
Under Political Pressure: How Courts and Congress Can Help Prosecutors Seek Justice

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ABSTRACT. Recently, federal prosecutors have faced a stark choice: follow the orders of their supervisors or abide by what they consider to be their obligation to the public to seek justice. Political appointees within the Department of Justice have the incentive to appease elected officials, and politicians have sought to use the immense power of criminal prosecution for partisan political ends. This Essay argues that the norms and traditions of prosecution, including the prohibition on considering such political goals in making charging decisions, are legal obligations inherent in prosecutors' fiduciary duties of care and loyalty. Prosecutors are expected to uphold these obligations on their own, but they are, nonetheless, at risk. The Essay analyzes how Congress and federal courts can help sustain these legal duties without overstepping separation-of-powers limitations.

INTRODUCTION

In a radical break from tradition, President Trump's Department of Justice (DOJ) recently fired dozens of career prosecutors,¹ many of whom had worked on cases against the President or his allies.² Others resigned to protest what they

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1. See Patrick Marley, Jeremy Roebuck & Yvonne Wingett Sanchez, *Trump's DOJ Has Fired Dozens of Prosecutors, Upending Decades-Old Norm*, WASH. POST (July 19, 2025), <https://www.washingtonpost.com/politics/2025/07/19/justice-career-prosecutors-staff-firings-trump> [<https://perma.cc/7RWT-NYVQ>]. DOJ employs more than 10,000 lawyers nationally. See *Office of Attorney Recruitment and Management*, U.S. DEP'T JUST., <https://www.justice.gov/oarm> [<https://perma.cc/A4HM-EULE>]. Slightly more than half of DOJ's lawyers are Assistant United States Attorneys (AUSAs) serving in one of ninety-three United States Attorney's Offices throughout the country. See *NAAUSA Mission*, NAT'L ASS'N ASSISTANT U.S. ATT'YS, <https://www.naaua.org/about> [<https://perma.cc/AE2B-JKMY>].
 2. See Alanna Durkin Richer, *DOJ Abruptly Fires Prosecutors Involved in Jan. 6 Criminal Cases*, AP Sources Say, PBS (June 28, 2025, 11:48 AM EDT), <https://www.pbs.org/newshour/politics/doj-abruptly-fires-3-prosecutors-involved-in-jan-6-criminal-cases-ap-sources-say> [<https://perma.cc/NMB9-85D5>].

believed was inappropriate pressure to use their considerable power for partisan political ends.³ While these departures have come to seem commonplace, they are a stark reminder of the professional dilemma facing federal prosecutors during Trump's second term. Government lawyers have been forced to choose whether to follow what they see as inappropriate orders to take political considerations into account or resign from their positions. Under the constant threat of losing their jobs, those who remain may hesitate to accept cases that would displease the President. At stake is prosecutors' traditional independence, which helps ensure that innocent people do not go to jail, individuals are treated fairly and equally, and the power to deprive anyone of liberty is not used arbitrarily.

In this new climate, federal prosecutors have had to weigh their roles as public officials and lawyers who owe fiduciary duties to the public against their roles as DOJ employees who must take direction from higher-ups. Some orders from supervisors have contravened the clear understanding previously expressed by courts, the legal profession, and DOJ itself that prosecutors have a legal duty to seek justice, which requires excluding partisan politics from charging decisions. This Essay considers how federal prosecutors should navigate this and similar dilemmas, while upholding their fiduciary obligations as lawyers for the United States. It also considers what more Congress and the courts can do to enable subordinate prosecutors to carry out their fiduciary obligations. We conclude that Congress can better protect prosecutors who resist questionable demands, and that in the gaps left by federal legislation, courts should use their supervisory authority to reinforce federal prosecutors' ability to seek justice in the face of contrary pressure or direction from DOJ leadership.

Part I sets the stage by describing the pressure that high-ranking political appointees in DOJ have imposed on subordinate DOJ lawyers to serve President Trump's personal and partisan interests at the expense of their professional obligations.

In Part II, we argue that when supervisors' directions clash with prosecutors' understanding of their ethical and fiduciary duties, ethical and fiduciary obligations should take priority. Prosecutors must resist instructions to violate the law, including fiduciary obligations and ethical rules that define their role, even if that means resigning their positions instead of following orders. Prosecutors'

3. See James Bickerton, *Trump DOJ Resignations: List of Prosecutors and Officials Quitting in Protest*, NEWSWEEK (Feb. 15, 2025, 9:30 AM EST), <https://www.newsweek.com/trump-doj-resignations-list-prosecutors-officials-quitting-protest-2031713> [https://perma.cc/M5TK-SLXE]. For a discussion of the politicization of prosecutorial power in the first Trump administration, see Joyce White Vance, *Treat Every Defendant Equally and Fairly: Political Interference and the Challenges Facing the U.S. Attorneys' Offices as the Justice Department Turns 150 Years Old*, 130 YALE L.J.F. 516, 516-23 (2021).

fiduciary role also helps explain why courts and other nonpolitical bodies provide the proper form of accountability as opposed to political appointees, who should have a limited role in policing politicization.

In Part III, we suggest how Congress and the federal judiciary might reinforce subordinate federal prosecutors' fiduciary and ethical obligations. Although separation-of-powers principles limit the authority of Congress and, even more so, of federal courts, both branches have the authority to institute measures to better enable subordinate prosecutors to comply with their ethical and fiduciary obligations. Congress could delineate the extent to which subordinate prosecutors can exercise independent professional judgment regarding matters of professional duty. Furthermore, Congress could enhance protections for prosecutors against adverse employment actions when they operate within their designated authority. As to the federal judiciary, courts could clarify subordinate prosecutors' duties and inquire more deeply into prosecutors' decision-making. Judges could then institute disciplinary actions if supervisors instruct prosecutors to violate fiduciary and ethical duties and if subordinate prosecutors comply with such instructions.

I. BACKGROUND: CONTEMPORARY CHALLENGES TO DOJ LAWYERS' INDEPENDENT PURSUIT OF JUSTICE

As fiduciaries, lawyers owe clients duties including “undeviating fidelity,”⁴ or, in the words of then-New York Court of Appeals Chief Judge Cardozo, “the finest loyalty.”⁵ Prosecutors, like other lawyers, owe fiduciary duties to their client.⁶ For federal prosecutors, their client is the United States.⁷ But from the start of the second Trump administration, DOJ leadership has conveyed that loyalty to the United States equates with loyalty to President Trump and his administration.⁸ This view is dangerously wrong because, although the President sets the agenda and policy for DOJ, he is not the client.⁹ As the Supreme Court observed

4. *Van Dyke v. White*, 349 P.2d 430, 437 (Wash. 1960) (“The standards of the legal profession require undeviating fidelity of the lawyer to his client.”).

5. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *see also id.* (describing a fiduciary's obligations as involving “[n]ot honesty alone, but the punctilio of an honor the most sensitive”).

6. *See generally* Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805 (2020) (drawing on fiduciary theory to analyze prosecutorial obligations).

7. *United States v. Childers*, No. CR-24-102-G, 2024 WL 3953993, at *4 (W.D. Okla. Aug. 27, 2024) (“[A] federal prosecutor . . . represents one client in all cases—the United States.”).

8. *See infra* text accompanying notes 11–13.

9. While the President is the chief executive and represents the public for policy purposes, the public has an interest in the administration of justice that transcends different administrations and exists regardless of who is in power. Because prosecutors wield so much power and could

ninety years ago, a federal prosecutor represents the United States, “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹⁰ As lawyers for the United States, federal prosecutors must pursue justice for the American people — justice as defined by a fidelity to the law, courts, ethical obligations, and policies of the office, not as defined by the President.

DOJ leadership has repeatedly announced its inaccurate understanding of the prosecutor’s role. For example, Ed Martin, then serving as the interim U.S. Attorney for the District of Columbia, asserted on social media that federal-government lawyers are “Trump’s lawyers,” falsely implying that they serve President Trump personally.¹¹ Soon after, Attorney General Pam Bondi circulated a memo about DOJ employees’ duty of “zealous advocacy,” which declared that “the interests of the United States” served by government lawyers are “set by the Nation’s Chief Executive, who is vested by the Constitution with all ‘[E]xecutive Power.’”¹² She warned that government lawyers who do not “vigorously defend[] presidential policies and actions” will be “subject to discipline and potentially termination” for “depriv[ing] the President of the benefit of *his lawyers*.”¹³ This view is false because DOJ lawyers do not serve any individual elected official. Instead, they ensure that the public is served by implementing the elected officials’ policy objectives while simultaneously safeguarding the public’s interest

so easily pervert justice, they must represent the public’s interest in justice, an interest that is often distinct from, and at times even in tension with, the President’s agenda. See Rebecca Roiphe, *A Typology of Justice Department Lawyers’ Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1119–21 (2020).

10. United States v. Berger, 295 U.S. 78, 88 (1935).
11. Barbara McQuade, *The Top D.C. Prosecutor Just Called Himself Trump’s Lawyer. That’s a Problem.*, MSNBC (Feb. 26, 2025, 7:42 PM EST), <https://www.msnbc.com/opinion/msnbc-opinion/top-dc-prosecutor-ed-martin-trump-president-lawyer-rcna193919> [<https://perma.cc/KY42-AUYJ>].
12. Memorandum from Pam Bondi, U.S. Att’y Gen., General Policy Regarding Zealous Advocacy on Behalf of the United States (Feb. 5, 2025) [hereinafter Bondi Memo], <https://www.justice.gov/ag/media/1388521/dl?inline> [<https://perma.cc/6MKS-JFD2>]. While there is general agreement that the President can set criminal-justice policy, the memo implied that the President has authority to “set” the government’s “interests” in individual investigations and prosecutions — for example, that the President could decide whether DOJ should pursue an investigation or prosecution based on his view of the government’s interest. *Id.*
13. *Id.* (emphasis added).

in maintaining the institutions of justice and ensuring the lawfulness of government action.¹⁴

DOJ's leadership communicated its expectations of loyalty to the President's wishes by deed, no less than by word. It began by firing prosecutors whom it did not trust to "faithfully" carry out Trump's "agenda" because they had previously worked on cases against him or against defendants who stormed the Capitol on January 6, 2021.¹⁵ Over the following months, DOJ leaders continued to fire or force the resignations of lawyers assumed to lack sufficient commitment to advancing the administration's positions,¹⁶ conveying that DOJ's lodestar had become loyalty to the President's personal and political interests and to his political agenda.

On the civil side, Bondi fired Erez Reuveni, a senior government lawyer, for failing to defend zealously a lawsuit brought by a U.S. resident seeking return from an El Salvadoran prison.¹⁷ Reuveni's ostensible lapses included acknowledging under the judge's questioning that the plaintiff should not have been removed,¹⁸ and refusing to sign an appellate brief that he believed contained falsehoods.¹⁹ On the criminal side, Danielle Sassoon, the Acting U.S. Attorney for

14. See Roiphe, *supra* note 9, at 1079 (explaining that the various different roles within DOJ are designed to balance government lawyers' dual goals as facilitators of executive policy and independent enforcers of the law).

15. Kyle Cheney & Josh Gerstein, *DOJ Fires Dozens of Prosecutors Who Handled Jan. 6 Cases*, POLITICO (Jan. 31, 2025, 6:50 PM EST), <https://www.politico.com/news/2025/01/31/doj-purges-prosecutors-january-6-cases-00201904> [<https://perma.cc/E7SV-LSB8>]; McQuade, *supra* note 11; Sarah N. Lynch & Andrew Goudswaard, *Trump Administration Fires Team of Lawyers Who Prosecuted Him, Official Says*, REUTERS (Jan. 28, 2025, 2:51 AM EST), <https://www.reuters.com/legal/trump-appointed-prosecutor-opens-internal-review-justice-depts-jan-6-cases-wsj-2025-01-27> [<https://perma.cc/82LC-Q34K>]. The assumption that prosecutors bore animus against President Trump was contrary to conventional professional understanding. DOJ had previously assumed that government lawyers could carry out assignments without regard to their personal beliefs. See, e.g., *Mendoza Toro v. Gil*, 110 F. Supp. 2d 28, 35 (D.P.R. 2000). As an ethical matter, prosecutors' willingness to carry out assignments cannot fairly be regarded as an expression of their personal beliefs. See MODEL RULES OF PRO. CONDUCT r. 1.2(b) (A.B.A. 2023).

16. See, e.g., Erica Orden, *Maurene Comey, Daughter of James Comey and Prosecutor of Jeffrey Epstein, Is Fired*, POLITICO (July 16, 2025, 6:36 PM EST), <https://www.politico.com/news/2025/07/16/maurene-comey-fired-doj-00458921> [<https://perma.cc/7CL4-2S9M>].

17. Sadie Gurman, *He Represented Contentious Immigration Cases for the Government. His Candor Lost Him His Job.*, WALL ST. J. (Apr. 15, 2025, 9:00 AM EST), <https://www.wsj.com/us-news/law/this-lawyer-defended-republicans-and-democrats-his-candor-cost-him-his-job-b3515a38> [<https://perma.cc/NZG9-2D6K>].

