



COURTS, CAMPAIGNS, AND CORRUPTION: JUDICIAL RECUSAL FIVE YEARS AFTER *CAPERTON*

The 2009 Supreme Court decision in *Caperton v. A. T. Massey Coal Co.* held that a litigant's due process rights can be violated when an elected judge refuses recusal in a case in which that judge received significant campaign support from a litigant. The majority emphasized that *Caperton* was an extreme case, urging states to adopt recusal rules more stringent than the minimum necessary to protect due process. The dissent warned that "the cure was worse than the disease," predicting a flood of recusal motions would swamp state courts following the decision.

The Symposium will look at the state of affairs five years after *Caperton*. We will examine the effects of *Caperton* in the courtroom, evaluate the current state of judicial recusal reform, and discuss the issue of judicial partiality and recusal beyond the context of campaign spending. The Symposium will consist of three panels focusing on different areas of the *Caperton* decision and issues of bias and recusal, and a lunch roundtable during which several judges will discuss judicial perspectives on those issues. The topics for the panels and the roundtable are described in greater detail below.

November 14, 2014
9:00 a.m. - 4:00 p.m.
Greenberg Lounge, Vanderbilt Hall
40 Washington Square South

SCHEDULE

- 8:30 a.m. – 9:00 a.m. **Registration** *Coffee/tea will be served*
- 9:00 a.m. – 9:15 a.m. **Opening Remarks**
- 9:15 a.m. – 10:30 a.m. ***Caperton* and the Courts: Did the Floodgates Open?**
- 10:30 a.m. – 10:45 a.m. **Break**
- 10:45 a.m. – 12:00 p.m. **The State of Recusal Reform**
- 12:00 p.m. – 12:30 p.m. **Lunch Break** *Sandwiches will be served*
- 12:30 p.m. – 2:00 p.m. **Judicial Lunch: A View from the Bench**
- 2:00 p.m. – 2:30 p.m. **Break**
- 2:30 p.m. – 3:45 p.m. ***Caperton's* Next Generation: Beyond the Bank**
- 3:45 p.m. – 4:00 p.m. **Closing Remarks From Dean Trevor Morrison**



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CAPERTON AND THE COURTS: DID THE FLOODGATES OPEN?

This panel will explore the effects of *Caperton* within the courtroom and why the dissent's fear of extreme and intense litigation over recusal did not come to pass. The panel will consider the importance of the "extreme facts" identified by the *Caperton* majority in efforts to use recusal as a tool to mitigate the continued rise in judicial campaign spending, and whether *Caperton*'s analysis of the probability of bias based on campaign support can be reconciled with *Citizens United*, *McCutcheon*, and other Supreme Court cases addressing campaign spending and corruption.

MODERATOR



ADAM LIPTAK has been the Supreme Court Correspondent for *The New York Times* since 2008. Mr. Liptak's series on ways in which the United States's legal system differs from those of other developed nations, "American Exception," was a finalist for the 2009 Pulitzer Prize in explanatory reporting. In 2006, he and two colleagues studied connections between contributions to the campaigns of justices on the Ohio Supreme Court and those justices' voting records. His work has also appeared in *The New Yorker*, *Vanity Fair*, *Rolling Stone*, *Business Week*, and *The American Lawyer*.

PANELISTS



JAMES SAMPLE is an Associate Professor at Hofstra School of Law and former Counsel for the Democracy Program at the Brennan Center for Justice. Professor Sample regularly comments on voting rights and constitutional issues in leading media outlets, including *The Wall Street Journal*, *The New York Law Journal*, *Slate.com* and *The Huffington Post*, as well as at national conferences. He has authored a number of articles focusing on judicial recusal since the *Caperton* decision in 2009.



BRAD SMITH is the Josiah H. Blackmore II/Shirley M. Nault Professor of Law at Capital University Law School. Professor Smith also holds the 2013-15 Judge John T. Copenhaver Visiting Endowed Chair of Law at the West Virginia University College of Law. A 2010 recipient of the Bradley Prize, Professor Smith is one of the nation's leading authorities on election law and campaign finance. In 2000, he was nominated by President Clinton to fill a Republican-designated seat on the Federal Election Commission, where he served for five years, including serving as Chairman of the Commission in 2004.



KEITH SWISHER is an Associate Dean and Associate Professor at Arizona Summit Law School (Phoenix School of Law). Professor Swisher teaches legal ethics and torts, and his practice includes appeals and ethics consulting. His scholarship is regularly published and cited in the areas of legal and judicial ethics and disqualification, and he founded the first blogs on judicial ethics and lawyer disqualification. He is a member of the State Bar's Ethics and Fee Arbitration Committees, the O'Connor Advisory Committee of the Quality Judges Initiative (IAALS/University of Denver), and a former member of the Editorial Board of ABA/BNA Lawyers' Manual on Professional Conduct.



