Understanding Caperton: Judicial Disqualification Under the Due Process Clause

Dmitry Bam
University of Maine School of Law, dmitry.bam@maine.edu

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/faculty-publications

Part of the Constitutional Law Commons, Courts Commons, Judges Commons, and the Legal Ethics and Professional Responsibility Commons

Suggested Bluebook Citation
Dmitry Bam, Understanding Caperton: Judicial Disqualification Under the Due Process Clause, 42 McGeorge L. Rev. 65 (2010).
Available at: https://digitalcommons.mainelaw.maine.edu/faculty-publications/95

This Article is brought to you for free and open access by the Faculty Scholarship at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.
Understanding *Caperton*: Judicial Disqualification Under the Due Process Clause

Dmitry Barn*

TABLE OF CONTENTS

I. INTRODUCTION ............................................................................................................. 65
II. THE ROLE OF APPEARANCES IN JUDICIAL RECUSALS ........................................ 67
   A. Federal Recusal Statutes .................................................................................. 67
   B. ABA Codes of Judicial Conduct ........................................................................ 68
   C. Due Process Clause ............................................................................................ 69
      1. Pre-Caperton ............................................................................................. 69
      2. Post-Caperton ............................................................................................ 71
III. DUE PROCESS AND THE “APPEARANCE OF BIAS” .............................................. 72
   A. Are Appearance of Bias and Probability of Bias Synonymous? ..................... 72
   B. Why Caperton is Not an Easy Case ................................................................... 76
IV. JUDICIAL IMPARTIALITY AND DUE PROCESS: IS PROCEDURAL RECUSAL REFORM THE ANSWER? ................................................................................ 78
   A. Tailoring Recusal Procedures to Caperton’s Probability-Based Recusal Standard .................................................................................................................. 78
   B. Keeping Appearances Relevant ....................................................................... 80
   C. Making Caperton Matter ................................................................................. 81
V. CONCLUSION ................................................................................................................. 82

I. INTRODUCTION

It is virtually impossible to discuss the Supreme Court’s decision in *Caperton v. A.T. Massey Coal Co.* ¹ without hearing some variant of the following response: “I can’t believe it was as close as it was.” And whether one is chatting with his next-door neighbor who had never thought about judicial ethics in his life, or discussing the case with a judicial-recusal expert,² nearly everyone seems to agree: *Caperton* was an “easy” case and the fact that four justices dissented

* J.D., Stanford Law School; Fellow, Stanford Center on the Legal Profession. I am particularly grateful to Samuel Bray, Nora Freeman Engstrom, and Amanda Packel for their helpful comments.

¹ 129 S. Ct. 2252 (2009).

² The terms “recusal” and “disqualification” are used interchangeably throughout this Article. These terms originally had slightly different meanings, with “recusal” referring to withdrawal at the judge’s discretion and “disqualification” meaning exclusion by force of law. Modernly, however, this distinction is almost never recognized. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 (1970); see Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.1 at 3-4 (2d ed. 2007).
indicates that something is terribly wrong. Not only has Caperton elevated the issue of judicial impartiality to the national spotlight, but it has also triggered a firestorm: Congress has held hearings examining judicial recusals in light of Caperton; states have grappled with new recusal rules and procedures, as well as changes to state judicial elections; and law schools around the country have held conferences and symposia dedicated solely to Caperton and judicial ethics. Together with the Court’s earlier ruling in Republican Party of Minnesota v. White and this year’s decision in Citizens United v. FEC, Caperton is part of a trilogy that will shape our views of judicial independence and accountability for years to come.

This Article argues that Caperton is often misunderstood and concludes that Caperton was not an easy case, in large part because the Court rejected the well-established appearances-based recusal standard in favor of a probability-based one that examines the likelihood of actual bias. While Caperton’s changes to the law are seemingly minor, this Article asserts that these changes, in fact, affect the recusal landscape more than is or has been appreciated. Furthermore, Caperton’s probability-based standard may contain a blueprint for an improved recusal framework across state and federal judiciaries.

This Article proceeds in three parts. Part II explains the role of appearances, both historically and currently, in recusal decisions in the United States. Today, appearance of partiality, rather than actual fairness, is the key factor in judicial recusal under both the federal recusal statutes and state judicial codes. This was not always so.

Part III argues that Justice Kennedy’s majority opinion in Caperton limited, if not excluded, the role of appearances from its due process analysis. Some scholars, judges, and commentators, however, have wrongly interpreted Caperton’s “probability of bias” standard to be coterminous with the “appearance of bias” standard that currently controls recusal under federal statutes and state judicial codes. This Article will explain why this interpretation is incorrect and why the Court’s opinion should be read to reject an appearance-based disqualification standard under the Constitution’s Due Process Clause.


4. Contentious debate regarding the appropriate response to Caperton took place in a number of states, including West Virginia, Michigan, and Wisconsin. See James Sample, Court Reform Enters the Post-Caperton Era, 58 Drake L. Rev. 787 (2010) (summarizing the state court reforms in the year following Caperton).


7. 130 S. Ct. 876 (2010).

The final part of this Article discusses the implications of adopting a probability-based—rather than an appearance-based—recusal standard, and how states can use \textit{Caperton}, and recusal generally, to address the public’s growing concern about the impartiality of an elected judiciary. This Article argues that in response to \textit{Caperton}, states should change their recusal procedures and tailor them to the newly-announced probability-based substantive standard for judicial disqualification. In adopting these new recusal procedures, states should pay special attention to appearances, ensuring that the newly-adopted procedure creates an appearance of impartiality and fairness. As a result of greater emphasis on the appearance of procedural fairness, public’s confidence in the judiciary will increase.

