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# "Any Good Hunting?": When a Justice's Impartiality Might Reasonably Be Questioned

**Stephen R. Bruce***

Abstract

*By every account, Justice Antonin Scalia was an extraordinarily gifted, insightful, entertaining, charismatic, and combative (usually engagingly so) judge and individual. But in the area of a judicial code of conduct, Justice Scalia simply did not follow the standard in effect since 1974 under the Judicial Code of Conduct and 28 U.S.C. §455(a) that a judge "shall disqualify" himself in any case where his "impartiality might reasonably be questioned." Instead, Justice Scalia followed the standard in effect for the 50 years before under which his own "opinion" of his impartiality was dispositive without any objective review. To do this, Justice Scalia used a loophole of viewing the Judicial Code of Conduct, which technically covers every Federal judge except a Supreme Court justice, as just "a key source of guidance." He then evidently treated the identical recusal standard under 28 U.S.C. §455(a), which expressly applies to Supreme Court "justices," as infirm because the application of the Congressionally-legislated standard to "Article III" Supreme Court justices has not been tested in court. While in a limited sense Justice Scalia may thus been treating the Code of Conduct and the recusal statute as "a key source of guidance," his actions, including the 21-page March 2004 memorandum against his recusal in the Cheney v. United States District Court case, are only explainable on the basis that he was following the pre-1974 standard for recusal under which his subjective "opinion" of his own impartiality controlled without any review under an objective, reasonable-person standard.*

*Justice Scalia's partiality in cases before the Court was most explosively revealed in a nearly unnoticed radio interview on Armed American Radio given*

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*on February 14, 2016, the day after Justice Scalia's death, by Alan Gottlieb, the founder of the Second Amendment Foundation, about the litigation that culminated in Justice Scalia's groundbreaking 2008 opinion in Heller v. District of Columbia:*

> *"I ... had the pleasure to spend a day with [Justice Scalia] in Nuremberg, Germany when he came to accept an award from the World Forum for the Future of Sports Shooting Activities [in March 2007].... I guess this is something that I probably haven't shared with anyone on the air, I've talked to some people about it privately. But that was the day in fact that the appeals court in Washington, DC ruled against the city in DC and knocked down the DC gun ban and both Scalia and I knew that it was going to be headed to the Supreme Court and that the city of DC was going to appeal it. So we didn't talk directly about the case itself because it would have been like sort of a conflict, but he did say something to me that was very encouraging to me at the time. And that was, he said, "You know, Alan, it takes four votes on the Supreme Court to hear a case, and it takes five to win it. If I don't think we have the five to win it, there won't be four to hear it." And that just made me feel like I knew at that point in time that if the Supreme Court took the Heller case, that we were going to win it."*

*Justice Scalia's conversation with Mr. Gottlieb, whose gun rights foundation was an amicus in the case (and which filed another gun rights case against the City of Chicago the next day) was clearly improper, and it shows that Justice Scalia had made up his mind about Heller before the Supreme Court had even received the first papers. Another interview reveals that Justice Scalia held a "real roundtable discussion" with "half a dozen" gun rights lawyers the day before.*

*Compounding the issue of not following the modern standard on impartiality, Justice Scalia regularly failed to disclose honoraria, outside income, and gifts that he received primarily in the form of high-end hunting trips over the*

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*last two decades of his service. Without information about the honoraria, outside income, and gifts, potential conflicts could not be identified and considered. The undisclosed hunting trips included not only the infamous 2004 trip on Air Force Two for duck-hunting in Louisiana with Vice President Cheney while Vice President Cheney's case was pending before the Court, but also completely unnoticed trips with relatives and friends to such locations as the 8,000 acre Galena Plantation in North Mississippi, which may be a top quail hunting lodge but also celebrates the relocated and restored log cabin of the first Grand Wizard of the Ku Klux Klan. On another November 2015 hunting trip to Louisiana, an internationally-renowned chef was brought into prepare three-star meals for Justice Scalia along with Vice President Dick Cheney, former Secretary of State James A. Baker, III, and lobbyist and former Republican National Committee Chair Haley Barbour as if it was a White House State Dinner. Other undisclosed hunting trips were with the leaderships of national hunting organizations like Safari Club International, the National Wild Turkey Federation, Ducks Unlimited, and the Order of St. Hubertus. The extravagant February 2016 weekend at the Cibolo Creek resort with the leadership of the Order of St. Hubertus where Justice Scalia passed away would be valued conservatively at $10,000 for the justice and a guest, including a chartered jet from Houston International Airport and guided hunting of pen-raised birds. Former federal district judge Charles Pickering, whose son's Congressional district was redrawn in a case the Supreme Court decided in 2003, estimates that he personally took Justice Scalia on 40 hunting trips. According to Mississippi Governor Phil Bryant, Justice Scalia stayed at the Governor's mansion and went duck hunting with him while cases involving the Affordable Care Act, which Governor Bryant sought to block with executive and legal actions, were before the Supreme Court. Similar to the Mississippi governors who preceded him in resisting school integration, Governor Bryant has resisted the benefits of the Affordable Care Act for over 300,000 Mississippians as"a socialist takeover of health care forced down the throats of the American people" and has said that the decisions of "a majority" of the Supreme Court justices, "including, again, the Chief Justice" are "incredibly troubling to me." More recently, in the Western North Carolina mountains, Justice Scalia hunted with a State elections board chair who is a named defendant in two cases over*

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*voter suppression measures and Congressional redistricting that are now before the Supreme Court.*

*Many important decisions, including the 2008 anti-gun-control decision in Heller, which Justice Scalia called his "proudest" achievement, must be asterisked because Justice Scalia did not disqualify himself under the Code of Conduct or 28 U.S.C. §455(a) as in effect since 1974. On the occasions when a litigant or the press raised the issue of his failure to recuse, Justice Scalia expressed disbelief that anyone rationally believes a Supreme Court justice "can be bought so cheap" and diminished the seriousness of the questions with an analogy to calling a tennis player for "foot-faults." Because the Supreme Court historically has only taken action on ethical matters with unanimity, Justice Scalia's force of personality and ability to withhold a unanimous vote appears to have held the Chief Justice and other members of the Supreme Court at bay and kept them from enforcing or revisiting the ethical standards needed "to maintain the public's trust" in the judiciary.*

*As Justice Scalia himself often expressed it, we need to "get over it" and move on with improving the administration of justice. The 5-4 Heller decision must definitely be asterisked because the deciding justice's "impartiality might reasonably be questioned." But that does not mean it is likely to be overturned. We can, however, learn from this and other cases where "impartiality might reasonably be questioned" that the Judicial Code of Conduct and 28 U.S.C. §455(a) must apply to Supreme Court justices without allowing a "duty to sit" to cause the Code to revert to the subjective standard that applied before 1974. And meaningful and enforceable disclosure standards can be adopted to ensure full disclosure of honoraria and gifts, including "personal hospitality" at properties or facilities owned by a host, as well as consideration of the identities of the hosts and intermediaries who arrange such trips in deciding whether to recuse in cases before the Supreme Court. And, lastly, in light of this extensive record of gifted trips, the pay of Supreme Court justices should be raised so there is less temptation for any justice to accept honoraria or gifts from persons with business that may come before the Court.*

## The Modern Judicial Code of Conduct and Recusal Statute and the Related Ethics in Government Disclosure Rules and Prohibition on Honoraria

Chief Justice Roberts' year-end 2011 Annual Report on the Federal

Judiciary focused on ethical issues. That focus appears to have been triggered by complaints about Justice Scalia's and Justice Thomas' attendance at political events sponsored by the billionaire Koch brothers. The 2011 Annual Report recognized that "[s]ince 1789, every federal judge has taken the same solemn oath ... 'to faithfully and impartially discharge and perform the duties of judicial office.'" The 2011 Report also recognized "the common interest" of the public and all branches of government in "preserving the Court's vital role as an impartial tribunal governed by the rule of law." The Chief Justice recognized that, as with the 1924 Judicial Code of Conduct resulting from the baseball team owners' hiring of Judge Kennesaw Mountain Landis as Commissioner of Baseball, the judiciary may need "to revisit and revise those standards to maintain the public's trust in the integrity of its members." But the Annual Report nevertheless concluded that there currently was no need for the Judicial Conference's Code of Conduct to be made applicable to the Supreme Court. The Chief Justice stated: "I have complete confidence in the capability of my colleagues to determine when recusal is warranted."

The standard in the Judicial Code of Conduct and the recusal statute is more objective and specific than the judicial oath to which the Chief Justice referred. The Judicial Code of Conduct and the recusal statute mandatorily provide that "Any justice, judge, or magistrate judge ... ***shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned***." Judicial Code of Conduct, Canon 3(C)(1), and 28 U.S.C. §455(a). As the words "shall disqualify" and "in any proceeding in which his impartiality might reasonably be questioned" indicate, this standard is not discretionary, and it is not to be applied from the subjective perspective of the judge, but "from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (opinion by Chief Justice Rehnquist about his own recusal).

After the 1919 Black Sox major league baseball scandal and the ensuing hiring of Federal District Judge Landis to be Commissioner of Baseball, questions arose about his continuing service as a Federal judge when the baseball owners were paying him five times as much to serve as Commissioner of Baseball. John P. MacKenzie, *The Appearance of Justice* (1974), at 181. As a result of those questions, the ABA formulated its first Canons of Judicial Ethics in 1924. Those canons served as the guideposts for state and federal judges for nearly 50 years prior to their revision in 1972. The pre-1972 canons did not include a mandatory

provision for recusal or disqualification, but stated that "It is desirable that [a judge] should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties." Canon 26.

A string of ethical controversies finally led to changes in the 1924 Canons. Those controversies included the resignation in May 1969 of Supreme Court Justice Abe Fortas after revelations about corporate sources of funding, many of whom had been clients of his former law firm, for a very highly-compensated seminar that Justice Fortas gave at American University and about a contract he had entered into with a financier who "had just gone to prison for illegal stock dealing" that provided for annual payments to both Justice Fortas and his wife following his death. Mackenzie, *The Appearance of Justice*, at 72-78. There were also revelations concerning Justice William Douglas' financial relationship with a businessman who had owned the Flamingo hotel-casino in Las Vegas and a related personal foundation that was under IRS investigation. *Id*. at 47-65.[1] In 1972, the ABA revised its Model Code of Conduct, and a year later, the Judicial Conference of the United States adopted the revised Code and made it specifically applicable to federal judges. As adopted in 1973, Canon 3C provided that "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."

Until 1974, the standard under 28 U.S.C. §455 was that "Any justice or judge ... shall disqualify himself in any case in which he has a substantial interest ... or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial appeal, or other proceeding therein." P.L. 773 (June 25, 1948). The problem with this standard was that the existence of a conflict was based on a "subjective 'in [the judge's] opinion' standard" rather than "an objective test." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 n.7 (1988). In 1974, Congress recognized that this

[1] Two decades earlier, in June 1946, Justice Robert Jackson had charged Justice Hugo Black with conflicts of interest in cases before the Court in cables that Justice Jackson transmitted to President Truman and the judiciary committees of Congress while serving as Chief United States Prosecutor at the Nuremberg trials in Germany. Dennis J. Hutchinson, "The Black-Jackson Feud," *Supreme Court Review (1988),* at 203, 219-22.

standard was "less restrictive" than the one the ABA and the Judicial Conference had adopted in 1972 and 1973. Congress consequently revised Section 455 to "make both the statutory and the ethical standard virtually identical." 1974 U.S.C.C.A.N. 6351, 6353. The amended 28 U.S.C. §455 "sets up an objective standard and "promote[s] 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." *Id*. at 6354-55; *accord*, *Liljeberg*, 486 U.S. at 859 n.7. The impartiality standard is an "objective," "reasonable person" standard, with the "reasonable person" being, not a judge but a "thoughtful" and "well-informed" individual. Charles Geyh, *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center 2d ed. 2010), at 18-19; *accord*, *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). The impartiality standard recognizes that, without an objective standard, "there may be no adequate protection against a judge who simply misreads or misapprehends the real motives that work in deciding the case." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009).

In the decade before 1974, the duty to disqualify under the Code of Conduct and 28 U.S.C. §455(a), subjective as it was, had begun to be further tempered by the "duty to sit." Under this concept, a judge facing facts or circumstances favoring disqualification could "resolve close cases in favor of sitting." *See, e.g., United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2001). To illustrate the "duty to sit," some cite Justice John Marshall's staying on *Marbury v. Madison*, 5 U.S. 137 (1803), despite the fact that Justice Marshall was the Secretary of State whose duty it was to deliver the commission to the putative Midnight Justice, William Marbury. Chief Justice Roberts' 2011 Annual Report recognized the "duty to sit" as "an important factor" for Supreme Court justices because while "[l]ower court judges can freely substitute for one another," "if a Justice withdraws from a case, the Court must sit without its full membership." There is no serious debate, however, that the "impartiality" standard in the Code of Conduct and 28 U.S.C. §455 is what Congress and members of the public expect federal judges to follow and is an example of how the law evolves and progresses. In his memo in *Laird v. Tatum*, 409 U.S. 824 (1972), Justice Rehnquist relied heavily on the "duty to sit," which had actually only been recognized in the circuit courts less than one decade before, in refusing to disqualify himself from that case based on his actions as a government prosecutor. But as Chief Justice Rehnquist wrote sixteen years later in *Liljeberg*, in a dissent that Justice Scalia joined, the "duty to sit, which had become an accepted gloss on the existing statute," was rejected in both the Code

and 28 U.S.C. §455 as amended in 1974. 486 U.S. at 847. The 1974 House Report states that "elimination of this 'duty to sit' w[ill] enhance public confidence in the impartiality of the judicial system." H.R. Rep. 93-1453, at 5, 1974 U.S.C.C.A.N. 6351, 6355.

Constitutional due process has been recognized as a further safeguard to the integrity of the judicial process since *Tumey v. Ohio*, 273 U.S. 510 in 1927. Since *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), it has become clear that Constitutional due process requires that both 28 U.S.C. §455 and the Code of Conduct be construed to avoid hidden exceptions that narrow the grounds for recusal. In *Caperton*, the Supreme Court held that a state supreme court justice's failure to disqualify himself was a due process violation when the defendant was a major $3 million contributor to the justice's re-election campaign.[2] The Court held that due process is "concerned with more than the traditional common law prohibition on direct pecuniary interest" and is "concerned with a more general concept of interests that tempt adjudicators to disregard neutrality." The Court held that due process was violated when the "probability of bias" rose to an unconstitutional level based on "a realistic appraisal" of the "risk of actual bias or prejudgment." *Id*. at 883-84.[3]

Judges and litigants cannot sit silently or quietly by if there are grounds for disqualification, including grounds of which other litigants or non-litigants may be unaware. A "judge or litigant [should] carefully examine possible grounds for disqualification and .... promptly disclose them when discovered." *Liljeberg,* 486 U.S. at 867. Under Canon 3(D) of the Judicial Code of Conduct, the judge can still have an opportunity to participate in the case if the parties and attorneys agree to proceed. Canon 3(D) provides that "a judge disqualified by Canon 3C(1)" can "disclose on the record the basis of disqualification" and may then "participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge [and] all agree in writing or

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[2] The defense was that the contributions were to two organizations that were supportive of the West Virginia Justice but "independent" of his campaign.

