No. 03-475

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO RECUSE

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LEGISLATIVE HISTORY

Pursuant to Supreme Court Rule 21, Respondent Sierra Club respectfully moves for the recusal of Justice Antonin Scalia from this matter in order to redress an appearance of impropriety and to restore public confidence in the integrity of our nation's highest court.

The federal recusal statute, 28 U.S.C. § 455(a), requires that "any justice . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Justice Scalia's impartiality has been so questioned: there has been an outpouring of public concern over this matter, and dozens of editorials by the nation's newspapers, from all around the country, have called on Justice Scalia to step down. Indeed, to our knowledge, there has not been a single editorial arguing against recusal. Sierra Club respectfully submits that, by the objective standard required by federal law, Justice Scalia's impartiality has reasonably been called into question, and he must be recused.

FACTS

This litigation involves the proceedings of the National Energy Policy Development Group (the "Task Force") and its sub-groups. Petitioner Vice President Cheney presided over the Task Force, and respondents have alleged that he was among the defendants who allowed private citizens to participate in the Task Force's proceedings and those of its sub-groups, thereby making them subject to the Federal Advisory Committee Act ("FACA").

The case is before this Court because the district court refused to dismiss the consolidated complaints and ordered defendants, including the Vice President, to provide plaintiffs with their requested discovery or to submit specific objections and assertions of privilege. The Vice President and three other defendants declined to

provide any discovery, and instead all of the defendants attempted to appeal. After the Court of Appeals found no basis for such an interlocutory appeal and remanded for further proceedings, In re Cheney, 334 F.3d 1096, 1104 (D.C. Cir. 2003), the Vice President and the other defendants petitioned this Court for a writ of certiorari, which was granted on December 15, 2003.

Thereafter, as described in literally hundreds of media reports, on January 5, 2004, Justice Scalia and one of his children accompanied Vice President Cheney on an Air Force Two flight from Washington DC to Morgan City, Louisiana.[1] There, Justice Scalia and the Vice President were guests of Wallace Carline, president of an energy services company, on a duck hunting vacation. On January 16, Justice Scalia issued a statement in response to press inquiries, a copy of which is attached as Exhibit 2. In that statement, he equated his vacation with Vice President Cheney to traditional social contacts between Justices and Executive Branch officials, and concluded that "I do not think my impartiality could reasonably be questioned."

ARGUMENT

I JUSTICE SCALIA'S VACATION WITH THE VICE PRESIDENT HAS LED TO REASONABLE QUESTIONS ABOUT THE JUSTICE'S IMPARTIALITY.

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). As this Court has explained, that provision requires that the judicial conduct at issue:

> be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reasonably be questioned."

[1] A copy of one such article, summarizing the relevant facts, is attached as Exhibit 1. Courts have previously relied on news articles in deciding recusal motions under Section 455(a), e.g., United States v. Tucker, 78 F.3d 1313, 1322-23 (8th Cir. 1996).

Liteky v. United States, 510 U.S. 540, 548 (1994)(Scalia, J.)(emphasis in original.) Thus, it is the appearance of partiality – and not actual bias -- that is the test for recusal under Section 455(a): "In applying § 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993).

Congress established the "appearance of impartiality" standard "to promote public confidence in the integrity of the judicial process." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988). The legislative history of § 455(a) is clear:

> This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case.

H. Rep. No. 93-1453, p. 5 (1974), U.S. Code Cong. & Admin. News 1974, p. 6355. In the words of the Seventh Circuit, "Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done." Durhan v. Neopolitan, 875 F.2d 91, 97 (1989).

Sierra Club makes this motion because that damage is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside because his vacation with the Vice President (including transportation on Air Force Two, courtesy of the Vice President) has created an appearance of impropriety in this case.[2] Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's impartiality "might reasonably be questioned."

[2]Copies of these editorials, and several editorial cartoons, are attached as Exhibit 3.

Under titles ranging from the polite ("Scalia's Conflict of Interest" in the Denver Post, and "Justice Scalia's Misjudgment" in the New York Times), to the sarcastic ("Hunt for impartiality" in the Charlotte Observer, and "If it walks like a duck . . ." in the Chicago Tribune), to the angry ("Supreme contempt" in the Raleigh News and Observer), the nation's editorial writers have called upon Justice Scalia to step aside in the interests of promoting the "public confidence in the integrity of the judicial process" that this Court discussed in Liljeberg. Whether put delicately, as in "No matter how much integrity can be presumed of public officials, the appearance of bias on [Justice] Scalia's part is unavoidable" (Seattle Post-Intelligencer), or more bluntly, "In this case, [Justice] Scalia's impartiality is not only in question, but in tatters" (Houston Chronicle), the result is the same: "[Justice] Scalia has been hopelessly compromised" (Newsday).

The national media reflects the American public's great concern about the continuing damage this affair is doing to the prestige and credibility of this Court. As Newsday put it, nothing less than "[Justice] Scalia's reputation and the court's credibility are on the line." Others agree:

> To foster public confidence in the judiciary, [Justice] Scalia should step aside and let his court colleagues handle this one. (San Antonio Express-News)
>
> The stakes -- the high court's reputation and the credibility of the federal judicial system -- are much higher than one man's pride. (Denver Post)
>
> [T]he strength of the justice system relies on the appearance of propriety. The Scalia-Cheney hunting trip reeks of conflict of interest. (Detroit Free Press)
>
> In the interest of building public confidence in the Court, in this case [Justice Scalia] should step aside and avoid the appearance of partiality. (Charlotte Observer)
>
> [Justice Scalia] should withdraw from the energy task-force case. Justices of the nation's highest court should act in a manner that inspires public confidence that their decisions are being rendered without even the appearance of bias. (Columbus Dispatch)
>
> [Justice Scalia's] participation would be an embarrassment to the court. . . (Cincinnati Enquirer)

Not only the Court's reputation is at stake; if Justice Scalia is not recused, the public may not view the decision in this case as legitimate:

> [Justice Scalia] risks being part of what many Americans will view as a tainted decision. That can only undermine the respect and trust citizens invest in the Supreme Court. (Chicago Tribune)

As the Denver Post has noted, Justice Scalia's participation will bring about that result regardless of how he comes down on the merits:

> Scalia's poor choice of vacation plans will make any decision-making on the Cheney case suspect no matter how he votes. If Scalia says the vice president can keep his records secret from the American people, he will be seen as favoring a hunting buddy. But if he votes against Cheney, Scalia will look like he was trying to protect his own reputation by making up his mind before the court heard the case, an outcome that also would undercut the court's credibility.

Justice Scalia's vacation with the Vice President has also led the nation's editorial cartoonists to question the Court's integrity, as in the following example:

Justice Scalia's conduct has even become fodder for late-night comedians, as demonstrated by Jay Leno on the Tonight Show on February 11, with an audience of millions of people:

> Embarrassing moment today for Vice President Dick Cheney - as he went through the White House metal detector this morning, security made him empty his pockets and out fell Justice Antonin Scalia!
>
> You know this story - V.P. Dick Cheney went duck hunting with Supreme Court Antonin Scalia while the Supreme Court was deciding a case involving Cheney's Energy Task Force. Cheney said there's no conflict of interest. And just to be sure, he said as soon as Halliburton finishes construction on Justice Scalia's new house, he'll look into it.

One of the deepest sources of discomfort for the American public is the fact that Justice Scalia and his daughter were the Vice President's guest on Air Force Two on the flight down to Louisiana. As such, the public believes that the Justice accepted a sizable gift from a party in a pending case; the value of this flight is certainly measured in the thousands of dollars.[3]

> Legal ethicists and anyone with a common sense understanding of fairness would disagree [with Justice Scalia's statement that his impartiality could not reasonably be questioned.] "If the vice president is the source of the generosity, it means Scalia is accepting a gift of some value from a litigant in a case before him," said New York University Professor Stephen Gillers. "This is an easy case for stepping aside." (Raleigh News & Observer)
>
> It's bad enough that Scalia went hunting with the vice president, who has a case before him. It's worse, as several legal experts have noted, that the trip was at the expense, in effect, of the vice president. (Los Angeles Times)
>
> Cheney provided Scalia with a freebie seat on his Air Force Two plane for the trip down, which means that Scalia accepted a gift from a litigant in a case before him. (Boston Globe)
>
> Some legal experts say Scalia, in accepting Cheney's gift of the trip, stepped over the bounds of what a judge is allowed to do concerning someone who has a case before him. (Kansas City Star)

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[3]Assuming that Air Force Two's accommodations are equal to a first-class flight on a commercial carrier, and assuming a 30-day advance purchase, the cheapest ticket that Sierra Club found was $1,039.

> The justice not only went duck hunting with the litigant, but also received his cushy transportation from the litigant. (Houston Chronicle)
>
> What's more, this trip can be construed as a gift or a favor from who paid for the jet. Impartiality certainly can be reasonably questioned. (San Diego Union-Tribune)

A. Case Law Counsels that Justice Scalia Recuse Himself From This Case

While this situation appears unique in the history of this Court, lower courts have dealt with similar issues, and have recognized that cases involving elected officials are especially sensitive to public perceptions of judicial partiality. For example, United States v. Tucker, 78 F.3d 1313 (8th Cir. 1996), involved the criminal prosecution of the Governor of Arkansas. At the request of Independent Counsel Kenneth Starr, the Court of Appeals held that the trial judge should be recused under § 455(a) because the judge and the defendant both happened to be friends of then-President Clinton and Mrs. Clinton. Thus, even though neither President Clinton nor Mrs. Clinton were parties in the case, the Court decided that (id. at 1325):

> Given the high profile of the Independent Counsel's work and of this case in particular, and the reported connections among Judge Woods, the Clintons and Tucker, assignment to a different judge on remand is required to insure the perception of impartiality.

If the Eighth Circuit concluded that a reasonable person could question the impartiality of a judge on the basis of his being a friend of the President, who in turn was a friend of the defendant, then certainly reasonable observers would reach the same conclusion about Justice Scalia's vacation with the Vice President – the lead defendant in this matter -- during the pendency of this case.

Even in cases without such political sensitivity, courts have understood that stringent application of Section 455(a) is necessary to foster public trust in the integrity of the judiciary. A recent example is Republic of Panama v. American Tobacco Co., 217 F.3d 343 (5th Cir. 2000), which involved claims against the tobacco industry for conspiring to conceal the health risks of tobacco products. Prior to his appointment to the federal bench, the trial judge had been president of the Louisiana Trial Lawyers

Association ("LTLA"). In 1991, the LTLA filed a state court amicus brief in a tobacco product liability case; the motion for leave to file the brief listed the judge as counsel and President of LTLA. The judge's name appeared by mistake on the motion, and he in fact had nothing to do with the research, writing, signing or approval of the actual brief (where his name did not appear) and was no longer President of LTLA when these papers were filed. Nonetheless, the Court of Appeals held that Section 455(a) required recusal: "The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality." Id. at 347.

Finally, even if the decision to recuse in this case were a close one, the statute's purpose of promoting public confidence in the judiciary requires that judges must resolve any doubts in favor of recusal. See, e.g., Republic of Panama v. American Tobacco Co., 217 F.3d 343, 347 (5th Cir. 2000)("[I]f the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal."); In re United States, 158 F.3d 26, 30 (1st Cir. 1998), Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995); United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir. 1993)("Where the question is close, the judge must recuse himself."); United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)(Section 455(a) "requires judges to resolve any doubts they may have in favor of disqualification.")

II JUSTICE SCALIA SHOULD BE RECUSED BECAUSE THIS CASE INVOLVES THE VICE PRESIDENT'S OWN CONDUCT AND THEIR JOINT VACATION IS NOT A TYPICAL SOCIAL CONTACT BETWEEN JUSTICES AND EXECUTIVE BRANCH OFFICIALS.

According to Justice Scalia's January 16 response to press inquiries:

> Social contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity. For example, Supreme Court Justices are regularly invited to dine at the White House, whether or not a suit seeking to compel or prevent certain presidential action is pending. I expect that all of the Justices were

> invited to the Vice President's annual Christmas party. The invitation was not improper, nor was the attendance.

Sierra Club respectfully disagrees with Justice Scalia's characterization of both the Vice President's role in this litigation and the nature of their vacation together.

A. The Vice President's Own Conduct Is At Issue In This Case.

Critical to the issue of Justice Scalia's recusal is understanding that this is not a run-of-the-mill legal dispute about an administrative decision. And more to the point, the American public understands that it is not. Because his own conduct is central to this case, the Vice President's "reputation and his integrity are on the line." (Chicago Tribune.) This is because respondents have alleged, inter alia, that the Vice President, as the head of the Task Force and its sub-groups, was responsible for the involvement of energy industry executives in the operations of the Task Force, as a result of which the Task Force and its sub-groups became subject to FACA. Indeed, the Vice President's brief in this Court affirmatively argues that "the President and the Vice President are in the best position to know how the [Task Force's] advisory activities were structured" (Brief at 23), and it contends that the "decisions below impose intrusive and distracting discovery obligations on the Vice President himself." (Id. at 38-39).

The difference between this case and the typical litigation involving the Executive Branch can be seen by comparing it to another case pending before this Court, Norton v. Southern Utah Wilderness Alliance et al, No. 03-101. Sierra Club is a co-plaintiff with Respondent Southern Utah Wilderness Alliance in that dispute, which involves the Interior Department's management of certain federal lands in Utah. Because that case does not in any way involve Secretary Norton's own conduct, social

contacts between Justices and Secretary Norton would not create the same need for recusal as Justice Scalia's vacation with Vice President Cheney does in this matter.