\section*{II. The Role of Appearances in Judicial Recusals}

In the United States, judicial recusal is largely about appearances. Under the federal recusal statutes, as well as the state judicial codes, judges must recuse themselves to avoid even the appearance of bias.\textsuperscript{9} Although universally accepted throughout the United States today, this is a relatively new concept. Undoubtedly the need for judicial impartiality was recognized in early Jewish, Roman, and English law,\textsuperscript{10} but there is virtually no evidence suggesting that mere appearance of partiality prevented judges from participating in cases before the adoption of an appearance-based recusal standard in the United States.\textsuperscript{11}

\subsection*{A. Federal Recusal Statutes}

Judicial recusal was on the minds of our founding fathers at the time of this nation’s birth. In 1792, Congress passed the United States’ first recusal statute.\textsuperscript{12} The legislation was narrowly drawn, narrowly interpreted, and did not even prohibit judges from hearing cases in which they might have a bias for or against

\begin{itemize}
  \item \textsuperscript{9} FLAMM, supra note 2, §§ 5.6-5.6.1, at 118-19; Susan E. Liontas, \textit{Judicial Elections Have No Winners}, 20 STETSON L. REV. 309, 312 (1990).
  \item \textsuperscript{10} FLAMM, supra note 2, § 1.2, at 5. Bracton set out the common law rule for disqualification in the thirteenth century:
    A justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, his vassal or subject, his parent or friend, or an enemy of the tenant, his kinsman or a member of his household, or a table-companion, or he has been his counsellor or his pleader in that cause or in another, or in any such like capacity.
    BRACTON, \textit{LEGIBUS ET CONSUETUDBINUS ANGLIE} 249 (Travers Twiss ed., 1883).
  \item \textsuperscript{11} In 18th century England, for instance, the common-law recusal practice was exceedingly simple: Only if he had a direct financial interest in the case was the judge to be presumed biased and disqualified. John P. Frank, \textit{Disqualification of Judges}, 56 YALE L.J. 605, 609-12 (1947). This was the law at the time of the colonization of America, rejecting the broader standard contained in BRACTON, supra note 10.
  \item \textsuperscript{12} Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79 (1792).
\end{itemize}
2010 / Understanding Caperton

The statute largely codified the common-law disqualification rules and called for disqualification of district court judges who were “concerned in interest,” as well as those who had “been of counsel for either party.”

Even in the late nineteenth century, a judge was permitted to preside over a bankruptcy proceeding despite his status as a creditor of the bankrupt.

Over the next two centuries, the federal recusal statute was amended and shaped, often in response to high-profile scandals or controversies involving federal judges. The federal statute that governs disqualification by any federal court today, 28 U.S.C. § 455, is divided into two parts. The first section (and for our purposes the most relevant), § 455(a), is a general catch-all provision that requires disqualification whenever “[a judge’s] impartiality might reasonably be questioned.” It is now uncontroversial that this standard was intended to promote not only the impartiality of the judiciary but also the public perception of the impartiality of the judicial process. As a result, a mere appearance of bias, as viewed from the perspective of an objective observer, requires recusal.

B. ABA Codes of Judicial Conduct

While 28 U.S.C. § 455 is controlling only in federal courts, nearly every state has adopted the American Bar Association’s Code of Judicial Conduct. The Code, which applies to all full-time judges and all legal and quasi-legal proceedings, addresses when judicial disqualification is necessary.

13. Id.
14. Id.
15. In re Sime, 22. F. Cas. 145, 146 (C.C.D. Cal. 1872) (No. 12,860).
17. Id. § 455(a). The second section, 28 U.S.C. § 455(b), enumerates certain specific factual situations when recusal is required. For example, disqualification is mandatory when the judge “has . . . personal knowledge of disputed evidentiary facts concerning the proceeding” or if the judge previously served as the lawyer, or had been a material witness, in the matter in controversy. 28 U.S.C. § 455(b)(1)-(2).

18. H.R. Rep. No. 93-1453, at 5 (1974); see also S. Rep. No. 93-419, at 5 (1973); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 n.7 (“The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective ‘in his opinion’ standard with an objective test.”).


20. MODEL CODE OF JUDICIAL CONDUCT, supra note 19. The Code of Conduct for United States Judges is another ethical code adopted and revised by the Judicial Conference of the United States that applies to most federal judges and is largely similar to the ABA Model Code. It does not, however, govern the Justices of the United States Supreme Court because the Conference has no authority to create rules controlling the Supreme
The Code imposes a general standard that is similar to 28 U.S.C. § 455(a). Subsection (a) of rule 2.11 of the Code states: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” Impartiality means the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” Although the Code itself makes no mention of appearances, courts and commentators have focused on the appearance of impropriety in their interpretation, leaving judges with broad discretion in interpreting and applying this standard. In short, the Code and the federal disqualification statute are largely coterminous, and both indirectly impose appearance-based recusal standards.

