**Pepperdine Law Review**

Volume 33 | Issue 3 Article 3

4-20-2006

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*"No man is an island, entire of itself. . . "*[1]

*"It has been said that a judge is a member of the Bar who once knew a Governor."*[2]

## I. INTRODUCTION

Judicial recusal is the mandatory, optional, or self-proscribed removal of a judge from a case.[3] The standard has most recently been objective: recusal is necessary when the judge's impartiality might reasonably be questioned.[4] Thus, actual bias or prejudice by the judge is not necessary.[5] Justice must

1. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS No.17 (1624); *see also Romans* 14:7 (King James) ("For none of us liveth to himself, and no man dieth to himself.").

2. CURTIS BOK, THE BACKBONE OF THE HERRING 3 (1941).

3. *See generally* ABA MODEL CODE OF JUDICIAL CONDUCT (2003) (setting forth widely-accepted standards for judicial recusal), *available at* http://www.abanet.org/cpr/mcjc/mcjc_home.html. Throughout this paper, disqualification, which is mandatory recusal, is used interchangeably with recusal.

4. *See id.* at Canon 3E.

5. *Id.*

have the appearance of justice.[6] When the recusal is not voluntarily initiated by the judge it is called disqualification.

The typical inquiry regarding judicial recusal is whether the judge stands to make or lose more than minimal amounts of money,[7] or whether the judge has a family interest with an individual who is closer than a cousin and is directly involved in the case.[8] Additionally, if the judge shows extreme antipathy or a particularized predisposition to one side of the case, recusal is necessary.[9]

When recusal is mandatory, non-recusal fatally flaws the judicial proceeding. In the Fourth Amendment context, the lack of a "neutral and detached" magistrate invalidates a warrant,[10] and is not subject to harmless error resuscitation of the proceeding.[11] In other cases, judicial bias rises to the level of a Fifth or Fourteenth Amendment Due Process Clause violation, and mandates a new trial.[12]

This paper will discuss the case and statutory law of judicial recusal. Attention will be placed primarily on influential model standards and treatise authority, federal case and statutory law, and state experience. There is a glaring gap in the law on the issue of when a judge must recuse himself or herself because a party or advocate in the case is a friend.[13] Many related recusal standards are discussed throughout this article. The purpose of this discussion is to show that a friendship recusal standard is possible and consonant with the present-day objective and specific standards and trends regarding recusal.

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6. *Id.* at Canon 3E cmt.

7. *Id.* at Canon 3E.

8. *Id.*

9. *Id.* Although there is no recusal standard regarding friendship, there is some minimal jurisprudence on recusal regarding "being enemies"—nevertheless, an admitted enemy (a standard almost impossible to meet) will mandate recusal because impartiality might reasonably be questioned. *See* Liteky v. United States, 510 U.S. 540, 550-51 (1994); *see also infra* notes 128-35 and accompanying text. The so-called "extra-judicial source" doctrine is essentially the jurisprudence of "enemy" recusal. *See infra* notes 136-45 and accompanying text. It is discussed herein to show that specific standards are possible and necessary.

10. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971) (official issuing the invalid warrant was also prosecuting the case).

11. *See* Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) (judicial partiality is a structural error not subject to harmless error analysis).

12. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825, 828-29 (1986).

13. The gap may or may not be intentional. Certainly the term "friend" has essentially been dismissed as a factor mandating recusal; but it has also been ignored. It is hoped that this has been an oversight. It is feared that this dismissal allows the powers that control the law to hold on to their control and entrench it.

The problem is not new. When President Thomas Jefferson arranged for Vice President Aaron Burr to be tried for treason (for attempted cessation of the Western Territories), Burr reportedly played chess with Chief Justice John Marshall during the trial.[14] Burr was acquitted, later fled after killing Alexander Hamilton in a duel,[15] and the rest is history.[16]

More recently, flamboyant Associate Justice Antonin Scalia arranged for a very special hunting trip with Vice President Dick Cheney and accepted a ride on Air Force Two—all during the pendency of litigation before the United States Supreme Court, with the Vice President a named party.[17] Justice Scalia was asked to recuse himself on these grounds. He refused, setting in motion a tsunami of impotent protest.

Using treatise, federal, other case and statutory law, and law review studies, it appears that there is a paucity of authority on point. Provided there is no monetary gift, no familial (blood) proximate relationship, no verifiable and unjustifiable judicial animosity, no judicial incompetence or corruptness, and no romantic or sexual judicial entanglement—friendship, standing alone, is not grounds for mandatory recusal.[18]

Judges should not, and are not expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.[19] In one sense, this is necessary and axiomatic. Judges were, in their earlier days, successful practicing lawyers. They had to be "discovered," and discovery requires that the judge (then lawyer) knows many influential lawyers, politicians and business people. So mere acquaintance, obviously, could not practically or logically be grounds for recusal. If so, judges would be recused (disqualified) from many, if not most, cases.

However, it is also axiomatic that justice, to be justice, must have the appearance of justice,[20] and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge. It is therefore proposed that a new standard be included in the lengthy list of recusal/disqualification factors: *Friendship between the judge and a named*

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14. For one version of this "serious judicial indiscretion," see ALF J. MAPP, JR., THOMAS JEFFERSON: PASSIONATE PILGRIM 131 (1991).

15. *See generally* RON CHERNOW, ALEXANDER HAMILTON (2004) (providing an account of Hamilton's death).

16. *See generally* JOSEPH J. ELLIS, FOUNDING BROTHER: THE REVOLUTIONARY GENERATION (2002); JOSEPH WHEELAN, JEFFERSON'S VENDETTA: THE PURSUIT OF AARON BURR AND THE JUDICIARY (2005).

17. *See generally* Motion to Recuse, Cheney v. U.S. Dist. Court for the D.C., 542 U.S. 367 (2004) (No. 03-475) (setting out detailed reasons why Justice Scalia should recuse himself), *available at* http://news.findlaw.com/hdocs/docs/scotus/chny22304scrbrf.pdf. For a more detailed discussion see discussion *infra* Part XII.

18. *See* discussion *infra* Parts II, IV.

19. This would be both an impractical and unreasonable standard.

20. In fact this axiom is the root of the objective impartiality standard that is now the law. *See* discussion *infra* Part VI.

*party or attorney of record, that exceeds ordinary and reasonable social intercourse between acquaintances and business associates, mandates judicial recusal.* Perhaps this was an unworkable standard in sparsely populated agrarian Colonial America. But there are plenty of judges now, and it is accepted that lawyers can be temporary, *pro tempore,* judges when there is a need.[21]

Friendship, as defined by this author, is intimacy beyond social or business collegiality (politeness).[22] Friendship is *loyalty*, and loyalty to one side of a case (be it a named party or lawyer) is the perfect antonym to impartiality. Partiality being the perfect definition of a bad judge.

This paper will build to this conclusion. It will first discuss the applicable clause and commentary of the American Bar Association (ABA) Model Code of Judicial Conduct, and then comment other treatise authority. This paper will then examine federal (and other) authority as well as law review approaches, and will enumerate hypothetical situations indicating that the proposal herein is needed, prudent, and workable. Ultimately, this discussion will reveal the present lack of a usable standard regarding friendship recusal, and will present several judicial impartiality values that are consistent with the above proposed friendship recusal standard.

## II. THE MODEL CODE OF JUDICIAL CONDUCT

The ABA Model Code of Judicial Conduct, propounded in 1972, and as amended through August 2003,[23] sets out, in Canon 3, the general judicial recusal standard.[24] Subsection E is worth quoting in entirety (commentary is omitted) and reads as follows:

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21. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5E (1990).

22. *Cf.* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 258, 261-67 (3d ed. 2004). In work that is characteristically brilliant, the authors walk to the brink of a workable standard, then shy away into irrelevance by loosely defining friendship and by creating an unworkable standard of "close" versus ordinary friendship—the former mandating recusal, the latter not. *Id.* The authors then venture into a possibly *ad hominem* attack on Justice Scalia without admitting Scalia's taunting brilliance that the standards are amorphous on this point. *Id.* These and related points will be discussed, *infra* Parts III-IV.

23. *See generally* LISA L. MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992) (explaining the evolution of the Model Code from the 1972 version through the 1990 one); STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS 636-37 (2006).

24. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2003), *available at* http://www.abanet.org/cpr/mcjc/canon_3.html.

E. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality*[25] might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge*[26] of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known* by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.

(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s]

25. Impartiality is defined in the introductory section, entitled "Terminology." "Impartiality" or "impartial denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge . . . ." ABA MODEL CODE OF JUDICIAL CONDUCT Terminology (2003), *available at* http://www.abanet.org/cpr/mcjc/pream_term.html#TERMINOLOGY.

26. This requires actual knowledge, which may be inferred. *Id.* Note: further asterisks will not be footnoted unless the meaning is obscure or not obvious.

> made aggregate* contributions to the judge's campaign in an amount that is greater than [[$] for an individual or [$] for an entity] [[is reasonable and appropriate for an individual or an entity]].*
>
> (f) the judge, while a judge or a candidate* for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to
>
> (i) an issue in the proceeding; or
>
> (ii) the controversy in the proceeding.[27]

Aside from the verbose nature of this judicial recusal provision, it is unremarkable. In short, judges must recuse themselves when their impartiality might reasonably be questioned from an objective standpoint. Impartiality might be so questioned when judges stand to make or lose money, when a close relative is intimately involved, when they were personally involved with the proceeding, or when they have expressed a specific opinion on the case (outside of court).

This is a good start, but it is glaringly silent on the specific issue of the intimacy we call friendship.

