



Justice Scalia's Warning to President Trump

Betsy Woodruff

December 22, 2016

Antonin Scalia might have been a bit irked with Donald Trump's approach to conflicts of interest, according to a memo the late justice wrote more than 40 years ago.

Donald Trump has been unflinching in his refusal to follow in the steps of former presidents, most of whom put their assets in blind trusts to prevent the perception that they made decisions based on their own financial interests.

In a memo to the Ford White House dated Dec. 16, 1974, Scalia, who was assistant attorney general for the Justice Department's Office of Legal Counsel at the time, addressed questions about presidents and conflicts of interest. He argued that the president and vice president were technically exempt from regulations designed to prevent conflicts of interest—but he also said the president should consider voluntarily complying with these laws to avoid blistering criticism.

It "would obviously be undesirable as a matter of policy to engage in conduct" that was illegal for other executive branch employees, the future Supreme Court justice wrote.

"Failure to observe these standards will furnish a simple basis for damaging criticism, whether or not they technically apply," he wrote in the memo ([PDF](#)).

After spending three pages digging into the technicalities of the law, Scalia suggested that if the president truly needed to violate those rules, then White House attorneys put together an internal memo explaining which sections he needed to violate and why.

In short, Scalia wanted the White House to take steps to mitigate the perception that the president engaged in shady dealings—even, potentially, going so far as following laws that don't technically apply.

Trump has long lavished praise on Scalia. In the second presidential debate, he promised to appoint Supreme Court justices "very much in the mold of Justice Scalia," who died on Feb. 13 of this year. And he mourned Scalia's passing with this tweet:

He also criticized President Obama for not attending the justice's funeral:

It remains to be seen if Trump will take Scalia's advice on conflicts of interest.

"It's a very crafty lawyer letter," said Heidi Lee Feldman, a law professor at Georgetown Law. "It's certainly well done. He's saying, 'Look: It looks really bad if you don't abide by these rules, because it looks like you're just drawing on a technicality when you say they don't legally apply to you.'

"He's saying it would be imprudent for you," she added. "It may not be technically illegal for you to violate these laws, but it would be imprudent, it would harm you."

Transparency advocates may seize on the memo to boost their arguments that Trump should divest his businesses and put his holdings in a blind trust. Scott Amey, the general counsel for the Project on Government Oversight—a group that holds that view—told The Daily Beast that Trump would have to take those steps if he wanted to follow the advice from Scalia's memo.

"Certainly the implication is, even though certain laws may not apply to the president, the basic premise is, 'Let's do everything you can to avoid any conflicts of interest,'" Amey said. "And really, the only way to do that would be to set up a genuine blind trust, with an independent manager."

POGO and other transparency groups, including Citizens for Responsibility and Ethics in Washington, have urged Trump to take that step.

"Presidents have been advised for years that even though they may not be legally prohibited from engaging in conflicts of interest, they should behave as if they were," said Jordan Libowitz, a spokesman for the left-leaning CREW. "Trump should follow this advice and sell his business outside the family and put the proceeds in a true blind trust."

Others say Trump shouldn't necessarily take Scalia's advice.

Hans von Spakovsky, a senior legal fellow at the conservative Heritage Foundation, said there's a good reason the president and vice president are exempt from conflicts of interest laws: They can be voted out of office if they become corrupt, while federal employees aren't directly accountable to voters.

"Presidents are only temporarily in the federal government," von Spakovsky said. "There is no reason to require them to entirely sell their businesses or other assets to pauper themselves and make it impossible for them to earn a living when their terms are done."

David Rivkin, who served in the White House Counsel's office under George H.W. Bush and in the Justice Department under Bush and Ronald Reagan, said Trump could alleviate concerns about conflicts of interest without putting all his assets in a fully blind trust.

"As a matter of policy he should not do anything that would violate the intent, the purpose of the regulations," Rivkin said. "And there are ways he can do that that do not involve divestiture, which is what everybody's talking about now with a blind trust."

Rivkin argued **in a Nov. 22 Washington Post op-ed** that Trump could let his children run his companies if he pledged not to discuss their dealings with them, and if they turned to the White House counsel or the Department of Justice's Office of Legal Counsel if they had legal concerns about dealings with foreign entities. Rivkin said this kind of set-up would satisfy critics, thus comporting with Scalia's advice.

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, said he shares Rivkin's view: that Trump could heed Scalia's advice without going as far as POGO and others would like.

"It's important to be seen as legitimate and above-the-board and above reproach," Shapiro said. "How I would interpret this would be to say, 'Do things that make it look like you have the country's interests at heart, and that means setting out exactly what your business dealings are going to be.'"

At one point, he promised he would hold a press conference on Dec. 15 to explain his approach to the issue. But his team canceled that presser, and now promises he will hold a press conference in January. They haven't said which day. The critics will be listening.