Word for Word/Scalia's Defense; A Case of Blind Justice Among a Bunch of Friends

By ADAM LIPTAK

LAST week’s riposte by Justice Antonin Scalia to critics of his duck-hunting trip with Vice President Dick Cheney in January displays the qualities that have made his Supreme Court opinions, often in dissent, such compelling reading. His 21-page memorandum, in which he denied a request by the Sierra Club that he recuse himself from a case involving Mr. Cheney, bristles with vigorous rhetoric, powerful advocacy and a confident command of history and precedent. The Sierra Club had argued that the trip required the justice to recuse himself from a case considering whether the vice president should be required to turn over records from his energy task force.

The Times invited six law professors specializing in legal ethics to evaluate Justice Scalia's legal arguments: Stephen Gillers of New York University, Monroe H. Freedman of Hofstra, Steven Lubet of Northwestern, James E. Moliterno of William & Mary, Ronald D. Rotunda of George Mason and G. Edward White of the University of Virginia. The professors largely passed over Justice Scalia’s analogies to past socializing between high-ranking Washington officials and Supreme Court justices; they said the resignation of Justice Abe Fortas in an ethics scandal in 1969, Watergate and amendments to the federal judicial disqualification law in 1974 had altered the legal terrain. But there was plenty more to chew over.

Following are excerpts from Justice Scalia's memorandum, followed by comment from the professors. ADAM LIPTAK

It was not an intimate setting. The group hunted that afternoon and Tuesday and Wednesday mornings; it fished (in two boats) Tuesday afternoon. All meals were in common. Sleeping was in rooms of two or three, except for the vice president, who had his own quarters. Hunting was in two- or three-man blinds. As it turned out, I never hunted in the same blind with the vice president. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them -- walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case.

Freedman: The denial of impropriety by the very judge whose impartiality is being questioned is not adequate.
White: Only the individual justice is capable of knowing if he or she is capable of rendering an impartial decision. On balance, I think that it was appropriate for Scalia to decide not to recuse himself.

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 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.

But while friendship is a ground for recusal of a justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the government officer.

To be sure, there could be political consequences from disclosure of the fact (if it be so) that the vice president favored business interests, and especially a sector of business with which he was formerly connected. But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one. That possibility exists to a greater or lesser degree in virtually all suits involving agency action. To expect judges to take account of political consequences -- and to assess the high or low degree of them -- is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend upon what degree of political damage a particular case can be expected to inflict.

Gillers: This is a very clever, lawyerly stance. He's redefined the standard and avoided the issue. The decision before the court will have a significant effect on the vice president personally and politically. That's where he elides the real issue. It's very well done as a piece of advocacy, but it's not as candid as we want it to be.

Freedman: In this case, the political issue relates directly to the vice president's reputation and integrity. If the Supreme Court rules that the vice president acted properly in withholding the information, that is unquestionably going to be used to bolster the vice president's reputation and integrity. If, on the other hand, the court rules against him, that is going to be a major issue in the campaign.

Our flight down cost the government nothing, since space-available was the condition of our invitation. And, though our flight down on the vice president's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the vice president's plane.

Lubet: That answers the question of whether this was a gift. It wasn't a gift.
Gillers: We would all like to pay coach and fly on Air Force Two. It is simply disingenuous to say this is about money. It's about luxury and status. He got those things from a litigant with a case before the court.

The [Sierra Club's] motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe) or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the vice president and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time to talk privately" (Los Angeles Times); that we "spent quality time bonding together in a duck blind" (Atlanta Journal-Constitution); and that "[t]here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the vice president and I were never in the same blind, and never discussed the case. (Washington officials know the rules, and know that discussing with judges pending cases -- their own or anyone else's -- is forbidden.) The Palm Beach Post stated that our "transportation was provided, appropriately, by an oil services company," and Newsday that a "private jet whisked Scalia to Louisiana." The vice president and I flew in a government plane. The Cincinnati Enquirer said that "Scalia was Cheney's guest at a private duck-hunting camp in Louisiana." Cheney and I were Wallace Carline's guest. Various newspapers described Mr. Carline as "an energy company official" (Atlanta Journal-Constitution), an "oil industrialist" (Cincinnati Enquirer), an "oil company executive" (Contra Costa Times), an "oilman" (Minneapolis Star Tribune) and an "energy industry executive" (Washington Post). All of these descriptions are misleading.

Gillers: The press was trying to get the story, but there was only one person who knew the whole story. It's kind of a gotcha response to withhold information and then blame people for not getting information only he knew.

Two days before the brief in opposition to the petition in this case was filed, lead counsel for Sierra Club, a friend, wrote me a warm note inviting me to come to Stanford Law School to speak to one of his classes. (Judges teaching classes at law schools normally have their transportation and expenses paid.) I saw nothing amiss in that friendly letter and invitation. I surely would have thought otherwise if I had applied the standards urged in the present motion.

Rotunda: He's a friend of the litigant on one side and a friend of the lawyer on the other side. Judges don't have to drop out of life when they go on the bench.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the vice president might cause me to favor the government in cases in which he is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here.
The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the vice president would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a government plane. If it is reasonable to think that a Supreme Court justice can be bought so cheap, the nation is in deeper trouble than I had imagined.

Freedman: After earlier stating it correctly, he misstates the legal standard here. The statute says not "would" but "might" and not "cannot decide it impartially" but whether "his impartiality might reasonably be questioned."

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here -- even to the point of becoming (as the motion cruelly but accurately states) "fodder for late-night comedians." If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot. The motion is Denied.

Rotunda: What the recusal standard cannot mean is that if a lot of editorial writers make fun of you then you have to recuse yourself. We take somebody and make him a judge. We typically lower his salary. We flyspeck his career. We dig up dirt on him. If on top of this you have to say, "You must divorce yourself from life," it's silly and it's not what's been done since the founding of the Republic.

Moliterno: If the standard is appearance of impropriety, late-night comics do sometimes have a sense of how things appear to the public.

Photos: Justice Antonin Scalia, right, will hear a case involving Dick Cheney. (Photographs by Associated Press)