C. Due Process Clause

1. Pre-Caperton

Although the Constitution’s Due Process Clause guarantees litigants a right to have their cases heard and decided by fair and impartial judges, and the Supreme Court has periodically held that prejudice or bias by the presiding judge violates the litigant’s constitutional rights, it has long been thought that the Constitution mandates disqualification only in very limited circumstances. The Supreme Court has explained that “matters of kinship, personal bias, state policy, [and] remoteness of interest would seem generally to be matters merely of legislative discretion” rather than a constitutional recusal floor. And until Caperton, it was unclear whether improper appearances alone could rise to the

---

21. MODEL CODE OF JUDICIAL CONDUCT, supra note 19, at R. 2.11(a). The rule goes on to list specific situations in which the likelihood of prejudice or its appearance is presumed, although the list is not exhaustive. Id. at R. 2.11.


23. Abramson, supra note 19, at 55 n.2 (“Whether a judge’s impartiality might reasonably be questioned is also referred to as the appearance of partiality, the appearance of impropriety, or negative appearances.”).


25. U.S. CONST. amends. V, XIV.

26. See In re Murchison, 349 U.S. 133, 136 (1955) (explaining that “[a] fair trial in a fair tribunal is a basic requirement of due process.”).

27. See Tumey v. Ohio, 273 U.S. 510, 523 (1927) (“All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.”); Bracy v. Gramley, 520 U.S. 899, 904 (1997) (“Most questions concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.”); Aetna Life Insruace Co. v. Lavoie, 475 U.S. 813, 828 (1986) (“The Due Process Clause demarks only the outer boundaries of judicial disqualifications.”).

level of a due process violation. In fact, historically, there have been only two types of cases where the Due Process Clause was held to require recusal.

First, the Due Process Clause has been read to require disqualification when the judge has a financial interest in the litigation. The leading case is *Tumey v. Ohio.*

In *Tumey*, an Ohio statute authorized judges to receive court costs assessed against convicted defendants, but not against those who were acquitted. The Court held this incentive scheme created too much partiality and invalidated the statute on due process grounds, explaining that due process is violated when a judge is “paid for his service only when he convicts the defendant.” This result is neither controversial nor surprising—a judge should not be incentivized to reach a particular result.

However, a judge’s interest need not be a direct financial one. For example, in *Ward v. Village of Monroeville*, the Court held that a mayor may not preside as a judge over ordinance violations and traffic offenses when the court-assessed fines for such transgressions would be contributed to the town’s budget. While the mayor’s salary did not depend on his conviction rate, the mayor still had a financial incentive to convict—he was responsible for the town’s revenue production. That incentive, the Court held, is inconsistent with due process.

Similar incentives were held to violate due process in *Aetna Life Insurance Co. v. Lavoie.* There, Alabama Supreme Court Justice Embry ruled in favor of the plaintiff on his bad-faith claim against Aetna. It turned out, however, that Justice Embry himself had filed two comparable actions against other insurance companies making similar allegations and seeking punitive damages while the plaintiff’s action against Aetna was still pending. The Supreme Court held that Justice Embry’s refusal to recuse himself was in violation of the Due Process Clause. As with *Tumey* and *Ward*, the judge’s decision furthered his own financial interests, allowing him to act as “a judge in his own case.”

29. *Id.* at 523.
30. *Id.* at 519-20.
31. *Id.* at 531.
33. 409 U.S. 57, 60 (1972). Between 1964 and 1968, the fines, forfeitures, costs, and fees that the court had imposed provided nearly one-half of the Village’s annual revenue. *Id.* at 58
34. *Id.* at 60.
35. *Id.*
37. *Id.*
38. *Id.* at 817.
39. *Id.* at 824. The reason recusal was necessary was not because of Justice Embry’s ill-will towards insurance companies. Rather, the opinion rendered by Justice Embry “had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.” *Id.*
40. *Id.*
Second, the Court has held that due process forbids a judge from wearing too many hats. For example, in *In re Murchison*, the Court found a violation of the Due Process Clause although the judge did not have a personal pecuniary interest in the outcome of the case.\(^{41}\) Rather, the judge had served as a one-person grand jury before presiding over a hearing to determine that two of the testifying witnesses were guilty of contempt.\(^{42}\) This procedure, the Court held, ran afoul of due process.\(^{43}\)

*Mayberry v. Pennsylvania* is also instructive.\(^{44}\) There, the defendant verbally attacked the presiding judge\(^{45}\) and continuously interrupted court proceedings to the point where the defendant had to be removed from the courtroom.\(^{46}\) The Supreme Court held that when the defendant is charged with criminal contempt, he “should be given a public trial before a judge other than the one reviled by the contemnor.”\(^{47}\)

2. Post-Caperton

Such was the state of recusal law under the Due Process Clause until *Caperton v. A.T. Massey Coal Co.*\(^{48}\) In *Caperton*, West Virginia Supreme Court Justice Brent Benjamin cast the deciding vote to overturn a trial court’s decision against the appellant, Massey Coal Company.\(^{49}\) Before Justice Benjamin was elected to the court, Massey’s CEO, Don Blankenship, provided generous support to his election campaign.\(^{50}\) Indeed, Blakenship contributed more to Benjamin’s campaign than all other donors combined (a total of approximately $3 million), all while his lawyers were preparing the *Caperton* case for appeal.\(^{51}\) After refusing Caperton’s recusal requests, Justice Benjamin voted with the majority in a 3-2 decision overturning the trial court’s verdict.\(^{52}\)