18. *Id.*

19. Letter from Gov't Accountability Project, to Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just., Jamieson Greer, Acting Special Couns., U.S. Dep't of Just., Hon. Chuck Grassley, Chair, U.S. Senate Comm. on the Judiciary, Hon. Richard Durbin, Ranking Member, U.S.

the Southern District of New York, was forced to resign when she refused to drop the prosecution of New York City's mayor, Eric Adams, believing that the instruction from the acting Deputy Attorney General, Emil Bove III, was politically motivated.²⁰ Reuveni and Sassoon have led a parade of DOJ lawyers on both the civil and criminal side who were fired or resigned in the early months of the Trump administration, including most of the lawyers in the unit tasked with defending the President's policies.²¹

DOJ leadership's insistence on undeviating loyalty to the administration presents a dilemma. As subordinate government employees, government lawyers take direction from the Attorney General and other supervisory lawyers. But as lawyers for the United States, they also have fiduciary and ethical obligations to the public and the courts. Ordinarily, these different roles are mutually reinforcing, because higher-ups in DOJ generally expect – if not demand – that subordinates will act consistently with these obligations. Subordinate government lawyers are pushed in opposing directions, however, if their superiors expect or

Senate Comm. on the Judiciary, Hon. Jim Jordan, Chair, U.S. House Comm. on the Judiciary & Hon. Jamie Raskin, Ranking Member, U.S. House Comm. on the Judiciary 25-26 (June 24, 2025), https://www.judiciary.senate.gov/imo/media/doc/06-24-2025_-_Protected_Whistleblower_Disclosure_of_Erez_Reuveni_Redacted.pdf [<https://perma.cc/B2X2-XRQN>]. Reuveni's whistleblower disclosure discusses other aspects of this immigration case in which he crossed swords with higher-ups. *Id.* at 21-25. It also discusses two other immigration cases in which supervisors may have been dissatisfied because he was unwilling to make judicial submissions that lacked adequate factual support and persistently tried to obtain information from federal agencies to secure their compliance with a court order. *Id.* at 8-21. It is unclear whether Reuveni's firing was prompted by any particular conduct or by his general resistance to political appointees' expectations.

20. See Letter from Danielle R. Sassoon, Acting U.S. Att'y S. Dist. of N.Y., to Hon. Pamela Jo Bondi, U.S. Att'y Gen. (Feb. 12, 2025) [hereinafter Sassoon Letter], <https://www.documentcloud.org/documents/25526481-sassoon-letter> [<https://perma.cc/MX8J-CDCG>]; Letter from Emil Bove, Acting Deputy Att'y Gen., to Danielle Sassoon, Acting U.S. Att'y S. Dist. of N.Y. (Feb. 13, 2025) [hereinafter Bove Letter], <https://www.documentcloud.org/documents/25527022-bove-letter> [<https://perma.cc/64TE-XYFF>]; Sadie Gurman, Corinne Ramey & James Fanelli, *Top U.S. Prosecutors Resign After Order to Drop Eric Adams Case*, WALL ST. J. (Feb. 13, 2025, 6:37 PM EST), <https://www.wsj.com/us-news/top-u-s-prosecutor-in-manchattan-resigns-after-being-ordered-to-drop-eric-adams-case-766412d4> [<https://perma.cc/R84G-D9CW>]. A different criminal case prompted the forced resignation of Denise Cheung, the Chief of the Criminal Division of the U.S. Attorney's Office in the District of Columbia, after she was unwilling to make factual and legal assertions that she believed were unfounded. See Letter from Jon May et al. to Fla. Bar, Ethics Complaint Against Pamela Jo Bondi 3 (June 5, 2025), <https://ldad.org/wp-content/uploads/2025/06/Pamela-Bondi-Ethics-Complaint-6.5.25-1.pdf> [<https://perma.cc/WN4Z-8JRD>].
21. See Andrew Goudswaard, *Two-Thirds of the DOJ Unit Defending Trump Policies in Court Have Quit*, REUTERS (July 14, 2025, 1:29 PM EDT), <https://www.reuters.com/legal/litigation/two-thirds-doj-unit-defending-trump-policies-court-have-quit-2025-07-14> [<https://perma.cc/7BKW-3UNS>]; Bickerton, *supra* note 3.

specifically direct them to proceed in a way that they believe is inconsistent with their fiduciary obligations, which we argue impose *legal* obligations on prosecutors, too.

Sassoon's clash with Bove over whether to dismiss the Adams case exemplifies this dilemma for federal prosecutors, who are the focus of this Essay. Bove insisted on dropping the charges against Adams, claiming that they were politically motivated.²² Sassoon disputed this claim, asserting that the various subordinate prosecutors involved in the charging decisions were politically disinterested,²³ and that it was Bove who was politically motivated to secure Adams's cooperation with Trump's immigration policy.²⁴ Sassoon explained that, as a prosecutor, her obligation was "to pursue justice impartially, without favor to . . . those who occupy important public office."²⁵ She pointed specifically to the established understandings that "[f]ederal prosecutors may not consider a potential defendant's 'political associations, activities, or beliefs,'" that "a criminal prosecution cannot be used to . . . induce or coerce [political] activity," and that "[t]hreatening criminal prosecution even to gain an advantage in civil litigation is considered misconduct for an attorney."²⁶

Sassoon relied on sources that express conventional understandings regarding the scope of prosecutors' fiduciary and ethical obligations. These included provisions of DOJ's internal written policies, guidance from the American Bar Association, a bar association opinion interpreting the rules of professional conduct, and the teachings of the judges for whom she had served as a law clerk.²⁷ Even while disagreeing, Bove might have appreciated Sassoon's exercise of independent professional judgment, her fidelity to conventional conceptions of prosecutorial obligation, and her loyalty to the interests of the United States as reflected in DOJ policy and other writings. But instead, Bove accepted her resignation, placed the remaining prosecutors involved in the case on

22. Bove Letter, *supra* note 20, at 3-5.

23. Sassoon Letter, *supra* note 20, at 4.

24. *Id.* at 2-3. One of Bove's stated rationales for requiring the dismissal of the charges was to ensure that Adams could cooperate with the President's immigration policies. Bove Letter, *supra* note 20, at 2.

25. Sassoon Letter, *supra* note 20, at 1.

26. *Id.* at 2 (quoting U.S. Dep't of Just., Just. Manual § 9-27.260 (2024)).

27. *Id.* at 1-2. Sassoon clerked for Judge J. Harvie Wilkinson III and Justice Antonin Scalia. In her words, these jurists "instilled in me a sense of duty to contribute to the public good and uphold the rule of law, and a commitment to reasoned and thorough analysis. I have always considered it my obligation to pursue justice impartially, without favor to the wealthy or those who occupy important public office, or harsher treatment for the less powerful." *Id.* at 1.

administrative leave, and initiated an internal investigation of all of the lawyers involved.²⁸

Prosecutors' fiduciary role justifies conventional understandings about prosecutors' professional obligations, particularly the duty to "seek justice,"²⁹ but the legal obligations that follow from this premise remain unexplored. This Essay argues that because the norms we associate with prosecution are, in fact, legal obligations that derive from prosecutors' fiduciary duty to the public, federal prosecutors must work to uphold the public interest in justice in the face of questionable orders from DOJ supervisors. Because this task can be a difficult one for subordinate prosecutors, the Essay explores how Congress and the federal judiciary can support prosecutors in carrying out their duties.

II. WHEN DIRECTIONS FROM THE EXECUTIVE CLASH WITH PROFESSIONAL OBLIGATIONS

This Part first explains how the norms associated with the duty to seek justice are in fact a legal obligation that gives substance to prosecutors' fiduciary duty to the public. Next, through a comparison with corporate fiduciaries, we assess prosecutors' obligations and options when instructed to do something inconsistent with these norms. The Part then goes on to analyze problems of accountability that leave prosecutors' obligation to the public vulnerable to abuse. This vulnerability makes it clear that while prosecutors must refuse to abide by improper instructions and communicate risks to the public, the current structure for preserving the public interest in this context is imperfect at best.

A. *The Duty to Seek Justice as a Legal Obligation*

Federal prosecutors are fiduciaries trusted to protect the public's interest in justice.³⁰ The practices we associate with seeking justice are not simply nonbinding norms or traditions, but legal obligations that derive from prosecutors' fiduciary role. That is because, like other fiduciaries, prosecutors have fiduciary duties to serve competently, loyally, and disinterestedly, and the duty to seek justice

28. Larry Neumeister, Alanna Durkin Richer & Eric Tucker, *Order to Drop New York Mayor Adams' Case Roils Justice Department as High Ranking Officials Resign*, AP NEWS (Feb. 13, 2025, 8:55 PM EST), <https://apnews.com/article/new-york-city-us-attorney-0395055315864924a3a5cc9a808f76fd> [<https://perma.cc/N7TW-JT4J>].

29. Green & Roiphe, *supra* note 6, at 809.

30. *Id.*

is an attribute of competent, loyal, disinterested representation in a criminal prosecution.

Federal prosecutors' fiduciary role has important implications. As fiduciaries for the public, federal prosecutors serve the United States or the public, not themselves or another person, including the President; their duty of loyalty means they must refrain from self-dealing or from serving third parties' interests.³¹ They must resist pressure or direction, even from the President, that would require them to breach a fiduciary duty to the public. The President may not give direction that contravenes prosecutors' fiduciary obligations, but, on the contrary, he has a constitutional duty to "take care" that prosecutors abide by these legal obligations.³² Although it is possible for a principal to change the terms of a fiduciary relationship, the public is the principal, not the President. While the President has his own fiduciary obligations to the public, he may not properly pursue his policy objectives by compelling prosecutors to violate their obligation to seek justice, and if the President attempts to do so, prosecutors must not capitulate.³³

Like all fiduciary duties, prosecutors' obligation to seek justice on behalf of the public is a legal duty, and, as client, the United States could theoretically assert a breach of loyalty or care in court when a prosecutor has failed to seek justice.³⁴ For various reasons, however, courts have limited contexts in which to elaborate on federal prosecutors' fiduciary role. Criminal defendants are not the prosecutor's principal or direct beneficiary and therefore lack standing to assert a fiduciary breach. The United States, which *can* assert a federal officer's fiduciary breach,³⁵ rarely has reason to do so. And when prosecutors arguably breach

31. *Id.* at 829-43.

32. U.S. CONST. art. II, § 3.

33. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2118 (2019) ("[T]he U.S. President . . . has the commands of fidelity with antecedents dating back centuries . . ."); cf. *Chesemore v. All. Holdings Inc.*, 886 F. Supp. 2d 1007, 1042 (W.D. Wis. 2012) (holding that a directed trustee must ignore the direction of another fiduciary if it is plainly imprudent and retain and rely on an expert if they lack the requisite expertise); *Jo Ann Howard & Assocs. P.C. v. Cassity*, 868 F.3d 637, 647 (8th Cir. 2017) (holding that trustees were required to assess independently the wisdom of investments and could not simply rely on the advice of an investment advisor).

34. It is well-established that clients can sue fiduciaries, including lawyers, for breach of fiduciary duty. See *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1286 (Pa. 1992) (explaining that "[c]ourts throughout the United States have not hesitated to impose civil sanctions upon attorneys who breach their fiduciary duties to their clients" and that such "sanctions have been imposed separately and apart from professional discipline").

35. See, e.g., *Snepp v. United States*, 444 U.S. 507, 510 (1980) (per curiam) (holding that a CIA officer violated his fiduciary obligation by publishing a book without going through the proper review process); *United States v. Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977).

a fiduciary duty, there is usually some more specific constitutional, statutory, or other basis to be asserted.³⁶ Fiduciary obligations as a general matter require judicial elaboration since they originate in courts of equity.³⁷ As a result, in this context, prosecutors have been left to develop the substance of these obligations on their own. Ethical obligations, norms, policies, and traditions are the product of that effort.³⁸

Thus, the distinction between soft law, enforceable rules of professional conduct, and legal obligations is misleading. The norms and practices of prosecution *are* legal obligations, albeit ones that are developed by prosecutors themselves and enforced largely through professional socialization rather than direct accountability. The duty to seek justice, therefore, serves as a guide to prosecutors' legal obligations and specifically determines when a supervisor's order is illegal. When faced with political pressure, the most important aspect of this obligation is the prosecutor's duty to consider only relevant factors in making discretionary decisions. The duties of loyalty and care require all prosecutors to ensure the justness of individual cases,³⁹ which involves prioritizing core criminal-justice considerations, such as avoiding wrongful convictions, treating individuals proportionally and equally regardless of their beliefs or identity, incapacitating dangerous individuals, deterring future offenses, and securing retribution or restitution for victims.⁴⁰ Achieving these goals involves judgment framed by rules of

(finding that a congressman's receipt of compensation in violation of 18 U.S.C. § 203 breached his fiduciary duty to the United States as a matter of law).

36. For example, rather than alleging a breach of the fiduciary duty of loyalty, a party would likely rely on rules, regulations, or statutes applicable to government lawyers' conflicts of interest. See *United States v. Farrell*, 115 F. Supp. 3d 746, 754 (S.D. W. Va. 2015) (explaining that the defendant alleged the prosecutor had an impermissible conflict of interest under 18 U.S.C. § 208 and Rule 1.7(a)(2) of the West Virginia Rules of Professional Conduct).
37. See *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987) (explaining that fiduciary duties "are imposed by equity and are recognized and enforced exclusively by a court of equity" (citing *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 498 (Del. 1982))).
38. See, e.g., MODEL RULES OF PRO. CONDUCT, r. 3.8 cmt. 1 (A.B.A. 2023); A.B.A. CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-1.2 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function [<https://perma.cc/74DM-QVAY>]; U.S. Dep't of Just., Just. Manual § 9-27.001 (2024) (stating that the principles of federal prosecution include "two important purposes: ensuring the fair and effective exercise of prosecutorial discretion and responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively based on an individualized assessment of the facts and circumstances of each case").
39. Green & Roiphe, *supra* note 6, at 823-24.
40. A.B.A. CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION, *supra* note 38, § 3-4.4; see Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1327 & n.57 (2000) (discussing Section 1.02

professional conduct, as well as by the norms, traditions, and policies of prosecutors' offices. Once a prosecutor has weighed these concerns and followed office policies and practices, other policy considerations (such as the effect of a particular prosecution on foreign policy) might come into play, but only if the decisions are consistent with the core criminal-justice mission.⁴¹

Partisan political considerations, however, are always inconsistent with the duty to seek justice because they are not only extraneous to core criminal-justice considerations but also necessarily at odds with securing these public ends. One's political affiliation or allegiance is irrelevant to guilt or innocence, and incorporating that factor into prosecutorial decision-making would be contrary to the central criminal-justice principle of treating individuals equally regardless of beliefs or identity. Giving an advantage to some individuals or unduly targeting them based on their political allegiance is not just a violation of prosecutorial tradition, but it is also a violation of the prosecutor's fiduciary obligation to the public—and is therefore illegal.