The public also understands this critical distinction. In the words of the Minneapolis Star-Tribune, "When an interior secretary is named in a suit against her department's policies or practices, her personal integrity is not under challenge -- as Cheney's clearly is in this case." Or, as succinctly put in the New York Times, this case "involves not just any action, but one calling [the Vice President's] integrity into question." Many others have also recognized that the Vice President "has a personal and political stake in the outcome" (Miami Herald) of this case:

> Cheney is not an incidental party to the lawsuit: It was he who convened the task force, believed to have been top-heavy with industry players, and he who kept the meetings secret. (Newsday)
>
> The vice president individually has a real stake in this case; it is consequently unseemly for it to be decided, in part, by a friend with whom he takes a vacation as the case is pending. (Washington Post)
>
> [T]he suit turns not just on the interpretation of a law but on Cheney's very conduct of the task force." (Boston Globe)

In other words, the American public recognizes that this case is of critical personal importance to the Vice President, and is not a routine disagreement over the meaning or applicability of a federal law.

B. A Shared Vacation is Not a Simple Social Contact.

Although Justice Scalia equates his vacation with the Vice President to more traditional and minimal social meetings between Supreme Court Justices and members of the Executive Branch, Sierra Club agrees with Newsday's observation that "a private out-of-state getaway is different from a chat at a cocktail party." Again, the American public understands this distinction as well:

> As legal experts point out, a private hunting trip is not a simple social event. It's extremely personal access by a litigant to a judge hearing his case. (San Diego Union-Tribune)
>
> [W]hen a judge goes on a three-day hunting trip in Louisiana as the guest of man [*sic*] who's at the center of a case before the court, that's hardly the kind of casual social contact that most people would consider innocuous. (Charlotte Observer)
>
> [V]acationing with a litigant in a small group, outside the public eye, raises a far greater appearance of impropriety than attending a White House dinner. (New York Times)
>
> A hunting trip and transport on a government jet is not the same as a group invitation to a Christmas party. (Cincinnati Enquirer)

The central question of this litigation is whether energy industry participation in the Task Force and its sub-groups made them subject to FACA. Therefore, the fact that Justice Scalia's vacation was hosted by the president and owner of an oil industry services firm has increased public discomfort about an appearance of impropriety. As the Houston Chronicle bluntly put it, "To make matter worse, the host of the hunting party was a man who had made his fortune in the energy sector." Others, such as the Salt Lake Tribune, also find this circumstance especially troubling:

> Perhaps that businessman, Wallace Carline of Diamond Services Corp., was a member of the secret advisory committee that Cheney convened to draft the administration's pro-oil energy policy. Perhaps he wasn't. Whether the public ever knows that is up, in part, to Mr. Hunting Buddy Scalia.

At least one appellate court has had to deal with the appearance of impropriety arising out of vacation plans. In United States v. Murphy, 768 F.2d 1518, 1538 (7th Cir. 1985), immediately after sentencing, the prosecutor and the judge departed on a vacation together with their families. As Judge Easterbrook observed:

> [W]e conclude that an objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation. A social relation of this sort implies extensive personal contacts between judge

and prosecutor, perhaps a special willingness of the judge to accept and rely on the prosecutor's representations.[4]

If such is the case where the prosecutor and the judge vacation together after a proceeding, it is hard to imagine how much greater the appearance of impropriety when the judge vacations with one of the parties, while the matter is still before the court and, most disturbingly, in part as a result of the litigant's largesse.

C. Justice Scalia Recused Himself From Previous FACA Litigation, Which Also Supports Recusal Here.

In the previous case before this Court concerning the constitutionality of FACA, Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989), Justice Scalia recused himself. While no explanation for this recusal was given, Justice Scalia had authored a legal memorandum in 1974, when he was an Assistant Attorney General, in which he concluded that applying FACA to presidential advisory committees was unconstitutional. To the extent that Justice Scalia may have prejudged the merits of this case as a result of the 1974 memorandum, this would also be grounds for him to recuse himself in this matter.

CONCLUSION

For the reasons given above, Justice Scalia should be recused from this matter.

Respectfully submitted,

_____
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[4]Because the recusal motion in Murphy came after sentencing, the Court of Appeals did not award any relief because "Judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts." Id. at 1541.

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Dated: February 23, 2004

CORPORATE DISCLOSURE STATEMENT

Sierra Club has no parent coporation, and no publicly held corporation owns 10% or more of Sierra Club.

CERTIFICATE OF SERVICE

I certify that on February 23, 2004, copies of the foregoing Motion to Recuse were served on all parties required to be served, by email and first class mail, postage prepaid, at the following addresses:

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Exhibit 1

Los Angeles Times

February 5, 2004 Thursday
Home Edition

SECTION: MAIN NEWS; National Desk; Part A; Pg. 1

LENGTH: 1495 words

HEADLINE: Scalia Was Cheney Hunt Trip Guest; Ethics Concern Grows

BYLINE: David G. Savage and Richard A. Serrano, Times Staff Writers

DATELINE: PATTERSON, La.

BODY:

Supreme Court Justice Antonin Scalia traveled as an official guest of Vice President Dick Cheney on a small government jet that served as Air Force Two when the pair came here last month to hunt ducks.

The revelation cast further doubts about whether Scalia can be an impartial judge in Cheney's upcoming case before the Supreme Court, legal ethics experts said. The hunting trip took place just weeks after the high court agreed to take up Cheney's bid to keep secret the details of his energy policy task force.

According to those who met them at the small airstrip here, the justice and the vice president flew from Washington on Jan. 5 and were accompanied by a second, backup Air Force jet that carried staff and security aides to the vice president.

Two military Black Hawk helicopters were brought in and hovered nearby as Cheney and Scalia were whisked away in a heavily guarded motorcade to a secluded, private hunting camp owned by an oil industry businessman.

The Times previously reported that the two men hunted ducks together while the case was pending, but it wasn't clear then that they had traveled together or that Scalia had accompanied Cheney on Air Force Two.

Several experts in legal ethics questioned whether Scalia should decide the case.

"In my view, this further ratchets it up. If the vice president is the source of generosity, it means Scalia is accepting a gift of some value from a litigant in a case before him," said New York University law professor Stephen Gillers.

"It is not just a trip with a litigant. It's a trip at the expense of the litigant. This is an easy case for stepping aside."

Aides to Cheney say the vice president, like the president, is entitled to travel to vacation spots on government jets and to take along guests at no cost.

"The vice president is on duty 24 hours, seven days a week," said Kevin Kellems, a spokesman for Cheney. "His security is important, and a certain number of people must accompany him."

Judges are bound by different rules, however. Federal law says that "any justice or judge shall disqualify himself in any proceeding in which his impartiality might be questioned."

When asked about the trip last month, Scalia confirmed that he had gone duck hunting with Cheney, but said he did not see a need to withdraw from the case.

"I do not think my impartiality could reasonably be questioned," he said in a written response to The Times. He said "social contacts" between justices and high-level government officials have not been seen as improper, even when those officials have cases in the courts that concern "their official capacity, as opposed to their personal capacity."

"I expect that all of the Justices were invited to the Vice President's annual Christmas Party. The invitation was not improper, nor was the attendance," Scalia wrote.

This week, the justice was asked whether he had traveled to south Louisiana as Cheney's guest or paid for the trip. He refused to comment.

Two years ago, the Sierra Club and Judicial Watch sued Cheney, seeking to learn whether the vice president and his staff had met behind closed doors with lobbyists and corporate officials from the oil, gas, coal and electric power industries.

A judge ordered Cheney to turn over documents detailing who met with his energy task force. Cheney appealed, and in September, Bush administration lawyers asked the Supreme Court to hear the case and reverse the judge's order.

It "would violate fundamental principles of separation of powers" to force the president or the vice president to disclose who they met with, said U.S. Solicitor Gen. Theodore B. Olson.

After considering the appeal behind closed doors on three occasions, the Supreme Court on Dec. 15 announced that the case of "in re Richard B. Cheney" would be heard in the spring.

It takes the votes of at least four justices to grant review of a case, but the court does not disclose which justices vote in favor of such appeals.

The hunting trip took place three weeks later.

Northwestern University law professor Steven Lubet said a vacation trip with the vice president is not the same as attending a Christmas party.

"This is certainly a level of hospitality that most litigants are not able to extend to Supreme Court justices," he said. "It also reinforces the perception this was an exceptional event, not a run-of-the-mill social event or a White House dinner."

The Washington legal director for the Sierra Club said his group is considering filing a motion to ask Scalia to withdraw from the case.

"On the face of it, that makes things worse," said the Sierra Club's David Bookbinder, referring to the justice's trip aboard an Air Force jet. "The fact that the vice president is his host and, in effect, is paying for his vacation puts it in an even more awkward light for Justice Scalia."

The decision is likely to rest with Scalia himself. In a response to a recent inquiry from two Senate Democrats prompted by the hunting trip, Chief Justice William H. Rehnquist said the high court does not have a formal policy or rules for reviewing decisions by justices on whether to withdraw from a case.

Gillers said he found Rehnquist's response troubling as well.

"This has exposed a gap in the ethics rules. This is a federal law that applies to the justices, but in this instance, Scalia is the judge of his own case. I would think the full court has an interest in its institutional reputation and would want to review a decision like this."

In south Louisiana -- the state bills itself as the "Sportsman's Paradise" -- the Cheney-Scalia trip drew the attention of local officials because of the unusual security precautions.

Scalia had hunted ducks in the state's southern marshes several times before, and in November, Secret Service agents visited the area to plan for a visit by the vice president.

Ken Perry, who runs the Perry Flying Center at the Harry P. Williams Airport, said Secret Service agents were there in November to study security plans for the upcoming trip. They returned for a second trip around the Christmas holidays when the nation's terror level was raised to orange, or high, he said.

He and St. Mary Parish Sheriff David Naquin said that on the morning of Jan. 5, a large security contingent was in place -- two Black Hawk air combat rescue helicopters, a line of armored sport utility vehicles and a ring of federal agents and sheriff's deputies who set up a security perimeter. The area was declared a no-fly zone for other aircraft.

It was raining when the two blue-and-white jets, with the U.S. flag on their tails and the fuselages clearly marked "United States of America," appeared under the clouds. Perry said the planes radioed that "Air Force Two was on its approach." Perry said Cheney was among the first to deplane, followed by Scalia and a young woman who was identified to Perry as one of the justice's daughters.

Both Perry and Naquin said there were orders prohibiting photographs of those who exited the planes and climbed into the motorcade. But two days later, Cheney returned to the airport without Scalia, and photographs were allowed. Perry and Naquin said the vice president happily posed with them for photos at the Patterson airport.

Scalia stayed on to hunt for a few more days, the sheriff said, but local officials said it was unclear how he returned to Washington.

Perry said the planes were piloted by Air Force crews, and he added that the Air Force paid $2,000 for fuel to return to Andrews Air Force Base in Maryland.

Lt. Col. David Branham, a spokesman at the base, said the 10- and 12-seat planes are assigned to the 89th Airlift Wing there and are typically used for trips to rural airports too small to handle larger aircraft. "That's part of the package for moving the president and the vice president," he said.

The hunting camp is on private land and in a secluded section of a bayou. According to several local hunters, it includes a large floating camp where guests stay overnight. During the day, hunters armed with shotguns go out in small boats to duck blinds to position themselves for shooting.

Scalia and the sheriff said the hunting was not good in early January, probably because of inclement weather. "It was terrible," Naquin said. "There were very few ducks killed."

The camp is owned by Wallace Carline, the head of Diamond Services Corp., an oil services firm that is on 41 acres of waterfront property in Amelia, La. The company provides oil dredging, pile driving, salvage work, fabrication, pipe-rolling capability and general oilfield construction.

Carline, who founded the company 42 years ago, also contributes money to local Republicans running for office in Louisiana. He refused to comment on the visit by Cheney and Scalia.

Carline's secretary said he was in Mexico and had nothing to say about the hunting trip. "He enjoyed the visit," she said. "But it's over with now. It's old news. He's not going to talk to you."

Serrano reported from Patterson, La., and Savage reported from Washington.

GRAPHIC: PHOTO: HOST, GUEST: Vice President Dick Cheney, left, and Supreme Court Justice Antonin Scalia went after ducks together. Before it was disclosed that Scalia was Cheney's guest, the justice said he could be impartial in judging a case before the high court involving the vice president. PHOTOGRAPHER: Reuters PHOTO: (no caption)

[redacted] Exhibit 2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

January 16, 2004

Mr. David Savage
Los Angeles Times Washington Bureau
1875 Eye Street NW #1100
Washington, D.C. 20006

Dear Mr. Savage:

To answer your three questions in descending order of difficulty:

(1) Even though the duck hunting was lousy (our host said that in 35 years of hunting on this lease he had never seen so few ducks), I did come back with a few ducks, which tasted swell.

(2) Vice President Cheney was indeed among the party of about nine people who hunted from the camp.

(3) I do not think my impartiality could *reasonably* be questioned. Social contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity. For example, Supreme Court Justices are regularly invited to dine at the White House, whether or not a suit seeking to compel or prevent certain presidential action is pending. I expect that all of the Justices were invited to the Vice President's annual Christmas Party. The invitation was not improper, nor was the attendance.