---

42. Id. at 134-37.
43. Id.
44. 400 U.S. 455, 465 (1971).
45. See id. at 456-57 (noting that the defendant referred to the judge as a “hatchet man for the State,” a “dirty sonofabitch” and a “dirty, tyrannical old dog.”).
46. Id. at 462.
47. Id. at 466. The same rule applies when a trial judge, following trial, punishes a lawyer for contempt committed during trial without giving that lawyer an opportunity to be heard in defense or mitigation. See *Taylor v. Hayes*, 418 U.S. 488, 499-500 (1974). In such circumstances, a different judge should conduct the trial in place of the judge who initiated the contempt. Id. at 501-502.
50. During the campaign, Mr. Blankenship spent approximately $3 million to help Justice Benjamin. However, only $1000, the West Virginia limit for direct campaign contributions, was given directly to Benjamin. The rest of the money funded a tax-exempt organization, “And For The Sake Of The Kids,” which was formed to defeat incumbent Justice McGraw, and newspaper and television advertising attacking McGraw. See Brief for Petitioners at 5-8, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No.08-22).
51. Id.
The United States Supreme Court reversed; holding that Justice Benjamin’s failure to recuse himself violated Caperton’s right to due process.53 In reaching this decision, the Court relied on the principles announced in its prior decisions and applied them to the facts of the case at hand.54 Quoting Tumey, the Court once again announced that due process requires judicial recusal when the circumstances “offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.”55 The Court explained that “when a person with a personal stake in a particular case had a significant and 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 risk of actual bias violates due process.56

After Caperton, little doubt remains that recusal is required under the Due Process Clause, even when the judge has no personal interest in the outcome of the litigation and did not act as both a judge and a prosecutor or witness in the same case. But the question remains: What about appearances? Can an appearance of bias rise to the level of a due-process violation?57

III. DUE PROCESS AND THE “APPEARANCE OF BIAS”

A. Are Appearance of Bias and Probability of Bias Synonymous?

As Part II shows, recusal for almost all judges in the United States—at the state and federal levels—is governed by an appearance-driven standard. Of course, actual bias is prohibited as well, but rarely does a disqualification inquiry turn on a judge’s actual bias. This is in large part due to the fact that judges deciding their own recusal motions tend to downplay the existence of actual bias. Furthermore, the appearance-of-bias test does not require parties to argue for actual bias.58 But does the Due Process Clause require only an absence of actual bias? Or does it prohibit even its appearance? Justice Benjamin himself took the position that due process does not require recusal based solely on the appearance of impropriety and at least some state courts agreed.59

54. Id. at 2260-2262.
55. Id. at 2261-62.
56. Id. at 2263-64.
57. Compare Del Vecchio v. Ill. Dep’t. of Corrs., 31 F.3d 1363, 1373 (7th Cir. 1994) (“[B]ad appearances alone do not require disqualification. Reality controls over uninformed perception”), with Peters v. Kiff, 407 U.S. 493, 502 (1972) (“Due process is denied by circumstances that create the likelihood or the appearance of bias.”).
58. GRANT HAMMOND, JUDICIAL REcUSAL: PRINCIPLES, PROCESS AND PROBLEMS (2009) (discussing the differences between recusal standards based on the appearance of bias, on the one hand, and actual bias, on the other).
59. Caperton, 129 S. Ct. 2252; see Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223 (2008) (Benjamin, J. concurring); see also State v. Canales, 916 A.2d 767, 781 (Conn. 2007) (“[A] judge’s failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises...
In *Caperton*, the Supreme Court was asked to resolve the issue. But by the time the case came up for oral argument, it was unclear whether Caperton had abandoned the argument that an appearance of bias alone was enough to trigger a due process violation. During oral argument, two interesting exchanges about the role of appearances under the Due Process Clause took place between the justices and counsel for Massey. First, Justice Stevens expressed incredulity that appearances alone could not rise to the level of a constitutional violation.

JUSTICE STEVENS: Mr. Frey, is it your position that the appearance of impropriety could never be strong enough to raise a constitutional issue?

MR. FREY: Well, we might have appearance of impropriety overlapping with conditions that would justify—

JUSTICE STEVENS: I’m assuming appearances only. Are you saying that appearances without any actual proof of bias could never be sufficient as a constitutional matter?

MR. FREY: I think we are.

JUSTICE STEVENS: Is that your position?

MR. FREY: We are saying that the Due Process Clause does not exist to protect the integrity or reputation of the State judicial systems.

JUSTICE GINSBURG: Why—

JUSTICE STEVENS: That’s not an answer to my question.

MR. FREY: Well, I thought I said —

JUSTICE STEVENS: Supposing, for example, the judge had campaigned on the ground that he would issue favorable rulings to the United Mine Workers, and the United Mine Workers campaigned, raising money saying, we want to get a judge who will rule in our favor in all the cases we’re interested in. Would that create an appearance of impropriety?

MR. FREY: Well—

JUSTICE STEVENS: Or take another example. The Chief Justice asked what if there are ten members of a trade association and would all—and they all contributed to get a judge to vote in their favor in a case that involved a conspiracy charge among the—charged the ten of them for violations of the Sherman Act, something like that. And if all ten of them raise money publicly for the very purpose of getting a judge who

from *actual bias* on the part of that judge."); *Cowan v. Bd. of Comm’rs*, 148 P.3d 1247, 1260 (Idaho 2006) ("[W]e require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness."). *But see* *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair."); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("[T]here need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns."); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (concluding that due process requires that justice “satisfy the appearance of justice”).
would rule favorably in their favor, that would clearly create a very extreme appearance of impropriety. Would that be sufficient, in your judgment, to raise a constitutional issue?

