Legal Ethics and the Rule of Law

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NOTE: This article has been abbreviated in the interest of brevity.

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It is essential not only for government lawyers but also for the broader legal profession and the general public to understand the rules, standards, and commitments governing the practice of law in the United States so that they can accurately judge both the administration's actions and those of its opponents and hold all attorneys involved accountable when they fail to meet their ethical obligations.

Government lawyers have special responsibilities. The federal executive branch has immense power to shape the lives of individual Americans and the collective public through investigations, criminal prosecutions, civil litigation, and administrative actions. These powers have always been susceptible to abuse, spurring the creation of a range of internal checks within the executive branch to prevent the weaponization of government power, as well as informal norms against conduct by career prosecutors and others that could create even an appearance of — let alone actual — bias. [4] But recent years have seen the erosion of these safeguards, which has accelerated in the first months of the second Trump administration with the firings of agency inspector generals and sidelining of other internal executive branch watchdogs. [5]

This does not mean that guardrails are entirely absent, however. The law is a self-governing profession. All practicing lawyers, including government lawyers, are bound by a variety of rules and standards enforced by state and federal courts, bar authorities, and the broader profession. The erosion of both formal checks and informal constraints on abuse of power in the executive branch has cast a spotlight on the question of what conduct these rules and standards do and do not proscribe.

To help answer this question, we have consulted with dozens of legal ethics experts and practitioners, and our conclusions reflect their input.

Broadly speaking, the most relevant constraints found in constitutional and statutory law, court rules, codes of professional conduct, and long-standing policy guidance from DOJ and other agencies can be distilled into at least six broad principles:

- **Dishonesty is prohibited.** Criminal and civil law and rules of professional responsibility and court procedure strictly prohibit dishonesty to courts, clients, other participants in legal proceedings, and in some cases even the general public. Dishonesty can include both affirmative misrepresentations and omissions of relevant facts. Abuses of power, including politicized or partisan prosecutions, will often necessitate some form of dishonesty, which would be the basis for

an actual rule violation.

- **Defiance of court orders is prohibited.** Overtly disobeying or encouraging a client to disobey a court order violates multiple disciplinary rules and could subject an attorney to legal sanctions or a finding of criminal contempt.

- **Criminal investigations, prosecutions, and lawsuits must have some good-faith, credible basis in law and fact.** Bringing criminal proceedings without probable cause or pursuing frivolous civil actions that lack a cognizable basis in either fact or law violates numerous rules. Particularly in civil cases, however, the bar for formal sanctions is high. The fact that a civil claim, particularly one brought by a private party, is novel in some respect generally does not establish a sanctionable violation.

- **Law enforcement cannot be used to harass, intimidate, or exact political retribution or as leverage to achieve unrelated political goals.** Pursuing even nonfrivolous investigations or prosecutions primarily to harass or intimidate targets or as a form of political leverage violates numerous agency policies and other long-accepted ethical standards for government lawyers. It also potentially violates specific disciplinary rules in certain jurisdictions.

- **Conflicts of interest and similar misuses of office are generally prohibited.** All lawyers must adhere to attorney conflict rules. These rules include restrictions on concurrent representation of a client who is directly adverse to another client, "switching sides" between two clients in a particular matter or a set of related matters, and representing a client whose interests are materially adverse to a former client in the same or a substantially related matter (proscribing government lawyers from participating in official matters that they previously worked on outside of government). These rules can generally be waived if both the former and current clients explicitly agree (for waiver purposes, a government attorney's "client" is usually the agency that employs the attorney). Government lawyers are also subject to various ethical rules for federal employees, including gift restrictions, criminal prohibition on participating in a specific matter in which they have a financial interest, and other constraints. Most of these restrictions cannot be waived.

- **Lawyers are responsible for their own conduct and that of supervisees.** Every practicing lawyer is required to obey rules of professional conduct and other ethical standards. Line prosecutors and other subordinate government lawyers generally cannot evade responsibility for ethical violations on the grounds that they were following a supervisor's directives. Moreover, supervisors can be held responsible for directing unethical conduct by the lawyers whose work they oversee.

Importantly, violations of the rules described above can carry serious formal consequences, including monetary sanctions, temporary or permanent loss of the right to practice law, and public rebukes from courts and bar authorities that go on a lawyer's permanent record. Some conduct that violates legal ethics rules may also be illegal and give rise to criminal or civil charges. But compliance with the core ethical standards and commitments matters regardless of whether the lawyers involved face any type of formal sanction. These standards are an important metric by which members of the legal profession can judge government lawyers' conduct and by which all Americans can judge the administration's actions. At stake is the future of the profession and the long-term health of American democracy.

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Nearly every state has adopted a version of the *Model Rules of Professional Conduct* (Model Rules) drafted by the American Bar Association (ABA). The ABA Model Rules thus provide a useful overview of existing state rules and commentary to clarify these rules for practicing lawyers, although they do not themselves carry the force of law.