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THE STATE OF RECUSAL REFORM

This panel will focus on the efforts at the state level and in the ABA to produce new standards for judicial recusal. After *Caperton*, the ABA has not reached consensus on an updated model rule addressing recusal standards and campaign support, while some states have taken the initiative to implement new recusal regimes. How successful have the efforts proven, and what are the prospects for additional recusal reform?

MODERATOR



CHARLES GEYH is the John F. Kimberling Professor of Law at Maurer School of Law, Indiana University at Bloomington. Professor Geyh has served the American Bar Association as director of and consultant to its Judicial Disqualification Project and as Reporter to four Commissions: the Joint Commission to Evaluate the Model Code of Judicial Conduct; the Commission on the 21st Century Judiciary; the Commission on the Public Financing of Judicial Campaigns; and the Commission on the Separation of Powers and Judicial Independence.

PANELISTS



ROBERT PECK is the President of the Center for Constitutional Litigation. Mr. Peck argues constitutional cases in the U.S. and state supreme courts. Mr. Peck also serves as a member of the adjunct law faculty at American University, where he teaches an advanced constitutional law seminar. He is chair of the Board of Overseers of the RAND Corporation's Institute for Civil Justice, secretary of the Board of Directors at Justice at Stake, and co-chair of the Lawyers Committee of the National Center for State Courts.



MYLES LYNK is the Peter Kiewit Foundation Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. Professor Lynk teaches civil procedure, legal ethics, and business organizations. He is a past President of the District of Columbia Bar; a past national Chair of the Fellows of the American Bar Foundation ("ABF"); and is the incoming chair of the American Bar Association's Standing Committee on Ethics and Professional Responsibility.



HON. TONI CLARKE is an Associate Judge for the Seventh Judicial Circuit, Circuit Court for Prince George's County, Maryland. Toni E. Clarke was appointed to the Seventh Judicial Circuit sitting in the Circuit Court for Prince George's County, Maryland on January 8, 1998. Judge Clarke presides over many types of cases including, but not limited to, Civil, Criminal, Family and Juvenile. She is also an Adjunct Professor for the Prince George's County Community College.



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JUDICIAL LUNCH: “A VIEW FROM THE BENCH”

Recusal rules vary widely between the states, which affects the experience of elected judges and perceptions of the judiciary across jurisdictions. This interactive lunch panel will feature judges with experience in a variety of recusal regimes. The panel’s focus will be judicial perspectives on the *Caperton* decision, its effects, and recusal reform.

MODERATOR



BARBARA S. GILLERS is an Adjunct Professor at New York University School of Law. Professor Gillers practices and teaches in the area of professional responsibility, legal ethics, and the law governing lawyers. She also directs the Legal Ethics Bureau, a student clinic. Professor Gillers is Vice-Chair of the New York State Bar Association's Committee on Standards of Attorney Conduct, past Chair of the New York City Bar Association’s Committee on Professional and Judicial Ethics, and a member of the ABA Standing Committee on Ethics and Professional Responsibility.

PANELISTS



HON. SUE BELL COBB is the former Chief Justice of the Alabama Supreme Court. Chief Justice Cobb was the first woman elected as Alabama's Chief Justice and had previously served from 1995 to 2007 as a judge on the Alabama Court of Criminal Appeals, the state court for criminal intermediate appeals. She was the only Democrat to serve on the Alabama Supreme Court during her tenure .



HON. MAUREEN O’CONNOR is the Chief Justice of the Ohio Supreme Court. Since she took office in 2011, Chief Justice O’Connor has led significant reforms and improvements in the Ohio judicial system, including establishing a task force to examine court funding statewide, creating a committee to examine the administration of the death penalty, and proposing improvements to strengthen judicial elections in Ohio.



HON. LOUIS BUTLER is a former Justice for the Wisconsin Supreme Court. Justice Butler was appointed to the Supreme Court by Governor Jim Doyle in August 2004; his term expired on July 31, 2008. He was the first African American to serve on the Wisconsin Supreme Court. He is currently a Partner at Gonzalez Saggio & Harlan LLP. Justice Butler is a permanent member of the faculty of the national Judicial College in Reno, Nevada.



HON. JONATHAN LIPPMAN is the Chief Judge of the New York State Court of Appeals. As New York's Chief Judge he has championed equal access to justice issues and taken an active leadership role in identifying permanent funding streams for civil legal services, strengthening the state's indigent criminal defense system, addressing the systemic causes of wrongful convictions, responding to the increased numbers of foreclosure cases entering the courts, reforming New York's juvenile justice system, and creating Human Trafficking Courts among many other areas.