MR. FREY: If you were—if you thought there was no basis for believing there was actual bias, but it looked bad—

JUSTICE STEVENS: No, it would meet the test in the—in the judges’ brief of an average judge would be tempted under the circumstances. That’s the test that the Conference of Chief Justices judges—

MR. FREY: That I don’t—

JUSTICE STEVENS: And do you think that could ever, just appearance, could ever raise a due process issue?

MR. FREY: No, I don’t think just appearance could ever raise a due process issue.\(^60\)

Later in the argument, Justice Ginsburg suggested that the two phrases—appearance of bias and probability of bias—are synonymous.

MR. FREY: I don’t—I think, first of all, the Petitioner has not advanced on the merits in this case an appearance standard. A lot of the—

JUSTICE GINSBURG: Would you please clarify that? Because I was taking appearance, likelihood, probability as all synonyms . . . . \(^61\)

The questioning suggests that Justices Stevens and Ginsburg—two of the five Justices in the *Caperton* majority—believe that (a) the mere appearance of bias can rise to the level of a due process violation and (b) that “appearance of bias” and “probability of bias” are interchangeable terms. Perhaps as a consequence, some scholars and commentators read the majority opinion in *Caperton* to hold that the appearance of impartiality may violate the Due Process Clause.\(^62\)

---


\(^61\) Id. at 34-35.

Such a reading is incorrect. The majority opinion focuses not on appearances but rather on the probability that Justice Benjamin is actually biased.63 And probability of bias is not the same as appearance of bias, although many commentators—and even Justice Ginsburg—conflate the two. But the difference is crucial: An appearance-based standard focuses on the public’s perception of the fairness of the court, while a probability-based standard centers on a reasonable judge’s likelihood of actual bias. The subject of the former inquiry is a member of the public; the subject of the latter inquiry is the judge in question. These are two very different tests, and the relevant factors in determining whether the test is met may be wildly different.

Two reasons support the view that the Court’s majority opinion adopts the latter approach.64 First, the Court makes little mention of appearances throughout its opinion. Instead, it embraces the old constitutional test that focuses on “whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.’”65 In other words, the spotlight is directly on the judge, not on the observations of the public, which is consistent with a probability-based disqualification standard. The majority opinion only uses the word “appearance” in two contexts: First, when discussing Justice Benjamin’s own decision,66 and second, when explaining that most states have implemented an even more stringent, appearance-based standard for recusal.67 In fact, the Court explicitly stated that the states’ appearance-based codes “provide more protection than due process requires.”68

Second, the majority explained that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal . . . .”69 Rather, the Court held Caperton is “an exceptional case.”70 But as explained in greater detail below, there is nothing exceptional about this case from an appearance-of-bias perspective. Had the Court intended to adopt an appearance-based test for judicial recusal, Blankenship’s contributions to Justice

---

63. See, e.g., Caperton, 129 S. Ct. at 2265 (“On these extreme facts the probability of actual bias rises to an unconstitutional level.”).
66. Id. at 2258.
67. Id. at 2266 (“One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality,”) (emphasis added).
68. Id. at 2267.
69. Id. at 2263.
70. Id.
Benjamin would not be seen as extraordinary because even minor contributions can create an appearance of bias.\footnote{See infra note 73 and accompanying text.}

\section*{B. Why Caperton is Not an Easy Case}

After the Supreme Court issued its decision in \textit{Caperton}, various commentators expressed surprise that the Court was closely divided. Charles Geyh, an expert in judicial ethics who has written prolifically about judicial bias, and Stephen Gillers, a leading ethics scholar, both commented that the case was “easy.”\footnote{Marcia Coyle, \textit{Hot Recusal Case Debated: Justice Will Decide What Standard Due Process Requires}, \textit{Nat'l L. J.}, Mar. 2, 2009, available at http://www.law.com/jsplnlj/PubArticleNLJ.jsp?id=1202428674548 (on file with the McGeorge Law Review).} Presumably, this is because of the large sum of money contributed by the defendant’s CEO.\footnote{Caperton, 129 S. Ct. at 2257.} Also focusing on the size of the contribution, Lawrence Lessig wrote “if contributions were small . . . the fact that money was contributed to a judge’s campaign could not lead anyone reasonably to believe that the contribution would affect any particular result.”\footnote{Lawrence Lessig, Comment, \textit{What Everybody Knows and What Too Few Accept}, 12 \textit{Harv. L. Rev.} 104, 105-106 (2009).}

