

C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	THEODORE B. OLSON, ESQ.
4	On behalf of the Petitioners
5	ANDREW L. FREY, ESQ.
6	On behalf of the Respondents
7	REBUTTAL ARGUMENT OF
8	THEODORE B. OLSON, ESQ.
9	On behalf of the Petitioners
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-22, Caperton v. Massey Coal Company.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS

MR. OLSON: Thank you, Mr. Chief Justice, and may it please the Court:

A fair trial in a fair tribunal is a fundamental constitutional right. That means not only the absence of actual bias, but a guarantee against even the probability of an unfair tribunal. In short --

JUSTICE SCALIA: Who says? Have we ever held that?

MR. OLSON: You have said that in the Murchison case and in a number of cases, Your Honor.

JUSTICE SCALIA: A guarantee against even --

MR. OLSON: Yes, the language of the Murchison case specifically says so. The Court said in that case: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases, but our system of law has always endeavored to

1 prevent even the probability of unfairness."

2 And in that paragraph, the Court goes on --

3 JUSTICE SCALIA: "Has always endeavored."

4 MR. OLSON: Pardon?

5 JUSTICE SCALIA: "Has always endeavored."

6 "Has always endeavored."

7 MR. OLSON: Yes, but that's --

8 JUSTICE SCALIA: And there are rules in the
9 States that do endeavor to do that.

10 MR. OLSON: But the Court has said that
11 frequently, not only the probability of bias, the
12 appearance of bias, the likelihood of bias, the inherent
13 suspicion of bias. The Court has repeatedly said that
14 in the context -- a series of contexts or cases.

15 CHIEF JUSTICE ROBERTS: "Probability" is a
16 loose term. What -- what percentage is probable --

17 MR. OLSON: Well --

18 CHIEF JUSTICE ROBERTS: If you've a 50
19 percent chance of bias, a 10 percent chance? Probable
20 means more than 50?

21 MR. OLSON: It's probable cause, Mr. Chief
22 Justice. The Court frequently decides questions
23 involving due process, equal protection, probable cause,
24 speedy trial, on the basis not of mathematical
25 certainty, but in this case where an objective observer

1 would come to the conclusion -- knowing all of the
2 facts, would come to the conclusion that a judge or
3 jurist would probably be biased against that individual
4 or in favor of his opponent, that would be sufficient
5 under the Due Process Clause, we submit. The Court --

6 JUSTICE GINSBURG: Does it mean the same
7 thing as likelihood of bias?

8 MR. OLSON: The Court -- the Court, Justice
9 Ginsburg, has used the changes interchangeably. We
10 think the probably -- the "probable" standard is the one
11 we would advance to this Court. But the -- but the
12 seminal case, the Tumey case, said that even if there
13 was a possibility -- any procedure where there would be
14 a possible temptation for the judge not to hold the
15 balance nice, clear, and true, would be the standard.
16 But -- and the Aetna -- in the Aetna v. Lavoie case not
17 very many years ago, the Court repeated that standard,
18 and that standard has been repeated again and again.
19 The likelihood or the possibility or even the temptation
20 --

21 JUSTICE SCALIA: And you claim that there is
22 such a temptation here because of gratitude?

23 MR. OLSON: Well --

24 JUSTICE SCALIA: You've been around
25 Washington a long time. How far do you think gratitude

1 goes in -- in the general political world?

2 MR. OLSON: Well, let me put it this way,
3 Justice Scalia. If -- an ordinary person would say that
4 it would be very difficult for a judge to hold the
5 balance nice, square, and true when that judge has just
6 been put on the bench during the pendency of the trial
7 of the case by his opponent's contribution of \$3 million
8 to his election.

9 JUSTICE SCALIA: Yes, but that -- that
10 person contributed money to my election because he
11 expected me to be a fair and impartial judge. And I
12 would be faithful to that contributor only by being a
13 fair and impartial judge. That is showing gratitude. I
14 should do what he expected me to do, and I have no
15 reason to think he expected me to lie and distort cases
16 in order to come out his way. What I expected he wanted
17 me to do was to be a good judge, and I'm being faithful
18 to him and I'm -- I'm showing my gratitude by -- by
19 being a good judge.

20 MR. OLSON: Well, I would go back to the
21 words of this court in the Tumey case, the seminal case:
22 "Due process is not satisfied by the argument that men
23 of highest honor and greatest self-sacrifice could carry
24 it out without danger of injustice."

25 JUSTICE SCALIA: It isn't a matter of honor

1 and sacrifice. You talk as though what gratitude
2 consists of is coming out in favor of this fellow, but
3 that is not necessarily what gratitude consists of.
4 Gratitude consists of performing the way this person
5 would like me to perform. Now, in this case, I will
6 acknowledge that you seem to have a contribution based
7 upon more. This contributor never even met the judge,
8 did he?

9 MR. OLSON: Well, it's not clear. There is
10 a --

11 JUSTICE SCALIA: They're certainly not good
12 buddies.

13 MR. OLSON: We're not claiming that there is
14 a basis based on personal relationship, Your Honor.

15 JUSTICE SCALIA: And his contributions, as I
16 understand it, were mainly based upon his opposition to
17 the incumbent, who he thought was an activist judge that
18 -- that was distorting the tort law of the State, all in
19 favor of the plaintiffs' bar. And if -- if the
20 contribution were to engender any gratitude, it seems to
21 me it would simply be that this other candidate would do
22 what he promised in his campaign and that is not be an
23 activist judge and not distort the tort law of the
24 State.

25 MR. OLSON: Well, if I can address part of

1 the premise of your question and invite the Court to
2 look at page 188a of the joint appendix. This addresses
3 the point that you just made that he was contributing
4 his money to defeat Justice McGraw as opposed to
5 supporting Justice Benjamin. On page 188a is one of
6 those financial disclosure reports that's required by
7 West Virginia law. It's filed by Mr. Blankenship and it
8 says on that page: "Expenditures made to support or
9 oppose," and he underlines the word "support," and then
10 he types in the word "Brent Benjamin."

11 Then if you'll turn over to page 200a, which
12 is the last page of that report, that shows that he
13 directly spent \$508,000 of his own money to support
14 Justice Benjamin.

15 Now, to the larger part of your point, the
16 context of this case suggests that, while the appeal was
17 going to be coming to the -- to the West Virginia
18 Supreme Court, Mr. Blankenship, who was the CEO,
19 chairman, major stockholder and a -- the prime mover in
20 the case that gave rise to liability in this case,
21 decided to unseat Justice McGraw, who he thought would
22 be unfavorable to him, and elect Justice Benjamin, who
23 he thought would be favorable to him.

24 CHIEF JUSTICE ROBERTS: What if, instead of
25 having the focus on one, we're dealing with a trade

1 group that's making the donation. Ten companies form a
2 trade group. Is the judge recused in the case of every
3 one of those companies?

4 MR. OLSON: I think that -- I think the
5 answer probably is not, Chief Justice Roberts, but this
6 is, like your cases involving reasonable search and
7 seizure, it's going to require an analysis of the
8 complex of circumstances.

9 CHIEF JUSTICE ROBERTS: Well, let's just
10 take this case, the same amount of money, except it's
11 not from an individual, not from that individual's
12 company, but from ten different ones, and divide it up
13 by ten.

14 MR. OLSON: I think the Court would -- a
15 reasonable objective observer knowing all of the facts
16 would not feel that that -- that trade group was not a
17 party to the case, who is not personally involved in
18 having a personal stake in the election or the outcome
19 of that particular case, but may be interested in a
20 panoply of cases or judges that approach things in a
21 certain way; that would not give rise to what you're
22 concerned about here.

23 CHIEF JUSTICE ROBERTS: Well, okay. Now,
24 I'm sure you know where I'm going next. What if it's
25 five companies in the trade group? When do you decide

1 that there's a probability? I take it if there are two
2 companies, under your theory there would be a
3 probability of bias?

4 MR. OLSON: If those are the companies that
5 are a party to the case, if it's when their case is
6 pending, if it's a vast magnitude -- the magnitude --

7 CHIEF JUSTICE ROBERTS: Well, can I stop you
8 right there, "When their case is pending." The Massey
9 Company has a lot of cases pending, so is it only those
10 cases that were pending on the day of the election?

