CAPERTON ON THE INTERNATIONAL STAGE

*Rex R. Perschbacher**

INTRODUCTION 699
I. SIMILAR RECUSAL STANDARD 699
II. SIMILAR DECISION-MAKER 701
III. SIMILAR APPROACH BY THE DECISION-MAKER WHEN EMPLOYING THE RECUSAL STANDARD 702
CONCLUSION 706

INTRODUCTION

In my remarks as a panelist at "Courts, Campaigns, and Corruption: Judicial Recusal Five Years After *Caperton*," I presented an international perspective on judicial recusal, a process by which a judge abstains from adjudicating due to a conflict of interest. This is an opportunity to offer expanded remarks on that same theme. In particular, I would like to focus on the surprising similarities between the approach to judicial recusal in the United States and the approach taken in other countries.[1]

Internationally, problematic concerns in judicial recusal play out in the same manner as those issues do here in the United States. In this brief Article, I will focus on three central points of comparison: (1) similar recusal standard, (2) similar decision-maker, and (3) similar approach by the decision-maker when employing the recusal standard.

I.
SIMILAR RECUSAL STANDARD

Throughout the world, judicial recusal standards appear to be reasonably similar,[2] with the common ultimate aim of achieving the judi-

* Professor of Law, Daniel J. Dykstra Endowed Chair, U.C. Davis School of Law.

1. My remarks here and at the *Caperton* symposium draw largely from an article that I published with my co-author Debra Lyn Bassett. *See* Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 FORDHAM INT'L L.J. 136 (2013).

2. *See* R. Matthew Pearson, Note, *Duck, Duck, Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV.

cial impartiality[3] that is crucial to maintaining public confidence in the judiciary.[4] As Professor Moore put it recently, "Avoiding not only impropriety, but also the appearance of impropriety, is important for judges because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public's willingness to accept judicial decision-making and submit to the rule of law."[5] Generally speaking, judicial recusal standards require a judge to disqualify him or herself from participating in a case when the judge is unable to decide the matter impartially[6] or when the judge's continued participa-

---

1799, 1827 (2005) ("[R]ecusal policy . . . has developed similarly in many countries . . . [and] it is clear that certain common principles are found in the way most modern common law systems address disqualification of judges.").

3. *See* Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias?: An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizens United, *Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 883 (2010) ("Although the issues might differ across countries, the objectives are similar, including decision-makers who are competent, efficient, and neutral . . . ."); *see also* Pearson, *supra* note 2, at 1814 ("The expectation of judicial impartiality is a hallmark of most modern legal systems. In fact, resolution of disputes by an unbiased tribunal has been characterized as a fundamental human right.").

4. *See* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."); JEFFREY M. SHARMAN, INTER-AM. DEV. BANK, JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY 8–9 (1996), http://www.iadb.org/wmsfiles/products/publications/documents/991625.pdf ("Hence, judges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system."); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610–11 (2002) ("That judicial decision-making must *appear* to be free of bias is premised on the widely held belief that public confidence is essential to upholding the legitimacy of the judiciary. . . . [T]he judiciary—especially the appointed judiciary—derives its authority and legitimacy from the willingness of the people and sister branches of government to accept and submit to its decisions. Because public confidence is so essential to maintaining the integrity of the bench, even the appearance of bias, parochialism, or favoritism can threaten the judicial function."); Theodor Meron, *Judicial Independence and Impartiality in the International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 369 (2005) ("[J]udicial independence . . . depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.").

5. Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 291 (2010).

6. *See, e.g.*, Greene, *supra* note 3, at 883–84 ("International and domestic principles of the rule of law, including the internationally respected model The Bangalore Principles of Judicial Conduct, require that judges be impartial. To the same effect are the United Nations Principles on the Independence of the Judiciary, noting that judges shall decide 'impartially . . . without any improper influences, inducements . . . for any

tion might create the appearance of impropriety.[7] Thus, as the Bangalore Principles of Judicial Conduct require, regardless of nationality, a nation's judiciary is measured in terms of its fairness and impartiality—both actual impartiality and *perceived* impartiality.[8] Judges must avoid both actual partiality and the appearance of partiality because the appearance of a judge who lacks impartiality diminishes public confidence in the judiciary and degrades the justice system.[9]