Sincerely,

Antonin Scalia

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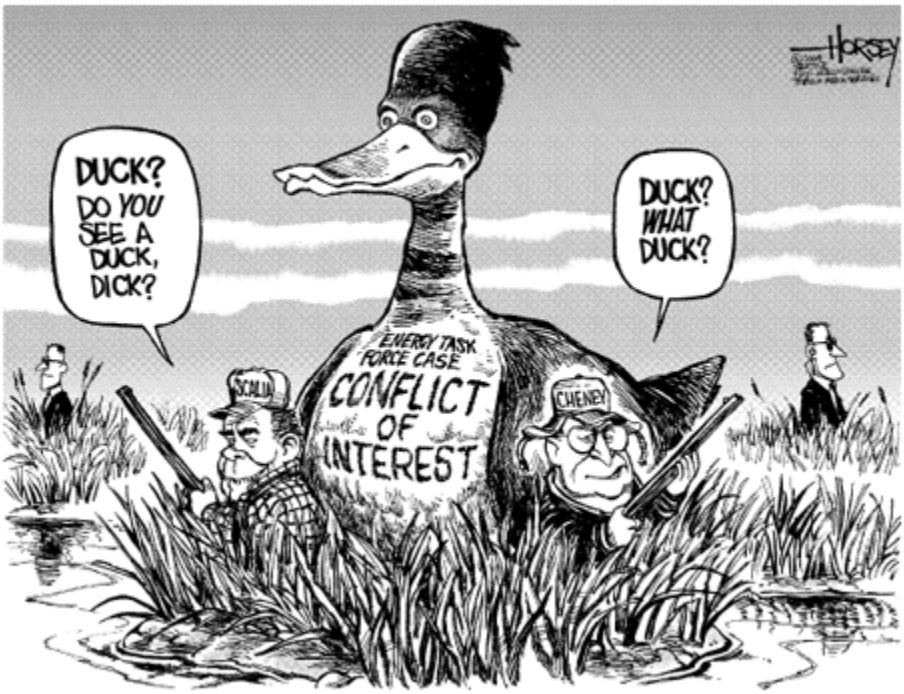


HEY, DUCKS!!
WE CALL DAT A DUCKCALL
DUCK HUNTING WITH THE CHENEY-SCALIA GANG
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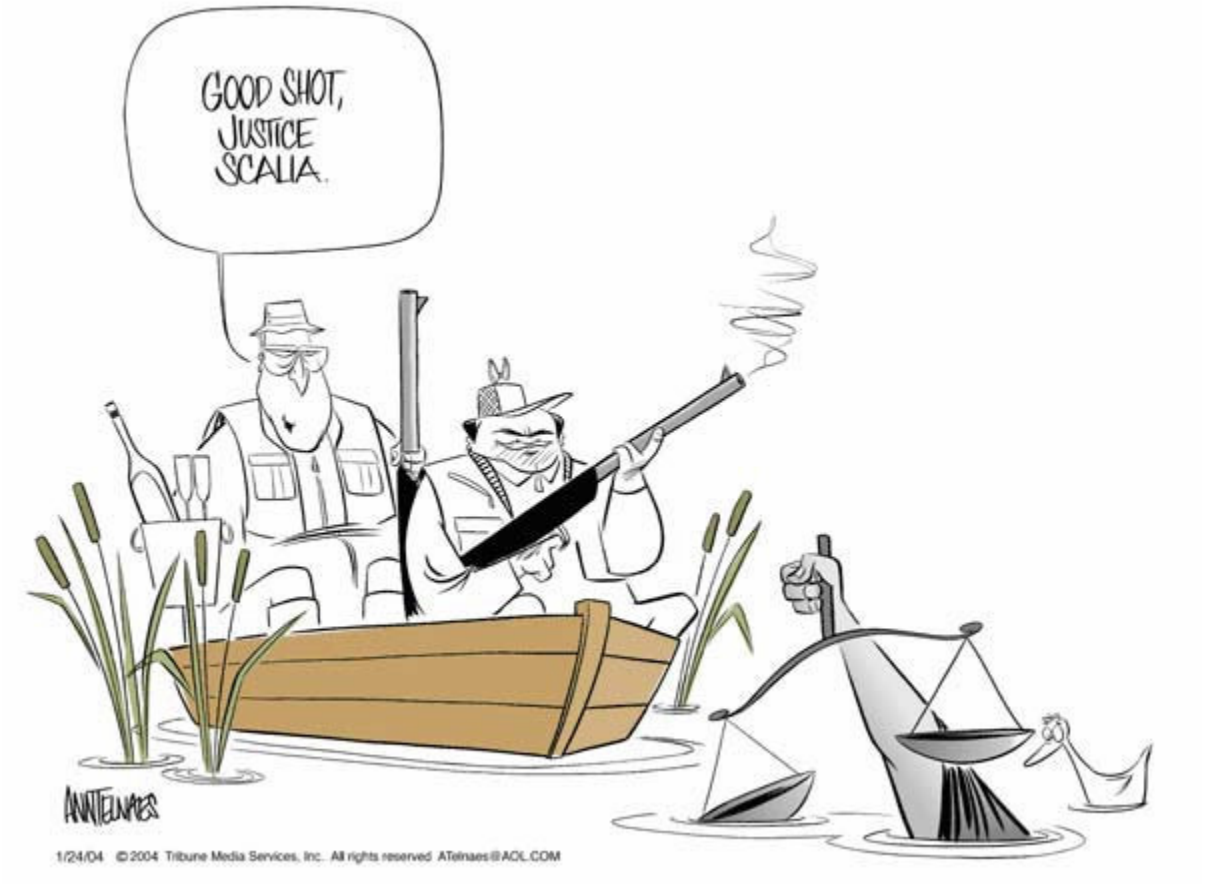
GOOD SHOT, JUSTICE SCALIA.
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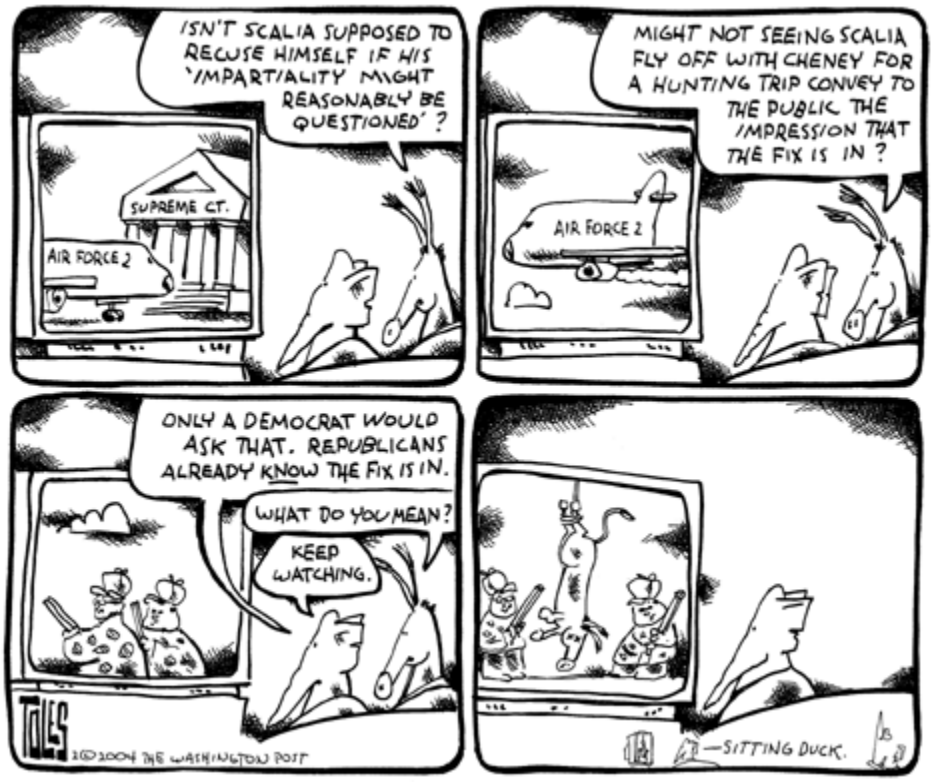
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KEEP WATCHING.
TOLES
©2004 THE WASHINGTON POST
—SITTING DUCK.

The Atlanta Journal-Constitution
January 29, 2004

HEADLINE: OUR OPINIONS: Scalia, use good judgment; bow out of Cheney case

What could be more innocent, more ruggedly all-American, than two old hunting buddies spending a weekend together bagging mallards and chugging a few brewskis? Probably nothing, unless one of them is Vice President Dick Cheney and the other is U.S. Supreme Court Justice Antonin Scalia, who will be hearing a case in which his longtime friend is the defendant.

Recently, Cheney, Scalia and seven others were part of a hunting party hosted by an energy company official at a Louisiana camp. The high-powered guest list notwithstanding, the episode might have been forgotten as just another junket for Beltway insiders.

But for good reason, the timing of the trip is raising eyebrows and hackles; Cheney is the target of a pending lawsuit filed by two public interest groups demanding that the vice president surrender records from a national energy task force he chaired in 2001.

In the complaint, Judicial Watch and the Sierra Club allege that Cheney met exclusively with energy company executives --- including former Enron Chairman Ken Lay and top officials from Atlanta-based Southern Co. --- while shutting out environmental groups and other concerned stakeholders.

A lower federal court last year mostly agreed with the plaintiffs and ordered Cheney to hand over the documents. Facing a contempt of court citation, Cheney's office persuaded the Supreme Court to review the case. Two months later, Scalia and Cheney had dinner; this month, they spent more quality time bonding in a duck blind.

Usually, disclosures that a sitting judge was chummy with a principal in a case before him would be taken more seriously. But Chief Justice William Rehnquist has brushed off inquiries by Senate Democrats who have suggested that Scalia withdraw. Rehnquist called their concerns "ill considered."

In a Los Angeles Times interview, Scalia said he didn't think his "impartiality could reasonably be questioned." He added that "social contacts with high-level executive branch officials [including Cabinet officers] have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity."

There is a grain of truth in Scalia's statement. It would be unrealistic to think federal officials should sacrifice every aspect of their personal lives in order to serve their country. When it comes to the highest court in the land, however, Americans have a legitimate expectation that justices serving for life will go beyond the pale to avoid conflicts of interest, or even the slightest hint of bias.

That's especially important at a time when the American public has grown so accustomed to scandal that they tend to suspect that whatever waddles and quacks like a duck probably is.

Scalia has already demonstrated he understands that; in another case before the Supreme Court he voluntarily recused himself after admitting he'd expressed a personal opinion on the matter in a public forum. (That case involved including the phrase "under God" in the Pledge of Allegiance.)

Before the court hears the Cheney task force appeal this spring, Scalia should again follow his own wise counsel by disqualifying himself.

The Boston Globe
February 7, 2004

HEADLINE: SCALIA'S APPARENT CONFLICT

For three years, Vice President Richard Cheney has been stone walling attempts by Congress and two public-interest groups to reveal details about a Cheney-led task force that drafted the Bush administration's energy policy with the help of industry executives. A suit to get this information, by the Sierra Club and the conservative watchdog group Judicial Watch, is headed to the Supreme Court.

Showing extreme bad judgment, Justice Antonin Scalia went on a four-day duck-hunting trip with Cheney last month, after the Supreme Court had accepted the case. Cheney provided Scalia with a freebie seat on his Air Force Two plane for the trip down, which means Scalia accepted a gift from a litigant in a case before him. Democrats in Congress have asked Scalia to recuse himself from the case, which he has so far refused to do. That's a mistake.

It is quite possible that Scalia and Cheney never breathed a word about the case while pursuing ducks in Louisiana as guests of an oil services company owner. But federal law requires that the judge step aside in any case where his "impartiality might reasonably be questioned." Scalia has already done so in a different case, involving the "under God" phrase in the Pledge of Allegiance, because he had delivered a speech critical of a lower-court decision in the case.

Scalia bases his refusal to sit out the Cheney suit on the grounds that Supreme Court justices have traditionally socialized with high-level members of the executive branch, even if there are cases involving the officials before the court. But there is a difference between meeting at a Georgetown dinner party and spending a long flight and two days together in a hunting lodge. Also, the suit turns not just on the interpretation of a law but on Cheney's very conduct of the task force.

Finally, it is impossible to separate Scalia's duck-blind camaraderie with Cheney from Scalia's part in the Supreme Court's highly questionable 5-4 ruling in Bush v. Gore that made Cheney vice president in the first place. Scalia should leave the Cheney case to his eight fellow justices.

Buffalo News
February 18, 2004

HEADLINE: Judicial arrogance: Scalia's attitude in Cheney case reflects badly on the Supreme Court

The continuing, obstinate refusal of Supreme Court Justice Antonin Scalia to recuse himself from a case involving his hunting buddy, Vice President Cheney, illuminates one of the great truths about many of today's conservatives in high office: They will do what they want when they want and they don't give a hoot what anyone thinks about it. The arrogance is breathtaking.

Under increasing pressure to remove himself from a pending case that directly involves Cheney's conduct, Scalia the other day flatly and dismissively refused. In doing so, he not only demonstrated terrible judgment - not something you want to see in a Supreme Court justice - but he compounded last month's original sin, which was to accompany defendant Cheney on a corporate-paid duck-hunting vacation to Louisiana, in the first place.

