

MEMORANDUM

To: The Honorable Gerry Connolly, Chairman, United States House of Representatives
Committee on Oversight and Reform Subcommittee on Operations

From: Richard W. Painter, S. Walter Richey Professor of Corporate Law, University of
Minnesota Law School

Re: Answers to Questions of Chairman Connolly following September 13 Testimony
of Richard W. Painter and accompanying letter to the Subcommittee from Claire O. Finkelstein
and Richard W. Painter

Date: October 13, 2020

On September 13, 2020, I testified before the Subcommittee on Operations of the House
Committee on Oversight and Reform regarding the conflicts of interest of Postmaster General
Louis DeJoy. I also submitted as an exhibit to my testimony a letter written by myself and Claire
O. Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy and
Faculty Director, Center for Ethics and the Rule of Law at the University of Pennsylvania.
Professor Finkelstein and I consulted on preparation of these answers to your questions and I
am copying her on this memorandum.

Below you will find answers to the questions I was asked to address by the Subcommittee
following my testimony. All of these questions were from you as Chairman of the
Subcommittee. To date I have not received questions from any other Member of the
Committee.

1. *In the current hiring process for the Postmaster General (PMG), there is no
statutory requirement to conduct an ethics or conflicts of interest review of
candidates by an outside entity prior to the start of a PMG's term. What do you
think the role of the Office of Government Ethics should be in vetting the
Postmaster General?*

Response:

The ethics or conflicts of interest review I refer to in my response to this question consists of
two parts: 1) review by ethics professionals of the financial disclosure form of the public
official and 2) agreements and arrangements by the public official to avoid financial conflicts of
interest, and to resolve other ethics issues, sometimes contained in a written ethics agreement
addressing matters such as divestment, recusal and additional safeguards to prevent violation,
or the appearance of a violation, of federal ethics statutes and regulations.

Presently there is no statutory requirement that the Office of Government Ethics (OGE) conduct
an ethics or conflicts of interest review of a prospective Postmaster General because the

Postmaster General is an appointee of the Board of Governors of the United States Postal Service (the "USPS Board") rather than an appointee of the President. The President appoints the USPS Board which in turn appoints the Postmaster General. The ethics review for a prospective or current Postmaster General is conducted by ethics officials and lawyers in the USPS within a reporting structure headed up by the Postmaster General and the USPS Board.

This arrangement is unacceptable because it does not involve an ethics and conflicts of interest review of the Postmaster General by ethics professionals outside of the USPS. The ethics professionals inside USPS who conduct the review must report to people who ultimately report to the Postmaster General. Given the enormous size of the USPS and its importance to the American people, and in election years the importance of USPS to mail in voting, and the enormous potential cost of financial conflicts of interest at USPS to taxpayers as well as customers of the USPS, the Postmaster General's conflict of interest review itself must be free of conflicts of interest.

Furthermore, the appointment of the Postmaster General by the USPS Board rather than by the President is a matter of form more than substance. The President appoints the USPS Board and in recent years the USPS Board has been made up mostly of campaign donors and political supporters of the President. Independence of the USPS Board is a mere fig leaf. The Postmaster General holds a position that is far more powerful than the positions held by many of the Presidential appointees for whom a conflict of interest review is currently conducted by OGE. Congress should provide by statute that OGE shall provide a financial disclosure and conflict of interest review for the Postmaster General that is the same as the financial disclosure and conflicts of interest review for appointees of the President.

2. At what point during the hiring process should the Board of Governors be made aware of a candidate's potential conflicts of interest if he or she were to be selected to serve as the PMG?

Response:

Even though the Postmaster General (PMG) is not nominated by the president, this process should be handled in a manner similar to the appointment and nomination of persons to senate confirmed positions by the president.