In the ABA's August 2003 amendments, section 3E(1)(f) was added to insure that candidates running for judicial office (including sitting and would-be judges) not be precluded from exercising their First Amendment-Free Speech Clause guarantees.[28]

In *Republican Party of Minnesota v. White*,[29] the High Court pronounced it to be unconstitutional to muzzle judicial candidates regarding contested legal issues (not actual cases) that might someday be litigated before their court.[30] Thus, recusal became even more difficult.

The High Court itself made a "Statement of Recusal Policy," in 1993, which was signed by most of the Justices.[31] However, this statement

27. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3E (2003), *available at* http://www.abanet.org/cpr/mcjc/canon_3.html.

28. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 637 (2006).

29. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

30. *Id.* at 788.

31. Press Release, Chief Justice Rehnquist et al., Statement of Recusal Policy (Nov. 1, 1993).

discussed recusal only as it pertained to blood relatives and family of Justices;[32] friendship was not its subject.

Perhaps most surprising is that the ABA's new draft of the Model Code of Judicial Conduct, if anything, takes pains to further minimize the friendship recusal issue.[33] Let us discuss that, then move on to discuss other, perhaps more fruitful, sources.

### *A. Canon 1 of the June 2004 Draft*[34]

Canon 1 reads: "CONDUCT IN GENERAL: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL THE JUDGE'S ACTIVITIES, SO AS TO A [sic] UPHOLD THE INTEGRITY, INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY."[35]

The Commentary to this Canon and its similar, but minimally more specific, Standard 1.01, also adds in the term "impartiality."[36] Paragraph 2 of the Commentary to Standard 1.01 begins, "Avoiding impropriety and the appearance of impropriety is an overarching principle of judicial conduct embodied in this Canon itself."[37] In fact, this is an important clause because, although the emphasis must be on an objective standard of impartiality (reasonably appears impartiality might be questioned), the drafters slip in the older standard of actual (subjective) partiality as a reason for judicial disqualification.[38]

The older standard of actual partiality was far more forgiving.[39] Appearances could be ignored. The present-day standard, focusing on appearances, is more protective of the system of justice. With a bit of discrimination, however, it is clear both standards are necessary. If in fact the judge is partial, but no one but the judge knows, that plainly should be a reason for judicial disqualification. Even though this secret partiality might

32. The federal recusal statute, which this statement addressed, 28 U.S.C. § 455, will be discussed in Part VI of this paper.

33. Access to this new draft can be found on the ABA's website. *See* ABANet.org, Commission Drafts, *available at* http://www.abanet.org/judicialethics/drafts.html .

34. Accessing this on the ABA website shows, via underline and strike-out, proposed amendments. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1 (Discussion Draft June 2004), *available at* http://www.abanet.org/judicialethics/redline_canon1_051104.pdf. When relevant, these proposed amendments will be pointed out in the textual discussion.

35. *Id.* This draft adds the word "impartiality"—not present in the prior draft—and is potentially a promising addition.

36. *Id.* at 1.01.

37. *Id.* at 1.01 cmt. 2.

38. *See* FREEDMAN & SMITH, *supra* note 22, at 265.

39. *See* 28 U.S.C. § 455 (1952) (amended 1976).

be nearly impossible to discover, it nevertheless must be overtly stated (in the judicial ethics code) as being unacceptable for a judge.

Then, however, the draft plummets in applicability to the focus of this paper. Paragraph 6 of the Commentary to Standard 1.01 redlines (strikes through) the following sentence: "Because it is not practicable to list alll [sic] prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in this Code."[40] The Model Code and its redraft list a plethora of inappropriate judicial acts, including monetary ties, family ties, degree of family ties, contact with parties, prior relationship with the case, treatment of jurors, membership in discriminatory organizations, sexist comments, public comments on pending cases, and nepotism in hiring.[41]

Indeed it is probably impossible to list *all* prohibited judicial acts leading to a conclusion of partiality, but it is possible to list friendship. If there is a gross flaw and ignorance, it is because the sentence reeks of sophistry, as it is impossible to list all specific instances of *any* prohibited conduct. For example, each murder is different, but we can divide the crime into premeditated killings, killings by ambush, killings by bomb, killings by poison, killings by felony perpetration, intentional (non-calculated) killings, and reckless killings.[42]

Whether it is the power of the bench, fear in damaging the friendship camaraderie club of the federal and state bars, or that this is a "taboo" or "missed" issue, the American Bar Association falls short here.[43] This strike out is the major flaw in the new code. This paper aims to prove that there are specific and unequivocal recusal standards and that friendship recusal *can and should* be one of those specifically enumerated.

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40. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1, 1.01 cmt. 6 (Discussion Draft June 2004), *available at* http://www.abanet.org/judicialethics/redline_canon1_051104.pdf.

41. *See generally* ABA MODEL CODE OF JUDICIAL CONDUCT (2003) (providing a widely-accepted code of judicial conduct), *available at* http://www.abanet.org/cpr/mcjc/mcjc_home.html.

42. *See* JEREMY M. MILLER, CRIMINAL LAW: TREATISE AND HYPOTHETICALS 93-102 (2001).

43. Rightly or wrongly, the American Bar Association has been no stranger to litigation, including Consent Decrees from the Department of Justice and Department of Education. For a most insightful look at some of this, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

*B. Canon 2 of the June 2004 Draft*[44]

Canon 2 parrots Canon 1 with its chapter heading: "JUDICIAL CONDUCT: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY."[45]

Standard 2.04 reads: "Impartiality and Fairness. A Judge shall apply the law without regard to the judge's personal views and shall decide all cases with impartiality and fairness."[46] Although this may sound well and good, it is somewhat silly. Everyone always decides issues with their enlightened personal views, their selfish personal views, or something in between.[47] Is this standard the best that the best minds can do?

In fairness, Commentary paragraph 1 begins, "A judge must be objective and free of favoritism to ensure impartiality . . . ."[48] Favoritism is the operative word. Favoritism indicates a proclivity to one side, generally based on shared friendship or philosophy.[49] It is axiomatic that a judge's philosophy cannot be eradicated (absent lobotomy)—otherwise why would there be such recurrent and rampant debates regarding judicial confirmation?[50]

But, we can *potentially create a rule* whereby we remove a judge for being more than a social or business acquaintance with an interested party, i.e., a "friend."[51] Sadly, the draft ignores this important issue.

We must go to Standard 2.10, "External influences on judicial conduct" to find even a hint at how to tackle this problem.[52] Subsection (b) reads: "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."[53] A critical reading of this clause notes that "social" factors may be a reason for recusal, but the clause *omits* express reference to friendship, as something either subsumed in the term "social," or as not worth referencing. Most individuals have hundreds of social contacts which are essentially meaningless. But most

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44. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2 (Discussion Draft June 2004), *available at* http://www.abanet.org/judicialethics/redline_canon2_051104.pdf.

45. *Id.*

46. *Id.* at 2.04.

47. *See, e.g.*, FRANCOIS DUC DE LA ROCHEFOUCAULD, REFLEXIONS; OU, SENTENCES ET MAXIMES MORALES 39 (1678).

48. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2, 2.04 cmt. 1 (Discussion Draft June 2004), *available at* http://www.abanet.org/judicialethics/redline_canon2_051104.pdf.

49. *See* COLLINS GEM WEBSTER'S DICTIONARY 227 (2d ed. 2002).

50. At the time of this writing, the United States Senate was pondering changing its procedural filibuster rules, the so-called "nuclear option," so as to prevent forty-one Senators from leaving chambers and, thus, preventing approval of a judge.

51. *See infra* Parts III-XIV.

52. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2, 2.10 (Discussion Draft June 2004), *available at* http://www.abanet.org/judicialethics/redline_canon2_051104.pdf.

53. *Id.* at 2.10(b).

individuals have fewer than ten friends, and these relationships are *meaningful*.[54]

The Model Code's redraft is fully unsatisfactory in its treatment of the extraordinarily important issue of judicial recusal based on friendship.

## III. IS "FRIENDSHIP" CAPABLE OF DEFINITION? IS THAT THE PROBLEM?

In this section, a definition of friendship will be offered. Were it an undefinable concept, perhaps the Model Code and redraft positions might be defensible. There was a definition offered above[55]—but let us examine several sources, and discern if that definition is workable. We will begin with the greatest of all philosophers, Plato,[56] move to a dictionary definition,[57] and finally discern what, if anything, law or treatises have commented.[58]

### *A. Plato's Lysis ("On Friendship")*

Western philosophy begins and ends with Plato.[59] Thus, it is fitting to begin with the classic Socratic dialogue, *Lysis*.[60] It is a dialogue principally between Socrates and two boys. The most difficult hurdle for a present-day reader is that one of the boys is extremely physically attractive, and the other and he are in the midst of a same-sex relationship, which may be under-age.[61] One not at ease with either same sex relationships, or with the obvious comfort Plato felt in describing such, might obscure the purpose of the dialogue. The frequent "blushes" and references to physical beauty throughout the dialogue might prove to be a distraction to many a present-day reader.

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54. *See, e.g.*, 2 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 404 (1939).

55. A friend is another human to whom one feels loyalty. This loyalty is not based on money, family or fear. A friend is one to whom the friend feels admiration, love and respect—which are distinct from ordinary social or business acquaintance and the requisite collegiality (politeness) associated with that social or business intercourse. This is this author's definition—but is not a new fabrication. It is a synthesis, as will be shown later in this article.

56. *See infra* Part III.A.

57. *See infra* Part III.B.

58. *See infra* Part III.C.