The hubris is startling, even from men as resistant as these two are to the currents of common sense. Scalia contends the trip was acceptable because the lawsuit involves Cheney's official role rather than personal conduct, and while the argument may meet some official standard of conduct, it fails the laugh test.

Let's be blunt: There is simply no reason to think these two did not discuss the pending case while they were vacationing. It defies reason to believe that people this arrogant would behave appropriately in private when they've already decided they don't need to do so in public. It's like hiding in plain sight.

It's not acceptable, and the public should keep pressuring both Scalia and Cheney over this. This is a matter of constitutional importance and public propriety, not to mention the issue involved in the lawsuit itself: whether Cheney has to release records relating to a task force on energy he chaired in 2001. The fundamental question is whether the public has a right to know who may have been influencing the administration's energy policy. Cheney doesn't think so. Does anyone wonder why?

Both men bring to mind the 1966 retort of Michael Quill, then the leader of New York City's Transport Workers Union, to a judge's injunction forbidding a strike. Said Quill: "The judge can drop dead in his black robes."

Today, it's the man in the black robes pointing his finger, and it is the public he is consigning to the lower regions. The public shouldn't have to stand for it.

Charlotte Observer
February 9, 2004

HEADLINE: Hunt for impartiality: Justice Scalia should excuse himself from Cheney's case

Antonin Scalia likes to hunt with friends. Sometimes he heads for the woods of Wilkes County to shoot the breeze and whatever else is in season with his buddies.

But he made a mistake going on a three-day duck-hunting trip to Louisiana last month with Vice President Dick Cheney, who is at the center of a controversial case soon to come before Associate Justice Scalia and his colleagues on the U.S. Supreme Court. He should recuse himself from hearing that case.

It's not clear that Justice Scalia sees the conflict between his friendship with the vice president and his duty to be an impartial arbiter of the law. He told the Los Angeles Times in January, "I do not think my impartiality could reasonable be questioned." He also suggested that social contacts between judges and administration officials has never been thought improper in Washington.

That may be true, but "social contacts" covers a lot of territory. Justices and executive branch officials may often find themselves in the same room or at the same table for a social event in the nation's capital. But when a judge goes on a three-day hunting trip in Louisiana as the guest of man who's at the center of a case before the court, that's hardly the kind of casual social contact that most people would consider innocuous.

It matters not a whit whether the two men discussed the case during their hunting trip. What matters is that three weeks prior to the trip, the Supreme Court agreed to hear Vice President Cheney's appeal of a federal court order requiring him to disclose who was involved in an energy task force he met with while the Bush administration was shaping its energy policy in 2001.

Judges across the land understand the necessity of recusing themselves when there is a potential conflict of interest, or even the appearance of one. N.C. Supreme Court Justice Bob Orr, for instance, appropriately recused himself from hearing a high-profile redistricting case after he made some fairly innocuous remarks about a fellow Republican at a political event.

Justice Scalia understands the principle involved. He earlier recused himself from a case about the constitutionality of the words "under God" in the Pledge of Allegiance because he had expressed a view on the issue before the court agreed to hear the case Justice Scalia's confidence in his own opinion sometimes comes across as arrogance, an unseemly quality in a judge. In the interest of building public confidence in the court, in this case he should step aside and avoid the appearance of partiality. And next time, perhaps he'll think twice about gallivanting off to the shooting range as the guest of someone whose case he's about to judge.

Chicago Tribune
February 13, 2004

HEADLINE: If it walks like a duck . . .

A job that includes the word "Supreme" in the title carries a risk. It may lead a worker to think he's above the common-sense, conflict-of-interest mores that apply to mere mortals. How else to explain Supreme Court Justice Antonin Scalia's refusal to recuse himself from a case involving his hunting buddy Dick Cheney, the vice president of the United States.

In 2001, Cheney headed a task force to develop a national energy policy. The group worked secretively, not disclosing names of participants at its deliberations. Critics of the Bush administration suspect that some of the most influential participants were from the energy industry.

In response to challenges filed by two groups, the Sierra Club and Judicial Watch, a federal court ruled last July that Cheney had to disclose who had met with the task force. Cheney, who has been fighting disclosure, asked the Supreme Court to review the lower court action. On Dec. 15, the Supremes agreed to take up the case, which is likely to be argued this spring.

Three weeks later, a hunting party including Cheney, his longtime pal Scalia and several other men flew to Louisiana to hunt ducks at a private camp. As the Los Angeles Times prepared an article disclosing the trip, and quoting experts in legal ethics saying it raised doubts about Scalia's ability to judge the Cheney case impartially, Scalia acknowledged the trip and likened it to other innocent contacts between the judges and "high-level executive officials" who, in their official (as opposed to personal) capacity, have cases pending before those judges. Scalia flatly rejected concerns about a potential conflict of interest, telling the newspaper: "I do not think my impartiality could reasonably be questioned."

Scalia chose his words carefully. Federal law requires a judge to disqualify himself from any case in which he has "a personal bias or prejudice . . . or personal knowledge of disputed facts." That's not the issue here. But a judge also is to recuse himself "in any proceeding in which his impartiality might reasonably be questioned."

Northwestern University law professor Steven Lubet, a specialist in judicial ethics, concludes that, "Taking a vacation with a litigant in a lawsuit is disastrously bad judgment" on Scalia's part. "Cheney's conduct is at the heart of the case." And while Cheney faces no possible personal penalty in the pending lawsuits, his reputation and his integrity are on the line.

Having exercised bad judgment, Scalia now should let his eight colleagues decide Cheney's case. Thus far, though, the feisty Scalia has refused. Tuesday, speaking at

Amherst College in Massachusetts, he reiterated his comments to the L.A. Times and concluded cheekily: "That's all I'm going to say for now. Quack, quack."

Part of the problem, Lubet says, is that the Supreme Court, alone among U.S. federal and state courts, has no code of conduct that defines the limits of social contacts and other conflicts. Instead, justices decide when to recuse themselves--as Scalia often has done in the past.

Why a jurist of Scalia's extraordinary intellect won't exercise simple good judgment is a mystery. Maybe he has concerns about setting a precedent that could overly constrict other justices.

But as is, he risks being part of what many Americans will view as a tainted decision. That can only undermine the respect and trust citizens invest in the Supreme Court.

Without question, Scalia and Cheney are entitled to a warm and loyal friendship. Under codes of conduct in other courts, Lubet says, they still could spend time together and dine at one another's houses--even with Cheney's case before Scalia's court. But an elaborate hunting trip is too tight and valuable a bonding experience for citizens to discount as simple chumminess.

Scalia needs to embrace a basic axiom of public life. An apparent conflict of interest has one thing in common with a duck: If it walks like one, it is.

Quack, quack.

CINCINNATI ENQUIRER
February 13, 2004

HEADLINE: Scalia misfires in Cheney case

U.S. Supreme Court Justice Antonin Scalia has given new meaning to the term "duck blind." He has refused to recuse himself from an upcoming case involving Vice President Dick Cheney, even though the two are longtime friends and only last month Scalia was Cheney's guest at a private duck-hunting camp in Louisiana.

Scalia should drop out of hearing the in re Richard B. Cheney case this spring. His participation would be an embarrassment to the court and the Bush administration.

Scalia spoke out on the issue Tuesday night at Amherst College. He argued the Bush appeal did not involve a lawsuit against Cheney as a private individual, and that ethics rules do not say justices cannot socialize with White House officials.

"It's acceptable practice to socialize with executive branch officials when there are not personal claims against them," Scalia said. "That's all I'm going to say for now. Quack, quack."

Although Cheney could not suffer any direct dollar loss if the court ruled against him, it could affect his career. In Scalia's earlier written response to the Los Angeles Times, he noted that all the justices were probably invited to the vice president's annual Christmas party, and that neither Cheney's hunting trip invitation nor Scalia's acceptance was improper. "I do not think my impartiality could reasonably be questioned," he wrote.

But this case involves a lower court decision against Cheney, who is trying to keep confidential the details of closed-door White House strategy sessions that led to President Bush's energy policy. Energy executives including former Enron chairman Kenneth Lay took part in those sessions. The plaintiffs - the Sierra Club and Judicial Watch - argue Cheney and his staff violated the Federal Advisory Committee Act when they met behind closed doors with lobbyists for the oil, gas, coal and nuclear industries.

Just three weeks after the Supreme Court agreed, on Dec. 15, to hear the Bush appeal, Scalia flew, as Cheney's guest, aboard an Air Force jet to a private hunting camp owned by oil industrialist Wallace Carline, owner of Diamond Services Corp. A hunting trip and transport on a government jet is not the same as a group invitation to a Christmas party.

There's nothing wrong with a justice being close friends with a vice president, but a vacation trip is an offer of hospitality well beyond what most litigants could offer a justice. It doesn't help appearances that Cheney's former company, the oil-and-gas contracting giant Halliburton, grossly overcharged for services in Iraq and that last week the Justice Department opened a probe into alleged Halliburton bribes.

It's left to justices themselves to decide if they should recuse themselves. But the canons do require that any judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Scalia is a man of integrity and no doubt could rule impartially, but the charge of government by crony lies at the heart of this case. Scalia should stop acting "duck-blind" to it and step aside.

Columbus Dispatch
January 23, 2004

HEADLINE: Too close for comfort; Scalia should recuse himself from case against Dick Cheney

Justice Antonin Scalia and Vice President Dick Cheney are friends -- close friends, from all appearances. Nothing wrong with that.

Cheney has been under pressure from Judicial Watch, a government watchdog group, and the Sierra Club, an environmental organization, to release the names of members of an energy task force that the vice president convened early in the Bush administration. Cheney refused to reveal the names, citing executive privilege, and in September the administration asked the Supreme Court to overrule a lower court that ordered disclosure.

Last month, the justices agreed to consider the case. Critics say Scalia should recuse himself, given his close ties to Cheney. And they're right. They point out that two months after the administration appealed the case, Scalia dined with Cheney, Defense Secretary Donald H. Rumsfeld and others at a Maryland restaurant.

Earlier this month, Cheney and Scalia hunted ducks together at a private camp in southern Louisiana. They were guests of Wallace Carline, the owner of Diamond Services Corp., an oil-services company.

Scalia's response to the suggestion that he's bound by ethics to remove himself from the case was succinct.

"I do not think my impartiality could reasonably be questioned," he said.

Considering his close relationship with Cheney, Scalia asks too much of an increasingly cynical public.

Legal scholars and court watchers agree that Scalia is a brilliant jurist, probably the most intelligent and conservative member of the court. He is tough-minded and suffers neither fools nor criticism gladly. One senses that Scalia takes any challenge to his impartiality as an affront to his intellectual honesty.

First, let's suppose that Scalia is fully capable of ruling against Cheney in this case. No problem there.

But what if Scalia's reading of the Constitution and the law is such that he sides with the administration's view that the task force members' identities should remain private. Now there is a problem.

No matter how legally justifiable that position might be, the appearance of coziness between branches at the highest level of the federal government would be unavoidable and especially troublesome in light of recent history.

Pressure for disclosure is tied to charges that the task force was weighted in favor of oil producers, power companies and industries to whom the administration was indebted for large campaign contributions.

Because the task force was expected to influence energy policy, the Sierra Club and others hope that identifying the participants will add credence to their argument that the environment was given short shrift.

The appearance of impropriety, even where none exists, can do great damage to public confidence. That Scalia was a key vote in the 5-4 decision that stopped the presidential-election recount in Florida and assured victory for George W. Bush (though Bush lost the popular vote to Al Gore) would raise eyebrows if Scalia supported Cheney's view in this case.

And critics of the administration would lose no time in pointing out that Scalia and Cheney have continued to socialize even after the court agreed to consider the case.

Confidence in the Supreme Court and the Bush administration will suffer unnecessarily if Scalia's role in this case suggests favoritism. That's a risk neither has to or should take. Rules for federal judges require that they "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Scalia withdrew from a case involving the Pledge of Allegiance in October because he had said in a speech that the courts have gone too far in removing religion from public schools. The phrase "one nation under God" is at the crux of the case.

He should withdraw from the energy task-force case. Justices of the nation's highest court should act in a manner that inspires public confidence that their decisions are being rendered without even the appearance of bias.

Contra Costa Times
February 6, 2004

HEADLINE: Court in duck soup

The Bush administration’s predilection for secrecy is no secret. It is almost Nixonian in the White House's reluctance to cooperate with investigations into who released the identity of a CIA covert agent, securing documents and testimony in the bipartisan Congressional investigation of Sept. 11 has been like pulling teeth, and Vice President Dick Cheney's adamant refusal to reveal the identities of the energy task force who helped formulate America's energy policy.

It is the latter case that now raises questions. More specifically, it raises questions as to whether Supreme Court Justice Antonin Scalia has the ability to render a fair judgment in the matter.

Cheney's energy task force worked in secret. Nobody took minutes, no interim reports were revealed nor were the participants named. If they were all government employees that might be OK, but it is widely suspected that some of the meetings included energy company lobbyists and executives, including Enron's Kenneth L. Lay. If that suspicion is true, it clearly would be a conflict of interest.

Cheney could easily have erased all doubts by just naming the task force members but he has refused, claiming executive privilege. The Sierra Club and public advocate Judicial Watch filed suit and the lower court agreed, ordering Cheney to release the information.