11 MR. OLSON: No, I think that that --

12 CHIEF JUSTICE ROBERTS: Well, then we
13 shouldn't talk about pending cases.

14 MR. OLSON: Well, no. I think that that is
15 -- I answered your question whether it's only those
16 cases. That is a part of the circumstances that would
17 give rise -- you have decided, this Court has decided
18 that the possibility that a \$12 benefit, the Tumey case,
19 might ultimately come to the judge is a disqualifying
20 interest. You've decided in the Monroeville case that
21 because the adjudicator was the mayor of a town who
22 might receive some fines --

23 CHIEF JUSTICE ROBERTS: Well, but that's the
24 whole distinction that your friend on the other side
25 makes. Those cases involve financial interest and the

1 recusal rules are, you know, if you have one share of
2 AT&T stock and it's in AT&T, you have to recuse. But
3 this is different. This is a probability of bias, not
4 financial interest.

5 MR. OLSON: Well, I would submit that your
6 cases say that when the judge has an interest in the
7 case and that interest leads to the likelihood of --

8 JUSTICE SCALIA: No, they don't say that.

9 MR. OLSON: Yes.

10 JUSTICE SCALIA: There are only two
11 categories of cases, only two categories. One -- one is
12 where the judge is almost the aggrieved party in
13 conducting contempt proceedings against someone who is
14 contemptuous of that very judge, and the other one is
15 cases where the judges have a financial interest.
16 That's far from this broad category of whenever there is
17 a possibility of bias.

18 I was appointed to the bench by Ronald
19 Reagan. Should I be any -- should I have been any less
20 grateful to Ronald Reagan than -- than the judge here
21 was grateful to the person who spent a lot of money in
22 his election?

23 MR. OLSON: Well, let me -- let me answer
24 that. There's more parts, there's more than one part to
25 that question. Let me answer the first part first. The

1 Court hasn't said that there are only two categories of
2 disqualifying bias. I submit the Court has said that
3 it's an interest in the outcome. That interest in the
4 outcome might be financial --

5 JUSTICE SCALIA: Two categories are the only
6 categories in which it has applied that.

7 MR. OLSON: I respectfully submit, Justice
8 Scalia, that in the *Monroeville* case the judge didn't
9 have a personal financial interest. He had what the
10 Court called a partisan interest because the money that
11 might have been assessed in the way of fines might have
12 come to the city. In the *Lavoie* case, the judge didn't
13 have a direct financial interest. He had an indirect
14 potential financial interest. In the *Johnson v.*
15 *Mississippi* case, the judge had been named in an
16 institutional suit about racial bias and whether juries
17 should be -- those -- there's a panoply of
18 circumstances, all of which add up, Justice Scalia, I
19 submit, to a situation where a judge is -- a reasonable
20 person would suspect that the judge would have a hard
21 time, in the words of this Court, "holding the balance
22 nice, clear, and true."

23 JUSTICE SCALIA: Nice, clear, and true. Are
24 you going to tell me why I shouldn't have been grateful
25 to Ronald Reagan?

1 MR. OLSON: And I was going to --

2 JUSTICE SCALIA: And he had a lot of, a lot
3 of issues coming before me while his presidency
4 continued.

5 MR. OLSON: In the first place, there is a
6 -- there is a significant difference with respect to the
7 framers of the Constitution who gave the members of this
8 Court and the Federal Judiciary life tenure for the very
9 purpose of ensuring the independence of the judiciary.
10 There is a separate consideration that this Court has
11 mentioned because of the fact that judges and justices
12 of this Court cannot be replaced if they feel that they
13 must recuse themselves. There is -- another interest is
14 institutionally presidents appointing justices all of
15 the time for a variety of reasons, but not to attempt to
16 affect the outcome in their case.

17 CHIEF JUSTICE ROBERTS: What about the
18 United Mine Workers. If they give a contribution to
19 somebody's campaign, is that judge then recused in every
20 labor case? Or I don't know if they give contributions
21 or not, but a group like Mothers Against Drunk Driving,
22 because they think the other judge is too lenient in DWI
23 cases, so they give contributions. Is their preferred
24 judge recused in every DWI case?

25 MR. OLSON: No, Chief Justice Roberts.

1 CHIEF JUSTICE ROBERTS: Or are those all
2 factors and circumstances we have to look at?

3 MR. OLSON: Well, of course they're factors
4 and circumstances, but the -- when -- when an individual
5 or a group of individuals makes contributions in the
6 context of elections -- and we are going to have State
7 elections of -- of judges. We have them in 40 -- 39
8 States, and there's no sign that those are going to be
9 discontinued any time soon.

10 But when a group of individuals or an
11 individual is -- is making contributions because they
12 think the jurist is going to be sensitive to -- to the
13 rights of criminals or sensitive to the rights of
14 victims of criminals, those are generic concerns that
15 people participating in the electoral process --

16 CHIEF JUSTICE ROBERTS: Well, also, if there
17 is a big -- a big United Mine Workers case, or not even
18 United Mine Workers, involving particular union members,
19 and the UMW gives large contributions to a judge, that
20 -- that judge is recused?

21 MR. OLSON: I can't -- I can't rule out a
22 situation where there is a potential litigant who has a
23 stake in front of a case. The amounts here have to be
24 taken into consideration, too.

25 JUSTICE KENNEDY: Well, then, my -- my

1 question in this case is this: In your petition for
2 certiorari you said that, well, by the time you came
3 here you would have a standard for us that we can work
4 with. You know, all of us know, that a ruling in your
5 favor means that law and motion practice will -- could
6 -- could change drastically in States all across the
7 country. Disqualification for bias will now become a --
8 a part of the pretrial process, and I'm asking you what
9 your standard is.

10 Your standard is an unacceptable risk of
11 impropriety or perception of bias, but I -- I need some
12 more specific standards within which to fit this case.
13 You give a general standard, and then we hear about the
14 amount of the contribution. We hear about the fact that
15 it was a contested election, et cetera.

16 MR. OLSON: It would be --

17 JUSTICE KENNEDY: But your -- your standard
18 of -- of impropriety doesn't, it seems to me, give
19 sufficient -- or "unacceptable risk of bias" doesn't
20 give sufficient guidance to the courts to implement this
21 rule unless it's just -- it's just going to be one case.
22 Now, I know the law evolves on a case-by-case system. I
23 understand that, but it doesn't seem to me that the
24 standard you offer us is specific enough.

25 MR. OLSON: Well, there are several answers

1 to that. In the first place, the Conference of Chief
2 Justices of all of the States of the United States filed
3 a brief in this case and said that we need a standard
4 with respect to recusals for extraordinary campaign
5 contributions in cases. They also said that --

6 JUSTICE SCALIA: Was their standard the same
7 as yours? I mean, that's frankly one of the problems in
8 this case. The various amici and -- and you come up
9 with, you know, a wide divergence of standards. And all
10 of them say: By the way, these seven factors or five
11 factors or six factors, whatever they say, are not
12 exhaustive; There may be others as well.

13 MR. OLSON: That's --

14 JUSTICE SCALIA: Right?

15 MR. OLSON: That's because, Justice Scalia,
16 the -- the jurisprudence of this Court in connection
17 with standards like due process or probable cause or
18 speedy trial or equal protection can't be nailed down
19 with levels of specificity. It would be very inviting
20 --

21 JUSTICE KENNEDY: I want you to articulate
22 some substandards that have -- that are general in
23 nature, that apply to this case, substandards that are
24 more specific than the probability of bias.

25 MR. OLSON: Well, I -- I -- the reason we --

1 we approached it from that standpoint, Justice Kennedy,
2 is the probability of bias is something that this Court
3 has said repeatedly. But let me answer your question
4 this way: When the circumstances, including the timing
5 of the contribution, the magnitude and proportion of the
6 contribution, are such that it would lead a reasonable
7 person in possession of all of the facts -- these are
8 all words from these courts' decisions -- to believe
9 that the judge would have a difficult time being other
10 than biased in favor of one of the parties, that would
11 be the standard that would be applied. It's a general
12 standard, but --

13 JUSTICE GINSBURG: To what --

14 MR. OLSON: -- the Conference of Chief
15 Justices --

16 JUSTICE GINSBURG: To what extent do you
17 rely on -- and this is a very unusual situation -- that
18 you have a defendant in the ongoing litigation who is in
19 fact a prime culprit from the point of view of the
20 plaintiff? That is, Blankenship, who made all these
21 contributions, is charged with driving Caperton out of
22 business. So he is not simply the CEO of the company
23 that's named as the defendant, but he is targeted as the
24 perpetrator. So that's an -- an additional factor.

25 Is that just one of a laundry list, or is

1 that central to your view that there is really an
2 appearance of impropriety here?