Prosecutorial power may not be used to retaliate against an individual for unpopular beliefs⁴² or to coerce behavior unrelated to criminal justice corruptly.⁴³ Therefore, when Bove ordered Sassoon to drop the charges against Eric Adams, in part to allow him to carry out the President's immigration agenda, he was acting in one of two impermissible ways. He may have been giving Adams an unfair advantage to reward Adams's allegiance to certain partisan political goals, which violates the core criminal-justice principle of treating individuals alike despite irrelevant characteristics like their beliefs or identity. Or perhaps Bove was using the threat of prosecution in order to corrupt a public official by inducing him to cooperate with the administration's immigration agenda for Adams's personal benefit. While DOJ might ordinarily decline to prosecute out of concern for federal policy, including immigration policy, it must avoid illegality and adhere to principles of fair process, which do not include using a criminal prosecution to induce a politician to take a particular official action.

Finally, given the President's obligation to take care that the laws are faithfully executed, Bove and other leadership in DOJ failed to serve the President. As several scholars recently argued, the original meaning of faithful execution included "true, honest, diligent, due, skillful, careful, good faith, and *impartial* execution of law," which, along with other valences of the term, resembles "what

of the Texas Penal Code, which lists various purposes of punishment); MODEL PENAL CODE § 1.02 (A.L.I. 1962).

41. *Id.* at 829-43.

42. U.S. Dep't of Just., Just. Manual, § 9-27.260 (2024).

43. See *United States v. Ballester*, 763 F.2d 368, 369 (9th Cir. 1985) (per curiam) (stating that prosecutors must not threaten to increase charges based on the defendant's exercise of a statutory or constitutional right).

we would today call fiduciary obligations of the President.”⁴⁴ Because political appointees and other senior officials in DOJ have their own fiduciary obligation to the public to seek justice, it has historically been their role to screen out improper political considerations from individual prosecutions. Policies have emerged since Watergate that reinforce this role by tasking these top officials with insulating subordinate prosecutors from impermissible partisan influence. For instance, Attorneys General since Watergate have implemented policies to restrict communications from administration officials to career prosecutors.⁴⁵ These policies may, however, prove inadequate because while Attorneys General, like all prosecutors, are fiduciaries and, at least since Watergate, have sworn to uphold DOJ independence,⁴⁶ they are also cabinet members who may stray from historic practice and seek to use prosecutorial power in individual cases to further the administration’s partisan goals.

B. Conceptualizing Prosecutors’ Options when Ordered to Breach Fiduciary Duty

This Section explores what prosecutors should do when faced with an order to breach their duty to the public by analogizing to private fiduciaries. Federal prosecutors are embedded within the executive branch and take direction from political appointees like the Attorney General. But, at the same time, they are both officers of, and lawyers for, the United States as a client. In both capacities, federal prosecutors owe fiduciary duties to the public, which has an interest in justice in criminal cases.⁴⁷ This dynamic may seem odd at first because

44. Kent, Leib & Shugerman, *supra* note 33, at 2118-19 (emphasis added).

45. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 67 (2018) (discussing the policy designed by Attorney General Griffin Bell and memorialized by Attorney General Benjamin Civiletti restricting calls from administration officials to prosecutors).

46. *Id.* at 22.

47. As noted above, the Supreme Court famously captured this understanding in *Berger v. United States*, 295 U.S. 78, 88 (1935), when it stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

While the public also has an interest in justice in civil cases, agency heads normally have more power to define what justice requires when it comes to civil government lawyers. See Roiphe, *supra* note 9, at 1099-1104. If a civil government lawyer is directed to violate an ethical obligation, following the order would constitute a breach of fiduciary obligation that he could not

prosecutors, as employees and as lawyers, serve two masters. But it is a common arrangement for certain fiduciaries, such as corporate officers who take direction from superiors but owe an obligation to the organization as a whole. As fiduciaries, prosecutors are not permitted to follow a direction from a superior that would violate their fiduciary duties to the principal, the American public.

Corporate officers provide a useful comparison since they answer to the board of directors, but ultimately serve the corporation as a whole and in that capacity have an obligation to maximize profits. The board can control officers by, among other things, setting corporate policy, ordering the resolution of certain contractual or legal matters, or hiring or firing certain executives.⁴⁸ But a board's power is limited. A corporate officer may be hired or fired by the board but owes a fiduciary obligation only to the corporation. As such, the officer is not generally permitted to follow a board mandate or a controlling shareholder's order if it would result in a breach of the fiduciary obligation to maximize corporate profits.⁴⁹ While officers owe a duty of obedience to more senior agents, they have no obligation to comply with orders that would result in a breach of fiduciary obligation or otherwise expose them to civil liability.⁵⁰ In any fiduciary relationship, the beneficiary is necessarily vulnerable to the fiduciary. Prioritizing the duty of loyalty over the mandates of powerful individuals ensures integrity and accountability, avoiding abuse by dominant actors with ulterior motives.⁵¹

Even though the Attorney General has a fiduciary obligation to the public, subordinate prosecutors must exercise their own independent judgment if the Attorney General directs them to do something that is, in the prosecutor's own

abide by. *See id.* at 1104. But the role of the civil government lawyer in assessing the "public's interest" is more limited. *See id.* at 1102-04.

48. *See, e.g.,* DEL. CODE. ANN. tit. 8, § 141(a) (2024) (setting out a board-centric framework that vests the board with ultimate authority and responsibility for managing the business and affairs of the corporation); *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809, 828-29 (Del. Ch. 2024) (invalidating facially parts of a contractual corporate-governance arrangement for improperly restricting the authority of the board).
49. *In re Sears Hometown & Outlet Stores, Inc.*, 309 A.3d 474, 483-84 (Del. Ch. 2024); *Lien v. Lien*, 674 N.W.2d 816, 824 (S.D. 2004). This is also true of other fiduciaries. A trustee, for instance, has a duty to administer a trust solely in the interest of the beneficiary and if anyone, including the settlor, instructs the trustee to do something at odds with that responsibility, the trustee must not comply. RESTATEMENT (THIRD) OF TRUSTS § 70 (A.L.I. 2007).
50. *See Cygnus Opportunity Fund, LLC v. Wash. Prime Grp. LLC*, 302 A.3d 430, 448 (Del. Ch. 2023); *Goldstein v. Denner*, No. CV 2020-1061-JTL, 2022 WL 1671006, at *52 (Del. Ch. May 26, 2022) ("[A]n officer does not have a duty to comply with directives that the officer has reason to believe would constitute a breach of fiduciary duty.").
51. *See, e.g.,* *Spence v. Am. Airlines*, 775 F. Supp. 3d 963, 1004-09 (N.D. Tex. 2025) (explaining that the duty of loyalty is designed to ensure that fiduciaries serve the interest of the beneficiary rather than themselves or other powerful actors); *Cygnus Opportunity Fund LLC*, 302 A.3d at 448; *In re Sears*, 309 A.3d at 483-84.

assessment, at odds with the public's interest in justice. Just as the board can speak for the corporate entity for certain purposes, so too can political appointees in DOJ. Political actors and appointees, such as the Attorney General, can, for instance, set the law-enforcement policy agenda that subordinate prosecutors are required to carry out. Politically appointed DOJ officials can also direct individual prosecutorial decisions. But because subordinate prosecutors, like corporate officers, owe an ultimate obligation to the beneficiary, the power of supervisors is limited. Subordinate prosecutors must defer to supervisors if, after weighing relevant concerns and following the appropriate processes, there is a fair disagreement about the ultimate question of what best serves justice in an individual case. Prosecutors, like corporate directors and officers, must not comply if they are ordered to do something at odds with the public's interest in justice in individual cases.⁵²

Of course, the public's interest in justice is harder to assess than the maximization of profits in the corporate context. How, then, can prosecutors define the duty to seek justice, such that they can identify in a principled manner when an order conflicts with their fiduciary obligation to the public? The public's interest in this context is vague, but it is not entirely without meaning.⁵³ In the area of nonprofit corporate governance, the guiding principle is "mission" rather than profit. Courts have developed a line of cases elaborating a new fiduciary obligation that requires adherence to the goals of the nonprofit organization.⁵⁴ While broader concerns, like the profitability of a transaction, can factor into decisions, a fiduciary who represents an entity with an abstract interest must always consider the impact of any action on the mission. Prosecutors similarly have an obligation to prioritize justice over other public interests.

The norms and traditions of federal prosecution have developed over time to define the contours of the obligation to seek justice and, in turn, delineate how to remain faithful to the public's interest. These norms include the prosecutor's obligation to weigh only valid considerations in making discretionary decisions and not to take inappropriate partisan concerns into account. Prosecutorial

52. Green & Roiphe, *supra* note 6, at 809.

53. Compare Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1210 (2020) (arguing that the duty to do justice does not offer "a meaningful standard"), with Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 49 (1991) (concluding that "'justice' has two fairly limited prongs: (1) prosecutors should not prosecute unless they have a good faith belief that the defendant is guilty; and, (2) prosecutors must ensure that the basic elements of the adversary system exist at trial").

54. See, e.g., *Manhattan Eye, Ear, & Throat Hosp. v. Spitzer*, 715 N.Y.S.2d 575, 593 (Sup. Ct. 1999). Thus, directors of a nonprofit have a duty not only to avoid self-dealing but also to devote themselves to furthering its mission. See *Commonwealth by Kane v. New Found., Inc.*, 182 A.3d 1059, 1070-71 (Pa. Commw. Ct. 2018).

independence is designed to protect this process and, as a result, political appointees typically defer to subordinate prosecutors' charging decisions in individual cases.⁵⁵ This practice minimizes the risk that subordinate prosecutors will encounter an order at odds with their obligation to seek justice.⁵⁶

With corporate fiduciaries, the business-judgment rule dictates that courts defer to officers and directors as long as they act in good faith on an informed basis and are free from conflicts of interest.⁵⁷ The subordinate prosecutors, who are least likely to be politically motivated, deserve this level of trust until there is evidence of wrongdoing. Just as prosecutors' deviation from normal practice can be a warning sign, an officer's failure to follow accepted policies and procedures for decision-making can be evidence that the officer was not acting in good faith and no longer deserves the presumed deference.⁵⁸

C. *Prosecutors' Options When Ordered to Do Something at Odds with Their Duty of Loyalty to the Public*

This Section explores a prosecutor's options if a public official or supervisor directs the prosecutor to do something at odds with the public's interest in justice. These options include resigning, recusing from the case but remaining in the office, and issuing a public statement.

If a prosecutor is ordered to do something inconsistent with the fiduciary obligation to seek justice, it is clear that the prosecutor cannot comply. The choice of which steps to take in response, however, is discretionary. Prosecutors—like other lawyers—are ordinarily presumed to be able to put aside their ideological or philosophical preferences, their self-interest in career advancement, and similar self-interests to serve their client. Prosecutors are in the best position to determine the nature and severity of the risk that they will betray the public. This assessment will determine whether the prosecutor should simply refuse to do the problematic task (and accept the risk of adverse employment

55. For instance, the Justice Manual specifies that in highly charged political cases, prosecutors consult with the Public Integrity Unit, a DOJ section traditionally staffed by career prosecutors with expertise in such cases. U.S. Dep't of Just., Just. Manual, § 9-85.110 (2024) (explaining this process for cases involving members of Congress); *id.* § 9-85.210 (cases involving campaign finance or election fraud); *id.* § 9-85.220 (cases involving the sale of a public office). To prevent improper politically motivated prosecutions, these provisions offer a mechanism of oversight by disinterested experts who are unlikely to have their own political motivations.

56. Green & Roiphe, *supra* note 45, at 69-74.

57. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

58. See, e.g., *In re Bridgeport Holdings, Inc.*, 388 B.R. 548, 564 (Bankr. D. Del. 2008) (finding that plaintiffs made out a breach of fiduciary duty claim where the directors outsourced their normal decision-making to a third party and failed to monitor that party).

consequences), withdraw from the case, or resign from the office entirely. If the prosecutor can disregard improper directions or otherwise subordinate contrary interests and focus on the public's goal of justice, then the prosecutor will be able to continue to work on the matter. Prosecutors' personal interests that, in theory, may adversely affect the prosecutor's exercise of professional judgment are not invariably disabling. Often, personal interests, which may be inherent in the nature of prosecutors' work, can be managed by the individual prosecutor without taking any further action, because prosecutors are trusted to disregard them.⁵⁹ In other words, prosecutors are expected to put aside professional ambition, personal beliefs, and institutional interests that might undermine their ability to serve the public in a disinterested way.⁶⁰ Like all fiduciaries, however, if prosecutors cannot loyally serve the beneficiary in a matter because of their self-interest or their commitment to serve others' interests, they may not proceed. They may have to decline to do the tasks they cannot perform loyally in a matter, decline to work on the affected matter altogether, or resign from their government positions.

Resignation creates some transparency, enabling political accountability for those DOJ officials who are issuing unlawful directives. A high-profile resignation also brings the issue to the attention of the public through media coverage. But given that the President can appoint loyalists to serve within DOJ, resignation may not solve the problem. The empty positions can be filled with lawyers who are willing to disregard their fiduciary obligations in favor of following orders. Moreover, political accountability is both slow and incomplete. Harm to the public may be done before the next election, and the public may not remember or fully understand the implications of the resignations.

