

Opinion analysis: Another step toward constitutionalizing recusal obligations

Richard M. Re

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In *Williams v. Pennsylvania*, the Court ordered the Supreme Court of Pennsylvania to reconsider Terrance Williams's allegations of prosecutorial misconduct. In doing so, the Court created a new, albeit narrow, constitutional recusal rule: a judge who has had "significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case" must recuse. In this case, that meant that Chief Justice Ronald Castille of the Pennsylvania Supreme Court had to recuse from Williams's post-conviction appeal, since Castille had previously approved the decision to seek the death penalty against Williams.

It's hard to know what to make of this decision. On the one hand, the Court offered some relief for a plausible instance of judicial bias. On the other hand, the Court's rule and remedy both seem artificially narrow, particularly given the Court's own logic. So while immediate effects of the Court's decision are small, the Court's decision might eventually come to be seen as an important step in the creation of a new constitutional law of recusal.

I

The Court's key holding is this: "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." Notably, this rule operates at the level of a "case." The prosecutor might have been involved in deciding only one aspect of the case, but if that involvement was "significant" and "personal," then the prosecutor is prohibited from later hearing any aspect of that case as a judge. The prohibition appears to be absolute. In this case, for instance, the Court was unimpressed that "almost thirty years" had passed between Castille's prosecutorial and judicial decisions.

The Court offered a few insightful comments on the nature of judicial bias, observing for instance that "[b]ias is easy to attribute to others and difficult to discern in oneself." The Court was also careful not to accuse Castille of actually harboring impermissible bias. Instead, the Court emphasized that the relevant inquiry is "objective." In other words, the Court asks "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.'" The Court also distinguished several types of psychological effects. A judge who has previously acted as accuser might not be able to "set aside any personal interest in the outcome." Or the judge might be "psychologically wedded" to her prior position, or want to maintain an appearance of consistency over time. Finally, the judge's personal knowledge about the case might have an outsized effect, apart from the strengths and weaknesses in parties' arguments.

The Court had little trouble finding that Castille's behavior should have triggered recusal. "No attorney is more integral to the accusatory process," the Court explained, "than a prosecutor who participates in a major adversary

decision.” The Court also noted that Williams’s accusations of prosecutorial misconduct – endorsed in a post-conviction proceeding below – in effect represented “a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.” The Court pointed out that its rule found support in many local, non-constitutional recusal rules. So, as the Court put it, “the fact that most jurisdictions have these rules in place suggests that today’s decision will not occasion a significant change in recusal practice.”

That left the question of remedy. Rejecting a harmless-error analysis, the Court emphasized the importance of preserving the confidentiality of judicial deliberations, which allows for collaborative work and a free exchange of ideas. Pennsylvania argued that Williams shouldn’t receive any remedy because Castille was just one judge on a multi-member court. But the Court accordingly held that “an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.”

The Court further acknowledged the possibility that a remand to the Pennsylvania Supreme Court might be an incomplete remedy, because members of that Court have already deliberated with Castille and, moreover, have already denied Williams’s claim. But the Court felt that something was better than nothing: “An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether.” The Court thus seemed to acknowledge that it was willing to tolerate some risk that the unconstitutional bias would remain.

II

Chief Justice John Roberts wrote a brisk dissent (joined by Justice Samuel Alito) arguing that “[t]he majority opinion rests on proverb rather than precedent.” The proverb was the ancient notion that no one should be both accuser and judge in the same case. After disputing the relevant precedents, the Chief Justice argued that even the proverb didn’t really support the Court. The reason: Castille’s involvement in Williams’s case was limited to the decision to seek the death penalty – and so did *not* include review of Williams’s allegations of prosecutorial misconduct. Because the misconduct allegations were new to Castille, he could review them neutrally. This argument may sound odd, since Castille surely had more than a random bystander’s interest in defending the integrity of the very office that he had personally supervised. But note that even the majority didn’t argue that Castille had to recuse from *any* case previously handled by his office. Instead, the majority held only that Castille had to recuse from any case in which he “had significant, personal involvement.”

Finally, Justice Clarence Thomas filed a solo dissent that distinguished between Williams’s criminal case and his post-conviction proceedings. In Thomas’s view, Castille had worked in the criminal case as a prosecutor, but that case was separate from Williams’s subsequent request for post-conviction relief. Thomas also noted that a “broader rule” would be at odds with the Supreme Court’s own practices. As an example, Thomas noted that, in *Marbury v. Madison*, “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.”

III

So the Court has elevated a widespread state recusal rule to constitutional status. The immediate effects will be small, both because the substance of the rule is already widespread and because it will often be hard to prove that a judge previously had “significant, personal involvement” as a prosecutor. And the Court ordered only a new appellate hearing in the Pennsylvania Supreme Court, which – because it has already rejected Williams’s claims – could well turn out to yield no practical relief at all. So although the Court’s decision is bound to increase the frequency of judicial recusals and, even more, the frequency of recusal motions, few claimants are likely to be directly affected.

But if the Court’s rule is narrow, its logic is broad. While the Court’s holding is limited to cases in which Castille personally participated, the Court’s reasoning trades on the fact that Castille had a special interest in defending the office that he ran. And the Court’s remedies analysis emphasizes that one rotten apple on an appellate panel necessarily spoils the whole barrel. So today’s decision might do more than increase the frequency of recusals and recusal motions. In time, it might – or might not – come to be seen as an important step toward constitutionalizing recusal law.