3 MR. OLSON: It is very much central, but
4 it's not exclusively central. If the -- and -- and that
5 is absolutely correct, Justice Ginsburg. On pages 63
6 through 65a of the joint appendix, for example, are the
7 specific post-trial motion findings of the judge saying
8 that the prime mover in the -- in the conduct that was
9 declared to be fraudulent and a deliberate effort to
10 drive this company out of business was Mr. Blankenship.
11 So factually that's correct.

12 CHIEF JUSTICE ROBERTS: Counsel --

13 MR. OLSON: That is a central factor. If he
14 had given one dollar --

15 JUSTICE SCALIA: But not the only central
16 factor.

17 MR. OLSON: It's not --

18 JUSTICE SCALIA: You said it's one central
19 factor.

20 MR. OLSON: Well, that's --

21 JUSTICE SCALIA: You really have no test
22 other than probability of bias. We can't -- we can't
23 run a system on -- on such a vague standard.

24 MR. OLSON: I submit, Justice Scalia, you're
25 going to have to wipe out a lot of jurisprudence from

1 this Court that uses terms like "appearance of bias,"
2 "likelihood of bias."

3 JUSTICE SCALIA: Not -- not for situations
4 that have such an infinite variety as -- as the
5 appointment of judges and the election of judges and --
6 and as funding your opponent or -- or declining to fund
7 or joining some agglomeration of -- of other
8 institutions that fund.

9 The -- the variety is immense, and you give
10 us nothing to hang onto except, you know, case by case
11 we're going to have to decide whether there's a
12 probability of bias.

13 MR. OLSON: Well, it would be -- it would be
14 -- I would be delighted to say that the standard was 50
15 percent of the contributions in an election, and we
16 would come along in a case where there would be a very
17 small amount of money, and someone -- that -- that all
18 of those situations are distinguishable.

19 I admit this is not easy, but the Conference
20 of Chief Justices specifically said, to get back to
21 Justice Kennedy's question, what did they propose and
22 are they proposing something comparable to us? They are
23 -- they are -- and this is on page 4 of the Conference
24 of Chief Justices' brief. They are the judges who would
25 have to live with this decision. They said: (A), we

1 need it, extraordinary, out of line campaign support
2 from a source that has a substantial stake in the
3 outcome of the proceedings where those extreme facts
4 create a probability of actual bias.

5 And then they go on to say, to answer the
6 floodgate problem that my opponent raises -- this is
7 going to open the floodgates, and you will have nothing
8 but recusal motions. They explicitly state that concern
9 is not -- is unfounded. No bright line rule can or
10 should be attempted. These are the judges --

11 JUSTICE SCALIA: Don't you think it would be
12 easier to solve the problem, as some States have done,
13 not by having this -- this raffle for -- for whatever
14 judge gets -- gets stricken from the case or not, but
15 simply limiting the amount of contributions that can be
16 made? Isn't -- isn't that a much more sensible
17 solution?

18 MR. OLSON: Well, the States are perfectly
19 free to do that. But let me --

20 JUSTICE SCALIA: And some of them are doing
21 that.

22 MR. OLSON: Let me make this point, Justice
23 Scalia. The contribution limit in West Virginia is
24 \$1,000. Mr. Blankenship contributed \$1,000, and then he
25 put up three million additional dollars, three thousand

1 --

2 CHIEF JUSTICE ROBERTS: Are the States --
3 are the States really free to do that? We have
4 recognized First Amendment interests in participating in
5 the electoral process before. I mean, would your
6 approach constitutionalize McCain-Feingold at a State
7 level?

8 MR. OLSON: I -- I think that this Court's
9 -- this Court's campaign finance jurisprudence
10 acknowledges the appropriateness of campaign
11 contribution limits, the very point that Justice Scalia
12 just made, and other limits. And in -- and, in fact,
13 States have limits against corporate contributions,
14 limits against union contributions. I think the United
15 Mine Workers incident came up.

16 CHIEF JUSTICE ROBERTS: Well, this -- this
17 --

18 MR. OLSON: But -- but the -- and -- and the
19 States do have limitations with respect to what
20 litigants can do.

21 JUSTICE SOUTER: All right. Mr. Olson, the
22 very fact that they do raises what I think is one of the
23 difficult issues in this case, and it's raised by --
24 specifically by the -- the brief of the nine States,
25 Alabama and so on. And -- and I would put it this way.

1 It's not exactly the way that brief did, but I see the
2 problem that you are -- that you are addressing as -- as
3 not only a procedural, but certainly to a degree a
4 substantive due process kind of problem.

5 One of the factors that goes into the
6 recognition of at least a substantive limitation when
7 there has been none before is -- is the issue of timing.
8 Is the political process in fact working now toward a
9 solution? Because if it is, that kind of ethos of total
10 unreasonability is -- is still being worked out, and --
11 and the courts ought to stay their hands. So my
12 question is, what do you say to the argument that there
13 is a political process going on addressing this issue?
14 And I forget the details, but my recollection is that it
15 may well have been that brief pointed out that the State
16 of West Virginia itself has enacted some legislation
17 since these events began to transpire.

18 So the nut of the question is, is
19 the political process in process and is that a good
20 reason for us to stay our hand in recognizing a new
21 procedural or substantive due process right at this
22 point?

23 MR. OLSON: I think there are -- there are
24 more than one answer to that question. One, the
25 political process to which you refer is spiraling out of

1 control. There is a financial arms race in judicial
2 elections in various States throughout the country, and
3 the briefs --

4 JUSTICE SOUTER: Oh, I think we all
5 recognize that. Is there -- is there a
6 counter-political process going on?

7 MR. OLSON: It hasn't done the job so far,
8 and the trend seems to be in the opposite direction, but
9 even if it --

10 JUSTICE SOUTER: What happened in West
11 Virginia?

12 MR. OLSON: Pardon me?

13 JUSTICE SOUTER: Is my recollection correct
14 that West Virginia has, in fact, enacted some kind of
15 limiting legislation?

16 MR. OLSON: I believe that is correct, but I
17 don't think that would have addressed the problem in
18 this case.

19 JUSTICE SCALIA: I thought they closed the
20 527 loophole that allowed him to contribute so much
21 above the individual limit.

22 MR. OLSON: Irrespective of that, I was
23 going to go on and answer this in response to Justice
24 Souter's question. The Conference of Chief Justices, I
25 think, provide a second answer to that question. They

1 are the ones where the rubber meets the road, so to
2 speak. They are saying, and the entire conference is
3 saying, we need some guidance here with respect to a
4 constitutional limit --

5 JUSTICE ALITO: Well, they propose a
6 seven-factor test, and all of the other amici, who know
7 a lot about this subject, propose multifactor tests.
8 Public Citizen has ten factors, the ABA has four
9 factors. In an effort to see if this can be put in more
10 concrete terms, I wonder if you would be willing to say
11 categorically that your -- the holding that you're
12 proposing would not apply under any of these situations:
13 Where the judges are appointed, where there are massive
14 contributions and a hotly contested election, but the
15 issue is not an economic issue, it's a social issue;
16 where there isn't any specific issue headed for the
17 court but there are massive contributions by, let's say,
18 the plaintiffs' bar and the defense bar? Could you say
19 categorically in any of those situations that your rule
20 would not apply?

21 MR. OLSON: I would hesitate -- I would
22 hesitate to do so, Justice Alito. I think you've put
23 your finger on some of the circumstances that would take
24 it out of the context of the appearance of justice for
25 sale.

1 I'm going to reserve, if I may, the balance
2 of my time, but finish with a reference to the principle
3 that we're articulating here is not new to the
4 jurisprudence of the western world and the legal
5 jurisprudence that we come from. In the Magna Carta the
6 king promised: "To no one will we sell justice." And
7 Blackstone repeated that and restated it and stated:
8 "For injury done to every subject, he may take his
9 remedy by the course of law and have justice freely
10 without sale."

11 This circumstance in this case involves the
12 appearance of judges being bought. Now, we're not
13 saying that there's actual bias because there's actual
14 -- as this Court has repeatedly said, that's impossible
15 to prove, and that's why the appearance of probability
16 of bias is so important to the respect that we need to
17 have for the judicial system.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Frey.

