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Judicial Ethics Under Review

There was widespread outrage when word got out that Justice Antonin Scalia had gone duck hunting with Vice President Dick Cheney while Mr. Cheney had an important case pending in the Supreme Court. That outrage grew when Justice Scalia was allowed to remain on the case. Now Chief Justice William Rehnquist has appointed a committee to look broadly at federal judicial ethics. This has the potential to do some good, although the committee's skewed composition raises concerns about whether it will strengthen the rules or weaken them. Judicial ethics are too important to fall prey to self-protectionism or to partisanship. Congress and the public should watch closely and insist that any changes raise the standard of judicial conduct.

It is an elemental principle of law that judges must not have, or even appear to have, an interest in the cases before them. Federal law requires a judge or justice to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The law is broadly written because it is intended, as the Supreme Court has held, to avoid "even the appearance of impropriety."

The law and popular opinion are not always aligned, but on this issue they are. The public wants judges to avoid even the suggestion of bias, and its displeasure has been clear in the case of Justice Scalia and Mr. Cheney. They became the butt of late-night comedy, including Jay Leno's famous joke about how Justice Scalia fell out of Mr. Cheney's pocket at a White House metal detector.

Perhaps the biggest problem with the judicial ethics rules is the lack of effective enforcement. Although Justice Scalia's behavior was called into question, he was nonetheless allowed to decide whether he should hear Mr. Cheney's case. After deliberating on the matter, Justice Scalia ruled in his own favor. Leaving the decision up to the jurist whose impartiality is being questioned raises major appearance-of-conflict problems of its own.

The committee could provide a service by coming up with recommendations for putting more teeth into judicial ethics. There is a need for a better procedure for determining when justices will be recused and who will enforce those rules. The improper practice of judges' accepting free resort vacations, under the guise of "judicial education," also has to be reined in. If the committee held public hearings and invited testimony from lawyers and other private citizens, it could educate people on an important matter and inform its recommendations.

But there is reason to wonder whether this particular committee will take such a reform-minded approach. Chief Justice Rehnquist's own ethics have been questioned, most recently this month, when he flew on a corporate jet owned by an Ohio power plant company with dozens of cases in federal court. His opinions on the court, including a troubling dissent in a 1988 case involving a Louisiana judge with a conflict, have argued for less exacting standards for judges. In the Scalia-Cheney matter, Justice Rehnquist told a group of Democratic senators that the suggestion that Justice Scalia recuse himself was "ill considered."

Party identification alone is not a reliable indicator of ethical standards. But here, too, appearances

matter, and it is troubling that four of the six members of the committee are judges appointed, like Justice Rehnquist, by Republican presidents. A fifth is his own administrative assistant. The sole member appointed by a Democratic president is Justice Stephen Breyer. He is a thoughtful jurist, but he seems a curious choice for this undertaking as his nomination to the court was jeopardized by questions about his failure to recuse himself, as an appeals court judge, from cases that could have affected his investments.

Justice Rehnquist has not indicated what he will do with the committee's recommendations, but we hope he bears in mind that the court's reputation has already suffered because of the Scalia-Cheney matter. Watering down existing rules on judicial ethics would only do more harm. Justice Rehnquist may believe that the current rules go too far, but as Mr. Leno has shown, much of the country regards them as laughably ineffective.