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Caperton, Due Process, and Judicial Duty: Recusal Oversight in Patrons' Cases

Steve Sheppard*

In his thoughtful and provocative article, Professor Ronald Rotunda offers several arguments against "constitutionalizing judicial ethics," especially criticizing the majority in *Caperton v. A.T. Massey Coal Co.*,[1] because he, echoing Chief Justice John Roberts in dissent, believes it offers "no coherent and reasonably clear theory of judicial disqualification."[2] It appears to be his hope that a future court might reverse this decision, and allow judges to be the sole assessors of judicial partiality. Despite Professor Rotunda's reservations, many good reasons support the *Caperton* majority, which requires federal, constitutional oversight of a state judge who refuses to recuse from participation in a case involving that judge's patron.

In this brief essay, I will relate just two reasons that support *Caperton's* result. First, though *Caperton* may indeed interject greater federal oversight of state judges as well as new oversight of the judges of courts of last resort, *Caperton* does not add a new review for most judges. Second, the due process of law must protect litigants from apparent corruption, or it cannot protect them from real corruption.

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*Judge William H. Enfield Professor of Law, University of Arkansas. This symposium essay is written in celebration of the life of Judge Enfield, who provided a model of rectitude for the bench as well as the bar, and in gratitude for the efforts of two former justices, Sandra Day O'Conner and Annabelle Imber Tuck, whose retirements from their respective benches have been spent in diligent attempts to improve the integrity of the bench and bar.

1. 129 S. Ct. 2252 (2009).

2. Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After* Republican Party v. White, Caperton, and Citizens United, 64 ARK. L. REV. 1 (2011). Chief Justice Roberts argued that asking what a judge's probability of bias might be is too vague. *Caperton*, 129 S. Ct. at 2267. Justice Scalia separately argued that the standard would invite a wave of cases alleging bias in states, like Arkansas, that have an elected judiciary. *Id.* at 2274.

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As an initial matter, though, remember *Caperton* as a precedent. And, thankfully, Caperton is a precedent.[3] The case arose in a messy lawsuit between two West Virginia energy companies—Harman Mining, headed by Hugh Caperton, and the A.T. Massey Coal Company, headed by Don Blankenship—which had gone to trial in 2002, resulting in a $50 million jury verdict for Caperton's Harman Mining. Massey appealed the verdict. While the appeal moved up, Don Blankenship created a nonprofit entity that supported Brent Benjamin, a candidate challenging the state chief justice for reelection. He and his political 527 corporation spent $3 million campaigning for Benjamin, who was elected. When Blankenship's case reached the state supreme court of appeals, Justice Benjamin, who had since been seated, refused to recuse himself, claiming that he would be unbiased in Massey's case.[4] Benjamin cast one of the deciding votes in a 3-2 decision to overturn the verdict. Caperton took the case to the United States Supreme Court, claiming that Harmon Mining, which was now defunct, had been denied due process of law by Benjamin's vote.[5]

Justice Kennedy and a majority agreed. Due process of law forbids a judge to sit on a case involving a party who has just paid for that judge's election to the bench.[6] More to the point, every litigant in a court in the United States has a right to a judge who has not just been placed on the bench by that litigant's opponent.[7] The right to fair trial cannot allow such a blatant challenge to judicial neutrality. There was no evidence of bribery, solicitation, a debt by Benjamin to Blankenship, a family relationship, or even a direct gift from Blankenship to Benjamin, or any evidence of actual bias by Benjamin. Yet, the influence Blankenship had exerted to elect Benjamin was still likely to have influence. Justice Kennedy resolved:

> [T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and

3. *See* Precedent, THE BOUVIER LAW DICTIONARY, q.v. (Stephen Sheppard, ed.) (Wolters Kluwer, 2011)(forthcoming).

4. Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252, 2257 (2009).

5. The facts are set out in the opinions and in the briefs. *See generally id.*

6. *See Caperton*, 129 S.Ct. at 2265.

7. *See id.*

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> disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[8]

The majority set no further analysis in place. At some point, a patron's influence on a judge's election has to be so great that an appearance of influence is present when the judge rules on a case involving that patron.[9] Due process of law cannot force another litigant to appear against a patron before such an apparently tainted judge.

The question, "at what point," is serious, and Chief Justice Roberts emphasized it in an inventory of forty unanswered questions.[10] Yet answers to many of these questions have been quick in coming, and not as Chief Justice Roberts forecast, through a wave of petitions of certiorari, but by careful and measured reevaluations of recusal in the states. Michigan, for instance, has created an en banc review de novo for a denied recusal motion.[11]

I. JUDGES BEAR LITTLE NEW BURDEN FROM THE CONSTITUTION

The real question in *Caperton* was not whether a judge should recuse when a patron stands before that judge as a litigant. The real question was whether a judge is subject to review when the judge refuses to do so.

First, there was no real question that under West Virginia law, Justice Benjamin was required to recuse, and he violated the state's law by not doing so. As Justice Kennedy pointed out, "The West Virginia Code of Judicial Conduct also requires a judge to 'disqualify himself or herself in a proceeding in which

8. *Id.* at 2263.

9. For more ranting on this point, see Steve Sheppard, *Supreme Court Bans Judge Buying*, FINDLAW, at http://writ.news.findlaw.com/commentary/20090629_sheppard.html (last visited Mar. 12, 2011).