20 ORAL ARGUMENT OF ANDREW L. FREY

21 ON BEHALF OF THE RESPONDENTS

22 MR. FREY: Mr. Chief Justice, and may it
23 please the Court:

24 First of all, just on the West Virginia
25 statutory amendment, they did, as Justice Scalia

1 suggested, close the 527 loophole and limit
2 contributions by individuals to 527 groups to \$1,000
3 after the 2004 election in response to the concern about
4 the amount of money that was being spent through 527
5 groups in that election. So I think this is a situation
6 where the States are dealing with it legislatively and,
7 and as I hope to get to in a minute or two, the Court
8 has recognized that this is -- repeatedly recognized
9 that this is something that is meant to be dealt with
10 through legislative or canons of judicial ethics or
11 codes.

12 JUSTICE GINSBURG: How is it -- is it --
13 this Court's decision in the Republican Party of
14 Minnesota said that judges could say anything, just as a
15 legislator. Are you extending that notion that an
16 election is an election to this area of the appearance
17 of impropriety? I mean, is it your position that the
18 judge is elected just like a legislator is elected, and
19 legislators all the time are beholden to interest
20 groups?

21 MR. FREY: Well, of course I don't agree
22 that Justice Benjamin was in the least beholden to
23 anybody in this case. But the Republican Party case was
24 a case about the First Amendment right of candidates in
25 an election to speak their position on issues. I'm not

1 sure that I follow what this has to do with this case.
2 But I will say that this is not a case about
3 appearances. The petition was about appearances.
4 They've -- the other side has withdrawn or it has
5 abandoned an appearance argument, and with good reason
6 because the Due Process Clause --

7 JUSTICE STEVENS: Mr. Frey, is it your
8 position that the appearance of impropriety could never
9 be strong enough to raise a constitutional issue?

10 MR. FREY: Well, we might have appearance of
11 impropriety overlapping with conditions that would
12 justify --

13 JUSTICE STEVENS: I'm assuming appearances
14 only. Are you saying that appearances without any
15 actual proof of bias could never be sufficient as a
16 constitutional matter?

17 MR. FREY: I think we are.

18 JUSTICE STEVENS: Is that your position?

19 MR. FREY: We are saying that the Due
20 Process Clause does not exist to protect the integrity
21 or reputation of the State judicial systems.

22 JUSTICE GINSBURG: Why --

23 JUSTICE STEVENS: That's not an answer to my
24 question.

25 MR. FREY: Well, I thought I said --

1 JUSTICE STEVENS: Supposing, for example,
2 the judge had campaigned on the ground that he would
3 issue favorable rulings to the United Mine Workers, and
4 the United Mine Workers campaigned, raising money
5 saying, we want to get a judge who will rule in our
6 favor in all the cases we're interested in. Would that
7 create an appearance of impropriety?

8 MR. FREY: Well --

9 JUSTICE STEVENS: Or take another example.
10 The Chief Justice asked what if there are ten members of
11 a trade association and would all -- and they all
12 contributed to get a judge to vote in their favor in a
13 case that involved a conspiracy charge among the --
14 charged the ten of them for violations of the Sherman
15 Act, something like that. And if all ten of them raise
16 money publicly for the very purpose of getting a judge
17 who would rule favorably in their favor, that would
18 clearly create a very extreme appearance of impropriety.
19 Would that be sufficient, in your judgment, to raise a
20 constitutional issue?

21 MR. FREY: If you were -- if -- if you
22 thought there was no basis for believing there was
23 actual bias, but it looked bad --

24 JUSTICE STEVENS: No, it would meet the test
25 in the -- in the judges' brief of an average judge would

1 be tempted under the circumstances. That's the test
2 that the Conference of Chief Justices judges --

3 MR. FREY: That I don't --

4 JUSTICE STEVENS: And do you think that
5 could ever, just appearance, could ever raise a due
6 process issue?

7 MR. FREY: No, I don't think just appearance
8 could ever raise a due process issue.

9 JUSTICE STEVENS: No matter how extreme the
10 facts?

11 MR. FREY: The question is whether there is
12 actual bias of a kind that is recognized as
13 disqualifying. The Court has recognized --

14 JUSTICE STEVENS: The whole point of this
15 case is it has not been recognized. We have never
16 confronted a case as extreme as this before. This fits
17 the standard that Potter Stewart articulated when he
18 said "I know it when I see it."

19 (Laughter.)

20 MR. FREY: I would take exception to the
21 characterization of this case.

22 JUSTICE SCALIA: I don't think we adopted
23 his principle, did we, in the obscenity area?

24 JUSTICE STEVENS: The question is not
25 whether we have, but whether we should.

1 MR. FREY: I hope to address that question.
2 Let me start off by pointing out, as Justice Benjamin
3 said in his opinion on discussing the recusal issue, his
4 July opinion, which I commend to the Court, he is being
5 asked to recuse on the basis of activities of a third
6 party over which he had no control, in a case whose
7 disposition offers him no current or future personal
8 benefit, and where he has no personal connection with
9 the parties or their counsel, has expressed no opinion
10 about any of them. He has done nothing that would call
11 into question his objectivity, his impartiality.

12 I think that's a very important point.

13 JUSTICE GINSBURG: What about the view that
14 Benjamin should not be the judge of his own cause?
15 Wasn't -- wasn't it -- it was either Massey, the
16 company, or Blankenship that brought a 1983 action
17 insisting on that very point, that in recusal matter --
18 -

19 MR. FREY: Well, that --

20 JUSTICE GINSBURG: -- it wasn't -- well,
21 maybe you can tell me what that 1983 suit was. It was a
22 charge --

23 MR. FREY: Yes, it challenged the procedure.
24 That's not an issue that's before the Court here, and
25 our -- our position today is that this Court has

1 consistently allowed recusal matters to be decided by a
2 -- the single justice who is challenged. I don't think
3 the Court thinks it's unconstitutional to do that.

4 I understand the -- the concerns about
5 having the judge making the decision about whether
6 recusal is required, but that is not the practice of
7 this Court, and if it's not the practice of this Court I
8 frankly doubt it's unconstitutional.

9 JUSTICE GINSBURG: But it was the position
10 that Blankenship took?

11 MR. FREY: Well, it was -- no, not
12 Blankenship. Massey.

13 JUSTICE SOUTER: Well, it may not be per se
14 unconstitutional, but it is certainly one contributing
15 factor, it seems to me, to the argument that the system
16 that we have depended on up to this point is not working
17 very well.

18 MR. FREY: Well, I don't think -- I don't
19 think the system -- I don't -- I don't agree that the
20 system is not working well. I mean, of course there are
21 adjustments --

22 JUSTICE SOUTER: Well, I -- as I understand
23 it, although you never directly, I don't think you ever
24 directly answered it, I -- I understood you to imply in
25 response to Justice Stevens that there would be no

1 appearance problem that would ever justify a
2 constitutional standard.

3 MR. FREY: Yes, but --

4 JUSTICE SOUTER: And in fact --

5 MR. FREY: -- but appearances, but
6 appearances -- I don't mean to interrupt you. If I'm --
7 sorry.

8 JUSTICE SOUTER: Go ahead.

9 MR. FREY: Appearance is a standard for
10 recusal, a nonconstitutional statutory standard for
11 recusal in virtually every State, so we already have --
12 and in the Federal system, so --

13 JUSTICE SOUTER: Yes. And we have -- and we
14 have an appearance standard under the ABA Canons, but I
15 think it would be difficult to make a very convincing
16 argument that that standard was effective in this case.

17 MR. FREY: Well, that -- that's a matter of
18 opinion. I -- I --

19 JUSTICE SOUTER: Well, it's -- it's the
20 matter of opinion that brings the case before us. And
21 would you agree -- I am not -- I am not asking you to
22 agree that the ABA standard was violated. That's not
23 what you're here for. But would you agree that the ABA
24 standard is certainly implicated by the facts of this
25 case, whatever the ultimate recusal decision should have

1 been?

2 MR. FREY: I think I would agree that
3 reasonable people could have a different view one way or
4 the other about whether there is an appearance of
5 impropriety for Justice Benjamin sitting. I would agree
6 with that. I don't think I would go further than that
7 because my personal view is that there was no
8 impropriety, that it was reasonable, and if you read his
9 opinion I think you'll see a -- a fair, balanced,
10 thoughtful statement of the reasons why he feels he
11 could sit.

12 JUSTICE KENNEDY: I want you to be able to
13 elaborate your full theory of the case, but just so you
14 know, it -- it does seem to me that the appearance
15 standard has -- has much to recommend it. In part it
16 means that you don't have to inquire into the actual
17 bias; it's -- it's more objective. Now, of course it
18 has to be controlled, it has to be precise. But I just
19 thought that you know that I -- I do have that
20 inclination.