59. Robert J. Fogelin, Conversation with the Author at Yale Univ. (Jan. 1976).

60. PLATO, LYSIS, *reprinted in* THE COLLECTED DIALOGUES OF PLATO INCLUDING LETTERS 145-68 (J. Wright trans., Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1973). The dialogue can be a bit perplexing for some present-day readers. *Id.* at 145.

61. *See id.* at 147.

However, Socrates disparages this sexual love as true friendship[62] and proceeds to disprove many commonly held views of friendship. According to Socrates, it is not a relationship of mere expedience,[63] nor is it a relationship based on money—a friend is more dear than "all the gold in Darius."[64]

Plato's dialogue describes friendship as a transcendental quality.[65] This dialogue may well have given rise to the common term, "Platonic love"—a thing superior to mere physical love.[66]

Friends do not injure one another.[67] Friends may or may not be alike in personality and other attributes.[68] Generally friends "assist" one another, but not always.[69] Friendship is not a mere physical thing, and thus is difficult to define in physical terms.[70] In short, it is a kind of love.[71] In the context of Plato's other work, it is a "form" or "idea." It is a value that has a transcendental, spiritual, and permanent basis.[72]

At the very least, if Plato is correct, this relationship known as friendship is every bit as intimate as love, marriage, or business. Thus, if we make standards on impartiality that exclude friendship, this would be a gross error. Impartial judges do not decide cases involving friends, and the statutory and case standards should reflect this. In truth and fact, friendship is a more intimate relationship than marriage, blood, or money![73]

### *B. Dictionary Definition*

It is somewhat troubling that different dictionaries define the same word differently. In seeking a basic dictionary definition, this author hunted countless dictionaries hoping to find the most reliable one. Language

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62. *See id.* at 149.

63. *See id.* at 153.

64. *See id.* at 154.

65. *See id.* at 157.

66. If this is true, and it probably is, then all of the recusal/disqualification rules when physical love (as in marriage) is present are exposed for what they are—incomplete rules of appropriate recusal, at best.

67. PLATO, *supra* note 60, at 157.

68. *See id.* at 157-59.

69. *See id.* at 159-60. Incidentally, one public figure, who is an influential acquaintance of the author, described friends as those who do not merely promise favors, but do them. He requested not to be named—which also shows something.

70. *See id.* at 162.

71. *See id.* at 166-68.

72. *See generally id.* (discussing the nature of friendship).

73. The argument that too many judges would have to be recused because of friendships truly does not apply because most people have very few friends. On the contrary, they have many more family and business interests, and these do mandate recusal.

changes, and the author considered this in his quest to find a correct, accurate, and current dictionary definition.

For example, although the term "metamorphosis" is ancient, the term "morph" has become commonplace. Surprisingly, many a new dictionary does not include this word (meaning change, usually with technological implications). However, the 2002 version of Webster's Dictionary, Collins Gem New Edition, included the word morph.[74]

Hoping that the differences do not matter or matter much, let us turn to this dictionary's definition of friend: "one well known to another and regarded with affection and loyalty; intimate associate; supporter . . . ."[75] Once again, we find, although with less philosophical brilliance, a *concrete*, tangible, and definable example of one who is *partial*, whose impartiality not only might reasonably be questioned,[76] but certainly should be questioned!

Thus, the conclusion reached from a common dictionary is that the term "friend" is definable and should be among the listed factors for mandatory judicial recusal.

### *C. Noteworthy Alternate Definitions of Friendship*

Zeno, the great Greek philosopher, defined friend as the alter ego of oneself.[77] Can there be a more succinct definition of bias than favoring oneself?

In one of the most famous closing arguments, alluding to friendship, George Graham Vest stated:

> The one absolutely unselfish friend that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous . . . . [This one] stands by him in prosperity and poverty, in health and sickness. He will sleep on the cold ground where the wintry winds blow and the snow drives fiercely, if only he may be near [his friend]. He will kiss the hand that has no food to offer; he will lick the wounds and sores that

74. COLLINS GEM WEBSTER'S DICTIONARY, *supra* note 49, at 355. I leave to the reader to verify all the many dictionaries that exclude this now common term.

75. *Id.* at 227. This is the entire definition.

76. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3E (2003), *available at* http://www.abanet.org/cpr/mcjc/canon_3.html.

77. "To the question 'Who is a friend?' [Zeno's] answer was, 'A second self (*alter ego*).'" 2 DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS 135 (R.D. Hicks trans., 1925).

> come in encounter with the roughness of the world. He guards the sleep of his pauper [friend] as if he were a prince. When all other[s] . . . desert he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens."[78]

Vest's quote refers, incidentally, to the canine friend, the dog.[79] But, Vest's and this author's point is to illustrate the quality of extreme loyalty.

Professor Charles Fried defines a friend as one who acts in the interests of another, over his or her own.[80] This is almost identical to the definition offered by Zeno.[81] Fried offers his definition as the root of the lawyer-client relationship.[82] The lawyer-client relationship is, most obviously, one characterized by partiality and loyalty.[83] No one would argue a lawyer could be a lawyer and a judge on the same matter. In fact, full-time judges are precluded from practicing law *at all*.[84]

Professors Freedman and Smith, relying on the dictionary definition, define friendship as one person being "attached" to another.[85] These authors then make a distinction between a "close" friendship and an ordinary friendship.[86] This author does not find this definition helpful.[87]

In conclusion, friendship is quite definable, and is, for the most part, a recognized relationship that is similarly defined in disparate and varied sources. Friendship is loyalty, transcending and superseding most demands that life places on the friend.

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78. George Graham Vest, Address to Jury, Burden v. Hornsby, (Warrensburg, Mo. 1870), *in* EDWIN M.C. FRENCH, SENATOR VEST: CHAMPION OF THE DOG 34 (1930), *quoted in* FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 10 (1993).

79. *Id.*

80. *See* Charles Fried, *The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976). This definition is cited and quoted with approval in FREEDMAN & SMITH, *supra* note 22, at 258.

81. *See supra* note 77 and accompanying text.

82. Fried, *supra* note 80, at 1071.

83. *See id.* at 1061.

84. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 4G (2003), *available at* http://www.abanet.org/cpr/mcjc/canon_4.html.

85. FREEDMAN & SMITH, *supra* note 22, at 258 (citing RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1997)).

86. *Id.* at 261.

87. Although on any given case of judicial recusal, it appears that this author would agree with Freedman and Smith. *See generally id.* at 261-67 (discussing the Scalia case and other related cases).

## IV. ALTERNATE REASON FOR EXCLUDING FRIENDSHIP AS A DISQUALIFICATION/RECUSAL FACTOR: HISTORY

The prior version of the federal disqualification statute, as passed in 1948, read as follows:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, 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.[88]

That is, the prior standard for judicial recusal was not objective.[89]

A subjective recusal standard, particularly with a concurrent standard that it was the duty of judges to hear all cases,[90] meant that only in the most egregious of circumstances would recusal flow from friendship.

In fact, history does shed light on the matter. First, with this subjective recusal standard, the self-recused judge would be admitting bias or prejudice. This admission can be damaging to one's reputation, and is a difficult thing for most people to admit—particularly a judge, who is supposed to be impartial by the nature of the job.

Second, there were fewer judges fifty, let alone a hundred, years ago. So, the ramifications of judicial recusal were greater, i.e., there may not have been a judge available!

Third, a more distant look at the history of the law evidences a greater and greater reticence to recuse or disqualify a judge.[91] Our common law roots, as explained by William Blackstone, indicate that judges could not be disqualified for any reason.[92] Earlier and other English law did allow disqualification when there was a financial interest,[93]—but Blackstone has always been the most relevant statement of the common law to Americans.[94]

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88. 28 U.S.C. § 455 (1952) (emphasis added) (amended 1976).

89. 28 U.S.C. § 455(a) (1976) (recusal appropriate when "impartiality might reasonably be questioned").

90. *See* FREEDMAN & SMITH, *supra* note 22, at 258-67.

91. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223 (2002).

92. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 361 (William D. Lewis ed. 1922), *cited in* Bassett, *supra* note 91, at 1223.

93. *Id.*

94. Volume IV of his treatise *is* our American criminal law common law. *See generally* JEREMY M. MILLER, *supra* note 42.

Eighteenth century United States history shows a slow, grudging, and *specific-only* willingness to expand the recusal factors. For example, in 1792, Congress expanded mandatory recusal to include a direct financial interest of the judge.[95] In 1891, judges were precluded from hearing appeals in which they were the trial judge.[96] And in 1911, judicial recusal was expanded to include when the judge was an interested party to the litigation or related to a party involved in the litigation.[97]

The pre-1974 law, using the subjective recusal standard, and delineating only a few reasons for recusal led, not surprisingly, to few cases of recusal. Let us focus more now on the subjective standard and a sampling of cases it produced. Some of these cases are cited in Justice Scalia's Memorandum in *Cheney v. United States District Court for the District of Columbia*.[98]

In *Youngstown Sheet & Tube Co. v. Sawyer*,[99] a 1952 case, President Truman's seizure of steel mills was challenged.[100] Chief Justice Vinson played poker regularly with President Truman, and no recusal was obtained.[101] Associate Justice Holmes was friends with President Theodore Roosevelt, yet did not recuse himself in *Northern Securities Co. v. United States*,[102] a 1904 case involving the President's trust-busting.[103]

Justice Scalia does not cite the Marshall-Jefferson incident mentioned above,[104] but does cite President John Quincy Adams' socializing with justices, and Justice Byron White skiing with Attorney General Robert F. Kennedy (when obviously many cases from the Justice Department were before the High Court).[105]

As correctly pointed out by Freedman and Smith, however, the law of recusal and disqualification was quite different then.[106] First, the recusal standard was based on the judge's own subjective opinion.[107] If the judge thought he or she could be impartial, he or she was expected to hear the case.[108]

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95. Bassett, *supra* note 91, at 1223 (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278).

