Congress Can and Must Restrict the President's Financial Conflicts of Interest

KATHLEEN CLARK 3:20 AM

The financial conflict statute prohibits federal employees from participating in matters where they could enrich themselves. It applies to everyone in the executive branch, from the lowliest file clerk up to the White House chief of staff – except for the president and vice president. I have argued that Congress should re-impose this statute on the president. The Republican-led Congress has the constitutional authority to do exactly that.

Congress needs to recognize that the strength of our democracy depends on ensuring that the public can reasonably have faith in government officials, including the president.

The Constitution's emoluments clause grants Congress the authority to set ethics standards for government officials, including the president. When Congress enacted a financial conflict statute during the Civil War, it did not exempt the president. When Congress recodified that statute in 1962, it specifically rejected President John F. Kennedy's proposed presidential exemption. A 1989 amendment exempted the president, but Congress retains the authority to restrict the president's conflicts of interest.

Acting Attorney General Laurence Silberman claimed in 1974 that "weighty constitutional problems" would arise if the conflict statute were applied to the president. But the Supreme Court addressed those "constitutional problems" in a 1977 decision arising from former President Richard Nixon's papers, clarifying that Congress can regulate the president if properly justified. Where a statute could potentially "prevent the Executive Branch from accomplishing its constitutionally assigned functions," the court "must determine whether that impact is justified by an overriding need to promote objectives within" Congress's constitutional authority. The court found that restoring public confidence in our political processes after Watergate was one such justification.

Some may argue that re-imposing the financial conflict statute on the president could cause disruption. The president, like other employees, will have to divest from conflicting interests or avoid participating in particular matters that would enrich him. But any disruption is justified by the "overriding need" to prevent the president from advancing his own interests at the expense of the public. And a president-elect can prevent government disruption by divesting from conflicting interests.

In 1961, the Supreme Court acknowledged the importance of the financial conflict standard, explaining that it was "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials … engage in activities which arouse suspicions of malfeasance and corruption." The strength of our democracy depends on ensuring that the public can reasonably have faith in government officials. Congress needs to recognize that this standard is as important for the president as for other executive branch employees.

Prohibitions on Presidential Conflicts of Interest Have Negative Repercussions

C. BOYDEN GRAY 3:20 AM

The Constitution prevents congressional prohibitions on presidential conflicts of interest. The reason, as detailed in a 1974 memorandum by then-Acting Attorney General Laurence Silberman, is that such prohibitions generate one or the other of two equally bad outcomes.

Prohibitions on presidential conflicts of interest either improperly disable the president from performing one or more of his constitutional duties or unlawfully supplement the Constitution's qualifications for becoming president.

The president alone is responsible for executing the duties the Constitution assigns to him. Thus, a prohibition on conflicts of interest that compelled his recusal from certain decisions would impair his ability to fulfill those obligations. By contrast, no similar impairment occurs when Congress prohibits bribe-taking, perjury and the like.

Of course, the mere fact that President-elect Donald J. Trump's conflicts of interest are lawful does not mean he should ignore them.

A prohibition on conflicts of interest that compelled divestiture would be similarly unlawful. The Constitution establishes the exclusive qualifications for becoming president. To be president, a person need only be a natural born citizen, at least 35 years old and a resident within the United States for a minimum of 14 years. Congress can no more disqualify individuals with conflicts of interest than it can disqualify those who do not own property.

The firestorm surrounding President-elect Donald J. Trump's financial holdings demonstrates the wisdom of precluding congressional regulation of presidential conflicts of interest. Since his election, Mr. Trump's critics have aimed to delegitimize and hamstring his presidency. For such people, conflict-of-interest statutes are an attractive tool for accomplishing their objective. But the people elected Mr. Trump as their next president after a long campaign, during which his conflicts of interest were on full display. Across the country, state-by-state, the people determined that Mr. Trump, conflicts and all, should bear ultimate responsibility for Executive Branch decisionmaking. The Constitution does not permit Congress to second-guess that determination.

Of course, the mere fact that Mr. Trump's conflicts of interest are lawful does not mean he should ignore them. The Department of Justice and the Office of Government Ethics have long taken the position that presidents should conduct themselves as if conflict-of-interest laws apply to them. I agree. By doing so, Mr. Trump can likely reap substantial tax benefits while removing a potent arrow from his critics' quiver and enhancing the legitimacy and staying power of his presidential actions. Past presidents appear to have acted in accord with the Department of Justice and the Office of Government Ethics position, and I am optimistic that Mr. Trump will as well.