21 MR. FREY: But -- but we're here on the
22 question of constitutional requirements and the
23 Constitution --

24 JUSTICE KENNEDY: And we're asking -- we're
25 asking what substance we can give to the constitutional

1 protection.

2 MR. FREY: Well, what you're really asking
3 is whether you should abandon what is a fairly clearly
4 stated rule and practice of this Court, dating back to
5 the common law, that questions of bias in general as
6 opposed to interest are matters for legislative
7 resolution and not for -- not for constitutional --

8 JUSTICE SCALIA: Of course the appearance
9 standard is -- is wonderfully ratchetable. Once it is
10 clearly established that a certain -- certain set of
11 facts creates the appearance of impropriety, that is
12 solidly established, then the set of facts right next to
13 that suddenly acquires the appearance of impropriety
14 because it's so -- it's so close to what is obviously
15 improper. And -- and so we go down and down and down.
16 And I -- I personally don't favor a constitutional rule
17 that is a sliding scale like that.

18 JUSTICE STEVENS: Of course, you can stop at
19 what is obviously improper.

20 MR. FREY: I don't -- I think, first of all,
21 the Petitioner has not advanced on the merits in this
22 case an appearance standard. A lot of the --

23 JUSTICE GINSBURG: Would you please clarify
24 that? Because I was taking appearance, likelihood,
25 probability as all synonyms, and I think of Justice

1 Marshall's decision in Peters and Kiff, involving a
2 grand jury, and he said that due process is denied in
3 circumstances creating the likelihood or the appearance
4 of bias. And there are other decisions, too, that use
5 those terms interchangeably. So I don't know that
6 probability of bias, likelihood of bias, appearance --
7 that -- those seem to me synonyms.

8 MR. FREY: All right. Well, if you're
9 viewing them as cinnamons -- synonyms, then the question
10 is whether that kind of standard is a -- is the
11 constitutional standard; and let me say about the Tumey
12 case which -- the "possible temptation" language in the
13 Tumey case, which is of course a wide open standard:
14 That was discussed only after the Court said questions
15 of bias are not constitutional, they're for the
16 legislature; questions of interest, pecuniary interest
17 in the Tumey case, are. And then the language that Mr.
18 Olson quoted came in the discussion of the question of
19 whether the pecuniary interest was substantial enough to
20 create a disqualification, constitutional
21 disqualification.

22 JUSTICE KENNEDY: I -- I think you're quite
23 right in the way you describe Tumey, but I wonder why is
24 that the reason -- why is appearance never
25 constitutional? Why should that be? Can you talk about

1 that?

2 MR. FREY: Because it seems to me to be --
3 if we're talking about appearance as distinct from
4 actual bias or probable -- you know, I can understand a
5 rule that says the probability of bias is enough. I
6 think it would be a very ill-advised rule without
7 historical foundation, without foundation in the Court's
8 precedents, and open-ended and creating all kinds of
9 problems; but I can understand that rule. That at least
10 is addressed to the right of the party to get a fair
11 trial.

12 Appearance is addressed to a different
13 thing. It's addressed to the reputation of the judicial
14 system, which is not, I think, the function of the Due
15 Process Clause to address.

16 JUSTICE STEVENS: Why not?

17 MR. FREY: Because I think the Due Process
18 Clause is concerned with the fairness of the --

19 JUSTICE STEVENS: You don't think the
20 community's confidence in the way judges behave is an
21 important part of due process?

22 MR. FREY: No, I think it's -- it may be a
23 systemically important value. But I think as long as
24 the judge is impartial in the -- in the case at hand, I
25 don't think there's a problem.

1 JUSTICE SOUTER: But --

2 JUSTICE KENNEDY: But our whole system is
3 designed to ensure confidence in our judgments.

4 MR. FREY: Well, I don't -- I think this is
5 a side point.

6 JUSTICE KENNEDY: And it seems -- it seems
7 to me litigants have an entitlement to that under the
8 Due Process Clause.

9 MR. FREY: Well, I don't think so, but I
10 don't think it -- I don't think it really essentially
11 matters. We're -- we're dealing with a semantical
12 quibble here, where the real question is, is possibility
13 of bias, a temptation of bias, a subconscious effect
14 that -- even a probability of bias, whatever -- there's
15 a lot of different standards that have been put
16 forward -- is that a constitutional basis for
17 disqualifying a judge, A? B, if it is sometimes a
18 constitutional basis for disqualifying a judge, is it a
19 basis under the debt of gratitude theory? And, C, if
20 the debt of gratitude theory is a viable theory -- for
21 reasons I hope to have a minute or two to address, I
22 think it's not viable -- does it apply on the
23 circumstances of this case?

24 JUSTICE GINSBURG: May I ask you -- I mean,
25 there were a few recusal motions in this case. Judge, I

1 think it was Matthew, moved to disqualify Judge
2 Starcher, and Justice Starcher did indeed recuse
3 himself. He had spoken out against what went on here.
4 If he had refused to recuse after speaking out as he
5 did, would that be compatible with due process, the due
6 process owed to the Massey Company?

7 MR. FREY: That would raise an interesting
8 question and I think a much closer question than this
9 case, because that would involve the question of whether
10 -- there is -- the Court has recognized that where a
11 judge is embroiled with a litigant, and has a personal
12 animosity arising out of the relationship with the
13 litigant, that is a -- that is possible ground for
14 recusal. So it's a -- it's a stronger case. I'm not
15 sure it's strong enough.

16 JUSTICE GINSBURG: I thought the animosity
17 was directed at Judge Benjamin?

18 MR. FREY: No, no. The animosity is
19 directed at Massey and Mr. Blankenship, who were --

20 JUSTICE GINSBURG: So you think the
21 Constitution might have been violated if Starcher -- you
22 think due process might have been violated if that judge
23 had remained on the bench?

24 MR. FREY: I think it's a closer case. I'm
25 not prepared to say that it would have been violated

1 even then.

2 JUSTICE SOUTER: Mr. Frey, you've tried a
3 couple of times to -- to get to your -- your point that,
4 even if we assume probability of bias is the standard,
5 the debt of gratitude would not qualify. I'll be candid
6 with -- to say that I don't see why probability of bias
7 is necessarily an inappropriate constitutional standard,
8 whether we should adopt it or not. But would you give
9 your argument on why the debt of gratitude could not
10 qualify?

11 MR. FREY: Of course. I'd be happy to.

12 JUSTICE SOUTER: Because that may illustrate
13 the point.

14 MR. FREY: Let me say just one point about
15 probability of bias, which is conceptually -- the rule
16 is quite clear at common law, as the Court knows, that
17 that was not a ground for disqualification of a judge.
18 Now --

19 JUSTICE SOUTER: Well, but I don't know what
20 common law -- how much help common law is. Common law
21 didn't have elected judges.

22 MR. FREY: No, but it had --

23 JUSTICE SOUTER: Common law did not have
24 this contribution system, which your colleague referred
25 to as spiraling out of control.

1 MR. FREY: That's the point I wanted to
2 make, that while common law did not have elected judges,
3 it had the issue of bias. After all, elected judges are
4 not really the issue here. The issue is not whether
5 judges should be elected; the issue is whether --
6 whether there should be disqualification for bias. That
7 is an issue that the common law confronted. This is not
8 like some novel situation that has arisen that the
9 common law didn't deal with.

10 JUSTICE GINSBURG: We don't deal with an
11 abstract setting. We have the setting of elections, of
12 elections of judges and millions of dollars spent on
13 them. That's the context in which this case arises.

14 MR. FREY: Yes, I understand, and the
15 question is whether that -- that gives rise to bias. So
16 let's -- let's turn -- let's turn to the question of
17 whether the debt of gratitude theory, which I take it is
18 the principle that would underlie disqualification in
19 the election context --

20 JUSTICE SOUTER: I don't take it as the
21 principle, but I take it as an application of the
22 principle. And I thought if you get to responding to
23 the application, I may understand your position better
24 on the principle.

25 MR. FREY: Debt of gratitude I think is a

1 principle. You have to ask yourself what is the reason
2 why somebody would conclude -- why a court would
3 conclude that Justice Benjamin is -- is not biased.