96. *Id.* at 1223 (citing Act of March 3, 1891, ch. 517, § 3, 26 Stat. 826 (codified as amended at 28 U.S.C. § 47 (2000)).

97. *Id.* at 1224 (citing 46 Cong. Rec. H2626-27 (1911)).

98. Cheney v. U.S. Dist. Court for the D.C., 541 U.S. 913 (2004) (mem. of Justice Scalia), *available at* http://news.findlaw.com/hdocs/docs/scotus/chny31804jsmem.pdf.

99. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

100. *Id.* at 582.

101. Cheney, 541 U.S. at 917 (mem. of Justice Scalia).

102. N. Sec. Co. v. United States, 193 U.S. 197 (1904).

103. Cheney, 541 U.S. at 917 (mem. of Justice Scalia).

104. *See supra* note 14 and accompanying text.

105. Cheney, 541 U.S. at 917 (mem. of Justice Scalia); *see also* FREEDMAN & SMITH, *supra* note 22, at 265.

106. FREEDMAN & SMITH, *supra* note 22, at 265.

107. *Id.*

108. *Id.*

Additionally, with the present-day recusal statute and the Model Code of Judicial Conduct—which *both* voluminously list the reasons for recusal and do *not* list "friendship"—an "originalist" or strict constructionist[109] judge like Antonin Scalia would feel compelled *not* to expand the law as written. Certainly the argument can be made that the objective recusal standard is a catch-all that mandates more recusals. But since it failed to list "friendship" among its many factors,[110] Justice Scalia is probably correct that his recusal was not necessary—though it is a close call.[111]

This section goes a long way in explaining what appears to be an obvious error by Justice Scalia, and in explaining the indignant tone of his brief.

## V. TREATISE AUTHORITY ON JUDICIAL RECUSAL BASED ON FRIENDSHIP

The most amazing discovery regarding research into legal ethics, professional responsibility, and judicial ethics treatises is the paucity of discussion regarding the need (or lack thereof) for judges to recuse themselves (or be involuntarily disqualified) based on being a friend of an interested party or lawyer.

For example, Professor Charles W. Wolfram's classic treatise makes no mention of this particular issue at all.[112] In fairness to Professor Wolfram, the major thrust of his classic is the ethical mandates and aspirations of lawyers[113]—but judges and recusal are discussed often, although not with a mention of the friendship factor.

Professor (and Dean) Freedman, in his earlier work, which was quite brave, and often controversial, made no reference to judicial recusal based on friendship.[114] The latest edition corrects this flaw,[115] but full development of this issue is overdue.

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109. That is, a judge who prides himself on not usurping the intent of the Framers of the law at issue. *See generally* JEREMY M. MILLER, SUM AND SUBSTANCE: JURISPRUDENCE (West Publishing 1996).

110. *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2003), *available at* http://www.abanet.org/cpr/mcjc/toc.html.

111. *See infra* Part XII. Note, however, that it would not be a close call under the older subjective standard.

112. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986).

113. *Id.*

114. *See generally* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990). Freedman failed to reference judicial recusal based on friendship despite presenting other controversial positions such as his non-adopted, but groundbreaking view that lawyers should allow and assist in a client's intended perjury.

Similarly, Professors Hazard and Hodes, in their well-respected treatise, are silent on this issue.[116] Of course, the Justice Scalia case made conscious what was hidden for too long. In any case, the thesis of this article is that a standard is both necessary and practical.

The American Law Institute has promulgated a Restatement on legal ethics entitled "The Law Governing Lawyers."[117] Although its focus is on the lawyer as adversary, there are numerous references to judges throughout the treatise.[118] As a restatement, and in its defense, there is no statement indicating that recusal is advisable in even *some* cases of close friendship between the judge and a party or a lawyer.[119]

A typical law casebook, although devoting a chapter to judicial ethics, avoids or ignores the topic of recusal based on friendship.[120]

All of this may change after the celebrated and castigated Justice Scalia case,[121] but, with the exception of the ever-brave Freedman, the topic has been either intentionally or accidentally avoided in the treatise law.

## VI. THE FEDERAL JUDICIAL RECUSAL STATUTE

The federal judicial recusal statute is, of course, the applicable federal statutory law on when a judge must or should recuse himself or herself.[122] 28 U.S.C. § 455 sets out the standards.[123] This statute is modeled after the American Bar Association Model Code of Judicial Conduct, but its importance mandates quoting it in its entirety:

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115. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 261-67 (3d ed. 2004) (devoting an entire section, § 9.10, to criticizing Justice Scalia's position).

116. *See generally* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. 2001 & Supp. 2005).

117. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

118. *See generally id.*

119. *Id.*

120. *See, e.g.*, RICHARD C. WYDICK ET AL., CALIFORNIA LEGAL ETHICS (4th ed. 2003).

121. *See infra* Part XII.

122. 28 U.S.C. § 455 (2004). Under § 451, this statute is binding on all federal judges—except, as a practical matter, those of the United States Supreme Court. 28 U.S.C. § 451 (2004). While Supreme Court Justices are technically bound by this statute, because they are the highest court of the land there is no avenue to appeal their decisions regarding their own non-recusal. Additionally, each U.S. Supreme Court Justice makes his or her own decision regarding the necessity of recusal. This is probably a good rule, because putting recusal to a High Court vote might not only destroy the necessary collegiality of that small group, but might also turn recusal into a filibuster-type of political maneuvering. It is hoped and expected that with more explicit standards on friendship recusal, the High Court Justices will follow this rule. If not, there remains the near-impotent remedy of impeachment and removal from office.

123. 28 U.S.C. § 455 (2004).

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it

> is preceded by a full disclosure on the record of the basis for disqualification.
>
> (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.[124]

Like the ABA Model Code of Judicial Conduct, the federal judicial recusal statute focuses on money interest, family interests, and prior relations with interested parties when having served as a lawyer.[125] It was quoted in its entirety to show that while it is quite explicit, if not verbose, it omits even a hint of recusal based on friendship. This specificity, even with its objective impartiality standard, leaves the door open to non-recusal based on friendship. Justice Scalia walked through that door, albeit incorrectly.[126]

Friendship recusal is not the statute's only flaw. In passing, it is also interesting to note, with requisite respect, that it is sloppily drafted. For example, subsection (f) uses the presently preferred gender neutral language, e.g., "he or she" or "himself or herself," whereas the remainder of the statute uses the older "he" or "himself" language.[127]

## VII. LEADING UNITED STATES SUPREME COURT CASES ON JUDICIAL RECUSAL

In this survey section, the leading pronouncements of the U.S. Supreme Court regarding judicial recusal will be set out chronologically. These are interesting, particularly in their creation of the so-called "extrajudicial

124. *Id.*

125. *See generally id.*

126. *See infra* Part XII.

127. *See generally* 28 U.S.C. § 455 (2004). This is mentioned not as a cheap shot, but rather to show that, unfortunately, the statute was not well thought out, nor was it proofread well.

source" doctrine, but there is almost perfect silence on the proposed, much-needed friendship standard.

### *A.* Berger et al. v. United States

In *Berger v. United States*,[128] a 1921 case, a motion was filed to recuse the judge based on alleged antipathy the judge had against certain defendants.[129] Alternately stated, recusal was requested because the judge was an *enemy* of some of the defendants.[130]

The allegation was that Judge Kenesaw Mountain Lewis had a prejudice against Germans.[131] Quoting the judge, "Their [German] hearts are reeking with disloyalty. . . . [They] have the interests of the enemy at heart."[132] Of course these views were given with the backdrop of World War I. Ultimately, it was concluded that he could not fairly preside over the murder trial.[133]

The case is significant in several respects. It gives an example of both subjective and objective partiality. Further, the bias or prejudice is not based on money or blood, but on emotional ties (and lack thereof).[134] Finally, the recusal is mandated not by what the judge did or did not do during the trial or pretrial, but by an extrajudicial (emotional) source.[135]

### *B.* United States v. Grinnell Corp.

In *United States v. Grinnell Corp.*,[136] a 1966 case, the defendants filed a motion to disqualify the judge.[137] The subject of the case was alleged restraint of trade.[138] The argument for disqualification arose from the following dialogue:

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128. Berger v. United States, 255 U.S. 22 (1921).

129. *Id.* at 28-29.

130. *Id.* Without spoiling the conclusion, it is interesting to note that enmity is a valid ground for recusal—provided the "enemy" relationship is not a result of fierce *in-court* proceedings. Certainly, if there can be an enemy standard, which there is, there can be a friendship standard, which there is not. The two terms (friend and enemy) are opposites—both indicating bias and/or prejudice; and if one has a standard, the other *should*.

131. *Id.* at 28.

132. *Id.* at 28-29.

133. *Id.* at 36.

134. *See id.*

135. *See id.*

136. United States v. Grinnell Corp., 384 U.S. 563 (1966).

137. *Id.* at 582.

138. *Id.* at 566.

