

Testimony of Richard W. Painter
before the United States House of Representatives
Committee on Natural Resources, Subcommittee on Oversight and
Investigations
Hearing "Full Blast: Contrasting Momentum in the Space Mining Economy
to the Terrestrial Mining Regulatory Morass" February 25, 2025

Mr. Chairman, Ranking Member, and Members of the Committee:

Thank you for inviting me to testify today.

I am a law professor at the University of Minnesota, and I was the chief White House ethics lawyer for President George W. Bush from 2005 to 2007. I specialize in corporate law, securities regulation, lawyers' ethics, and government ethics. I am also the Associate Reporter for the American Law Institute's Principles of Government Ethics which will be published later this year.

I do not appear before you to advocate for or against space mining. Mining here on earth is important to our economy and national security, although some proposed projects involve unacceptable environmental risks. Arne Carlson, a former Republican Governor of Minnesota, and I have expressed concern about proposals by foreign billionaires to open sulfide mines near the Boundary Waters.¹ If space mining is an alternative that will increase supply of precious metals at reasonable cost, it is a concept worth exploring.

Space mining could yield minerals worth billions, even trillions of dollars.²

¹ Colleen Connolly, Former Gov. Arne Carlson is 88 and battling a massive mining conglomerate, Minnesota Reformer, June 8, 2023, <https://minnesotareformer.com/2023/06/08/former-gov-arne-carlson-is-88-and-battling-a-massive-mining-conglomerate/>

² Andrew Wong, Space mining could become a real thing — and it could be worth trillions, CNBC, May 15, 2018, <https://www.cnbc.com/2018/05/15/mining-asteroids-could-be-worth-trillions-of-dollars.html> (“Noted astrophysicist Neil deGrasse Tyson, among others, have claimed that the world’s first trillionaire will make his or her fortune in space minerals. According to NASA, the minerals that lie in the belt of asteroids between Mars and Jupiter hold wealth equivalent to a staggering \$100 billion for every person on Earth.”).

But who should pay for space mining, and who should reap the rewards? A space mining project funded by the government should return profits to taxpayers. A space mining project funded by private enterprise should return profits to the owners of that enterprise. A space mining project funded both by the government and by private enterprise should distribute cost, risk and return equitably between taxpayers and private companies that pay for it. Negotiations between the government and companies in space mining projects must be at arm's length and free of financial conflicts of interest.

This is where federal conflict of interest statutes and financial disclosure requirements are critically important. Federal officers are prohibited from participating in government matters that affect their financial interests. Senior federal officers also are required to publicly disclose their assets, liabilities, income and other financial information so the public can know whether they are complying with conflict-of-interest rules. Federal officers involved with a space mining program will need to comply with these rules to assure there is not a massive waste of taxpayer money. I discuss those rules in more detail below.

Elon Musk, Space X and Space Mining

Since the beginning of the 20th Century, presidents have brought successful businesspeople into their administrations to advise on operation of the United States Government. The Government spent \$6.75 trillion in 2024, and the total Government debt is now about \$36 trillion. Something needs to be done, and a business expert like Elon Musk can bring new ideas that will help.

Space exploration and space mining are among Mr. Musk's many intellectual interests. Space mining is also one of his many financial interests. Space X is forming partnerships with asteroid-mining companies. As reported last month in Space.com:

“A U.S. asteroid-mining company has announced the target space rock for its upcoming test mission. California-based AstroForge has identified asteroid 2022 OB5 as the destination for its Mission 2 spacecraft, named Odin, which is set to launch next month, SpaceNews reports. The Odin

spacecraft will be flying as a secondary payload aboard a SpaceX Falcon 9 rocket, which will send Intuitive Machines' IM-2 lander toward the moon.”³

Five years ago in 2020, Mr. Musk's likelihood of success in space mining was sufficiently serious that some financial experts believed he would increase gold supply and drive down the price of gold and other precious metals.⁴

Mr. Musk can bring useful ideas to the Trump Administration, including in space mining.

We must recognize two caveats, however.

