Congress of the United States
House of Representatives
Washington, D.C. 20515

January 30, 2004

The Chief Justice
The Supreme Court of the United States
Washington, DC 20543

Dear Chief Justice Rehnquist:

In a letter this week to Senator Leahy regarding Supreme Court recusal practices, you said that "there is no formal procedure for Court review of the decision of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself."[1] We are writing to ask that you consider whether the Supreme Court should develop a formal procedure for reviewing the recusal decisions of Supreme Court justices.

We make this request because it appears that Justice Antonin Scalia is following a different standard than the lower courts in deciding recusal questions. The federal statute requiring a judge to recuse himself "in any proceeding where his impartiality might reasonably be questioned" applies to Supreme Court justices and other federal judges alike.[2] Yet Justice Scalia's decision not to recuse himself in *In re: Cheney* appears to conflict with the recusal standards articulated by the Eighth Circuit Court of Appeals in *United States v. Tucker,* a similar case involving a federal judge who was friends with President Clinton and First Lady Hillary Rodham Clinton.[3] We do not believe that one standard should apply to judges who are friends of the Clintons and another standard should apply to judges who are friends of Mr. Cheney.

United States v. Tucker

The Eighth Circuit's decision in *United States v. Tucker* concerned Independent Counsel Kenneth Starr's prosecution of tax fraud and other charges against then–Arkansas Governor Jim Guy Tucker. This case that grew out of the investigation of the "Whitewater" matter. In 1995, United States District Judge Henry Woods found that the Office of Independent Counsel lacked jurisdiction to prosecute the case. Independent Counsel Starr then appealed this decision and requested that the court assign the case to a judge other than Judge Woods.[4]

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[1] Letter from Chief Justice William Rehnquist to Senator Patrick Leahy (Jan. 26, 2004).

[2] 28 U.S.C. § 455.

[3] *United States v. Jim Guy Tucker*, 78 F.3d 1313 (8th Cir. 1996).

[4] *See id.*

Mr. Starr argued that reassignment was necessary because there was "an unmistakable appearance of bias by Judge Woods."[5] His argument, based "primarily on newspaper articles,"[6] was that Judge Woods was a friend of Hillary Rodham Clinton and President Clinton. Mr. Starr cited in his brief an article in which the judge said he had come to admire Mrs. Clinton when she was an attorney on a special committee.[7] Mr. Starr also relied on an article that reported that the judge had spent a night at the White House.[8]

With respect to the allegation of bias, Judge Woods stated, "I have no connection with Tucker, and the Clintons, in my opinion, are not involved in this matter."[9] Mr. Starr, on the other hand, argued that an actual connection between the Clintons and the case was not critical to a finding of the need for reassignment: "The public perception is that the genesis of this Whitewater investigation — and everything that occurs in this investigation — is regarding President Clinton. . . . Whether or not the facts of a particular case are directly connected to President Clinton, a reasonable observer would question the impartiality of Judge Woods in matters where this independent counsel is a party."[10]

The Eighth Circuit Court of Appeals granted Independent Counsel Starr's request to reassign the case in order to preserve "the appearance of impartiality."[11] The court stated that it had the power to reassign a case under 28 U.S.C. § 2106, "including . . . where, in the language of 28 U.S.C. § 455(a) . . . the district judge's 'impartiality might reasonably be questioned.'"[12] Noting that 28 U.S.C. § 455(a) concerns the appearance of bias and does not require a showing of actual bias,[13] the court found:

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[5] *Whitewater Prosecutor Says Judge Should Be Removed from Tucker Case*, Associated Press (Oct. 12, 1995) (quoting Independent Counsel Starr's brief to the court).

[6] *United States v. Tucker*, *supra* note 3, at 1322–23.

[7] *Id.* at 1323 (describing article cited by Independent Counsel Starr).

[8] *Id.* (describing article cited by Independent Counsel Starr).

[9] *Whitewater Prosecutor Says Judge Should Be Removed from Tucker Case*, *supra* note 5.

[10] *Id.*

[11] *United States v. Tucker, supra* note 3, at 1322.

[12] *Id.* at 1323–24.

[13] *Id.* at 1324.

> Judge Woods's link with the Clintons and the Clintons' connection to Tucker have been widely reported in the press. Moreover, as the Independent Counsel has noted, 'this case will, as a matter of law, involve matters related to the investigation of the President and Hillary Rodham Clinton.' . . . Given the high profile of the Independent Counsel's work and of this case in particular, and the reported connections among Judge Woods, the Clintons, and Tucker, assignment to a different judge on remand is required to insure the perception of impartiality.[14]

In re: Cheney

Under the standards applied in *United States v. Tucker*, Justice Scalia's relationship with Vice President Cheney would seem to raise similar concerns about "the appearance of impartiality." According to recent news accounts that have not been denied by Justice Scalia, he and Vice President Cheney went on a duck hunting trip together at a private camp at the beginning of this year.[15] This trip occurred just a few months before the Supreme Court will hear arguments in the case *In re: Cheney,* a case in which the Vice President himself is a party.[16]

There are close parallels between the *Tucker* case and *In re: Cheney*. Just as the *Tucker* court found that case would involve matters concerning the Clintons, *In re: Cheney* will involve matters concerning Vice President Cheney. Indeed, the underlying controversy in *In re: Cheney* involves the Vice President's assertion that task forces that he heads, such as the energy task force, should be allowed to operate in secret.

Moreover, just as the *Tucker* court found that the case before it was high profile, the *Cheney* case is high profile. And the reported connection between Justice Scalia and the Vice President — a vacation together — appears at least as strong as the reported connections between the Clintons and Judge Woods at issue in the *Tucker* case.

There are cases where a judge's friendship with an individual has not been sufficient grounds for recusal. For example, *Baker v. City of Detroit* involved an allegation of race-based discrimination on the part of the Detroit Police Department.[17] The plaintiffs in this case filed a motion to disqualify the judge under 28 U.S.C. § 455(a) on the basis of the judge's friendship with the Mayor of Detroit, and the court denied the motion. But in *Baker* the Mayor was a nominal party. In the case of *In re: Cheney*, there can be no question that the Vice President

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[14] *Id.* at 1324–25.

[15] *Trip with Cheney Put Ethics Spotlight on Scalia*, Los Angeles Times (Jan. 17, 2004).

[16] *See* 157 L. Ed. 2d 793, *cert. granted.*

[17] 458 F. Supp. 374 (E.D. Mich. 1978).

plays a far more central role. It is no exaggeration to say that the prestige and power of the Vice President are directly at stake in *In re: Cheney*.

Conclusion

Justice Scalia has stated, "I do not think my impartiality could reasonably be questioned."[18] We want to make it clear in this letter that we are not questioning the impartiality or integrity of Justice Scalia. In fact, it may be that Justice Scalia has reached the correct conclusion and that Independent Counsel Starr and the *Tucker* court reached the wrong one. But we do believe that public trust in the Supreme Court could erode if recusal decisions appear arbitrary and inconsistent with recusal standards applied to lower court judges.

For these reasons, we urge you to examine the merits of establishing a procedure for formal review of recusal decisions by Supreme Court justices. We believe such a system would help assure that consistent standards are applied to these important matters.

Sincerely,

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform

John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

[18] *Trip with Cheney Put Ethics Spotlight on Scalia, supra* note 15.