

OP-ED CONTRIBUTOR

**The Wrong Ticket to Ride**

By IAN AYRES and BARRY NALEBUFF

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**The Wrong Ticket to Ride**

By IAN AYRES and BARRY NALEBUFF

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**N**EW HAVEN — Of the many ethical questions raised by Justice Antonin Scalia's duck-hunting trip with Vice President Dick Cheney, one has actually been prompted by the justice himself: how is a law-abiding public servant supposed to get back to Washington from Louisiana?

Justice Scalia had flown to Louisiana in January on the vice president's plane. But Mr. Cheney left before Justice Scalia did, so the justice and his relatives bought their own tickets home. In a 21-page memo explaining his decision not to recuse himself from a case involving the vice president, Justice Scalia wrote, "We purchased (because they were the least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights."

It may have been the right ethical decision as far as the vice president was concerned; as Justice Scalia later noted, "None of us saved a cent by flying on the vice president's plane." But from the airline's standpoint, it was wrong. Justice Scalia and his family probably saved a bundle by misrepresenting their intentions.

In the topsy-turvy world of airline pricing, a round-trip ticket is often cheaper — even much cheaper — than a one-way fare. On US Airways, for example, a round-trip ticket between Washington and New Orleans could have been bought yesterday for as little as \$198, while the cheapest unrestricted one-way fare was \$638.

Justice Scalia did not say how much he paid for his round-trip ticket, but it seems fair to assume that he bought what is known as a "throw-away ticket" — something the airlines expressly prohibit. US Airways, for example, does not allow the "use of round-trip excursion fares for one-way travel," and reserves the right to refuse to board those who try to use them and to charge them the difference between the round-trip and one-way fare.

Granted, this is a crazy condition. A newspaper doesn't charge buyers more when they throw away everything but the sports section. They might want to — and their advertisers might agree — but they don't. Airlines, however, charge more for a one-way ticket because they

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know that some business travelers need the flexibility to buy such tickets, and are willing to pay more for it.

Of course, maybe Justice Scalia plans to use the return half of his ticket later. If he does not, however, he in essence has admitted to buying a ticket under false pretenses. He made a promise without any intention of fulfilling it. Justice Scalia is no doubt familiar with the legal term for such an act: it's called promissory fraud.

The airlines' policy may be annoying, inconvenient and customer-unfriendly. But they can legally insist that their passengers abide by it. And certainly a strict believer in the rule of law like Justice Scalia would agree. Then again, if a case about the airlines' pricing practices ever reaches the Supreme Court, maybe Justice Scalia should recuse himself.

*Ian Ayres is a professor of law and Barry Nalebuff is a professor of business at Yale.*