration of the federal criminal laws."[57] The guidance thus includes, for example, prohibitions on prosecutors considering a target's political associations, activities, or beliefs in charging decisions.[58] Prosecutors also may not consider "the possible effect" of a charging decision "on the attorney's own professional or personal circumstances."[59] There are additional provisions on sentencing considerations and individually assessing potential charges.[60]

Other Norms and Policies

Various additional norms and policies guide the evenhanded administration of justice. For example, the Justice Manual limits public statements on pending investigations or active cases and cautions against the release of potentially prejudicial information.[61] Some divisions within DOJ also have their own manuals that lay out ordinary procedures for investigations and standards that must be met in order to proceed with a matter.[62] And with regard to hiring, "[a]ll personnel decisions regarding career positions in the Department must be made without regard to the applicant's or occupant's partisan affiliation."[63]

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[55] *Supra* note 52.

[56] 5 U.S.C. § 7323.

[57] Justice Manual 9-27.001, *Principles of Federal Prosecution: Preface*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/ktjts46c.

[58] Justice Manual 9-27.260, *Initiating and Declining Charges—Impermissible Considerations*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/mrxdh4xd.

[59] *Id.*

[60] *See generally* Justice Manual Title 9, *Criminal,* U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/jm/title-9-criminal.

[61] Justice Manual 1-7.400, 1-7.410, 1-7.500, 1-7.510, 1-7.600 and 1-7.610, *Confidentiality and Media Contacts Policy*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/jm/jm-1-7000-media-relations.

[62] *Testimony of John W. Elias*, U.S. House Committee on the Judiciary (June 24, 2020), https://tinyurl.com/3ynrm7n4 (discussing the Antitrust Division's manual).

[63] Justice Manual 1-8.700, *Personnel Decisions Concerning Positions in the Civil Service*, U.S. Department of Justice Office of Professional Responsibility and Office of the Inspector General (last accessed Dec. 19, 2024), https://www.justice.gov/jm/jm-1-8000-congressional-relations#1-8.700; *see also* U.S. Department of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), https://tinyurl.com/5fn72rme.

If any of this internal guidance is violated, a key question should be *why*? If an investigation proceeds even though the ordinary standards were not met — why? If a hiring manager begins to hire only members of a certain political party — why?[64] If DOJ officials begin to comment publicly on an ongoing investigation — why? These violations could be indications of deeper problems, which should be interrogated by an ethically conscious DOJ attorney.

Rules of Professional Responsibility

While a DOJ attorney may worry that refusing to follow an improper order could jeopardize their job, *following* that order may jeopardize the attorney's entire career. In addition to being bound by legal and ethical rules like other federal employees, federal law requires DOJ attorneys to follow the professional responsibility rules of their state bars and, when involved in litigation, the rules of the courts in which they appear "to the same extent and in the same manner as other attorneys in that State."[65] This is both an independent obligation — state bars can and have taken disciplinary action against government attorneys engaged in misconduct — and an obligation that is enforced by DOJ, which is prohibited by statute from paying an attorney who does not have an active bar license.[66] Thus, violating a rule of professional responsibility carries a number of risks: from jeopardizing one's law license, to being sanctioned by a court, to being disciplined by DOJ itself.

Regardless of whether they are acting on direction from a supervisor, and regardless of whether an action technically violates DOJ ethics rules, DOJ attorneys must satisfy themselves that their behavior comports with the applicable rules of professional conduct. This section will discuss how different professional responsibility obligations may come into play. Though this analysis is something that attorneys can and should conduct for themselves when deciding how to act, it can be difficult in the heat of the moment to slow down and call to mind relevant rules. This section thus provides a basic overview that can serve as a starting place for further research. It will rely on the Model Rules of Professional Conduct, as DOJ attorneys belong to many different state bars.

Rules Related to Improperly Selected Targets

As explained above, retaliatory investigations and prosecutions violate a number of constitutional protections. If asked to participate in such a prosecution, DOJ attorneys might also find themselves on the wrong side of a number of ethical rules. Rules of professional conduct prohibit criminal prosecutors from "prosecuting a charge that the prosecutor knows is not supported by probable cause."[67] Further, a "lawyer who represents a client in an adjudicative

[64] To be clear, this may not just be a normative violation; depending on the circumstances, it could also violate the First Amendment and/or amount to a prohibited personnel practice under 5 U.S.C. § 2302(b)(1)(E).

[65] 28 U.S.C. § 530B(a); *see also* 28 C.F.R. § 77.1(b); 28 C.F.R. § 77.4(a).

[66] 28 U.S.C. § 530C(c)(1); *see also* Justice Manual 1-4.110, *Attorney Credentialing and Bar Lapse*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/pvjh8594.

[67] Rule 3.8(a), *Special Responsibilities of a Prosecutor,* The American Bar Association-Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/257ukb2f.

proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[68] Thus, an attorney in a criminal or civil matter who knows that the target was selected in violation of his or her constitutional rights may have an obligation to disclose that fact, particularly if explicit untrue representations are made to the court as to how the target was selected.[69] Because attorneys also have a general obligation to keep information about and communications with a client confidential (unless the client consents to disclosure),[70] the analysis is complex and context-specific; having to make a decision about breaking confidentiality is not a position any lawyer wants to find themselves in.

Rules Governing the Investigation or Litigation Process

Even when the initiation of a civil or criminal matter is legally and ethically sound, actions taken during the course of litigation can run afoul of ethical rules. For example, discovery requests cannot be issued for the sole purpose of burdening or harassing the recipient.[71]

Moreover, though many government ethical rules focus on attorneys engaged in affirmative enforcement matters, civil defensive litigators are not immune from ethical issues. It can be difficult for some DOJ attorneys working with other agencies to make sure the agency conducts a timely and thorough investigation of the relevant facts, but a DOJ attorney who knows that the agency or its officials aren't being truthful — whether that means lying at a deposition, concealing or withholding documents, or otherwise misrepresenting information — has an affirmative obligation to correct a misrepresentation if the officials involved will not do so themselves.[72] Indeed, courts have held DOJ attorneys to these standards and have not minced words when finding that DOJ attorneys have been less than fully candid — sometimes even calling those attorneys out by name.[73] Finally, though lawyers are free to make legal arguments that push the law in new directions, that principle only stretches so far. Truly frivolous legal arguments are not allowed,[74] and each attorney must judge where that line lies.

