

TESTIMONY OF RICHARD W. PAINTER
FORMER BUSH ADMINISTRATION WHITE HOUSE ETHICS OFFICIAL
BEFORE THE SUBCOMMITTEE ON GOVERNMENT OPERATIONS
OF THE COMMITTEE ON OVERSIGHT AND REFORM
U.S. HOUSE OF REPRESENTATIVES
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Mr. Chairman, Ranking Member and Members of the Subcommittee, thank you for inviting me to testify about the situation at the U.S. Postal Service involving Postmaster General Louis DeJoy.

My name is Richard Painter. I am a professor at the University of Minnesota Law School and a member of the bar of the State of New York. From 2005 to 2007 I was the chief White House ethics lawyer and Associate Counsel to the President under President George W. Bush. For about 30 years I was a Republican. Since 2018 I have been an independent.¹ I have strongly urged that candidates and office holders of both political parties adhere to high ethical standards.²

I testify before you today based in part on my extensive experience with the vetting standards in the Bush White House for financial conflicts of interest and other clearance issues for senior appointees of the president. Although the Postmaster General is not an appointee of the president, the vetting standards in the Bush White House conformed with what is ethically appropriate for senior officials throughout the executive branch, including the Postmaster General.

Financial Conflicts of Interest

In the Bush White House, I was the principal lawyer responsible for clearing financial conflicts of interest for White House staff as well as for Presidential appointees and nominees to agencies throughout the executive branch. My deputy was Emory Rounds, a former Navy officer who became a commissioned officer in the Bush White House and recently was nominated by President Trump and confirmed by the Senate as Director of the United States Office of Government Ethics (OGE).

In clearing financial conflicts of interest, Emory and I, with the help of others, carefully reviewed the financial disclosure form (OGE Form 278) for each prospective appointee or nominee before the President made a final decision on the appointment or nomination. President Bush made it clear that nomination or appointment was subject to a thorough ethics review and it was our responsibility to conduct that review.

¹ In 2018 I ran as a candidate for the United States Senate in the open primary of Minnesota's Democrat Farmer Labor Party (DFL) although I expressly identified myself as an independent and not a member of either political party.

² See Stephanie Saul, Kenneth P. Vogel and Danny Hakim, *Will Doug Emhoff's Legal Career Be an Issue for the Biden-Harris Ticket?*, New York Times, September 8, 2020 ("'He should leave the firm entirely,' said Richard W. Painter, who served as chief White House ethics counsel during the George W. Bush administration. 'Leave of absence still imputes the financial interests of the firm to him.' He added that clients that pay the firm could be accused 'of trying to buy influence.'")

We told each prospective nominee or appointee that financial holdings that conflicted with official duties must be sold. No exceptions.

The reason for this is simple. The American people must be able to trust that holders of public office are motivated solely by doing what is right for the country, not by what would increase the value of their investments. Any conflict of interest in the executive branch no matter how small, casts a shadow on the probity of the government's action. Even for the most upright and ethical executive branch employee, removing the temptation to put oneself, rather than one's country, first is critical. Making money in the private sector is laudable. Making more than one's allowed salary from government service – or even appearing to profit from government service -- is an egregious breach of the public trust. A representative democracy that tolerates such conduct will not last.

The foregoing concept is reflected in the federal conflict of interest statute, 18 U.S.C. § 208, which provides that it is a federal crime to participate in a particular United States government matter that has a direct and predictable effect on one's personal financial interests. If an executive branch employee owns stock or stock options in a company and participates in a particular government matter that has a direct and predictable effect on the financial interests of the company, that federal employee commits a crime. The crime can be a felony. One can go to jail.

The statute applies when there is a “particular United States government matter.”³ By regulation, OGE has clarified that a “particular matter” is any matter “that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.”⁴ This definition is important because it makes clear that the conflict of interest statute covers more than just a particular matter involving specific parties (“party matter”), such as a government contract, grant, or litigation. It also covers any matter that focuses on the interests of a “discrete and identifiable class of persons,” such as an agency's contractors or a specific industry.