First, the aim of government is fundamentally different from a for-profit corporation. Government exists to serve the people, to provide essential services while minimizing tax burdens on the middle class and curtailing deficits that shift costs to future generations. For profit companies by contrast focus primarily on profits, although some business leaders also are aware of their fiduciary obligations to the public.⁵ Because of the fundamentally different objectives in the private and public sector, some ideas from business will work in government, and others not.

Second, the laws that Mr. Musk and everyone else in the Administration must comply with include conflict-of-interest statutes and regulations, financial disclosure statutes and regulations and other ethics rules intended to safeguard the integrity and efficiency of the United States Government, and our national security. As a federal employee Mr. Musk will work for the benefit of the United States, not himself.

³ Andrew Jones, Space mining company AstroForge identifies asteroid target for Odin launch next month, Space.com, January 31, 2025, <https://www.space.com/space-exploration/tech/space-mining-company-astroforge-identifies-asteroid-target-for-odin-launch-next-month>;

⁴ Billy Bambrough, Winklevoss Twins Tell Barstool's Dave Portnoy To Pick Bitcoin Over Gold Due To Elon Musk's 'Space Mining', August 14, 2020, <https://www.forbes.com/sites/billybambrough/2020/08/14/winklevoss-twins-tell-bar-stools-dave-portnoy-to-pick-bitcoin-over-gold-due-to-elon-musks-space-mining/>

⁵ Richard W. Painter, *The Conservative Case for ESG*, 9 University of Pennsylvania Journal of Law & Public Affairs 151 (2024)

The conflict-of-interest statute

The conflict-of-interest statute imposes criminal penalties on any executive branch officer or employee (except the president and vice president⁶) who:

“participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.” 18 U.S.C. Section § 208(a).

This statute applies not just to matters in which there are identifiable parties but to any “particular matter.” A particular matter may involve specific parties (for example a government contract, permit or case) or a particular matter of general applicability focused on the interests of a discrete and identifiable class of persons (for example an industry such as space exploration or space mining)⁷ A particular matter will have a direct effect on a financial interest if there is a close causal link between a government decision or action in the matter and any expected effect of the matter on the financial interest.⁸

⁶ I believe this conflict-of-interest prohibition also should apply to the President, Vice President, and Members of Congress. See Getting the Government America Deserves; How Ethics Reform Can Make a Difference, Chapter 2 (Oxford University Press 2009).

⁷ “The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.” 5 C.F.R. § 2635.402 (b)(3) <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2635/subpart-D/section-2635.402>

⁸ “(i) A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the

Some federal employees are part time special government employees (SGEs) who work with or without compensation.⁹ This statute applies to SGEs as well as full time officers and employees with very narrow exceptions. A SGE serving on a committee governed by the Federal Advisory Committee Act may participate in particular matters of general applicability where the disqualifying financial interest arises from the SGE's non-Federal employment. However, the matter may not have a "special or distinct effect" on either the SGE or the SGE's non-Federal employer, other than as part of a class, and this exception does **not** cover interests arising from the SGE's ownership of stock or other financial interests in the employer.¹⁰

Here are some examples:

A full-time federal employee or SGE may not advise NASA or the White House on NASA's budget for space mining if the employee owns stock in a company that will financially benefit from NASA spending money on space mining.

matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart. (ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial." 5 C.F.R. § 2635.402 (b)(1).

⁹ A "special Government employee" is defined as an employee "who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days," 18 U.S. Code § 202(a).

¹⁰ "A special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. app.) may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, *provided* that the matter will not have a special or distinct effect on the employee or employer other than as part of a class. For purposes of this paragraph, "disqualifying financial interest" arising from non-Federal employment does not include the interests of a special Government employee arising from the ownership of stock in his employer or prospective employer." 5 C.F.R. 2640.203(g), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2640#2640.203>

A full-time federal employee or SGE may not advise NASA or the White House on regulatory matters pertaining to space mining if the employee owns stock in a company that will be affected financially by NASA's regulation of space mining.

A SGE serving on a federal advisory committee who is an employee of a company that has a financial interest in space mining, *but who does not own stock in the company*, might be permitted to participate in the above matters provided the matter does not have "special or distinct effect" on the company that is his employer.

