



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

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Department of Justice attorneys, agents and investigators may not undertake political investigations or prosecutions

Political prosecution occurs when DOJ or FBI staff participate in an investigation or prosecute a person or matter for political purposes. There are significant guardrails against [unjust or selective prosecution](#), and the [Supreme Court](#) has [repeatedly held](#) that federal investigations and prosecutions must be impartially executed and the [First, Fourth, Fifth, and Fourteenth Amendments](#) prohibit targeting individuals based on animus or bias or due to their individual characteristics or views, including political views. DOJ employees should refuse to undertake any type of investigation or prosecution that would violate applicable law designed to prevent politicization of federal law enforcement.

[Article VI of the Constitution](#) mandates that “**all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.**” The oath itself is codified in [5 U.S.C. § 3331](#), and it requires each official to swear to “support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;... and that I will well and faithfully discharge the duties of the office[.]” Under the terms of this oath, [unconstitutional actions are illegal](#), and further, [actions that undermine](#) the duties of the office and [insider threats](#) to national security are also prohibited. Some of the laws that DOJ and FBI officials [might potentially violate](#) during a political prosecution or investigation include the [Hatch Act](#), which [prohibits certain political activities](#) as well as [politicized coercion](#) of government employees, and the [Foreign Intelligence Surveillance Act and related statutes](#), which prohibit warrantless surveillance of [U.S. citizens and legal permanent residents](#). DOJ officials should not only refrain from these actions—they must also [refuse to follow unconstitutional and illegal orders](#) or assignments and faithfully execute their duties. [5 U.S.C. § 2302\(b\)\(9\)\(D\)](#) provides the right to refuse unlawful orders, and [subsection \(b\)\(3\)](#) prohibits retaliation for doing so—however, the [Merit Systems Protection Board](#) ruled in one case that this protection [only applies if the order would have violated a federal statute](#) and did not apply to guidance or [regulations](#), which are subject to change. It is therefore best to [seek ethics advice](#) and base refusals to follow unlawful orders on [constitutional or statutory grounds](#).

DOJ employees should not only refuse to implement unlawful orders, they also have a [duty to report misconduct](#), and whistleblower protections may be available. Federal law prohibits coercing political activity, or taking any action, “[as a reprisal for the refusal... to engage in such political activity](#)[;]” and “[cooperating with or disclosing information to the Inspector General](#) (or any other component responsible for internal investigation or review) of an [agency](#), or the Special Counsel, in accordance with applicable provisions of law,” may not be grounds for personnel actions. DOJ employees must also comply with federal ethics law, [including criminal law prohibitions](#) of misconduct, fraud, disclosures of confidential

information, financial incentives and conflicts of interest, with additional standards for [attorneys](#) based on their bar rules of professional conduct, and government-wide standards against [discrimination, harassment and retaliation](#) that may support career staff. Attorneys, investigators and agents who have received [security clearances](#) must comply with those standards and may not violate such standards of [honesty, trustworthiness and loyalty](#) to the United States, even if ordered to undertake questionable actions. This essential body of law is codified in longstanding internal DOJ and FBI guidance issued through the [Justice Manual](#) and the [FBI Domestic Investigations and Operations Guide](#), and these manuals provide an important preliminary source to consult. In any case, ethics officers are charged with providing advice on these types of matters and federal employees [must seek it out](#) when potential conflicts arise, and they may also seek ethics advice to get clarity. Generally speaking, it can be helpful to have communications in writing.

In addition to the above, here are several potentially helpful resources:

- [Office of Professional Responsibility](#) - DOJ Office of Professional Responsibility.
- [Ethics Officials - Justice Management Division](#) - lists designated ethics officials for each department, with standing opinions as well as the option to consult and receive advice.
- [Discrimination, harassment, and retaliation | USAGov](#) - Federal law and EEOC procedures regarding discrimination, harassment and retaliation.
- [About OSC](#) - Office of Special Counsel, an independent agency enforcing the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act and the Uniformed Services Employment & Reemployment Rights Act, providing a “secure channel” for whistleblower complaints.
- [About the Office of Inspector General](#) (OIG) - statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse and misconduct, and to promote economy and efficiency in DOJ’s operations; OIG [hotline](#) for reporting fraud, waste and abuse.
- [Protect Democracy, Supporting and Defending the Constitution](#) - a DOJ attorney’s guide to upholding ethical obligations and the rule of law (listing further resources).
- [Office of Legal Counsel | Opinions](#) - including many about prosecutions and investigations.
- [FISA Query Audit May 2023 – FBI](#) - FBI Office of Internal Auditing, charged with enhancing compliance, oversight and accountability of national security activities at the Bureau.
- [U.S. Privacy and Civil Liberties Oversight Board](#) - an independent, bipartisan agency authorized by statute to review all Executive Branch national security efforts which may receive information about privacy and civil liberties from concerned staff.
- [5 U.S. Code § 7211 - Employees’ right to petition Congress](#) - provides a statutory right for federal employees to report concerns to Congress, but it should be used with caution, particularly regarding confidential information.
- [Learn About DOJ Affinity Groups – DOJABA](#) - DOJ Association of Black Attorneys webinar about various affinity groups.
- [Legal Ethics](#) - DC bar ethics rules, opinions and ask an expert (DOJ attorneys barred in other jurisdictions should also consult their relevant rules and resources).
- [Civil Service Strong](#) - resources for civil servants if they are targeted or attacked.
- [AFGE](#) - American Federation of Government Employees union (if applicable).
- [Government Accountability Project](#) - provides whistleblower protection and advocacy.
- [Whistleblower Aid](#) - provides support for whistleblowers to report and expose wrongdoing.
- [Whistleblower Resources](#) - provides whistleblower and other resources.
- [Supporting Federal Employees Through Change](#) - resources for federal employees during presidential transitions; provides links to ethics pledges of the incoming administration.

This text is intended as a general summary of relevant resources, and it is not intended to offer legal advice