As chief White House ethics lawyer from 2005 to 2007 I identified potential conflicts of interest early in the selection process for presidential nominees and appointees. Persons seriously being considered for a position were sent to my office for a private interview. Often, I interviewed more than one candidate for the same position. I believe that most of the people whose names were sent to the President for consideration had previously had a preliminary "financial conflicts" interview with me or a member of my staff in the White House ethics office. The purpose of this interview was to explain the federal financial disclosure requirements for senior executive branch officials and the federal financial conflict of interest

statutes and rules as well as to discern any potential problems a candidate might have with the financial disclosure regime or the conflict of interest statutes and rules. Topics discussed included financial holdings of the candidate and the candidate's spouse, prior and current employment of the candidate and the candidate's spouse, board memberships, and nonprofit activities.

Separate from the ethics office another office called Clearance Counsel handled background checks. This started with an interview with Clearance Counsel about such things as personal and business taxes, law compliance, interactions with law enforcement, and aspects of personal life that could be problematic in public life.

After the president decides on a nominee or appointee, but usually prior to public announcement, a more detailed vetting process takes place. The prospective nominee completes the public financial disclosure form, which is reviewed by White House ethics lawyers, ethics lawyers in the agency in which the appointment will be made and ethics specialists at OGE. An ethics agreement is drafted to address divestiture, recusal and other matters. At the same time Clearance Counsel arranges an FBI background check to address any clearance issues.

Such a vetting process – if it had been undertaken for Postmaster General LeJoy -- would have identified the substantial conflict of interest from his holdings in XPO Logistics which does business with USPS. I can say with certainty that he would have been asked to divest completely from the company and the appointment would have been conditioned on his divesting. The option of his simply recusing from matters that have an effect on the company would have been unworkable for the reasons explained in my testimony. Furthermore, the political contributions by Mr. LeJoy's employees and his possible reimbursement of some of them, also probably would have been identified in the course of the FBI background check which ordinarily involves interviewing a prospective appointee's employees and other personal contacts. The objective of this process is for all such issues – on both the financial conflicts of interest front and the clearance front – to be identified and dealt with before a nomination or appointment is announced by the White House.

This is the same process that should be conducted with respect to appointment of a prospective PMG. Because the PMG is not a presidential appointment the White House need not have as important a role in the vetting process, but OGE should be involved in all stages of this process with the timing of the conflict of interest vetting and the level of scrutiny being similar to that undertaken by OGE in the case of a presidential nominee or appointee. A similar FBI background check also should be undertaken. All of this should happen before announcement of appointment of the PMG. Problematic issues should be resolved to the satisfaction of OGE as well as the Board of Governors of the USPS before the appointment is made, and the White House should be informed about any serious issues that have not been fully resolved. As I explained in my testimony the President as head of the executive branch is ultimately responsible for the ethics of the PMG. The White House should have an opportunity to discourage the Board from appointing a PMG if that appointment is ethically problematic.

3. *What steps can Congress take to prevent politicization of the Postal Service and Hatch Act violations at USPS in the future?*

Response:

Politicization of the Postal Service is more likely when the president appoints a Board that is all or mostly his own political supporters. Congress could alleviate this problem by providing for stricter enforcement of the provision in 39 U.S.C. Section 202 that no more than five members of the Board can be members the same political party. It appears that, regardless of party affiliation, almost all of the current Board members are supporters of President Trump. The statutory language needs to be changed to address de facto as well as de jure support for a political party or for the president. It is also highly doubtful that the very specific Congressional consultation provisions in 39 USC Section 202, requiring among other things consultation with the Speaker of the House and minority leader of the House, were complied with by the President when the Board was appointed. Alternatively, Board members could serve staggered terms running from one presidential administration to the next.

