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

ALAN B. MORRISON
(COUNSEL OF RECORD)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-7720

DAVID BOOKBINDER
SIERRA CLUB
408 C Street, NE
Washington, DC 20002
(202) 548-4598

PATRICK GALLAGHER
ALEX LEVINSON
SANJAY NARAYAN
SIERRA CLUB
85 Second Street
San Francisco, CA 94105
(415) 977-5709

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

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)

---

[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,

_____
Alan B. Morrison
(Counsel of Record)
Public Citizen Litigation Group
1600 20th Street, NW

[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.

Washington, DC 20009
(202) 588-7720

_____
David Bookbinder
Sierra Club Environmental Law Program
408 C Street, NE
Washington, DC 20002
(202) 548-4598

_____
Patrick Gallagher
Alex Levinson
Sanjay Narayan
Sierra Club Environmental Law Program
85 Second Street
San Francisco, CA 94104
(415) 977-5709

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:

Theodore B. Olsen
(Counsel of Record)
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2217

David B. Salmons
Assistant to the Solicitor General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-1030

Counsel for Petitioners Richard B. Cheney et al.

Paul Orfanedes
(Counsel of Record)
Judicial Watch
501 School Street, SW
Suite 725
Washington, DC 20024
(202) 646-5172

Counsel for Respondent Judicial Watch, Inc.

_____
David Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002
(202) 548-4598