AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Criminal Justice/Due Process and Habeas Corpus

**Williams v. Pennsylvania, \_\_ U.S. \_\_** (2016)

*Terrance Williams was charged with the murder of Amos Norwood. The local prosecutor, Andrea Foulkes, requested and received permission to seek the death penalty from District Attorney Ronald Castille. Williams was subsequently tried and sentenced to death in 1986. In 2012, Williams filed a habeas corpus petition claiming that Foulkes violated* Brady v. Maryland *(1963) by withholding evidence that his alleged accomplice, Marc Draper, committed perjury at Williams’s trial. A local court ordered a new sentencing hearing and Pennsylvania appealed to the Pennsylvania Supreme Court. Williams then filed a motion asking now-Chief Justice Castille to recuse himself on the ground that he had participated in the original prosecution. Castille refused to recuse himself and the Pennsylvania Supreme Court unanimously reinstated Williams’s death sentence. Williams appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-3 vote vacated the decision of the Pennsylvania Supreme Court. Justice Anthony Kennedy’s majority opinion claimed that due process required judges to recuse themselves whenever they previously had significant involvement in a case before the Court. Why does Justice Kennedy think any significant involvement is sufficient to constitutionally disqualify a judge? Under what conditions does Chief Justice John Roberts believe due process requires recusal? What standard would Justice Clarence Thomas apply? Who has the better of the argument? How far should the rule in* Williams *be applied? Should a judge who formerly worked to abolish capital punishment recuse themselves from deciding cases involving the death penalty?* Williams *was handed down thirty years after Williams was sentenced to death for a crime he committed when eighteen years old? Should Pennsylvania had bothered pursuing this appeal?*

Justice [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I854bc5e32e4711e690d4edf60ce7d742&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The Court now holds 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.

Due process guarantees “an absence of actual bias” on the part of a judge.  Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, “the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’ ” . Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. . . .

The due process guarantee that “no man can be a judge in his own case” would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. . . . No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge “would be so psychologically wedded” to his or her previous position as a prosecutor that the judge “would consciously or unconsciously avoid the appearance of having erred or changed position.”  In addition, the judge's “own personal knowledge and impression” of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court.

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. . . . Within a large, impersonal system, an individual prosecutor might still have an influence that . . . is nevertheless significant. A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

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. . . . [T]here can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

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Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he “sent 45 people to death rows” as district attorney. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional *Brady* violations during Williams's prosecution. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

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Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the case “must be forbidden if the guarantee of due process is to be adequately implemented.”

. . . . The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. . . . These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party.

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The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

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Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I854bc5e32e4711e690d4edf60ce7d742&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I854bc5e32e4711e690d4edf60ce7d742&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere “in the very idea of free government” and are “the inalienable right of a citizen of such a government.”  In ensuring that right, “it is normally within the power of the State to regulate procedures under which its laws are carried out,” unless a procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

It is clear that a judge with “a direct, personal, substantial, pecuniary interest” in a case may not preside over that case.  We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted “an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification

Prior to this Court's decision in *Caperton v. A.T. Massey Coal Co.* (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton*, however, the Court adopted a new standard that requires recusal “when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. The Court framed the inquiry as “whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”

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This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that “the information on which he relies could not have been obtained earlier with the exercise of due diligence.” Even if Williams were to overcome the timeliness bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. . . .

. . . . Chief Justice Castille had not made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition. How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence. . . . [A]s a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams's fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an “objective risk of actual bias,” that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I854bc5e32e4711e690d4edf60ce7d742&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), dissenting.

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There has been . . . no “single case” in which Castille acted as both prosecutor and adjudicator. Castille was still serving in the district attorney's office when Williams' criminal proceedings ended and his sentence of death became final. Williams' filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding “is not part of the criminal proceeding itself” but “is in fact considered to be civil in nature,” and brings with it fewer procedural protections.

Williams' case therefore presents a much different question from that posited by the majority. It is more accurately characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner's criminal case was pending. For the reasons that follow, that different question merits a different answer.

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At common law, a fair tribunal meant that “no man shall be a judge in his own case.” That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. . . . But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of judges “cannot be challenged,” according to Blackstone, “[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”

The early American conception of judicial disqualification was in keeping with the “clear and simple” common-law rule—“a judge was disqualified for direct pecuniary interest and for nothing else.” Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legislatures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the same case. . . .

This limitation—that the same person must act as counsel and adjudicator in the same case—makes good sense. At least one of the State's highest courts feared that any broader rule would wreak havoc: “If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges.”  Indeed, any broader rule would be at odds with this Court's historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. The examples are legion; chief among them is *Marbury v. Madison* (1803), in which then-Secretary of State John Marshall sealed but failed to deliver William Marbury's commission and then, as newly appointed Chief Justice, Marshall decided whether mandamus was an available remedy to require James Madison to finish the job.

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. . . . Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as “counsel” in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief. As discussed above, this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding.

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The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution.  And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he “served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding” in its Code of Judicial Conduct. Officials in Pennsylvania are fully capable of deciding when their judges have “participated personally and substantially” in a manner that would require disqualification without this Court's intervention. Due process requires no more, especially in state postconviction review where the States “ha[ve] more flexibility in deciding what procedures are needed.”