\begin{itemize}
  \item Indeed, \textit{Caperton} is an easy case if the Court is applying an appearance-based recusal standard.\footnote{Professor Gillers seems to think that is exactly what the Court did in Caperton. He explained that “[t]he appearance of justice is just as important as justice.” Coyle, \textit{supra} note 72.} Of course a large contribution or expenditure by one of the litigants to elect a judge creates an appearance of bias. But wouldn’t a “mini-\textit{Caperton}” also be an easy case? Wouldn’t a contribution of even a few hundred dollars to Justice Benjamin by Blankenship also create an appearance of bias? After all, research shows that even a small contribution—a contribution too small to play any role in the election’s outcome—may create an appearance of impropriety.\footnote{James \textit{L.} Gibson \& Gregory A. Caldeira, \textit{Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?}, 23-24, (Oct. 19, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723 (follow “One-Click Download” hyperlink) (on file with the \textit{McGeorge Law Review}). According to a 2009 Harris Interactive poll conducted for Justice at Stake, eighty-five percent of all voters believe judges should not hear cases in which a litigant spent $50,000 or more to help elect them. Justice at Stake Campaign, Financial Limit Survey, http://staging.justiceatstake.sitevizenterprise.com/media/cms/Justice_at_Stake_Campaign_Final_Tab_44B0AF6D36565.pdf (last visited Oct. 9 2010) (on file with the \textit{McGeorge Law Review}).} Even more surprising is a recent study showing that merely \textit{offering} a campaign contribution creates an appearance of bias and partiality.\footnote{The Talmud proscribes that “even a judge who had refused a trivial favor from a litigant might find himself leaning in [the litigant’s] favor.” John Leubsdorf, \textit{Theories of Judging and Judge Disqualification}, 62} In other words, relatively minor contributions—even those that are rejected—may produce an appearance of bias and lead some to question the judge’s impartiality.\footnote{Gibson \& Caldeira, \textit{supra} note 76, at 23-24.}
Were a judge required to recuse herself every time a campaign contribution created an appearance of bias towards a contributor to her campaign, a contributor against her campaign, or even somebody whose contribution the judge declined, judges would be unable to adjudicate the very cases that they were elected to decide. Furthermore, if recusal were necessary every time a contributor appeared in front of a judge, judicial elections would become a major obstacle to the operation of the justice system. States created—and people overwhelmingly support—judicial elections to hold judges accountable for their decisions, and to strengthen the separation of power between the legislative and judicial branches.\(^79\)

An elected judiciary assumes that there will be campaign supporters and contributors—many of whom will be the very parties who will appear in front of the judge they worked to elect (or defeat). For example, a recent study showed that nearly two-thirds of cases heard by the Pennsylvania Supreme Court in 2008 and 2009 involved at least one party, lawyer, or law firm that contributed to the campaign of at least one of the justices.\(^80\) Even if that number is an aberration, surely the people and groups with the most interest in judicial elections are those who are most likely to appear in front of the judges. Requiring judges to recuse in such circumstances would unduly burden the courts and create opportunities for campaign contributors to game the system by offering contributions to judges perceived as unfavorable to their side.\(^81\)

If \textit{Caperton} is not about appearances, but instead about the probability of actual bias, the case becomes much more difficult. What is the likelihood of actual bias when a litigant’s CEO spends his own money on a judge’s campaign? Would an offer of a campaign contribution, or a contribution too small to have made any difference in the outcome of the election, create an undue risk of bias?\(^82\) Whatever the answers to these questions, the recusal analysis is much more complicated when focus is shifted away from an appearance of bias and towards a probability of bias.\(^83\)


\(^81\) See \textit{Caperton} v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267-69 (2009) (Roberts, J., dissenting) (expressing this concern); \textit{see also} Tuan Samahon, \textit{Caperton and Judicial Disqualification in Nevada}, 17 NEVADA LAWYER 28 (Jan. 2010) (responding to the concern “that litigants and their counsel will ‘game the system’ to obtain a preferred adjudicator by ‘buying’ disqualifications, i.e. by donating to disfavored judicial candidates.”).

\(^82\) The Supreme Court suggested that these circumstances would not rise to the level of a due process violation when it explained that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.” \textit{Id.} at 2263.

\(^83\) Of course, even if the due-process disqualification standard is based on the probability of actual bias, most judges are still required to recuse based on the non-constitutional appearance-of-bias test contained in the
IV. JUDICIAL IMPARTIALITY AND DUE PROCESS: IS PROCEDURAL RECUSAL REFORM THE ANSWER?

Adopting a probability-based recusal standard rather than an appearance-based standard raises another important question: What procedures are appropriate for recusal? It is a question that is rarely asked—when it comes to recusal, procedure is often ignored. In fact, while substantive recusal standards have undergone significant transformation in the last few centuries as the public's view and understanding of the judiciary have changed, recusal procedures have remained stagnant. For example, neither 28 U.S.C. § 455 nor the judicial codes adopted by the states set out guidelines for what procedures should be followed in the event disqualification is sought. In Caperton, the Court had an opportunity to address the issue and prescribe certain procedures, but it declined to do so. It is time for a fresh approach, one where disqualification procedures under the Due Process Clause are tailored to the substantive recusal standards set forth by the Supreme Court in Caperton, so that they reflect the modern understanding of judicial bias and the judicial role.

There are three reasons why new procedures for disqualification are necessary under the Due Process Clause and Caperton's probability-of-bias recusal test. First, recusal procedures must be tailored to the substantive standard for judicial disqualification. Caperton's new substantive standard calls for a consideration of a new procedure at the very least, and it may even require it. Second, eliminating the role of appearances in the substantive disqualification standard under the Due Process Clause requires an increased emphasis on appearances in the disqualification procedures. Third, to give Caperton some teeth, states must address the corrosive effect of campaign contributions on judicial impartiality. The best way to do so, however, is not by eliminating judicial elections altogether, but by revising the disqualification procedures to limit the potential corrupting influence of money.

A. Tailoring Recusal Procedures to Caperton's Probability-Based Recusal Standard

Scholars commenting on judicial disqualification rarely ask whether existing disqualification procedures are appropriate for the substantive standard. As a result, while substantive recusal standards have gradually evolved in response to judicial controversies, recusal procedure has remained stagnant. One such federal disqualification statute and the Code of Judicial Conduct. See 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT, supra note 19.