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CAPERTON'S NEXT GENERATION: BEYOND THE BANK

Caperton drew attention to the issue of potential judicial bias and partiality. This panel will explore how we identify sources of bias and discuss the prevalence of motions for judicial recusal for reasons that cannot be reduced to the passing of money from hand to hand. Is it possible to identify sources of bias and craft meaningful and workable standards to mitigate them? May allegations of bias sometimes represent efforts to intimidate decision-makers?

MODERATOR



JED SHUGERMAN is an Associate Professor at Fordham University School of Law. Professor Shugerman, a leading legal historian, wrote *The People's Courts: Pursuing Judicial Independence in America* (Harvard U. Press, 2012) on the history of judicial elections from the 18th century through the 21st century, and won the Cromwell Prize from the American Society of Legal History. He has published in the Harvard Law Review, the Yale Law Journal, the Stanford Law Review, the Georgetown Law Journal, and peer-reviewed historical journals. He teaches torts, administrative law, constitutional law, and legal history.

PANELISTS



DEBRA LYN BASSETT is the Justice Marshall F. McComb Professor of Law at Southwestern Law School. Professor Bassett teaches in the areas of civil procedure, complex civil litigation, federal courts, and professional responsibility. She focuses her scholarship primarily on federal litigation and legal ethics, and her writings regularly employ insights from law and psychology.



GREGORY PARKS is an Assistant Professor of Law at Wake Forest University School of Law. Professor Parks' research focuses on both race and law issues as well as social science and law issues. While generally interested in the application of cognitive and social psychology to law, his work, to date, has specifically focused on what implicit attitudes and biases portend for the law. Professor Parks is currently working on a book on unconscious race bias and law.



DMITRY BAM is an Associate Professor at University of Maine Law School. Mr. Bam writes and teaches in the fields of constitutional law, professional responsibility, employment law, and the judiciary. He is recognized as a scholar and commentator on judicial ethics, judicial selection, and constitutional interpretation. He has written a number of pieces that focus on judicial recusal and judicial bias in the wake of the decision in *Caperton*.



REX PERSCHBACHER is the Daniel J. Dykstra Endowed Chair at UC Davis School of Law. Professor Perschbacher was Dean of the Law School from 1998 to 2008, and before that served as Associate Dean from 1993-1998. He has taught at UC Davis since 1981 with an emphasis on the areas of Civil Procedure, Professional Responsibility, and Clinical teaching.



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CLE MATERIALS

Panel 1: *Caperton* and the Courts: Did the Floodgates Open?

- James Sample – “Court Reform Enters the Post-*Caperton* Era”
- Michael Kang & Joanna Shepherd – “The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions”
- Pamela Karlan – “Electing Judges, Judging Elections and the Lessons of *Caperton*”
- Ronald D. Rotunda – “Judicial Disqualification in the Aftermath of *Caperton v. A.T. Massey Coal Co.*”

Panel 2: The State of Recusal Reform

- Stephen Hoerstring & Bradley Smith – “The *Caperton* Caper and the Kennedy Conundrum”
- James Sample – “Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality”
- Dmitry Bam – “Understanding *Caperton*: Judicial Disqualification Under the Due Process Clause”
- Keith Swisher – “Pro-Prosecution Judges: ‘Tough On Crime,’ Soft on Strategy, Ripe for Disqualification”

Judicial Lunch: A View From the Bench

- Eric Posner – “Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform”
- Steven Lubet – “Judicial Ethics and Private Lives”
- James Sample – “Supreme Court Recusal From *Marbury* to the Modern Day”
- Tobin Sparling – “Keeping Up Appearances: The Constitutionality of the *Model Code of Judicial Conduct*’s Prohibition of Extrajudicial Speech Creating the Appearance of Bias”
- Dmitry Bam – “Voter Ignorance and Judicial Elections”
- Penny White – “Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations”

Panel 3: *Caperton*’s Next Generation: Beyond the Bank

- Melinda A. Marbes – “Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform”
- Dmitry Bam – “Making Appearances Matter: Recusal and the Appearance of Bias”
- Debra Lyn Bassett & Rex Perschbacher - “The Elusive Goal of Impartiality” Debra Lyn Bassett & Rex R. Perschbacher – “Perceptions of Justice: An International Perspective on Judge and Appearances”
- Chris Guthrie, Jeffrey Rachlinski, & Andrew Wistrich – “Judging by Heuristic: Cognitive Illusions In Judicial Decision Making”
- Stephen Choi & G. Mitu Gulati – “Bias in Judicial Citations: A Window Into the Behavior of Judges?”