Sassoon provides an example of when resignation becomes a reasonable, and perhaps even required, option. Before Sassoon resigned from DOJ, she sought to convince Bove to change his position and attempted to arrange a meeting to raise her concerns directly with the Attorney General.⁶¹ She clearly hoped to resolve the problem first by persuading her supervisors that their demand to dismiss the charges against Mayor Adams was inappropriate. After her attempts at persuasion failed, she made the reasonable determination that she could no longer work for DOJ and abide by her obligation to the public to seek justice. The top remaining official in the public-integrity unit at DOJ and the acting head

59. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 465-67 (2017).

60. *Id.* at 466.

61. Sassoon Letter, *supra* note 20, at 1-2.

of the criminal division in the Southern District of New York followed her lead.⁶² Bove's decision to place all of the prosecutors on the Adams case on administrative leave pending an investigation⁶³ supports these lawyers' determination that they could no longer serve the public faithfully. The constant threat of removal and sanctions pushed Sassoon and her colleagues to leave DOJ: they may have reasoned that every decision they would make in the future would be scrutinized with an eye toward their political loyalty to President Trump.

Other times, however, federal prosecutors who faced what they determined was inappropriate political interference have resigned from the case or refused to do the improper task but continued to work at DOJ. During the first Trump administration, for instance, several DOJ lawyers assigned to the prosecution of longtime Trump ally Roger Stone withdrew from the case, but not the office, after senior DOJ officials intervened to reduce the recommended sentence.⁶⁴ These lawyers likely believed that following the direction of senior DOJ officials to reduce the recommended sentence would inappropriately take political considerations into account and therefore fail to serve the public's interest in that case. This determination was reasonable, especially because Trump himself had previously tweeted that the recommended sentence was too high.⁶⁵ But, unlike Sassoon, the prosecutors may have also reasonably concluded that their ability to represent the public in other cases had not been fatally compromised. Similarly, while many of the prosecutors involved in the Adams case resigned after

62. Joe Anuta, Jeff Coltin & Josh Gerstein, *Top Manhattan Prosecutors and Two DOJ Officials Resign After Being Ordered to Drop Eric Adams Case*, POLITICO (Feb. 13, 2025, 5:35 PM EST), <https://www.politico.com/news/2025/02/13/danielle-sassoon-eric-adams-prosecutor-00204146> [https://perma.cc/FM8K-KA9R].

63. The AUSAs assigned to the case were Hagan Scotten, Celia V. Cohen, Andrew Rohrbach, and Derek Wikstrom. See Press Release, U.S. Att'y Off., S. Dist. of N.Y., New York City Mayor Eric Adams Charged with Bribery and Campaign Finance Offenses (Sep. 26, 2024), <https://www.justice.gov/usao-sdny/pr/new-york-city-mayor-eric-adams-charged-bribery-and-campaign-finance-offenses> [https://perma.cc/T5GM-AUPU]. All of them were put on administrative leave, except for Hagan Scotten, who resigned. See Jonah E. Bromwich, William K. Rashbaum & Benjamin Weiser, *Justice Dept. Is Said to Put Two Prosecutors in Adams Case on Leave*, N.Y. TIMES (Mar. 7, 2025), <https://www.nytimes.com/2025/03/07/nyregion/eric-adams-prosecutors-sdny.html> [https://perma.cc/TX67-6XSM].

64. Katie Benner, Sharon LaFraniere & Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/02/11/us/politics/roger-stone-sentencing.html> [https://perma.cc/83VN-FKLQ].

65. Morgan Chalfant, *Trump Criticizes 'Very Unfair' Sentencing Recommendation for Roger Stone*, HILL (Feb. 11, 2020), <https://thehill.com/homenews/administration/482471-trump-criticizes-very-unfair-sentencing-recommendation-for-roger> [https://perma.cc/7UBH-KQ2H].

Bove instructed them to drop the case, others in the public-corruption unit refused to file the motion to dismiss but remained in the office.⁶⁶

Prosecutors faced with improper political mandates may be permitted, and perhaps even required, to inform their client—the public—in addition to simply resigning.⁶⁷ Fiduciaries are required to disclose any information that could materially affect the beneficiary, including any facts that might compromise the fiduciary’s ability to serve the beneficiary’s interest—in other words, facts that might create a conflict of interest.⁶⁸ The underlying circumstances will determine whether withdrawal from the case or resignation from the office is sufficient to communicate the necessary information.⁶⁹ The simple fact of resignation can, under some circumstances, convey the necessary information. For instance, when DOJ lawyers withdrew from the Roger Stone prosecution after they were ordered to reduce the recommended sentence, in what appeared to be a politically motivated effort to aid President Trump’s political ally, the public could, and did, understand the significance of their withdrawal.⁷⁰

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66. See Devlin Barrett, *Why Bove Wants Someone Else to Request the Adams Charges Be Dismissed*, N.Y. TIMES (Feb. 14, 2025), <https://www.nytimes.com/2025/02/14/nyregion/bove-adams-charges-dismissal.html> [<https://perma.cc/X7LG-C5KK>]; Devlin Barrett, Glenn Thrush & Adam Goldman, *Under Pressure to Drop Charges, Career Prosecutors Faced Stark Options*, N.Y. TIMES (Feb. 14, 2025), <https://www.nytimes.com/2025/02/14/us/politics/eric-adams-doj-lawyers.html> [<https://perma.cc/C4HV-SHZR>].
67. See MODEL RULES OF PRO. CONDUCT r.1.4(a)(3) (A.B.A. 2023) (requiring lawyers to keep clients reasonably informed of the matter); see also *Kenseth v. Dean Health Plan, Inc.* 610 F.3d 452, 466 (7th Cir. 2010) (explaining that the duty to disclose material information is central to a fiduciary’s obligation).
68. See e.g., RESTATEMENT (THIRD) OF TRUSTS § 82 (A.L.I. 2007) (laying out obligations of trustees to inform the representative beneficiaries about material facts that could affect their interests); MODEL RULES OF PRO. CONDUCT r. 1.4 (A.B.A. 2023) (outlining obligations of lawyers to keep their clients informed about the representation); see also *Hudson v. Foster*, 283 Cal. Rptr. 3d 822, 839 (Ct. App. 2021) (describing a general duty of all fiduciaries to keep the beneficiary informed); *Aero Drapery of Ky., Inc. v. Engdahl*, 507 S.W.2d 166, 169 (Ky. 1974) (“Whenever a fiduciary possesses information and the withholding of that information will damage the corporation, it is his duty to fully disclose these facts to the corporation.”).
69. See, e.g., *Spencer v. Barber*, 299 P.3d 388, 399-400 (N.M. 2013) (holding that when an attorney has a conflict of interest, he must not only inform the beneficiary about the conflict but also provide all information necessary to make a decision about how to proceed); see also MODEL RULES OF PRO. CONDUCT, r. 1.7 cmt. 18 (A.B.A. 2023) (“Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client The information required depends on the nature of the conflict and the nature of the risks involved.”).
70. Benner, LaFraniere & Goldman, *supra* note 64 (“The development immediately prompted questions about whether the Justice Department was bending to White House pressure.”).

When a prosecutor's resignation does not send a clear signal, a public statement might be necessary to convey the nature of the conflict.⁷¹ Because the public is the client and beneficiary, the public has the right to know when its interest is in jeopardy. If a resignation from the case or a refusal to do a particular task is insufficient to communicate the danger to the public, a prosecutor may have to resort to a more explicit statement. When Sassoon resigned after Bove ordered her to dismiss the case against Mayor Adams, she sent Bove a letter that was leaked to the public, and she may have anticipated that it would be.⁷² Her letter revealed the extent of the strain on the prosecutor's duty of loyalty and also served as warning that the public's interest was still at risk even after the prosecutor resigned and the case was resolved. It would have been difficult to communicate the nature of the risk without the details provided in her letter. In determining whether to make a public statement, of course, prosecutors may feel obliged to refrain because of the effect on the prosecutor's future employment prospects if she issues a public statement. As a result, prosecutors should be careful that their interest in professional advancement after leaving the office is not driving their decision about whether to issue a statement.

D. Accountability and the Prosecutor's Fiduciary Role

By resigning and sending a message to the public that its interest is at risk, prosecutors enable the public to hold its fiduciaries accountable. Public resignations and statements communicate the nature of the threat to the public, enabling citizens to exercise their First Amendment rights and ultimately, to vote for different political officials who will safeguard their interest. This Section argues that there are other important mechanisms for ensuring prosecutors' loyalty to the public interest, which include allocating the responsibility for policing prosecutors' conduct to career officials.

71. On the civil side, DOJ attorney Erez Reuveni sent a letter to Congress and the Office of the Inspector General after he was fired for conduct that defied higher-ups' expectations in high-profile immigration cases. See Gurman, *supra* note 17; Letter from Gov't Accountability Project & Gilbert Emp. L., P.C., to Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just., Jamieson Greer, Acting Special Couns., U.S. Dep't of Just., Hon. Chuck Grassley, Chair, U.S. Senate Comm. on the Judiciary & Hon. Jim Jordan, Chair, U.S. House Comm. on the Judiciary (June 24, 2025), https://www.judiciary.senate.gov/imo/media/doc/o6-24-2025_-_Protected_Whistleblower_Disclosure_of_Erez_Reuveni_Redacted.pdf [<https://perma.cc/8XYA-6WTJ>]. Reuveni may have reasonably concluded that his fiduciary obligation to the public required not simply accepting his dismissal, but also informing the public about the nature of DOJ leadership's breach of its fiduciary obligation to uphold the laws and Constitution of the United States.

72. Sassoon Letter, *supra* note 20.

Political accountability, while important, can be inadequate for a number of reasons. First, a great deal of harm can be done before the next election. And despite the efforts of individual prosecutors to convey information and communicate risk to the public, the message may get muddled. Accountability within DOJ is also vulnerable because the administration can install loyalists in units that were traditionally apolitical or assign supervisory roles to political appointees.

Prosecutors' refusal to obey instructions to breach their duty to seek justice may be inadequate and insufficient because DOJ supervisors and political actors might disguise an effort to inject improper political considerations into individual prosecutorial decisions as an effort to hold prosecutors accountable. DOJ leadership in the second Trump administration, for instance, has repeatedly defended its efforts to control individual lawyers and prosecutions as a campaign to end the weaponization of government lawyers.⁷³ When Bove ordered Sassoon to dismiss the case against Mayor Adams, he claimed to be doing so because that prosecution was itself politically motivated.⁷⁴ Attorney General William Barr similarly derided what he concluded were politically motivated prosecutors and agents.⁷⁵

Checks on prosecutorial power are important to ensure loyalty to the public's interest in justice, but political appointees, who are most likely to have their own partisan goals and aspirations, are the least well-suited to serve that role.⁷⁶ The Office of the Inspector General or the Office of Professional Responsibility, traditionally staffed by career civil servants, are in better positions to investigate allegations of political motivation, because they are unlikely to have their own political agenda. The public-integrity unit, when staffed with career prosecutors,

73. See, e.g., Bondi Memo, *supra* note 12; Devlin Barnett, *Justice Dept. Leader Suggested Violating Court Orders, Whistle-Blower Says*, N.Y. TIMES (June 24, 2025), <https://www.nytimes.com/2025/06/24/us/politics/justice-department-emil-bove-trump-deportations-reuveni.html> [<https://perma.cc/25ZS-M4AP>].

74. Bove Letter, *supra* note 20, at 1.

75. Aaron Blake, 'One of the Greatest Travesties in American History': Barr Drops All Pretense About Ongoing Probe of Russia Investigation, WASH. POST (Apr. 9, 2020), <https://www.washingtonpost.com/politics/2020/04/09/one-greatest-travesties-american-history-barr-drops-all-pretense-about-ongoing-probe-russia-investigation> [<https://perma.cc/9NGF-DUJV>].

76. See Bruce A. Green & Rebecca Roiphe, *Who Should Police Politicization of the DOJ?*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 671, 685 (2021) ("[T]he attorney general and other high-ranking presidential appointees . . . are the DOJ lawyers who are most likely to interact with the President, who are most closely politically allied with the President (since they owe their positions to him) and, in some instances, to have political aspirations of their own, and who have the most authority and opportunity to bring partisan influence to bear on DOJ's work.").

is also in a better position to review decisions in politically charged cases.⁷⁷ Under the Trump administration, however, DOJ units that have traditionally been removed from partisan interest have been filled with loyalists, eliminating this critical source of accountability.⁷⁸

When inappropriate political considerations are involved, supervisors like the Attorney General and other politically appointed officials are at the greatest risk of betraying the public's interest because they are most likely to have political aspirations and be beholden to political actors.⁷⁹ Because it would be impractical and undesirable to have all political appointees absent themselves from decision-making, norms and policies have developed to minimize the risk of conflicts of interest from above. Prosecutorial independence, like the business-judgment rule governing corporate officers and directors, ensures that prosecutors can develop and apply expertise to achieve the beneficiary's goal without constantly worrying about being penalized by their superiors.⁸⁰ But fiduciaries are also held accountable through various mechanisms, and prosecutors are no exception. They can be disciplined by courts and investigated by designated government offices. Independence and accountability serve the same end, ensuring that prosecutors abide by their duties of loyalty and care.⁸¹

Because accountability, like independence, is designed to ensure that prosecutors abide by their duties of loyalty and care, which require prioritizing a commitment to criminal justice, political appointees and elected officials cannot

77. The DOJ manual used to reflect this insight by tasking the public-integrity unit with this function in politically sensitive cases. *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-85.210 (2022) (requiring review of campaign-finance investigations and charging decisions); U.S. Dep't of Just., Just. Manual § 9-85.110 (2024) (requiring review of certain charging decisions involving members of Congress and staff). But the requirement to consult the public-integrity unit in campaign-finance investigations has been suspended pending review, potentially demonstrating how political actors are taking over traditionally nonpartisan units tasked with reviewing the conduct of prosecutors. U.S. Dep't of Just., Just. Manual § 9-85.210 (2025).