The Supreme Court accepted Cheney's appeal on Dec. 15. Three weeks later, on Jan. 5, Scalia and Cheney went on a duck-hunting expedition together in Louisiana at the private preserve of an oil company executive.

Federal law says a judge "shall disqualify himself in any proceeding in which his impartiality might be questioned," but Scalia said his hunting trip should not disqualify him from deciding the Cheney case.

"I do not think my impartiality could reasonably be questioned," he said in a written response to an inquiry by the Los Angeles Times.

Indeed, it is near impossible in Washington for members of the executive and judicial branches to not know each other and even to socialize. But in this case where it was known that a case involving possible cronyism was going to come before the bench, Scalia should have altered his vacation plans.

Supreme Court Chief Justice William Rehnquist, in response to two senators, said only the individual judge could disqualify himself.

Who knows what was discussed in the private confines of the hunting preserve? The two pals may have just discussed favorite duck recipes for all we know. But the mere appearance of a conflict of interest is enough to place doubt on the court's impartiality and any ruling that might favor the vice president.

At a time when the nation's intelligence agencies are being questioned, when White House credibility is ebbing, the country doesn't need the cloud of suspicion besmirching the belief in an independent judiciary.

For the sake of the nation's faith in justice, Scalia should recuse himself from hearing Cheney's appeal.

The Dallas Morning News
January 24, 2004

HEADLINE: Hits and Misses

A great sign. Forget John Kerry. Forget John Edwards. Forget Howard Dean. What jumps out the most about the Iowa caucuses is that participation by people under age 30 increased to 17 percent of the turnout. That's up from 9 percent four years ago. You gotta love seeing more young people voting. New Hampshire, South Carolina, Oklahoma, the challenge's been issued. Turn out those young voters! Are you ready to be a role model? Big Brothers Big Sisters of America, which now has 5,300 mentors helping 2.5 million young people, turns 100 this year. But the need remains great, so backers are using January, National Mentoring Month, to recruit more mentors. If you can involve yourself in the life of a young person who could use some guidance, check out www.WhoMentoredYou.org on the Internet. Blind spot justice Last year, Justice Antonin Scalia was forced to take his vote off the table from this year's pledge of allegiance "under God" case because of a speech he gave to the Knights of Columbus. Now his impartiality can be questioned again after he took a multi-day duck-hunting trip with Dick Cheney - just weeks after the Supreme Court had agreed to hear the controversial case brought against the vice president for his secret energy task force. Appearances count. Justice Scalia was true to his friend, but he let the nation down. Bait and switch In 1998, the Texas Commission on Environmental Quality allowed the Holcim cement plant in Midlothian to double its capacity on the condition that it would reduce its emissions of nitrogen oxide. The Swiss-based company didn't hold to the terms of its deal with the state. Now, Holcim wants the state's permission to more than double its emissions of the ozone-causing chemical. Nothing doing. Human health trumps corporate profits. What was he thinking? After a public outcry, County Commissioner Ken Mayfield gave up his free Super Bowl tickets. But we just have one question: Why'd he accept them from an attorney representing the Dallas Cowboys in the first place? None of his colleagues took the tickets, perhaps sensing a conflict of interest with the Cowboys looking for help with a new stadium. The attorney says he was acting on behalf of Houston clients, not the Cowboys. But Mr. Mayfield should have seen this conflict coming. It shouldn't have passed his smell test.

Denver Post
January 26, 2004

HEADLINE: Scalia's conflict of interest

U.S. Supreme Court Justice Antonin Scalia should recuse himself from a case involving Vice President Dick Cheney. The stakes - the high court's reputation and the credibility of the federal judicial system - are much higher than one man's pride.

Last year, a federal appeals court said Cheney must reveal who he met with when crafting administration energy policy. Last month, the high court agreed to hear Cheney's appeal.

Then this month, Scalia unwisely went on vacation with Cheney. On the private trip to a posh hunting lodge, the nation's second-highest-ranking government executive and a justice on the country's most important court were guests of an energy company executive - whose business interests might benefit from the Bush energy policy.

The public would be justifiably concern if a federal district judge vacationed with a defendant with business pending before his or her court. Although the district judge might profess an ability to remain impartial even after such socializing, any decision the court rendered would be suspect. If district judges are expected to not just remain impartial, but also look impartial, Supreme Court justices should be held to no lesser standards.

Scalia's poor choice of vacation plans will make any decision-making on the Cheney case suspect no matter how he votes. If Scalia says the vice president can keep his records secret from the American people, he will be seen as favoring a hunting buddy. But if he votes against Cheney, Scalia will look like he was trying to protect his own reputation by making up his mind before the court heard the case, an outcome that also would undercut the court's credibility.

Scalia's refusal to recuse himself let the sour tinge of politics ooze into the high court's chambers. On Friday, two top Democratic U.S. senators wrote Chief Justice William Rehnquist, asking what the high court's policies are on apparent conflicts of interest.

"When a sitting judge, poised to hear a case involving a particular litigant, goes on vacation with that litigant, reasonable people will question whether that judge can be a fair and impartial adjudicator of that man's case or his opponent's claims," said Sens. Patrick Leahy and Joe Lieberman.

In nearly 18 years on the high court, Scalia has rendered many thoughtful opinions and earned respect even from people who disagree with him. He should not let his poor judgment concerning a Louisiana duck hunt mar his otherwise honorable service on the nation's most important court.

Detroit Free Press
January 28, 2004

HEADLINE: Cheney-Scalia; Supreme Court justice should sit out energy case

Chief Justice William Rehnquist predictably deflected calls for U.S. Supreme Court Justice Antonin Scalia to recuse himself from a case involving Vice President Dick Cheney's super-secret energy task force. Cheney and Scalia are such good friends they went duck hunting recently in Louisiana, despite the case before the court.

Rehnquist's response was predictable not because of the content of the concern, but because of the character of the court. Justices jealously guard the court from charges it plays or is influenced by politics, the 2000 Florida election debacle notwithstanding. The chief, particularly, would not like any senators telling the court what to do, especially two Democrats looking to make political hay.

But behind closed doors, Scalia's berobed brethren should encourage him to sit out the case. Technically, he could sit in, because the issue is bigger than any individual, centering on how much leeway the White House has to craft policy with anonymous sources behind closed doors. But it was Cheney's committee and Cheney's reluctance to disclose its members that forced the issue. Indeed, Cheney's name is on the case.

Scalia surely has the ability to set aside his friendship and rule on principle. But the strength of the justice system relies on the appearance of propriety. The Scalia-Cheney hunting trip reeks of conflict of interest.

Rehnquist and other justices can proclaim publicly that the choice is Scalia's alone. But to protect the integrity of the court as a whole, they should quietly urge Scalia to step aside on this one -- and to do so gracefully.

That way, if the court sides with Cheney, no one can say it was looking out for its friends.

Fort Worth Star-Telegram
February 7, 2004

HEADLINE: Shot in the foot

High-ranking public officials should not have to give up their private lives or their friends when they assume office.

But they must be careful to resist even the appearance of a conflict of interest when their private and public roles intertwine.

It seems that lesson has not been learned by two of the nation's highest-ranking public servants: Vice President Dick Cheney and Supreme Court Justice Antonin Scalia.

On the surface, a duck hunting trip to Louisiana with old friends is not a big deal.

Considering, however, that a case involving Cheney is pending before the Supreme Court, this was not an insignificant get-together.

The case concerns the vice president's energy task force and whether he has to reveal the names of those serving on it.

It further muddies the waters of this trip that the officials' host in Louisiana was a man who is very much a part of the energy industry.

Conflict of interest? Whether it is or not, surely Cheney and Scalia must have realized that there would be a perception of conflict, and the best way to avoid such an appearance is to avoid such situations.

But the deed, described by Scalia as something like a White House dinner, has been done.

The question now is whether the justice should remove himself from ruling on the case. Maintaining his impartiality, Scalia has said he would not recuse himself.

He should, for it would be the proper thing to do. Otherwise he stands the chance of further marring the Supreme Court with the tag of being too politicized.

That would not be good for the court or the nation.

Hartford Courant
January 30, 2004

HEADLINE: Justice Scalia goes duck hunting

U.S. Supreme Court Justice Antonin Scalia erred when he went duck hunting with Vice President Dick Cheney after the high court agreed to hear a case involving the vice president.

Justice Scalia then compounded the mistake by saying he will not step aside when the case is argued in April. Federal law requires that judges, including Supreme Court justices, disqualify themselves in any case in which their ``impartiality might reasonably be questioned.''

The sequence of events in this case is troubling. Mr. Cheney headed a task force on U.S. energy policy in 2001. After environmental groups sued successfully to learn who had attended the panel's closed meetings, the government appealed to the Supreme Court and waited for a response.

Following the appeal, Mr. Cheney had a private dinner with Justice Scalia. Subsequently, the high court agreed to hear the case. Three weeks after that, the justice and the vice president flew to Louisiana to hunt ducks.

Responding to concerns raised by those connections between a jurist and a defendant, Chief Justice William Rehnquist said his colleagues on the court make their own decisions about when to recuse themselves.

Discretion should prompt Justice Scalia to recuse himself, as others have done when they have actual or apparent conflicts.

The case has major open-government implications. Mr. Cheney's task force met with energy lobbyists before the Bush administration recommended opening more federal land, including the Arctic National Wildlife Refuge, to oil, natural gas and coal development. The Supreme Court will rule on whether task force documents should be public, an important test case involving government secrecy.

Justice Scalia isn't helping himself or his personal friend, Mr. Cheney, by refusing to recuse himself and thereby helping to taint the case.

Houston Chronicle
February 9, 2004

HEADLINE: Friend of court: Justice Scalia's impartiality highly questionable

After going hunting last month with his friend Dick Cheney, a litigant in a case before the U.S. Supreme Court, Justice Antonin Scalia said his impartiality could not reasonably be questioned. This is another case in which justice, though not evenhanded, is certainly blind.

Last month Scalia flew to Louisiana with the vice president on Air Force 2. The justice not only went duck hunting with the litigant, but also received his cushy transportation from the litigant.

In the case at hand, a watchdog group and environmental activists are suing the vice president to force him to disclose records that show which energy executives and lobbyists he met with in crafting the administration's national energy policy. Cheney's position is that executive privilege allows him to meet in secret with interested parties such as Ken Lay, Enron CEO at the time, while minimizing public involvement.

To make matters worse, the host of the hunting party was a man who had made his fortune in the energy sector.

Throughout history, justices have socialized with presidents and other senior officials, even when the executive branch had a case before the court. Historians offer the prime example of President Franklin D. Roosevelt and Justice Robert Jackson. But Jackson was known to rule against Roosevelt from time to time.

It is inconceivable that Scalia would vote to rule against his hunting buddy and political ally when the Supreme Court decides the case. However, Scalia should have shown better judgment and avoided Cheney's society and gratuity while the case is before the court.

Would Scalia have accepted an invitation to go birdwatching with the litigants on the other side of the case, whom Cheney declined to consult on energy policy? Doubtful.

A judge or justice should disqualify himself in any proceeding in which his impartiality might be questioned. In this case, Scalia's impartiality is not only in question, but in tatters.

A jurist of his intellect should be able to discern the plain circumstances and recuse himself, for the good of the court.

The Kansas City Star
February 12, 2004

HEADLINE: Scalia should step aside from case

Vice President Dick Cheney may have gotten more than ducks in a hunting trip last month. His real trophy may be his guest -- a Supreme Court justice.

Cheney reportedly took Justice Antonin Scalia to a private Louisiana camp. The two traveled on a small government jet. Scalia and Cheney are old friends but this trip has raised serious ethical questions.

Three weeks before the trip, the Supreme Court agreed to hear Cheney's appeal of a lower court ruling in a case of considerable national interest.

Sierra Club and Judicial Watch had sued the vice president, seeking documents showing who met with Cheney's energy policy task force. It has been widely speculated that the task force members included energy company executives.

Some legal ethics experts say Scalia, in accepting Cheney's gift of the trip, stepped over the bounds of what a judge is allowed to do concerning someone who has a case before him.

Federal judicial ethics rules say "any justice or judge shall disqualify himself in any proceeding in which his impartiality might be questioned."

Scalia defended the trip, noting that Supreme Court justices regularly have dinner at the White House and arguing that the hunting trip was no different.

It isdifferent. Dinner in a public setting creates less concern about the integrity of the court than does an expense-paid trip over several days.

The trip also tarnishes the vice president, who should avoid the appearance of attempting to exert improper influence over the court.

The trip creates reasonable doubts about the court's impartiality. That should be enough for Scalia to step aside from the case.

Los Angeles Times
January 22, 2004

HEADLINE: One case Scalia should skip

The federal rules on how U.S. judges should behave are straightforward and reasonable: "A judge should not allow family, social or other relationships to influence judicial conduct or judgment" or "permit others to convey the impression that they are in a special position to influence the judge." Antonin Scalia scoffs at the idea that his hunting trip with friend Dick Cheney might bias the Supreme Court justice when he hears the vice president's appeal to keep the details of his 2001 energy task-force meetings secret. Scalia may be able to separate friendship from his judicial duty to be fair and impartial. But the appearance of impropriety is no less important, and the duck shoot leaves a dreadful impression.