Financial Disclosure

Under the Ethics in Government Act of 1978¹¹ and federal regulations thereunder senior government officials holding "covered positions"¹² must file public financial

¹¹ See 5 U.S.C. §§ 13101-13111: Financial Disclosure Requirements of Federal Personnel.

¹² These "covered positions" include the President and the Vice President; officers and employees (including special Government employees, as defined in 18 U.S.C. § 202) in positions that (1) are paid under a system other than the General Schedule (e.g., Senior Executive Service) and (2) have a rate of basic pay equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; members of the uniformed services whose pay grade is O-7 or above; and officers or employees in any other positions determined by the Director of the Office of Government Ethics to be of equal classification; administrative law judges; employees in positions which are excepted from the competitive service because of their confidential or policy-making character, unless the position has been excluded from the public financial disclosure requirements by the Director of the Office of Government Ethics; the Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the U.S. Postal Service, and officers or employees of the U.S. Postal Service or Postal Regulatory Commission in positions for which the rate of basic pay is equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; the Director of the Office of Government Ethics and each designated agency ethics official; *and civilian employees in the Executive Office of the President (other than special Government employees) who hold commissions of appointment from the President.*" U.S. Office of Government Ethics, Public Financial Disclosure Guide, Appendix A, Definitions. (emphasis added)

<https://www.oge.gov/web/278eGuide.nsf/Definitions>

disclosure Form 278.¹³ This includes “civilian employees in the Executive Office of the President (other than special Government employees) who hold commissions of appointment from the President.”¹⁴ There are approximately one hundred commissioned officers in the White House (Assistants to the President, Deputy Assistants to the President, and Special Assistants to the President), and all file a public financial disclosure form 278.

A SGE in the White House does not have to file the Form 278 but instead files a private financial disclosure Form 450. During my time in the Bush White House the only SGEs I encountered served on boards and commissions appointed by the President, for example the President’s Foreign Intelligence Advisory Board. The President did not for any significant time frame appoint a SGE “part time” to perform the functions of a senior White House official such as an Assistant to the President. Using the SGE designation in this manner would be an obvious and inappropriate circumvention of the requirement that senior White House officials publicly disclose their finances.

I am aware of only one exception to this prior to 2025; it was wrong; and I said it was wrong. Antia Dunn took a temporary role on President Biden’s staff as a “special government employee” which, pursuant to 3 U.S.C 101(f)(8) exempted her from the public financial disclosure requirement (Form 278) that is required for all senior advisors to the President and other senior employees of the Executive Office of the President.¹⁵ After I and other ethics lawyers publicly objected to this arrangement, in August 2022 Ms. Dunn reversed course and became a full time

¹³ The OGE Form 278e has nine substantive Parts: Part 1 – Filer’s Positions Held Outside United States Government; Part 2 – Filer’s Employment Assets & Income and Retirement Accounts; Part 3 – Filer’s Employment Agreements and Arrangements; Part 4 – Filer’s Sources of Compensation Exceeding \$5,000 in a Year; Part 5 – Spouse’s Employment Assets & Income and Retirement Accounts; Part 6 – Other Assets and Income; Part 7 – Transactions; Part 8 – Liabilities; Part 9 – Gifts and Travel Reimbursements.

¹⁴ U.S. Office of Government Ethics, Public Financial Disclosure Guide, Appendix A, *supra*.

¹⁵ Haisten Willis, Anita Dunn courts controversy while taking charge in Biden White House, Washington Examiner, September 20, 2023, <https://www.washingtonexaminer.com/news/2586994/anita-dunn-courts-controversy-while-taking-charge-in-biden-white-house/>

White House employee, filling a financial disclosure Form 278.¹⁶ Ms. Dunn had significant assets the public had a right to know about, but she was no billionaire. She certainly was no Elon Musk.