78. Rebecca Beitsch, *DOJ Rocked by Wave of Trump Firings*, HILL (July 20, 2025, 6:00 AM ET), <https://thehill.com/regulation/court-battles/5409135-doj-firings-trump> [<https://perma.cc/5WQ6-97FU>]; Sarah N. Lynch, Ned Parker, Peter Eisler & Andrew Goudsward, *How Trump Defanged the Justice Department's Political Corruption Watchdogs*, REUTERS (June 9, 2025, 10:00 AM EDT), <https://www.reuters.com/investigations/how-trump-defanged-justice-departments-political-corruption-watchdogs-2025-06-09> [<https://perma.cc/52CD-X4NZ>]; Laura Barrón-López & Shrai Popat, *Trump's Firing of Independent Watchdogs Raises Concern About Government Fraud and Ethics*, PBS (Jan. 27, 2025, 6:25 PM EDT), <https://www.pbs.org/news-hour/show/trumps-firing-of-independent-watchdogs-raises-concerns-about-government-fraud-and-ethics> [<https://perma.cc/9W26-CULW>].

79. Green & Roiphe, *supra* note 76, at 676.

80. *See* Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431, 1458–59 (2023).

81. Green & Roiphe, *supra* note 6, at 844.

police politicization.⁸² There is too great a danger that they will try to usurp the prosecutors' role for other ends. While political accountability is an important check on prosecutors' power, it should further rather than undermine a prosecutor's dedication to justice in individual cases.

The difficulty and inadequacy of prosecutors' options when faced with improper partisan orders, along with the fact that many of the sources of accountability are themselves susceptible to partisan influence, make it critical that courts and Congress intervene to reinforce prosecutors' fiduciary obligations.

III. REINFORCING FEDERAL PROSECUTORS' FIDUCIARY OBLIGATIONS THROUGH THE COEQUAL BRANCHES

As we argued above, once a case is assigned to particular prosecutors, these prosecutors must act lawfully,⁸³ including by fulfilling their fiduciary duties. This Part focuses on how Congress and the federal courts might protect federal prosecutors' fiduciary role, enabling them to make decisions in an independent, informed, and disinterested way, especially in situations when higher-ups expect them, or are pressuring them, to further partisan political objectives.

Section III.A addresses how Congress might protect federal prosecutors' fiduciary role, and Section III.B addresses how the federal judiciary might do so. As we discuss, while both institutions must work within constitutional limits imposed by separation-of-powers principles, there is still room for them to bolster federal prosecutors' ability to seek justice in the face of contrary direction from above. Courts in particular can exercise their supervisory power to reinforce prosecutors' fiduciary role simply by regulating prosecutors like other lawyers, rather than with excessive deference.

A. Congress's Role

This Section considers how Congress can protect and support subordinate federal prosecutors in fulfilling their fiduciary obligations in the face of higher-ups' contrary directions. First, it acknowledges that separation-of-powers principles may limit Congress's authority to regulate DOJ as an executive-branch agency, but concludes that, within admittedly ill-defined limits, Congress has

⁸². Green & Roiphe, *supra* note 76, at 687-88.

⁸³. See, e.g., N.Y. City Bar Assoc. Comm. on Pro. Ethics, Formal Op. 2025-1 (2025) (directing government lawyers to abide by professional-conduct rules, even if a supervisor directs them not to).

considerable authority. It then discusses five ways for Congress to support prosecutors who face a clash between their fiduciary duties and superiors' directions.

1. *Congressional Authority and Separation-of-Powers Limitations*

Congress might seek to enact laws or take other steps to protect federal prosecutors' independence as fiduciaries by authorizing them to seek justice – and justice alone – and preventing adverse consequences when they do. The Constitution would impose some limits on federal legislation designed to bolster federal prosecutors' independence from higher-ups, and from the President in particular. Although the extent of those separation-of-powers limits is both uncertain and contested,⁸⁴ Congress would have substantial leeway as the law now stands.

Congress plainly can define federal prosecutors' role and responsibilities, as it has done since the Founding. The Constitution itself does not designate who prosecutes cases on behalf of the U.S. Government. The Federal Judiciary Act of 1789 (FJA) – often deemed trustworthy evidence of the original understanding of the Constitution⁸⁵ – gave the Attorney General no authority over federal prosecutors, and in an initial draft of the FJA, Congress authorized the Supreme Court to appoint the Attorney General and district courts to appoint U.S. Attorneys, before resolving to establish the positions of Attorney General and U.S. Attorneys within the executive branch.⁸⁶ Since then, Congress has authorized the Attorney General to appoint subordinate prosecutors and has established both DOJ and the U.S. Attorneys' Offices within which federal prosecutors are housed.⁸⁷ Congress enacts the criminal laws that federal prosecutors enforce and procedural laws governing their enforcement. Federal laws can establish criteria for how prosecutors decide whom to investigate, whether to initiate charges,

84. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 250–52 (2000).

85. See, e.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (explaining that the FJA “was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning”); WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 32 (8th ed. 2025) (“[T]he first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress’s constitutional obligations concerning the vesting of federal jurisdiction.”).

86. Charles Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1923).

87. 28 U.S.C. §§ 519, 542 (2024); Act to Establish the Department of Justice, ch. 150, §§ 1–5, 16 Stat. 162, 162–64 (1870).

what charges to bring, and the like.⁸⁸ Congress can also oversee prosecutors' compliance with the various laws or establish other oversight mechanisms.⁸⁹ Although Congress has authorized the Attorney General to adopt regulations or issue internal instructions or guidance governing federal prosecutors' conduct, Congress can pass a law superseding the Attorney General's authority, as it did with the McDade Amendment, which subjects federal prosecutors to the professional-ethics rules of the states in which they practice.⁹⁰

Whether Congress can authorize individual prosecutors to conduct their work independently of the President or the President's designees, based on the prosecutors' own best judgment of what "seeking justice" entails, is constitutionally questionable. The Constitution entrusts the President to "take care that the Laws be faithfully executed,"⁹¹ and the Supreme Court recently reaffirmed that enforcement of federal criminal law is an executive-branch function.⁹² As we discussed extensively in an earlier writing, it is contested whether the President's authority is limited to setting broad criminal-justice policy, or whether the Take Care Clause gives the President legal authority to direct prosecutors' work on individual investigations and prosecutions.⁹³ At the very least, it seems implausible that the President's obligation to "take Care that the laws be faithfully executed" could include improper political directives, if, as we argue above, prosecutors have a legal fiduciary obligation to do justice.⁹⁴

The leading case on the President's authority in federal criminal cases is *Morrison v. Olson*, a 1988 decision upholding a now-defunct federal law establishing the position of Independent Counsel, a federal prosecutor appointed by federal judges to investigate and prosecute criminal conduct by specified executive

88. For example, federal law narrows and channels the Attorney General's discretion to prosecute a juvenile in federal court. 18 U.S.C. § 5032 (2024).

89. Congressional committees can conduct hearings regarding DOJ investigations and prosecutions. See, e.g., Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranh Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587, 617-19 (1995) (discussing congressional hearings that investigated DOJ enforcement of environmental criminal laws); see also *infra* notes 119-123 and accompanying text (discussing the potential for congressional oversight to reinforce the fiduciary obligations of subordinate prosecutors). Additionally, Congress has established the position of Inspector General to investigate wrongdoing by DOJ and its officials or employees. See 5 U.S.C. § 413 (2024).

90. For a discussion of the McDade Amendment and its background, see Zacharias & Green, *supra* note 84, at 211-15.

91. U.S. CONST. art II, § 3.

92. *Trump v. United States*, 603 U.S. 593, 620 (2024).

93. Green & Roiphe, *supra* note 45, at 7-38.

94. See *supra* text accompanying notes 30-41.

officials.⁹⁵ The law was designed to protect these investigations and prosecutions from improper political influence, including influence by the very officials who were the subject of investigations or prosecutions.⁹⁶ Over a lone dissent by Justice Scalia, the Court, in an opinion authored by Chief Justice Rehnquist, rejected the premise that all federal prosecutorial power is vested in the President.⁹⁷ It upheld the law, which freed the Independent Counsel to implement federal criminal-law policy, subject to termination only for incompetence or malfeasance.⁹⁸

Although the majority opinion in *Morrison* “strongly suggest[ed] that Congress can make any and all federal prosecutors independent from presidential direction,”⁹⁹ the opinion has lost favor. Justice Scalia’s dissent, which some regard as his “masterpiece,”¹⁰⁰ has been declared “a watershed in the development of [the] unitary executive theory,”¹⁰¹ which is the idea that the Constitution vests federal executive power solely in the President, who must therefore retain direct control over all officers who exercise executive power.¹⁰² Many academics (us among them) reject that theory, at least as applied to federal criminal prosecution,¹⁰³ but it has gained traction in conservative political circles,¹⁰⁴ and it is

95. 487 U.S. 654 (1988).

96. See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 626 (1998) (“[T]he statute’s overarching purpose was to drag certain investigations of the President and other high-level executive officials out of the muck of partisan politics in order to restore public confidence in government.”).

97. *Morrison*, 487 U.S. at 693–96.

98. See *id.* at 662–64, 696–97.

99. Green & Roiphe, *supra* note 45, at 32.

100. Noel J. Francisco, *Justice Scalia: Constitutional Conservative*, 84 U. CHI. L. REV. 2169, 2171 (2017).

101. Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2191 (2024).

102. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992). For an overview of the unitary executive theory and its various flavors, see *id.* at 1165–68.

103. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14–22 (1994); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 190–97 (2022); Green & Roiphe, *supra* note 45, at 4–6.

104. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 76, 79 (2009) (explaining that Justice Scalia’s dissent in *Morrison* “provides the leading judicial articulation of the unitary executive theory,” which “has profoundly influenced executive branch conduct, much of it either unreviewable judicially or reviewable only in a very deferential sense”); Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 209 (2011) (observing that Justice Scalia’s dissent gave weight to DOJ litigators in the Reagan Administration who pursued the unitary executive theory).

implicated in pending cases regarding President Trump's power to fire agency heads.¹⁰⁵

One can easily imagine the current Court saying, at the very least, that the President or his designee (i.e., the Attorney General) must have broader authority to fire subordinate prosecutors than afforded by the Independent Counsel Act.¹⁰⁶ It would be a much greater leap, but still conceivable, for the Court to say that federal law cannot give line prosecutors *any* decision-making authority in matters assigned to them, beyond whatever authority the President elects to delegate. On that theory, line prosecutors would have a responsibility to follow higher-ups' directions and meet their expectations, and they could be fired for failing to do so, unless, or even if, the directions or expectations were plainly unlawful. But even if Congress could not make subordinate prosecutors independent of the President, Congress can use its lawmaking and oversight authority in other ways to restrain the federal government from using its criminal power toward political ends.

2. *Possibilities for Legislative Protection*

Broadly speaking, we envision five possible ways for Congress, in theory, to protect line prosecutors' ability to carry out their fiduciary obligations in the face of contrary political pressure.¹⁰⁷ We do not mean to suggest that the current Congress, or any particular Congress, would be interested in any of these measures, but only to explain that they are available. It is safe to assume that in 2025, Congress would have no inclination to expand subordinate prosecutors' independence from DOJ officials. But at various times in the past, Congress has passed laws directed against the politicization of criminal power,¹⁰⁸ and it might consider doing so again in the future.

^{105.} See, e.g., *Wilcox v. Trump*, 775 F. Supp. 3d 215, 217-20, 230-34 (D.D.C. 2025).

^{106.} Judge Cannon explored this issue in an opinion in the Special Counsel's prosecution of Donald Trump before the 2024 presidential election. See *United States v. Trump*, 740 F. Supp. 3d 1245, 1257-59 (S.D. Fla. 2024).

^{107.} For an earlier discussion of possible congressional measures to protect federal prosecutors' independence from partisan political influence, see Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1955-96 (2019).

^{108.} See, e.g., 5 U.S.C. § 7323 (2024) (restricting federal employees' political activities); 28 U.S.C. § 528 (2024) (requiring the Attorney General to promulgate rules to disqualify U.S. Attorneys with conflicts of interest, including political conflicts); Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (expired).

First, Congress could adopt laws or rules for federal prosecutors,¹⁰⁹ with the aim of dictating more precisely how prosecutors should conduct their work as fiduciaries who are legally obligated to seek justice. The President and his designees could not legitimately instruct prosecutors to contravene whatever specific laws were properly enacted, because the President's obligation is to take care that federal laws are faithfully executed, not countermanded. The ability to point to some law that specifically authorizes or requires the prosecutor to act in a particular way would help prosecutors stand up to higher-ups who pressure them to handle assigned cases in ways that appear to be an abuse of power. It would not be enough for Congress to instruct prosecutors to seek justice in accordance with general principles, since there is so much room for prosecutorial judgment—and input from politically appointed superiors—on how these broad principles apply in concrete situations.

It is hard to define prosecutors' fiduciary responsibilities more specifically, however. Fiduciaries, including prosecutors, are generally authorized to exercise their best judgment in light of varied and complex facts precisely because expert decision-making is not susceptible to a detailed roadmap.¹¹⁰ But Congress could still target certain prosecutorial conduct, such as decisions intended to promote partisan political objectives. Federal prosecutors' ability to seek justice might be reinforced by a federal law forbidding prosecutors from exercising their authority, including in deciding whom to investigate or charge, to favor political friends or punish political foes—even if there remains room for disagreement about whether prosecutors are politicizing their power in any given case.¹¹¹

Second, Congress could establish inclusive internal processes by which DOJ will make contested decisions when line prosecutors perceive that higher-ups are directing them to abuse their fiduciary authority toward partisan political ends. At present, higher-ups can make decisions by whatever process they please. In the prosecution of New York City's Mayor Adams, for example, the SDNY prosecutors bringing the case appear to have been largely excluded from whatever

109. See generally Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144 (2010) (outlining a uniform system of ethical regulation to standardize the enforcement of federal criminal law); cf. Gregory B. LeDonne, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231, 232 (2007) (proposing that Congress adopt a uniform code of attorney ethics for federal judicial proceedings).

