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# ESSAYS

## Duck-Blind Justice: Justice Scalia's Memorandum in the *Cheney* Case

MONROE H. FREEDMAN\*

A dramatic and controversial case of judicial disqualification is Justice Antonin Scalia's denial of a motion that he recuse himself in *Cheney v. U.S. District Court for the District of Columbia*.<sup>1</sup> The case relates to the National Energy Policy Development Group ("Energy Group"), created by President Bush to establish a national energy policy, and chaired by Vice President Richard B. Cheney.

The Sierra Club and others allege that unidentified industry representatives participated as de facto members of the Energy Group, and the plaintiffs seek to compel disclosure of the identities of the industry members.<sup>2</sup> Cheney, however, has denied that anyone other than government employees participated in the group as members or as de facto members.<sup>3</sup> As stated by the Justice Department, representing Cheney, the first issue before the Supreme Court relates to the allegation that the Energy Group had not truthfully reported who its members were.<sup>4</sup>

The basis for the recusal motion under the federal disqualification statute, § 455(a),<sup>5</sup> was that while the case was pending before the Supreme Court, Scalia and Cheney, who are old and close friends, went on a duck-hunting trip together.<sup>6</sup> In a twenty-one page Memorandum Opinion, Scalia denied the motion.<sup>7</sup> The opinion is both disappointing and disingenuous.

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1. *Cheney v. United States Dist. Court for the Dist. of Columbia*, 124 S. Ct. 1391 (2004) (Scalia, J., mem.).

2. *See* *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) (ordering that the names be produced in discovery), *aff'd, In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003).

3. *See Cheney*, 124 S. Ct. at 1396.

4. *Id.* Cheney's lawyers are challenging the applicability of the Federal Advisory Committee Act, and are contending that the federal district court does not have power to compel disclosure of the members' names through discovery. *Id.*

5. 28 U.S.C. § 455(a) (2004) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

6. *Cheney*, 124 S. Ct. at 1393.

7. *Id.* at 1403.

The applicable federal law is clear. The federal disqualification statute expressly applies to Supreme Court justices.<sup>8</sup> It requires disqualification whenever a justice's impartiality "might" reasonably be "questioned," and the Supreme Court has interpreted that language broadly to avoid "suspicions and doubts" about the integrity of judges.<sup>9</sup>

The close and long-standing friendship between Scalia and Cheney might cause a reasonable person to question Scalia's impartiality in a case of such importance to Cheney, especially in a presidential election year in which energy and environmental issues are being debated.

In addition, a situation that is universally recognized as relevant to a judge's impartiality is the acceptance of something of value from a litigant. For example, in 2002, Justice Scalia recused himself in *Kahvedzic v. Republic of Croatia*.<sup>10</sup> Just before that case had come before the Supreme Court, Justice Scalia had been reimbursed by Croatia for a trip to meet Croatian judges in Zagreb.<sup>11</sup>

Another situation that is universally recognized as relating to a judge's impartiality is *ex parte* communications. For example, like every other code of judicial conduct, the Code of Conduct for United States Judges says that a judge shall "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding."<sup>12</sup> Although the Code applies to all federal judges except Supreme Court justices, Scalia makes it clear in his opinion that he is well aware of the relevance of that issue to his own disqualification under § 455(a).<sup>13</sup>

A justice's close friendship with a litigant, his acceptance of something of value from a litigant, and the potential for *ex parte* communications with a litigant, are all implicated in Scalia's duck-hunting trip with Cheney.

First, the facts. Scalia is caustic about errors that have been made in the recusal motion and in news reports and editorials relating to the trip<sup>14</sup>—errors that could

8. 28 U.S.C. § 455(a) ("[a]ny justice . . . of the United States").

9. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

10. 537 U.S. 1150 (2003); *see also* Tony Mauro, *Decoding High Court Recusals*, LEGAL TIMES, March 1, 2004, at 1.

11. *See* Mauro, *supra* note 11.