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[68] Rule 3.3(b), *Candor Toward a Tribunal*, The American Bar Association - Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/4evbe9xn.

[69] *Id.*; *see also* Rule 4.1(b), *Truthfulness in Statements to Others*, The American Bar Association-Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/2tfbt87d ("In the course of representing a client a lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.").

[70] Rule 1.6, *Confidentiality of Information,* The American Bar Association-Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/yzk2wzxa.

[71] Rule 4.4, *Respect for Rights of Third Persons*, The American Bar Association - Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/57apnms7 ("[A] lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."); *see also* Rule 3.4(d), *Fairness to Opposing Party & Counsel,* https://tinyurl.com/y2u3hedu; Fed. R. Civ. P. 30, 34.

[72] Rule 3.3(a)(3), *Candor Toward the Tribunal*, The American Bar Association - Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/4evbe9xn.

[73] *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.*, 538 F. Supp. 3d 124, 143 (D.D.C. 2021), aff'd sub nom. *Citizens for Resp. & Ethics in Washington v. United States Dep't of Just.*, 45 F.4th 963 (D.C. Cir. 2022) ("DOJ has been disingenuous to this Court with respect to the existence of a decision-making process that should be shielded by the deliberative process privilege.").

[74] Rule 3.1, *Meritorious Claims & Contentions*, The American Bar Association - Model Rules of Professional Conduct (last accessed Dec. 19, 2024), https://tinyurl.com/ydrvs4b8.

Navigating Ethical Concerns

Once a DOJ attorney spots a likely ethical violation, what is the proper response? As this section will discuss, DOJ attorneys have obligations to report misconduct and avoid personally participating in such misconduct. Aside from those mandatory obligations, there are various optional steps to consider: from seeking additional counsel, to advocating internally for the conduct to stop, to reporting externally to Congress or the press.

DOJ attorneys have made use of all of these options at one time or another. Some DOJ attorneys have resigned in protest.[75] And there is at least one recent high-profile example of a DOJ official taking a voluntary demotion to avoid having to implement a policy he believed ran counter to longstanding DOJ norms.[76] Countless others have reported misconduct either internally within DOJ, or to Congress or the press[77] — while remaining in their positions.[78]

Each of these avenues has different risks and advantages, and individual DOJ attorneys will weigh those risks and advantages differently. Doing nothing may feel less risky in the moment. However, given attorneys' professional obligations, particularly the obligation to report any evidence of misconduct,[79] inaction is not only unethical — it is personally risky as well. Staying and participating in misconduct — or even simply remaining silent when reporting is required — may pose a substantial risk to the attorney's law license and career.

This part of the guide will outline options for responding to misconduct, highlighting when possible the likely benefits and drawbacks of the various approaches so attorneys can weigh the options themselves.

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[75] Joel McElvain, *Senior Justice Department Lawyer Resigns after Shift on Obamacare*, The Washington Post (June 12, 2018), https://tinyurl.com/4tkfe7fc. At least one prosecutor on the Roger Stone matter quit the Department, citing political interference at sentencing. *See* Katie Benner, Sharon LaFraniere, and Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, The New York Times (July 8, 2020), https://tinyurl.com/2cvsrvwk. However, the OIG report found that there had been no wrongdoing — though it also found that the prosecutor's belief that the sentencing recommendations were affected by political pressures was not unreasonable. *See* Office of the Inspector General, *An Investigation of Allegations Concerning the Department of Justice's Handling of the Government's Sentencing Recommendation in United States v. Roger Stone*, U.S. Department of Justice - Oversight and Review Division (July 2024), https://oig.justice.gov/sites/default/files/reports/24-081.pdf.

[76] Daniel Villarreal, *DOJ's Election Crimes Director Resigns After Barr Authorizes Election Fraud Investigation*, Newsweek (Nov. 9, 2020), https://tinyurl.com/2zdhvr4p; Ari Shapiro, *DOJ's Top Election Crimes Prosecutor Resigns to Protest Allegations of Election Fraud*, NPR (Nov. 10, 2020), https://tinyurl.com/2wmwfbvt; *see also* Benner, LaFraniere, and Goldman, *supra* note 75 (a number of prosecutors assigned to the Roger Stone matter withdrew *from that matter* but stayed on as DOJ attorneys).

[77] *See* note 62, *supra*; Kyle Cheney and Leah Nylen, *Prosecutor Says He Was Pressured to Cut Roger Stone 'A Break' Because of His Ties to Trump*, Politico (June 23, 2020), https://tinyurl.com/4dj83xwc.

[78] However, a common critique of whistleblower laws is that while whistleblowers may remain employed, they may still face unfair backlash for reporting misconduct. Government Accountability Project, *POGO: Corrupted: Failing Our Truth-Tellers* (Oct. 27, 2020), https://tinyurl.com/4t98k5nf.

[79] Justice Manual 1-4.300, *Reporting Attorney Professional Misconduct and Related Law Enforcement Misconduct to the Office of Professional Responsibility (OPR)*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.300 (emphasis added).

ETHICAL OBLIGATIONS AND OPTIONS

Witnessing or Being Asked to Participate in Misconduct

Attorneys *Must*	Attorneys *May*
Report the conduct to the appropriate authority (OIG, OPR, or a supervisor).	Seek counsel from PRAO or an Ethics Officer.
Avoid participating personally: ask to be reassigned, refuse, or resign.	Speak up internally to advocate for the misconduct to stop, and to prevent its normalization.
Follow all rules of professional responsibility, particularly in active litigation. Don't risk a law license.	Disclose the misconduct externally — in some circumstances to Congress or the press.

Responses to Ethical Violations

There is no easy answer to the question of how exactly DOJ attorneys should respond when asked to do something unethical. In that circumstance, attorneys may have to weigh more than one goal, including not becoming personally involved in the misconduct, stopping the misconduct from happening, and exposing the misconduct. Because actual circumstances will differ, there is no single flowchart or checklist that can illustrate the steps that every attorney should take when faced with — or asked to participate in — misconduct. Instead, the section below provides an overview of available options and the potential drawbacks and advantages of each. Some of the responses may be mandatory, while others are optional.

