Supreme Court Justice Scalia's hunting trip with Cheney: the political and constitutional issues

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Following press reports of a private duck-hunting outing with Vice President Dick Cheney in January, Supreme Court Justice Antonin Scalia has refused to recuse himself from a case currently before the high court in which Cheney is a named party. Scalia has responded to questions about the hunting trip with provocative statements that underscore his contempt for the public and scorn for long-standing canons of judicial conduct.

Judicial ethics strictly prohibit judges from meeting privately with one of the sides to a dispute. When such a violation occurs, the judge is expected to withdraw from considering the case, a process known as recusal. Despite his clear violation of the rule, Scalia has cynically brushed off questions about his refusal to take himself off the case.

On January 5, Cheney and Scalia slipped away from Washington, D.C., in a private Gulfstream V jet, landing in Morgan City, Louisiana, guests of local oilman Wallace Carline. The next day, they shot ducks on Carline's private hunting preserve. They flew back to Washington together on January 7.

There were no media announcements preceding the trip, and local law enforcement helping with security were told to keep quiet. The trip did not go entirely unnoticed, however. After the departure of "Air Force Two"—the designation for any plane carrying the vice president—several regional news outlets in southern Louisiana reported the visit. When asked to confirm the identities of the visitors, Sheriff David Naquin of St. Mary's Parish responded that the duck hunting was good, with Scalia and Cheney each shooting his "bag limit of three mallards and three teal."

While as a general rule there is nothing unusual about a member of the Supreme Court socializing with members of the executive branch, in this case Scalia and Cheney spent three days together a mere three weeks after the Supreme Court accepted review of *Cheney v. United States District Court*. As such, the trip clearly violated Canon 2 of the American Bar Association's Model Code of Judicial Conduct, which requires a judge to "avoid impropriety and the appearance of impropriety in all of the judge's activities."

The *Los Angeles Times* was the first major news outlet to take note of Scalia's ethical breach. According to a report published January 17, Scalia confirmed in a written response to a *Times* letter that "Cheney was indeed among the party of about nine who hunted from the camp." Scalia contradicted Sheriff Naquin, stating that "The duck hunting was lousy. Our host said that in 35 years of duck hunting on this lease, he had never seen so few ducks. I did come back with a few ducks, which tasted swell."

The *Times* report and Scalia's sarcastic response generated editorials in newspapers from Florida to Hawaii calling on Scalia to disqualify himself from further participation in the *Cheney* case. Two Democratic senators, Joseph Lieberman and Patrick Leahy, complained in a letter to Chief Justice William Rehnquist. The chief justice replied that disqualifications are left to the individual justices, and called the suggestion that Scalia should be disqualified "ill considered."

On February 10, Scalia was asked about his refusal to recuse himself during a talk at Amherst College in Massachusetts. Splitting hairs, Scalia said disqualification was not required because the case "did not involve a lawsuit against Dick Cheney as a private individual." He continued: "This was a government issue. 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."

The Cheney-Scalia get-together and Scalia's arrogant defense of his conduct are all the more significant given the substantive issues in the case involving Cheney that is before the Supreme Court. At the heart of that case are constitutional matters involving the separation of powers between the three branches of government and, in particular, the constitutionally prescribed power of Congress to monitor the actions of the executive branch.

The case stems from the closed-door meetings that Cheney, as chairman of Bush's energy task force (the National Energy Policy Development Group—NEPDG), held in early 2001. Cheney's task force drew up a detailed statement on the administration's energy policy that included huge windfalls for the oil and energy conglomerates, including the proposal to allow oil drilling in the Alaskan wilderness preserve.

It was widely reported that Cheney and his staffers met with top energy company executives, including then-Enron chairman Kenneth Lay, and that the energy industry had a direct hand in the formulation of the Bush administration's policy. The incestuous character of the energy task force was underscored by the fact that, before becoming vice president, Cheney had himself headed the giant oil construction firm Halliburton.

Later in 2001, the General Accounting Office (GAO), the investigative arm of the US Congress, requested that Cheney turn over a list of participants at the meetings of his energy task force. Cheney, with the support of the Bush White House, refused. Eventually, the GAO brought suit to force the executive branch to provide Congress with the requested information, but a federal district court judge with well-known Republican ties dismissed the GAO suit in December

2002. (The judge, John Bates, had been appointed to the federal district court in Washington, D.C., the previous year by President Bush.) In February 2003, the GAO announced that it would not appeal Bates's ruling.

The position of Cheney and the Bush administration was, and remains, a direct challenge to the constitutional principle of "checks and balances" between three equal branches of government. It is consistent with the efforts of the Bush administration to ride roughshod over traditional democratic norms, vastly expand the powers of the executive branch, and establish the framework for a presidential dictatorship.