While many rules of professional conduct address topics more specific to lawyers in private practice — including client confidentiality, fiduciary responsibilities, and general malpractice — others are broadly applicable to all lawyers, including government lawyers. These include stringent honesty and integrity requirements, restrictions on conflicts of interest, minimum standards of competence and respect for governing law, and standards for professional accountability to clients, opposing counsel, and the public. Certain jurisdictions, including the District of Columbia and New York State, also have specific rules for government lawyers, especially prosecutors, as discussed below.

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Constitutional and Statutory Law

Government lawyers must, of course, also obey all governing constitutional and statutory law. Typically these rules relate to a lawyer's official, not personal, conduct, but there are notable exceptions. For instance, some constitutional violations — such as withholding exculpatory evidence in violation of a defendant's due process rights — can also result in a prosecutor violating the ethical obligation to deal honestly with opposing parties, as discussed below. And certain statutes — notably conflict-of-interest restrictions and other ethics statutes for federal employees — expressly regulate government lawyers' personal conduct in their positions.

Key Standards and Commitments

The rules and standards governing the legal profession constrain in important ways the ability of lawyers in the federal government to use its vast power to improperly target political enemies, to reward friends, or to restrict the administration's opponents in the legal tactics they use against it. Six major sources of misconduct give rise to key restraints on government lawyers.

Dishonesty

One of the issues raised frequently by critics of the current administration — and the administration itself — is dishonesty. Being untruthful in legal proceedings or in public discussions of legal matters is a common basis for attorney discipline in the United States. Many of the unethical legal actions feared by the administration's critics, such as aggressive prosecution of political opponents, would likely necessitate making misrepresentations to judges, opposing counsel, criminal and civil enforcement targets, and the broader public. The administration itself has also leveled charges of dishonesty against members of the private bar. [13]

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It is important to note that not every untruth told by a lawyer will constitute an ethical or legal violation. Inadvertent mistakes typically do not breach any ethical rule; in many jurisdictions this extends even to

mistakes that result from negligence. [36] Misstatements that are immaterial to a legal matter also generally are not covered. [37] But if an attorney intentionally or recklessly attempts to deceive a court, an opposing party, or even the general public in connection with a legal matter, this will often constitute a serious ethical violation.

Defying Court Orders

Direct defiance of court orders is another clear-cut basis for sanctions or other disciplinary action — one that has become increasingly relevant in litigation over the administration's use of novel legal arguments to deport immigrants residing in the United States. [38]

Defiance of court orders is expressly prohibited by numerous ethical rules. ABA Model Rule 3.4(c), adopted in most jurisdictions, states that a lawyer "shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." [39] Federal courts have clarified that, under this rule, a lawyer acting on behalf of himself or a client may disregard a court order only if it is invalid on its face. [40] The U.S. Supreme Court has held that counseling a client to disobey a court order is itself a violation of Rule 3.4(c). [41] Numerous other ethical rules also potentially apply. [42]

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Legally or Factually Baseless Prosecutions and Lawsuits

Another core concern arising from statements and actions by key administration officials is the potential for baseless criminal prosecutions and other enforcement actions. Meanwhile, the administration itself has charged that many of the lawsuits opponents have filed against its early executive actions are themselves "baseless" and "partisan"; it has pledged to aggressively seek sanctions and refer attorneys in the private bar to disciplinary authorities. [48] Were either government or private attorneys to bring truly frivolous legal proceedings, they would run afoul of a number of rules of procedure and attorney ethics rules.

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DOJ prosecutors are also bound by numerous agency policies that reinforce "the longstanding threshold requirement . . . that a prosecutor may commence or recommend federal prosecution only if he/she believes that the person will more likely than not be found guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal." [60]

At least until recently, truly baseless prosecutions have been exceedingly rare. If anything, in high-profile cases DOJ lawyers have repeatedly recommended against prosecution — even where the evidence meets the threshold sufficiency requirement — when it has not served a substantial federal interest or for other prudential reasons. [61]

Other Abusive Criminal, Civil, and Administrative Actions

Aside from truly baseless or frivolous legal actions, prosecutors and other enforcement lawyers necessarily have broad discretion to investigate potential lawbreaking. But even that discretion has certain limits. As Attorney General Robert Jackson warned in 1940: "If the prosecutor is obliged to

choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." [62] Jackson was specifically addressing the role of prosecutors, but his warning could apply to any lawyer responsible for enforcing federal law. Preventing the abuse Jackson warned against is the core objective of many rules proscribing the use of prosecutorial or other government power to harass or take retribution against political opponents, or as a bargaining chip to secure some concession unrelated to the matter being investigated. Even in cases in which government lawyers can identify a basis for some legal violation, selecting targets in order to harass, intimidate, or punish political opponents or to accomplish unrelated political goals is not permissible.