[3] *Caperton* also recognizes that "the Codes of Judicial Conduct provide more protection than due process requires" so that "most disputes over disqualification will be resolved without resort to the Constitution." 556 U.S. at 890.

on the record that the judge should not be disqualified."[4]

Similar to the recusal statute at 28 U.S.C. §455, the application of the Ethics in Government Act at 5 U.S.C §101, et seq., to "Article III" Supreme Court justices has not been formally tested in the courts. But in 1991, Chief Justice Rehnquist endorsed a unanimous internal resolution in which the members of the Supreme Court agreed that while the Ethics in Government Act regulations "do not apply to officers and employees of the Supreme Court," the members of the Court "will comply with the substance" of the regulations. However, under a "personal hospitality" exception to the reporting of gifts in the Ethics Act, 5 U.S.C. §102(a)(2)(A), public officials and high-ranking government employees are not currently required to disclose "hospitality extended for a nonbusiness purpose by an individual" not just "at the personal residence of that individual or his family" but also "*on property or facilities owned by that individual or his family*." 5 U.S.C. §109(14) (emph. added). Although the Ethics Act suggests that any business purpose, such as a corporate form of ownership of the property or facilities, or taking a business deduction for expenses associated with the property or facilities, may void the personal hospitality exception, in practice the personal hospitality exception appears to be claimed without reference to such niceties, e.g., a guest omit the lodging without asking the host to see the deed to the property or the tax returns. To illustrate the latter part of the "personal hospitality" exception, as presently drafted, Republican Presidential candidate Donald Trump could apparently offer every Supreme Court justice a fully-furnished suite at Mar-a-Lago in Palm Beach with free food, wine, golfing, and other outings, and no disclosure would be required so long as a "nonbusiness purpose" was asserted–like that Mr. Trump "cherishes" the association.

Based on the work of a Presidential Commission and Congressional Task Force, the 1989 Ethics Reform Act went beyond disclosure to categorically prohibit the acceptance of "honoraria" for any appearance or speech by Federal employees, including judges. An honoraria means a payment of money or anything of value, excluding lodging, food, and travel to and from the location. The 1989 Ethics Reform Act also capped outside income from sources that are not

[4] The parallel provision in 28 U.S.C. §455(e) provides that "[w]here the ground for disqualification arises under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

prohibited at a certain level, which currently is $27,500. In the January 1991 resolution, the Supreme Court unanimously agreed that the justices will comply with Judicial Conference regulations on both honoraria and outside income, even though the regulations formally do not apply to them.

**Justice Scalia's Two-Decade Long Grand Tour of Hunting Resorts and Lodges In and Outside of the Fifth Circuit**

During Justice Scalia's last two decades on the Supreme Court, the most frequently recurring activities were multi-day hunting trips all over the country but especially in the Deep South–to shoot ducks, quail, pheasant, deer, wild turkey, elks, antelopes, wild boar, and other game. As Justice Scalia told NPR legal correspondent Nina Totenberg in February 2015, he "became a hunter after being assigned as the justice responsible for the appeals court covering Texas, Mississippi and Louisiana" where he had judicial responsibilities on behalf of the Supreme Court for emergency appeals and stays and for staying or dissolving injunctions. Over the last two decades of his years of service, Justice Scalia's hunting trips read as if he was rapidly moving through a directory of male, white, wealthy, Catholic or Christian, Republicans who owned hunting clubs to decide which to visit, often with friends and family (and U.S. Marshals) in tow. Justice Scalia thus engaged in what can only be called a "grand tour" of the nation's private hunting clubs, especially in the judicial circuit covering Louisiana, Mississippi, and Texas where he had "circuit justice" responsibilities.

All or practically all of Justice Scalia's hunting trips, including to many expensive resorts, lodges, and ranches appear to have been "comped" by wealthy hosts, not only for Justice Scalia but for family and friends traveling with him. Justice Scalia made no public disclosures about these hunting trips, which appear to have been as often as ten multi-day trips per year. This would be very much like one of Britain's Lord Chancellors engaging in a grand tour of the Dukes' and Barons' castles and hunting lands in the 18th or 19th centuries, principally choosing those Dukes and Barons within Scotland over which the Lord Chancellor had special judicial responsibilities and who could offer him and his family the finest hunting, accommodations, and amenities. While a two-decade grand tour like that might proceed on the pretense that "in the opinion of the Lord Chancellor" those visits had no effect on his impartiality, it was well-known then, as it is now, that the Lord Chancellor's impartiality in matters involving his hosts' hunting rights,

lands and other interests "might reasonably be questioned."

Before his untimely death in February 2016, many of the hunting trips that Justice Scalia had taken over the last two decades of his service were unreported because of exceptions to the Ethics in Government Act, most prominently, the "personal hospitality" exception, and also because Justice Scalia avoided the ban on "honoraria" and disclosure of outside income that the Supreme Court had unanimously agreed to follow in January 1991. Many of Justice Scalia's more inflammatory speeches outside the courthouse were similarly unreported because the press was not allowed to cover the event or he prohibited the use of recording devices (during a 2004 speech in Hattiesburg, Mississippi, Justice Scalia notoriously had U.S. Marshals seize audio recorders from reporters covering the speech–for which he later apologized as a misunderstanding).[5] However, interviews between 2008 and 2012 to promote his book *Reading Law* and for a biography by Joan Biskupic, memoirs written by Vice President Cheney and former Judge Charles Pickering, Justice Scalia's most frequent hunting host, as well news reports, photos, videos, and, most recently, reminisces by friends and associates in many forms following his death, provide a more complete picture of the recurring conflicts from the frequent hunting trips that he took and for which he does not appear to have paid.

As detailed below, Justice Scalia avoided the Ethics Act's prohibition on honoraria as well as the cap on outside income by asking about "any good hunting" when the subject of a speech or appearance came up. He then accepted the hunting trips that were offered as though they were non-business personal

[5] Despite the apology, this was not the last such incident. Journalists were shooed away from an October 2005 speech to the American Council of Life Insurers (when former Oklahoma Governor Frank Keating was serving as president). Reporters also were not allowed at an October 2007 speech at Notre Dame Law School arranged by Professor A.J. Bellia. A *San Antonio Express-News* article on an April 3, 2008 talk at St. Mary's University says the press was prohibited "from using recording devices during his talks." Justice Scalia's keynote speech in March 2007 to the NRA-backed World Forum on Sporting Activities in Nuremberg, Germany, and his speech in January 2009 to the Safari Club International in Reno, Nevada, were similarly unreported. An October 2010 speech in Green Bay to St. Thomas More Society judges and lawyers was another event where the press was told it could not make "audio or video recordings of his speech."

hospitality not subject to the prohibition on honoraria or the cap on outside income, or even the rules on disclosure of gifts. Justice Scalia's outside income was regularly up against the cap so any honoraria or additional outside income, even if not prohibited, would have been barred. Justice Scalia's speeches, for which he was reimbursed for travel and expenses, show many speeches in the States where he was hunting that were arranged to coincide with the hunting trip (and to cover the transportation costs of going to and from the area). To illustrate, in January 2013, Justice Scalia spoke at the First Baptist Church of Jackson, Mississippi, where former Federal Judge Charles Pickering, with whom Justice Scalia hunted for 20 years, is a deacon. First Baptist picked up the tab for Justice Scalia's airfare, and Judge Pickering arranged their hunting trip.

As detailed below, Justice Scalia's statement that he hunted with "people of the sort [he] had never known before [who] could live in the woods" and that "none of them are lawyers, or very few," as stated in an October 2013 interview with Jennifer Senior at *New York* magazine, appears to be the opposite of truth. Like Judge Pickering, who arranged hunting trips for Justice Scalia for over two decades with virtually the entire Mississippi Republican Party's leadership and elected officials, practically everyone on these trips was a judge, lawyer or a businessman who was politically-active and aligned with Justice Scalia's views. As mentioned, in early November of 2015, Justice Scalia was hunting in Louisiana with former Vice President Cheney, James A. Baker, III, and former Republican Governor and RNC Chairman Haley Barbour. Just before Christmas of 2015, he was out hunting again in Western Nebraska with a Republican Congressman and Tea Party official. In January 2016, he was back in Louisiana again hunting with a group that included the first Republican Lieutenant Governor of that State. When he died in February 2016, he was hunting with a prominent Washington, D.C. lawyer and a select group of politically-active Texas businessmen who the host described to the *Los Angeles Times* as "strictly ... sympathetic to the justice's views."

After Justice Scalia's death, many stories surfaced about how these hunting trips were tied in with speeches and other appearances. Ken Shigley, a Georgia lawyer who was recently President of the Georgia Bar, recounts a story (see www.atlantainjurylawblog.com) of Justice Scalia soliciting a hunting trip in exchange for participating in a 2014 symposium in Atlanta on the Constitution. Mr. Shigley and Charles ("Buck") Ruffin, who was President-elect of the Georgia

Bar, approached Justice Scalia after a speech in New Orleans about speaking at the symposium in Atlanta. Justice Scalia "smiled" and said "I've always enjoyed hunting quail in Georgia." Immediately, Mr. Ruffin and Mr. Shigley got to work planning the symposium and a quail hunting trip on a South Georgia plantation with the help of Georgia Supreme Court Justice David Nahmias, a former law clerk to Justice Scalia. Justice Nahmias confirmed the deal, explaining in *The Daily Report*: "The way you got Justice Scalia to speak was to offer him a good hunting trip."

Justice Scalia's longtime and most frequent host, Judge Pickering, candidly told *The (Jackson) Clarion-Ledger* that Justice Scalia declined his invitations to speak in Mississippi until he combined a hunting trip with a speaking invitation: "After it got out that if you took him hunting or fishing that he would come speak, he started getting invitations all over the place." A similar story is posted on the University of Mississippi Law School's website about how James McClure, Jr., the lawyer who funded the James McClure Lecture for the Law School, offered to take Justice Scalia turkey hunting to get him to speak at his eponymous lecture. Mr. McClure said: "That's how we used to get him down here; he loved to hunt." Justice Scalia's former colleague, Justice Sandra Day O'Connor, was blunter. As reported in the *Washington Post*, she told Texas super-lawyer Mark Lanier that "He'll do anything if you take him hunting." As a result, Mr. Lanier chartered a plane to take Justice Scalia hunting for wild boar and deer on a private ranch in 2008 immediately after Justice Scalia spoke at Mr. Lanier's alma mater, Texas Tech University, at a lecture series that Mr. Lanier underwrote and named after Justice O'Connor.

Along the same line, Patrick Borchers, a Creighton University law professor told Omaha's KETV that "One of the ways we were able to lure him out to Creighton [in 2009] was that we knew people with an acreage where he could hunt [pheasants]." Tampa attorney Meredith Wester, a Stetson Law alumnus who helped arrange a 2007 speech, recalled in the newsletter of the Tampa Federal Bar Association that "Scalia's love of fishing and hunting was well-known, so people made efforts to include those activities in invitations." In November 2001, Justice Scalia spoke at the University of Kansas Law School and immediately flew to hunt pheasants at the 10,000-acre Ringneck Ranch, with the Governor of Kansas and the former State Senate President. The Law School's dean, Stephen McAllister told 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." In 2010, Bishop Ricken of the Catholic Diocese of Green Bay asked Wisconsin State court judge William Atkinson if he could host Justice Scalia for a duck hunting trip as an "additional incentive" for Justice Scalia to speak to the newly-formed chapter of the St. Thomas More Society in Green Bay. After Justice Scalia's death, Bishop Ricken confirmed to Fox 11 that duck hunting with "judges and lawyers" had been arranged to "entice him" to come speak. Many other speeches and hunting trips follow the same pattern of combining speaking and hunting invitations, including Justice Scalia's speeches to the conventions of the National Wild Turkey Federation, Ducks Unlimited, and the Safari Club International.

Justice Scalia not only solicited and accepted these hunting trips directly or through intermediaries, but he secured free invitations for his family and friends, too. According to his 2004 memorandum on the Dick Cheney case, he had his duck-hunting host, Wallace Carline, invite Dick Cheney as well as both Justice Scalia's son John and son-in-law Britt Courtney, for a total of four non-paying guests. W.O. Fitch in Holly Springs, Mississippi hosted not just Justice Scalia but also his son John and grandson at Galena Plantation, which is considered one of the nation's top quail hunting destinations. Justice Scalia's friend, C. Allen Foster, served as the intermediary to elicit the invitation from John B. Poindexter to the exclusive Cibolo Creek ranch in West Texas where the Justice was housed in the top-of-the-line El Presidente suite. Mr. Poindexter told the *San Antonio Express News* that Justice Scalia's son had been invited, too, but "had to drop out for reasons I don't know." Other conditions were added, such as separate rooms, transportation to the property from the airport or location of the speech, or a chartered plane to a regional airport if the hunting location was too far from an international airport, as many hunting locations are.

The most important condition, however, was that the hunting trip was hosted by an individual who owned the property or facilities. Even if the trips were not prohibited honoraria or outside income, to fall within the "personal hospitality" exception to disclosure of a "gift" of more than $335, the trip had to be "on property or facilities owned by th[e] individual or his family" who was hosting the Justice and any accompanying family or friends. The hosts sometimes did not even know Justice Scalia before the trip. For example, Keith Fontenot, owner of Lil Hannah's Farm in Port Barre, Louisiana, said he "was floored" when someone asked if he could host Justice Scalia and his son. Another host, Richard

Zuschlag, describes only having met Justice Scalia "weeks" before he hosted not just Justice Scalia, but also former Vice President Dick Cheney and James A. Baker, III, for a hunting trip with an internationally-renowned chef brought into prepare meals as if it were a White House State Dinner. Mr. Poindexter, the owner of the Cibolo Creek resort, said he only briefly met Justice Scalia before he was asked to invite him and his son on the February 2016 trip to his expensive resort. Judge Atkinson told ABC2 TV in Green Bay that he had "never dreamed he would meet Supreme Court Justice Scalia," but the Bishop knew he "owned some land along the bay" called Little Tail Point where he could host the Justice after his 2010 speech.