Applying the Conflict-of-Interest rules and Disclosure rules to Mr. Musk

Mr. Musk as a federal employee may not participate in a government matter that affects his financial interest.¹⁷ He has a control interest in Space X which is poised to lead the way in space mining, potentially earning Mr. Musk billions of dollars if projections about the value of minerals in space are correct. He has every right to pursue this as a private venture, but as a federal employee he cannot legally at the same time advise the Government on space mining or make decisions for Government agencies that affect space mining. Like countless other successful

¹⁶ Caitlin Oprysko, Anita Dunn finally discloses her corporate clients, POLITICO, August 12, 2022 (“Richard Painter, the chief White House ethics lawyer in the George W. Bush administration, said that Dunn and her husband’s extensive investment portfolio raised another set of conflicts”) <https://www.politico.com/newsletters/politico-influence/2022/08/12/anita-dunn-discloses-corporate-clients-00051541>

¹⁷ Another area of concern is Mr. Musk’s financial conflicts of interest in the efforts of DOGE to dramatically scale back or close the Consumer Financial Protection Bureau (CFPB). Richard W. Painter, *So Elon Musk works for the government. That comes with obligations. As a “special government employee,” he must abide by conflict-of-interest laws and the Emoluments Clause*, Minnesota Star Tribune, February 17, 2025. Tesla like other car manufactures, finances consumer car loans that are regulated by CFPB. Musk is also enhancing X with a new digital payment platform, a consumer finance vehicle also regulated by CFPB. On February 6, Musk’s employees – presumably DOGE employees -- reportedly entered CFPB headquarters seeking access to sensitive CFPB information, including staff records, industry data, and personally identifiable consumer information. Bobby Allyn, Laurel Wamsley, and Chris Arnold, Musk's team takes control of key systems at Consumer Financial Protection Bureau, NPR, February 7, 2025, <https://www.npr.org/2025/02/07/g-s1-47322/musks-team-takes-control-of-key-systems-at-consumer-financial-protection-bureau> The next day, Mr. Musk tweeted “CFPB RIP.” <https://x.com/elonmusk/status/1887979940269666769?s=46&mx=2>. DOGE also is gaining access to confidential corporate data of X’s competitors that the CFPB obtained from Amazon, Apple, Facebook, Google, and others. *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans Orders will help CFPB monitor for data surveillance, access restrictions, and other consumer protection risks as payments technologies and markets evolve*, Consumer Financial Protection Bureau, October 21, 2021, [HTTPS://WWW.CONSUMERFINANCE.GOV/ABOUT-US/NEWSROOM/CFPB-ORDERS-TECH-GIANTS-TO-TURN-OVER-INFORMATION-ON-THEIR-PAYMENT-SYSTEM-PLANS/](https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/).

business leaders before him who entered public service, he must either divest his financial interest in space mining or recuse from government matters that affect space mining.

The Administration perhaps could have hired Mr. Musk as a government contractor, like a defense contractor, but then other rules would apply, such as competitive bidding for most contracts. Regardless, he is not a government contractor. Mr. Musk is a government employee. He is bound by the conflict-of-interest statute.

Mr. Musk's companies are government contractors, however, and hence the conflict of interest for him as a government employee. In fact, his companies have about \$22 billion in government contracts, \$15 billion with NASA and billions more with the Department of Defense.¹⁸ If he were to participate in government matters affecting these contracts, he would stand on both sides of transactions potentially worth billions of dollars, and likely would violate the conflict-of-interest statute.

Mr. Musk also should publicly disclose his financial information like every other senior official in the White House. Calling him a SGE to avoid the disclosure requirement of OGE Form 278 is a charade. Mr. Musk's duties in the Trump Administration in the past four weeks have already far exceeded the duties of any SGE who has ever served in the Executive Branch. The impact of Mr. Musk's decisions and recommendations on the Government also has far exceeded that of any SGE who has ever served. Once he exceeds the 130-day limit on government work of a SGE the inappropriateness of his SGE designation will be even more obvious. Disclosure law avoidance at some point becomes disclosure law evasion, which like tax evasion is illegal. At best Musk, if he does not disclose his finances, is in an in-between area of law "avoision" a practice popularized in both tax loophole literature¹⁹ and even on T.V. by Bart Simpson ("Krusty the Clown goes to

¹⁸ See Elon Musk's US Department of Defense contracts, Reuters, February 11, 2025 ("SpaceX's CEO Gwynne Shotwell has said the company has about \$22 billion in government contracts. The vast majority of that, about \$15 billion, is derived from NASA."), <https://www.reuters.com/world/us/elon-musks-us-department-defense-contracts-2025-02-11/>

¹⁹ ARTHUR SELDON ET AL. TAX AVOISION (London School of Economics 1979).

jail for tax avoidance!”).²⁰ Such circumvention of the law is fundamentally dishonest and would be entirely inappropriate for a public servant.