> [MR. MCINERNEY.] [I]f your Honor would indicate the relief that might be appropriate in this case that would help both sides to come to a better understanding. . . .
>
> THE COURT. I don't think it would help very much.
>
> MR. MCINERNEY. Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.
>
> THE COURT. I assure you that you would not be helped by anything I would say. You would do better to get together with the government rather than run the risk of what I would say from what I have seen.[139]

The defendants, a short while later, requested a postponement of the trial, which was denied by the judge.[140] And the judge commented, "I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial . . . [M]y views are more extreme than those of the government."[141]

The defendants then moved to disqualify the judge.[142] The motion was denied,[143] and the High Court reasoned that, "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[144] Thus, disqualification based on the so-called extra-judicial source doctrine was created.[145] Although it is hoped that judicial demeanor will be calm during trial, spirited exchanges between the judge and counsel are not grounds for disqualification.

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139. *Id.* at 581.
140. *Id.* at 582.
141. *Id.*
142. *Id.*
143. *Id.* at 582-83.
144. *Id.* at 583 (citing Berger v. United States, 255 U.S. 22, 31 (1921)).
145. *See* discussion *infra* Part VII.G. This doctrine could easily be extended to friendship, although as yet, it has not been.

### C. Coolidge v. New Hampshire *and Its Progeny*

In *Coolidge v. New Hampshire*,[146] a 1971 case, an attorney general who was involved in the investigation of a criminal case issued a warrant.[147] This violated the requirement that warrants issue from "neutral and detached" magistrates.[148] Incidentally, the lack of a neutral and detached magistrate, i.e., an *impartial* judge, is not subject to harmless error analysis.[149] Therefore, *Coolidge* presented a clear Fourth Amendment violation.

The progeny of cases following *Coolidge* indicate that a judge being paid extra for warrants issued (and not being paid for warrants not issued) violates this impartiality aspect of the Fourth Amendment.[150] Also, participating in the criminal investigation disqualifies a judge from issuing a warrant.[151]

The mandate of impartiality of judges is, in fact, enshrined in at least three clauses of the U.S. Constitution: The Fourteenth Amendment Due Process Clause, The Fifth Amendment Due Process Clause, and the Fourth Amendment. Additionally, it appears the easiest test to meet is the Fourth Amendment standard, which precludes the judge from prior involvement in investigations.[152] It is submitted that this more rigorous approach is more appropriate.

### D. United States v. Will

In *United States v. Will*,[153] a 1980 case, the familiar "necessity doctrine" was explained. Several federal district judges filed a class action suit against the United States in the District Court for the Northern District of Illinois, arguing for increased salaries.[154] The High Court reasoned that in such a suit where all or most judges have a pecuniary interest, although a pecuniary interest would generally mandate disqualification, it does not when the body of partial judges is too large.[155] Were there recusal, judges themselves would be deprived of their day in court and might be subject to great

146. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

147. *Id.* at 450.

148. *Id.*; *see also* U.S. CONST. amend. IV.

149. Harmless errors cannot be "structural," e.g., a partial judge. *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

150. Connally v. Georgia, 429 U.S. 245, 250-51 (1977).

151. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 328 (1979).

152. *See id.*

153. United States v. Will, 449 U.S. 200 (1980).

154. *Id.* at 209.

155. *See id.* at 216-17.

injustices.[156] The High Court added that § 455 of the recusal statute merely sets up a presumption.[157]

The Court is probably correct, and, although we do perceive a theme of self-preservation and self-protection of judges by judges for judges, this case does foreshadow the very real problem of friendship recusal, and Justice Scalia's conduct.[158]

*E.* Aetna Life Insurance Co. v. Lavoie

In *Aetna Life Insurance Co. v. Lavoie*,[159] a 1986 case, an Alabama judge wrote the opinion and cast the deciding vote on an insurance bad faith claim.[160] The problems were that the judge himself had a claim pending on a similar issue, and the law was unsettled.[161] Under these circumstances, his impartiality could reasonably be questioned.[162] The High Court vacated the Alabama Supreme Court holding, and ordered a new appeal.[163]

In language of constitutional dimension, the High Court wrote, "We conclude that Justice Embry's participation in this case violated appellant's due process rights . . . . '[J]ustice must satisfy the appearance of justice.'"[164] The Court indicated that the older test for mandatory judicial recusal, i.e., that the judge be actually (subjectively) biased or prejudiced, was no longer the law.[165] The standard for judicial recusal had been expanded.[166] That, in this author's opinion, is a good thing and may foreshadow an expansion to include the friendship standard proposed in this paper.[167]

*F.* Liljeberg v. Health Services Acquisitions Corp.

In *Liljeberg v. Health Services Acquisitions Corp.*,[168] a 1988 case, the judge was a board member of an entity seeking to acquire a parcel of land

156. *Id.*
157. *See id.* at 216.
158. *See infra* Part XII.
159. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).
160. *Id.* at 816-18.
161. *Id.* at 823-24.
162. *Id.*
163. *Id.* at 828.
164. *Id.* at 825 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
165. *Id.*
166. *See Aetna Life Ins. Co.*, 475 U.S. at 825.
167. *See* discussion *infra* Part XIII.
168. Liljeberg v. Health Servs. Acquisitions Corp., 486 U.S. 847 (1988).

from the petitioner.[169] The respondent, also wishing to purchase that parcel of land, sought to have the judge disqualified under 28 U.S.C. § 455.[170] The judge took part in several of the board meetings regarding this purchase.[171]

The judge ruled in favor of his board, under disputed facts.[172] Refusing to find that § 455 requires "scienter," i.e., actual knowledge and actual partiality, the High Court ruled that not only was disqualification mandated, but that the remedy was a new trial.[173] Citing favorably our previous case, the Court found that when "impartiality might reasonably be questioned"[174] and the judge decides the case anyway, there is a Fifth and Fourteenth Amendment Due Process Clause violation.[175]

### G. Liteky v. United States

In *Liteky v. United States*,[176] a 1994 case, and the final case in this survey section on High Court jurisprudence on judicial recusal, a judge was asked to recuse himself based on angry in-court exchanges between himself and one of the defendants at a somewhat related trial that occurred prior.[177] This is the definitive case on the extra-judicial source doctrine.

This doctrine states that even in fiery trials in which the judge exchanges words with a lawyer or party, there are *no* grounds for recusal.[178] As Justice Scalia noted in his opinion, "If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."[179]

The extrajudicial source doctrine, prior to *Liteky*, had been thought to apply only to exchanges during that particular trial. *Liteky* extended it to say, essentially, that each trial's beginning is a blank slate, and alleged grudges from previous trials are not grounds for recusal.[180]

Let us examine the *Liteky* facts more closely. Relying on 28 U.S.C § 455(a), the petitioners moved to remove the district judge because he presided over a prior trial where one of the petitioners (Bourgeois) was a

169. *Id.* at 850.
170. *Id.* at 850-52.
171. *Id.* at 853-55.
172. *Id.* at 855.
173. *Id.* at 859-63; *see also* Fed. R. Civ. P. 60(b) (allows overturning a judgment in exceptional cases like this one).
174. 23 U.S.C. § 455(a) (2004).
175. *Liljeberg*, 486 U.S. at 865 n.12 (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).
176. Liteky v. United States, 510 U.S. 540 (1994).
177. *Id.* at 542.
178. *Id.* at 550-51.
179. *Id.* at 551 (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943)).
180. *See id.*

defendant.[181] Quoting Justice Scalia, "Petitioners claimed that recusal was required in the present case because the judge had displayed 'impatience, disregard for the defense and animosity' toward Bourgeois, Bourgeois' codefendants, and their beliefs."[182]

Among other things, the judge stated that "closing argument was not a time for 'making a speech' in a 'political forum.'"[183] The extrajudicial source doctrine mandates recusal when the judge's motives of bias or prejudice are not based on the trial itself.[184] But, this case posed a new "spin," as it were, on the extrajudicial source doctrine—what if the judge held a grudge from a prior trial?

Citing to the 1821 United States law, and the prior version of § 455, recusal was mandated only when the judge, *in his or her own opinion* believed that his or her participation as judge would be improper.[185] Justice Scalia correctly points out that recusal bases were expanded by the present statute and that the standard, which was subjective, became objective by including the phrase, "impartiality might reasonably be questioned."[186]

Justice Scalia, after a typically erudite and intellectual discussion,[187] concludes that "[t]o demand the sort of 'child-like innocence' that elimination of the 'extrajudicial source' limitation would require is not reasonable."[188] The Justice writes beautifully, but in exaggerating the opposition's non-recusal standard to "child-like innocence,"[189] he does disservice to the law of the land, and foreshadows his own error in the *Cheney* case.[190] In short, impartiality will not reasonably be questioned with *adult*-like innocence, or even reasonably moderate open-mindedness.[191]

Justice Scalia correctly reasons that although objective (reasonable person) impartiality is the benchmark, if the judge is subjectively partial, that remains a ground for recusal.[192] Then the Justice concludes that the

181. *Id.* at 542.
182. *Id.*
183. *Id.*
184. *See id.* at 550-51.
185. *Id.* at 546.
186. *Id.* at 548.
187. For example, although agreeing that "personal" judicial bias is never appropriate, Justice Scalia then states that "official" judicial bias might be appropriate. *Id.* at 549-50. However, he views the distinction as an oversimplification.
188. *Id.* at 552.
189. *Id.*
190. *See* discussion *infra* Part XII.
191. Truly, who can claim "child-like innocence" except very young children?
192. *Liteky*, 510 U.S. at 553 n.2.

extrajudicial source doctrine *includes* not only the present trial but *all* trials (more accurately and broadly put, "judicial proceedings").[193]

In conclusion to this section, it is clear that the United States Supreme Court has expanded when recusal is *not* necessary, and has deemed recusal necessary only in the most severe of circumstances—i.e., when the judge has a monetary, family, or career interest, or is acting as a prosecutor or detective.