85. Recent scholarship, however, has finally begun to pay attention to recusal procedures. See id. at 535 (calling for the incorporation of the core tenets of legal process theory into recusal law).
procedure dictates that the very judge who is being asked to disqualify himself makes the disqualification decision, often without any written decision and subject to minimal appellate review.\textsuperscript{86} Thus, one must ask whether the Supreme Court’s pronouncement of a probability-based substantive disqualification rule calls for a new, concordant procedure.

This Article posits that it does. For appearance-based recusal standards imposed by the federal disqualification statutes and the Code of Judicial Conduct, current recusal procedures (whereby a judge decides his own recusal motion) may be defensible, at least in theory. After all, in conducting the appearance-of-bias inquiry, the judge determines whether a member of the public would perceive the judge to be biased. Whatever the problems with an appearance-based recusal standard—it is imprecise,\textsuperscript{87} it allows parties to flippantly accuse a judge of misconduct,\textsuperscript{88} and it may lead to over-recusal\textsuperscript{89}—at the very least it is the type of inquiry that judges traditionally engage in and are generally very good at.\textsuperscript{90}

An appearance-driven recusal standard also presents a judge with the opportunity to avoid hearing the case without admitting any actual bias or impropriety. While this may be problematic in-itself,\textsuperscript{91} at least it makes recusal easier to stomach for some judges.

But for the probability-based recusal standard established in \textit{Caperton}—one that focuses on the likelihood that a judge is biased—self-recusal makes little sense. How can a biased judge, one that arguably owes one of the litigants a “debt of gratitude” for getting him elected, decide whether there is a probability of a bias in a given situation? Most people would agree that he cannot.\textsuperscript{92}

\begin{quote}


88. \textit{Id.}


90. In a tort case, for example, a judge may consider how a reasonable person would have acted in a certain situation. In a libel case, the judge determines whether plaintiff’s interpretation of the allegedly defamatory phrase is reasonable.

91. Arguably, allowing judges to make recusal decisions based on mere appearances—on the perceptions of the “average person”—is nothing more than a fig leaf—a shield behind which judges can hide in order to avoid acknowledging that judges are human and are subject to bias and prejudice. Of course, using an appearance-based recusal standard, judges can pretend that actual judicial bias is not a problem and that recusal is necessary only because the public perceives a problem, not because there actually is a problem.

92. Professor Geyh, in his response to this Article, suggests that mine is a distinction without a difference and that self-recusal is equally problematic regardless of the substantive standard. While I tend to believe, for the reasons already described, that the difference indeed matters, my proposal also has the benefit of allowing states to make a piecemeal procedural change, limited only to disqualification motions under the Due Process Clause. Charles Gardner Geyh, \textit{Judicial Selection, Judicial Disqualification, and the Role of Money in Judicial Campaigns}, 42 MCGEORGE L. REV. 85 (2010).
\end{quote}
same incentives that may lead a judge to favor one side on the merits may create an incentive for that same judge to find against recusal. Implementing procedural changes that address this problem will not only help foster fairness and impartiality in the judiciary, but it will also increase the public’s confidence in the appearance of justice.  

B. Keeping Appearances Relevant

The Supreme Court’s rejection of an appearance-based substantive recusal standard does not mean that appearances should play no role in our recusal jurisprudence under the Due Process Clause. In fact, appearances should continue to play a central role because of the importance of the appearance of impartiality to the judiciary. Take, for example, those nations where court rulings carry no weight and are routinely ignored. Judges, lacking both electoral legitimacy and political force, depend in large part on the public’s acceptance of their authority. For the sake of self-preservation and to maintain their own legitimacy, courts should protect their reputation from public outrage and rejection. As Justice Stevens has said, “[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.” Therefore, the public’s perception of the fairness and impartiality of the courts is relevant to any discussion of recusal. But questions remain as to precisely what role appearances should play. If appearance of bias is not the determining factor in judicial disqualification under the Due Process Clause, how should appearances be considered and who should consider them? This Article suggests that state legislatures, rather than


94. Some scholars have sought to eliminate the role that appearances play in recusal analysis. For example, Professor Sarah Cravens has argued that an appearance-based recusal standard results in too many unnecessary recusals. Cravens, supra note 89, at 2-3. In her view, recusal rules should not be about promoting public confidence but about the elimination of bias. Id. She proposes that so long as judges are able to adequately explain their rulings, appearance should not play a role in recusal. Id. Similarly, Professor Ronald Rotunda has argued that the appearance-based recusal standards are too imprecise and make it too easy for litigants to seek a judge’s recusal. Rotunda, supra note 87. He too argues in favor of abandoning an appearance-based recusal standard. Id.


98. Cf. Randall J. Litteneker, Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U. CHI. L. REV. 236, 267 (1978) (identifying the importance of “a judicial system that not only is impartial in fact, but also appears to render disinterested justice”).
challenged judges, should consider appearances in creating *ex ante* rules—procedural guidelines—that would control judicial disqualification. These disqualification procedures should be designed to foster not only judicial impartiality, but also the public’s confidence in the courts. In other words, in adopting new procedures for judicial disqualification, states must ensure that the procedures create an appearance of impartiality and fairness. Empirical research is necessary to determine precisely what those procedures may be, but there are at least two rules that states must adopt: (a) a rule requiring a different judge or an impartial panel to rule on a disqualification motion; and (b) a rule requiring publication of an opinion explaining the rationale for a disqualification decision. If appearances are going to play any role in our recusal jurisprudence under the Due Process Clause, that role should be in the recusal procedures adopted by the states to address future *Caperton* motions.