Justice Scalia's hunting trips and his hosts in the States of Texas, Louisiana, and Mississippi, and in States outside of the Fifth Circuit Court of Appeals are detailed below:

***The Texas Hunting Trips***

1. Justice Scalia's untimely and tragic death on February 13, 2016 occurred on a trip to the 30,000 acre Cibolo Creek ranch/resort in West Texas owned by John B. Poindexter, a Houston-based manufacturer of truck bodies, including for the delivery vans for UPS, FedEx, and other national fleets, as well as pick-up truck accessories. Mr. Poindexter holds a Ph.D in economics and finance from NYU and has a background in investment banking on Wall Street. The vistas at his Cibolo Creek ranch/resort, which sits on a plateau nearly a mile above sea level, offered some of the settings for the movies *No Country for Old Men* and *There Will Be Blood.* The resort's website features photos of Mick Jagger who stayed there with his Texas-born spouse, Jerry Hall, in the 1990's.

The other 35 hunters on the February 2016 Cibolo Creek trip were members of a Catholic-based hunting association known as the "Order of St. Hubertus," which is known for the lavishness of its events and is sponsored by European royalty, including Archduke Istvan von Hapsburg-Lothringen of Austria. The Cibolo Creek resort's owner, Mr. Poindexter, is the leader of the Order's "Southwest Priory," which covers Texas, Louisiana, Arkansas, and New Mexico, and is the Order's largest U.S. chapter. One month after Justice Scalia's death, Mr. Poindexter was elevated to "Grand Prior" of the USA Chapter of the Order in a ceremony at the Citadel in Charleston, South Carolina. He replaced retired Army

Brigadier General Jack Nicholson, the brother of former Republican National Committee Chair and Secretary of Veteran Affairs Jim Nicholson, and like Mr. Poindexter highly-decorated for his military service in Vietnam. Among the other leadership of the Order of St. Hubertus is James Porter, the former President of the NRA (the position in the NRA that Charlton Heston once held). As reported by CBS News, Mr. Porter has a history of incendiary rhetoric, including calling President Obama a "fake president" and Attorney General Eric Holder "rabidly un-American." Mr. Porter has said that the NRA is engaged in a "culture war" in which its organizers "are the fighters for freedom" and has called for training every US citizen in the use of military firearms to defend themselves against "tyranny." Mr. Porter's law firm in Birmingham, Alabama offers "firearms manufacturers" its "expertise in the areas of products liability defense." Before becoming the NRA's President in 2013, Mr. Porter served as the head of the NRA's Legal Affairs committee challenging gun control laws around the country.

Although almost none of the 35 other Cibolo Creek guests have been positively identified, planes owned by San Antonio businessmen, Wallace "Happy" Rogers III and A.J. Lewis III, were reported at the Cibolo Creek Ranch's airstrip. Both are members of the Order of St. Hubertus and Republican campaign donors. Based on newspaper reports of past Order of St. Hubertus events at the Cibolo Creek ranch, many of the other attendees were "knighted" members from Houston's business elite. *See* "Houstonians Join the Order of St. Hubertus," *Houston Chronicle*, October 6, 2011 (identifying twelve "knights" from Houston, including John Poindexter); "Knighthood never looked so splendid as at the Order of St. Hubertus festivities in Houston," at www.houston.culturemap.com (4/1/2013 posting identifying 10 more Houston members). Many of the Houston knights in the Order are the current or former CEO's of large Houston-based companies, including Donald ("Boysie") Bollinger, former CEO of Bollinger Shipyards, which has shipyards in Texas, Louisiana and Mississippi; Scotty Arnoldy, CEO of the Triten Corp.; Downey Bridgewater, current President of Comerica Bank's Houston Market and former CEO of Sterling Bank; Ned Holmes, CEO of Laing Properties; Reed Morian, CEO of DX Holding Company; Keith Mosing, CEO of Frank's International, an oil and gas services company; and Dan Tutcher, founder and principal of Center Coast Capital which invests in and operates "midstream energy assets."

According to an interview Mr. Poindexter gave to the *LA Times,* the

individuals who he invited on the February 2016 trip with Justice Scalia were "very substantial business people" and "strictly a group ... sympathetic to the justice's views." Like many of the other "knights" and leaders in the Order of St. Hubertus, Mr. Poindexter is not apolitical. He is a major contributor to the Houston-based "Texans for Lawsuit Reform," which focuses on limiting product liability and other mass tort actions and has a PAC that makes major contributions to candidates who it endorses, like former Texas Governor Rick Perry. Texans for Lawsuit Reform applauded, in particular, Justice Scalia's 2011 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, as a "death knell" for class actions in the United States. Other knights in the Order of St. Hubertus are also politically active: Boysie Bollinger was a three-time State Finance Chairman of the Louisiana Republican Party, a "Super Ranger" for President Bush's 2004 campaign, and is considered a political kingmaker in Louisiana. Ned Holmes was Texas' Department of Transportation Commissioner under Governor Rick Perry. Reed Morian was a member of Rick Perry's RickPAC Advisory Board in 2015 and was later appointed to the Texas Parks and Wildlife Commission by Governor Greg Abbott. Keith Mosing hosted a "meet and greet" for Republican Presidential candidate Mitt Romney at his home in November 2010. Dan Tutcher held a fundraiser at his home in July 2008 for Republican Congressman Pete Olson featuring President Bush.

Befitting his stature as a Supreme Court justice, Justice Scalia was lodged in the Cibolo Creek resort's "El Presidente" suite, which commands views of a lake and surrounding mountains and otherwise rents for $800 per night. Hunting excursions at Cibolo Creek are "extras" to the expenses of lodging and are priced on a "per use" basis, depending on the type of bird or other animal hunted. The Cibolo Creek resort specializes in "pen-raised" hunting, i.e., different species of birds (quail, pheasant, chukar, ducks, and doves) are raised in pens and then released for hunting. The ranch also offers "per use" hunting for mule deer, white-tailed deer, elk, Barbary sheep, skunk pigs, and mountain lions. Hunters are transported around the 30,000 acre ranch in customized Humvees.

Justice Scalia was flown to this extravagant West Texas resort from Houston's Intercontinental Airport in a private jet chartered by C. Allen Foster, a Louisiana-native and prominent Washington, D.C. lawyer who graduated *summa cum laude* from Princeton University, and has a Harvard Law School degree. Mr. Foster is a "knight" in this royal hunting order and also its "Chancellor." Mr.

Foster had made at least one earlier trip to the Cibolo Creek resort in February 2012 with other members of the Hubertus Order, which he had written about in glowing terms in the July 2012 issue of "The Bird Hunting Report," including describing a shoot of an 800-bird "release" of pen-raised pheasants. Mr. Foster had gone with Justice Scalia on other hunting trips and asked Mr. Poindexter to invite him (one of Justice Scalia's sons was also invited). From 1998 until 2014, Mr. Foster was at the Greenberg Traurig law firm in Washington, D.C. with Justice Scalia's son John, who was also a partner. Shortly before he was indicted for bribing Congressmen, Jack Abramoff, another Greenberg Traurig partner, recommended Mr. Foster to the *Legal Times* as "the guy I'd call upon if I were in trouble." Prior to Greenberg Traurig, Mr. Foster was a partner with Patton Boggs & Blow where he served as special litigation counsel for the Republican Party with the famed election law expert Ben Ginsberg, on redistricting cases in Florida and North Carolina. Mr. Foster's one Supreme Court argument was a challenge to electoral redistricting for Dade County, Florida on behalf of Hispanic Republicans, *Johnson v. De Grandy*, 512 U.S. 997 (1994). *See also Thornburg v. Gingles*, 478 U.S. 30 (1986) (challenging North Carolina redistricting on behalf of Republican African-Americans). Mr. Foster was in charge of the Greenberg Traurig firm's litigation and appeals department, which handled the *Bush v. Gore* voting and recount litigation focusing on Dade County, Florida.

In addition to being the "Chancellor" of the St. Hubertus royal hunting order, Mr. Foster has served as a lobbyist/spokesperson for Safari Club International (to which Justice Scalia gave a speech in January 2009–only six months after his decision on gun rights in *District of Columbia v. Heller*). Some of Mr. Foster's most explosive statements on hunting were quoted by Jeffrey Toobin in "The Company Scalia Kept" in the March 2, 2016 issue of the *New Yorker* (telling his fellow Princeton alumni, "I've ... been pursuing my passion—killing things" and that he hunts with "royalty" and not "rednecks"). A May 28, 1978 *Washington Post* article on Mr. Foster's role as a lobbyist for the Safari Club International also contains inflammatory quotes on endangered species laws such as that "the leopard was put on the [endangered species] list in 1972 as a result of newspaper outcry, not scientific evidence ... I'll tell you something. The leopard is no more endangered than a housefly."[6]

[6] An April 1995 UPI story recounts Justice Scalia peppering an Assistant Solicitor General in *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687 (1995), about

2. After Justice Sandra Day O'Connor told him "He'll do anything if you take him hunting," Mark Lanier, a Houston-based Republican trial lawyer who leads a 50-person law firm, describes himself as a social conservative, and founded the "Lanier Theological Library," took Justice Scalia hunting for deer, wild boar, and even alligator. A hunting trip in November 2008 for deer and wild boar with Mr. Lanier, a Texas Tech alumnus, immediately followed a lecture by Justice Scalia for the Sandra Day O'Connor Lecture series at Texas Tech, which Mr. Lanier, a Texas Tech alumni, had underwritten. After the lecture, Mr. Lanier chartered a plane to transport Justice Scalia to a ranch near Junction, Texas owned by David Segrest, a partner at Gardere Wynne Sewell. Gardere Wynne is a law firm that specializes in energy, corporate law, and tax for Fortune 500 companies. In September 2013, Mr. Lanier's Theological Library again hosted Justice Scalia for a lecture on the applicability of "Christian virtues" to capitalism and socialism. In that lecture, which is available on Youtube, Justice Scalia opines that socialism is "death to Christian virtue." In 2014, Mr. Lanier made large contributions to several Republican candidates for the Texas Supreme Court in an effort to reshape Texas' highest court. In line with Mr. Lanier's views about funding judicial elections, Justice Scalia's dissent in *Williams-Yulee v. the Florida Bar*, 135 S.Ct. 1656 (2015), states that "[w]hen a society decides that its judges should be elected, it necessarily decides that selection by the people is more important than the oracular sanctity of judges" and that a prohibition of personal solicitation of campaign funds by judicial candidates is a "wildly disproportionate restriction upon speech." *Id*. at 1670, 72.

3. While the *District of Columbia v. Heller* gun rights case was under submission before the Supreme Court, the San Antonio Express-News has reported that Justice Scalia went hunting for wild turkey in West Texas. In conjunction with that trip, Justice Scalia volunteered to make a lunchtime talk at St. Mary's University in San Antonio on Thursday, April 3, 2008, in exchange for St. Mary's reimbursing his transportation expenses. No details about the hunting

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whether the Endangered Species Act provision making it illegal to "take" an endangered species should be limited to "harming the animal, not harming the forest." Justice Scalia's dissent subsequently lamented that interpreting the "harming" provision to preserve the habitability of private lands "imposes unfairness to the point of financial ruin ... upon the rich ... who finds his [sic] land conscripted to national zoological use." 515 U.S. at 714.

trip, including who accompanied Justice Scalia or who hosted it, have ever been reported. Former Secretary of State, Presidential chief-of-staff to President Reagan and George H.W. Bush, and four-time Republican Presidential campaign manager James A. Baker, III, owns a 4,000-acre ranch in Pearsall, Texas, 55 miles from San Antonio, where he is passionate about wild turkey and quail hunting. Presidents Reagan and George H.W. Bush have both stayed there and hunted with Mr. Baker for wild turkey and quail. James A. Baker was chief of staff to President Reagan when Justice Scalia was nominated in 1982 to be on the Court of Appeals for the District of Columbia. Justice Scalia has hunted with James A. Baker on other occasions, including a November 2015 Louisiana duck hunting trip which included Vice President Cheney. When asked about his trip to San Antonio, Justice Scalia quickly corrected a reporter that April was not the season for quail, but the season for wild turkey hunting.

***The Mississippi Hunting Trips***

4. In Mississippi, virtually all of Justice Scalia's hunting trips revolve around the aforementioned Judge Charles Pickering, a former Federal district judge and controversial appeals nominee and interim judge who has been one of the mainstays of the Mississippi Republican Party since conservative white Mississippians abandoned the Democratic Party following Freedom Summer and the 1964 Democratic Convention. Judge Pickering served as Chair of the Mississippi Republican Party in the late 1970's and was in the state legislature before he became a Federal district judge in 1990 under the first President Bush. Senate Democrats famously (or infamously) filibustered to block Judge Pickering from being promoted to the Fifth Circuit Court of Appeals in 2003 because of his opposition to abortion and alleged "racial insensitivity" (President Bush made a controversial recess appointment of him anyway in 2004, which lasted for eleven months).

Following Justice Scalia's death, Judge Pickering told *The (Jackson) Clarion-Ledger* that he hunted with Justice Scalia at least once a year for 20 years "in Texas and Georgia, from Florida to Colorado." In another place, Judge Pickering said, "after 20 years we've probably hunted together 40 times." These hunting trips were mainly in Mississippi and the Louisiana Delta. Judge Pickering said "We'd duck hunt in the Delta, turkey hunt in south Mississippi and deer hunt in southwest Mississippi." Judge Pickering and his wife own a 390 acre property

in the area of the Leaf River floodplain; he also owns a "partial interest" in a hunting camp in Leflore County, Mississippi, which is part of the Mississippi Delta.

Beginning in the mid-1990's, Judge Pickering along with his friends Louis Griffin, a banker, and Wesley Breland, a local developer, began hosting Justice Scalia for hunting parties with fellow judges, politicians, lawyers, and business people, including virtually all of the Mississippi State Republican leadership. The elected Mississippi Republican officials with whom Justice Scalia hunted included former Governor Haley Barbour, current Governor Phil Bryant, Lieutenant Governor Tate Reeves, Secretary of State Delbert Hosemann, Mississippi Republican Party chairman Joe Nosef as well as judges like Federal district judge David Bramlette and Mississippi Supreme Court Justice James W. Smith, Jr.. Justice Kagan's celebrated novice duck hunting trip with Justice Scalia in December 2014 was with Judge Pickering and Secretary of State Delbert Hosemann. At the time of Justice Scalia's death, Judge Pickering had hunting trips with Justice Scalia already planned for the first week in April and the first week in May of 2016.

5. In the middle of the legendary Mississippi flyway, Justice Scalia hunted at the "Fighting Bayou," a premier 3,000 acre duck hunting club 17 miles from Greenwood, MS with an 18-room lodge and restaurant-quality kitchen and dining, where James Beard-nominated Chef Derek Emerson comes in to prepare meals. It is estimated that 80% of the ducks on the Mississippi flyway fly over the Fighting Bayou, which is owned by nine individuals, four of whom played on the last all-white Ole Miss football team that starred Archie Manning and won the 1970 Sugar Bowl and the 1971 Peach Bowl. The Fighting Bayou's owners include Arthur (Skip) Jernigan, a lawyer who is now the chairman of the board of Baptist Health Systems in Mississippi, W.J. (Billy) Van Devender, a former CIA agent and now wealthy investor and executive who is the head of Southern Timber Ventures, Southeastern Timber Products, and Claw Forestry, and George Lotterhos, now a managing director and financial advisor at Raymond James in Memphis, TN.