110. See, e.g., *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1993) (emphasizing that directors are "best equipped to make . . . judgments" in light of "the complexity of the directors' task"); see also *id.* at 42 ("Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors.").

111. See Green & Roiphe, *supra* note 76, at 671 ("[A]lthough prosecutors should never allow partisan concerns to affect their decisions in individual cases, it is hard to determine if and when this corruption of federal prosecutorial decision-making has occurred.").

internal deliberations led to DOJ's decision to dismiss the case. Congress does not ordinarily tell DOJ how to make decisions, but it could at least arguably do so in particular circumstances. In cases involving public officials, and other cases in which subordinate prosecutors perceive that higher-ups' decisions may be politically influenced, Congress might require that decisions be justified in an internal writing, that career prosecutors have a role in making charging decisions, that the subordinate prosecutors assigned to the case have a seat at the table, or that charging decisions be approved by the leadership of multiple DOJ offices.¹¹² At least sometimes, a more inclusive process may discourage higher-ups not only from articulating impermissible considerations but from ultimately making decisions based on such considerations.

Third, Congress could provide meaningful employment protection to line prosecutors who resist pressure to breach their fiduciary duty (as Sassoon and several of her colleagues did in the Adams case)¹¹³ or who disclose what they believe to be higher-ups' breaches of fiduciary duty either to Congress (as some prosecutors did in the first Trump administration)¹¹⁴ or to the public. Federal law forbids adverse employment action against federal prosecutors, among other federal employees, who blow the whistle on certain abuses of authority.¹¹⁵ But, for understandable reasons, internal prosecutorial decision-making is ordinarily confidential, and it is unclear whether the whistleblower protections supersede prosecutors' confidentiality obligations.¹¹⁶ At the very least, federal prosecutors

112. See Bruce A. Green & Rebecca Roiphe, *Depoliticizing Federal Prosecution*, 100 DENV. L. REV. 817, 833-34 (2023) [hereinafter Green & Roiphe, *Depoliticizing Federal Prosecution*] ("If both the Attorney General and the U.S. Attorney must approve of a sensitive political prosecution before it goes forward, trust in the propriety of any resulting prosecutions will be higher."); Bruce A. Green & Rebecca Roiphe, *De-Weaponizing the Federal Government*, FORDHAM L.: VOTING RTS. & DEMOCRACY PROJECT (Feb. 28, 2023, 11:40 AM) [hereinafter Green & Roiphe, *De-Weaponizing the Federal Government*], <https://fordhamdemocracyproject.com/2023/02/28/de-weaponizing-the-federal-government> [<https://perma.cc/7HJR-976B>] (suggesting that Congress consider requiring "a nonpartisan approval process" in the executive branch "for certain politically-charged investigations and prosecutions").

113. Sassoon Letter, *supra* note 20.

114. *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 61-62 (2020) (statement of Aaron S.J. Zelinsky, Assistant U.S. Att'y).

115. See 5 U.S.C. § 2302(b)(8)(A), (C) (2024) (forbidding adverse employment action against federal employees who disclose certain information about abuses of authority and other misconduct to the public or to Congress).

116. See Mika C. Morse, Note, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 439 (2010) ("[E]ven though government employees are protected by whistleblower protection laws, it is unclear whether these laws supersede government lawyers' confidentiality obligation.").

should have discretion to report unremedied abuses of authority to other watchdogs in the federal government, such as the DOJ Inspector General or, if necessary, to Congress.¹¹⁷ Further, the mechanisms for enforcing federal whistleblower protections and other federal employment protections, which are notoriously ineffective,¹¹⁸ should be strengthened. Authorizing federal prosecutors to disobey wrongful directions from above may have little impact unless their jobs are better protected when they do so.

Fourth, Congress could exercise authority apart from lawmaking. In confirmation proceedings, members of Congress customarily ask nominees for Attorney General and for other high-ranking positions in DOJ to commit to protecting federal prosecutions from partisan influence, and not to exert such improper influence.¹¹⁹ Congress could exercise significantly greater oversight of the operation of DOJ to ascertain whether these promises are being kept.¹²⁰ While there may be separation-of-powers limits on Congress's ability to investigate decisions that are within DOJ's discretion,¹²¹ Congress can inquire into whether the

117. See *supra* text accompanying notes 67-72 (discussing the fiduciary duty to disclose conflicts of interest to the client). If one regards federal government agencies and offices as independent entities, then confidentiality rules generally restrict government lawyers from disclosing wrongdoing outside their own agencies or offices. But disclosures of perceived wrongdoing should be permitted at least to other government agencies that are designed to serve as a check on abuses by one's "client." Otherwise, the other agencies and offices of the federal government cannot effectively serve their intended function. Cf. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1080 (2007) ("As a policy matter the federal government's whistleblower protection seems to go too far in allowing government lawyers to blow the whistle externally without first requiring them to try internal whistleblowing.").

118. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 944 (2009) ("[W]histleblower-retaliation complainants are often bogged down in administrative proceedings and may never have a timely opportunity to argue their cases before an independent administrator or the judiciary."). For proposals to strengthen federal whistleblower laws, see Nancy M. Modesitt, *The War on Whistleblowers*, 6 U. PA. J.L. & PUB. AFF. 603, 627-40 (2021).

119. See Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. LAW & PUB. POL'Y 217, 285 (2020). We have previously suggested making it harder for the President to circumvent the confirmation process for DOJ officials. See Green & Roiphe, *Depoliticizing Federal Prosecution*, *supra* note 112, at 834-42.

120. See, e.g., Green & Roiphe, *supra* note 76, at 683-85 (observing that occasional congressional inquiries into the politicization of federal prosecutors' power are important but, for various reasons, not the preferable way to hold federal prosecutors accountable); Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 101-16 (2010).

121. Smith, *supra* note 120, at 109-10.

officials employed unconstitutional or otherwise unlawful considerations,¹²² including in situations where it appears that DOJ has acted to promote partisan political objectives. Congress has recently seemed less interested in ascertaining whether federal prosecutors weaponize or politicize their power than in exploiting inquiries into this subject for political advantage,¹²³ but one can envision a future Congress engaging in consistent, bipartisan oversight.

Finally, and most radically, Congress might test the limits of its constitutional authority by restructuring DOJ to make it independent of the President, to make U.S. Attorneys independent of DOJ leadership,¹²⁴ or perhaps even to make individual prosecutors entirely independent of DOJ leadership, subject only to termination for improprieties.¹²⁵ Such legislation would insulate those deciding whom and how to prosecute from those at the top of DOJ hierarchy who are closest to the President and most likely to make decisions to promote the President's personal interests or partisan political interests. At a minimum, Congress could direct a prosecutor assigned to a case to exercise the prosecutor's best professional judgment about what measures to take when a prosecutor reasonably believes that following a higher-up's direction would result in a breach of fiduciary duty. Essentially, this sort of direction would make line prosecutors more like the Independent Counsel in *Morrison v. Olson*.¹²⁶ Although it seems unlikely that the current Supreme Court would uphold a law protecting federal prosecutors from presidential removal,¹²⁷ political forces might discourage some

122. *Id.*

123. See Green & Roiphe, *De-Weaponizing the Federal Government*, *supra* note 112 (discussing the establishment in 2023 of a subcommittee of the House of Representatives on "Weaponization of the Federal Government" which may "merely engage in its own 'weaponization' by using Congress's investigatory power to achieve partisan objectives").

124. See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 413-39 (2009) (reviewing and ultimately rejecting arguments for U.S. Attorneys' independence).

125. See, e.g., Andrew Nisco, *The Independent Attorney General: An Analysis of Why the Office Should Be Insulated from Presidential Political Imperatives*, 36 GEO. J. LEGAL ETHICS 743, 770 (2023); see also Leslie B. Arffa, Note, *Separation of Prosecutors*, 128 YALE L.J. 1078, 1115-29 (2019) (advocating for the decentralization of federal criminal law enforcement).

126. This would be the most effective check on improper partisan influence from above. But besides its political improbability, this approach is the most susceptible to a separation-of-powers challenge, given contemporary views about plenary presidential power. And wholly apart from constitutional concerns, one might object that the cure is worse than the disease, because prosecutors would become less accountable to higher-ups within DOJ or elsewhere in the executive branch, and therefore at greater liberty to abuse their fiduciary authority.

127. See, e.g., *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (staying a lower court's order enjoining the removal of members of the Consumer Safety Protection Commission); *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025) (staying a lower court's order enjoining the President from

Presidents from removing prosecutors who comply with a law expressly requiring them to ignore directions to breach their fiduciary duties as they understand them.

B. The Federal Judiciary's Role

This Section explains how courts can enable subordinate federal prosecutors to fulfill their fiduciary obligations. Under separation-of-powers principles, courts have considerably less authority than Congress to regulate DOJ. But the separation of powers does not justify the excessive deference to prosecutors that pervades the federal courts. In our view, courts can and should use their supervisory authority more assertively to protect subordinate prosecutors' role as fiduciaries, including by insulating subordinate prosecutors from partisan political pressure.

1. Judicial Authority and Separation-of-Powers Limitations

While judges are not ordinarily conceived of as lawmakers or law-enforcement authorities, courts have various sources of power to adopt and enforce rules and laws regulating lawyers, including federal prosecutors. Federal courts' regulatory authority is generally implicit in their constitutional role. Federal courts have inherent constitutional authority to supervise lawyers practicing before them by adopting standards of professional conduct and sanctioning lawyers who violate those standards.¹²⁸ Federal courts also have supervisory authority over federal criminal proceedings,¹²⁹ which includes the power to enforce the constitutional and statutory procedures relevant to prosecutors appearing in their courts. State judiciaries also have some lawmaking and enforcement authority, even over federal prosecutors' conduct. A federal law known as the

removing a member of the National Labor Relations Board and a member of the Merit Systems Protection Board).

128. *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 603 F.3d 888, 890 (11th Cir. 2010) ("That Courts have the inherent and main—if not exclusive—authority (along with the duty and responsibility) to supervise their Bar members is . . . no innovative idea." (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 41-42 (1991))). Regarding supervisory authority over the federal bar, see, for example, Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1337-74 (2003).
129. *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) ("The supervisory power . . . permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943))). Regarding courts' supervisory authority over federal criminal proceedings, see generally Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

McDade Amendment requires federal prosecutors to abide by the ethics rules of the states where they practice.¹³⁰ Further, the courts of the states where federal prosecutors are licensed may discipline them for professional misconduct occurring in federal proceedings.¹³¹

Although the precise scope of federal courts' authority is fuzzy and contested,¹³² their authority is certainly more limited than that of Congress and more circumscribed by separation-of-powers considerations. To begin with, Congress itself can limit courts' regulatory reach; courts generally make and enforce their professional-conduct rules and pronouncements in the gaps left by federal law. Insofar as courts can make law for lawyers, whether pursuant to legislative delegation or supervisory authority, they are on firmer footing in regulating prosecutors' in-court conduct or other conduct that threatens the integrity of the adjudication.¹³³ Courts are expected to be most deferential when prosecutors decide whether to conduct an investigation, bring or continue to pursue criminal charges, offer a plea bargain, or engage in similar conduct that is generally entrusted to prosecutorial discretion.¹³⁴

2. Possibilities for Judicial Protection

Federal courts cannot order federal prosecutors to bring charges if DOJ declines to prosecute the President's friends,¹³⁵ and criminal defendants must

130. For a discussion of the McDade Amendment and its origins, see Zacharias & Green, *supra* note 84, at 214-24.

131. See, e.g., *In re Howes*, 940 P.2d 159, 169-71 (N.M. 1997) (censuring a federal prosecutor licensed in New Mexico for violating the no-contact rule in the District of Columbia).

132. See Zacharias & Green, *supra* note 128, at 1308-14; Zacharias & Green, *supra* note 84, at 247-49.

133. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 448, 463-65 (2002).

134. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); see also Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 260 (2017) ("Prosecutors exercise near-plenary power at a number of different stages in the criminal adjudication process.").

135. Federal courts cannot require a prosecutor to initiate an investigation or prosecution. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1967). And, other than in contempt-of-court cases, they cannot appoint a special prosecutor to investigate or prosecute a case. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987) ("[A] court has the authority to initiate a prosecution for criminal contempt . . ."). Federal courts also have limited authority to deny a prosecutor's application to dismiss charges once they have been brought, although federal courts may have authority to deny such an application when it is made in bad faith. Compare *Rinaldi v. United States*, 434 U.S. 22, 31 n.17 (1977) (per curiam) ("[A] result which leaves intact a conviction obtained through a prosecution tainted by bad faith may encourage repetition of the impropriety . . ."), with *United States v. HSBC Bank USA, N.A.*, 863 F.3d

surmount high evidentiary hurdles to invoke federal courts' constitutional authority to dismiss politically motivated prosecutions on due-process, equal-protection, or other related grounds.¹³⁶ In *Wayte v. United States*, the Supreme Court assumed that it would violate the First or Fifth Amendments to single out draft protestors for prosecution in retaliation for their political speech.¹³⁷ Sassoon's letter to Attorney General Bondi cited the decision for the broader proposition that "politically motivated prosecutions violate the Constitution."¹³⁸ But judicial decisions dismissing politically motivated prosecutions on constitutional grounds are vanishingly rare.¹³⁹

Where the Constitution does not provide relief, rules of professional conduct, adopted and enforced pursuant to the courts' supervisory authority over the bar, give courts a solid basis to punish prosecutors' political partisanship in criminal prosecution.¹⁴⁰ Professional-conduct rules codify lawyers' fiduciary duties, such as the duties of competence, confidentiality, and loyalty.¹⁴¹ In disciplinary proceedings, these rules are ordinarily applied to lawyers for private clients.¹⁴² Federal courts should interpret and apply existing rules to incorporate

125, 129 (2d Cir. 2017) ("In the absence of evidence to the contrary, the Department of Justice is entitled to a presumption of regularity – that is, a presumption that it is lawfully discharging its duties. Though that presumption can of course be rebutted in such a way that warrants judicial intervention, it cannot be preemptively discarded based on the mere theoretical possibility of misconduct.").

136. Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 166 (2016) ("The federal constitutional case law sets a high bar to a criminal defendant who claims to have been charged selectively, vindictively, or discriminatorily in violation of the Constitution . . ."); see also Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 750–51 (2005) (noting the difficulty of making the requisite constitutional showing of bad faith).

137. 470 U.S. at 608–10, 611–13.

138. Sassoon Letter, *supra* note 20, at 2.

139. Compare *United States v. Steele*, 461 F.2d 1148, 1151–52 (9th Cir. 1972) (overturning a conviction for refusing to answer census questions, finding the defendant was singled out for prosecution for publicly advocating refusal to cooperate with the census), with *United States v. Rundo*, 108 F.4th 792, 799–804 (9th Cir. 2024) (rejecting a claim that a defendant prosecuted for violence against left-wing counter-protestors was treated differently from left-wing protestors who engaged in similar conduct).

140. Although a court cannot require a prosecutor to initiate a criminal prosecution, it can discipline a prosecutor who, under the applicable professional-conduct rules, had an impermissible conflict of interest when making the decision not to prosecute. For example, a prosecutor who made the decision not to bring charges against a family member could and should be disciplined for failing to recuse herself.

141. MODEL RULES OF PRO. CONDUCT r. 1.1, 1.6–1.7 (A.B.A. 2023).

142. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 754 (2001) ("[M]ost discipline occurs in cases involving the private civil bar.").

prosecutors' fiduciary duties to the public, including their duty to ignore partisan considerations in their work. Courts should initiate disciplinary proceedings when federal prosecutors appear to be giving undeserved leniency to political favorites or undeservedly pursuing political enemies, and courts should sanction prosecutors who are discovered to have knowingly used their authority to achieve their own or others' partisan political objectives, in breach of their fiduciary duties of competence and loyalty.

Strict judicial enforcement of the rules of conduct in these contexts would mean that courts must overcome their customary deference to prosecutors. Currently, courts play only a modest role in regulating federal prosecutors, whether by enforcing relevant constitutional and statutory provisions or by exercising their supervisory authority. For example, courts enforce prosecutors' constitutional and statutory disclosure obligations, including, on rare occasions, by overturning convictions when prosecutors engage in misconduct, such as by wrongly withholding evidence.¹⁴³ Some courts have also interpreted professional-conduct rules to expand on prosecutors' disclosure obligations,¹⁴⁴ and have sanctioned or disciplined prosecutors for discovery violations.¹⁴⁵ But courts are generally reluctant to regulate prosecutors, particularly through the disciplinary process, for a host of reasons, including that prosecutors are politically powerful and well-resourced, that their "clients" do not complain, and that they are thought to deserve the benefit of the doubt on questions of professional impropriety.¹⁴⁶ Consequently, it would be a "sharp break from traditional practice for federal courts to regulate federal prosecutors through the disciplinary process."¹⁴⁷

Courts have been particularly reluctant to inquire into prosecutors' charging decisions, as distinct from their courtroom conduct or other conduct as trial advocates. Not only do "separation-of-powers considerations . . . make federal courts deferential to federal prosecutors' charging and plea-bargaining decisions," but "[c]ourts have no clear disciplinary standard to enforce against

¹⁴³. See, e.g., *Wearry v. Cain*, 577 U.S. 385, 386 (2016) (per curiam).

¹⁴⁴. See, e.g., *In re Kline*, 113 A.3d 202, 204 (D.C. 2015).

¹⁴⁵. See, e.g., *In re Jordan*, 913 So. 2d 775, 784 (La. 2005).

¹⁴⁶. See *In re Dobbie*, 305 A.3d 780, 826 (D.C. 2023) (Deahl, J., dissenting) ("But perhaps out of respect for their institutional role, disciplinary bodies rarely sanction prosecutors, and when they do, they often impose no more than a slap on the wrist."); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 890-95 (2015).

¹⁴⁷. Green & Roiphe, *supra* note 76, at 682.

prosecutors who acted on political motivations, and federal courts would be reluctant to adopt and apply one.”¹⁴⁸

Consequently, large swaths of federal prosecutorial decision-making have been relegated principally to self-regulation by DOJ and individual prosecutors.¹⁴⁹ Although we have argued that prosecutors’ fiduciary obligations are legal ones, courts, which regularly elaborate on private lawyers’ fiduciary obligations, rarely explicitly address prosecutors’ fiduciary duties. Courts’ expectations regarding prosecutorial conduct are also rarely rooted expressly in prosecutors’ fiduciary role. In practice, prosecutors’ understandings about what it means to seek justice when making discretionary decisions are memorialized in internal written policy,¹⁵⁰ expressed in dicta in court opinions, and incorporated in other writings that some might regard as “soft law.”¹⁵¹ They are passed down in trainings, through supervision, or through similar internal interactions. The relevant expectations are largely enforced, if at all, through employment action, internal discipline (albeit rarely) by DOJ’s Office of Professional Responsibility, or informal expressions of approval or disapproval.

In the past decade, those asserting that federal prosecutors are abusing their power toward partisan ends have urged courts to respond more actively in the context of adjudication by scrutinizing charging decisions and other discretionary decisions more closely and providing defendants a remedy for abuses of discretion.¹⁵² But courts have extremely limited constitutional and statutory authority to inquire into whether prosecutors’ decisions are politically motivated and, if so, to afford a remedy. Consequently, criminal defendants, such as President Trump, have failed to persuade the courts that prosecutors were politically weaponizing their power.¹⁵³ Amici gained only slightly greater traction, arguing

148. *Id.*; see also Green & Roiphe, *supra* note 6, at 822 (discussing the necessity of a monitoring gap for prosecutors and other fiduciaries).

149. See George, *supra* note 136, at 739-40 & n.4 (citing an example of a federal prosecutor who received a formal reprimand for taking political considerations into account or appearing to do so).

150. See Fish, *supra* note 134, at 271-73 (discussing DOJ’s “United States Attorneys’ Manual” and individual federal prosecutors’ offices’ internal policies).

151. See Bruce A. Green & Jessica A. Roth, *Subordinate Prosecutors’ Independence*, 55 STETSON L. REV. (forthcoming 2025) (manuscript at 5-6), https://ssrn.com/abstract_id=5309879 [<https://perma.cc/KRJ6-9XW9>].

152. See, e.g., Green & Levine, *supra* note 136, at 146-48; Brief of Amicus Curiae, State Democracy Defenders Fund, Lawyers Defending American Democracy, and Individual Experts in Legal Ethics at 19, *United States v. Adams*, 777 F. Supp. 3d 185 (S.D.N.Y. 2025) (No. 24-cr-00556); Brief of Former Federal Prosecutors and High-Ranking Department of Justice Officials as Amici Curiae at 5, *United States v. Flynn*, 507 F. Supp. 3d 116 (D.D.C. 2020) (No. 17-cr-00232).

153. See *United States v. Trump*, No. CR 23-257, 2024 WL 3638344, at *4-5 (D.D.C. Aug. 3, 2024).

in General Michael Flynn’s case in the first Trump Administration and in Mayor Adams’s case in the current one that DOJ leadership was doing the President’s political bidding in moving to dismiss prosecutions brought by their predecessors. The district court’s inquiry in the Flynn case was shut down by the court of appeals,¹⁵⁴ and the district court in the Adams case, although critical of DOJ’s leadership, was constrained to dismiss the indictment as the government requested.¹⁵⁵

Disciplinary grievances filed by advocacy groups and other outsiders against federal prosecutors for pursuing partisan political objectives have fared little better. For example, grievances against Attorney General Barr in the prior Trump Administration and against Attorney General Bondi in the current one went nowhere.¹⁵⁶ One might take the view, at least in retrospect, that many of the grievances against Department officials in the past decade have themselves been politically motivated.¹⁵⁷ The notable exception was the grievance against Jeffrey Clark, who served as the Acting Assistant Attorney General for the Civil Division of DOJ at the end of the first Trump Administration.¹⁵⁸ Based largely on the testimony of Clark’s colleagues in DOJ, a D.C. Bar hearing committee found that Clark attempted to persuade DOJ’s leadership to announce falsely that its investigation disclosed irregularities in the 2020 presidential election that may have impacted the outcome.¹⁵⁹ The committee concluded that Clark had “attempted to engage in reckless dishonesty” and, based on this unusual disciplinary finding, recommended his suspension.¹⁶⁰

While it would be as difficult for courts, as for Congress, to codify more specific professional expectations arising out of prosecutors’ fiduciary duty to the public, courts have an alternative that Congress lacks. Courts can interpret and

^{154.} See *In re Flynn*, 961 F.3d 1215, 1221 (D.C. Cir. 2020).

^{155.} See *Adams*, 777 F. Supp. 3d at 236–38.

^{156.} See Jacqueline Thomsen, *An Ethics Complaint Against Bill Barr Was Rejected, and It Has Lawyers Worried*, NAT’L L.J. (June 9, 2021), <https://www.bloomberglaw.com/document/XBB1SF3G000000> [<https://perma.cc/RVN6-LGED>]; Lisa Willis, *Florida Bar to Pam Bondi Critics: Hands Tied Until She’s Out of Office*, DAILY BUS. REV. (June 6, 2025), <https://www.law.com/dailybusinessreview/2025/06/06/florida-bar-to-pam-bondi-critics-hands-tied-until-shes-out-of-office> [<https://perma.cc/W8A6-P6EX>].

^{157.} Cf. Bruce A. Green & Rebecca Roiphe, *Impeaching Legal Ethics*, 49 FLA. ST. U. L. REV. 447, 448–52 (2022) (discussing the use of rules of professional conduct as political weapons).

^{158.} Report and Recommendation of Hearing Committee Number Twelve at 1–6, 10, *In re Jeffrey B. Clark*, No. 22-BD-039 (D.C. Ct. of Appeals Bd. on Pro. Resp., Hearing Comm. No. Twelve, Aug. 1, 2024), <https://www.dcbbar.org/ServeFile/GetDisciplinaryActionFile?fileName=HCJeffreyBClark22BD039.pdf> [<https://perma.cc/4B5K-82TD>].

^{159.} *Id.* at 38–70.

^{160.} *Id.* at 195, 212–13.

enforce professional-conduct rules that already codify lawyers' fiduciary duties to clients while limiting lawyers' advocacy on clients' behalf. Traditionally, courts have not applied these rules to prosecutors, but when prosecutorial power appears to have become politicized, courts can and should serve as referees.

Outside the context of criminal prosecutions, courts are accustomed to interpreting and applying imprecise rules of professional conduct, including those giving expression to lawyers' fiduciary obligations. For example, lawyers are regularly disciplined for violating a duty of competence that could scarcely be expressed less precisely.¹⁶¹ Rather than elaborating on what competent representation entails in any given situation, the relevant rule states simply, "A lawyer shall provide competent representation to a client."¹⁶² The duty of loyalty, given meaning through conflict-of-interest rules, is elaborated with only marginally greater precision. For example, the most broadly applicable rule states that "[a] concurrent conflict exists if . . . there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer."¹⁶³ The rule is given meaning by countless opinions interpreting and applying it.¹⁶⁴

Rules protecting the integrity of judicial proceedings by placing limits on lawyers' advocacy are similarly open-textured, such as a rule forbidding lawyers from "engag[ing] in conduct that is prejudicial to the administration of justice."¹⁶⁵ Courts also apply open-textured rules when lawyers engage in misconduct while serving in fiduciary roles aside from providing legal representation, such as a bankruptcy trustee.¹⁶⁶ And courts augment the open-textured rules by issuing and enforcing pronouncements in opinions on lawyers' duties, such as the duty of candor.¹⁶⁷ Courts have latitude to interpret the relevant professional-conduct rules and to make judicial pronouncements dynamically, in common-law fashion, drawing on conventional professional understandings.¹⁶⁸

Courts could regulate federal prosecutors in the same way rather than leaving them to decide almost entirely for themselves, as fiduciaries, what it means to

161. See, e.g., *In re Munn*, 553 P.3d 1039, 1049–51 (Or. 2024); *Bd. of Pro. Resp. v. Manlove*, 527 P.3d 186, 199–200 (Wyo. 2023); *In re Breault*, 913 S.E.2d 691, 698–99 (Ga. 2025).

162. MODEL RULES OF PRO. CONDUCT r. 1.1 (A.B.A. 2023).

163. *Id.* r. 1.7(a).

164. See, e.g., *Kenneth P. Jacobus, P.C. v. Kalenka*, 464 P.3d 1231, 1238–39 (Alaska 2020); *Bd. of Trs. of Leland Stanford Junior Univ. v. Zhang*, 659 F. Supp. 3d 1061, 1069 (N.D. Cal. 2023); *In re Wyatt's Case*, 982 A.2d 396, 407–11 (N.H. 2009).