Seeking Counsel or Advice

An initial step that DOJ attorneys should seriously consider when faced with possible misconduct is seeking advice from their designated ethics or professional responsibility officials. The Justice Manual says that any employee who relies in good faith on advice from DOJ's ethics officials or, in the case of advice regarding applicable bar rules, DOJ's Professional Responsibility Advisory Office ("PRAO") will not face disciplinary action from DOJ for violations of certain government-wide standards of conduct, provided that the employee made full disclosure of all relevant facts and circumstances and followed completely the advice given.[80]

[80] Justice Manual 1-4.020, *Obtaining Advice and Approval on Ethics-Related Matters,* U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.020.

If an attorney's questions do not concern professional responsibility and thus aren't properly addressed toward PRAO, government-wide regulations of the Office of Government Ethics (which is outside DOJ and different than each component's Ethics Advisor) also provide a similar safe harbor against certain disciplinary actions, with the same types of caveats regarding the need for good faith reliance, full disclosure, and strict compliance with advice given.[81] Where possible, it may be wise to obtain or confirm advice in writing in the event that a question arises later. The Justice Management Division oversees the government ethics program for Main Justice, and the Executive Office of the U.S. Attorneys oversees the program for U.S. Attorney offices.[82]

When deciding whether to seek this sort of advice, employees may consider how strongly they feel about bringing attention to the possible misconduct, and how much they value remaining anonymous if they ultimately make an external disclosure. Discussing an issue internally at DOJ before later reporting it externally may make the employee identifiable. The safe harbor provisions described above also do not offer guarantees against criminal prosecution, civil penalties, or all types of disciplinary action — and are thus somewhat narrow safe harbors.

And of course, PRAO and the ethics officers are internal to DOJ. This means both that seeking advice will not advance the goal of bringing the misconduct to light outside DOJ, and that PRAO may be susceptible to the same political pressures as other parts of DOJ. If an attorney does not want to inquire of PRAO, some state or local bars have mechanisms that allow attorneys to seek similar advice (sometimes with a degree of anonymity or other protections that allow attorneys to maintain privilege).

Avoiding Participating in Misconduct While Remaining at DOJ

It is in the nation's best interest for attorneys who respect the rule of law and are committed to upholding the Constitution to have the option of remaining in their positions whenever possible.

There may be times, however, when DOJ attorneys are not able to avoid becoming involved in misconduct while also remaining in their positions. In those circumstances, both legal and ethical obligations may demand that the attorney resign either their position or their employment entirely. For those DOJ attorneys who wish to remain employed — whether because of practical family and financial constraints, or out of a sense of duty — there are some options for responding to misconduct in a way that can maximize their chances of remaining in their jobs.

There is no sugar coating the fact that disobeying a direct order is likely grounds for discipline, up to and including removal.[83] There is an exception to this principle that applies in some

[81] 5 C.F.R. § 2635.107(b).

[82] *Supra* note 80; Ethics Officials, *Justice Management Division*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/jmd/ethics/ethics-officials.

[83] *Shaw v. U.S. Government Printing Office*, 26 M.S.P.R. 664 (1985) (removal was appropriate penalty for employee's refusal to perform assigned work); *see also Hanna v. Dep't of Labor*, 80 M.S.P.R. 294, 1998 WL 842699 (1998), aff'd, 18 F. App'x 787 (Fed. Cir. 2001) ("To prove the insubordination part of its charge, the agency had to show that the appellant's statement . . . was a willful and intentional refusal to obey an authorized order of a superior officer which the officer was entitled to have obeyed."); *Sepulveda v. Dep't of Interior*, 38 M.S.P.R. 449, 1988 WL 112808 (1988) (failure to follow supervisor's instructions, "even if predicated on honestly-held misapprehensions, constitutes serious misconduct that cannot properly be condoned"); *Nagel v. Dep't of Health and Hum. Servs.*, 707 F.2d 1384, 1387 (Fed. Cir. 1983) ("[F]ailure to perform assigned duties clearly justifies

circumstances when the order would "require the individual to violate a law, rule, or regulation."[84] However, the possibility of grounds for successfully challenging an adverse employment action does not necessarily prevent the action in the first place. Even if a removal is ultimately found to be unjustified, the process of being fired and challenging that action is itself onerous, sometimes costly, and may take a long time. DOJ attorneys who wish to remain employed but also understand the dangers of engaging in misconduct may thus wish to avoid outright refusal as a strategy.

If participating in a specific matter would violate the law or compromise the attorney ethically, seeking reassignment may be an option. This sort of thing happens not-infrequently, even outside of the context of ethical misconduct; for example, in many offices, attorneys can opt out of prosecuting death-eligible cases. This may or may not work without an explanation, of course, and may very well force the question of whether the attorney is ultimately willing to refuse a direct order from a supervisor.

Short of seeking reassignment, DOJ attorneys may try to convince their superiors to change course or otherwise document their legal and ethical objections in a way that may give decision-makers pause and, in the best case scenario, prompt reconsideration. Even short of detailing why a course of conduct is improper, simply voicing ethical concerns to colleagues may help deter misconduct. If each individual attorney thinks they are alone in their doubts, they are more likely to question their own analysis or moral compass. This sort of internal advocacy with decision-makers and peers is critical to upholding the law and preventing the normalization of misconduct.

Finally, a DOJ attorney who has successfully avoided becoming directly involved in misconduct themselves must nonetheless consider their legal and ethical obligations to report that misconduct. Options for reporting will be discussed below in the section on Reporting.

Special Considerations For Attorneys In Active Litigation

As noted above, there are special considerations for attorneys already involved in active litigation and thus subject to court supervision — and discipline.

In a best case scenario, when confronted with a potential ethical violation, attorneys can leverage their obligation to comply with rules of professional responsibility and court rules to encourage others to do so. For example, a witness (including another government official) who has given untrue testimony during a case may choose to correct that testimony themselves if the DOJ attorney explains that she may have to do so (including, potentially, by alerting the court) if the witness does not.[85] Or supervisors may approve narrower discovery requests or

adverse agency action, and the choice of an appropriate 'penalty' is a matter of agency discretion."). There is an exception to this principle that applies in some circumstances when the order would "require the individual to violate a law, rule, or regulation." 5 U.S.C. § 2302(b)(9)(D). However, as noted elsewhere, having a successful path to challenging an unwanted personnel action like removal is not the same as actually avoiding being fired. Termination is harmful even if the employee is ultimately reinstated.