This means that criminal conflicts of interest can arise under this statute if the government official participates in agency deliberations, recommendations or decisions concerning any one of a wide range of matters including but not limited to:

- industry-wide regulations, if the employee has a financial interest in a company that is within the regulated industry;
- agency rules that apply to all contractors, if the employee has a financial interest in a company that is an affected agency contractor;
- agency policies, procedural changes, or planning activities that have a direct and predictable effect on the agency's demand for contractors, if the employee has a financial interest in an agency contractor; and
- agency policies and specifications that have a direct and predictable effect on the tasks performed by contractors or the contract performance costs of contractors, if the employee has a financial interest in a company that is one of those agency contractors.

³ 18 U.S.C. § 208(a).

⁴ 5 C.F.R. § 2640.103(a).

As I bluntly told Goldman Sachs CEO Hank Paulson in 2006: If he wanted to become Treasury Secretary he would have to sell all of his stock in Goldman Sachs – worth about six hundred million dollars. His patriotic response was that he had already assumed that he would have to sell the stock because it was intuitive that one cannot be Treasury Secretary while owning stock in Goldman Sachs or any other entity regulated by the Treasury Department or one that does business with the Treasury Department. The stock must be sold, and any stock options must be cashed out, cancelled out or otherwise disposed of. No exceptions.

I have never been in a situation where I was required to sell six hundred million dollars' worth of stock in my personal portfolio – in my family \$60,000 is a very large sum of money. But I tried as best I could to empathize with Mr. Paulson. I also quickly told him that he could obtain a “certificate of divestiture” (CD) from the Office of Government Ethics. A CD, if issued prior to sale, allows the government official to avoid paying capital gains tax on the sale of stock, and instead to transfer his existing basis in the stock into “permitted property,” such as diversified mutual funds or Treasuries, that are bought with the sale proceeds.⁵ This means that the official will only pay the tax later when those “roll over” assets are sold. In Paulson’s case, the CD clearly eased the financial burden of divestiture, potentially saving him tens of millions of dollars in capital gains taxes. This tax treatment is justified on the theory that he would not have had to sell the stock if he had not entered government service. Postmaster General DeJoy should have divested from his conflicting assets, and he could have eased the burden by requesting a CD. The program exists for that very reason.

In short, Congress has established both a carrot and a stick to eliminate conflicts of interest in the executive branch. The carrot is very favorable tax treatment of government officials who sell conflict creating assets. The stick is the criminal penalties in 18 U.S.C. § 208 for executive branch officials who do not sell such assets before participating in government matters affecting their financial interests. These statutes apply to the Postmaster General.

These rules were clearly and faithfully applied during the Bush Administration. Nobody was permitted to head an agency while owning stock in a company that has contracts with that agency. I do not recall any exceptions. I do recall agonizing over whether a Deputy Counsel to the President should be required to sell stock in the Xerox Corporation because the Counsel’s office had a photocopy machine. The alternative was for the Deputy Counsel to agree to an ethics pledge where he would delegate to another lawyer or paralegal any and all decisions about how many copies to make when additional hard copies of documents were required. The Bush White House expected other executive branch agency officials to hold themselves to similarly high standards of conduct. Even the appearance of a violation of 18 U.S.C. § 208, no matter how small, was unacceptable. A violation of the criminal conflict of interest statute, after all is a federal crime.

This includes the Postmaster General. He is not appointed by the President, but he is still part of the executive branch of which the President is the head. The President has authority under the

⁵ 26 U.S.C. § 1043; 5 C.F.R. §§ 2634.1003(b), 2634.1006.

Constitution to remove a postmaster including the Postmaster General.⁶ A President thus cannot hide behind the Board of Governors of the United States Postal Service to avoid his constitutional responsibility to make sure that the Postmaster General complies with criminal conflict of interest statutes. As the famous sign on President Harry Truman’s desk read “The Buck Stops Here.”

I cannot imagine a President – or a Board of Governors of the United States Postal Service – tolerating a Postmaster General who owns stock in a company that contracts with the USPS, particularly a large contract with the USPS as opposed to a contract with a single post office. For purposes of the criminal conflict of interest statute, the conflict of interest would be unworkable. It is not enough for a Postmaster General who owns stock in a USPS contractor to recuse from particular party matters to which the contractor is a party. The criminal conflict of interest statute applies not only to the particular party matter which is the contract itself, but also to all particular matters including USPS rules and regulations, specifications, scheduling orders, and other system wide matters that have a direct and predictable effect on the contractor. The Postmaster General cannot participate in any of these decisions without violating the statute unless he first sells his stock in the contractor.