To be sure, no justice works in a vacuum in Washington; friendship with presidents helped many get appointed to the court. Such personal loyalties were as important in 1801 — when John Adams named his longtime lieutenant, John Marshall, as chief justice — as they are today. Once confirmed, justices serve for decades, deepening their network of rich, powerful friends over White House dinners and on private golf courses. There's added skepticism, of course, about the independence of this court since its majority put George W. Bush in office with a controversial ruling in Bush vs. Gore.

Inevitably, justices' friends or the presidents who put them on the bench are parties to a pending case. That's why the highest court — like every other — calls on its members to recuse themselves in instances of conflict of interest or its appearance. Jurists recognize that taking this simple step is their vital responsibility to keep the courts' integrity above reproach. Justice Sandra Day O'Connor, for example, has withdrawn from business cases because she owns stock in a firm. Scalia is properly recusing himself from a Pledge of Allegiance case this term because he appeared to criticize a lower-court ruling on the issue in a speech last year.

His friendship should prompt him to do the same in the Cheney case. On Jan. 5, just three weeks after the court agreed to hear the suit, the two pals hunted ducks for a few days at a private Louisiana camp, as Times staffer David G. Savage reported. It's worth noting that if Scalia, in misguided fashion, hears this case in April, he will be part of a court that decides whether Cheney violated an open-government law by meeting behind closed doors with lobbyists for the oil, gas, nuclear and coal industries while formulating national energy policy. Scalia bristles at the notion that "my impartiality could reasonably be questioned," but he is smart enough to see that others could conclude otherwise. For the court's credibility, he should duck out of this case.

Los Angeles Times
February 6, 2004

HEADLINE: Scalia's Blind Eye

Supreme Court Justice Antonin Scalia didn't just casually meet up with Vice President Dick Cheney for a few days of male bonding and duck shooting in Louisiana last month on a hunting trip. The judge was the vice president's official guest. Yet Scalia still declines to recuse himself from a case before the court involving Cheney. This is a serious ethical issue that Scalia clearly wants to minimize. That cannot be done because the more that is known about the January trip, the worse it looks. The appearance of impropriety is something that ought to concern all members of the nation's highest court.

Scalia flew to rural Louisiana with Cheney on a small government jet that served as Air Force Two. As Times staffer David Savage reported, a second Air Force jet followed with the vice president's staff and security aides. Cheney and Scalia were then whisked away to the private hunting camp in a heavily guarded motorcade.

Such a trip should have been an easy ethical "no-no." It's bad enough that Scalia went hunting with the vice president, who has a case before him. It's worse, as several legal experts have noted, that the trip was at the expense, in effect, of the vice president. Cheney is appealing the order from a lower court judge that he turn over documents from secret meetings he held in 2001 with lobbyists for oil, gas, nuclear and coal industries while formulating national energy policy. Cheney contends that his closed-door meetings did not violate an open-government law.

In mid-December, the high court voted to hear arguments in the appeal, now scheduled for April. Three weeks after that vote, Scalia and Cheney spent two days huddled together in a Louisiana marsh. Because the duck hunting was lousy, they had plenty of time to kill -- and to talk privately.

Federal rules instruct a judge to disqualify himself "in any proceeding in which his impartiality might be questioned." Though these ethics rules apply to all federal courts, the Supreme Court does not have a formal policy for ensuring that individual justices follow them. Scalia has bristled at suggestions that he recuse himself or that his longtime friendship with Cheney -- and their many past hunting trips -- could bias his judgment.

Chief Justice William Rehnquist appears to have the same ethical blind spot, dismissing as "ill considered" the letters he received from four Democratic lawmakers questioning Scalia's continued participation in Cheney's case.

Yet the other seven justices must surely understand that their court's reputation for independence, already called into question by the Bush vs. Gore decision, is now very much on the line. The majority in that case, which included Scalia, marshaled legal

reasoning that can best be called a stretch to block recounts of disputed Florida ballots and put George W. Bush in the White House. Scalia's continued participation in Cheney's appeal will only deepen concerns that the justices put their political allegiances before the law. It's time Scalia's colleagues took him aside for a little chat.

Los Angeles Times
February 13, 2004

HEADLINE: It Walks Like a Duck

The judges had finished their discussion, and the subject turned to an upcoming meeting.

"We could have Justice Scalia speak on ethics," one judge volunteered to an outburst of laughter.

Another judge, chatting with friends at a social gathering, mused: "I know a defense lawyer who'd love to take me to a Lakers game. If it's OK for Justice Scalia, maybe it's OK for me too."

Antonin Scalia has become an embarrassment and the butt of circulating jokes for many state and federal judges, men and women who put on black robes every morning and do their best to decide cases fairly and impartially.

The angry refusal by a justice on the nation's highest court to step aside in the pending case involving his longtime friend and hunting buddy, Dick Cheney, could raise unwarranted questions about the ethics of every judge.

Once that happens, Lady Justice might as well pull off her blindfold and hock her scales to the highest bidder.

To recap, Scalia and the vice president spent a few days together last month shooting ducks. Cheney invited Scalia as his guest; the justice flew to Louisiana in Cheney's government jet, and they spent time alone in the rushes. The jaunt came shortly after the court agreed to hear Cheney's appeal of a lower court order that he turn over records of the closed task force meetings he held with executives of the oil, coal, gas and nuclear companies. Those 2001 meetings produced the president's national energy policy, one heavily festooned with tax breaks and subsidies for these same industries.

Federal rules instruct a judge to disqualify himself "in any proceeding in which his impartiality might be questioned." States have similar rules. In California, the Commission on Judicial Performance can sanction or remove a judge who violates these ethical canons. But there is no such check on the behavior of Supreme Court justices, no matter how blatant the conflict of interest.

Scalia insists that neither his long friendship with Cheney nor the freebie shooting trip will bias his decision in the pending secret-records case, and he dismisses any suggestion that he recuse himself. You don't have to know field game to smell a rotten odor here.

Yet as criticism has mounted, Scalia has only become more insolent. Speaking at Amherst College in Massachusetts on Tuesday night, he again defended his participation in Cheney's case. As a parting shot, Scalia announced: "That's all I'm going to say for now. Quack. Quack."

Some could say the same about conflict of interest. If it walks like a duck and talks like a duck, indeed ... Quack. Quack.

The Miami Herald
February 16, 2004

HEADLINE: Justice Scalia's duck-hunting caper; Our opinion: He should step aside in case involving the Vice President

During his nearly 18 years on the Supreme Court, Justice Antonin Scalia has displayed an admirable combination of wit, sarcasm and erudition in support of the conservative views he so ably champions. But the reasons he has expressed for failing to recuse himself so far from a case involving Vice President Cheney amount to a lame excuse for refusing to do the right thing.

Long-time friends

Let's review the facts: In January, Justice Scalia joined the vice president and seven others on a duck-hunting trip in Louisiana. The two are friends of long standing. But at the time, the court had agreed to hear an appeal from the vice president regarding a lower-court order that he release the names of those who met with an energy task force that he was directing during the early days of the administration. Both the Sierra Club and Judicial Watch -- strange bedfellows, indeed -- have challenged Mr. Cheney's secrecy.

The issue isn't the friendship between the justice and vice president, but rather the cavalier disregard for the customary -- and necessary -- protocol involving judges and parties to a case. Not only must a judge be impartial, but he must avoid behavior that gives rise to the appearance of a conflict of interest. Or, as Sen. Patrick J. Leahy, the ranking Democrat on the Judiciary Committee, put it: "He has to know that with similar tactics, in any state in the country, a state supreme court justice would have to recuse himself." Exactly.

Last week, Justice Scalia told a college audience that there was no conflict because "it did not involve a lawsuit against Dick Cheney as a private individual. . . this was a government issue." What is the difference? Either way, Mr. Cheney has a personal and political stake in the outcome. Moreover, if the court orders Mr. Cheney to release the names, it could damage the administration during the campaign, giving this decision even more importance.

The arrogance of Justice Scalia's refusal to step aside is matched only by the vice president's stubborn insistence on secrecy regarding the people and organizations who helped to frame the Bush energy policy.

Prior recusal

It's also uncharacteristic for Justice Scalia. Last year, the justice gracefully recused himself from a case regarding the constitutionality of the phrase "under God" in the

Pledge of Allegiance. He had criticized the lower-court ruling on the case in an earlier speech.

Justice Scalia tried to make light of all this by closing his remarks with the words, "Quack, quack." That brings to mind the old saying that if it looks like a duck, walks like a duck and sounds like a duck, it must be a duck. Justice Scalia's duck-hunting caper has all the appearance of a conflict of interest. He should step aside before the parties to the case formally ask him to recuse himself.

Minneapolis Star Tribune
January 31, 2004

HEADLINE: Scalia/Cheney/The justice must step aside

Just hypothetically, assume that a district judge in Hennepin County is hearing a lawsuit in which a high-ranking local official (maybe the chairman of the county parks commission) is accused of conducting public business in secret (say, in the hiring of a new parks superintendent).

Imagine, too, that the parks commissioner has lots of friends whose businesses (making playground equipment or resurfacing tennis courts) may benefit from decisions that new superintendent makes.

Now assume that, in the middle of the case, an executive of one of these companies invites the commissioner and the judge to go elk hunting in Montana, as his guests, and they accept.

Question for the class: How many think the judge can continue to preside in this case?

OK, Justice Scalia, you can put your hand down now.

Perhaps it's the majesty of the U.S. Supreme Court that has obscured, not only for Antonin Scalia but also for Chief Justice William Rehnquist, two commonsensical conclusions:
• That Scalia goofed by going duck hunting in Louisiana with Vice President Dick Cheney this month as guests of an oilman.
• That this mistake can be remedied only by Scalia's recusing himself from a high-profile case in which the vice president stands accused of shaping U.S. energy policy in secret, with inappropriate help from energy executives including Kenneth Lay, the former Enron chief.

How else to explain their facile rationalizations of a situation that, notwithstanding differences in officeholder rank, is essentially identical to the scenario imagined above? Federal law and rules in this area are clear: A jurist must not "permit others to convey the impression that they are in a special position to influence the judge," and must withdraw from any proceeding in which his or her "impartiality might reasonably be questioned."

Under challenge from some U.S. senators and legal ethicists, Scalia has denied that his impartiality has been tainted by the hunting trip, asserting that he and his colleagues frequently socialize with Cabinet secretaries and such in the normal course of Washington life. (He has also conveyed his sense of the situation's gravity by noting that the ducks "tasted swell.")

Scalia's justification is absurd. When an interior secretary is named in a suit against her department's policies or practices, her personal integrity is not under challenge -- as Cheney's clearly is in this case.

As for Rehnquist, he has brushed aside as ill-timed and inappropriate a senators' query about the high court's rules for applying the recusal provisions. This invites doubt as to whether the court even has such rules, which is especially unsettling since its decisions can't be appealed to a higher authority.

Though Scalia and Rehnquist seem unable to appreciate the point, their lofty offices carry a greater burden, not a lesser one, to honor the principles of impartiality in both act and appearance. If they were still on a county bench somewhere, perhaps their perspective would be clearer.

New York Post
February 10, 2004
Scalia & Cesar's wife

Supreme Court Justice Antonin Scalia last month went duck hunting with Vice President Dick Cheney in Louisiana; now he's the one being targeted.

To find Democrats and other liberal types with their sights set squarely on Scalia is hardly surprising - his pointed, eloquent opinions annoy them no end.

This time, Scalia was asking for it.

The trip came just three weeks after the high court agreed to hear arguments in Cheney's appeal of a judge's ruling that he must turn over documents from closed-door meetings he held with energy-company executives while he was drawing up the Bush energy policy.

Scalia was Cheney's official guest on the trip - which was hosted by a prominent oil-services executive - and the veep paid some of the justice's expenses, too. Critics say this amounts to improper social contact.

The jurist doesn't seem to appreciate that being the court's leading conservative makes him a lightning rod - which obliges him, fairly or not, to be purer than Caesar's wife, as the saying goes.

Certainly, Scalia's ill-considered trip with Cheney, a longtime friend, is enough to raise the impartiality issue.

Sadly, Justice Scalia appears to have a tin ear on such matters.

Last year, he was forced to disqualify himself from the court's upcoming ruling in the Pledge of Allegiance "under God" case, after he gave a speech arguing against a judicial role in the issue - suggesting that he'd formed an opinion on the case before hearing any arguments.

And it is now widely believed that Scalia's action may have jeopardized the chances of overturning that dubious lower-court ruling.

We have no doubt that Scalia's critics here are less concerned with preserving the Supreme Court's reputation than in trying to knock off the case a justice who'd likely have sided with Cheney - completely on the merits.

Partisan politics is at work here.

But that's no reason for Justice Scalia to help his opponents succeed.

It's time for him to think long and hard about the consequences of his actions.

New York Times
January 25, 2004

HEADLINE: Justice Scalia's Misjudgment

This month may have been duck hunting season in Louisiana, but it was still a bad time for Justice Antonin Scalia to hunt ducks with Vice President Dick Cheney. Their trip came shortly after the Supreme Court agreed to hear Mr. Cheney's appeal of an order requiring him to disclose members of his secret energy task force. By going, Justice Scalia raised serious questions about his ability to judge the case impartially, and needlessly sullied his court's reputation.

Environmental groups and others have long suspected that the Cheney task force, which met to devise a national energy strategy in 2001, gave representatives for the oil, electricity and nuclear industries ? many of them large Republican donors ? undue influence. A federal appeals court ruled in a case brought by two public-interest groups that at least some of the names should be made public.