The Fighting Bayou is best known for frequently hosting Archie Manning and his two sons, Eli and Peyton Manning, both of whom have won Super Bowls. But the Fighting Bayou is also known as a club for Mississippi politicians and

judges to meet. Skip Jernigan and Billy Van Devender are on the Board of Baptist Health Systems, which Mr. Jernigan now chairs, as well as a number of other Mississippi boards of directors. Mr. Jernigan represented the Republican voters in the 2003 redistricting case about Chip Pickering's Congressional district (and in litigation related to the same issues in 2011).

In the 2012 book *A Million Wings: A Spirited Story of the Sporting Life Along the Mississippi Flyway*, Justice Scalia is pictured standing between Mr. Jernigan and George Lotterhos at the Fighting Bayou. Justice Scalia's visits there dated back to at least early 2008. A January 23, 2008 blog post at "wordpress" states: "Justice Scalia spent the night and hunted this morning at Fighting Bayou Hunting Club in Leflore County.... I believe he was a guest of Judge Pickering." Justice Scalia's financial disclosures show he spoke at Mississippi State University in Starkville the next day. On MSU's website, a photo shows Justice Scalia with prominent MSU alumnus and Carlyle Group operating executive Bobby Shackouls, who previously was the $20 million per year CEO of Burlington Resources. The January 24, 2008 speech was "organized by the Shackouls Honors College, for which Shackouls is the major benefactor and namesake" according to the website. After Justice Scalia's death, John Kennedy, a former jet pilot for Mississippi State's flight department, posted on Facebook that he "flew Justice Scalia to Dulles [airport in Virginia] after a duck hunting trip in the delta" and that "[h]e was one of the most humble, appreciative passengers I've ever had." Dulles Airport is 15 minutes away from Justice Scalia's home in McLean.

6. In North Mississippi, Justice Scalia was hosted in December 2013 and 2014 by W.O. (Bill) Fitch, a Mississippi native and retired Wall Street investment banker, at Mr. Fitch's private 8,000 acre quail, wild turkey and deer hunting lodge in Holly Springs, Mississippi, which he calls Galena Plantation. In addition to the Galena Plantation hunting lodge and Fitch Farms, Mr. Fitch is chairman of Fidelity National Loans, Inc., a consumer finance company with 18 locations in Northern Mississippi whose slogan is "Making sure you get the cash you need when you need it." Mr. Fitch's daughter Lynn Fitch is also the current Republican State Treasurer of Mississippi.

Galena Plantation describes itself as offering "the finest quail hunting in the Southeast." Guests like Justice Scalia are taken hunting in mule-drawn carriages

with African-American drivers. As its website prominently displays, Galena Plantation celebrates the log cabin where Confederate General Nathan Bedford Forrest lived, along with memorabilia about him. After the Civil War, General Forrest, who was a slave trader before the War and is known for a massacre of Black Union soldiers at Fort Pillow, Tennessee during the War, became the first Grand Wizard of the terrorist Ku Klux Klan. Mr. Fitch now proudly lives in General Forrest's log cabin which Mr. Fitch had relocated from 40 miles away in Hernando, Mississippi and meticulously restored. Portraits and busts of General Forrest are featured in different parts of the property. Justice Scalia not only brought his son John and grandson to Galena Plantation with him after speaking at the University of Memphis on December 16, 2013, but he brought Justice Elena Kagan after they spoke at the University of Mississippi on December 15, 2014. On both occasions, former Federal Judge Pickering accompanied Justice Scalia. In 2013, George Lotterhos, the part-owner of the Fighting Bayou hunting club, and Judge Pickering's friend Wesley Breland were also in the hunting party. In an interview after Justice Scalia's death, James Carroll, an insurance defense lawyer who hosted Justice Scalia in Arkansas, said he was also on the 2014 trip with "the Obama appointee," Justice Kagan, and Judge Pickering. The Galena Plantation website now displays eight photos of Justice Scalia sitting with his family or hunting from a mule-drawn wagon (http://fitchfarms.com/photos/special-guests/jonathan-papelbon-paul-maholm/).

7. In 2015, Justice Scalia hunted at a private 2,400-acre duck hunting lodge called "Six Shooter" in South Mississippi that is owned by a group of physicians from Jackson, Mississippi specializing in pain management and plastic surgery. They restored the acreage, which is formally set up as Six Shooter Land & Timber LLC, using the USDA's Wetlands Reserve Program. Wistfully evoking the lost cause of the Confederacy in describing the property's old homesite, one of the owners told *Mississippi Land & Lodges* magazine that "it appeared as though the entire Yankee Army had pillaged and burned a Confederate home to the ground." "Six Shooter Is Where the Heart Is," *Mississippi Land & Lodges*, Spring 2011. In a YouTube video, Dr. Carroll McCleod, one of the owners who went to Justice Scalia's funeral in Washington, DC, described hosting not just Justice Scalia, but also his son and grandson at Six Shooter.

Outside the funeral, Dr. McCleod showed a *Washington Post* reporter a cell phone photo of Justice Scalia hunting at Six Shooter with Mississippi Governor

Phil Bryant, who had been elected to succeed Governor Haley Barbour with Tea Party backing. Governor Bryant has posted the same photo of Justice Scalia and himself standing in knee-high water holding their shotguns on his official Facebook page. In a taped interview with *Politico*, Governor Bryant said Justice Scalia had "spent the night ... at the [Governor's] Mansion with us." Governor Bryant explained "as I became governor [on January 10, 2012, after being Lieutenant Governor for the previous four years] we came into the opportunity of going on hunts together" with Justice Scalia.

Like Justice Scalia, Governor Bryant is an avowed opponent of the Affordable Care Act, including both its Medicaid provisions and its State exchanges. Mississippi has not participated in the federally-funded Medicaid expansion and it closed down a State-run exchange begun under the Barbour administration that was near completion. On March 23, 2010, the day the ACA was signed, Mississippi was one of nineteen States to file suit challenging it. That case, *Florida v. Department of Health and Human Services* was consolidated with *Nat'l Federation of Independent Businesses v. Sebelius* and eventually decided by the Supreme Court on June 28, 2012. By the time the reply briefs were filed, Governor Bryant had succeeded Governor Barbour, who had previously also enjoyed the opportunity of hunting with Justice Scalia. Governor Bryant rejected the Medicaid expansion even though it would "add 300,000 Mississippians" to the health insurance rolls at an expense of just $1 in State funds for every $50 in Federal funding. In his dissent in the *Sebelius* case, Justice Scalia also sided with Mississippi and the other 18 States and attacked those, most notably Chief Justice Roberts, who had not.

At the end of June 2015, Justice Scalia dissented in the second major challenge to the exchange provisions of the ACA, *King v. Burwell,* where Justice Scalia again criticized the majority, including the Chief Justice, by sarcastically saying "We should start calling the law SCOTUScare." In a June 25, 2015 statement on *King v. Burwell*, Justice Scalia's hunting buddy and host, Governor Bryant, called Obamacare "a socialist takeover of health care forced down the throats of the American people" and castigated the Supreme Court for not declaring it unconstitutional, stating that it was "incredibly troubling to me that a majority of United States Supreme Court justices--including, again, the Chief Justice--have found yet another way to uphold a portion of this disastrous law."

8. In several photos posted on the Internet, Justice Scalia is shown proudly holding a wild turkey that he shot, while sitting in between the founder, Toxey Haas, and senior vice-president, Ronnie ("Cuz") Strickland, of "Mossy Oak," a camouflage and other hunting apparel and equipment manufacturer and distributor based in West Point, MS. Mossy Oak has an almost-legendary media branch that Mr. Strickland heads that offers online videos and broadcasts about hunting trips. It also has a properties branch that markets places like the 1,370-acre Blackhawk hunting camp in Concordia Parish, LA. Following his death, Mossy Oak posted a tribute to Justice Scalia as a "great hunting buddy" and talked about how they "share[d] camp" with him.

***The Louisiana Hunting Trips***

9. In Louisiana, Justice Scalia was hosted for close to 15 years by Wallace Carline, a multimillionaire owner of Diamond Services Corp., an oil services industry company that lays pipe, puts in foundations for drilling barges and platforms, as well as doing dredging and towing. It was Mr. Carline, who died in December 2014, who hosted Justice Scalia and Vice President Cheney (along with Justice Scalia's son John and son-in-law) at his duck hunting lodge on Little Pecan Island in January 2004. An article entitled "Sportsman's Paradise, Inc." describes how guests would "arrive at Little Pecan Island Preserve by private plane, and guides stand waiting in their boats at daybreak for each." According to Justice Scalia's 21-page memo where he refused to recuse himself in the *Cheney v. U.S. District Court* case, Mr. Carline hosted Justice Scalia annually for hunting trips in December or January of each year beginning in either 1999 or 2000. The hunting parties hosted by Mr. Carline often included Louis Prejean, the brother of Sister Helen Prejean, the renowned death penalty opponent who wrote the book *Dead Man Walking* on which the Oscar-winning movie is based. In *The Death of Innocents*, Sister Prejean writes about an encounter she had with Justice Scalia at the New Orleans International Airport after one of those hunting trips. Justice Scalia in turn told *New York* magazine that her brother Louis Prejean was "as "conservative as [Sister Prejean] is liberal."

In his March 2004 memo refusing to disqualify himself in the *Cheney* case, Justice Scalia stated that his host of many years, Mr. Carline, "has never, as far as I know, had business before this Court" and disputed the press' characterization of Mr. Carline as an "energy industry executive" even though he was incontestably a

multi-millionaire CEO of a large company in the energy industry that provided oil and gas exploration barges and other services in Louisiana's territorial waters. Apparently, Justice Scalia's point was that the press should not call anyone an "energy industry executive" unless the company is "ExxonMobil or ConEdison." 541 U.S. at 914. But the oil services industry in which Diamond Services operates is the same industry in which Halliburton, formerly headed by Vice President Cheney, is engaged. It is also the same industry that was involved in a case in which Justice Scalia actually recused himself: *Chao v. Mallard Bay Drilling*, 534 U.S. 235 (2002), involved the application of OSHA to an explosion on an oil and gas exploration barge in Louisiana's territorial waters that killed four workers. After Hurricane Katrina in 2005 and the BP oil spill disaster in 2010, there were, of course, even more instances in which companies like Mr. Carline's might have "business before this Court."

10. Richard Zuschlag, the CEO of Acadian Ambulance, which provides ground and air medical transportation services in Louisiana, Mississippi, and Texas, hosted Justice Scalia in early November 2015 at his Grande View Lodge in Cameron Parish after reportedly only having met Justice Scalia "weeks" earlier while hunting in California. A photo posted on Acadian Ambulance's Facebook page shows Justice Scalia standing between Dick Cheney and James A. Baker, III with Mr. Zuschlag on the far right. Another photo dated November 7, 2015 and posted on Facebook by the renowned chef John Folse, who was brought in to cook for this group, shows Justice Scalia with Vice President Cheney, James A. Baker, III, Haley Barbour, and (while not named) Louisiana political kingmaker Boysie Bollinger, who is also in the Order of St. Hubertus hunting organization that convened at the Cibolo Creek resort only three months later. Not including Mr. Zuschlag, fourteen people appear in photographs of this hunting party. The client roster and lobbying skills of former RNC Chairman and Mississippi Governor Haley Barbour are legendary, including innumerable health care associations and pharmaceutical companies, as shown on the Open Secrets website. At the time of this trip, Mr. Bollinger's company, Bollinger Shipyards, was facing a False Claims Act case by the United States government because of defective hulls for Coast Guard cutters built and supplied under a multi-billion dollar contract. The government's case centered on an email in which Mr. Bollinger as CEO advised against any structural analysis of the hulls because it might "BLOW the

program."[7]

Contrary to Justice Scalia's March 2004 description of hunting trips as about shooting game and roughing it with "communal" accommodations and meals, Mr. Zuschlag has said in a November 2011 article in *The Independent* magazine on "The Business of Pleasure" that "I'm going to write a book about how a hunting camp helped take a two-ambulance company to a $400-million-a-year business," and has colorfully and candidly described how hosting hunters, including public officials like former Senator John Breaux, helped him get Medicare to cover his tri-state airborne ambulance services ("By catering to Republicans and Democrats alike, I've been able to ride on the doctors' Medicare bills and be lumped in with them").

Inconsistent with Justice Scalia's depiction of hunters quietly sitting in duck blinds, Mr. Zuschlag has also said, "You get to do a lot of visiting in between the shooting." The November 2011 article in *The Independent* offers further details about how private hunting clubs are used for business dealmaking and lobbying, including clubs where tuxedoed servants greet guests after a day of hunting with hors d'oeuvres and fine wine and even ATMs close by so guests can obtain cash to cover gambling losses. In his 2011 memoir, Justice Scalia's frequent fellow hunter, Vice President Cheney, recognized that Halliburton used hunting trips for business purposes and that "[w]e got a lot of business done on hunting trips."

11. Keith Fontenot, the owner of "Lil Hannah's Farm" outside of Port Barre, Louisiana, hosted Justice Scalia on a hunting trip in January 2016 which spanned five days (just one month before the extravagant Cibolo Creek resort trip). This trip was arranged by Patrick Morrow, an Opelousas attorney and former Chair of the Louisiana Wildlife & Fisheries Commission, who met Justice Scalia through a "mutual friend" in 2014. Mr. Morrow, who was invited to Justice Scalia's funeral, is a named partner with his brother Craig in a maritime and personal injury law firm, which recently added former Western District of Louisiana Chief Judge Richard Haik, himself described as an "avid game hunter," as a named partner. A photo in the *Opelousas Daily World* shows John Scalia, Justice Scalia's son, and Craig and Patrick Morrow on the January 2016 hunting trip. Before the trip, the host, Mr. Fontenot, did not even know Justice Scalia and

[7] *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 258 (5th Cir. 2014).

said he "was floored" when "asked if Scalia could join them." On the same trip, Mr. Morrow hosted Justice Scalia and his son John at his own Ville Platte hunting camp where they hunted with Paul Hardy, the first Republican Lieutenant Governor of Louisiana, and were fed by two other chefs, Carroll Angelle and Ray Bellow. A website maintained by Mr. Morrow's wife (www.geauxaskalice.com) shows pictures of the food and Justice Scalia.