165. MODEL RULES OF PRO. CONDUCT r. 8.4(d) (A.B.A. 2023).

166. See, e.g., *In re DiLieto*, 468 B.R. 510, 540–41 (Bankr. D. Conn. 2012).

167. See, e.g., *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 459 (4th Cir. 1993).

168. See, e.g., *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("[W]e are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines . . .").

seek justice. Indeed, once it is accepted that prosecutors' professional obligations in making discretionary decisions are legal obligations that grow out of their role as the client's fiduciary, it is natural for courts to oversee prosecutors' conduct more robustly by invoking open-ended professional-conduct rules that apply generally to advocates as fiduciaries. Among other things, when appropriate cases are presented, the disciplinary process can be used to instruct subordinate prosecutors not to succumb to partisan political influence (and to sanction those who do), to provide a justification and a motivation for resisting improper orders, and to discipline superiors when they pressure subordinates to implement politically motivated directions in breach of their fiduciary duties. Disciplinary proceedings are the one context where courts can elaborate on what is expected of prosecutors as fiduciaries because courts can initiate disciplinary proceedings on their own.¹⁶⁹

In Jeffrey Clark's case, for example, the disciplinary authority could have better justified its decision with reference to rules governing lawyers, including government lawyers, as fiduciaries. Clark sought to advise state officials, contrary to the available evidence, that there were material voting irregularities in the 2020 presidential election. The disciplinary panel found that he attempted reckless fraud, but it could equally have found that he violated the fiduciary duty, codified in the professional-conduct rules, to "provide competent representation to a client."¹⁷⁰ Although prosecutors and other public officials are rarely sanctioned for incompetence, because their "client" rarely complains, government lawyers have the same competence duty as other lawyers.¹⁷¹ Further, Clark evidently had a conflict of interest and prejudiced the administration of justice by attempting to use DOJ's authority to advance both President Trump's personal political interests and Clark's own interest in professional advancement in government. The

169. See *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983) ("[T]he court could have dealt with the [prosecutor's] offending argument by directing the District Court to order the prosecutor to show cause why he should not be disciplined, . . . or by asking the Department of Justice to initiate a disciplinary proceeding against him . . ."). Federal district courts have local rules providing for the initiation of disciplinary proceedings against attorneys. See, e.g., E.D. MICH. LOC. R. 83.22(c), (e); N.D. IOWA LOC. R. 83(f)(3).

170. D.C. RULES OF PRO. CONDUCT r. 1.1(a) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."); *id.* r. 1.1(b) ("A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.").

171. See, e.g., N.Y.C. Bar Comm. on Pro. Ethics, Formal Op. 2018-2 (2018) ("The duty of competence under Rule 1.1 establishes [prosecutors'] additional duties in the post-conviction context . . .").

D.C. disciplinary authorities could have taken advantage of the opportunity to elaborate on what they expect of government lawyers as fiduciaries.

The conventional rules also allow courts to elaborate on the relationship between subordinate prosecutors and their supervisors when the rules establishing prosecutors' fiduciary obligations are implicated. Rules governing lawyers who represent organizational clients can be read to empower federal prosecutors to resist higher-ups' directions to breach their fiduciary duties to the public because federal prosecutors' client is the United States, not their boss or the President.¹⁷² The questions of whether a lawyer must, may not, or need not follow the directions of clients or supervisory lawyers are within the proper ambit of professional-conduct rules and decisions interpreting them. Courts can clarify that a prosecutor, as a lawyer, is not required to follow a higher-up's direction to engage in professionally questionable conduct when the legality of the direction is uncertain.¹⁷³ And, if the conduct turns out to be impermissible, the subordinate prosecutor is not excused because a higher-up directed the conduct, unless the question of professional duty was arguable and a higher-up's resolution was reasonable.¹⁷⁴ At the same time, courts may discipline politically motivated officials in DOJ who instruct their subordinates to violate fiduciary duties because these higher-ups would be violating their obligation to provide reasonable supervision.¹⁷⁵

From a regulatory perspective, there is a value to initiating disciplinary inquiries when prosecutors appear to have used their power for political ends and in similar situations, even if the court cannot provide a remedy and may be unlikely to impose a litigation sanction or professional discipline. Exposing the relevant facts gives the court a basis to articulate and elaborate on the court's understanding of prosecutors' fiduciary obligations or other professional obligations. Where no formal discipline is warranted, a court's comments on the

172. See Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817, 1829-36 (2019).

173. See A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011) ("When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation.").

174. MODEL RULES OF PRO. CONDUCT r. 5.2(b) (A.B.A. 2023); see, e.g., *In re Lightfoot*, 217 F.3d 914, 917 (7th Cir. 2000) (explaining that the AUSA's reliance on her supervisor did not excuse misconduct, because it is unreasonable to believe that it is permissible for a lawyer to mislead the court).

175. MODEL RULES OF PRO. CONDUCT r. 5.1 (A.B.A. 2023). A disciplinary complaint was filed against Attorney General Bondi based in part on this rule. See Letter from Jon May, *supra* note 20. It is unclear whether the complaint had an adequate factual basis, but the Rule 5.1 theory is sound.

propriety of the prosecutors' conduct serve an informal regulatory function and promote political accountability by providing a transparent record.¹⁷⁶

Courts, and their disciplinary arms, have considerable discretion in how they use their supervisory power, and courts should exercise that discretion when, as in the Eric Adams prosecution, there is a well-founded claim that DOJ abused its discretion by making a charging decision based on impermissible political considerations.¹⁷⁷ Courts should not remain highly deferential to DOJ; they should take a stronger role in enunciating and enforcing ordinary fiduciary expectations for criminal prosecutors.

While there may be separation-of-powers limitations on courts' ability to discipline federal prosecutors for breaches of fiduciary duty, those limitations are yet to be determined. Both state and federal courts have disciplined federal-government lawyers for professional misconduct,¹⁷⁸ including under open-textured disciplinary standards.¹⁷⁹ Courts should not hesitate to sanction prosecutors who violate professional-conduct rules that express the fiduciary obligations of competence and loyalty, which are among lawyers' most fundamental obligations. While courts might deferentially review federal prosecutors' conduct as fiduciaries, as courts ordinarily do in evaluating fiduciary-breach claims, courts should not give prosecutors a free pass. To embolden prosecutors to seek justice, courts must themselves be emboldened to exercise their supervisory authority to

176. In general, courts make liberal use of shaming sanctions when lawyers engage in misconduct. For example, courts reprimand lawyers from the bench, in public opinions, or through formal admonitions. These sanctions may be thought to serve any of several functions, including expressing judicial expectations, deterring future misconduct, and providing a record to support harsher punishment for repeat offenders. Although the effectiveness of stigmatization in the criminal context has been much discussed, see, for example, Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006); and Note, *Shame, Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2194-2202 (2003), we are unaware of any social-science evidence regarding the effectiveness of public shaming for lawyers in general or prosecutors in particular. Nevertheless, courts and commentators assume that because prosecutors value their professional reputations, shaming sanctions are effective for prosecutors. See, e.g., *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (per curiam) ("A reprimand in a published opinion that names the prosecutor is not without deterrent effect."); Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 312-13 (2016).

177. See Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 165-70 (2022).

178. See, e.g., *In re Howes*, 940 P.2d 159, 170-71 (N.M. 1997) (per curiam) (censuring a federal prosecutor for violating the no-contact rule).

179. See, e.g., *In re Lightfoot*, 217 F.3d at 917-18 (reprimanding an AUSA for conduct unbecoming a member of the appellate bar).

instruct prosecutors on what is expected of them. There is no secret formula here – courts must have the courage of their convictions.

The recent federal indictment of former FBI Director James Comey will likely provide another opportunity for a federal court to elaborate on prosecutors' fiduciary obligations. As this Essay neared publication, President Trump publicly called for federal prosecutors to indict Comey and other political foes.¹⁸⁰ Trump then forced the resignation of Eric S. Siebert, the U.S. Attorney for the Eastern District of Virginia, who had declined to indict Comey due to insufficient evidence.¹⁸¹ Trump replaced Siebert with Lindsey Halligan, a White House staff member who had represented Trump personally but who had no experience in criminal prosecution.¹⁸² Disregarding the investigating prosecutors' memo explaining why there was no probable cause,¹⁸³ Halligan hurriedly presented the case to the grand jury – her first courtroom experience ever – while other prosecutors in the office disassociated themselves from it.¹⁸⁴ The grand jury rejected one charge, and more than a third of the grand jurors voted against the remaining two counts, which alleged that Comey lied to Congress.¹⁸⁵ The barebones indictment provided scant details to support the charges.¹⁸⁶

¹⁸⁰. Alan Feuer, Glenn Thrush, Maggie Haberman & Devlin Barrett, *Trump Demands that Bondi Move 'Now' to Prosecute Foes*, N.Y. TIMES (Sep. 20, 2025), <https://www.nytimes.com/2025/09/20/us/politics/trump-justice-department-us-attorneys.html> [https://perma.cc/J6HX-68Q2].

¹⁸¹. Glenn Thrush, Maggie Haberman, Jonah E. Bromwich, Alan Feuer & William K. Rashbaum, *U.S. Attorney Investigating Two Trump Foes Departs amid Pressure from President*, N.Y. TIMES (Sep. 19, 2025), <https://www.nytimes.com/2025/09/19/us/politics/erik-siebert-comey-letitia-james.html> [https://perma.cc/77ZU-RUXE].

¹⁸². Devlin Barrett & Glenn Thrush, *Trump's Handpicked Prosecutor Takes over Comey and James Cases*, N.Y. TIMES (Sep. 24, 2025), <https://www.nytimes.com/2025/09/22/us/politics/trump-lindsey-halligan-james-comey.html> [https://perma.cc/S8TT-ZL8Z].

¹⁸³. Katherine Faulders, Alexander Mallin & Peter Charalambous, *Prosecutors' Memo to New US Attorney Found No Probable Cause to Charge James Comey: Sources*, ABC NEWS (Sep. 25, 2025, 1:19 PM), <https://abcnews.go.com/US/prosecutors-memo-new-us-attorney-recommended-plans-charge/story?id=125925246> [https://perma.cc/2QE4-FW9W].

¹⁸⁴. Francesca Regalado, *Brief Comey Indictment Prompts Questions and Criticism*, N.Y. TIMES (Sep. 26, 2025), <https://www.nytimes.com/2025/09/26/us/politics/comey-indictment-legal-reaction.html> [https://perma.cc/5P96-UX6E]; Glenn Thrush, Maggie Haberman, Alan Feuer & Tyler Pager, *Inside the Trump Administration's Push to Prosecute James Comey*, N.Y. TIMES (Sep. 27, 2025), <https://www.nytimes.com/2025/09/27/us/politics/trump-comey-justice-department.html> [https://perma.cc/92K2-ZDY7].

¹⁸⁵. Jacob Rosen & Joe Walsh, *Judge Who Reviewed James Comey's Indictment Was Confused by Prosecutor's Handling of Case, Transcript Shows*, CBS NEWS (Sep. 26, 2025, 9:11 PM EDT), <https://www.cbsnews.com/news/judge-james-comey-indictment-confusion-trump> [https://perma.cc/TM9J-C5X3].

¹⁸⁶. Indictment, *United States v. Comey*, No. 1:25-CR-272 (E.D. Va. Sep. 25, 2025); Regalado, *supra* note 184.

As criminal proceedings in Comey's case progress, the district court will rightly focus on issues raised by the parties, such as whether the government's prosecution on the President's command violates due process, or whether the evidence is too weak or the charges too vague for the case to proceed. But when the proceedings end, the court will likely have a strong basis to initiate an inquiry into the propriety of Halligan's conduct and that of supervisory lawyers in DOJ who oversaw her. If so, the court should assess whether Halligan and higher-ups had a conflict of interest, because they served their own personal and political objectives along with those of the President, who was *not* their client. And it should consider whether Halligan and those above her represented the United States incompetently, because, in prosecuting a defendant whom they knew or should have known was unlikely to be convicted, they sought vengeance for the President, not justice.¹⁸⁷

CONCLUSION

Subordinate federal prosecutors are fiduciaries charged with protecting and promoting the public's interest in justice. As such, they cannot follow orders from supervisors to take inappropriate political considerations into account in making decisions in individual cases. If directed to do so, depending on the circumstances, they may have to resign from the case or DOJ. And in some instances, they may have to issue a public statement explaining the reasons for their departure.

Fulfilling fiduciary duties can be difficult given supervisors' pressure, personal ambition, and reputational consequences. Even if prosecutors overcome these obstacles and comply with their fiduciary obligations by, for example, resigning publicly, the message is not always sufficient. Political actors can fill the empty posts with loyalists. Furthermore, traditional mechanisms of accountability are often inadequate since political actors can fill DOJ units designed to investigate and punish errant prosecutors with loyalists as well. Finally, political appointees and elected officials can mask improper weaponization of prosecution as an effort to combat politicization, making it difficult for the public to assess the situation and hold politicians accountable.

The legislature and judiciary can work within the confines of the separation-of-powers doctrines to create more transparency and buttress federal prosecutors' fiduciary obligations. Congress could enact more specific rules of conduct,

187. See U.S. Dep't of Just., Just. Manual § 9-27.220 cmt. (2023) ("[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.").

design processes to address prosecutions that raise the specter of political motivation, and provide more robust employment protection for federal prosecutors who blow the whistle. The judiciary could use its well-established supervisory power to shame or sanction lawyers, developing a more detailed understanding of what it means to seek justice by elaborating on existing rules of professional conduct. In some circumstances, courts can also hold hearings to develop a factual record that will provide support and reputational protection for subordinate prosecutors.

In recent years, the political parties have virulently disagreed about which prosecutors have been politically weaponizing their power, but there appears to be a bipartisan recognition that such weaponization is a significant problem that should be averted. It follows that subordinate prosecutors, who are less likely to be politically motivated, need greater protection from higher-ups' temptation to misuse this power to reward friends and punish foes. Far from offering the last word, this Essay urges a serious public discussion about how best to provide that protection while discouraging abuses of prosecutorial power.

The starting point for this conversation is the recognition that federal prosecutors' obligation to seek justice in a nonpartisan fashion is not a vague aspiration, but a legal obligation arising from the fiduciary duties of competence and loyalty that federal prosecutors owe to the United States. This foundational understanding must guide future legislative and judicial undertakings to ensure that federal prosecutors wield their power without fear or favor.

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