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Conflicts of Interest and Other Misuses of Office

Conflicts of interest and related abuses of public office are another core concern, given that many high-level lawyers in the second Trump administration are taking on roles in which they could influence proceedings they previously handled in private practice (including on behalf of the president himself) or in which they could have financial conflicts or political biases. [80]

Federal law forbids all executive branch officials other than the president and vice president from participating in particular governmental matters in which they have a personal financial interest; violations can result in criminal prosecution. [81] Related regulations also restrict government employees from using public office to benefit themselves and their family and friends and from otherwise acting in ways that could raise reasonable questions about their impartiality. [82] Waivers are available in some of these instances, but they must be in writing and, in the case of financial conflicts, may be granted only if the conflict is not "substantial." [83]

The Hatch Act also restricts partisan political activities by federal officials. While these restrictions vary depending on a person's role — and are generally less restrictive for political appointees — they bar all federal officials other than the president and vice president from engaging in partisan political activity while on duty, using official resources for partisan political purposes, and using their position to interfere with an election. [84]

Attorney ethics rules impose further restrictions. Government lawyers generally may not participate in official matters that they previously worked on outside of government, including "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter" involving a specific party or parties. [85] This rule is an extension of the more general prohibition that exists in all U.S. jurisdictions on lawyers working on legal matters where they previously took an opposing position. [86] These restrictions can be waived, but only if the lawyer's prior client and the government agency where they currently work do so in writing. [87]

Finally, long-standing agency guidelines often go beyond the requirements of federal ethics law and state bar rules. DOJ lawyers, for instance, are required to avoid situations in which their official actions affect or appear to affect private interests, financial or nonfinancial. [88] Another DOJ rule prohibits employees from engaging in an investigation if they have "a personal or political relationship" with anyone involved in the investigation or any person or organization that they know has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution. [89] A "close

identification with an elected official, a candidate . . . a political party, or a campaign" are types of political relationships that would require recusal. [90]

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Individual and Supervisory Responsibility

Finally, government lawyers may face ethical questions when they are directed to take certain actions by a supervisor. Attorney General Pam Bondi and other key [Trump] administration officials have made clear that they will not tolerate dissent from any DOJ attorney "who because of their personal political views or judgments declines to sign a brief or appear in court, refuses to advance good-faith arguments on behalf of the administration, or otherwise delays or impedes the Department's mission." [97] As noted, a number of career DOJ lawyers have already resigned when faced with directives that they felt violated their professional obligations.

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While subordinates cannot excuse unethical conduct on the grounds that they were obeying a supervisor, lawyers acting in a supervisory capacity can be held responsible for the actions of their subordinates. ABA Model Rule 5.1(c), for example, provides that an attorney can be held responsible for other lawyers' violations if that attorney ordered the violation, knew of the violation and ratified it, knew of the violation and failed to take action, or made a professional judgment that protected the subordinate. [100] Washington, DC, professional conduct rules explicitly state that Rule 5.1 applies to "government lawyers." [101] Similarly, Model Rule 8.4(a) states that "it is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." [102] Most states and Washington, DC, have incorporated these principles into their respective codes. [103]

In short, all government lawyers are responsible for their own actions and for upholding the standards of the legal profession, whether giving or following orders. Government lawyers cannot excuse their conduct by shifting the blame onto a superior or someone who reports to them.

Consequences for Violating Ethical Rules and Standards

The ethical standards and commitments sketched out in this resource serve as important checks on abuse of power, regardless of who occupies the White House. As should be evident from the discussion above, the consequences of violating these standards can be significant. Lawyers can be referred to bar authorities for discipline ranging from public admonition to suspension of one's law license to disbarment. State bar discipline is usually preceded by a lengthy and public disciplinary process, which often needs to be disclosed when a lawyer subject to such discipline seeks to appear in a new court or practice law in a new jurisdiction. [104] Therefore, even when a lawyer does not face formal consequences, violations of ethics rules can damage the lawyer's professional reputation, impacting future employment prospects, associations, and relationships within the legal community.

Courts also have inherent authority to sanction attorneys appearing before them. This is because lawyers are "officers of the court," implying a special relationship between lawyers and the courts that have licensed and regulated them. Judges may consider a lawyer's ethical violations when determining the outcome of a case, especially if the misconduct has significantly affected the proceedings. While

individual judges themselves cannot take away an attorney's law license, they may disqualify an attorney from a case, order monetary penalties, and at times impose other sanctions (e.g., requiring continuing legal education). Courts may also refer lawyers to disciplinary authorities.

As discussed above, some ethical violations also overlap with criminal and civil law — for instance, a lawyer who lies under oath breaks numerous ethical rules and also potentially commits perjury, a criminal offense. Ignoring conflicts of interest and other violations of government ethics rules can also carry both criminal and civil liability. [105]

Finally, clear disregard for ethical rules and standards has historically resulted in other serious professional consequences. Trust and perceived integrity are central to a lawyer's success, making compliance with ethical rules indispensable to safeguarding one's professional reputation and sustaining a long-term legal career.

Allegations of unethical behavior by a lawyer should never be made lightly or used as a proxy to litigate substantive disagreements about law or policy. But the high standards to which all lawyers are held in the United States remain a bulwark to defend the rule of law, which is critical for all members of the profession to maintain.
