BRIEFS

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WHEN TO DISQUALIFY?

Supreme Court pushes states to develop – and use – clearer recusal procedures

THE U.S. SUPREME COURT'S 2009 DECISION IN *CAPERTON V. A.T. MASSEY COAL CO.*, 556 U.S. 868 (2009) WAS SUPPOSED TO BE A WAKE-UP CALL FOR STATE COURTS. The overturning of a decision of a state's highest court because a justice of that court should have disqualified himself should have prompted the states to take action reaffirming their commitment to judicial impartiality. (In *Caperton*, reversing a decision of the West Virginia Supreme Court of Appeals, the Court had held that, where campaign contributions from the principal of one of the parties "had a significant and disproportionate influence" on the election of one of the justices on the state court, the risk of actual bias was "sufficiently substantial" to require that justice's disqualification under the Due Process Clause of the U.S. Constitution.)

The Conference of Chief Justices, for example, adopted a resolution urging "its members to establish procedures that incorporate a transparent, timely, and independent review for determining a party's motion for judicial disqualification/recusal." *See Conference of Chief Justices Resolution 8* at http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Urging-Adoption-Procedures-Deciding-Judicial-Disqualification-Recusal-Motions.ashx.

States haven't taken the hint. Despite the U.S. Supreme Court's direction in *Caperton* that due process requires an objective analysis of impartiality given "the difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one," some judges and entire courts insist that as long as the judge subjectively feels impartial (like the justice

in *Caperton*), the judge can preside regardless of what others objectively may think. *See, e.g., Adams v. State of Wisconsin*, 822 N.W.2d 867 (Wisconsin 2012). In addition, only about 15 states have adopted standards that specifically address the issue of disqualification based on campaign contributions. *See Judicial Disqualification Based on Campaign Contributions* at http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx. And, with at most a couple of exceptions (one discussed below), states have not reformed their disqualification procedures or even reviewed them to consider possible improvements.

Thus, predictably, the U.S. Supreme Court had to step in again. In June, the Court held that the participation of a justice of the Pennsylvania Supreme Court in a decision denying post-conviction relief to a prisoner sentenced to death when that justice as the district attorney had approved seeking the death penalty violated due process. *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). The Court concluded that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." The majority emphasized:

> It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case.

The Court concluded that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."

Pennsylvania did and does have such a "stringent and detailed" rule; the state code of judicial conduct provides that a judge shall disqualify himself if he "served as a lawyer in the matter in controversy . . . ." and if he "served in governmental employment, and in such capacity participated personally and substantially as a lawyer . . . concerning the proceeding . . . ." However, when the prisoner filed a motion for the former-district-attorney-now-justice to recuse himself or refer the recusal motion to the full court, the justice denied the motion – "without explanation" as the U.S Supreme Court noted.

There are ways of preventing such appearances. For example, in Tennessee, rules require both trial and appellate judges (including supreme court justices) who are the subject of a motion to disqualify to promptly grant or deny the motion and explain a denial in writing. A trial court judge's denial can be appealed in an accelerated interlocutory appeal as of right or raised in an appeal following final judgment. If an appellate judge or justice denies a motion to disqualify himself, the movant has 15 days to file a motion for review "by the remaining justices upon a de novo standard of review." *Tennessee Supreme Court Rule 10B* (http://www.tsc.state.tn.us/rules/supreme-court/10b).

The federal courts cannot step in every time a state court judge or justice sits in a case in which she should not. Nor should they have to. Correctly interpreted, the standards of disqualification in the state codes of judicial conduct exceed due process minimums, and effectively implemented, those standards eliminate the need for federal intervention. State courts should be the primary protectors of state judicial impartiality and should demonstrate their willingness to fulfill that role by adoption of clear, effective, and comprehensive disqualification rules and procedures.

An expeditious, objective method of resolving issues of judicial disqualification promises to bring clarity and certainty for judges, litigants, attorneys, and the public. It would decisively dispel unwarranted claims of judicial bias and create caselaw on when disqualification is necessary and when a motion to disqualify is unjustified – while also demonstrating that the judiciary takes impartiality seriously both in a specific case and as a general principle.

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