II.
SIMILAR DECISION-MAKER

The second similarity is that judicial recusal motions typically are reviewed by the challenged judge rather than by an objective or otherwise impartial observer.[10] This approach, of course, not only carries the awkward consequence of essentially requiring the litigant to ac-

---

reason.' " (footnotes omitted)). The Bangalore Principles of Judicial Conduct were the result of the Judicial Integrity Group—formerly known as the Judicial Group on Strengthening Judicial Integrity—which consisted of chief justices from eight countries formed under the auspices of the United Nations' Global Programme Against Corruption. *See* JUDICIAL INTEGRITY GRP., HISTORY OF THE GROUP 2000–2011 (2011), http://www.judicialintegritygroup.org/images/resources/documents/JIG%202000-2011.pdf; *see also* JUDICIAL GRP. ON STRENGTHENING JUDICIAL INTEGRITY, THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT para. 2.1 (2002) [hereinafter BANGALORE PRINCIPLES] ("A judge shall perform his or her judicial duties without favour, bias or prejudice."), *reprinted in* Dato' Param Cumaraswamy (Special Rapporteur on the Independence of Judges and Lawyers), *Civil and Political Rights, Including Questions of Independence of the Judiciary, Administration of Justice, Impunity*, U.N. Doc. E/CN.4/2003/65, annex (Jan. 10, 2003), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/101/53/PDF/G0310153.pdf.

7. *See, e.g.*, BANGALORE PRINCIPLES, *supra* note 6, at para. 2.5; *see also* Manak Lal v. Dr. Prem Chand, (1957) SCR 575, 580–84 (India) ("[T]he test always is and must be whether a, litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. . . . Actual proof of prejudice in such cases may make the appellant's case stronger but such proof is not necessary in order that the appellant should effectively raise the argument that the, tribunal was not properly constituted.").

8. *See* Greene, *supra* note 3, at 883 ("Although the issues might differ across countries, the objectives are similar, including decision-makers who are . . . neutral, neither biased nor appearing to a reasonable observer to be biased . . . .").

9. *See* SHARMAN, *supra* note 4, at 8–9.

10. *See* United States v. Morris, 988 F.2d 1335, 1337 (4th Cir. 1993) (noting that it is the challenged judge who rules on a disqualification motion); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 536 (2005) (noting that the recusal decision "is almost always made in the first instance by the very judge being asked to disqualify himself"); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 242 (1987) (noting the "bizarre rule" requiring "the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias"); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 633 (1987) (noting that "the recusal motion is ruled upon by the district judge whose

cuse the assigned judge of bias,[11] but also results in the subject of the disqualification motion violating the long-standing maxim against judging one's own case.[12] This unfortunate procedure not only is the predominant process for handling judicial recusal requests in the United States, but also is the practice in such countries as Canada, the United Kingdom, Australia, and South Africa.[13] Moreover, appellate review of a judicial recusal ruling is both often long delayed—the denial of a disqualification motion is not a final judgment, and thus immediate appellate review typically is not available[14]—and the review that *is* available is subject to the highly deferential abuse of discretion standard.[15]

III.
SIMILAR APPROACH BY THE DECISION-MAKER WHEN EMPLOYING THE RECUSAL STANDARD

Worldwide, despite the reference in judicial recusal standards to the necessity of recusal *both* when the judge is actually unable to decide the matter impartially *and* when the judge's continued participation might create the *appearance* of impropriety, courts fail to give sufficient weight to the appearance of bias. Judges often focus on their

---

ability to decide fairly is the very subject of the motion"); *see also* Pearson, *supra* note 2, at 1815, 1820, 1824, 1827.

11. *See Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 82 (1973) (statement of Sen. Birch Bayh) ("Surely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias.").

12. *See In re* Murchison, 349 U.S. 133, 136 (1955) (stating that "no man can be a judge in his own case"); *see also* THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & CONTEMP. PROBS. 43, 45 (1970) (citing 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *141a for the axiom that "[n]o man shall be judge in his own case").

13. *See* Pearson, *supra* note 2, at 1815, 1820, 1824, 1827 (reporting that in the United States, England, Canada, Australia, and South Africa, the challenged judge rules on the disqualification motion).