The case currently before the Supreme Court arose as the result of a private suit filed separately from that of the GAO demanding that Cheney release information about the operations of his energy task force. The suit was filed by the conservative policy group Judicial Watch and the conservationist Sierra Club. The lower courts rejected Cheney's position in this suit because federal law requires records of executive task force meetings that include private individuals to be made public.

The Federal Advisory Committee Act (FACA) requires advisory committees such as the NEPDG to make public all documents they used unless the committee is "composed wholly of full-time officers or employees of the Federal Government." The trial court ordered Cheney to identify the individuals who participated in the NEPDG, information needed to confirm the applicability of FACA, and to turn over NEPDG records or file specific objections detailing why he should not do so. Cheney refused to comply, instead appealing to the District of Columbia Circuit Court of Appeals, which twice ruled against him, and then to the Supreme Court.

Oral arguments in the case should take place in April, and an opinion is expected before the current Supreme Court term ends July 2.

Scalia's trip with Cheney is all the more suspect since the outcome of this case could have significant political ramifications for the 2004 elections. Bush, as well as Cheney, is personally linked to the oil industry. (The duck-hunting trip itself was paid for by a prominent Louisiana oilman.)

Within months following Cheney's task force meetings, Enron and other energy speculators manipulated California energy supplies, driving up energy prices and effectively extorting billions of dollars from the state treasury.

Kenneth Lay, a likely target for criminal prosecution in connection with accounting fraud and other illegal methods that culminated in the collapse of Enron, was for many years Bush's biggest financial backer. The practices of Enron's top executives contributed to the largest corporate collapse in history, wiping out hundreds of millions of dollars in individual stock holdings and retirement accounts.

If made public before the election, the NEPDG records could further undermine the credibility of the Bush administration. According to records released by the Commerce Department pursuant to a separate Freedom of Information Act request, the NEPDG reviewed detailed maps of Iraqi oilfields, pipelines and refineries, as well as the contracts of foreign companies for oilfield development. Thus, the release of these records would again confirm that the Bush administration planned the conquest of Iraq at least six months before the September 11 terrorist attacks, and that a central war aim was to control and exploit the country's rich petroleum resources.

This is not the first time Scalia has failed to disqualify himself to "avoid the appearance of impropriety," the most important example being Scalia's participation in *Bush v. Gore*, the Supreme Court decision hijacking the 2000 election. The Code of Judicial Ethics required Scalia to recuse himself from that case because his son, Eugene Scalia, was then a lawyer with Gibson, Dunn & Crutcher, the firm representing Bush. (Scalia was not the only justice with a clear conflict of interest. Virginia Lamp Thomas, the wife of Associate Justice Clarence Thomas—another member of the pro-Bush majority—was working on the Bush transition team.)

Scalia not only cast the deciding vote in the 5-4 *Bush v. Gore* ruling, he also wrote a separate opinion to justify the high court's order that halted the vote count in Florida to protect against "irreparable harm to petitioner [Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." In other words, Scalia said that United States would suffer "irreparable harm" because tabulating the still uncounted ballots might have wiped out Bush's minuscule lead and put Al Gore in the White House.

Scalia and Cheney had other topics to discuss during their three days together besides the importance of the NEPDG records, including how the Court should handle the challenge to the Bush administration's power to keep 650 people imprisoned in a Guantanamo Bay, Cuba, concentration camp, as well as the pending appeals of Yassir Hamdi and Jose Padilla, US citizens being held in military jails indefinitely as "enemy combatants." (See: "Bush seeking Supreme Court precedents to dismantle democratic rights".)

Scalia epitomizes the social element that has risen to the top of the American political establishment and increasingly dominates the federal court system—an element that is profoundly hostile to democratic principles and feels itself in no way bound by traditional political methods or even legal prescriptions. The rise of this political underworld has been facilitated at every point by the prostration and cowardice of the Democratic Party and what passes for American liberalism, and the connivance of the corporate-controlled media.

Scalia has contempt for legal precedent, the Constitution and other juridical considerations. He is a political enforcer in judicial robes, whose modus operandi is to approach each case that comes before him by beginning with the outcome that fits his political agenda, and then cobble together an argument—no matter how far-fetched—to justify the predetermined conclusion.

Both the hunting trip and Scalia's reaction to its exposure highlight the degree to which an extreme right-wing element concentrated in the Bush administration, but dominant in all three branches of the federal government, runs the affairs of the nation as virtually the private preserve of themselves and their corporate cronies. The affair is emblematic of a government based on secrecy, conspiracy and non-accountability to the people.