The Hatch Act is binding on all federal employees including the Board of the USPS and employees of the USPS. Violations of the Hatch Act are a problem throughout the federal government and have become more common during the Trump Administration. Part of the problem is that Hatch Act violations are not criminal but instead are grounds for federal employee discipline which is discretionary within each agency. Investigations are undertaken by the Office of Special Counsel (OSC) but findings and recommendations are sent by OSC to the relevant agency and/or the White House. When OSC found multiple Hatch Act violations by White House Counsellor Kellyanne Conway, and recommended that she be fired, this advice was simply ignored by the White House. This scenario creates little incentive for the Board of the USPS to enforce the Hatch Act by firing the Postmaster General or any other USPS employee who violates it. Quite to the contrary the message from the White House is that Hatch Act violations are not only tolerated but encouraged if they support the reelection campaign of Donald Trump.

Congress should remedy this problem. One approach would be to make dismissal of a federal employee mandatory if that employee is found by OSC to have violated the Hatch Act. Congress could suspend funding for any federal agency that does not follow the advice of OSC after a Hatch Act investigation is completed. Furthermore, the budget of the OSC Hatch Act unit should be increased so OSC investigations can be undertaken in a thorough and timely manner, perhaps with a 60-day period for completion of at least a preliminary OSC report after a complaint is filed about an alleged violation. OSC reports should also promptly be given to Congress.

Finally, the Hatch Act may need to be amended to provide more clarification and to cover violations which arise when seemingly official action is taken shortly before an election with the

principal intent of influencing the election. The present language of the Hatch Act¹ does cover these types of violations, but OSC investigations and findings are rare or nonexistent as opposed to the cases of clearer cut violations where a federal official endorses a candidate in an official speech or uses federal resources – such as a vehicle – for partisan political work. The irony is, however, that the former category of partisan “official action” Hatch Act violations is a lot more damaging to our elections because these violations usually have a much greater impact. For example, seemingly “official” decisions by the Postmaster General to dismantle operations in the USPS on the eve of mail in voting have a far more harmful impact on our representative democracy than Kellyanne Conway standing on the White House lawn and attacking Vice President Biden in an interview for Fox News. Yet the latter type of violation is far easier for OSC to investigate and identify because the determinative facts are mostly objective (Conway did stand on the White House lawn, not her own lawn, and she did attack Joe Biden as a candidate). Why the Postmaster General did what he did to disrupt USPS operations on the eve of an election may be harder to discern.

A partial solution to this problem would be for Congress by statute to require that executive branch agencies provide to OSC and to Congress upon request from OSC or upon request from the chair or ranking member of the relevant House or Senate oversight committee a detailed explanation of major changes in agency operations within 90 days before an election. Questions required to be answered would include whether there was any mention of the election in any of the agency’s oral or written communications about the operational changes, whether there were any agency communications with the White House about the operational changes and whether there were any communications with any candidate, campaign or political party about the operational changes. These disclosures would help OSC decide whether there was a Hatch Act violation and would help Congress conduct its own investigation. False statements would be punishable as crimes under the false statement statute, 18 USC 1001.

4. *What can be done to strengthen the internal Postal Service ethics review process?*

Response:

This question is answered in substantial part in the answers to Questions 1 and 2 above. Involving OGE in the ethics review process for the Postmaster General is critically important -- the fact that the Postmaster General is not a presidential appointee does not justify excluding OGE from the process. USPS career government ethics officials should review financial disclosure forms for senior USPS officials and advise on divestment. Furthermore, the FBL background check and related inquiries should be similar for a Postmaster General as for presidential appointees to other agencies.

¹ See 5 U.S.C. 7323, providing that “Subject to the provisions of subsection (b), an [employee](#) may take an active part in political management or in political campaigns, except an [employee](#) may not— (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election...”