4 And let me say that one of the key elements
5 which is not mentioned by the other side which is very
6 important is the presumption of impartiality. It goes
7 back to Coke and Blackstone. Judges are clothed with a
8 presumption of impartiality. There has to be something
9 that overcomes that presumption. And let me say that, I
10 ask the Court to ask yourselves if you were in Justice
11 Benjamin's situation, do you really think you would be
12 incapable of rendering an impartial decision in a case
13 involving Massey? Because if the answer to that is no,
14 if the answer to that is you would not be incapable of
15 rendering an unbiased decision, then there's no
16 justification for saying that Justice Benjamin would --

17 JUSTICE STEVENS: May I ask you on your
18 challenge to the probability of bias as a standard. Do
19 you think it's an unworkable standard or that even if
20 there is a probability of bias, that should not be
21 constitutionally disqualified?

22 MR. FREY: I think it's an unworkable
23 standard, and -- and I ask the Court to look at --

24 JUSTICE STEVENS: Why is it any more
25 unworkable than probable cause in a Fourth Amendment

1 case?

2 MR. FREY: Well, the Fourth Amendment has
3 reasonableness as a standard, and reasonableness is a --

4 JUSTICE STEVENS: Well, it has probable
5 cause as a standard.

6 MR. FREY: If there was a standard that said
7 judges should recuse themselves when it would be
8 reasonable to suppose that there was bias, if the
9 Constitution said that, we wouldn't be here today or we
10 would be here arguing about whether --

11 JUSTICE STEVENS: Let me get back to the
12 question. Why is probability in this context any more
13 difficult to figure out than probability in the Fourth
14 Amendment context?

15 MR. FREY: I'm not --

16 JUSTICE STEVENS: Or is it?

17 MR. FREY: I'm not sure of the answer to
18 that. What I am sure is that if you start down the road
19 of debt of gratitude, which I think is the animating
20 principle if there is going to be a probability of bias.

21 JUSTICE STEVENS: Well, I'm not -- I'm not
22 asking you about debt of gratitude. I'm asking you why
23 isn't the probability standard perfectly administerable,
24 just as it is in the Fourth Amendment? And surely you
25 would agree --

1 MR. FREY: Well, you could --

2 JUSTICE STEVENS: -- that if there is a
3 probability of bias, he ought to get out.

4 MR. FREY: You could certainly have a series
5 of cases in which you would -- which you would decide
6 and provide standards. I think that could be done.

7 JUSTICE SCALIA: We have no choice with
8 regard to the reasonableness standard. We -- it's not a
9 standard we made up.

10 MR. FREY: It's in the Constitution.

11 JUSTICE SCALIA: -- as we would have been
12 making up this one. It's there in the Constitution.

13 MR. FREY: Yes.

14 JUSTICE SCALIA: We have to make the most of
15 it, do the best we can do with it. But here we're being
16 urged to adopt out of nowhere a new standard of
17 probability of bias. That's not in the Constitution,
18 and it's perfectly valid to ask, is that a sensible
19 standard?

20 MR. FREY: Well, I don't think it's a
21 sensible standard, and as --

22 JUSTICE SCALIA: Are you going to finally
23 get to discussing the debt of gratitude point?

24 MR. FREY: Yes. That's -- yes.

25 JUSTICE SCALIA: I've been waiting and

1 waiting.

2 (Laughter.)

3 MR. FREY: I've been trying to get to it,
4 but I was answering Justice Stevens's question.

5 The problem with debt of gratitude is that
6 it's not a principle with any reasonable limit. If you
7 apply it here, if you say there's a debt of gratitude
8 here, then you have the question about all the other
9 circumstances. The plaintiffs' lawyers gave a million
10 and a half dollars to Justice McGraw to support his
11 reelection. Suppose he had won? What do you do? It's
12 true that no one individual gave a lot of money, but
13 it's -- if you're looking at it in terms of what is the
14 probability of bias, it's at least as great, if not
15 greater than here. The doctors gave \$750,000 to
16 Benjamin.

17 JUSTICE BREYER: But that isn't the only
18 theory. That is, in my own mind -- I don't know if you
19 want to call it "probability" or "possibility," you
20 don't manacle a defendant in a courtroom even though
21 this jury may not have been affected. I read the
22 opinion Justice Benjamin wrote, it was a very good
23 opinion. I sympathized with his problem. Okay? So I'm
24 not talking about him. I'm talking about we don't
25 manacle defendants because many jurors, maybe not this

1 one, would have been adding affected, and that seems the
2 problem here.

3 The debt of gratitude I think, no, that
4 isn't the theory that underlies it, though it may in
5 part. It's that you have here the largest amount by a
6 factor, an order of magnitude perhaps, I mean hugely
7 greater than any other contribution given to a judge by
8 a single person. It doesn't just affect the fast
9 through gratitude. A normal human being also thinks, if
10 I play my cards right, maybe it will be repeated, and
11 they'll want to keep me in office. And we have the fact
12 of how it looks, and we don't have a situation where the
13 something like this is inevitable, where you appoint
14 judges. It's inevitable that there will be an
15 appointment. I mean, hey, but that isn't true of
16 sitting on this kind of case.

17 So we have all those things that make it
18 extreme. So what is the problem? If we say there is an
19 envelope that the Due Process Clause doesn't touch, and
20 that envelope is greater, and we touch less, if the
21 States are regulating it themselves. Where they're not
22 -- and this is way outside the envelope -- at that point
23 the Due Process Clause comes into play. Now, end of
24 opinion. Now, what terrible mess will the Court get
25 into if they write just that?

1 MR. FREY: Well, if you have a -- you have
2 to have a logical principle. I'm sorry, I --

3 JUSTICE BREYER: A logical principle or, I
4 thought, if I was mentioning all those things that might
5 lead a judge in the future, because of the size, in the
6 past, because of the size, in the fact that it's a
7 single individual, in the fact that there's a case
8 coming up that's likely that the judge will decide --
9 all those things that are listed by the chief justices
10 in their brief, all those things together make it a
11 serious risk that there will be bias, even though an
12 individual might not be. There is a serious risk.

13 Call it a "probability"; call it an
14 "appearance." Use the language that you want, but put
15 them together, and they spell "mother."

16 JUSTICE SCALIA: It doesn't matter what
17 language you use because it's pretty vague anyway --
18 "probability," "likelihood," "appearance" -- it doesn't
19 really --

20 JUSTICE BREYER: Don't you understand what I
21 mean? I'm not worried about what you call "probability"
22 --

23 CHIEF JUSTICE ROBERTS: Mr. Frey, why don't
24 you take a shot at answering it?

25 (Laughter.)

1 MR. FREY: I don't agree with you, Justice
2 Breyer. I think you have to -- you have to have a
3 reason. You don't have a decision that's good for this
4 case only. You have to have a decision that's
5 principled, and when -- and when you ask what is the
6 principle, what is it that would cause Justice Benjamin
7 -- and by the way, let me say that I think if Justice
8 Benjamin was moved to do anything, it's to vote against
9 Massey or to recuse himself to avoid the controversy
10 that would attend a vote for Massey that he knew was
11 going to happen. And if you look at page 692 of the
12 joint appendix, he actually discusses that problem.

13 So I don't think you can even predict which
14 way these circumstances would cause him to go, but I do
15 think you need a principle, and the principle is either
16 debt of gratitude or hope of future benefit.

17 As to the hope of future benefit in this
18 case, that is totally not viable for a couple of
19 reasons. One is Justice Benjamin's not running for
20 another eight years.

21 JUSTICE SOUTER: How long has Massey been in
22 business, eight years?

23 MR. FREY: A long time. Sure. A long time.

24 JUSTICE SOUTER: I mean --

25 MR. FREY: But you wouldn't --

1 JUSTICE SOUTER: If one is going to go into
2 that calculation, one is going to assume that in eight
3 years, there's going to be another three million dollars
4 waiting to be spent.

5 MR. FREY: That -- well, there's several
6 problems with that, Justice Souter. The first is
7 there's no more likely to be spent on Justice Benjamin
8 than on any other member of the court who might be
9 sympathetic.

10 JUSTICE SOUTER: Well, one has hopes.

11 (Laughter.)

12 MR. FREY: Excuse me?

13 JUSTICE SOUTER: One has hopes.

14 MR. FREY: A lot of members of the Court
15 would have the same exact hopes, with another reason,
16 they might be running sooner, they might end up with an
17 opponent who is more distasteful to Mr. Blankenship.

18 By the way, Mr. Blankenship is not Massey.
19 They are two separate things.

20 JUSTICE SOUTER: Well, you say that and I
21 say that because we took corporate law. But in -- in
22 terms of my brother a moment ago spoke of we've been
23 around Washington for a while, and I don't think that
24 fine distinction counts very much on the issue that
25 we've got.