Justice Scalia told The Los Angeles Times that social contacts between judges and officials with cases pending are permissible when officials are sued in the course of their public duties. He compared his situation to justices' dining at the White House when a suit involving a president is pending. But vacationing with a litigant in a small group, outside the public eye, raises a far greater appearance of impropriety than attending a White House dinner. And Mr. Cheney's case involves not just any action, but one calling his integrity into question.

This is the second time in recent months Justice Scalia has cast doubt on his impartiality. Last year, he told a civic gathering that the decision about whether the Pledge of Allegiance should contain the words "under God" should be left to legislators, not courts, when that issue was headed to the court. After a litigant protested, Justice Scalia recused himself.

To avoid the appearance of partiality, and to protect the reputation of the court, he should do the same in Mr. Cheney's case. And in the future, he should choose his shooting companions from the legions of hunters with no cases pending before him.

Newsday
January 26, 2004

HEADLINE: Scalia Mustn't Sit in Judgment of His Hunting Buddy

Antonin Scalia and Dick Cheney are hunting buddies. They went to Louisiana together a few weeks ago to shoot ducks. Ordinarily there would be nothing noteworthy about that. But Vice President Cheney is fighting in court to keep the records of his energy policy task force secret. And Scalia is a justice of the Supreme Court, which has agreed to hear the case.

Because of those official roles, ducks weren't the only thing imperiled by their trip.

Both Scalia's reputation and the court's credibility are on the line. He should recuse himself from the case. Such cozy fraternization between justice and litigant raises serious questions about his impartiality.

Two lower courts have ordered Cheney to turn over to the Sierra Club and Judicial Watch documents detailing who participated with the task force that crafted the White House's energy policy. Cheney appealed, and three weeks before the duck outing, the Supreme Court agreed to hear the case.

So the ball is in Scalia's court. Federal law says a judge should disqualify himself in any proceeding where his impartiality could reasonably be questioned. Scalia has resisted. In a written response to the Los Angeles Times, he said social contacts with high-level executive officials have never been thought improper. "I do not think my impartiality could reasonably be questioned," he said. Wrong.

There is no higher authority to review Scalia's decision. But a private, out-of-state getaway is different from a chat at a cocktail party. And Cheney is not an incidental party to the lawsuit: It was he who convened the task force, believed to have been top-heavy with industry players, and he who kept the meetings secret.

And who paid for the private jet that whisked Scalia to Louisiana? The Times said it was the owner of an oil services company. Scalia has been hopelessly compromised.

Oregonian
February 13, 2004

HEADLINE: Supreme indifference; Scalia's flip attitude suggests he values his leisure time with cronies more than the reputation of the Supreme Court

If U.S. Supreme Court justices regularly went on hunting trips or spa vacations with plaintiffs or defendants appearing before them, they would no longer be seen as the law of the land.

They'd be seen, rightly, as a random gaggle of people who put their personal lives above the long-term credibility of the nation's judicial system.

They might even be seen as quacks.

Justice Antonin Scalia finally responded publicly this week to calls for him to recuse himself from a case involving Vice President Dick Cheney's use of executive-branch powers. Three weeks after the court accepted this case, Scalia accepted a ride on Air Force Two and went on a private duck-hunting trip with the vice president.

"This was a government issue," Scalia told a large group at Amherst College on Tuesday night, while indicating he would not recuse himself. "It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."

Scalia's odd and flippant dismissal may renew discussions about federal laws covering judicial conduct. Some members of Congress say if the laws were more specific, perhaps Cheney and Scalia would have refrained from their trip.

Forget it. The laws about impartiality are more than specific. Supreme Court justices are expected to use the laws, and their best discretion, as guidance to avoid conflicts of interest or the appearance of conflict.

True, the law does not specifically address duck hunting in Louisiana or buckling up on executive-branch jets. But it shouldn't have to. Common sense says the hunting trip should've been off limits. Common sense also says if Scalia chooses to take such a trip, he should recuse himself from the case without question.

Federal law requires judges to disqualify themselves from hearing cases in several situations: for example, when they have personal biases or prejudices, or when they or relatives have a financial stake in the case. The law also requires recusal "in any proceeding in which (the judge's) impartiality might reasonably be questioned." Supreme Court justices are, quite literally, "above" the law. That makes their personal discretion even more critical.

Two Democrats on the House Judiciary Committee have called for hearings into "possible gaps in federal laws." They should instead encourage Chief Justice William H. Rehnquist to set a higher standard for the court.

Palm Beach Post
Saturday, January 31, 2004

HEADLINE: Scalia's quack defense

Imagine Vice President Dick Cheney as he packed for that duck-hunting trip this month to South Carolina. Shotgun? Check. Shells? Check. Supreme Court justice who's going to rule on a big case involving me? Check.

The justice was Antonin Scalia, who from the bench is always eager to fire both verbal barrels at his colleagues when he thinks their rulings undermine the Constitution and the moral fiber of the country. Yet he presents a much bigger target when it comes to judicial ethics.

In April, the high court will hear Mr. Cheney's appeal of a lower-court ruling that he turn over the names of those who met with his task force in 2001 to draw up the Bush administration's energy policy. Mr. Cheney has resisted, using the false claim of executive privilege. More likely, the White House doesn't want public confirmation of what is obvious: Mr. Cheney listened to energy executives and simply gave them what they want. The resulting bad energy bill died in the Senate last year.

When the Los Angeles Times broke the story of the hunting trip, Justice Scalia said, "I do not think my impartiality could reasonably be questioned." Hey, let's try. This was not a bump-in between a justice and a vice president at a White House Christmas party. This was a small, invited group on a pleasure trip to an isolated setting -- with transportation provided, appropriately, by an oil services company.

Once the court got the case, Justice Scalia needed to cut social ties with his old friend until the court rules. Since he didn't, he has no business ruling on the case. Sitting in that duck blind has blinded him to a clear conflict.

Philadelphia Inquirer
February 11, 2004

HEADLINE: Cheney and Scalia; So that's why it's called a duck 'blind'

Two old pals took a duck-hunting trip to Louisiana last month, and now one of them is in the soup.

Supreme Court Justice Antonin Scalia was the guest of Vice President Dick Cheney _ and American taxpayers _ aboard Air Force Two. They flew to a now-disclosed location: the bayou preserve of an oil-industry businessman. Once there, the veep and his distinguished legal pal set out to ruffle a few feathers.

If only they knew ...

What normally might be a gossip-column blurb has turned into something far more weighty, since Cheney is named in a case pending at the Supreme Court. Not only that, but the high court voted to hear legal arguments in the case only weeks before the two outdoorsmen took up arms.

The case revolves around the Bush administration's efforts to keep secret the names of advisers who helped draft its energy policy _ a project that Cheney directed in the early days of the Bush White House.

So the bayou trip by Cheney and Scalia reads more like a scene out of a John Grisham novel than an article in Field & Stream: a prominent litigant getting two days' private face-time with a key judge in the case.

Several respected legal ethicists agree: Scalia should recuse himself from the Cheney energy-policy case because, as the federal law on judicial recusals states, "his impartiality might reasonably be questioned."

Scalia says he has no intention of doing so, which shows that even a brilliant legal mind is capable of compounding one faux pas with another. It's not as though the justice never acknowledges conflict of interest; he's recused himself many times from cases in which his son, who works for the Labor Department, was involved.

The justice counters his critics by contending that the hunting trip was no different from the routine socializing done by court and government officials around the Georgetown dinner-party scene.

The only similarity, however, between a Washington dinner and the Cheney-Scalia hunt might be the main course _ if duck were on the menu.

A hunting trip is a different beast. It occurs far from public view, rather than amid the hubbub of a dinner party. Such a trip has the look and feel of a private audience _ albeit one punctuated by shotgun blasts and frantic quacks.

To spice the soup even further, Scalia's decision on recusal, in effect, could decide the case. A lower-court judge already has ordered the White House to 'fess up about its energy advisers (widely assumed to be industry big shots and campaign contributors.)

Leaving the case to the other eight justices _ as Scalia should do _ courts a possible 4-4 tie. In that instance, Cheney and Bush would lose: A tie reaffirms the ruling on appeal.

Given that it's so much in Cheney's interests to avoid a tie vote, though, the argument is even stronger for Scalia to distance himself from his hunting buddy's legal fight.

Raleigh News & Observer
February 6, 2004 Friday

HEADLINE: Supreme contempt

When public interest groups sued Vice President Cheney in federal court two years ago, they had every right and reason to expect their lawsuit to be decided impartially. Unfortunately, that expectation took a hit in December when U.S. Supreme Court Justice Antonin Scalia and Cheney went on a duck hunting trip together just three weeks after the highest court had scheduled a date to hear the case.

Amazingly, Scalia appears indifferent to the ethical questions raised when a judge goes on a weekend hunting trip with a litigant in a case due to come before his bench.

Two years ago, the Sierra Club and Judicial Watch sued Cheney to learn if the vice president and his staff had met secretly with energy company officials before drafting the Bush administration's industry-friendly energy plan.

This past Dec. 15, the Supreme Court announced it would hear the case early this year. Three weeks later, Scalia traveled to Louisiana as an official guest on an Air Force plane with Cheney. They were then taken to a secluded hunting camp owned by, of all things, an oil industry businessman.

Scalia issued a statement saying, in part, "I do not think my impartiality could reasonably be questioned." Legal ethicists and anyone with a common sense understanding of fairness would disagree. "If the vice president is the source of the generosity, it means Scalia is accepting a gift of some value from a litigant in a case before him," said New York University Professor Stephen Gillers. "This is an easy case for stepping aside."

It may be, as Scalia went on to say, that Supreme Court justices routinely socialize with high government officials and that cases involving some of those officials may some day end up before the high court. But federal law puts it very clearly: "any justice or judge shall disqualify himself in any proceeding in which his impartiality may be questioned."

At the very least, Scalia should immediately recuse himself from the Cheney lawsuit. It would also help restore his tarnished reputation for him to admit both his error and his glaring insensitivity to its appearances.

St. Petersburg Times
January 21, 2004

HEADLINE: Duck-blind justice

If judges are supposed to avoid even the appearance of bias, then U.S. Supreme Court Justice Antonin Scalia can't possibly defend his recent choice of duck-hunting buddies.

Just three weeks after the high court agreed to decide whether Vice President Dick Cheney broke the law when he held secret meetings with energy industry lobbyists, Scalia and Cheney boarded a Gulfstream jet bound for a hunting trip in southern Louisiana. Somehow, Scalia, appointed in 1986 by President Reagan, sees no conflict.

In defending the trip, Scalia likened it to a Washington social encounter. "For example, Supreme Court justices are regularly invited to dine at the White House," he wrote, "whether or not a suit seeking to compel or prevent certain presidential action is pending."

Whether such dinners in the White House are judicially prudent is a far different matter than whether Scalia ought to hike through the Louisiana woods, shotgun in hand, with a hunting buddy whose conduct is the very substance of a case the court had just agreed to hear on appeal. Cheney is the defendant in the case, brought by the Sierra Club and Judicial Watch, and the lower court ruled against him. Does Scalia think no one will notice if he now writes an opinion overturning the appeals court and exonerating his pal?

The federal code of judicial conduct requires that any justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." That provision, in fact, compelled Scalia to remove himself in October from a case involving the constitutionality of the words "under God" in the Pledge of Allegiance. While the pledge case was on appeal, Scalia had spoken publicly on the issue at a Religious Freedom Day appearance in Virginia.

In the Cheney case, Scalia ought to know better. The high court is still suffering from the political stain left by its decision on Florida's votes in the 2000 presidential election, a case in which Scalia's son was a member of the law firm representing candidate George Bush. For Scalia now to shoot ducks with Cheney, under the current circumstances, only wounds the court further.

Salt Lake Tribune
February 12, 2004

HEADLINE: Justice's blind

Supreme Court Justice Antonin Scalia is undoubtedly a wise and learned man. But he seems to misunderstand this stuff about justice being blind.

This justice is clearly blind to the horrible appearance of impropriety, if not downright unethical behavior, that follows a very expensive -- to the taxpayers -- duck hunting trip he took last month with Vice President Dick Cheney.

Scalia was Cheney's guest both for the ride to Louisiana on an Air Force jet and at a privately owned hunting club on the Gulf Coast, where the pair spent a few foul-weather days shooting at water fowl.

Shoulder-rubbing by the high and mighty is not uncommon and cannot, in itself, raise conflict-of-interest charges. But this trip was hardly a casual meeting at a Georgetown soiree.

Not only was Scalia riding on Cheney's -- and the Air Force's -- nickel, the duck club is owned by a prominent Louisiana oil man who made his bucks doing the same sort of thing Cheney did when he was running Haliburton -- selling equipment and services to the oil industry.

Perhaps that businessman, Wallace Carline of Diamond Services Corp., was a member of the secret advisory committee that Cheney convened to draft the administration's pro-oil energy policy. Perhaps he wasn't. Whether the public ever knows that is up, in part, to Mr. Hunting Buddy Scalia.

Just a few weeks before the duck hunt, the Supreme Court agreed to hear a case from environmental and watchdog groups challenging Cheney's right to keep the membership of that task force a secret.