## VIII. THE VERY FEW EXISTING LOWER COURT CASES ON FRIENDSHIP RECUSAL

The leading lower court case on friendship recusal is *United States v. Murphy*, a 1985 case from the Seventh Circuit.[194] In that case, the trial judge was close friends with the prosecutor and vacationed with this prosecutor immediately after the trial.[195] The Seventh Circuit held that, absent a showing of actual impropriety (which there was not), recusal was not mandated.[196]

*In re United States*[197] set out a compelling fact pattern for judicial recusal based on friendship. In that case, the trial judge had a close and personal friendship with the defendant.[198] The judge was, in fact, appointed judge by the defendant and had represented the defendant years earlier.[199] After reviewing the record, and taking into account the presumption that judges should not be disqualified and that there was no automatic friendship recusal standard, the court denied the requested disqualification.[200]

The result was identical in *Parrish v. Board of Commissioners of Alabama State Bar*, a 1975 case.[201] In that case, it was alleged that the judge was friends with a defense counsel and some defense witnesses.[202] The case is more troubling in that the judge was president of a discriminatory bar association while overseeing a case where discrimination was the main issue.[203]

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193. *Id.* at 556.
194. United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985).
195. *Id.* at 1536.
196. *Id.* at 1536-37.
197. *In re* United States, 666 F.2d 690 (1st Cir. 1981).
198. *Id.* at 691.
199. *Id.* at 691-92.
200. *Id.* at 696-99.
201. Parrish v. Bd. of Comm'rs of Ala. State Bar, 524 F.2d 98 (5th Cir. 1975).
202. *Id.* at 102.
203. *Id.* at 101. In the case in question, the issue was whether the Alabama Bar Examination was discriminatory, and this judge had been president of a bar group that banned membership to African-American lawyers. *Id.* at 99, 101.

The only anomaly in this line of cases is *United States v. Tucker*,[204] which is not a case at all, but rather a request by then Independent Counsel Kenneth Starr to have a different judge assigned to the investigation of Arkansas officials after the presiding judge dismissed the indictment.[205] The appellate court *granted* the request based on the judge's statement that he would recuse himself if President Clinton were involved.[206]

There are other tangentially-related cases,[207] but there are scant few on friendship, and even those indicate that it is not to be a forceful factor in recusal.

## IX. A BRIEF SURVEY OF NINTH CIRCUIT CASES

A survey of other lower federal court cases, particularly of the Ninth Circuit, shows a paucity of recusal cases and an even greater lack of discussion regarding recusal based on friendship.[208] For example, in *In re Webster*,[209] the petitioner sought reversal of a disbarment order because of an alleged bias of the judge.[210] Reasoning that in-court antagonism is generally not enough to mandate recusal (the "extrajudicial source" doctrine), the court held recusal unnecessary.[211]

In *United States v. Olander*,[212] it was indicated in a newspaper article that the judge was disappointed that the state was not enforcing his judgment.[213] Investigation of this newspaper article revealed that the report was not substantiated and was, in fact, false.[214]

The *Olander* court focused on 28 U.S.C. § 455(b)(1), which states that a judge should recuse himself or herself if "he has a personal bias or prejudice concerning a party . . . ."[215] Although it would be hoped that this standard

204. United States v. Tucker, 78 F.3d 1313 (8th Cir. 1996).
205. *Id.* at 1322.
206. *Id.* at 1322-23.
207. *See, e.g.*, Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 676, 683 (7th Cir. 1983) (non-friend arbiter's non-disclosure of distant business ties do not make proceeding infirm).
208. *See* discussion *supra* Part VIII.
209. *In re* Webster, 382 F.2d 79 (9th Cir. 1967).
210. *Id.* at 82.
211. *Id.* at 82-83.
212. United States v. Olander, 584 F.2d 876 (9th Cir. 1978).
213. *Id.* at 882-83.
214. *Id.* at 883-84.
215. *Id.* at 882 (quoting 28 U.S.C. § 455(b)(1) (1976)).

would cover friendship, at best it covers enemy status, and that is a difficult standard to meet, which in fact was not met in this case.[216]

In *United States v. Carignan*,[217] the court indicates that "bias for or against an attorney might be so virulent as to amount to bias for or against the party,"[218] but characterizes the alleged bias here a mere "squabble"[219] that occurred four years prior, and thus was not worthy of recusal.[220] The pattern is clear, and that pattern indicates non-recusal. Thus, at the least, a friendship (bias) standard needs to be overtly added to existing law. However, this brief survey section will continue.

What if, in a prior related proceeding, the judge hears evidence which turns out to be inadmissible in the latter proceeding? Is recusal mandated? That was the key issue in *United States v. Winston*.[221] The court held recusal unnecessary, because this showed neither bias, prejudice, nor a reasonable doubt of impartiality.[222] The claim was not based on an extrajudicial bias.[223] Judges are often exposed to evidence that is inadmissible.

Similarly, in *United States v. Sibla*,[224] the judge remarked, during the course of the judicial proceedings, that some of the defendant's claims were frivolous.[225] Since this was not an extrajudicial source bias, and was within the realm of the "drama" of trial, the recusal was denied.[226]

In the rather interesting fact pattern of *United States v. Conforte*,[227] the judge, outside of court, recommended on two occasions the denial of social and charitable applications based on the petitioner's prior felony convictions

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216. *Id.* at 883.

217. United States v. Carignan, 600 F.2d 762 (9th Cir. 1979).

218. *Id.* at 764.

219. *Id.*

220. *Id.*

221. United States v. Winston, 613 F.2d 221 (9th Cir. 1980).

222. *Id.* at 222.

223. *See id.* at 223; *see also* King v. U.S. Dist. Court for the Cent. Dist. of Cal., 16 F.3d 992 (9th Cir. 1994) (judicial recusal improper because no extrajudicial prejudice shown); Duckworth v. Dep't of Navy, 974 F.2d 1140, 1143 (9th Cir. 1992) (judge acting administratively, but in official capacity, is not an extrajudicial source); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 885 (9th Cir. 1991) (judge's comment that he had to "conduct a law school class" to a lawyer held to be not extrajudicial, and not sufficiently biased to mandate recusal); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (recusal inappropriate when two of the three alleged grounds for recusal were not extrajudicial and the third was too void to tell); Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) (a judge's previous adverse judgment against a party is not an extrajudicial source and not disqualifying); United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983) (prior trial with same judge is not an extrajudicial source); Trotter v. Int'l Longshoreman's and Warehouseman's Union, 704 F.2d 1141, 1144 (9th Cir. 1983) (although the judge has a self-imposed duty to recuse—such is not present when there is a judicial source).

224. United States v. Sibla, 624 F.2d 864 (9th Cir. 1980).

225. *Id.* at 866.

226. *Id.* at 867-68.

227. United States v. Conforte, 624 F.2d 869 (9th Cir. 1980).

and association with the infamous brothel, the Mustang Ranch.[228] This is clearly an extrajudicial source, shows prejudice, and is in error. It also shows the loathing that judges feel when they "kick off" one another from cases. The standards need to be rebuilt, with a focus on this weakness. Granted, the extrajudicial source doctrine is necessary and solves most of the *enemy* problems—but it does not touch the issue of friendship.

A survey of other Ninth Circuit cases indicates focus on money interests,[229] family interests,[230] prior or present involvement in the case,[231] and incompetence.[232] Friendship is an ignored issue.[233]

## X. STATE TREATMENT OF FRIENDSHIP RECUSAL: CALIFORNIA

Because most states have adopted the ABA Model Code of Judicial Conduct,[234] it is of little surprise that the most fertile development of recusal

228. *Id.* at 878.

229. *See, e.g.*, United States v. Rogers, 119 F.3d 1377 (9th Cir. 1997) (de minimis financial interest of judge in ownership of stock of company that was a victim of the defendant's alleged crime does not mandate recusal); United States v. Feldman, 983 F.2d 144 (9th Cir. 1992) (judge's financial interest based on bank merger mandates recusal); Davis v. Xerox, 811 F.2d 1293 (9th Cir. 1987) (judge's subjective lack of awareness of some financial interest does not mandate vacating judgment).

230. *See, e.g.*, Mangini v. United States, 314 F.3d 1158 (9th Cir. 2003) (discovery that brother-in-law on opposing side should have led to recusal, and leads to vacating judgment); *In re* Bernard, 31 F.3d 842 (9th Cir. 1994) (discovery that judge's spouse is a U.S. trustee with minimal impact does not mandate recusal).

231. *See, e.g.*, United States v. Silver, 245 F.3d 1075 (9th Cir. 2001) (the fact that the judge served as a prosecutor many years prior may allow non-recusal); First Interstate Bank of Ariz. v. Murphy, Weir & Butler, 210 F.3d 983 (9th Cir. 2000) (future employment of employee of judge, on one side, does not automatically mandate judicial recusal); United States v. Arnpreister, 37 F.3d 466 (9th Cir. 1994) (judge serving as prosecutor and investigator on the case, even though distant, mandates his recusal after elevation to the bench and vacating judgment of guilty); Preston v. United States, 923 F.2d 731 (9th Cir. 1991) (former legal associate involvement on opposing side mandates vacating judgment).

232. *See, e.g.*, United States v. Jaramillo, 745 F.2d 1245, 1248 (9th Cir. 1984) (judge's own criminal indictment is grounds for recusal).