[84] 5 U.S.C. § 2302(b)(9)(D).

[85] *See* note 72, *supra*.

more fulsome discovery responses if an attorney voices concern about being sanctioned for discovery abuses.

Even if an attorney believes there is a low risk of internal DOJ discipline for wrongdoing because superiors have ordered or approved certain behavior, being disciplined by a court is a real risk for DOJ attorneys in active litigation[86] — and that's true regardless of how many other attorneys may have approved or otherwise gone along with a course of action. Depending on the circumstances, such discipline might be directed at the attorney individually (e.g., monetary sanctions or a bar referral) or might be directed at the case (e.g., an adverse inference or even dismissal). And though holding federal prosecutors in contempt is rare, it can and has happened as well.[87] Even when declining to actually sanction attorneys, some courts are aggressive in detailing when they have fallen short of expectations.[88] This sort of accountability (often made part of a public record) can have professional consequences for DOJ attorneys beyond their time at DOJ.

Articulating these risks in advance may help attorneys to avoid an unethical course of action. Ultimately, however, the relevant ABA Model Rule of Professional Conduct, which has been adopted by many jurisdictions, mandates that an attorney "shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law."[89] Whether representation would actually result in a violation of a rule or law is an intensely fact-specific analysis, but the rule effectively obligates attorneys to ask themselves the question.[90]

Special Considerations for Supervisory Attorneys

Attorneys in supervisory positions should consider taking a few additional steps. First, because the rules allow employees to report suspected misconduct directly to their supervisors, attorneys in supervisory positions should ensure that they understand the correct process to follow if they receive such a report. DOJ components' ethics or general counsel's offices may offer training or other resources on this topic. Second, supervisors can help their teams ensure they are following ordinary practices and procedures

[86] *See State v. United States Dep't of Com.*, 461 F. Supp. 3d 80, 94–95 (S.D.N.Y. 2020) ("[T]he documents at issue here were improperly withheld in the course of resolving a dispute over whether Defendants had fully complied with [a discovery] order. . . ."); *see also Nat'l Urb. League v. Ross*, No. 20-CV-05799-LHK, 2020 WL 5548117, at *5 (N.D. Cal. Sept. 15, 2020) (noting that a "failure to produce or complete an administrative record can be the basis for sanctions" but that sanctions had not been requested at that time).

[87] Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, The Washington Post (Feb. 14, 2009), https://tinyurl.com/5cwa5myy.

[88] *Hassoun v. Searls*, 524 F. Supp. 3d 101, 110–11 (W.D.N.Y. 2021) ("[T]he Court continues to be troubled by the conduct of [government] counsel in connection with this case. . . . [government] counsel adopted litigation tactics that did not serve the cause of justice, including taking an unwarrantedly narrow and crabbed view of Respondent's discovery obligations.").

[89] Rule 1.16, *Declining or Terminating Representation,* The American Bar Association - Model Rule of Professional Conduct (last accessed Dec. 19, 2024), https://hinyurl.com/ff5mz7ya.

[90] Withdrawal is not without precedent; DOJ attorneys have moved to withdraw from particular matters shortly before a shift in litigation strategy, creating the impression that they withdrew in order to avoid participating in the new strategy. *Robyn Kravitz, et al., v. U.S. Department of Commerce, et al.,* No. 18-1041-GJH (July 8, 2019), https://tinyurl.com/y2cfh34c; *see also* Hansi Lo Wang, *Judge Says Administration Can't Change Lawyers in Census Citizenship Question Case*, NPR (July 7, 2019), https://tinyurl.com/bddb6a4u (Judge rejects attempt at withdrawal); *State of New York et al., v. U.S. Department of Commerce et al.,* No. 18-CV-2921-JMF (July 9, 2019), https://tinyurl.com/2dk5bkxy.

clear and accessible. Though much of this information is already available in the Justice Manual, this may be a good time to update resources that teams rely on regularly, such as approvals checklists or other tools that spell out proper investigative or litigative procedures.

Finally, good leaders understandably will want to project confidence and reduce anxiety on their teams — even if something does seem out of step with ordinary practice. Bear in mind, however, that supervisors set the standard for their offices or components and should avoid unintentionally discouraging a line attorney from investigating or reporting suspected wrongdoing.

Resignation or Refusal

What if a DOJ attorney has tried to avoid a legally or ethically suspect assignment, but she was assigned to that matter anyway? What if that attorney attempted to convince decision-makers to take a different course of action, but to no avail? What if a DOJ attorney attempted to report ethical concerns internally but was rebuffed in some way? Whether to explicitly refuse an order, risking termination — or to go even further and resign — is a deeply personal decision, but one that must be considered if all else fails.

Whether or not an attorney stays or leaves, if misconduct does happen, DOJ attorneys must fulfill their duty to report it. But how? The following section will provide a brief overview of the mechanics of reporting misconduct and some advantages and disadvantages to different reporting options.

Reporting Misconduct

Broadly speaking, DOJ attorneys can report misconduct *internally* — within DOJ or other parts of the executive branch — or, in some cases, *externally*, i.e., to the press, the public, or Congress. "Reporting" is not necessarily a term of art. Here, it simply refers to telling someone about actual or suspected misconduct. However, there are ways to report that provide some level of protection against retaliation. Thus, before discussing reporting options, this guide will discuss the Whistleblower Protection Act and how it might come into play for DOJ attorneys reporting misconduct.

As noted, there are statutes and regulations *requiring* DOJ attorneys to report certain types of wrongdoing in certain ways, and the types of reporting discussed in this section may satisfy those obligations. However, for all of the reasons discussed above, simply reporting wrongdoing does not relieve attorneys from the obligation *not to engage in wrongdoing themselves*.