1 MR. FREY: But why would -- why would
2 Blankenship be more likely to support Benjamin than to
3 support Justice Davis or justice --

4 JUSTICE SOUTER: We'll have to see when the
5 next election comes along. An expectation has been
6 created that if there is an interest, the money will be
7 spent, and it seems to me that underlies Justice
8 Breyer's analysis just as it does mine.

9 MR. FREY: Where that takes you is all the
10 judges have to recuse themselves because they all have
11 the possibility of garnering support.

12 JUSTICE SOUTER: They all have not had the 3
13 million.

14 MR. FREY: But either you look to the past
15 and you look at debt of gratitude, and in our brief we
16 have indicated a number of circumstances where the same
17 debt of gratitude rationale would apply. There are a
18 lot of things that led to Benjamin's election, and
19 Blankenship's money is not necessarily the main thing at
20 all. And if you're looking forward --

21 JUSTICE SOUTER: No, but with respect,
22 Justice Breyer disassociated his question from debt of
23 gratitude. I understand you -- you are arguing against
24 a debt of gratitude theory, but if I recall his
25 question, it was not based upon the debt of gratitude

1 theory.

2 MR. FREY: Right, but what I'm saying is you
3 can't. If -- if you're looking at -- at where -- where
4 would the bias come from, and I'm assuming now that some
5 probability of bias standard is accepted by the Court,
6 and I'm asking where would the bias come from. It
7 either would come from a debt of gratitude for past
8 contributions or an expectation of future benefits. If
9 it's an expectation of future benefits, it is not
10 reasonable to assume that Benjamin has any stronger
11 expectation than other members of the court. So it
12 seems to me you're in a position where if he has to
13 recuse, they all have to recuse.

14 JUSTICE KENNEDY: And then debt of
15 gratitude -- we keep asking but your time is running
16 out, have you said what you need to say on debt of
17 gratitude?

18 JUSTICE SCALIA: I'm really anxious to hear
19 what you have to say on debt of gratitude.

20 MR. FREY: Well, okay.

21 (Laughter.)

22 MR. FREY: I don't know. Some of the ground
23 is covered already by questions during Mr. Olson's
24 argument. I think the debt of gratitude cannot be
25 limited consistent with neutral principles to large

1 individual campaign contributions. You have newspaper
2 endorsements. Clearly you could have a debt of
3 gratitude there. Newspaper could be a party in the
4 case.

5 You have the plaintiff lawyers and the
6 doctors which we've talked about. You have labor unions
7 getting out the vote. You have political figures
8 endorsing. And you have appointed judges and -- and to
9 say that there's no -- to say that you're going to carve
10 out the gratitude that the judges feel toward the
11 president who appointed them -- I mean, the fact is in
12 the Nixon tapes case, and in Clinton --

13 JUSTICE STEVENS: Mr. Frey, there is
14 obviously a difference between appointed judges and
15 elected judges. But why do we have to rest on just one
16 factor? The Conference of Chief Justices suggested
17 their seven factors should be taken into account. Why
18 is that totally unworkable? Why does it have to be just
19 one theory, debt of gratitude and nothing else?

20 They don't -- the chief judges who are
21 elected don't think that's the way to do it.

22 MR. FREY: I think you're mixing up two
23 different things. What is the -- one question is what
24 is the wellspring of the bias? Why do we think the
25 judge has bias? And the second question is how do we

1 measure that?

2 And what I'm saying is if you think that
3 Justice Benjamin would be biased in this case, which I
4 certainly don't, and I think his track record has shown
5 no bias in favor of Massey, then why would -- why would
6 an appointed justice, appointed by a president in a case
7 where the president's personal interests are at stake
8 not have the same feelings of bias, and yet justices sit
9 in those circumstances.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. FREY: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Olson, five
13 minutes.

14 REBUTTAL ARGUMENT OF THEODORE B. OLSON

15 ON BEHALF OF THE PETITIONERS

16 MR. OLSON: Thank you, Mr. Chief Justice.

17 Justice Scalia, you mentioned that the words
18 "reasonable search and seizure" are in the Constitution.
19 The words "due process" are in the Constitution, and
20 that is what we're talking about today. This Court has
21 repeatedly said, and I don't think my opponent objects
22 or disagrees that due process means a fair trial in a
23 fair tribunal.

24 So what are we talking about today? What is
25 a fair tribunal? He said ask yourself, could you be

1 fair if you were in Justice Benjamin's position? That,
2 I submit, is not the question, because this Court has
3 repeatedly said actual bias is something that's
4 virtually impossible to prove, the counsel of -- the
5 Conference of Chief Justices said don't go there. We
6 can't ever determine that.

7 And so the question is what is -- is someone
8 likely to be biased, likely to be unfair?

9 And, Justice Kennedy, one of the factors
10 that led us to the conclusion that an objective
11 standard, that a reasonable person knowing all of the
12 facts would probably be biased is language from a number
13 of these court -- this Court's decisions, including your
14 concurrence in the *Liteky* case -- I think it's *Liteky*,
15 *L-I-T-E-K-Y* -- in which you said the objective observer
16 would entertain reasonable questions about the judge's
17 impartiality.

18 Now, that's a case involving section 455 and
19 not the Due Process Clause, but I think the logic with
20 respect to the application of the test and the ability
21 of this Court and other courts to apply it, as the
22 Conference of Chief Justices said they could, is the
23 same.

24 JUSTICE ALITO: What is the difference
25 between this situation and a situation where a justice

1 or a judge is appointed by an executive and then hears a
2 case that is of critical importance to the executive?

3 MR. OLSON: The -- the -- there's a number
4 of questions. In the first place, there's life tenure
5 for federal judges.

6 Secondly, was that appointment made --

7 JUSTICE ALITO: Specifically if Justice
8 Benjamin were term limited, would this case be
9 different?

10 MR. OLSON: No, I think it wouldn't be
11 different because of all the confluence of
12 circumstances. If a detached observer, again to use
13 Justice Kennedy's words --

14 JUSTICE SCALIA: Wait, you can't have it
15 both ways. I mean, if your response to the first
16 question is judges have lifetime tenure, you then can't
17 respond to the second question would it make a
18 difference if he was term limited by saying, no, it
19 wouldn't make a difference.

20 MR. OLSON: He might be running for another
21 court, he might need the benefits. This was \$3 million
22 in a race in which that amounted to more money than
23 everybody else collectively put into this race while
24 this case was pending.

25 Now, the language that I think is important

1 is from the Tumey case, might not a defendant with
2 reason say that he would fear he would not get a fair
3 trial. So instead of the question that my opponent
4 asks, would you be fair, which is not the standard
5 because actual bias isn't the test, would there be a
6 perception, likelihood, probability appearance of bias,
7 to use the language used by this Court over and over
8 again.

9 CHIEF JUSTICE ROBERTS: What about --

10 MR. OLSON: Ask yourself this question --

11 CHIEF JUSTICE ROBERTS: What about
12 protective donations? You actually give, not three
13 million, but a couple hundred thousand to somebody you
14 don't want deciding your case. And it comes up, and you
15 say, you have to recuse yourself because --

16 MR. OLSON: As this Court has said, I think,
17 in one of the cases that you can't allow a litigant to
18 try to game the system in that way. What I was getting
19 to instead of the question --

20 CHIEF JUSTICE ROBERTS: How do you know? I
21 mean, are you saying it's going to be clear in every
22 case that the judge is going to rule against the
23 particular entity?

24 MR. OLSON: It's not going to be clear in
25 every case, Mr. Chief Justice. It's going to be would a

1 detached observer conclude that a fair and impartial
2 hearing would be possible? So instead of the question
3 that Mr. Frey was asking whether you, yourself, could be
4 -- I would like to ask you to ask this question. If
5 this was going to be the judge in your case, would you
6 think it would be fair and would it be a fair tribunal
7 if the judge in your case was selected with a \$3 million
8 subsidy by your opponent?

9 CHIEF JUSTICE ROBERTS: Is that a reasonable
10 person that's making that inquiry, is that the standard?

11 MR. OLSON: That is the standard that
12 this --

13 CHIEF JUSTICE ROBERTS: Okay. Would a
14 reasonable person think it's a ground for recusal if the
15 lawyer and the judge were very close friends?