14. *See* Stempel, *supra* note 10, at 634 ("The denial of a disqualification motion is never a final order subjecting the case to immediate appeal since the case remains to be decided on the merits. Ordinarily, then, the unsuccessful recusal movant must wait until the conclusion of trial court proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits.").

15. *See, e.g.*, Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982) (stating that in an appeal of a ruling on a recusal motion under 28 U.S.C. §§ 144 or 455, "we ask only whether [the district judge] has abused [his or her] discretion").

subjective beliefs in their own impartiality rather than examining how the situation may appear to others, despite the fact that the latter consideration is critical under the recusal standard.[16] Moreover, even when judges claim to be employing an "objective" rather than "subjective" approach, the result is nevertheless to undermine the "appearance of impropriety" standard.[17] Some examples from specific countries may help to illustrate the problem.

In Canada, for example, the standard for judicial recusal requires an "apprehension of bias [that] must be a reasonable one held by reasonable and right-minded persons."[18] The Canadian judiciary has added "informed" to this standard, such that the reasonable person must be "an informed and right-minded member of the community"[19] who approaches the question of bias with a "complex and contextualized understanding of the issues of the case."[20] Note that this elaborated standard requires thorough knowledge of the facts and circumstances of a case—a prerequisite that fails to take into account any "appearances" of impropriety. Similarly, with regard to the "appearance of impropriety" standard, the United Kingdom requires an objective assessment based upon a person who "adopts a balanced approach" to the issue of bias.[21] And the courts in India likewise adopt a test requiring a "real likelihood of bias" standard, "considering whether a fair

16. This problem featured prominently in the lower court's *Caperton* decision. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 285 (W. Va. 2008) (Benjamin, J., concurring) ("If the touchstone of a judicial system's fairness is *actual* justice, which I believe it is, its legitimacy is measured in actualities, not in the manipulation of appearances . . . ."); *see also id.* at 286 n.2 ("The notion of . . . 'appearance-driven' justice in West Virginia conveys the message that appearances and rhetoric—particularly when contrived—mean more than actualities . . . ."); *id.* at 292–93 ("[N]either the Dissenting opinion nor the Appellees herein point to any actual conduct or activity on my part which could be termed 'improper.' Rather both the Dissenting opinion and the Appellees focus on appearances . . . ."); *id.* at 293 ("The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of law, is antithetical to due process."); *id.* at 293–94 ("The fundamental question raised by the Appellees and the Dissenting opinion herein is whether, in a free society, we should value 'apparent or political justice' more than 'actual justice.'").

17. *See supra* note 5 and accompanying text.

18. Comm. for Justice & Liberty v. Nat'l Energy Bd., [1978] 1 S.C.R. 369, 394 (Can.) (de Grandpre, J., dissenting). This test initially appeared in a dissenting opinion but is now the accepted test. *See* R.D.S. v. The Queen, [1997] 3 S.C.R. 484, 531 (Can.) (Cory & Iacobucci, JJ., concurring).

19. *See* R.D.S., 3 S.C.R. at 507–08 (Can.) (L'Heureux-Dube & McLachlin, JJ., concurring).

20. *Id.* at 509.

21. *See* Lawal v. N. Spirit Ltd. [2003] UKHL 35, [2004] 1 All ER 187, 193 (appeal taken from Eng.).

minded and informed person, apprised of all the facts, would have a serious apprehension of bias."[22]

Australia is a bit different by virtue of its willingness in determinations of judicial recusal to recognize the importance of public perception.[23] However, Australia nevertheless still requires greater emphasis on the perception of a hypothetical reasonable person, rather than focusing on the apprehension of bias as perceived by the parties.[24] It should be obvious that the parties, focused on their own cases and measuring bias from their own perspectives, are more likely to believe bias exists, in contrast to the perspective of a so-called reasonable person seen through the eyes of the judiciary.

South Africa initially appears different from the nations previously discussed due to its adoption of a "reasonable suspicion" test.[25] However, despite the initial appeal of this standard, its emphasis on the presumption of judicial impartiality,[26] combined with its insistence that the relevant viewpoint is that of a "reasonable, objective and informed person" who possesses the "correct facts," undermines its usefulness in cases involving appearances of bias.

