

Another violation of ethics law by US Supreme Court Justice Scalia

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6 March 2004

The *Los Angeles Times* reported February 27 that in October of 2001 Associate Justice Antonin Scalia went pheasant hunting in Kansas as a guest of the governor, while the Supreme Court was considering two cases challenging Kansas law. The man who made all the arrangements and paid for Scalia's travel to Kansas was the lawyer who argued both cases for the state.

By accepting benefits from and meeting privately with litigants then appearing before the Supreme Court, Scalia violated a federal law, Section 455(a) of Title 28 of the United States Code, which mandates that "any justice or judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

This is the same ethical violation Scalia committed in early January of this year when he and his daughter went on a private duck hunting vacation as the guests of Vice President Dick Cheney. The trip occurred three weeks after the Supreme Court accepted review of a highly publicized lawsuit against the vice-president seeking to compel the release of documents relating to the private meetings Cheney held with energy industry executives and lobbyists while working out the Bush administration's energy policy. (See "Supreme Court Justice Scalia's hunting trip with Cheney: the political and constitutional issues".)

One of the plaintiffs in that litigation, the conservationist Sierra Club, has filed a motion to recuse (disqualify) Scalia from further participation in the case.

In regard to the 2001 incident, Scalia claims that he accepted an invitation from the University of Kansas School of Law "sometime before October 2000," prior to the date the Kansas cases were placed on the Supreme Court's docket. The school's dean, Stephen R. McAllister, explained to the *Los Angeles Times*, "I

had worked for a couple of years on getting him to come here. And he asked whether there was any good hunting. He said he had hunted turkey and deer, but not pheasant, so that was appealing."

To help persuade Scalia to visit his school, McAllister arranged a side trip for Scalia to shoot pheasants with the state's Republican governor, Bill Graves.

McAllister also serves as Kansas' chief solicitor, which makes him responsible for arguing appeals on behalf of the state. There is nothing unusual about a Supreme Court justice visiting a law school or socializing with high-level public officials. However, once the Supreme Court accepted review of the two Kansas cases involving McAllister as the lawyer and Graves as the chief executive of one of the parties, judicial ethics clearly called for Scalia either to cancel the trip or disqualify himself.

On October 30, 2001, McAllister argued the first case, *Kansas v. Crane*, which challenged the power of Kansas to continue holding convicted sex offenders after the completion of their prison terms. Scalia arrived at the University of Kansas on November 15, only two weeks later, his airfare, lodging and meals having been paid for by McAllister's school. Scalia addressed a class and spoke to law students, and attended a reception with local judges and lawyers.

As promised, Governor Graves met Scalia at the Lawrence airport and flew him on the governor's official plane to a private ranch. Another participant in the trip was former state Senate President Dick Bond, another leading Kansas Republican.

Two weeks after the trip, McAllister was back in Washington arguing before the Supreme Court on behalf of Kansas in *McKune v. Lile*. McAllister defended a Kansas law requiring sex offenders to

confess to past sex crimes as part of prison treatment or face discipline and extended incarceration.

In the course of the oral argument, Scalia berated McAllister's adversary: "Your client had been deprived of no liberty to which he was entitled, not a single liberty to which he was entitled," Scalia said. The trial court, the Court of Appeals, four other justices of the Supreme Court, and many commentators disagreed. Compelling criminal confessions from prisoners violates the US Constitution's Fifth Amendment protection against self-incrimination.

Several months later, the Supreme Court issued its decisions upholding Kansas in both cases, with Scalia voting on McAllister's side each time.

It is rare for any lawyer, even the chief solicitor for a state, to appear before the Supreme Court, which only schedules a few more than 50 cases for argument each year. Kansas has not had a case in the Supreme Court since *McKune*.

Scalia responded to a written request from the *Los Angeles Times* with more seriousness than he displayed in his flippant response to a similar request last January regarding the Cheney vacation. "I do not think that spending time at a law school in which the counsel in pending cases was the dean could reasonably cause my impartiality to be questioned. Nor could spending time with the governor of a state that had matters before the court," Scalia said.

Although Scalia eschewed the arrogant and dismissive tone he adopted in relation to the Cheney hunting trip—in public remarks he limited himself to noting that "the duck hunting was lousy" and concluded with the quip "Quack, quack"—Scalia's position remains one of contempt for long-standing ethical canons, not to mention federal law.

The Kansas trip was not simply a case of Scalia "spending time at a law school in which the counsel in pending cases was the dean." Scalia accepted the gift of free travel and an exclusive hunting vacation with the sitting governor from a lawyer during the one-month hiatus between the lawyer's two appearances before the Supreme Court. A judge who meets privately and accepts gratuities from a lawyer who has matters pending before that judge's court cannot, with any credibility, deflect charges of partiality and possible corruption with a simple assertion to the contrary.

"He truly reflects the arrogance of power," Herman

Schwartz, a law professor at American University and an expert on the Supreme Court, told the Associated Press. "He doesn't give a damn."

The disclosure of the Kansas pheasant hunting affair was followed by the Sierra Club's filing on March 1 of a motion to disqualify Scalia from further proceedings in *Cheney v. United States District Court*. Focusing on the legal requirement that disqualification is mandatory whenever a justice's "impartiality might reasonably be questioned," the motion relies on the outpouring of published opinion calling on Scalia to remove himself from the case to demonstrate that Scalia's impartiality has been widely questioned.

The Sierra Club brief cites the fact that 20 of the 30 US newspapers with the largest circulations have published editorials calling for Scalia to disqualify himself from the *Cheney* case.

To underscore the breadth of national disgust at Scalia's antics, the Sierra Club quotes from a Jay Leno monologue on NBC television's "Tonight Show": "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!" Leno added that Scalia was planning on investigating whether there was a conflict "as soon as Halliburton finishes construction on his new house."

Of course, the prominence in all three branches of the federal government of extreme right-wing elements like Scalia, who feel completely unrestrained by the Constitution, precedent or the rule of law, is no laughing matter. These forces played a critical role in hijacking the 2000 presidential election for Bush, and will continue treating the federal government as their private domain for advancing their political agenda of enriching the financial elite and dismantling democratic rights, no matter which of the major party candidates wins the 2004 election.



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