Cheney argues he should be allowed to take advice from such folks in confidence, so he can be sure they'll shoot straight with him. The Sierra Club, among others, argue more convincingly that the people need to consider the source of the administration's policies in order to judge them.

The question, posed by the media but not, so far, formally by the plaintiffs in the case, is whether Scalia should recuse himself from considering the case. Of course he should.

Scalia's prickly insistence that no reasonable person could question his impartiality in the matter, which he was sticking to as recently as Tuesday, suggests that the rarified air of the Supreme Court has addled the justice's faculties somewhat.

The other eight justices are fully capable of ruling on this case without Scalia's learned hand on their outboard motor. The day the court hears the case, in fact, would be a perfect time for Scalia to decamp to the nearest duck blind.

San Antonio Express-News
January 28, 2004

HEADLINE: Duck hunt raises questions

Supreme Court Justice Antonin Scalia should recuse himself from the case to determine whether Vice President Dick Cheney must release the records of his energy task force. Scalia and Cheney are longtime friends, according to the Los Angeles Times. As Scalia pointed out in a response to an inquiry from the newspaper, that isn't rare. Supreme Court justices regularly socialize with other government leaders.

But the judge made a bad call by going on a nine-day duck hunting trip with the vice president this month as the high-profile case involving Cheney's task force is pending before the high court.

Judicial Watch and the Sierra Club are suing to force Cheney to release records in a major test of open-government laws.

The plaintiffs weren't invited to hunt with the judge.

While Scalia may be able to remain unbiased in considering the case, taking a trip with a participant created a perception of bias. Scalia should have avoided that perception. To foster public confidence in the judiciary, Scalia should step aside and let his court colleagues handle this one.

San Diego Union-Tribune
February 6, 2004

HEADLINE: Duck-blinded ethics; Scalia puts Supreme Court integrity at risk

Whether in a rural county courthouse or the highest court in the land, judges must scrupulously maintain their impartiality. Socializing with a major litigant involved in a pending trial or, worse, accepting something of value from that litigant is not acceptable for any judge.

That includes Supreme Court justices. Antonin Scalia went on a duck hunting trip to a Louisiana bayou camp with Vice President Dick Cheney early last month, a few weeks after the Supreme Court agreed to hear a case this spring on whether Cheney must reveal who served on his energy task force.

Scalia needs to recuse himself from the case. Federal law states that "any justice...shall disqualify himself in any proceeding in which his impartiality might be questioned." Scalia says he viewed the trip as a simple social contact with a top government official, much the same as attending a White House dinner.

It's very different. As legal experts point out, a private hunting trip is not a simple social event. It's extremely personal access by a litigant to a judge hearing his case. What's more, this trip can be construed as a gift or a favor from who paid for the jet. Impartiality certainly can be reasonably questioned.

Further, the difference between Scalia and a rural county judge who might commit the same impropriety is that there's no commission or higher court that can tell Scalia he's wrong. No one can remove Scalia from the case. Chief Justice William Rehnquist has said the Supreme Court has no policy for reviewing whether a justice should withdraw from a case. Only Scalia can decide what he must do.

That singular responsibility makes it all the more crucial that the justice act to protect the integrity of the high court. Scalia should err on the side of impartiality rather than being seen as abusing his power.

Scalia clearly made a mistake when he went on a hunting trip with a major litigant in a case before the Supreme Court. Scalia must withdraw from the case. If he won't do it himself, his fellows justices must persuade him to do so.

San Francisco Chronicle
January 26, 2004

HEADLINE: Too close for comfort

Supreme Court Justice Antonin Scalia is pushing the bounds of ethical propriety by refusing to recuse himself from hearing a case involving his longtime friend and duck hunting partner, Vice President Dick Cheney.

Scalia and Cheney recently spent several days together in a duck blind at a private camp in southern Louisiana. Their backwoods social came at a curious time, just three weeks after the Supreme Court had agreed to hear the appeal of a lower court ruling ordering Cheney to divulge the composition of the White House energy task force he chaired.

The task force members shaped the nation's energy policies, and the White House has fervently sought to shield their names. But the plaintiffs, Judicial Watch and the Sierra Club, suspect Cheney stacked it with industry officials, including former Enron chairman Kenneth Lay.

None of this, Scalia says, will affect his ability to fairly adjudicate the case. But Scalia must know it's a tough sell. If nothing else, his cozy relationship has created an appearance of conflict that judges, especially, are trained to recognize and avoid.

"When a sitting judge, poised to hear a case involving a particular litigant, goes on a vacation with that litigant, reasonable people will question whether that judge can be a fair," Democratic Sens. Joe Lieberman of Connecticut and Patrick Leahy of Vermont wrote to Chief Justice William Rehnquist, seeking to know if the court can disqualify a justice who refuses to withdraw from a case.

Federal judges, who have lifetime appointments, should set a high standard of ethical conduct by avoiding any appearance of conflict or bias.

Scalia wisely recused himself from the Pledge of Allegiance case involving an Elk Grove schoolgirl because he had expressed an opinion about the case in a speech.

Judges of integrity should go to great lengths to approach each case with open mind and an aura of independence. A justice who has reached the highest court in the land should be able to recognize the problem of sitting in judgment on the official actions of a longtime friend and hunting buddy.

Scalia should recuse himself.

San Jose Mercury News
January 20, 2004

HEADLINE: Cheney's got a pal on the court ruling in his case

When the U.S. Supreme Court this spring considers a dispute between the vice president of the United States and the Sierra Club, one of the parties in the case will recently have been duck-hunting with one of the justices.

Here's a hint. It ain't the Sierra Club.

In January, Justice Antonin Scalia joined Vice President Dick Cheney and seven others on a hunting trip in Louisiana. The two are longtime friends. Scalia dismisses any concern about a conflict of interest, making the case a two-fer in illustrating the arrogance of power.

First from Cheney. He is resisting a lower court order that he release the names of people and organizations that met with an energy task force he was directing. The secrecy is being challenged by the Sierra Club and an activist organization Judicial Watch.

Their contention is that representatives of the energy industry received special access to the vice president (yes, we know, it shocked us too).

Second is Scalia's rejection of any appearance of a conflict of interest.

"I do not think my impartiality could reasonably be questioned," Scalia told the Los Angeles Times, which reported the hunting trip. "Social contacts with high-level executive officials (including Cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity."

Experts in legal ethics don't think that distinction exonerates Scalia. Even if Scalia's longstanding friendship with Cheney doesn't require that he sit this case out, he should have respected appearances and skipped a hunting trip with vice president three weeks after the Supreme Court took the case.

It is, after all, a case about a public official who has turned his back on the need to appear impartial.

Seattle Post-Intelligencer
February 9, 2004

HEADLINE: Scalia should recuse himself

The honorable justice received some rather nice treatment. He was flown from Washington, D.C., to Louisiana, taken duck hunting and lodged at a floating camp. When the jurist and a pal stepped off the blue-and-white jet, emblazoned "United States of America" and serving as Air Force Two, vehicles were waiting for them. The old friends were U.S. Supreme Court Justice Antonin Scalia and Vice President Dick Cheney.

Scalia and the high court are set to hear a major case involving the vice president. Lower courts have ordered Cheney to make public the names of the members of his energy task force.

The justice has refused calls to remove himself from the case. Some legal experts say he's obviously wrong.

Federal rules say that a judge or justice "shall disqualify himself in any proceeding in which his impartiality might be questioned." Chief Justice William Rehnquist says the decision is up to Scalia.

No matter how much integrity can be presumed of public officials, the appearance of bias on Scalia's part is unavoidable. If Scalia has any problem understanding the public perception, he should try imagining others in his place and that of Cheney.

Suppose the issue before the court were the Clinton administration's attempt to keep its health care discussions secret. What would have been the public perception of a trip involving Hillary Clinton and, say, Justice Ruth Bader Ginsburg? Case closed.

Tampa Tribune
January 26, 2004

HEADLINE: Scalia tries to duck conflict with waterfowl reasoning

U.S. Supreme Court Justice Antonin Scalia is a brilliant jurist, quick to detect and demolish a flawed legal argument, particularly one that would manipulate the Constitution to achieve some liberal cause.

So it is difficult to believe that a judge so intolerant of legal tomfoolery would indulge in a brazen flouting of the judicial canon.

Just a few weeks after the Supreme Court agreed to decide whether Vice President Dick Cheney must reveal the names of the private interests who helped him develop the administration's energy plan, Scalia went on a Louisiana duck hunt with Cheney.

The judge claims this does not affect his objectivity. That's duck feathers.

By sloughing around with Cheney in bayou country, Scalia demonstrated a clear bias toward the defendant in the case.

Indeed, Scalia's actions raise questions about the court's accepting the vice president's flimsy case in the first place.

Three courts had already ruled against Cheney, who is being sued by the Sierra Club and Judicial Watch, a conservative government watchdog. The plaintiffs want the vice president to reveal the names of industry representatives who were collaborators in developing the administration's sweeping energy policy.

This is relevant to the public. The energy policy offered billions in tax breaks to energy interests. The administration relied heavily on such interests in developing the plan, while consumer groups, scholars and environmentalists were shut out of the debate.

Moreover, the court twice rightly rejected arguments similar to Cheney's made by the Clinton administration. The precedent is clear.

Scalia clearly is compromised and should remove himself from the case.

The usually clear-eyed judge may have bagged his limit in Louisiana, but when it came to legal judgment, he shot the decoys.

USA Today
February 10, 2004

HEADLINE: Appearances matter

When Vice President Cheney treated U.S. Supreme Court Justice Antonin Scalia to a trip aboard Air Force Two to go duck hunting in Louisiana last month, they might have had only recreation in mind. But the outing touched off questions about fair play that had nothing to do with the great outdoors.

The reason: Three weeks earlier, the Supreme Court agreed to decide whether Cheney must release documents on meetings he held with energy industry officials while developing an energy policy. Some legal experts argue that judges shouldn't pal around with subjects of cases before them, and they are calling on Scalia to disqualify himself.

Scalia has refused, shrugging off the trip as nothing more than a social contact.
But even if the trip were innocent, it raises the appearance of impropriety. That, alone, should give a public official pause.

Instead, the duck-hunting venture is just the latest example of public officials' disregard for how their actions look to a nation growing more distrustful of government. A New York Times /CBS News poll conducted last summer shows the percentage of Americans who trust the government to do what's right dropped from 55% soon after the Sept. 11, 2001, attacks to 36%.

Other recent cases:
Rep. W.J. "Billy" Tauzin, R-La., resigned as chairman of the House Energy and Commerce Committee last month and is considering a lucrative offer to head up the pharmaceutical industry trade association, an aide has confirmed. Tauzin played a key role in writing last year's Medicare prescription drug law, which benefits drug companies.

Thomas Scully resigned in December as chief administrator of Medicare and Medicaid to join a law firm representing top health care businesses.

In each case, involved officials insist no rules were broken. But that doesn't erase public perceptions about special favors that go to the politically connected.

And appearances matter. If they didn't, Republicans wouldn't have jumped on a news report this week that Massachusetts Sen. John Kerry, who in his Democratic presidential campaign has attacked the influence of special interests, collected more than $120,000 in speaking fees from companies and lobbying groups between 1985 and 1990. Although legal at the time, such fees now are banned under Senate ethics rules because of the questions they raise.

Protecting the public's trust in government requires officials to do more than follow the letter of the law. Paying closer attention to how their behavior looks is important, too.

Washington Post
January 28, 2004

HEADLINE: High Court Duck Blind

The duck hunting wasn't even good: "Lousy" was the word Justice Antonin Scalia used to describe the pickings on his trip to Louisiana to shoot fowl with Vice President Cheney and a few others. "I did come back with a few ducks, which tasted swell," he said. But Mr. Scalia also came back with a big appearance problem, one that -- judging from his jesting comments on the matter -- he does not appreciate. And judging from a peremptory letter sent this week by Chief Justice William H. Rehnquist in response to senators' inquiries on the subject, the chief justice isn't taking it very seriously either.

Yes, Mr. Scalia and Mr. Cheney are old friends, and some old friends like to get together and shoot birds. But Mr. Cheney is also the defendant in one of the Supreme Court's hot-button cases this term, a suit seeking disclosure of information concerning his energy task force. Vacationing with the vice president under such circumstances, with both guests of an energy industry executive, represents a serious lapse in judgment, one that Mr. Scalia should now correct by recusing himself from further involvement in the case.

Mr. Scalia told the Los Angeles Times, which initially reported on the potential conflict, that he did not "think my impartiality could reasonably be questioned." The justice explained that "[s]ocial contacts with high-level executive branch officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity."

This is right up to a point. Cabinet officers often are named as defendants in suits challenging actions by their agencies, though their personal behavior is not at issue. No one would argue that every time an executive branch official becomes a formal defendant, the judges hearing that case must cease all social contact with that person.

But this is not the classic case of a high official who is the nominal defendant in a suit that is, in practical terms, a suit against the government itself. Rather, it seeks the release of information that the plaintiffs believe will -- by showing undue influence on the part of energy interests in the formulation of administration policy -- prove embarrassing to Mr. Cheney. The secrecy of the energy task force, moreover, is a political issue, a target of Democratic presidential candidates. The vice president individually has a real stake in this case; it is consequently unseemly for it to be decided, in part, by a friend with whom he takes a vacation as the case is pending. Mr. Scalia only makes his appearance problem worse by digging in his heels and pretending it isn't there.