As I discussed earlier, the conflict of interest statute covers more than particular party matters. It also covers matters focused on the interests of a “discrete and identifiable class of persons.” OGE calls these “particular matters of general applicability.” I understand based on Postmaster General DeJoy’s public financial disclosure form that he holds at least \$30 million – and potentially as much as \$70 million – in stock in XPO Logistics, a major contractor with the United States Postal Service (USPS).⁷ In addition, he reports a number of stock options for XPO Logistic stock but has not provided a value.⁸

The *New York Times* reports that XPO is a major contractor of the USPS: “Through about 100 contracts with XPO Logistics and its subsidiaries, the Postal Service has paid the firm \$33.7 million to \$45.2 million annually since 2014 for services that include managing transportation and providing support during peak times.”⁹ The *New York Times* also reports that Mr. DeJoy’s short tenure at USPS has been an especially lucrative time for the company: “The documents also show a surge in revenue for XPO from the Postal Service since Mr. DeJoy took over on June 15. The Postal Service paid XPO Logistics and its subsidiaries about \$14 million over the past 10 weeks, compared with \$3.4 million during the same time frame in 2019 and \$4.7 million in 2018.” In 2019, XPO Logistics made the list of top contractors of USPS.¹⁰

Because Mr. DeJoy holds this USPS stock he must recuse not only from particular party matters, like the contract XPO Logistics has with USPS, but also from particular matters of general applicability affecting XPO Logistics. As I also discussed earlier, this would include such

⁶ See *Myers v. United States*, 272 U.S. 52 (1926) (upholding the president’s constitutional authority to remove a postmaster at will despite a federal statute providing that removal could only be for cause).

⁷ New Entrant Financial Disclosure Report (OGE Form 278e) of Louis DeJoy, Postmaster General, at Part 2, Lines 10.1 and 19.5.1, filed on June 15, 2020, <https://bit.ly/3ior6xV>.

⁸ *Id.*, Part 6, Lines 10.4, 10.5, 10.6, 19.5.2, 19.5.3, and 19.5.4.

⁹ Luke Broadwater and Catie Edmondson, Postal Service Has Paid DeJoy’s Former Company \$286 Million Since 2013, *New York Times*, Sep. 2, 2020, <https://nyti.ms/32mHZU8>.

¹⁰ Husch Blackwell LLP, *Top U.S. Postal Service Suppliers*, <https://bit.ly/3aH7mCI> (2019).

matters as USPS rules, policies or procedures that apply to all USPS contractors, including XPO Logistics. It would include deliberations, recommendations and decisions that would affect USPS's demand for contractors or that would affect the tasks performed by its contractors or the contract performance costs of its contractors. It would be unworkable for Mr. DeJoy to recuse from these types of particular matters of general applicability.

I assume that this Subcommittee has obtained information about the particular matters in which Postmaster General DeJoy has participated in at the USPS. If not, the USPS should provide this information to the Subcommittee at once. Mr. DeJoy has been in office since June 15 – that is approximately 13 weeks. It is difficult to imagine, however, that over those weeks he has been doing his job as Postmaster General and has not participated in particular USPS matters that likely have had a direct and predictable financial effect on XPO Logistics, particularly the profits that XPO Logistics makes from its contracts with the USPS. Any particular matter at USPS having an effect, no matter how small, on the cost to XPO Logistics of performing under the USPS contracts or on the demand by USPS for XPO Logistics services or on the types of services required by USPS would fall into this category.

I leave a final assessment of this issue to your Committee, with assistance from witnesses familiar with the specific terms of this XPO Logistics contract, the operations of the USPS and actual or contemplated changes to those operations during the tenure of Mr. DeJoy. Based on what I know, however, it is very likely that Mr. DeJoy did violate 18 U.S.C. § 208 unless he has recused from so many matters at the USPS that he is not fully functioning as Postmaster General. If you determine that Mr. DeJoy likely did commit a crime you should forward that information to the Public Integrity Section of the Department of Justice for further investigation and possible prosecution.

Based on the information of which I am aware, I believe that Postmaster General DeJoy's failure to divest his holdings in XPO Logistics and the likelihood of his having participated in matters that have an effect on XPO Logistics creates a circumstance where, if President Bush were still in office, Mr. DeJoy's resignation likely would have been requested by the White House.