Whistleblower Protection Act

The Whistleblower Protection Act, 5 U.S.C. § 2302,[91] ("WPA") protects many federal employees by prohibiting retaliation for certain disclosures. Specifically, a supervisor or other decision-maker may not "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of" a protected disclosure.[92] "'[D]isclosure' means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences — (i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[93]

The WPA also describes three categories of *protected* disclosures, each of which has certain limitations on what may be disclosed. One category is general disclosures;[94] one category is disclosures made to the Office of Special Counsel, the Inspector General, or another specific agency designee;[95] and one category is disclosures to Congress.[96] Employees who make disclosures that meet these definitions are more likely to be protected against retaliation under the WPA — though the statute and its interpretation are complex, so anyone considering relying on the WPA should seek legal advice before doing so.[97]

Internal Executive Branch Reporting

The Whistleblower Protection Act prohibits retaliation for protected disclosures made to the Office of Special Counsel ("OSC"), the DOJ Inspector General ("OIG"), or another designee. Allegations of attorney professional misconduct also can be reported to the DOJ Office of Professional Responsibility ("OPR").

One advantage of reporting internally within the executive branch is that there are not the same restrictions on the subject matter of the disclosure that may apply elsewhere; for example, classified information can be disclosed to the OIG and OSC, though there are special procedures for reporting classified information, such as not utilizing the unclassified OIG

[91] This law was updated in 2012 when the Whistleblower Protection Enhancement Act was signed into law to strengthen the protections for government employees who disclose evidence of fraud, waste or abuse. *See* 5 U.S.C. § 2302(b)(8), as amended (governing disclosures of violations of law, waste, fraud, abuse or public health or safety threats).

[92] 5 U.S.C. § 2302(b)(8).

[93] *Id.* § 2302(a)(2)(D); *see also* 5 U.S.C. § 2302(b)(8).

[94] *Id.* § 2302(b)(8)(A).

[95] *Id.* § 2302(b)(8)(B).

[96] *Id.* § 2302(b)(8)(C).

[97] *Supra* note 92; *but see Gabel v. Dep't of Veterans Affs.*, 2023 MSPB 4, 2023 WL 164193, at *2 (2023) (noting, among other things, that disclosures must be "specific and detailed").

hotline.[98] On the other hand, all three of these offices — DOJ OIG, DOJ OPR, and OSC — answer to executive branch leadership in some way, which may limit their independence.

DOJ Office of Professional Responsibility

The DOJ Office of Professional Responsibility fields "allegations of misconduct by a Department attorney that relate to the exercise of the attorney's authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct."[99] Employees have a duty to report this type of misconduct to either OPR or to their supervisor.[100] OPR may respond by screening out a non-meritorious complaint, conducting a short inquiry, or conducting a full investigation.[101]

When OPR makes a finding of attorney misconduct, it provides a report to the Professional Misconduct Review Unit (PMRU), which has jurisdiction to decide on discipline.[102] Consequences for misconduct include reporting to state bar disciplinary authorities and, if approved by the Deputy Attorney General (DAG), termination.[103] The DAG has the authority to personally serve as a deciding official in PMRU matters or to designate an acting PMRU chief.[104] Thus, this avenue of reporting ultimately ends with the appointed leadership of DOJ.

DOJ Office of the Inspector General

As noted above, in addition to reporting professional responsibility violations to OPR, DOJ employees have a responsibility to report "serious misconduct"[105] to the OIG, whether through the Office of Special Counsel or to the OIG directly.[106] "Serious misconduct" includes a "violation of any law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health or safety."[107] DOJ attorneys can report

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[98] Office of the Inspector General, *Whistleblower Rights and Protections*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://oig.justice.gov/hotline/whistleblower-protection ("In general, employees may disclose information to anyone, including non-governmental audiences, unless the information is classified or specifically prohibited by law from release. However, if the information is classified or specifically prohibited by law from release, it may only be shared with the OIG, OSC, or a designated agency official.").

[99] *See* note 35, *supra; see also* Office of Professional Responsibility, *Submit Professional Misconduct Complaint to OPR*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/5bzuh369.

[100] *Id.* § 45.12.

[101] Office of Professional Responsibility, *Attorney Professional Misconduct Matters*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/opr/professional-misconduct.

[102] Justice Manual 1-4.320, *Adjudicating Findings of Attorney Professional Misconduct—The Professional Misconduct Review Unit,* U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.320.

[103] Office of Professional Responsibility, *Frequently Asked Questions*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://www.justice.gov/opr/frequently-asked-questions.

[104] *Supra* note 102.

[105] *Supra* note 35.

[106] DOJ attorneys should note that OIG and OPR can refer complaints to each other: "the OIG ordinarily will refer to OPR allegations that reflect on the professional conduct and ethics of a Department attorney. Similarly, OPR ordinarily will refer to the OIG allegations against a Department attorney that are unrelated to the attorney's authority to investigate, litigate, or provide legal advice." *See* Office of Professional Responsibility, *Jurisdiction and Relationship to the Office of the Inspector General*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://tinyurl.com/2hpj5wnr.

[107] *Supra* note 98.

misconduct to the OIG via its online complaint portal (its "hotline")[108] or by mail, and there is an option to file the report anonymously.[109] The OIG may investigate and produce a report, and it may recommend corrective action, but it has no power to compel that the agency take specific actions in response to its investigation.[110]

The Inspector General Act provides a level of confidentiality for the reporting employee: The Inspector General "shall not . . . disclose the identity of the employee without the consent of the employee, unless the Inspector General determines the disclosure is unavoidable during the course of the investigation."[111] Another upside to reporting to the OIG is that an employee can make a "protected disclosure" under the WPA of confidential or nonpublic information to the OIG, which may not be the case when making disclosures to external audiences.[112]

However, although Offices of Inspectors General were created to provide "independent" oversight of federal agencies,[113] Inspectors General are appointed by the president and confirmed by the Senate, and they can also be removed by the president.[114] Thus, although the DOJ OIG may operate independent of agency leadership, it also may be responsive to the president. Importantly, the OIG is not bound by any timelines, and investigations can take so long that they are not always effective in addressing active or ongoing issues.[115]

Office of the Special Counsel

The DOJ OIG and the Office of Special Counsel have overlapping jurisdiction: Both can receive disclosures of wrongdoing.[116] However, the two bodies have different processes and are governed by different rules when handling reports. The OIG sits within DOJ, and the agency's response to its recommendations are ultimately the decision of DOJ leadership. OSC sits within the executive branch but is outside the DOJ; its leader is appointed by the president for a

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[108] *Id.*

[109] Office of the Inspector General, *Employee Complaint-or-Program Form*, U.S. Department of Justice (last accessed Dec. 19, 2024), https://oig.justice.gov/hotline/employee-or-program-complaint/form.