Scalia routinely recuses [himself] in cases involving Tulane University, at whose summer law school programs he teaches. When Scalia first recused [himself] in a Tulane case in 1991, the dean at the time said Scalia himself had called to determine if the Tulane entity in the case also sponsored the law school program.

*Id.*

12. 175 F.R.D. 364, Canon 3A(4) (1998).

13. *Cheney v. United States Dist. Court for the Dist. of Columbia*, 124 S. Ct. 1391, 1394 (2004) (Scalia, J., mem.). Scalia asserts that "we said not a word about the present case" and "the Vice President and I . . . never discussed the case." *Id.* at 1399. The significance of those denials are discussed *infra*.

14. *Id.* at 1393. "The decision . . . is to be made in the light of the facts as they existed, and not as they were surmised or reported." *Id.* (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000)).

have been avoided if Scalia had been forthright at the outset.<sup>15</sup> There is nothing new in Scalia's recitation of the facts, however, that is material to the motion for his disqualification. Indeed, one error Scalia points to is that it was not his daughter who accompanied him and the Vice President on Air Force Two, but his son and his son-in-law—which means that the value of the flight to the Scalia family was 150% greater than had been stated in the recusal motion.

The friendship between Scalia and Cheney goes back over a quarter of a century. Scalia has been going on duck-hunting trips to Louisiana for about five years.<sup>16</sup> Several months prior to the most recent trip, Scalia suggested to his host that Cheney be invited. Cheney accepted, "subject, of course, to any superseding demands on the Vice President's time."<sup>17</sup> (While recognizing that later events might have interfered with the Vice President's trip, Scalia omits any reference to the possibility of superseding demands on his own responsibilities as a Justice.) Scalia acknowledges that he and Cheney were together for the flight, during a car ride, during a boat trip, and during all meals. He also acknowledges they might have walked alone together going to or from a boat, or going to and from dinner. There were thirteen guests in all, plus staff and security personnel.<sup>18</sup>

All of those facts can be taken at face value. Scalia adds, however, that he and Cheney did not talk to each other about the pending case. The truth of Scalia's statement is irrelevant to a recusal motion under § 455(a). That is, a denial of impropriety by the judge whose impartiality might reasonably be questioned is not sufficient to remove the question.

For example, the issue in *Liljeberg v. Health Services Acquisition Corp.*<sup>19</sup> centered on which party owned a certificate of need from the State of Louisiana to build a new hospital. Loyola University was not a party to the litigation but, because of a contract between Loyola and Liljeberg, the University did have a substantial financial interest in Liljeberg's obtaining the certificate. After a trial, Federal District Judge Robert Collins awarded the certificate to Liljeberg.<sup>20</sup> Ten months later, the losing party, Health Services, learned that Collins had been a member of Loyola's board of trustees at the time of the trial.<sup>21</sup> Accordingly, Health Services moved to vacate the judgment and to retry the case before an impartial judge. The court of appeals granted the motion and the Supreme Court ultimately affirmed.<sup>22</sup>

As a board member, Collins had been present at meetings when Loyola's

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15. See 28 U.S.C. § 455(e) (2004) (Provided it is preceded by a "full disclosure on the record" by the judge, disqualification under § 455(a) can be waived by the parties.).

16. *Cheney*, 124 S. Ct. at 1393.

17. *Id.*

18. *Id.* at 1393–94.

19. 486 U.S. 847 (1988).

20. *Id.* at 850.