12. For the opening of duck hunting season just after Thanksgiving 2012, expert hunting guide Rick Hall, who operates out of Doug's Lodge in Klondike, LA, near Gueydan, escorted Justice Scalia. Doug's Lodge, which is a full-service hunting camp, is owned by Doug and Mary Sonnier. Mr. Hall reports that his communications with Justice Scalia were hampered by the hearing protection the Justice wore and that this "cost him some shooting."

13. According to KLFY News in Lafayette, Louisiana, Justice Scalia also went duck hunting "every year" with lawyer former Louisiana circuit court judge Paulin J. Laborde in the Atchafayla Basin near Morgan City, Louisiana. Former Judge Laborde did not identify the other members of those hunting parties.

14. Vice President Cheney and Justice Scalia also reportedly enjoyed hunting at the 50,000 acre Grosse Savanne hunting camp in Southwest Louisiana, which is owned by the Sweet Lake Land & Oil Co. and bears the coveted Orvis lodge endorsement. The luxuries of the Grosse Savanne camp and its ability to "instantly create a bond with the people you're with" are detailed in an article entitled "Sportsmen's Paradise, Inc." in the October 31, 2011 Greater Baton Rouge Business Report.

***The Virginia, North and South Carolina, Georgia, and Florida Hunting Trips***

15. Without naming the hosts, Justice Kagan said in a June 2013 interview that she and Justice Scalia had gone quail hunting "four or five" times in Virginia (Justice Scalia's home was in McLean, Virginia). In an earlier September 2012 interview, Justice Kagan identified "one of Justice Scalia's hunting buddies" as Judge Henry E. Hudson of the Eastern District of Virginia. Photos posted on Facebook by Danny Torgerson, a hunting guide and gundog trainer who works out of the 700-acre Orapax Hunting Preserve in Goochland, Virginia, also identify Judge Henry Hudson and other "hi-power lawyers" as part of the hunting groups

with Justice Scalia that Mr. Torgerson guided on March 29, 2010 and November 9, 2013. In December 2010, Judge Hudson ruled that the insurance mandate in the Affordable Care Act (Obamacare) was unconstitutional, which is the same position that Justice Scalia adopted in June 2012.

Ronald E. ("Ron") Dowdy, a successful Orlando, Florida real estate developer who owns a 2,000 acre Black Angus cattle ranch in Virginia's Shenandoah Valley told the *Farmville Herald* that he had also been on "numerous hunting trips" with Justice Scalia and a group of six others, which "quite often" included "an additional Supreme Court justice." He said "mutual friends" invited him into the hunting group with Justice Scalia "several years ago." Mr. Dowdy owns and runs Dowdy Properties in Orlando and owns his own private jet which he uses to go back and forth to Orlando from the regional airport outside Farmville.

16. In the mountains of Western North Carolina, Justice Scalia went hunting "several times" with Joshua Howard, who from 2013 through 2015 served as Chair of the North Carolina Board of Elections, after being appointed by Republican Governor Pat McCrory. After Justice Scalia died, Mr. Howard told WRAL-TV in Raleigh, NC about their hunting trips but did not identify who else was in the hunting parties or who hosted them. Mr. Howard's father is Federal District Judge Malcolm Howard of the Eastern District of North Carolina, who had ties to the late Senator Jesse Helms and was appointed by President Reagan in the late 1980's. In October 2007, Judge Howard introduced Justice Scalia for a speech at a $100 per plate fundraiser for the Jesse Helms Center. In March 2012, based on Justice Scalia's opinion in *District of Columbia v. Heller*, Judge Howard struck down a 43-year-old North Carolina law that allowed for bans of firearms and ammunition outside of the home during declared emergencies. In June 2013, Justice Scalia and Judge Howard were together again for a speech at the North Carolina Bar Association convention in Asheville. That speech was just days before the Supreme Court released the 5-4 decision in *Shelby County v. Holder* invalidating the "preclearance" requirement in the 1965 Voting Rights Act, and enabling the North Carolina legislature to pass voter suppression legislation less than one month later without Justice Department review. In May 2015, Justice Scalia was back in North Carolina two more times for speeches in Raleigh and Durham.

As Chair of the State Board of Elections, the younger Mr. Howard is a defendant in litigation over the North Carolina legislature's 2011 Congressional redistricting map as well as over the 2013 North Carolina Voter Information Verification Act ("VIVA"). On June 27, 2016, the Supreme Court agreed to hear the litigation over North Carolina's 2011 redistricting map (*McCrory v. Harris*, No. 15-1262). The Court had earlier denied an application to stay an order to redraw the map that had been under consideration at the time of Justice Scalia's death. On August 31, 2016, in *North Carolina v. NC Conference of NAACP* (No. 16A168), the Supreme Court denied by a 4-4 tie vote North Carolina's application to stay a Fourth Circuit decision striking down VIVA as racially discriminatory. Undoubtedly, that vote would have been a 5-4 grant if Justice Scalia were alive and did not disqualify himself.

17. In South Carolina, Justice Scalia hunted in Edgefield, the headquarters of the National Wild Turkey Federation and birthplace of Strom Thurmond. His hosts were Mandy and Jonathan Harling, both of whom work for the NWTF where Mandy Harling is the Hunting Heritage Program Director. In February 2012, Justice Scalia spoke at the NWTF convention in Nashville.

18. President Jimmy Carter has written that "[o]nly after I became governor and then President was I ever invited to enjoy the beautiful pageantry of the large plantations south of Plains around Albany and Thomasville, whose prime reason for existence was quail hunting." Jimmy Carter, *An Outdoor Journal* (2d ed. 1994) at 171. The South Georgia plantation trip that the Georgia Bar leadership arranged for Justice Scalia after his speech at their 2014 symposium was to the 6,000-acre Rio Piedra Plantation in Camilla, GA. The Rio Piedra Plantation is the only two-time winner of the coveted Orvis Wingshooting Lodge of the Year Award. A two-night single occupancy stay at the Rio Piedra Plantation costs $2,500. The Plantation is owned by Bill and Annie Atchison, who say most of their clients are "affluent, middle-aged Republican men."

19. Cobb County Superior Court Judge Greg Poole told the *Marietta Daily Journal* about still another Georgia hunting trip in 2009 near Sylvester with other lawyers and a hunting guide, after Justice Scalia flew into Atlanta with his son-in-law. Walter Hatchett, a famed hunting guide, has also reported guiding a Supreme Court Justice in South Georgia.

20. In April 2013 in Florida, Cary and Layne Lightsey, wealthy cattle ranchers, hosted Justice Scalia on their private 3,300 acre Brahma Island on Lake Kissimmee, which is only accessible by boat and features guided commercial hunting for wild boar, alligators, deer, bison, water buffalo, and exotic animals. Justice Scalia hunted there after speaking to the John's Island Club, an exclusive gated community in Vero Beach in exchange for his transportation and food. The Lightseys have granted extensive conservation easements to the State of Florida and the Federal government in exchange for tax deductions. In politics, they support Republicans such as Fred Thompson. Celebrities such as Shaquille O'Neal and Johnny Depp have hunted on Brahma Island.

The developer of the John's Island Club that hosted Justice Scalia, the Lost Tree Village Corp., has been engaged in litigation since 2008 with the United States over whether denial of a "wetlands fill permit" pursuant to the Clean Water Act constitutes a "taking" for which the company may be compensated. In that litigation, Greenberg Traurig, the law firm in which Justice Scalia's son John was a partner until January 2013, represents Lost Tree Village. (As of the end of the Supreme Court's 2015-2016 term, the Government's petition for certiorari in this case was still pending under No. 15-1192.)

***The Arkansas, Colorado, Wyoming, Nebraska, Iowa, Kansas and Wisconsin Hunting Trips***

21. In Arkansas, George Dunklin, a wealthy rice, soybean, and corn farmer with at least 15,000 acres of land, frequently hosted Justice Scalia at his "world-famous" Five Oaks Duck Lodge in Dewitt, Arkansas, including as recently as February 2015. The development of Mr. Dunklin's lodge, which is adjacent to a lodge owned by Dallas Cowboys owner Jerry Jones, is described in an article entitled "Dunklin Unlimited" in the November 2012 issue of *Arkansas Life*. As summarized in the *Arkansas Democrat-Gazette*, Mr. Dunklin served two terms as President of Ducks Unlimited and is currently Chair of the Ducks Unlimited Board of Directors. Mr. Dunklin also served on the Arkansas Game and Fish Commission from 2005-2012. Mr. Dunklin has hosted numerous other dignitaries at the Five Oaks Lodge, including Vice President Dick Cheney. Justice Scalia not only accepted Mr. Dunklin's hospitality at his Five Oaks Duck Lodge, but also accepted Mr. Dunklin's invitation to speak at the May 2014 Ducks Unlimited National Convention in St. Louis, Missouri. Ducks Unlimited is a "wetlands and

waterfowl conservation" organization, the majority of whose members and contributors are waterfowl hunters. Ducks Unlimited serves as an accredited land trust that accepts donations of conservation easements under a Federal tax code provision that provides "above-the-line" deductions from adjusted gross income for such easements, which can be worth millions of dollars. The trust portfolio of Ducks Unlimited now holds 465 easements covering 387,000 acres, primarily in Arkansas, Louisiana, and South Carolina.

On the February 2015 trip, Justice Scalia delivered a speech at the U.S. Marshals Museum in Fort Smith, Arkansas, where he was introduced by his hunting buddy from Virginia, Judge Henry E. Hudson, who was director of the Marshals Service from 1992-93. In that speech, Justice Scalia said the cases he "falls on his sword for" are those that deal with the "real Constitution" which is the "structural" parts of the Constitution exclusive of the Bill of Rights. He said every "tin-horn dictator and every banana republic" has a Bill of Rights.

22. In April 2015, Justice Scalia was hosted for another hunting trip in North Arkansas near the mountains overlooking the White and North Fork rivers by James Carroll, the founder of Carroll Warren & Parker, a 20-person insurance defense firm with offices in Jackson, Mississippi, Houston, Texas, and Miami, Florida. Until he retired, Mr. Carroll argued frequently in the Fifth Circuit as an appellate lawyer for major insurance companies including Aetna, Allstate, and Nationwide. This hunting trip was in conjunction with a speech Justice Scalia gave at Arkansas State University Mountain View. On both the hunting trip and on the conference speakers agenda were also former Judge Charles Pickering and senior Judge David Bramlette who frequently hosted Justice Scalia for hunting in Mississippi. Mr. Carroll candidly told KY3-TV that based on their talks, Justice Scalia "didn't think the Supreme Court should be sticking its nose into things like gay rights, gay marriage, or any other death penalty."

23. In January 2002, then-Governor Mike Huckabee took Justice Scalia on a duck hunting trip in northeast Arkansas with then-Oklahoma Governor Frank Keating (both Keating and Huckabee are Republicans) that was hosted by former Arkansas Senator Kaneaster Hodges (the trip was a payoff of a wager between the two governors on whose team would win the Cotton Bowl). Justice Scalia later spoke at the American Council of Life Insurers in 2005 when Governor Keating was President of that association.

24. For 15 years, Justice Scalia took annual hunting trips with Glen Summers, a partner in the Denver office of Bartlit Beck Herman Palenchar & Scott LLP who clerked for Justice Scalia in 1996-1997. Mr. Summers hunts in Colorado and also on land he owns on the North Platte River near McGrew, Nebraska. He first invited Justice Scalia to hunt for ducks and geese "a few years" after his law clerkship, and turned it into an "annual" event. After Justice Scalia's death, Mr. Summers wrote a remembrance for *National Review* that he had gone on "dozens of hunting and fishing outings" with Justice Scalia, including in 2003 for the elk that Justice Scalia prominently displayed on the wall of his Supreme Court Chambers. Mr. Summers is a trial and appellate attorney with an extraordinary roster of high-profile cases, including Amazon, DuPont, Hewlett Packard, Siemens AG, Tyco, and William Koch, the now-deceased brother of Charles and David Koch. According to his law firm's website, Mr. Summers was also a member of then-Texas Governor George W. Bush's Florida election trial team in 2000. He represented Governor Bush and former Secretary of Defense Cheney in both the election contest filed about the results of the Presidential election in Florida, and a separate case seeking recognition of disqualified overseas military ballots. The named partners and founders of his law firm were lead counsel for Bush-Cheney in the Florida recount trial, along with Barry Richard from the Greenberg Traurig firm.

25. According to the *Casper Star-Tribune*, former U.S. Marshal and Wyoming state legislator James A. ("Tony") Rose recounted that Justice Scalia bagged his first antelope while hunting with him "south of Rawlins," Wyoming. In the *National Review,* Mr. Summers, Justice Scalia's former law clerk, also recalls being hosted by Mr. Rose to hunt antelope in 2005 with Justice Scalia in Wyoming, while Mr. Rose was U.S. Marshal for Wyoming. Without naming the host or the other members of the hunting party, Justice Kagan said that she hunted in Wyoming with Justice Scalia for deer and antelope in the Fall of 2012. Guided hunting trips for deer and antelope in Wyoming easily run $1,500 per person for a two-day trip, not counting the costs of lodging, food, and transportation.

26. Justice Scalia and former U.S. Marshal Tony Rose also went duck hunting with Wyoming Secretary of State Ed Murray on Mr. Murray's ranch on the North Platte River in Wyoming. After Justice Scalia's death, Secretary Murray posted on Facebook that they hunted together "on several occasions" and posted a

beautiful scenic photo of them standing against the backdrop of the North Platte. Mr. Murray commented that "while sitting in the blinds," they "had some wonderfully fascinating discussions about various Supreme Court cases."

27. Since 2014, James Farrenkopf, who owns "Panhandle Collections," a credit and collections business in Scottsbluff, Nebraska and who has been a leader in the Wyobraska (Wyoming and Nebraska) Tea Party, hosted Justice Scalia for quail hunting on his land in Western Nebraska "east of Melbeta, Nebraska. Justice Scalia first came to Western Nebraska through Mr. Summers, the former Scalia law clerk who owns land near McGrew, Nebraska. Mr. Farrenkopf hosted Justice Scalia in 2014 as well as just before Christmas 2015. After Justice Scalia's death, Mr. Farrenkopf told the *Scottsbluff Star Herald* that Justice Scalia was "one of our kind of people, a strong conservative" and that he was a "gun advocate and an ardent supporter of the Second Amendment." Congressman Jeff Fortenberry, a Republican with Tea Party ties, told KETV in Omaha that he went duck hunting with Justice Scalia in Western Nebraska in December 2015 with a "mutual friend"–presumably Mr. Farrenkopf. Steve Olsen, a past president of the Nebraska Defense Counsel Institute and partner in the Simmons Olsen Law Firm in Scottsbluff, said he was unable to go on the 2015 hunting trip but spoke with Justice Scalia for "about an hour" and candidly told the *Scottsbluff Star Herald* that Justice Scalia "seemed concerned about what might happen to the Court if America elects a Democratic president."