[110] 5 U.S.C. § 404. Some examples of high-profile reports by DOJ OIG are: Office of the Inspector General, *An Investigation of Allegations Concerning the Department of Justice's Handling of the Government's Sentencing Recommendation in United States v. Roger Stone*, U.S. Department of Justice - Oversight and Review Division (July 2024), https://tinyurl.com/2cb3td3a; Office of the Inspector General, *Preliminary Review of Allegations Concerning the Antitrust Division's Handling of the Automakers Investigation*, U.S. Department of Justice - Oversight and Review Division (July 2024), https://tinyurl.com/mvj7sb64; U.S. Department of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), https://tinyurl.com/5fn72rme.

[111] 5 U.S.C. § 407.

[112] *Id.* § 2302(b)(8)(B).

[113] *Id.* § 402.

[114] *Id.* § 403.

[115] For example, in one case, approximately four years passed between when a former special counsel reported alleged political interference in a criminal sentencing and the OIG producing its report clearing all individuals of wrongdoing. *See* Kyle Cheney and Leah Nylen, *Prosecutor Says He Was Pressured to Cut Roger Stone 'A Break' Because of His Ties to Trump*, Politico (June 23, 2020), https://tinyurl.com/4dj83xwc; Ella Lee, *DOJ Watchdog Finds No Improper Pressure On Prosecutors to Lower Roger Stone Sentence,* The Hill (July 24, 2024), https://tinyurl.com/32as3muk.

[116] OSC is also charged with protecting federal employees from prohibited personnel practices, such as whistleblower retaliation and unlawful hiring practices. *See* U.S. Office of Special Counsel, *Know Your Rights When Reporting Wrongs* (last revised March 2019), https://osc.gov/Documents/Outreach%20and%20Training/Handouts/Your%20Rights%20as%20a%20Whistleblower%20(v2024).pdf.

five-year term and can only be removed for cause.[117] Thus, structurally, OSC may have a modest advantage over the DOJ OIG when it comes to independence from political influence. However, when OSC refers a matter to an agency, as described below, the referral process may open up an opportunity for the agency head to become involved.

OSC does not itself investigate complaints or disclosures. Instead, when OSC receives a report of alleged wrongdoing,[118] it conducts a screening within 45 days to determine whether there is a substantial likelihood that the employee has disclosed misconduct covered by the statute.[119] If OSC finds a substantial likelihood that an employee has disclosed information indicating misconduct at DOJ, OSC refers the disclosure to the head of the agency: here, the attorney general. DOJ, in turn, is required to investigate and produce a report that describes the investigation and its findings within 60 days.[120] Many agency heads have arrangements with their OIG, such that the OIG conducts the investigation OSC requires, though that arrangement is not universal. Once complete, OSC provides the agency's investigation report to the employee who made the original disclosure to review and comment, and then ultimately transmits the report with those comments to the president and certain congressional committees.[121] In August 2024, the Special Counsel announced a new initiative to increase transparency by, among other things, providing early public summaries of some disclosures.[122]

In terms of confidentiality, OSC has a somewhat stronger standard for protecting the identity of a person making a disclosure, as compared to OIG: The individual's identity cannot be disclosed "unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."[123] However, OSC requires that employees making disclosures identify themselves to OSC; anonymous reporting is not accepted.[124]

OSC or DOJ OIG?

Because OSC and DOJ OIG have overlapping jurisdiction, a DOJ attorney who wishes to disclose misconduct understandably might wonder which is the better avenue for reporting. Depending on the specific circumstances of the disclosure and employee's priorities, either agency could be a reasonable place to report misconduct. Additionally, employees need not

[117] 5 U.S.C. § 1211.

[118] Employees may make a disclosure by phone, mail, or online. *See* U.S. Office of Special Counsel, *How to File a Disclosure Claim* (last accessed Dec. 19, 2024), https://osc.gov/Services/Pages/DU-FileClaim.aspx.

[119] 5 U.S.C. § 1213(b); U.S. Office of Special Counsel, *What Happens When an Employee Files a Disclosure Claim?* (last accessed Dec. 19, 2024), https://osc.gov/Services/Pages/DU-Process.aspx (noting that the OSC determines whether there is a substantial likelihood that the information discloses "a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, and censorship related to research, analysis, or technical information").

[120] U.S. Office of Special Counsel, *What Happens When an Employee Files a Disclosure Claim?* (last accessed Dec. 19, 2024), https://osc.gov/Services/Pages/DU-Process.aspx.

[121] *Id.*

[122] U.S. Office of Special Counsel, *Special Counsel's Proposal to Promote Transparency and Speed Up Agency Accountability* (Aug. 30, 2024), https://tinyurl.com/4yfr72jv.

[123] 5 U.S.C. § 1213(h).

[124] U.S. Office of Special Counsel, *Confidentiality and Anonymity When Filing a Disclosure Claim* (last accessed Dec. 19, 2024), https://osc.gov/Services/Pages/DU-Confidentiality.aspx.

choose a single avenue; in some circumstances, employees may report to multiple entities simultaneously.

There are certain differences that DOJ attorneys may find advantageous when submitting a disclosure to OSC. Its standard for protecting the identities of people reporting misconduct is higher; there is an actual timeline for completing the investigative process (though it can be extended); the process requires that investigative reports are completed and allows the whistleblower the opportunity to review and comment on them; and for disclosures that are investigated, there is some greater likelihood that outside audiences will see the results of the investigation. The agency also sits outside DOJ, and there are more indicia of independence from potential political interference as compared to the OIG. Whistleblowers who value more immediate investigatory action and want to bring misconduct to light outside of DOJ may consider reporting to OSC.

REQUIREMENTS AND REMOVAL

Special Counsel vs. Inspector General

	U.S. Office of Special Counsel	DOJ Office of the Inspector General
Confidentiality	Identity not revealed unless "disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."	Identity not revealed unless "the disclosure is unavoidable during the course of the investigation."
Timeline	Screens disclosure within 45 days; requires agency to produce investigative report within 60 days of OSC's referral. But timelines may be extended.	None.
Leadership	Outside of DOJ: the Special Counsel is appointed by the president and removable only for cause.	Inside DOJ: the Inspector General is appointed by the president and can be removed by the president, without substantive limitation.