233. Other federal circuit courts have reached similar results. *See, e.g.*, Aguinda v. Texaco, 241 F.3d 194, 206 (2d Cir. 2001) (judge being given course tuition and expenses may be grounds for disqualification); Republic of Panama v. Am. Tobacco Co., 217 F.3d 343 (5th Cir. 2000) (judge being listed, albeit incorrectly, on related amicus brief is grounds for disqualification); Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (judge's chambers being bombed and staff member's injury is grounds for recusal); United States v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993) (judge's television statement giving opinion of pending case is grounds for recusal); United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989) (judicial statement doubting own ability to be impartial is grounds for disqualification). These cases illustrate that recusal is possible—but the friendship route is almost impossible.

234. FREEDMAN & SMITH, *supra* note 22, at 236 n.31.

and disqualification standards[235] has been under federal law. Nevertheless, let us take a brief look at the statutory and case standards of our most populous state, California.

Chapter seven of the California Code of Civil Procedure, section 170.1,[236] essentially follows the ABA approach.[237] That is, disqualification is mandated when the judge had a prior professional relationship with the case, is related to a party or attorney by blood, has a financial interest, or the judge is impaired.[238] Part (a)(6)(A)-(B) of this section reads:

> For any reason:
>
> (i) The judge believes his or her recusal would further the interests of justice.
>
> (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.
>
> (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.
>
> (B) Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.[239]

Although a plain reading of this section leaves the door open, as it were, for friendship recusal, there is no specific provision on point—just like the federal law.[240]

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235. As stated previously, and as is obvious from the words' plain meanings, recusal is voluntary disqualification by the judge and disqualification is when a higher court requires the judge to withdraw. *See supra* notes 3-6 and accompanying text. For purposes of the thesis of this paper, the distinction is not necessary—particularly because United States Supreme Court Justices can never be forced to disqualify themselves. It is their own decision. If there is a remedy at all, it is public disrespect and congressional impeachment. However, neither of these appear to carry much force.

236. *See generally* CAL. CIV. PROC. CODE §170.1 (West 2005) (setting out California's standard for judicial recusal).

237. *See* discussion *supra* Part II.

238. § 170.1.

239. *Id.* at § 170.1(a)(6)(A)-(B). The catch-all objective standard is the same as the federal and Model Code "impartiality might reasonably be questioned" test. *See* Robertson v. California, 498 U.S. 1004, 1006 (1990) (Blackmun, J., dissenting) (equating California's objective standard with 28 U.S.C. § 455(a)).

240. *See* discussion *supra* Part VI. In passing, it should be noted that California has a "watchdog" Commission on Judicial Performance and a monitoring provision at Rule 112 of same. *See* COMMISSION ON JUDICIAL PERFORMANCE, RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE RULE 112 (2005), *available at* http://www.courtinfo.ca.gov/reference/rules.htm.

A fair sampling of California cases reveals nothing remarkable—certainly no groundbreaking rules on judicial recusal or disqualification based on friendship. For example, if the judge is related to a party in a business or familial manner, the judge must recuse himself or herself.[241] When the judge's wife had worked for the plaintiff corporation six years earlier, although a close call, disqualification based on partiality was not necessary.[242] The choice of the judge hearing the case is presumptively valid.[243] Judicial expressions of frustration at a litigant or attorney do not lead to a conclusion of a lack of impartiality.[244] This is California applying the extrajudicial source doctrine.

Judges are not immune from disqualification. For example, a judge's error as to the law, such as failure to respond to a timely disqualification motion,[245] or not advising a probationer of his rights,[246] can be grounds for disqualification. The law is nearly silent on friendship recusal. Other states' cases are similar.[247]

## XI. LAW REVIEW LACK OF FOCUS ON FRIENDSHIP RECUSAL

There are few articles which even tangentially discuss judicial friendship recusal. Some of these will be analyzed, with appropriate depth, in this section.

In the most pertinent article, Professor Leslie Abramson argues that judicial recusal or disqualification should occur:

> When a judge presides in a proceeding in which the judge (or the judge's close relative) and an attorney, party, victim, or witness (or their close relative) have a social or business relationship or contact, the judge shall consider recusal, giving appropriate significance to the following factors: (1) the duration of the relationship or contact;

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241. *See, e.g.*, Lynis v. Alturas Sch. Dist., 155 P. 109 (Cal. Dist. Ct. App. 1915).

242. *See, e.g.*, United Farm Workers of Am. v. Superior Court, 216 Cal. Rptr. 4, 6-11 (Ct. App. 1985).

243. *See, e.g.*, Linney v. Turpen, 49 Cal. Rptr. 2d 813, 819-20 (Ct. App. 1996).

244. *See, e.g.*, PBA, LLC v. KPOD, Ltd., 5 Cal. Rptr. 3d 532 (Ct. App. 2003); Roitz v. Coldwell Banker Residential Brokerage Co., 73 Cal. Rptr. 2d 85 (Ct. App. 1998).

245. *See, e.g.*, Hemingway v. Superior Court, 19 Cal. Rptr. 3d 363 (Ct. App. 2004).

246. *See, e.g.*, *In re* Wagner, 25 Cal. Rptr. 3d 201 (Ct. App. 2005).

247. *See, e.g.*, Blaisdell v. City of Rochester, 609 A.2d 388 (N.H. 1992) (trial judge a nephew of senior partner of four related proceedings mandated disqualification); State v. Whitlow, 988 S.W.2d 121 (Mo. Ct. App. 1999) (that victim's son and grandson personally knew, and likely were "friends" of the judge, does not mandate disqualification).

(2) the content of any conversation during the relationship or contact; (3) the nature and circumstances of the relationship or contact; (4) the frequency of meetings or conversations; (5) the personal dependence of either on the relationship; (6) whether the relationship was connected with the subject matter of the proceeding; (7) in a business relationship, whether the judge receives preferential treatment not granted to others; (8) whether the relationship has been the subject of media publicity; and (9) statements attributable to the judge or any other person about the relationship.[248]

Although this approach is better than silence, it has several flaws. It is as amorphous and thus as impotent as any purported ethical standard could be. Professor Abramson is aware of this. She writes, "courts correctly refuse to promulgate *per se* rules."[249] In fact, however, the evolution of both legal ethics standards and judicial ethics standards have come from the general and evolved to the specific.[250] Where once even a money interest would not necessarily disqualify a judge, now it will.[251]

Thus, Professor Abramson adds little to purging judicial decisions based on friendship bias by this offered approach. Additionally, she obfuscates the issue by including monetary issues in the same amorphous lump as friendship ("social") issues.

However, in a respected poll of judges, the judges themselves indicated that they did, in fact, desire more guidance and specificity in recusal decisions.[252] Additionally, although lawyers are trained to offer deference to judges by calling them "Your Honor," "The Honorable," "Justice," and the like (their in-court dress, in ancient black robes differentiates them from all

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248. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 98 (2000). Professor Abramson is not alone in indicating that the *per se* rule approach is inappropriate. *See, e.g.*, John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 240, 283 (1987) (an interesting and thoughtful piece, but ultimately rejecting a *per se* ethics approach); Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829 (1984); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. §455(a)*, 60 TEMP. L.Q. 697, 723-24 (1987) (rejecting a delineated *per se* recusal approach, but noting that the United States Senate was aware of this potential problem); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).

249. Abramson, *supra* note 248, at 97.

250. *See, e.g.*, DAVID HOFFMAN, RESOLUTIONS IN REGARD TO PROFESSIONAL DEPORTMENT IN A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (2d ed. 1836); WOLFRAM, *supra* note 112, at 53 & n.20. The first legal ethics codes, including this, were quite general.

251. *See supra* notes 7, 125, 229 and accompanying text.

252. *See* Jona Goldschmidt & Jeffrey M. Shaman, *Judicial Disqualification: What Do Judges Think?*, 80 JUDICATURE Sept.-Oct. 1996, at 68-72.

others in court proceedings), in fact judges have the *very same* thinking processes as lawyers and lay people.[253] If this is true, that is all the more reason for having a friendship recusal rule. Humans, by their nature, are predisposed to favoring their friends.

Other writers are aware of the general problem and need for more recusal, but the issue of this paper is not theirs.[254]

## XII. THE JUSTICE SCALIA/CHENEY CASE

### *A. The Motion to Recuse*

In 2004, Alan B. Morrison and the Sierra Club filed a motion to recuse Associate Justice Antonin Scalia from a case involving alleged impropriety by Vice President Cheney when he presided over the National Energy Policy Task Group.[255] It was alleged that Vice President Cheney allowed private citizens to improperly participate and exert influence over the task force, that

253. *See* Chris Guthrie, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001).

254. *See, e.g.*, Leslie W. Abramson, *The Judge's Relative is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 HOFSTRA L. REV. 1181 (2004) (showing how easy it is to have specific and applicable recusal rules); Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1080 (1993) (discussion of possible need for *per se* recusal rule for judge's former law clerks); Bassett, *supra* note 91, at 1213 (a brilliant piece attempting to solve some of the judicial partiality problems by a peremptory challenge type of procedure); Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033 (2004) (an "open discussion" which is not so open as to include friendship recusal); Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657 (1996) (alluding to the particular problems of recusal as applied to U.S. Supreme Court Justices); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001) (a thoughtful piece indicating the unfortunate proximity judges have to politics); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994) (focusing on the negative bias of the judge); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (a psychological approach); Judith Resnick, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005) (because judging depends on the judge, selection takes on great importance); Christopher R. Carton, Comment, *Disqualifying Federal Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. §455(a)*, 24 SETON HALL L. REV. 2057 (1994) (discussion of in-court demeanor generally not mandating disqualification); Lawrence J. Hand, Jr., Note, *Liteky v. United States—Jeopardizing Judicial Integrity*, 40 LOY. L. REV. 995 (1995) (focusing on the negative bias of judges); Nancy L. Sholes, Note, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379 (1992) (idealistic piece focusing on personal integrity); Denelle J. Waynick, Comment, *Judicial Disqualification: The Quest for Impartiality and Integrity*, 33 HOW. L.J. 449 (1991).