28. In Iowa, James S. ("Jim") Cownie, the co-founder of Heritage Communications which became one of the nation's top cable operators before being sold to John Malone's TCI for $887 million in 1987, hosted Justice Scalia along with De Moines lawyers Jordan and Ed Hansell for pheasant hunting at "Stonehaven," which is Mr. Cownie's 2,000-acre game preserve near De Soto, Iowa. Jordan Hansell, who was a law clerk for Justice Scalia in 1999-2000, has been the CEO of "NetJets" since 2011, a luxury aviation unit of Berkshire Hathaway, where he reported directly to Warren Buffett. Jordan's father, Ed Hansell, is a named partner at Nyemaster, Goode, West, Hansell & O'Brien PC, a 100-person law firm in Des Moines. Many members of Mr. Cownie's family are active in politics, including his daughter-in-law who worked in the White House during the Bush-Cheney administration and his son Peter who serves in the Iowa House of Representatives.

29. In November 2001, in an incident whose timing was uncannily similar to the March 2007 trip to Nuremberg, Germany to meet with gun rights lawyers just as the D.C. Circuit was deciding the *Heller* case and the January 2004 duck hunting trip with Vice President Cheney one month after his petition for certiorari was granted, Justice Scalia went pheasant hunting at the 10,000-acre Ringneck Ranch near Beloit, Kansas with then-Kansas Governor Bill Graves and former State Senate President Dick Bond, both Republicans, sandwiched between two Supreme Court oral arguments involving the State of Kansas. The Governor's state plane was used to fly from Lawrence, where Justice Scalia spoke to the University of Kansas Law School, to the Ringneck Ranch. On October 30, 2001, two weeks *before* that hunting trip, Kansas Solicitor McAllister, who was also Dean of the Law School, and Kansas Attorney General Carla Stovall appeared before the Supreme Court in the case of *Kansas vs. Crane*. Two weeks *after* that hunting trip, Mr. McAllister returned to Washington to argue on behalf of Kansas in *McKune vs. Lile*. In both cases, Justice Scalia sided with Kansas.

30. As mentioned, in October 2010, Justice Scalia hunted ducks with Wisconsin Circuit Judge William Atkinson on a spit of land called Little Tail Point jutting out into Green Bay that Judge Atkinson owns. Before the duck hunting, Justice Scalia gave a speech for the St. Thomas More Society of Northern Wisconsin to a crowd of 350. Bishop Ricken, the Bishop who arranged both the duck-hunting and the speech, said that the hunting was not with Judge Atkinson alone but with "judges and lawyers" from the nascent St. Thomas More Society the Bishop had just founded in Green Bay. Justice Scalia gave Judge Atkinson a signed, wooden decoy as a memento of their trip.

In his speech, according to the newspaper for the Catholic Diocese of Green Bay, Justice Scalia encouraged the "lawyers and judges" to be "fools for Christ" and told the crowd that "traditional Catholics," who he described as those who "follow indiscriminately, rather than in smorgasboard fashion, the teachings of the pope" have been "ridiculed" by the "sophisticated world." Prior to Justice Scalia's speech, Bishop Ricken, who met Justice Scalia in Rome when Justice Scalia's son, Father Paul Scalia, was in seminary, delivered a homily for a Red Mass in which he "listed examples of laws supported by public officials that are contrary to God's laws," including "abortion, embryonic stem-cell research and physician-assisted suicide." In an infamous October 2012 letter, Bishop Ricken doubled down on that homily and told his parishioners that as they "approach[ed] the voting booth to

complete your ballot" for the Presidential election to "keep in mind" that homosexual marriage, abortion, and embryonic stem cell research are "intrinsically evil" and that anyone who "vote[s] for a political program" that includes such principles is "in grave moral danger." Justice Scalia's son, Father Paul Scalia, has likewise been outspoken against homosexual marriage, and on September 22, 2016 delivered a speech to the St. Thomas More Society of the Greater D.C. Metropolitan Area entitled "In Fairness to the Pharisees: Laws, the Law, and Lawlessness."

### *Other Hunting Trips*

As exhaustive as this list is, it only identifies some of Justice Scalia's hunting trips over the last two decades. C. Allen Foster, the prominent Washington, D.C. lawyer who chartered the jet from Houston to the West Texas Cibolo Creek resort for Justice Scalia, has indicated that he was a frequent hunting companion of Justice Scalia. Mr. Foster also states on LinkedIn that he owns the "Mazatlan Duck & Hunting Club" in Mexico and a *Washington Post* article describes a hunting trip Mr. Foster arranged and paid for in August 2006 for 40 of his friends to the Czech Republic to celebrate his 65th birthday. Mr. Foster has not identified any of his other hunting trips with Justice Scalia to date. Other reports indicate hunting in Florida after an April 2007 speech at Stetson University, hunting in Nebraska after a November 2009 speech at Creighton Law School, and hunting in California after an October 2015 speech at Santa Clara Law School (where Justice Scalia told the audience that the right to same-sex marriage was "at the bottom" of a "slippery slope" that "I can't imagine how you can go any further"). In 2014-2015, there were other speeches at locations near where Justice Scalia had gone hunting in the past, including Boise, Idaho (August 2014) and Memphis, Tennessee (September 2015).

## Four Cases in Which Justice Scalia's "Impartiality Might Reasonably Be Questioned"

Without presenting this as an all-inclusive list, there are at least four cases in which Justice Scalia's "impartiality might reasonably be questioned" as a result of these hunting activities, speeches, and revelations in interviews and memoirs of the principals:

1. *McKune v. Lile*, 536 U.S. 24 (2002). As mentioned, two weeks *before* Scalia's November 2001 pheasant hunting trip with then-Governor Bill Graves and former State Senate President Dick Bond, Stephen McAllister, Kansas' solicitor and dean of its law school, appeared before the Supreme Court in *Kansas v. Crane* to defend a Kansas law on confining sex offenders after the completion of their prison terms. Two weeks *after* the pheasant hunting trip, Mr. McAllister was again before the Supreme Court in *McKune v. Lile* to lead the Kansas' defense of a prison program for treating sex offenders. In both cases, Justice Scalia sided with the State of Kansas. Kansas lost the *Crane* case 7-2 but won the *McKune* case 5-4, with Justice Scalia in the majority. When Justice Scalia was asked about the hunting trip by the *Los Angeles Times* in 2004, he issued a written statement, "I do not think that spending time at a law school [he had spoken to the law school immediately before the hunting trip] 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." Similar to his rationale for refusing to disqualify himself in the *Cheney v. U.S. District Court* case, Justice Scalia reasoned that if ethics prohibited Supreme Court justices from taking such trips, they "would be permanently barred from social contact with all governors, since at any given point in time virtually all states have matters pending before us." Obviously, prohibiting *ex parte* contacts between justices and public officials while they have matters pending before the Court is necessary to maintain the public's trust in the impartiality of the judicial process and should not be characterized as an unreasonable or even a significant constraint on the "social contacts" of a justice.

2. *Branch v. Smith,* 538 U.S. 254 (2003). The emergency appeal and merits decision in this Mississippi Congressional redistricting case were both decisions where Justice Scalia's impartiality was questioned. Former Judge Charles Pickering whose only son Chip Pickering's Congressional district was the subject of the redistricting case had already hosted Justice Scalia on dozens of hunting trips and Justice Scalia had personally sworn Chip Pickering in as a Congressman in 1996. In a memoir, Judge Pickering described the redistricting plan in starkly personal terms: The Mississippi legislature's redistricting plan "could end his [son Chip's] political career," while "the federal court and Senate shaped plans were favorable to Chip." Charles Pickering, *A Price Too High*, at 8, 56. Following Justice Scalia's death, Judge Pickering revealed to *The Clarion-Ledger* that it was he and "Judge David Bramlette"– who was one of the three

judges who decided this case below–who "introduced [Justice Scalia] to deer hunting." According to Judge Pickering, the second judge on the redistricting panel, Grady Jolly, was also "a longtime friend." *A Price Too High*, at 2. Arthur (Skip) Jernigan, who hosted Justice Scalia along with Judge Pickering at the Fighting Bayou hunt club, represented the Republican voters in that case. As reported by the local ABC affiliate, WLOX, for South Mississippi, Vice President Cheney also appeared as the headliner for an April 2002 fundraiser for Rep. Chip Pickering, where Cheney also spoke about Judge Pickering being "treated unfairly" by the Senate Democrats who were filibustering his promotion to the Fifth Circuit.

In February 2002, acting as the circuit justice for the Fifth Circuit, Justice Scalia denied an emergency petition to block the redistricting plan from going into effect.[8] In a February 27, 2002 statement, now Virginia Governor and then-DNC chair Terry McAuliffe lamented:

> "In state after state, Republicans are persisting in efforts to dilute minority political voting strength. And the President has nominated several anti-civil rights reactionaries, including Judge Charles Pickering, who just happens to be the father of the Republican Congressman who benefits from the federal redistricting plan in Mississippi.
>
> "Perhaps the most questionable decision in this redistricting case was made by Supreme Court Justice Antonin Scalia, who rejected an emergency appeal to overrule the decision of the three-judge panel. Just as he did in *Bush v. Gore*, Justice Scalia has personal ties to the interested parties in this case, as a close friend of the Pickering family. And once again, Justice Scalia failed to do the appropriate thing and recuse himself."

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[8] In another single-handed exercise of his "circuit justice" authority in 2001, Justice Scalia dissolved a Mississippi state court injunction blocking a $1 million ad campaign by the Mississippi Chamber of Commerce that was targeted at Mississippi state court judges who were considered "friendly" to plaintiffs in tort actions. Articles in the *Wall Street Journal* and *Forbes* describe how the ads were part of the Chamber's campaign to rid the Mississippi courts of judges "unfriendly" to business.

Justice Scalia not only denied the emergency appeal but proceeded to write the plurality decision affirming the Republican redistricting plan. The plurality decision by Justice Scalia was issued on March 31, 2003. Less than two weeks later, Justice Scalia's financial disclosure reports show that he spoke at the University of Mississippi Law School. In his 2007 book, *A Price Too High*, Judge Pickering describes hosting Justice Scalia for wild turkey hunting in early 2003. *Id*. at 137.

Justice Scalia never issued a statement on why he did not disqualify himself in this case, on either the emergency appeal or the merits. As far as Judge Pickering was concerned the outcome was simple: "The Mississippi Republican Party had prevailed in its redistricting battle with the Democrats and Chip [his son] was running in a safer district," which Chip won with 64% of the vote and continued to hold until 2009. *A Price Too High*, at 110. The pattern of meeting with parties while districting cases were working their way through the courts has repeated itself more recently. As described above, Justice Scalia went hunting several times with Josh Howard, a North Carolina elections official who is a named defendant in another redistricting case that is now before the Supreme Court.

3. *Cheney v. United States District Court*, 542 U.S. 367 (2004). After Vice President Cheney's petition for certiorari was granted, this decision overturned the District of Columbia Circuit's refusal to review a district court order pursuant to the Federal Advisory Committee Act requiring Vice President Dick Cheney to disclose records showing how the Presidentially-created National Energy Policy Development Group, which Cheney led, developed its recommendations. Those disclosures would have included a list of the individuals who participated in those meetings, which reportedly included Enron CEO Kenneth Lay and other energy industry executives and lobbyists, including Haley Barbour. The Sierra Club moved to disqualify Justice Scalia on the basis that Justice Scalia and Vice President Cheney were old friends and had gone on a duck-hunting trip together after Vice President Cheney's petition for certiorari was granted in December 2003. Vice President Cheney had also invited Justice Scalia for dinner in Easton, Maryland on November 22, 2003 and for the Vice President's annual Christmas party on December 11, 2003 while the certiorari petition was pending. As Justice Scalia told Joan Biskupic in an interview, he was confident Vice President Cheney knew him well and knew that he (Scalia) "was on the right

team." *American Original: The Life and Constitution of Antonin Scalia* (2009), at 64 (quoting 1/28/2008 interview by the author).

Since the contested Presidential election in 2000, Vice President Cheney had made the executive branch's authority to control access to its records a signature issue of the new Bush-Cheney Administration. He pursued this agenda in much the same way that he and Justice Scalia had sought to establish executive authority over President Nixon's records during the Ford Administration 30 years earlier when Scalia was head of the Department of Justice's Office of Legal Counsel and Cheney was Deputy Chief of Staff for President Ford. *See American Original,* at 45-47. In a July 18, 2012 CNN interview, Justice Scalia downplayed Cheney's role by saying that the case was against him as "head of the agency" and that he "was not personally the defendant." Justice Scalia went on to say, "If we had to recuse ourselves every time one of our friends was named even though his personal fortune was not at stake, we would not sit in a lot of cases." In fact, Cheney was not "head of an agency" and, as Justice Scalia knew well, executive privilege and secrecy had been signature issues for Vice President Cheney dating back to the 1970's when he was Chief of Staff and President Ford had to decide how much of President Nixon's records to disclose.

The *Cheney* case thus involved a decades-old political ally and close friend who knew Justice Scalia "was on the right team" on executive authority issues. The *Cheney* case was also decided by the Court in the same year President Bush and Vice President Cheney were up for re-election when disclosures about secret meetings with energy executives and lobbyists, like Enron's Ken Lay and Haley Barbour, could have had an impact on a swing state such as Ohio where the vote with the Kerry-Edwards ticket was close. In his 2011 memoir, *In My Time*, Vice President Cheney recognized that this was not a case about him as "head of the agency": He called the Supreme Court's decision "a major victory for us and for the power of the executive branch." *Id.* at 318.

As Bruce Allen Murphy points out in his 2014 biography *Scalia: A Court of One*, the *Cheney* case was also decided at a time when Justice Scalia was under consideration to be nominated by President Bush as Chief Justice if Bush and Cheney were re-elected, and the health of Chief Justice Rehnquist, who was dying of throat cancer, declined. In a March 2005 *New Yorker* profile, Margaret Talbot observed that Justice Scalia appeared to be "campaigning for the job" in 2004-

2005 by making more public speeches and granting more interviews. He was also polishing his relationship with Cheney. In late June 2005 during a Second Circuit Judicial Conference at The Sagamore Hotel on Lake George, Justice Scalia stepped out to go to the Hudson Falls Fish and Game Club to practice his shooting. A *Post Star* article says he "asked for help with the rabbits because he was going hunting with Vice President Cheney in a couple of weeks."

After the Sierra Club filed its motion in January 2004, but before he announced any decision on disqualification, Justice Scalia responded to questions after a February 2004 speech at Amherst College by telling students that "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." He ended on a derisive note by saying, "Quack, quack." A month later, Justice Scalia released the 21-page memo rejecting the Sierra Club's motion to disqualify himself, saying, *inter alia*, that the Presidential jet ride with Vice President Cheney for himself, his son John and his son-in-law did not have any financial value because they were occupying otherwise unoccupied seats on Air Force Two and could have flown coach on a commercial airline (by that logic, flying first-class or on a chartered luxury aircraft has no value). Justice Scalia's memo concludes by saying, "I went hunting with [a] 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."