In addition to the recommendations discussed in responses to Questions 1 and 2 above, Congress should consider establishing a USPS Board of Overseers of similar oversight body that is outside of the executive branch and reports directly to both houses of Congress. In the Postal Reorganization Act of 1970, and then in the Postal Accountability and Enhancement Act of 2006, Congress established and then enhanced the role of the Postal Regulatory Commission which is composed of five Commissioners, each of whom is appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Commission, however, has regulatory authority over the Postal Service and is still within the Executive Branch which is headed by the President. It is important for there also to be a separate body that does not directly regulate the Postal Service or perform other Executive Branch functions but that gathers relevant information about the operations of the Postal Service and reports directly to Congress and to the public. This body should be appointed by Congress with both the majority and minority parties in the House and Senate having an opportunity to name some of its members. One of the critical functions of such an oversight body should be to monitor and report on whether partisan politics are influencing the operations of the Postal Service, whether the Postal Service is prepared to properly undertake its responsibilities in connection with mail in voting and whether businesses that compete with the Postal Service or contract with the Postal Service directly or indirectly exert influence over the operations of the Postal Service. Congress should then use this information to conduct its own investigations of the Postal Service and if necessary, to enact new legislation to protect the Postal Service and its mission, its employees, and the public.

5. *How will Mr. DeJoy's participation in certain Postal Service decisions likely affect XPO Logistics, Mr. DeJoy's former employer in which he retains significant personal investments? Why should Congress and the public be concerned about these effects?*

Response:

Because of his financial entanglements and conflicts of interest, Postmaster General Louis DeJoy stands to benefit personally from increased privatization of the United States Post Service operations, in particular outsourcing delivery operations to private companies such as XPO Logistics and Amazon. Mr. DeJoy has substantial financial interests in these two companies, both of which are the recipients of multiple contracts from USPS at the same time that they are increasingly competitors to USPS operations.

As I wrote in the letter supporting my testimony with Professor Claire Finkelstein regarding the trend towards privatization of USPS functions:

An underlying issue long preceding the Trump Administration has been the drive by politicians as well as USPS competitors in the mail and package delivery industry to privatize the USPS and force it to operate free of government subsidy. This includes pressure on USPS to farm out some of its operations to private companies that claim to

be able to perform those operations at lower cost. XPO Logistics, the company in which Mr. DeJoy owns a \$30 to \$70 million stake, is part of this privatization process. Instead of hiring more USPS employees to deliver mail in USPS trucks, USPS spends millions of dollars contracting with XPO Logistics and other companies for trucking of mail and other services. What this means is that some operations of the USPS have already been privatized. Postmaster DeJoy's conflicted ownership interest in an important USPS contractor must be understood in the context of the increasing dependence of the USPS on private industry. (Letter to Committee on Oversight and Reform, Subcommittee on Operations, September 13, 2020).

XPO Logistics transports a large volume of packages for the postal service and other customers. Their operations have taken over a number of functions previously performed independently by USPS, in particular, basic delivery functions that have been increasingly handled on a contract basis over the past several years. The USPS Inspector General has explained: "The Postal Service contracts with supplier-operated HCRs to transport mail and equipment between plants, post offices, or other designated points that receive or dispatch mail." Notably, Over the past three years, USPS has paid XPO over \$130 million, and at least \$14 million just since Mr. DeJoy became Postmaster General.

Financial disclosures indicate that Postmaster General Louis DeJoy has retained stock worth between \$30 and \$75 million, as well as stock options for up to 270,000 shares of XPO stock. In addition, Mr. DeJoy's LLC's receive at least \$2 million in payments from XPO as rental fees for warehouse space. A spreadsheet published by USPS reveals that XPO has Highway Contract Route ("HCR") contracts with USPS at specified rates. According to one law firm representing postal contractors, "[t]he U.S. Postal Service spends about \$3 billion per year to move the mail by truck and does so under a special type of contract called a Highway Contract Route (HCR) contract." Conflicts of interest appear to have arisen when DeJoy began making sweeping changes to USPS operations that prioritized cost over service, and postal customers are going without lifesaving medications and other urgently needed items. The *Washington Post* reported that DeJoy has "drastically reduced overtime and banned extra trips to ensure on-time mail delivery," "ousted several agency veterans in key operational roles," and decommissioned mail sorting machines. According to a USPS press release, the "new organization structure is focused on three business operating units," including the "Logistics and Processing Operations," whose mission is to "[p]rocess and move mail and packages efficiently to the delivery units, meeting service standards." They include zero-tolerance bright-line policies affecting "[a]ll operations" of the agency.