10. 129 S. Ct. at 2269-72.

11. See Mich. Ct. R. 2000.3 (2009).

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the judge's impartiality might reasonably be questioned.'"[12] Yet as a judge on the highest state court, the only immediate arbiter of Justice Benjamin's motion to recuse was, at that point, himself. He wrote four opinions rejecting such standards as appearance of impropriety, arguing that only "objective information" that he had prejudged the case or that he would be unfair or impartial would do.[13] There was, however, no procedure that allowed a review of this opinion, though it applied an erroneous legal standard under state law.

For the overwhelming number of judges, review of such a mistaken recusal was possible long before *Caperton*. Indeed, for by far the greater numbers of judges, review of denied recusal was already available in another court, which may apply standards for recusal through direct appeal, as well as by a writ of mandamus or a writ of prohibition.[14] The primary difference made by the *Caperton* rule is that the United States Supreme Court has said that due process of law now allows a federal review of a state judge's refusal to recuse, when there is unusual evidence of an appearance of undue influence by a patron who is a litigant before that judge.[15]

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12. 129 S. Ct. at 2266 (quoting W.V. Canon Judicial Ethics 3E(1)). Justice Kennedy also quoted a recent case emphasizing the requirement to recuse when a question arises, regardless of the judge's purity of motive. *See id.* (quoting State ex rel. Brown v. Dietrick, 191 W. Va. 169, 174, n. 9, 444 S. E. 2d 47, 52, n. 9 (1994)("The question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.")).

13. *See* Brief for Petitioner, No. 08-22 at 10, *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009) (quoting Opinion (Apr. 7, 2006)).

14. *See, e.g.*, In re United States, 441 F.3d 44, 68 (1st Cir. 2006) (ordering recusal of a federal district judge who had refused to recuse himself, noting that, "The appellate court is more removed and hence more objective.").

15. Indeed, for all state judges, some review for failure to recuse was possible before *Caperton*. The Due Process Clause had already been read to bar a state judge from hearing a case in which the judge had a direct interest related to a litigant or to an outcome. *See generally* Gibson v. Berryhill, 411 U.S. 564 (1973); Tumey v. Ohio, 273 U.S. 510 (1927). Further, the Court had already stated that a judge's interest in other, similar litigation was sufficient evidence of apparent influence to require due process review. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). The additional review required in the light of *Caperton* is only the degree to which a judge appears interested when a patron, a party whose unusual influence or money creates the appearance of obligation by the judge to the patron, refuses to recuse in a cause in which the patron has an interest.

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II. THE APPEARANCE OF CORRUPTION CAN HIDE TRUE CORRUPTION

The problem is not limited to elected judges; it is just more obvious with elected judges. When a judge owes a favor to a litigant, or is in a circumstance that would seem to owe a favor to a litigant, it is hard for that litigant's opponent to believe fairness is at hand in the courtroom. When that favor reaches a level of patronage, it does not matter whether the litigant paid for an election or invoked senatorial courtesy. A litigant who was a significant influence in the judge's holding the judgeship presents a presumptive conflict of interest for that judge.

Why, then can a judge not see this? In my experience, most judges quietly do see it and seek not to have such cases assigned or recuse themselves sua sponte.

When a judge won't recuse in a case involving a party who was clearly a patron to that judge, the stakes simply rise too quickly. Why won't the judge step aside?

There are times, of course, when motions to recuse are brought tactically by an opponent to a former patron, seeking to amplify the appearance of obligation of the judge toward a former sponsor. Such motions are likely to provoke anger, resentment, and defiance in the judge whose impartiality is questioned. Even so, there is simply no loss to justice in that judge stepping aside and allowing another judge to be assigned. The appearance of impropriety is all that is in issue, not impropriety itself.

Moreover, there are two distinct reasons why the judge should recuse when a patron is before the bench. One of these was apparent in the *Caperton* case, the other was not but was the unremarked elephant in the room.

As was discussed by Justice Kennedy for the Court, the other litigant has a right to a fair trial. No amount of reassurance by the seemingly tainted judge can assure the litigant that the judge is not tainted. And, the litigant has a fundamental right to a neutral judge, who is not apparently biased against that litigant's cause.

As was not discussed here but even more fundamental, the people have a right to judges who are in fact not bought off by their patrons. As election funding becomes more powerful and

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more subtle, and as the politics of selection make back-room politics in judicial selection more important to political and commercial interests, the opportunity grows for real corruption that is not provable by "objective" relationships of payment or promise.

All of the evidence suggests that Justice Benjamin was—in fact—independent of Don Blankenship and uninfluenced by his money. All of the evidence suggests that the justice had no more than a tin ear to the cries of his opponents who said his opinion looked like it had been bought by the man it favored.

But what if Justice Benjamin had actually been crooked? When a judge does act from a sense of obligation toward a patron-litigant, there is no reason to believe that either the patron or the judge would be so naive as to write a contract or make direct payments. There would probably be no evidence of the forms that Justice Benjamin demanded be produced before he would step down. If he were as corrupt as his detractors thought, the evidence would probably have looked very much the same.

The appearance of impropriety is essential as a standard to assure the absence of impropriety. Nothing less can assure the integrity of the American bench,which must certainly be a fundamental purpose of the due process of law.

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