US Justice Scalia's memo on Cheney case: contempt for the law and democratic rights

John Andrews
30 March 2004

In an unprecedented 21-page memorandum [*see* here], United States Supreme Court Associate Justice Antonin Scalia last week reaffirmed his decision not to recuse himself from the appeal of a case involving Vice President Dick Cheney, who is seeking to nullify a court order that he respond to questions about meetings with energy industry representatives during the preparation of the Bush administration's energy policy.

The conservationist Sierra Club, one of two plaintiffs suing the vice president in *Cheney v. United States District Court*, filed a motion for Scalia's recusal after media reports surfaced that he went duck hunting with Cheney last January, three weeks after the Supreme Court agreed to review the case. The disclosure was followed by publication of Scalia's flippant responses: he sent the *Los Angeles Times*, before it broke the duck-hunting story, a brief letter saying that "the duck hunting was lousy," but "I did come back with a few ducks, which tasted swell"; and he responded to a question following his remarks at Amherst College in Massachusetts last February with the words, "quack, quack." The justice's contemptuous remarks generated editorials in most major newspapers demanding his disqualification.

The Sierra Club motion cited the editorials as evidence that Scalia's "impartiality might reasonably be questioned," the standard for disqualification under federal law. The Supreme Court traditionally allows each justice to decide whether to hear a given case. Accordingly, the motion was referred to Scalia for determination.

Scalia's explanation for denying the Sierra Club motion carries all the hallmarks of his Supreme Court opinions—arrogance and self-righteousness coupled with sophistry, which guides his legal arguments to their preordained and politically determined conclusions. Scalia is the ideological leader of the extreme-right faction on the Supreme Court. He played the leading role in formulating the December 2000 ruling in *Bush v. Gore* that shut down the vote recount in Florida and handed the election to George W. Bush.

Scalia's memorandum was clearly aimed at slamming his media detractors: "The implications of [the Sierra Club's] argument are staggering," he wrote. "I must recuse because a significant portion of the press, which is deemed to be the American public, demands it."

The memorandum contained Scalia's first detailed description of the excursion. On Monday, January 5, he and Cheney, with Scalia's son and son-in-law, flew a government jet to Patterson, Louisiana, where their host, Louisiana oilman Wallace Carline, picked them up and drove them to a dock for "the 20-minute boat trip to his hunting camp."

The five men joined "about eight other hunters, making about thirteen hunters in all." (Scalia had told the *Los Angeles Times* that it was a "party of about nine who hunted from the camp.") Scalia described the hunting as taking place "in two- or three-man blinds"—referring to the camouflaged hide-a-ways used by bird hunters—and asserted, "I never hunted in the same blind with the vice president."

"It was not an intimate setting," Scalia concluded.

It stretches the plain meaning of the English language to call this remote encampment of a dozen or so hunters "not intimate." In any event, Cheney left on Wednesday, January 7, after three sessions of hunting and one of fishing. Scalia stayed until Friday. The high court justice wrote nothing about the other hunters—for example, whether there were others, besides Carline, who are involved in the oil business. (Cheney himself was, before becoming vice president, the chairman and CEO of the giant oil construction firm, Halliburton.)

Although only he and the other hunters knew the details of the trip, Scalia excoriated the critical editorial writers for "not even [having] the facts right," and rejected their criticisms because "the vice president and I were never in the same blind, and never discussed the case."

Scalia denied that anyone could conclude his "impartiality might be reasonably be questioned," asking rhetorically: "Why would that result follow from my being in a sizable group of persons, in a hunting camp with the vice president, where I never hunted with him in the same blind or had other opportunity for private conversation?... The only possibility is that it would suggest I am a friend of his," and "friendship...traditionally has not been a ground for recusal where official action is at issue."

Setting aside Scalia's strained characterization of the group of hunters as "sizable," his sophistry consists in shifting from the actual accusation against him—the propriety of his taking a vacation with someone who has a case pending in his court—to the more general matter of whether personal relationships between justices and officials in other branches of the federal government require recusal.

The question is not whether Scalia's personal relationship with Cheney warranted disqualification in this case, but whether he should have canceled the hunting trip once it became clear that Cheney was a party to a lawsuit before the Supreme Court. In his memo, Scalia did not address his breach of 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."

Scalia allowed that federal law would require disqualification "where the personal fortune or the personal freedom of the friend is at issue." Without citing any law, Scalia claimed that disqualification was not required "where *official action* is at issue no matter how

important the official action was to the ambitions or the reputation of the Government officer" (Scalia's emphasis). He dismissed the importance of the Sierra Club lawsuit, calling it "a run-of-the-mill legal dispute about an administrative decision" and asserted that "nothing this Court says" about the issues in the case "will have any bearing upon the reputation and integrity of Richard Cheney."