In the United States, although the American Bar Association's Model Code of Judicial Conduct[27] and federal and state regulations[28]

22. Dinakaran v. Honorable Judges Inquiry Comm'n, (2011) 8 SCC 380 (India).

23. *See Livesey v NSW Bar Ass'n* (1983) 151 CLR 288, 293–94 (Austl.).

24. *See Webb v The Queen* (1994) 181 CLR 41, 50–51 (Austl.). *See generally* ENID CAMPBELL & H.P. LEE, THE AUSTRALIAN JUDICIARY 153–71 (2001) (discussing Australia's "reasonable apprehension of bias" recusal standard).

25. *See President of the Republic of S. Afr. v. S. Afr. Rugby Football Union* 1999 (7) BCLR 725 (CC) at para. 36 (S. Afr.).

26. *See id.* at paras. 40, 48.

27. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2011), http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS'N 2011), http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/ruke1_2promotingconfidenceinthejudiciary.html ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *see also* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1920–36 (2010) (tracing the development of the "appearance of impropriety" standard in the United States).

28. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 2, 3 (2014), http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges; Marie McManus Degnan, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225, 227 (2010) ("All fifty states have adopted the American Bar Association's Model Code of Judicial Conduct . . . in substantial part.").

instruct judges to preserve the appearance of impartiality, the "appearances" portion of the professional ethics codes is often simply disregarded. "[T]he implicit governing notion" with respect to judicial recusal appears to be that "the judge will only recuse if she is convinced that nearly every sane person would hold a reasonable question regarding the judge's impartiality."[29]

As I have said elsewhere:

> Appearances—the way things seem to be—include a perception component . . . . Requiring disqualification when the judge's impartiality "might reasonably be questioned" similarly imports public opinion through its use of a reasonableness standard. If, in applying the appearance of impropriety standard, the judge disregards public perception, the standard is thereby impermissibly converted to one requiring actual bias . . . .[30]

A Seventh Circuit decision has adopted this view and explained it as follows:

> Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard . . . into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.[31]

It is fascinating that countries independently have adopted such similar judicial recusal standards, and it is equally fascinating (although dispiriting) that judiciaries really only appear comfortable with recusal in situations involving actual, demonstrable, obvious bias, to the potential exclusion of situations involving the "mere" appearance of bias. This tendency to resist recusal based on appearances or perceptions suggests the need for courts worldwide to acknowledge that their attempts to assess their own biases have been unsuccessful. Re-

---

29. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 739 (2011); *see also id.* at 737–38 ("[A] broader concept of what constitutes a 'reasonable question as to impartiality' is one that does not implicitly seek an unattainable consensus but instead recognizes that the health of the judicial system is threatened whenever a substantial portion of the public harbors significant, nonfrivolous concern over the neutrality of a judge who insists on continuing to preside over a matter.").

30. Bassett & Perschbacher, *supra* note 1, at 159.

31. *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990).

quiring "actual bias" or considering only the perceptions of those who are "fully informed" is insufficient to ensure genuinely unbiased adjudications, inconsistent with the recusal standard, and therefore unacceptable.

CONCLUSION

Concerns regarding judicial recusal are remarkably similar across common-law countries. Specifically, the use of the challenged judge as the sole decision-maker, and the insistence on focusing only on objective measures of impartiality, to the exclusion of public perceptions of impartiality, undermine the effectiveness of judicial recusal practices and procedures worldwide.

The underlying purpose of judicial recusal is to instill public confidence in the judiciary. Professor Bassett perhaps said it best when she said, "[P]ublic confidence in the judiciary does not result from the *judiciary's* perception of impartiality; it results from the *public's* perception of impartiality. Thus, a judge's belief that she is not biased is of little consequence to a [judicial] recusal determination."[32] When judges rule on recusal motions based upon their personal, non-public knowledge of the underlying circumstances, or upon their personal beliefs in their own impartiality, the recusal standard becomes subjective, and does little—if anything—to further public confidence. Acknowledging and honoring the necessity of recusal in situations involving the appearance of bias is a crucial step toward furthering public confidence in a truly fair judiciary.

32. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1245–46 (2002) (emphasis added).