As business ethics professors Max Bazerman and Ann Tenbrusel point out, Justice Scalia's incredulousness that anyone might question his impartiality based on his connections to Vice President Cheney "indicate[s] that he rejects or is unaware of the unambiguous evidence on the psychological aspects of conflicts of interest." *Blind Spots* (Princeton 2011) at 19. As for Justice Scalia's suggestion that a hunting trip is not the occasion for doing business, Vice President Cheney disagrees, writing in his memoir, *In My Time*, that "when Halliburton took over Dresser Industries we acquired a forty-thousand acre hunting lease on the King Ranch [in Texas]. We got a lot of business done on hunting trips, and it was a heck of a lot of fun." *Id.* at 249.

4. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Although Justice Scalia opposed Constitutional rights that State legislatures could not modify and derided the Bill of Rights as something that "tin-horned dictators" have, he

ardently advocated for one such Constitutional right, the individual right to bear arms which State legislatures could not modify or otherwise take away. In *Heller*, that position won by a 5-4 vote and Justice Scalia wrote the majority decision finding "an inherent [individual] right of self-defense" in the text of the Constitution that had not been discerned in the previous 220 years and that virtually read out the Amendment's reference to a "well-regulated" militia. Even the most ardent gun rights advocates recognize *Heller* as the Supreme Court's first recognition after more than two centuries years of an unmodifiable Constitutional right of all individuals to own firearms.

But despite two decades of hunting hospitality for him, his family, and his friends (almost always free of charge), and open advocacy for gun rights, including in speeches to the NRA-backed World Forum for Sport Shooting Activities, the National Wild Turkey Federation, the Safari Club International, and Ducks Unlimited, where a rifle, a shotgun, and a solid silver reproduction 16th century pistol were presented him as gifts, Justice Scalia never considered disqualifying himself from *Heller.* At a February 2006 National Wild Turkey Federation convention attended by over 40,000 people, at which Justice Scalia gave the keynote address, at the invitation of former Judge Pickering, and was awarded a rifle, Justice Scalia told the crowd that "the attitude of people associating guns with nothing but crime, that has to be changed." He said those who enjoy hunting and the outdoors should attack the idea that banning guns will cut crime and that "the hunting culture ... begins with a culture that does not have a hostile attitude towards firearms."

Barely one year later, on March 8, 2007, Justice Scalia delivered another keynote address in Nuremberg, Germany for the World Forum for the Future of Sport Shooting Activities (WFSA).[9] The WFSA, which is sometimes called the "International NRA," includes the National Rifle Association, with its over four million members, the Safari Club International, the National Shooting Sports Foundation, and the Second Amendment Foundation (SAF), as well as gun rights organizations from a number of other countries. In addition to making the keynote speech, Justice Scalia received the WFSA's "highest award, the "Sports Shooting Ambassador Award," which is "a solid silver reproduction of a Sixteenth Century

[9] The *Huffington Post* reported this story on the same day that *Heller* was decided: www.huffingtonpost.com/josh-sugarmann/sport-shooting-ambassador_b_109367.html.

pistol with its powder flask." According to his 2007 financial disclosures, Justice Scalia was at the University of Dublin for a speech on March 5, which covered his transportation, lodging and food on that leg of the trip. The 2007 disclosures list the WFSA as covering lodging and food, but not any transportation for the nearly four-hour flights from Dublin to Nuremberg and back. Nor did the 2007 disclosures list the solid silver 16th century pistol with powder flask as a gift or income.[10]

A news photograph that was reprinted in the *Huffington Post* from the WFSA event in Nuremberg shows Justice Scalia standing with Alan Gottlieb, the founder of the SAF (who it is no secret was convicted and served time for tax evasion in 1984). In the background, as identified by the *Huffington Post*, is Stephen Halbrook who is known for representing the NRA and prior to *Heller* had written over a score of law review articles on the Second Amendment. By that time, Halbrook had already successfully argued three times before the Supreme Court in gun rights cases, one of which was *Printz v. United States*, 521 U.S. 898 (1997), a controversial 5-4 decision that Justice Scalia authored striking down parts of the Brady Act. On March 9, 2007, the D.C. Circuit released its decision (*sub nom Parker v. District of Columbia*) striking down the District's gun law. The decision was written by Justice Scalia's friend, Judge Laurence Silberman, who reminisced at Justice Scalia's memorial service about how "over the years we ... brought our shotguns together to a gun club." Both the SAF and the NRA were already amicis in the D.C. Circuit case. In an explosive, nearly unnoticed audio-taped interview that was given the day after Justice Scalia's death on Armed American Radio, Mr. Gottlieb revealed:

> "I ... had the pleasure to spend a day with [Justice Scalia] in Nuremberg, Germany when he came to accept an award from the World Forum for the Future of Sports Shooting Activities [in March 2007].... I guess this is something that I probably haven't shared with anyone on the air, I've talked to some people about it privately. But that was the day in fact that the appeals court in Washington, DC ruled against the city in DC and knocked down the DC gun ban and

[10] The WFSA's website now lists the winners of its "highest award" in every year except 2007. Previous winners included Jackie Stewart, the race car driver, and Ugo Beretta, the head of the Beretta gun manufacturing company

> both Scalia and I knew that it was going to be headed to the Supreme Court and that the city of DC was going to appeal it. So we didn't talk directly about the case itself because it would have been like sort of a conflict, but he did say something to me that was very encouraging to me at the time. And that was, he said, "You know, Alan, it takes four votes on the Supreme Court to hear a case, and it takes five to win it. If I don't think we have the five to win it, there won't be four to hear it." And that just made me feel like I knew at that point in time that if the Supreme Court took the Heller case, that we were going to win it."[11]

Justice Scalia's conversation about the *Heller* case with Mr. Gottlieb, whose foundation already was an amicus in the case clearly should not have occurred, and it shows, as some suspected, that Justice Scalia had made up his mind about the *Heller* case before the Supreme Court had received even the first papers and was actively helping the gun groups. The day after this conversation, the Second Amendment Foundation filed the *McDonald v. City of Chicago* gun rights case which ultimately produced another 5-4 decision in 2010 striking down the City of Chicago's gun bans.

Renowned attorney Halbrook has also spoken about his interactions with Justice Scalia at the Nuremberg meeting in an interview he gave for NRA Radio on February 15, 2016, only two days after Justice Scalia's death:

> "I met Justice Scalia a few times, but the best time was over in Nuremberg at the IWA [Internal Weapons Exhibition]. He was an invited guest to speak at our luncheon for the World Forum on the Future of the Shooting Sports. And he talked about some of his hunting experiences and some of the contributions that gun owners make to American society. And he had a meeting with half a dozen of us lawyers, and it was a real roundtable discussion. It wasn't

[11] Broadcast from Feb. 14, 2016, Armed American Radio with Mark Walters (min. 16:02, 17:56), http://armedamericanradio.s3.amazonaws.com/02-14-2016_Hour_1.mp3. Mr. Gottlieb also said being with Justice Scalia at the International Weapons Exhibition was "like watching a kid in a candy store" and the Justice was most intrigued by the "expensive highly engraved shotguns by various manufacturers."

> something where he was just lecturing us.... The roundtable discussion that I mentioned, we talked about the fact that the only really solid Second Amendment in the world is in the United States."[12]

After the Supreme Court agreed to hear the *Heller* case, Mr. Halbrook wrote the amicus brief on behalf of a majority of the members of both houses of Congress opposing the DC gun ban. In an unprecedented move, Vice President Cheney broke with the Bush-Cheney Administration's own position on the D.C. gun law and joined the Halbrook-written amicus brief urging the Supreme Court to strike down the law rather than remand for further analysis. In his 2011 memoir, *In My Time*, Cheney writes that "Justice Antonin Scalia later joked [sic] that the Court was unsure how to rule until, thankfully, 'the vice president's brief showed up.'" *Id*. at 495-96.[13]

Less than three weeks after the March 2008 oral argument, Justice Scalia went hunting for wild turkey in West Texas after giving a lunchtime speech to students at St. Mary's University in San Antonio that was hastily arranged to cover his travel expenses. A *San Antonio Express-News* article on the April 3, 2008 talk said the press was prohibited "from using recording devices." Neither the individuals in the wild turkey hunting party nor the host have been identified, but James A. Baker, III, who was chief-of-staff when President Reagan first nominated Justice Scalia owns a 4,000 acre ranch 55 miles to the south where he is passionate about wild turkey hunting and where he previously hosted Presidents Reagan and George H.W. Bush for hunting. In a TV interview after Justice Scalia's death, Judge Charles Pickering, an officer in the National Wild Turkey

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[12] Cam & Co., NRA News (Feb. 15, 2016, min. 4:01, 8:48), https://www.nranews.com/series/cam-and-company/video/cam-and-company-2016-steve-halbrook-my-time-with-justice-antonin-scalia/episode/cam-and-company-season-12-episode-29.

[13] The NRA's amicus brief argued that an "individual right to keep and bear arms for private purposes" is "essential" to be "free from government tyranny." Justice Scalia's ubiquitous hunting companion, C. Allen Foster, also filed an amicus brief on behalf of the "American Hunters and Shooters Association" and 11 high-ranking retired military officers arguing that an individual right to bear arms "enhanc[es] the national defense by promoting martial training among the citizenry."

Federation, pointed to a "Rio" turkey mounted on the wall of his home that he killed hunting with Justice Scalia "in Texas."

Following the *Heller* decision, Justice Scalia was acclaimed by gun rights and hunting organizations. In January 2009, only six months after the *Heller* decision, Justice Scalia spoke to the Safari Club International convention in Reno, Nevada in January 2009, where his hunting companion, C. Allen Foster formerly served as lobbyist and spokesperson. Justice Scalia's speech to the Safari Club's convention, which drew 23,000+ people, was not reported because it is "open only to Safari Club members." But the convention materials praise *Heller* for "dispell[ing] decades of revisionist history by confirming, once and for all, that the Second Amendment does in fact guarantee an individual right to keep and bear arms." When Justice Scalia returned in February 2012 to speak at the National Wild Turkey Federation's convention, he was praised and awarded a shotgun. Justice Scalia was also hailed as a gun rights advocate when he spoke at Ducks Unlimited in May 2014. In a June 2012 speech, the President of the NRA and member of the Order of St. Hubertus, James Porter, stated that only "one vote" at the Supreme Court "stood between freedom and tyranny."

According to the *Great Falls Tribune*, Justice Scalia was asked at a Federalist Society meeting in Bozeman, Montana in 2013 what remained to be decided concerning the individual Second Amendment right to keep and bear arms. He fliply replied, "What remains to be determined ... appears to be the scope of the armament that people can keep and bear. Can they bear shoulder-fired rocket launchers?" Justice Scalia had a similar exchange with Fox News' Chris Wallace in July 2012 in which he only ruled out a Second Amendment right to bear "cannons" because they "cannot be hand-carried," but would not rule out "handheld rocket launchers that can bring down airplanes."

Obviously, Justice Scalia's hunting trip hosts, some of whom own lands in excess of 30,000 acres and hold high-ranking positions in gun rights and hunting organizations, many of which are leaders in or share leadership with the NRA,[14]

[14] To illustrate shared leadership among these organizations, Mr. Porter, the NRA's former President, is the Order of St. Hubertus' "Prior At-Large." Another leader in the Hubertus Order, Riley Boykin Smith of Alabama, is on the NRA's Nominating Committee, which controls who is elected to the NRA's Board of Directors. A third

would not have looked favorably on extending free invitations for high-end hunting trips to the justice, his family, and his hunting buddies, if his votes in *Heller* or other gun rights, land use, or endangered species cases had gone the other way.

**What Should the Impartiality Standard Be and How Should It Be Enforced?**

During his August 1982 Senate confirmation hearing to serve on the United States Court of Appeals for the District of Columbia Circuit, Justice Scalia's testimony suggested that he accepted the modern disqualification standards. He stated that "I would ... disqualify myself if a situation arose in which, even though my judgment would not be distorted, a reasonable person would believe that my judgment would not be distorted." In August 1986, Justice Scalia reaffirmed that position when Senator Mathias of Maryland asked if this was the standard he would carry with him to the Supreme Court. S. Hrg. 99-1064, at 43-44.

However, even before his March 2004 memo in the *Cheney* case, Justice Scalia had moved to a narrower view of the Code of Conduct and 28 U.S.C. §455 than at the confirmation hearings. In 1988, he joined with Chief Justice Rehnquist's dissenting position in *Liljeberg,* 486 U.S. at 872-73, that a judge should not be disqualified on the basis of "constructive knowledge," i.e., what he "should have known," but only on the basis of a more "objective" standard of the "facts and circumstances known to the judge at the time." Writing for a majority in *Liteky v. United States*, 510 U.S. 540 (1994), Justice Scalia next took the position that 28 U.S.C. §455 is limited by an "extrajudicial source" requirement, meaning that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not

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Hubertus leader, Garrick Steele, is on the Board of the Sportsmen's Alliance, an umbrella organization that includes the NRA, Ducks Unlimited, the National Wild Turkey Federation, and Safari Club International. Robert Puette, a former Grand Prior in the Order, is a member of the Charlton Heston Society in the NRA's Ring of Freedom based on donating at the $1 million level. Justice Scalia's friend, C. Foster Allen, is both the Chancellor of the Order of St. Hubertus and the former spokesperson and lobbyist for the Safari Club International. As mentioned, the World Forum for the Future of Shooting Sport Activities (WFSA) includes both the NRA and the Safari Club International, as well as the Shooting Sports Foundation and Second Amendment Foundation.

constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." 510 U.S. at 555. The dissent criticized this for narrowing the protection for litigants who challenge a judge's impartiality, stating that the "'impossibility of fair judgment' test bears little resemblance to the objective standard" in §455 of "whether a judge's 'impartiality might reasonably be questioned." *Id*. at 563.

Eight years later, in *Republican Party v. White*, 536 U.S. 765 (2002), Justice Scalia, writing for a majority again, made clear that the fact that a judge has expressed a view on an issue does not by itself establish a lack of impartiality. "A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." 536 U.S. at 776-77. Without articulating the standard that would result in disqualification, Justice Scalia proposed that something more than simply "tak[ing] a particular stand" on a legal issue is necessary to establish "bias against that party, or favoritism toward the other party." *Id*.