The underlying suit in the case before the Supreme Court alleges that Cheney, as chairman of Bush's National Energy Policy Development Group (NEPDG), violated the Federal Advisory Committee Act (FACA), which requires an advisory committee to make its proceedings public unless the committee is "composed wholly of full-time officers or employees of the Federal Government." The principal question before the Supreme Court is the validity of a trial court's order directing Cheney to identify the individuals who participated in meetings of the energy task force, so that a determination can be made as to whether the FACA applies and, consequently, the NEPDG records are subject to disclosure.

A ruling adverse to Cheney could have a serious detrimental effect on both his personal reputation and his political career, since he and Bush are running for re-election in November. The NEPDG report has been widely criticized for urging the relaxation of environmental safeguards, including oil drilling in the Arctic wilderness, and expanding government subsidies and tax breaks for energy corporations. If Cheney was compelled to respond to the court order, the list of participants would undoubtedly confirm that the NEPDG relied heavily on industry officials and lobbyists, while freezing out representatives of conservationist and consumer organizations.

Among those whom Cheney might be compelled to identify as an NEPDG advisor is Bush's largest 2000 campaign contributor, former Enron CEO Kenneth Lay, who presided over the largest corporate collapse and one of the most notorious corporate scandals in history, destroying thousands of jobs and wiping out hundreds of millions of dollars in individual stock holdings and retirement accounts. (See "White House stonewalls congressional probe into Enron links.")

Before its fraudulent accounting practices were brought to light, Enron spearheaded the manipulation of California energy supplies during the summer of 2001, which cost the state billions of dollars and set the stage for the recall of Democratic Governor Gray Davis and the election of Republican Arnold Schwarzenegger.

Even more importantly, the NEPDG records Cheney wants to keep under wraps reportedly include detailed maps of Iraqi oilfields, pipelines and refineries, as well as listings of the contracts of foreign companies for Iraqi oilfield development. The political fallout from the release of such documents, especially in the midst of the deepening crisis over Bush's lies about weapons of mass destruction, would obviously be considerable.

"Political consequences are not my concern," Scalia declared in his memo, in one of the biggest political howlers since Nixon's "I am not a crook." Scalia penned the unprecedented Supreme Court injunction that halted the 2000 Florida vote recount, claiming such action was necessary 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." It is difficult to imagine any clearer instance of "political consequences" guiding the resolution of a legal question.

The "political consequences" of the suit against Cheney are responsible for its being before the Supreme Court in the first instance. One of the Sierra Club's arguments is that Cheney, as a vice president conducting official business, should not be given immunity from civil discovery, citing as precedent the unanimous Supreme Court decision that President Clinton did not have immunity from discovery in the purely private sexual harassment lawsuit brought against him by Paula Jones. In the present case, the Supreme Court could have allowed the lower court order to stand, but intervened to decide what would seem to be a much clearer case for disclosure—whether the president's task force violated an act of Congress.

Underlying both the editorials against Scalia and his sharp response to them are deep divisions within the ruling elite itself. The Supreme Court's decision in favor of Paula Jones set the stage for the Clinton impeachment debacle, which was followed by the high court's intervention in the Florida vote count and the Republican Party's theft of the 2000 election. The widespread criticisms of Scalia's antics in the establishment media signify a growing concern that the Supreme Court is losing too much credibility, as it did almost 150 years ago following the pro-slavery *Dred Scott* decision in the years leading up to the American Civil War. The Supreme Court remains a crucial instrument of bourgeois rule in the US, one that could become all the more decisive in the event of a serious economic or political crisis that required, in the eyes of the ruling elite, more repressive and authoritarian forms of rule.

Indeed, the legal and constitutional principle that underlies the suit over the Bush administration's refusal to provide information about the closed-door deliberations of its energy task force, despite a formal request from Congress's General Accounting Office, goes to the heart of democratic procedures. Bush and Cheney are asserting unprecedented powers for the executive branch of government at the expense of the legislative and judicial branches, as well as the right to operate in secret, without being held accountable to the American people.

Despite Scalia's record of reactionary rulings, as well as his flaunting of both judicial ethics and federal law in the present case, the congressional Democrats and Democratic presidential candidate John Kerry have remained virtually silent on the recusal controversy. Scalia's actions constitute grounds for his impeachment and removal from the Supreme Court. His misconduct is far more serious than that which was used as the pretext to impeach Clinton. Yet none of Scalia's critics either in the media or the Democratic Party is calling for such action.