21. *Id.*

22. *Id.* at 850, 870.

contract with Liljeberg had been discussed. However, Collins testified at a hearing on the motion that he had forgotten Loyola's interest in the matter and had made no connection between Loyola and the *Liljeberg* case (to which Loyola had not been a party).<sup>23</sup> Also, a different district judge, who presided over the motion to vacate, found as a fact that Collins' testimony was truthful, and the Supreme Court accepted that finding in its discussion of § 455(a).<sup>24</sup>

That did not answer the question, however, of whether a reasonable person might nevertheless question whether Collins had really forgotten what he had known, and therefore question the judge's impartiality. Significantly, the Court posited a reasonable person "knowing all the circumstances"—and although Judge Collins had asserted under oath that he had had no recollection of Loyola's interest in the case, a reasonable person might suspect the judge to have had actual knowledge.<sup>25</sup> For purposes of disqualification, however, Collins' own testimony was not material as a "circumstance."<sup>26</sup> As the Second Circuit held in an analogous situation, "[w]e are confident that [there was in fact no impropriety]. However we cannot impart this same confidence to the public by court order."<sup>27</sup>

In sum, even though Scalia has asserted that he and Cheney did not discuss the case, a reasonable person might nevertheless question whether *ex parte* communications might have occurred during their trip together while the case was pending.

Scalia expressly recognizes that friendship between a judge and a litigant is a ground for recusal when the friend is sued personally.<sup>28</sup> He contends, however, that because Cheney is being sued in his capacity as chair of the Energy Group, Cheney has no personal interest in the outcome of the case.<sup>29</sup> Acknowledging that disqualification would be appropriate if Cheney's "reputation and integrity" were at stake, Scalia says that this is not the case here. "[T]his *is* 'a run-of-the-mill legal dispute about an administration decision,'" Scalia insists.<sup>30</sup>

But, despite Scalia's italics, this is *not* a routine administrative matter. The Justice Department, representing Cheney, stated the issue that was accepted for review. The case, according to Cheney's lawyers, relates to the allegation that the "advisory group was not constituted as . . . the advisory group itself reported."<sup>31</sup> That is, the issue is whether Cheney, as chair of the advisory group, has been

23. *Id.* at 851.

24. *Id.* at 864.

25. *See id.* at 860–61.

26. *See also* *Sao Paulo v. Am. Tobacco Co., Inc.*, 535 U.S. 229, 232 (2002).

27. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 n.1 (2d Cir. 1976).

28. *Cheney v. United States Dist. Court for the Dist. of Columbia*, 124 S. Ct. 1391, 1394 (2004) (Scalia, J., mem.).

29. *Id.* at 1396–97.

30. *Id.* at 1396 (quoting Motion to Recuse at 9, *Cheney* (No. 03-475)).

31. *Id.* at 1396 n.1.

lying about how the group was constituted. That goes to Cheney's "reputation and integrity" in the most significant way, and is of particular importance to him in an election year.

But Scalia turns that fact into a disingenuous play on words. Admitting that the decision in the case could have "political consequences," and that an adverse decision could do "political damage" to his good friend,<sup>32</sup> Scalia says that "political consequences" are not, and should not be, his concern as a judge.<sup>33</sup> Thus, Scalia characterizes the undeniable impact on Cheney's "integrity and reputation" as mere "political damage," which he then transforms into an abstract proposition about the propriety of isolating judges from politics. What remains true, however, is that Scalia's good friend has a great deal more at stake, personally, in this case than does a government official named as a pro forma party in the typical administrative law case.

Scalia also contends that a four-four tie in the Supreme Court is such a bad thing that the disqualification statute does not mean the same thing for Supreme Court justices as for all other judges. But the statute makes no distinction at all between judges and justices, and Scalia himself has written, "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."<sup>34</sup> Moreover, Scalia's rewrite of the statute would mean that a four-four tie, affirming a decision by a federal appellate court, is somehow worse than having the Supreme Court's decision determined by a Justice whose vote is crucial to protecting his friend's reputation and integrity.<sup>35</sup>

A substantial part of Scalia's opinion is a catalogue of instances in which justices have socialized with presidents and other government officials. His list begins with Chief Justice John Marshall, who attended dinner parties given by President John Quincy Adams.<sup>36</sup> His latest illustration is a skiing trip that Justice Byron White took with Bobby Kennedy in 1963, when Kennedy was about to make an argument before the Court as Attorney General.<sup>37</sup> These illustrations demonstrate, Scalia says, that there is no impropriety in social contacts between justices and government officials who are involved in litigation in their official capacities.<sup>38</sup>

The fallacy in characterizing this as an ordinary official-capacity case is discussed *supra*. But Scalia goes on to refute a non-argument. "Of course it can be claimed," he says, "that 'times have changed,' and what was once considered proper—even as recently as Byron White's day—is no longer so."<sup>39</sup> The point,

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32. *Id.* at 1397.