Mr. DeJoy benefits from the extensive business funneled to both XPO and Amazon in light of his extensive financial holdings in both companies, as well as the contracts his LLC's have entered into with XPO. In the long run, he may benefit even more extensively as more and more of USPS's contracts are shifted to Amazon. This suggests the profound benefit to Louis DeJoy from the privatization of USPS operations, and ultimately from the dismantlement of USPS as a functional agency.

As I wrote in my September 13 letter with Claire Finkelstein:

We believe this shift toward privatization is misguided. We do not treat the fire department, the police department, or national defense as for-profit businesses. Imagine a police department that refuses to service a poor rural area because the cost of sending the police to that area is higher than the perceived value of the assets (or people) being protected. Imagine an attack on rural Alaska by a hostile foreign power, and because the cost of deploying troops to Alaska was higher than, say, deploying them to downtown Washington, D.C., and the value of the real estate lower, the Pentagon decided the troop deployment was not worth the cost. Or a fire department that was willing to respond to calls in the immediate vicinity of the firehouse but charged residents a “surplus” for locations that were more than a certain distance from the firehouse.

Of course, there are competitors who could replace many of these essential public services. For example, defunding local police departments is an idea advocated by extreme libertarians on the right and by some activists on the left. Defunding the police would create a demand for private law enforcement, requiring businesses and wealthy individuals to pay private security companies to provide armed guards. Americans also would likely resort to self-help guaranteed under the Second Amendment of the Constitution. The firearms business would profit enormously. Yet most communities are continuing to fund their local police departments, despite the recognition that there is much needed reform in policing.

Similarly, the notion of fully privatizing a social service as critical as the post office is anathema to the Founders’ vision. Congress’ power “to establish Post Offices and Post Roads” is specifically provided for in Article I, Section 8, Clause 7 of the United States Constitution. Implicit in this mandate is the idea that all Americans should have access to the mails. This critical federal function, constitutionally delegated to Congress, should not be turned over to a private company.

Conflicts of interest rules exist for a reason. The failure of Mr. DeJoy to divest from his holdings in XPO, his unwillingness to desist from entering into further contractual relations with XPO, as well as his subsequent purchase of stock options from Amazon has left the USPS at grave risk of mismanagement due to the personal interests of the Postmaster General. The trend towards privatization is not good for the post office or for the American people, but Mr. DeJoy’s conflicts mean that he cannot be trusted to lead the USPS in light of the public interest, but instead may be guided by considerations of private, financial gain.

Furthermore, Section 6001 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act authorizes the USPS to borrow up to \$10 billion from the Treasury Department for operating expenses if the USPS determines that, due to the COVID-19 emergency, it will not be able to fund operating expenses without the borrowing. This Subcommittee should investigate how much of

this money was used by USPS to make payments on contracts to outside companies, including XPO Logistics.

6. *What are the prior and continuing financial conflicts of current members of the Postal Service Board of Governors?*

OGE should review the financial disclosure forms of current USPS Board members to identify financial conflicts of interest. Many of these USPS Board members are active in business and have substantial financial holdings as well as private sector relationships.

The members of the Postal Board of Governors are Special Government Employees (SGEs) and go through OGE review prior to Senate confirmation. However, these nominees complete a "confidential 278." That means that, by law and regulation, they are actually required only to complete confidential financial disclosure reports using the OGE Form 450. The Senate committee with jurisdiction over their nominations has requested that they complete an OGE Form 278, which is the form used for public financial disclosure reports. Committees sometimes do this because the OGE Form 278 collects more information than the OGE Form 450. But the OGE Form 278 that is collected from these nominees is treated as a confidential report, as though they had filled out an OGE Form 450. That means that we cannot get their forms. It might be possible to submit a FOIA request for their ethics agreements, but it is not clear how OGE would respond.