On the other hand, whistleblowers cannot remain anonymous *to OSC,* and OSC may screen out disclosures that lack sufficient factual or evidentiary support when making its initial determination of substantial likelihood that the information indicates misconduct. Individuals who place higher value on anonymity, or who believe they have witnessed misconduct but do not necessarily have evidentiary support, may consider reporting to the OIG. Consider, however, that OSC refers anonymous disclosures to the OIG and will notify the whistleblower in writing when it does not find that a disclosure meets its substantial likelihood standard.[125] Thus, a whistleblower may first try filing a disclosure with the OSC and then report to the OIG if OSC does not proceed with referring the disclosure for investigation.

Reporting Outside of the Executive Branch

Reporting misconduct internally within the executive branch can be a safer route, but it is unlikely to bring public attention to an issue. Reporting to Congress or to the press is much more likely to draw that sort of attention. However, a detailed set of laws applies in this situation and reporting outside of executive branch agencies designated to receive reports of misconduct is a riskier choice and raises additional considerations, especially when dealing with privileged or classified information.

Particularly because questions about privilege and protection of information are difficult to navigate, any DOJ attorney contemplating reporting wrongdoing to Congress or the press should consult an experienced lawyer. Often, DOJ attorneys can receive pro bono representation or may rely on a legal defense fund for this purpose, but such an arrangement may need to be approved by the relevant agency ethics officer unless it falls into a narrow gift rule exception.[126] The Resources section of this guide may be helpful to DOJ attorneys considering seeking counsel.

Reporting to Congress

Though every person enjoys a First Amendment right to petition the government,[127] federal workers have a specific statutory right to petition or provide information to Congress.[128] Additionally, the Whistleblower Protection Act prohibits retaliation and other adverse personnel actions against any person who makes a "disclosure" of non-classified information to Congress (including a member of Congress) and has a reasonable belief she is reporting misconduct."[129]

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[125] *See* note 120, *supra.*

[126] Emery A Rounds III, *Acceptance of Pro Bono Legal Services under the Legal Expense Fund regulation, 5 C.F.R. part 2635, subpart J,* U.S. Office of Government Ethics (June 21, 2023), https://tinyurl.com/y8hnfjse.

[127] U.S. Const. amend. I ("Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[128] 5 U.S.C. § 7211.

[129] *Id.* § 2302(b)(8)(C).

As noted above, if the disclosure involves classified information, there are further restrictions and very specific processes that must be followed.[130]

Reporting to Congress is not without risk, though, even when done in a cautious and thoughtful way. For example, some federal employees who have made public disclosures have faced backlash or retaliation (even if unlawful).[131] However, it can bring more attention to serious misconduct than other options. For example, DOJ attorneys have gone to Congress in the past with allegations of politicized prosecutorial decision-making in criminal cases,[132] investigatory irregularities that suggested improper interference,[133] and departures from DOJ norms meant to protect the integrity and neutrality of the agency.[134] Critically, these examples all involved improper political control or influence by DOJ leadership, making them the types of allegations least likely to be properly investigated and addressed via internal reporting to executive branch agencies.

Reporting to the Press

Talking to the press is a "protected disclosure" under the WPA if it is based on a reasonable belief of misconduct, and "if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."[135]

The Supreme Court has interpreted the phrase "prohibited by law" narrowly, to refer to statutory prohibitions but not rules or regulations.[136] That said, the risks of disclosing information to the press may be particularly high. For example, disclosing classified information to an unauthorized recipient can expose a DOJ attorney to serious criminal liability.[137] This aspect of reporting to the press thus presents real risk, as "leakers" can and have been prosecuted or otherwise disciplined for disclosing classified information.[138] The disclosure of information potentially covered by the attorney-client privilege may also raise particularly thorny questions.

Because so many DOJ attorneys also have access to information that may be confidential or privileged in some way, and whether and how they are protected in making a disclosure to the

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[130] *Id.* (an employee is protected against retaliation for making a "disclosure" to Congress of information which, "if classified . . . has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and . . . does not reveal intelligence sources and methods").

[131] *See, e.g.,* Jeff Stein, *Controversial Green Beret Retires Quietly With High Award*, Newsweek (Oct. 31, 2015), https://tinyurl.com/yeyf3xtm; Charles S. Clark, *TSA Air Marshal Whistleblower Fired for Second Time*, Government Executive (Apr. 9, 2019), https://tinyurl.com/4xbtbj9f.

[132] Aaron S. J. Zelinsky, *Statement For the Record*, House Judiciary Committee (June 24, 2020), https://tinyurl.com/ybp2axbv.

[133] *Supra* note 62.

[134] Joe McElvain, *Letter to The Honorable Jerrold Nadler* (July 28, 2020), https://tinyurl.com/54k3fmck.

[135] 5 U.S.C. § 2302(b)(8)(A).

[136] *DHS v. MacLean*, 574 US 383 (2015) (interpreting phrase "specifically prohibited by law" in the WPA narrowly).

[137] Eric Geller and Cory Bennett, *DOJ Charges Alleged Media Leaker Under Espionage Act*, Politico (June 5, 2017), https://tinyurl.com/5y629p2d.

[138] Jeff Sessions, *Remarks at Briefing on Leaks of Classified Materials Threatening National Security, Office of Public Affairs*, U.S. Department of Justice (Aug. 4, 2017), https://tinyurl.com/3spvxn32.

press will depend heavily on the nature of the information and the circumstances, consulting with an attorney specializing in this area of the law beforehand is advisable.

Employment Protections for DOJ Attorneys

DOJ attorneys have substantive and procedural employment rights under the Civil Service Reform Act ("CSRA"),[139] provided they meet the threshold for coverage,[140] as well as other federal employment laws.