33. *Id.*

34. ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION* 20–23 (Amy Gutmann ed., 1997).

35. A corollary to that notion is that a justice should recuse herself only when her vote doesn't matter.

36. *Cheney*, 124 S. Ct. at 1395.

37. *Id.* at 1400.

38. *Id.* at 1401.

39. *Id.*

however, is not that *times* have changed since 1963. The fact is that the *law* relating to disqualification has undergone what Scalia himself has called “massive changes.”<sup>40</sup>

Until 1974, the disqualification statute used a subjective standard for disqualification.<sup>41</sup> That is, if the judge herself believed that she could be impartial, she was not only permitted to sit, but had a duty to do so. Both the subjective standard and the notion of a “duty to sit” were abrogated by the 1974 amendment to § 455.<sup>42</sup> As noted at the beginning of this Essay, the standard today is whether a reasonable person might question the judge’s impartiality. If so, the judge is required, *sua sponte*, to recuse herself, regardless of her own opinion of her impartiality.

When the motion was made to recuse Scalia, “8 of the 10 newspapers with the largest circulation in the United States . . . and 20 of the 30 largest have called on Justice Scalia to step aside.”<sup>43</sup> Moreover, “not a single newspaper has argued against recusal.”<sup>44</sup> Unless we are to believe that all these editorialists are unreasonable people, the conclusion is inescapable that a reasonable person *might question* Scalia’s impartiality in the case.

Finally, Scalia misstates the law. Stating “[t]he question, simply put,” he asks rhetorically whether one “would reasonably *believe* that I *cannot* decide [the case] impartially because I went hunting with [a] friend and accepted an invitation to fly there with him on a Government plane.”<sup>45</sup> Of course, the question is not what a reasonable person *believes* about the Justice’s impartiality, but whether a reasonable person *might question* his impartiality. And the point is not that Scalia *cannot* decide the case impartially, but again, that a reasonable person *might question whether* he can do so.

Scalia then links his misstatement of the law to what he claims to be the inconsequential value of the flight on Air Force Two for himself and two family members. The issue then becomes whether he can be “bought so cheap.”<sup>46</sup> He even makes the disingenuous point that “[o]ur flight cost the Government nothing,” because the Vice President was going on the duck-hunting trip anyway, and the space was “available.”<sup>47</sup>

“I daresay,” Scalia adds, “that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to

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40. *Liteky v. United States*, 510 U.S. 540, 546 (1994).

41. FREEDMAN & SMITH, *supra* note 1, at 239–42.

42. *Id.*

43. *Cheney*, 124 S. Ct. at 1399 (quoting Motion to Recuse at 3–4, *Cheney* (No. 03-475)). Scalia does not contradict these figures.

44. *Id.*

45. *Id.* at 1403 (first emphasis added).

46. *Id.*

47. *Id.* at 1397.

Louisiana [for three] on the Vice President's jet [with the Vice President]."<sup>48</sup> (And how much, one might wonder, would be bid for a commercial flight for one to Croatia?) But, of course, this vacuous speculation about auctions hardly establishes that Scalia received nothing of value from Cheney while Cheney's case was pending. Nor does it respond in any way to the undeniable opportunities for *ex parte* discussion of the pending case, which a reasonable person might suspect took place during flights, rides, walks, dinners, and casual conversations.

In short, Scalia's opinion denying the recusal motion engages in fallacious arguments and misstates and misapplies the Federal Disqualification Statute. A Justice of the Supreme Court of the United States owes the litigants, and the public, a greater respect for the law of the United States.

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48. *Id.* at 1398 n.4.