C. Making *Caperton* Matter

Finally, there is yet another reason why the Court’s adoption of a probability-based recusal standard under the Due Process Clause should lead to procedural reform. Because *Caperton* adopts a less stringent recusal standard than was already in place in most states (see Parts II & III), *Caperton* itself is largely irrelevant unless states voluntarily make procedural changes to their disqualification practices. Undoubtedly, after *Caperton*, states should not leave the recusal decision to the challenged judge, and a number of states have grappled with making such changes to their recusal rules. If states combine *Caperton*’s substantive probability-of-bias standard with a more aggressive procedural approach, the combination could increase in the public’s confidence in the courts.

On the other hand, states need not scrap or revise their current recusal rules altogether. The procedural changes proposed in this Article may only be necessary in the context of judicial elections, and only to address those problems, like those in *Caperton*, that are associated with the role of money in judicial campaigns. When it comes to judicial disqualification, lawyers and judges tend to think of bias as one monolithic category that should be addressed with a homogenous recusal standard. But there need not be one solution for all types of bias. and sometimes minor alterations with a scalpel will yield much better results than large-scale changes with a sledgehammer. When it comes to impartiality, election-related bias is very important and should be addressed by procedural changes, even if the same recusal procedures are retained in other, non-*Caperton* contexts. After all, empirical research suggests that judges who receive contributions from litigants may in fact be more likely to possess actual

---

99. For example, further studies are necessary to determine what effect requiring other judges or independent panels to make disqualification decisions has on public confidence and perception of impartiality.
bias, and that the public is truly concerned about the impartiality of elected judges. This may be a good reason to treat recusal in the election context differently than other types of recusal (as when a judge presides over a case involving a former colleague). Large-scale procedural changes for all recusal motions may be a superior solution, but this is a good place to start.

Procedural changes are most crucial in the context of judicial elections and due-process challenges of the kind seen in *Caperton*. Today, nearly eighty percent of Americans believe that elected judges are biased towards their contributors. As a result, there is a movement, headed in part by former Supreme Court Justice Sandra Day O’Connor, to eliminate state judicial elections altogether. Professor Meryl Chertoff’s article included in this Symposium echoes the calls for the end of judicial elections. But eliminating judicial elections is the wrong approach to alleviating this concern: Despite the perceived problems with judicial elections, the public still favors them and judicial elections remain extremely popular. Thus, rather than seeking to eliminate judicial elections, states should begin implementing reforms that will address the problem, starting with recusal reform. And that reform begins with changes in recusal procedures for challenges under the Due Process Clause.

V. CONCLUSION

It is important for persons to see that judicial recusal is a key component in the tug-of-war between judicial independence and judicial accountability. Although judicial bias and recusal have always been issues of considerable importance, recusal has recently taken on an even greater importance that demands immediate attention. As judicial elections become “noisier, nastier and

---


102. See id. (explaining that while eighty percent of the public favors judicial elections, a similar number of people believes that elected judges are influenced towards their campaign contributors).


105. Id.

106. Election reform is also important, although the Court’s decision in *Republican Party v. White* and *Citizens United v. FEC* may limit states’ options. Some states, including West Virginia, have recently started experimenting with public financing for judicial elections, although the constitutionality of such measures remains in question. See *The New Politics of Judicial Elections, 2000-2009: Decade of Change* 4 (2010), available at http://brennan.3cdn.net/d091dc91bd67f73b_09m6yypgw.pdf (on file with the McGeorge Law Review).
costlier,” recusal reform becomes more and more important. In fact, it may be one of the best ways to retain the judicial elections that the public overwhelmingly supports while addressing the impartiality concerns and the corrupting influence of money that are inevitable in an elected judiciary. But the time for recusal reform is now. Public confidence in the impartiality of the judiciary is diminishing, and people are rightly concerned about the impartiality of their courts. The public does not believe that elected judges can remain impartial when either a litigant or an attorney contributes significant amounts of money (perhaps even any money) to a judge’s election campaign. Even judges themselves are unsure that their colleagues can be impartial when deciding cases involving those who helped get them elected.

In light of the United States Supreme Court’s decisions in Republican Party of Minnesota v. White and Citizens United v. FEC, judicial elections look more and more like legislative elections. Thus, recusal reform may be the best way—or perhaps the only way—to deal with the appearance of partiality that can be created by large campaign contributions to a judge in the course of an election. It is time for a new generation of recusal reform—one that is focused on reforming stagnant disqualification procedures rather than substantive rules.

This Article proposed three procedural reforms that would respond directly to Caperton. First, states should tailor the recusal procedure to the substantive recusal standard. This means that a recusal procedure that worked for one substantive rule may not work for a different rule. Second, because the Supreme Court’s decision in Caperton limited the role of appearance in the substantive disqualification standard, states must put greater emphasis on the appearance of fairness in developing disqualification procedures that will satisfy the Due Process Clause. Finally, states should feel free to create different recusal procedures for different factual situations. In other words, rather than following a single procedure every time a litigant seeks disqualification of a judge, states may create more stringent recusal procedures specifically for circumstances raising due-process concerns, as in Caperton.