One case in which Justice Scalia did recuse himself was the 2004 decision in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, about the inclusion of the words "under God" in the Pledge of Allegiance. There, Justice Scalia disqualified himself after news reports surfaced of a January 2003 speech that he had given in Fredericksburg, Virginia during a "Religious Freedom Day" ceremony sponsored by the Knights of Columbus. The *Washington Post* reported that Justice Scalia's speech criticized court decisions that outlaw expressions of religious faith, specifically referring to the Ninth Circuit's June 2002 ruling in the *Newdow* case as an example of how courts were misinterpreting the Constitution to "exclude God from the public forums and from political life." Justice Scalia's recusal, which appeared in the October 2003 order granting the petition for certiorari, was not explained beyond the statement that "Justice Scalia took no part in the consideration" of the petition.

Justice Scalia's reasons for not recusing himself as articulated in his 21-page March 2004 memo in the *Cheney* case (published at 541 U.S. 913) offer a variety of excuses joined with attacks on the press (the editorial pages of most major newspapers had suggested that he should recuse based on his relationship

with the Vice President). For example, Justice Scalia asserted hypertechnically that flying on Air Force Two with the Vice President of the United States did not have any value to him, his son, and his son-in-law since they could have all flown coach on a commercial airline without spending any more money. Justice Scalia also said that he had not been in a duck blind with Vice President Cheney without addressing their three-hour flight, motorcade and boat rides, as well as meals and other time together, or earlier meetings in November and December. Justice Scalia also quibbled with other details of how the press had described the duck hunting trip with the Vice President, such as stating one of his daughters accompanied him when it was his son-in-law and one of his sons.

Beyond this, Justice Scalia's March 2004 memorandum offers little in the way of operational principles for complying with the Code and 28 U.S.C. §455(a). Justice Scalia rejects the suggestion that he should "resolve any doubts in favor of recusal" despite the wording in the Code and 28 U.S.C. §455 that he "shall disqualify" if his "impartiality might reasonably be questioned." The memo then seems to rephrase that standard in a way that would shift the burden to whoever raises the question about impartiality by arguing:

> "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* [emph. in orig] decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane."

With due respect, that rephrasing cannot even be grammatically diagramed.

Apart from the effort to shift the burden by rephrasing, Justice Scalia's memo primarily relies on the "duty to sit," without once actually using that term. In Justice Scalia's memo, the duty to avoid "unnecessary recusal" is not only still in play despite Congress' effort to end it, but it appears to lead back to the pre-1974 ethical standard in which a justice's subjective opinion of his own impartiality is dispositive. Justice Scalia's 2004 memo said "if I were sitting on a Court of Appeals" where my place "would be taken by another judge, and the case would proceed normally," "resolv[ing] any doubts in favor of recusal" "might be sound advice." But the memo said that in the case of the Supreme Court, the Court must proceed "with eight Justices, raising the possibility that, by reason of a tie

vote, it will find itself unable to resolve the significant legal issue presented by the case." Thus, Justice Scalia contended that the same words on "impartiality" in 28 U.S.C. §455 have a different meaning when it comes to the Supreme Court, despite Congress' rejection of the "duty to sit" in both the statute's text and its legislative history. As mentioned, this is, to be fair, a view Chief Justice Roberts shared in his 2011 Annual Report, despite Congress' elimination of it from 28 U.S.C. §455 in 1974 and the Supreme Court's recognition of that in *Liljeberg*.

Effectively, this means that Justice Scalia's and Chief Justice Roberts' position on the "duty to sit" is sustainable only if the application of 28 U.S.C. §455 to "justices" is unconstitutional. But no one has ever challenged the constitutionality of 28 U.S.C. §455. In 1943, Chief Justice Harlan F. Stone testified before the House Judiciary Committee that although the federal disqualification statutes, at that time, did not explicitly apply to a Supreme Court justice, "it has always seemed to the Court" that "it was our manifest duty to take the same position" on recusal as applicable to a district judge or an appeals court judge. Hearings before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. (1943) at 24, quoted in John P. Frank, "Disqualification of Judges," 56 *Yale Law Journal* 605, 612 (1947). Two years later, on a petition for rehearing, *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 897 (1945), Justice Jackson criticized Justice Black's ethics in participating in a case that Justice Black's former law partner argued. Frank, 56 *Yale Law Journal* at 605-7; Dennis J. Hutchinson, "The Black-Jackson Feud," *Supreme Court Review* (1988), at 208. In 1948, Congress proceeded to amend the precursor to 28 U.S.C. §455, which was then codified as 28 U.S.C. 24, both to expressly include any "justice" of the Supreme Court and to expressly provide for recusal based on a justice's relationship with a party's attorney. Hutchinson, *Supreme Court Review* (1988) at 222. Since then, no one has challenged Congress' authority to do that. Indeed, Justice Rehnquist's 16-page memo in *Laird v. Tatum* does not challenge the authority of 28 U.S.C. §455, but describes it as "the governing statute." Likewise, neither Justice Scalia's confirmation testimony nor his 21-page memo in *Cheney v. United States District Court* challenges the authority of the statute, and his memo specifically states that "[m]y recusal is required if, by reason of the actions described above, my 'impartiality might reasonably be questioned.'" 541 U.S. at 916 (citing 28 U.S.C. §455(a)). It would simply not be a tenable position, in addition, to applaud the statute as a "key source of guidance" and later reveal that it was not being followed or was being narrowed on a Constitutional ground. If a

justice wants to challenge the constitutionality of the recusal statute, he or she should test that position in court rather than laud the statute as a "key source of guidance" while silently rejecting its application.

While Justice Scalia's 2004 memo predicts dire consequences if a justice recuses and only eight justices are left, with the possibility of a 4-4 tie, the flip side is that an otherwise tied vote will be broken by a justice whose "impartiality might reasonably be questioned," as occurred in *Heller*. The dire consequences predicted from having only eight justices appear to be less now that, following Justice Scalia's death, the Supreme Court is indefinitely sitting with only eight justices–not just in one case but in all the cases before it. In a February 23, 2016 appearance at the Georgetown University Law Center, Justice Alito stated that "we will deal with it" and "[t]here were times in the history of the court when the court had an even number of justices" (one of which times was when Justice Jackson voluntarily went to Nuremberg to serve as Chief United States Prosecutor in 1946). Even Chief Justice Roberts explained during an Eighth Circuit Judicial Conference in May 2016 that "most of our cases are not 5 to 4 ... sometimes we talk about cases longer to see if we can reach some type of agreement. But that's it. It's a great loss, the loss of Justice Scalia, and there are reasons most appellate courts have an odd number of judges. But the process is pretty much what it has been."

Justice Scalia's 2004 memo goes beyond its principal reliance on rephrasing and the "duty to sit" to suggest one other narrowing of the modern era's disqualification standard when "friendship" is the issue– as it partly was in *Cheney*. Justice Scalia's memo states that "friendship" should only be "ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue." There is no basis for that qualification in the text or history of 28 U.S.C. §455 or the Code. In other places, Justice Scalia sought to diminish the seriousness of disqualification motions by references to calling "foot-faults" based on the "slightest friendship or favor." 541 U.S. at 928. With respect, even if the "slightest friendship or favor" is the basis for some other recusal motion, this would not reasonably characterize Vice President Cheney's decades-old personal and political alliance with Justice Scalia (who he knew "was on the right team"). Nor does it reasonably characterize Justice Scalia's relationships and acceptance of gifts from gun rights organizations and advocates all over the country both before and after the most important Second Amendment decision in the last 220

years.

In one last, albeit plainly extrajudicial, rationale for not recusing in the *Cheney* case, Justice Scalia's 2004 memo expresses what may have been the most decisive factor: Justice Scalia's pride about "not allowing myself to be chased off that case" by the Sierra Club or editorials across the country questioning his impartiality. In comments in 2006 during a lecture at the University of Connecticut Law School, Justice Scalia returned to this point, stating "For Pete's sake, if you can't trust your Supreme Court justice more than that, get a life...I think the proudest thing I have done on the bench is not allow myself to be chased off that case." While pride is an understandable motivation, it is not a basis for violating ethical rules.

Justice Scalia's ultimate retort that it is not "reasonable to think that a Supreme Court justice can be bought so cheap" ignores not only 28 U.S.C. §455 but also the centuries-old history of influence and corruption in America and around the world, and what *Caperton* calls the "interests that tempt adjudicators to disregard neutrality." 556 U.S. at 883-84. As business ethics professors Max Bazerman and Ann Tenbrusel point out, Justice Scalia's incredulousness that anyone could question his impartiality based on his connections to litigants like Vice President Cheney "indicate[s] that he rejects or is unaware of the unambiguous evidence on the psychological aspects of conflicts of interest." *Blind Spots* (Princeton 2011) at 19. In fact, the impartiality of many public officials has been influenced by comparable or less valuable gifts. When Federal Judge Thomas Porteous in the Eastern District of Louisiana was impeached and removed from office in 2010 (one of only eight federal judges to ever be removed), the evidence against him included acceptance of "all-expenses-paid high-end hunting trips" arranged through a "middleman" or "intermediary" to at least one of the same "luxury" hunting resorts as Justice Scalia visited.[15] Justice Fortas similarly resigned from the Supreme Court in 1969 over amounts of money that he plainly did not require given his earnings as a founding partner of Arnold Fortas & Porter before he went on the Court.

Compounding the issues related to Justice Scalia's avoidance of the post-

[15] *See* H.R. Rep. No. 111-427, at 55, 127-37 (2010); *Turner v. Pleasant*, 663 F.3d 770, 773 and 776 (5th Cir. 2011).

1974 standard for recusal is the documented avoidance of the ban on honoraria by soliciting hunting trips directly and through intermediaries, and the misuse of the personal hospitality exception to avoid disclosure of expensive trips to locations such as the Cibolo Creek Resort that were hosted by individuals whom Justice Scalia barely knew, or did not know at all. The "gifted" trips or additional honoraria were not only for Justice Scalia but also for sometimes multiple family members and friends, and sometimes involved not only exclusive resorts but also transportation by private jets. When those trips were tendered in connection with speeches, they were prohibited honoraria. *See* Judicial Conference Regulation, §1020.30. The ethics regulations also show that the rifle, shotgun and silver 16th century pistol that Justice Scalia received when he spoke were not just disclosable as gifts, but were prohibited honoraria because of their "commercial value." *Id*. Moreover, even if they had not been prohibited as honoraria, the trips and guns awarded for speaking were "outside earned income" in excess of the 15% caps that Justice Scalia was already up against in those years. *Id*. at §1020.25. As indicated above, the "personal hospitality" exception that Justice Scalia appears to have regularly invoked so as not to even disclose the expensive trips that were not in connection with speaking events was utilized in situations where a guest would likely have no idea whether his host personally owned the property or facilities or was treating the expenses incurred in connection with the property or facilities as non-deductible personal expenses. As for whether the ethics rules are really too much to expect a justice to follow, even judicial law clerks are told, with no reservations, that they "may not accept" "expensive" retreat at a "fancy mountain resort" from a lawyer or law firm because of "the appearance of impropriety." Federal Judicial Center, *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* (2d ed. 2011) at 19.

Some would still suggest that there is nothing like the flagrantness of Judge Porteous' violations or the multi-million dollar campaign contributions in *Caperton* in any case in which Justice Scalia did not recuse. But, in fact, there were the flagrant *ex parte* conversations with Messrs. Gottlieb and Halbrook in Nuremberg and numerous gifts or outside income in the form of gifted hunting trips, chartered plane and ground transportation, accommodations and food, including for family members and friends, for as many as ten trips annually extending over a 20-year period, sometimes at lavish locations like the Cibolo Creek Resort and the Grande View Lodge where an internationally-renowned chef was brought in. Ten hunting trips per year over 20 years with conservatively an

average value of $2,000 per trip is $20,000 annually and $400,000 overall.

As for there being nothing like the $3 million campaign contributions in *Caperton*, only one month after Justice Scalia's death, there was a $10 million contribution by the Charles Koch Foundation with a related a $20 million contribution by an "anonymous" Koch-related donor in exchange for naming the George Mason Law School, a public state-supported institution, after Justice Antonin Scalia. Under the Grant Agreement, the "Estate of Antonin Scalia" and any successors or assigns were recognized as "third-party beneficiaries" to the Agreement with the right "to stop use" of his name if it ever reflects unfavorably upon the "legacy of the Justice."[16]

In both houses of Congress, legislators have already introduced bills, not to force the Court to accept bitter pills, but to encourage the Supreme Court to reform itself. Senator Chris Murphy of Connecticut and Rep. Louise Slaughter of New York have introduced legislation (S. 1072 and H.R. 1943), titled "The Supreme Court Ethics Act," that would require the Supreme Court to adopt the Judicial Code of Conduct and make it mandatory, thereby closing the loophole that it is simply a "key source of guidance." Senator Charles Grassley of Iowa, Chair of the Senate Judiciary Committee, has also introduced S. 1418 to create an inspector general to investigate misconduct claims in the Supreme Court and other parts of the federal court system.

Consistent with this legislation, a basic platform for reform would:

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[16] George Mason Law School is no stranger to controversy over molding its law program to secure conservative funding. A March 2013 *Washington Post* article uncovered that "[i]n 2003, the NRA marked the Second Amendment's new stature as a subject of serious study when its foundation endowed [Professor Nelson] Lund's Patrick Henry chair at George Mason University with $1 million." Daniel D. Polsby, the dean of the Law School who is a gun rights scholar himself, told the *Washington Post* that "What they [the NRA] were looking for was a means of legitimating the fact that the Second Amendment had arrived as a legitimate subject of study in constitutional law." In *Heller*, Dean Polsby and Don B. Kates, another gun rights scholar, wrote the amicus brief for the Alan Gottlieb-founded Second Amendment Foundation when the case was before the D.C. Circuit. Before the Supreme Court, the NRA-endowed Patrick Henry chair, Professor Lund, stepped in to write the SAF's amicus brief.

(1) Raise the salaries of the Supreme Court justices enough to at least lessen the temptation to accept high-end gifts or prohibited honoraria;

(2) Make the modern-era impartiality standard as binding on a justice as on a judge on the circuit courts of appeals, rather than continue to allow it to be treated as a "key source of guidance," which may mean next-to-nothing to one justice and a lot to another;

(3) Require full disclosure of business or nonbusiness gifts without using the "personal hospitality" exception for "property or facilities owned by the individual" who hosts a justice;

(4) Require justices to maintain recusal lists and report consideration of questions of impartiality, with a provision for review by a disinterested justice or inspector general when there are indications that self-policing is not functioning, such as unexplained omissions from disclosure reports of honoraria, outside income, or gifts.

Even without legislative action, the Supreme Court could make immediate improvements by taking the last three of these actions by unanimous resolution. Each of these reforms will bring disqualification issues into the open and subject them to review under the objective, reasonable-person standard envisioned in 1974, rather than allow the decisions to be made on a subjective basis by a justice whose "impartiality might reasonably be questioned" as repeatedly took place here.