Finally, space exploration and space mining involve matters important to our national security. Laws protecting national security – including laws requiring government contractors with access to classified information to report their contacts with foreign nationals²¹ - must be obeyed.²²

Conclusion

The Executive power is vested in the President,²³ but he is not a king who can empower a vassal to do anything he wants to do. The President must take care that the laws of the United States are faithfully executed,²⁴ and he must obey the orders of the judicial branch.²⁵ Commissioned officers, both civilian and military, swear

²⁰ *I Don't Say Evasion, I Say Avoidance (The Simpsons)*, YOUTUBE (Jan. 30, 2016), <https://www.youtube.com/watch?v=wpEaFmK3lrY>.

²¹ National Industrial Security Program Operating Manual (NISPOM), 32 CFR Part 117.

²² Kirsten Grind, Eric Lipton and Sheera Frenkel, *Elon Musk and Space X Face Federal Reviews After Violations of Security Reporting Rules*, New York Times, December 17, 2024 (“Elon Musk and his rocket company, SpaceX, have repeatedly failed to comply with federal reporting protocols aimed at protecting state secrets, including by not providing some details of his meetings with foreign leaders, according to people with knowledge of the company and internal documents.”), <https://www.nytimes.com/2024/12/17/technology/elon-musk-spacex-national-security-reporting.html>

²³ U.S. Constitution, Article II, Section 1, Clause 1.

²⁴ U.S. Constitution, Article II, Section 3.

²⁵ *Marbury v. Madison*, 5 U.S. 137 (1803) (“It is emphatically the duty of the Judicial Department to say what the law is.”). Fringe legal scholars of the left and right occasionally urge liberal or conservative presidents respectively to disobey orders of the Supreme Court. See e.g. Ryan D. Doerfler and Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, New York Times, Aug. 19, 2022 (stating that Congress should rewrite the Constitution without going through the Amendment process and that “Congress would be pretty openly defying the Constitution to get to a more democratic order — and for that reason would need to insulate the law from judicial review.” No Congress and no president in the 20th or 21st Century has done that.

an oath of allegiance to the Constitution, not to the President.²⁶ The Supremacy Clause is clear that the Constitution and laws of the United States are the supreme law of the land.²⁷ Among these laws are those that pertain to financial conflicts of interest, financial disclosure and national security. These laws are not optional; they must be obeyed.²⁸

Presidential power comes with responsibility, and it is the duty of Congress to assure that the Executive Branch is held accountable.²⁹

Mr. Musk brings promise to the Trump Administration, but also a serious risk unless the President, Mr. Musk, and their advisors assure that the affairs of the United States Government are carried out free of conflict of interest. Space exploration and space mining, where enormous wealth is potentially at stake but also national security, is one of the most critical areas where Government employees must comply with the law.

²⁶ "I ____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same." Officer's oath. 5 U.S. Code 3331. As an Associate Counsel to the President appointed by George W. Bush, I took that oath in 2005, swearing allegiance to the Constitution of the United States. I did not swear allegiance to any person, even the President.

²⁷ U.S. Constitution, Article VI, Clause 2.

²⁸ I discuss the importance of ethics statutes and rules for the efficiency and integrity of government in my book Getting the Government America Deserves; How Ethics Reform Can Make a Difference (Oxford University Press 2009).

²⁹ I discuss the extent and limits on presidential power in a wide range of areas, including appointment of White House staff in a forthcoming book co-authored with E. Thomas Sullivan, The Presidency: Power, Responsibility and Accountability (Cambridge University Press 2025).