Prior Conduct

Apart from financial conflicts of interest, another aspect of the vetting process for nominees and appointees to senior executive branch positions is an evaluation of legal and ethical issues in a person's personal, business and professional life that could reflect poorly on the president or on the agency in which that person intends to serve. In the Bush White House an attorney known as "clearance counsel" had an office adjacent to mine and was responsible for reviewing files with F.B.I. background checks on potential appointees and nominees. While I did not examine the F.B.I. files themselves, specific issues that were problematic were brought to my attention. Personal problems that were "deal-breakers" included failure to pay taxes on household helpers, DWI convictions and police reports or other evidence of domestic violence. The range of unacceptable business problems included bankruptcies, major investigations by federal or state regulatory agencies and civil litigation in which there was prima facie evidence of wrongdoing.

Professional problems included discipline by a professional licensing organization or other evidence of conduct violating the ethical norms of a profession.

Campaign finance violations that appear to be reckless or intentional are among the more serious “deal-breakers” for a potential presidential nominee or appointee. The situation is serious regardless of whose campaign is involved and even more serious if the campaign involved is that of the president or the president’s political party during his presidency.

Federal statutes and Federal Election Commission rules impose strict limits on the dollar amount of campaign contributions and also require campaign contributions to be accurately reported. Violation of these statutes and rules, including false statements to the F.E.C. or any other federal regulatory or investigative body can be a felony.¹¹ A “straw donor” arrangement in which one person makes a political contribution but another person pays for it through reimbursement, an upward adjustment to compensation or otherwise, is likely to be prosecuted as a felony. Conservative commentator Dinesh D’Souza was convicted, sentenced to jail and recently pardoned by President Trump for such conduct.¹²

An employer may encourage employees to contribute to political campaigns *provided* it is clear that terms of employment and compensation are not conditioned on political contributions. But an employer who puts pressure on employees to contribute to a political campaign treads dangerously close to violating the law. If an employee’s compensation is linked to a political contribution the employer likely has committed a felony. Proving such a link beyond a reasonable doubt in a criminal case may be difficult for prosecutors but when large numbers of employees are involved evidence justifying criminal prosecution can quickly mount.

I am only familiar with the newspaper accounts about evidence that Mr. DeJoy put pressure on his employees to donate to political campaigns.¹³ I cannot opine as to whether Mr. DeJoy committed a crime without knowing the facts for certain. I do believe, however, that the facts reported in the *New York Times* story, *if true*, would be evidence of multiple straw donor arrangements, each one of which would likely be a felony under federal election law.

Furthermore, the evidentiary threshold sufficient to be a “deal-breaker” for appointment to a senior position – or for the president to request a resignation – is substantially lower than the evidentiary threshold sufficient to justify a criminal indictment, much less a criminal conviction which requires proof of at least one crime beyond a reasonable doubt. In the Bush Administration the very existence of a story such as this one in the *New York Times*, unless

¹¹ See e.g. 18 U.S.C. § 1001 (false statements).

¹² Federal Bureau of Investigation, *Dinesh D’Souza Sentenced in Manhattan Federal Court to Five Years of Probation for Campaign Finance Fraud*, September 23, 2014, <https://www.fbi.gov/contact-us/field-offices/newyork/news/press-releases/dinesh-dsouza-sentenced-in-manhattan-federal-court-to-five-years-of-probation-for-campaign-finance-fraud>.

¹³ See Catie Edmondson Jessica Silver-Greenberg, and Luke Broadwater, *DeJoy Pressured Workers to Donate to G.O.P. Candidates*, *New York Times*, September 6, 2020 (“Former Employees Say Former employees at New Breed Logistics say they were expected to donate to candidates whom their executive, Louis DeJoy, was supporting, and would be rewarded through yearly bonuses”) <https://www.nytimes.com/2020/09/06/us/politics/dejoy-political-donations.html>.

repudiated with concrete evidence, would have put an immediate stop to a nomination or appointment and for an existing official likely would have led to a request for a resignation.

Apart from these financial conflicts of interest and alleged campaign finance violations by Postmaster General DeJoy, I have additional concerns about the operation of the USPS under his tenure, particularly relating to evidence that Mr. DeJoy is abusing his office in order to suppress mail-in and absentee voting prior to the November election. Some of these concerns are discussed in a letter to your Committee submitted separately by myself and Claire Finkelstein, a professor at the University of Pennsylvania Carey School of Law and the Faculty Director of its Center for Ethics and the Rule of Law.

Thank you again for asking me to testify before you today.