255. Motion to Recuse, *supra* note 17.

he lied as to such, and thus he became a named party both in his official capacity as Vice President and in his personal capacity.[256]

The allegation was that Associate Justice Scalia's impartiality might reasonably be questioned due to his ties to Mr. Cheney.[257] Those ties included Justice Scalia inviting Mr. Cheney to accompany him on a hunting trip in Louisiana, with Justice Scalia accepting *gratis* a one-way flight on Air Force Two, at Mr. Cheney's offering.[258]

It was an intimate vacation, and the recusal motion indicates, correctly, that the press all over the United States had questioned the propriety of Justice Scalia staying on the case.[259]

The flight on Air Force Two is worth, at a minimum, a thousand dollars[260]—therefore, there is an obvious recusal factor in the monetary gift to the judge.[261]

The motion to recuse argues that were the Vice President simply a named party, i.e., as sitting Vice President, the result might differ—but he is alleged to have committed perjury and behaved improperly—so it *is* personal.[262]

The recusal motion argues that mere social acquaintance, e.g., attendance at a Christmas or cocktail party, is quite different from a vacation and paid flight together.[263]

### *B. Justice Scalia's Response*

Justice Scalia denied the motion to recuse for many reasons.[264] He begins by admitting to having a friendship with Mr. Cheney and that he suggested a hunting trip together in Louisiana.[265] He continues by stating that, due to national security, he had to fly on Air Force Two.[266] He also maintains that he and Mr. Cheney spent no time alone, did not discuss the case, and that it was not an "intimate setting."[267]

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256. *See generally id.*

257. *Id.* at 1-2.

258. Cheney v. U.S. Dist. Court for the D.C., 541 U.S. 913 (2004) (mem. of Justice Scalia), *available at* http://news.findlaw.com/hdocs/docs/scotus/chny31804jsmem.pdf .

259. Motion to Recuse, *supra* note 17, at 3-6. Perhaps most painful was *Tonight Show* host Jay Leno indicating that the Vice President had Scalia in his pocket. *Id.* at 6.

260. *Id.* at 6 n.3. Query: What would it sell for on E-Bay?

261. *Id.*

262. *Id.* at 9-10.

263. *Id.* at 10-11.

264. *See generally* Cheney v. U.S. Dist. Court for the D.C., 541 U.S. 913 (2004) (mem. of Justice Scalia), *available at* http://news.findlaw.com/hdocs/docs/scotus/chny31804jsmem.pdf.

265. *Id.* at 913.

266. *Id.* at 914.

267. *Id.* at 915.

Justice Scalia pierces to the heart of the issue in writing that recusal could be based only on one fact: "The only possibility is that it would suggest I am a friend of his."[268] Then Justice Scalia dismisses friendship recusal as having no basis in the law.[269] Justice Scalia then goes on to list other justices who had ties to parties,[270] but he ignores the fact that the law on impartiality was subjective (i.e., the judge was the judge of his or her own impartiality), and dismisses the fact that Mr. Cheney is more than a named official whose reputation is being attacked.[271]

Justice Scalia dismisses the negative press views on his non-recusal.[272] This, of course, ignores the very standard itself—impartiality might reasonably be questioned. The widespread press criticism indicates a doubt as to his impartiality.

Justice Scalia flamboyantly concludes: "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."[273]

### *C. Should Justice Scalia have Recused Himself?*

Freedman and Smith call Justice Scalia's refusal "both disappointing and disingenuous."[274] Justice Scalia's belief that his flight on Air Force Two was worthless—he had purchased a round trip ticket on a regular airline, and thus saved no money—is disingenuous because most would view an Air Force Two flight as a valuable thing.[275] But the rest of his brief is legally correct.

Unfortunately, however, Justice Scalia, in reading the law *correctly*, indicates a flaw in the present law of recusal (and disqualification). Friends should and must recuse themselves.

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268. *Id.* at 916.
269. *Id.* He is arguably correct.
270. *Id.* at 917.
271. *Id.* at 918-19.
272. *Id.* at 923.
273. *Id.* at 929.
274. FREEDMAN & SMITH, *supra* note 22, at 262.
275. *Cheney*, 541 U.S. at 920-21.

### D. *Political Postscript*

Often a bad decision will cause legal reform. This occurred when Chief Justice Rehnquist refused to recuse himself in *Laird v. Tatum*,[276] a 1972 case, where Assistant Attorney General Rehnquist testified whether the Army was performing illegal surveillance, and then refused to recuse himself on that very same issue as a Supreme Court Justice, in a 5-4 decision.[277] This fact pattern probably led to more delineated disqualification rules regarding recusal when the judge took part as a prosecutor, witness, or party in that case.[278]

The problem is more complex in the *Bush v. Gore*[279] election case, because when all judges might be biased, necessity mandates no recusal.[280]

## XIII. HYPOTHETICAL SITUATIONS ON FRIENDSHIP RECUSAL

A pertinent query regarding whether judicial friendship with a lawyer or party mandates recusal is whether the standard is workable? Friendship, it will be recalled, is defined as more than ordinary social intercourse, either privately or publicly.[281] Friendship is more intimate than positive acquaintance.[282]

### A. *Hypothetical One: The Casual Golf Game*

Most golfers will "pick up" a game at their club. Perhaps one member of the regular foursome is ill. On this fine day, Judge Jones joins the foursome, plays 18 holes, then sits with the other three golfers for a cold drink afterward. The game was pleasant. Absent a pending or ongoing case involving one party, this social intercourse would not mandate recusal or disqualification.

### B. *Hypothetical Two: The Regular Foursome*

Let us say Judge Day plays golf each Sunday with the same three players, two of whom are lawyers and one is a banker. This close association should be characterized as a friendship, and mandate recusal for the judge from cases directly involving any of the parties.

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276. Laird v. Tatum, 408 U.S. 1 (1972).
277. FREEDMAN & SMITH, *supra* note 22, at 232-36.
278. *See, e.g.*, *supra* note 231.
279. Bush v. Gore, 581 U.S. 98 (2000).
280. *See, e.g.*, United States v. Will, 449 U.S. 200 (1980).
281. *See* discussion *supra* Part III.
282. *Id.*

*C. Hypothetical Three: The Bar Function*

Judge Smith attends several bar events each year. He will often co-lecture with a few individuals and will chat with lawyers who he sees in court. These positive acquaintances do not rank as friendship for the purpose of recusal.

*D. Hypothetical Four: The Early Morning Jog*

Judge Adam jogs out of doors a few mornings a week. Occasionally, he crosses paths with a neighbor and occasionally they chat. This acquaintance does not mandate recusal.

*E. Hypothetical Five: Tailor Ted*

Judge Bob has his new suits altered by tailor Ted. These alterations occur once or twice a year. The conversation is friendly, but no special pricing is given the judge. Again, no recusal is necessary.

*F. Hypothetical Six: The Wedding*

Judge Mary is invited to an exclusive wedding of one of her high school classmates, and attends the well-heeled affair. Mary should recuse herself from litigation involving the classmate.

*G. Hypothetical Seven: Friday Night Poker*

Poker, by its nature, not on the professional level, is an intimate game. It is characterized by joviality, cussing, and sharing of off-the-record comments. Regular poker buddies are friends under this definition.

*H. Hypothetical Eight: Pick-up Basketball*

Unlike the regular golf foursome above, absent a highly regular and formalized game, playing such games at the gym does not create friendship.

*I. Hypothetical Nine: Social Confidants*

Most people have one to three people who are their social confidants. The confidant may be privy to detailed information regarding the confidant's children, spouse, lover, co-workers, etc. Clearly the confidant is a friend for recusal purposes.

### J. *Hypothetical Ten: The War Buddy*

In war or similar extreme stress, men and women form ties of loyalty that endure throughout life. They are friends.

The above list is not exhaustive, but should indicate that friendship is not an amorphous standard that cannot be applied. A judge need not disclose, other than in general terms, that he or she is recusing himself or herself based on friendship grounds. A motion to disqualify a judge based on friendship should similarly be simple. If the judge denies the friendship, in most cases, that should end the matter in favor of the judge's denial.[283]

## XIV. CONCLUSION

The trend in judicial ethics has been to adopt objective standards of impartiality. These have been increasingly intricate and specific, as set out in the text and footnotes above. Specific standards are both possible and workable. Antipathy (enemy) standards *have* been developed already.

Additionally, judges do, in good faith, seek guidance as to when to recuse themselves. Finally, the trend has been to favor specific standards as to recusal, as opposed to amorphous standards about which reasonable minds might disagree.

Judges generally stay within closed circles, and are rather isolated as a group. This may just be their "judicial temperament," or it may be a purposeful self-imposition of an unspoken friendship recusal rule.[284]

Friendship is a rare relationship, one that may engender more loyalty than blood or business relationships—relationships that demand recusal. Section 455, the Model Code, and the several states' codes need an added provision: A judge must recuse himself or herself when he or she has a friendship with a lawyer or named party to the litigation. Friendship does not include the sharing of intimacies other than those beyond ordinary business or social intercourse. Although friendship is characterized by subjective loyalty, it is to be shown by objective manifestations of regular and longstanding social or business intimacy and loyalty.

Only would a bad friend be a good judge.

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283. Almost universally, only the otherwise corrupt will lie as to being friends.

284. I have personally noticed this among the many judges I know. Additionally, I have noticed judges socially withdrawing and sequestering themselves with other judges once they are elevated to the bench.