In contrast, the Postmaster General fills out a public OGE Form 278, which can be obtained from either OGE or USPS. But because he is not in a Senate-confirmed position, OGE does not review his report before he enters government. Instead USPS reviews his report and then sends it to OGE. In fact, USPS forwarded DeJoy's report to OGE on August 6. But it is not clear that DeJoy has a written ethics agreement or that OGE will require him to have one.

I have not reviewed the financial disclosure forms of all of the USPS Board Members. But one is a concern in particular. Board member Donald Lee Moak through a 501c4 he and his business partner founded in 2015, has been associated with Americans for Fair Skies, an organization that lobbied against foreign government airline subsidies and on other matters at least until August 2020. The organization is now known as fairskies.org and is still on the internet, but does not mention its management or donors. With Moak as 501c4 president the organization upon information and belief paid Moak Group millions of dollars in about three years. Moak Group apparently had as its main clients major airlines including Delta, Alitalia, Air Maroc, and China Eastern Airlines.

I am concerned that this lobbying information apparently was not given to the Senate confirmation committee when it asked about Moak's background -- orally or in writing. Please note also that 39 USC 202 forbids governors serving who "...are representatives of specific interests using the Postal Service." Such statutory language may apply to paid lobbying efforts

for airline(s) interests. Copies of documents that I believe to be the relevant financial disclosure documents and other materials concerning Mr. Moak are attached to these answers for review by your subcommittee. Your subcommittee should conduct a thorough investigation.

7. *What are the likely effects of the recent orders by Judge Stanley Bastian in the Eastern Washington's U.S. District Court and Judge Victor Marrero in New York's Southern District to temporarily block the Postal Service and Postmaster General Louis DeJoy from changing USPS policies or protocols ahead of November's election?*

Response:

With the COVID19 pandemic continuing unabated, mail in voting will be more important in the upcoming election than in any election in U.S. history. The reliability of the Postal Service and public perception of the reliability of the Postal Service are critical to the functioning of our representative democracy.

Many voters are concerned about COVID19 and want to vote by mail, but could be discouraged from voting by mail if they are not confident in the operations of the Postal Service. Of voters who postpone voting until Election Day, some may not vote at all. Election Day fear mongering furthermore can be targeted at particular precincts, with the intended effect of scaring people who did not originally want to vote in person, but did not vote by mail.

Two federal judges have weighed in against this attempt by Postmaster General LeJoy and the Trump Administration to interfere with mail in voting.

On September 17, 2020 Judge Bastian in the Eastern District of Washington granted a preliminary injunction in a case brought against President Trump and Postmaster DeJoy by 14 states. The injunction put a temporary stop to certain "transformative changes" at USPS. The Court held that "plaintiffs have established the likelihood of success on the merits of their claims that the United States Postal Service and the Postmaster General violated 39 U.S.C. Section 3661(b) and infringed on the States' constitutional authority to regulate elections and the people's right to vote. ... Although not necessarily apparent on the surface, at the heart of DeJoy's and the Postal Service's actions is voter disenfranchisement."

On September 21, U.S. District Judge Victor Marrero in the Southern District of New York ruled that the Postal Service must deliver election mail as first-class mail or priority mail express and "shall pre-approve all overtime that has been or will be requested" between Oct. 26 and Nov. 6. Judge Marrero noted that in prior elections the Postal Service typically treated election mail as first-class mail, even if it was sent at marketing mail rates.

The effect of these rulings on mail in voting turns on the willingness of the USPS to comply with these and any other injunctions. This subcommittee must follow up with an investigation of what steps were taken by USPS to comply with these court orders and what steps, if any, were

taken to avoid them. Unfortunately, even compliance with federal court orders is not to be taken as a given in the Trump Administration. The original litigants may or may not go back to court to find out if the court orders were complied with. A follow up investigation by your subcommittee is necessary.

RWP

CC: Professor Claire O. Finkelstein