Substantively, for example, federal law provides that the government may take adverse actions against covered employees only for cause.[141] And discrimination against any employee based on certain characteristics or membership in protected classes is prohibited.[142] In addition, the government may not take any personnel action against an employee or applicant for "refusing to obey an order that would require the individual to violate a law, rule, or regulation."[143] (However, disciplinary action is permitted if it is ultimately determined that the order would not have required the employee to violate a law, rule or regulation.) Procedurally, the law requires the government to take certain steps before implementing an adverse action against covered employees and gives them certain rights to appeal adverse actions to the Merit Systems Protection Board ("MSPB").[144]

Like other employees, DOJ attorneys may contact the agency's Equal Employment Opportunity ("EEO") office to file a complaint of discrimination that can, after investigation, be adjudicated by the U.S. Equal Employment Opportunity Commission.[145] Merit system protection laws also provide DOJ attorneys the right to file complaints with the U.S. Office of Special Counsel (and, in some cases, ultimately with the MSPB) regarding certain prohibited personnel practices,

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[139] 5 U.S.C. ch. 75, subch. II; 5 C.F.R. § 213.3102(d).

[140] Most DOJ attorneys are in Schedule A excepted service positions, but can verify their status by looking at their SF-50 employment form. *See* USAJOBs, *Reading Your SF-50 to Determine Your Service and Appointment Type* (last accessed Dec. 19, 2024), https://tinyurl.com/yzhcxetn. For non-preference eligible Schedule A employees, the requirement for coverage is that they must either have completed a probationary period in their current position or have "completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less." 5 U.S.C. § 7511(a)(1)(C); 5 C.F.R. § 752.401(c). For preference-eligible Schedule A employees, the requirement is that they must have "completed 1 year of current continuous service in the same or similar position" in "an Executive agency" or "in the United States Postal Service or Postal Regulatory Commission." 5 U.S.C. § 7511(a)(1)(B); 5 C.F.R. § 752.401(c).

[141] 5 U.S.C. § 7513(a); 5 C.F.R. § 752.403(a).

[142] 29 C.F.R. § 1614.103 (these include an employee's race, color, religion, sex, national origin, age, disability, genetic information, pregnancy, childbirth, or related medical conditions); see also 5 C.F.R. 2302(b) (marital status and political affiliation); *see also* 29 C.F.R. part 1614; U.S. Equal Empl. Opp. Commission, MD-110 (2015) (procedural manual for federal sector EEO complaints) (last accessed Dec. 19, 2024), https://www.eeoc.gov/federal-sector/management-directive/management-directive-110.

[143] 5 U.S.C. § 2302(b)(9)(d).

[144] 5 U.S.C. § 7513.

[145] *See* 29 U.S.C. §§ 206(d), 633a, 791, 794a; 42 U.S.C. §§ 2000e-16, 2000ff-6(e), 2000gg-2(e); 29 C.F.R. pt.1614; U.S. Equal Empl. Opp. Commission, MD-110 (2015) (procedural manual for federal sector EEO complaints) (last accessed Dec. 19, 2024), https://www.eeoc.gov/federal-sector/management-directive/management-directive-110. Employees must contact DOJ's EEO office within 45 days of the alleged discrimination. 29 C.F.R. § 1614.105(a)(2). Specific contacts within the DOJ Equal Employment Opportunity Staff can be found on the Justice Management Division website. *See* DOJ Justice Management Division, EEOS Contacts (last accessed Dec. 19, 2024), https://tinyurl.com/4ksyh3y9. Additionally, employees must file an EEO complaint within 15 days of receiving notice of the right to file a complaint from an assigned EEO Counselor or other EEO official in DOJ. 29 C.F.R. § 1614.106(b).

including the taking of personnel actions based on an employee's political affiliation or whistleblower activities.[146]

Federal employment laws are complex, and a full discussion of those laws is beyond the scope of this guide. However, DOJ employees should bear in mind that they may have grounds to challenge a disciplinary action or other personnel action, and they should move quickly if they wish to do so. They should also consider consulting with a lawyer who specializes in federal sector employment law in advance. Resources on this topic are provided at the end of this guide.

A final note — some insurance companies cater to federal civil servants and offer benefits for those who are subjected to disciplinary proceedings, have an adverse employment action taken against them, are sued civilly, or even become the subject of congressional or criminal investigations.[147]

[146] 5 U.S.C. §§ 1214, 2302; 5 C.F.R. pt. 1800.

[147] Two examples of companies offering this type of insurance are FEDS Protection and Starr Wright USA. This guide does not endorse any company or make representations about the content of their products; individuals are encouraged to do their own research.

Conclusion

While the extent of the president's accountability for unlawful acts may now be in question, it is clear that Department of Justice attorneys themselves can be held accountable for complying with laws, rules, and norms that govern the agency. Ethical obligations supersede the agency chain of command, and no shift in leadership changes the fact that a DOJ attorney's fundamental job is to support and defend the Constitution and ensure that justice is done.

Confronting ethical concerns may feel risky — indeed, it can be risky. But in addition to undermining the rule of law, attorneys who compromise their core legal and ethical obligations can face serious personal and professional consequences.

Additional Resources

Considering Ethical Obligations

- The Justice Manual
- Justice Management Division Department Ethics Office, Compilation of laws and regulations governing DOJ attorneys
- Protect Democracy, Investigating and Prosecuting Political Leaders in a Democracy: How to Assess the Difference Between the Rule of Law and Abuses of Power

Considering Reporting

- Office of the Special Counsel, Know Your Rights When Reporting Wrongs
- Project On Government Oversight, Government Accountability Project, and Public Employees for Environmental Responsibility, Caught Between Conscience and Career: Expose Abuse Without Exposing Your Identity
- Project On Government Oversight, Whistleblower Resources
- Government Accountability Project, Whistleblower Resources

To Report Wrongdoing

- DOJ Office of Inspector General Online Complaint Portal ("Hotline")
- Office of Special Counsel: File a Complaint
- DOJ Office of Professional Responsibility: How to File a Complaint

Employment Rights and Protections

- USA Jobs: Reading your SF-50 to Determine your Service and Appointment Type
- Merit Systems Protection Board (MSPB): Trainings Page and Prohibited Personnel Practices
- Equal Employment Opportunity Commission (EEOC): Overview of Federal Sector EEO Complaint Process
- Metropolitan Washington Employment Lawyers Association: Find a Lawyer Tool
- D.C. Bar: Help finding a lawyer
- Maryland Bar: Help finding a lawyer
- Virginia Bar: Help finding a lawyer