16 MR. OLSON: No, I don't think so.

17 CHIEF JUSTICE ROBERTS: You don't think so?
18 A reasonable person comes up and says I socialize all
19 the time, you know, they were at each other's weddings,
20 whatever it is, we know that that's not a basis for
21 recusal.

22 MR. OLSON: Then if it was a basis for a
23 recusal, you would have to be recusing all the time,
24 because that is a standard that's reasonable question of
25 impartiality is in section 455, it is in many of the

1 State codes. The courts handle these decisions all of
2 the time. These are factors, and I think I would go
3 back to Justice Stevens' and Justice Breyer's question,
4 this is a situation where there has got to be some
5 limits.

6 Our opponents say there's -- bias tribunals
7 are not prohibited by the Due Process Clause nor
8 probably biased or the appearance of bias. We think
9 there has to be some constitutional limit.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 11:18 a.m., the case in the
13 above-entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25

A	<p>adopt 39:8 43:16</p> <p>adopted 29:22</p> <p>advance 5:11</p> <p>advanced 34:21</p> <p>Aetna 5:16,16</p> <p>affect 13:16 45:8</p> <p>agglomeration 19:7</p> <p>aggrieved 11:12</p> <p>ago 5:17 48:22</p> <p>agree 26:21 31:19 32:21,22 32:23 33:2,5 42:25 47:1</p> <p>ahead 32:8</p> <p>AL 1:3,7</p> <p>Alabama 21:25</p> <p>Alito 24:5,22 53:24 54:7</p> <p>allow 55:17</p> <p>allowed 23:20 31:1</p> <p>amendment 21:4 25:25 26:24 41:25 42:2,14,24</p> <p>amici 16:8 24:6</p> <p>amount 9:10 15:14 19:17 20:15 26:4 45:5</p> <p>amounted 54:22</p> <p>amounts 14:23</p> <p>analysis 9:7 49:8</p> <p>ANDREW 1:18 2:5 25:20</p> <p>animating 42:19</p> <p>animosity 38:12 38:16,18</p> <p>answer 9:5 11:23,25 17:3 20:5 22:24 23:23,25 27:23 41:13,14 42:17</p> <p>answered 10:15 31:24</p>	<p>answering 44:4 46:24</p> <p>answers 15:25</p> <p>anxious 50:18</p> <p>anybody 26:23</p> <p>anyway 46:17</p> <p>appeal 8:16</p> <p>appearance 4:12 18:2 19:1 24:24 25:12,15 26:16 27:5,8 27:10 28:7,18 29:5,7 32:1,9 32:14 33:4,14 34:8,11,13,22 34:24 35:3,6 35:24 36:3,12 46:14,18 55:6 57:8</p> <p>appearances 1:15 27:3,3,13 27:14 32:5,6</p> <p>appendix 8:2 18:6 47:12</p> <p>application 40:21,23 53:20</p> <p>applied 12:6 17:11</p> <p>apply 16:23 24:12,20 37:22 44:7 49:17 53:21</p> <p>appoint 45:13</p> <p>appointed 11:18 24:13 51:8,11 51:14 52:6,6 54:1</p> <p>appointing 13:14</p> <p>appointment 19:5 45:15 54:6</p> <p>approach 9:20 21:6</p> <p>approached 17:1</p> <p>appropriateness</p>	<p>21:10</p> <p>area 26:16 29:23</p> <p>arguing 42:10 49:23</p> <p>argument 1:13 2:2,7 3:4,7 6:22 22:12 25:20 27:5 31:15 32:16 39:9 50:24 52:14</p> <p>arisen 40:8</p> <p>arises 40:13</p> <p>arising 38:12</p> <p>arms 23:1</p> <p>articulate 16:21</p> <p>articulated 29:17</p> <p>articulating 25:3</p> <p>asked 28:10 30:5</p> <p>asking 15:8 32:21 33:24,25 34:2 42:22,22 50:6,15 56:3</p> <p>asks 55:4</p> <p>assessed 12:11</p> <p>association 28:11</p> <p>assume 39:4 48:2 50:10</p> <p>assuming 27:13 50:4</p> <p>attempt 13:15</p> <p>attempted 20:10</p> <p>attend 47:10</p> <p>AT&T 11:2,2</p> <p>average 28:25</p> <p>avoid 47:9</p> <p>a.m 1:14 3:2 57:12</p> <p>A.T 1:6</p>	<p>back 6:20 19:20 34:4 41:7 42:11 57:3</p> <p>bad 28:23</p> <p>balance 5:15 6:5 12:21 25:1</p> <p>balanced 33:9</p> <p>bar 7:19 24:18 24:18</p> <p>based 7:6,14,16 49:25</p> <p>basic 3:22</p> <p>basis 4:24 7:14 28:22 30:5 37:16,18,19 56:20,22</p> <p>began 22:17</p> <p>behalf 1:16,18 2:4,6,9 3:8 25:21 52:15</p> <p>behave 36:20</p> <p>beholden 26:19 26:22</p> <p>believe 17:8 23:16</p> <p>believing 28:22</p> <p>bench 6:6 11:18 38:23</p> <p>benefit 10:18 30:8 47:16,17</p> <p>benefits 50:8,9 54:21</p> <p>Benjamin 8:5,10 8:14,22 26:22 30:2,14 33:5 38:17 41:3,16 44:16,22 47:6 47:8 48:7 49:2 50:10 52:3 54:8</p> <p>Benjamin's 41:11 47:19 49:18 53:1</p> <p>best 43:15</p> <p>better 40:23</p> <p>bias 3:13,24 4:11,12,12,13</p>
		B		
		<p>B 1:16 2:3,8 3:7 37:17 52:14</p>		

4:19 5:7 10:3 11:3,17 12:2 12:16 15:7,11 15:19 16:24 17:2 18:22 19:1,2,12 20:4 25:13,16 27:15 28:23 29:12 33:17 34:5 35:4,6,6,15 36:4,5 37:13 37:13,14 39:4 39:6,15 40:3,6 40:15 41:18,20 42:8,20 43:3 43:17 44:14 46:11 50:4,5,6 51:24,25 52:5 52:8 53:3 55:5 55:6 57:6,8	brings 32:20 broad 11:16 brother 48:22 brought 30:16 buddies 7:12 business 17:22 18:10 47:22	26:23,23,24 27:1,2 28:13 29:15,16,21 30:6 32:16,20 32:25 33:13 34:22 35:12,13 35:17 36:24 37:23,25 38:9 38:14,24 40:13 41:12 42:1 45:16 46:7 47:4,18 51:4 51:12 52:3,6 53:14,18 54:2 54:8,24 55:1 55:14,22,25 56:5,7 57:11 57:12	certiorari 15:2 cetera 15:15 chairman 8:19 challenge 41:18 challenged 30:23 31:2 chance 4:19,19 change 15:6 changes 5:9 characterizati... 29:21 charge 28:13 30:22 charged 17:21 28:14 chief 3:3,9 4:15 4:18,21 8:24 9:5,9,23 10:7 10:12,23 13:17 13:25 14:1,16 16:1 17:14 18:12 19:20,24 21:2,16 23:24 25:18,22 28:10 29:2 46:9,23 51:16,20 52:10 52:12,16 53:5 53:22 55:9,11 55:20,25 56:9 56:13,17 57:10	Clause 5:5 27:6 27:20 36:15,18 37:8 45:19,23 53:19 57:7 clear 5:15 7:9 12:22,23 39:16 55:21,24 clearly 28:18 34:3,10 51:2 Clinton 51:12 close 26:1 34:14 56:15 closed 23:19 closer 38:8,24 clothed 41:7 Coal 1:6 3:5 codes 26:11 57:1 Coke 41:7 colleague 39:24 collectively 54:23 come 5:1,2 6:16 10:19 12:12 16:8 19:16 25:5 50:4,6,7 comes 45:23 49:5 55:14 56:18 coming 7:2 8:17 13:3 46:8 commend 30:4 common 34:5 39:16,20,20,20 39:23 40:2,7,9 community's 36:20 companies 9:1,3 9:25 10:2,4 company 1:6 3:5 9:12 10:9 17:22 18:10 30:16 38:6 comparable 19:22 compatible 38:5 complex 9:8 conceptually
	C			
biased 5:3 17:10 41:3 52:3 53:8 53:12 57:8 big 14:17,17 Blackstone 25:7 41:7 Blankenship 8:7 8:18 17:20 18:10 20:24 30:16 31:10,12 38:19 48:17,18 49:2 Blankenship's 49:19 bought 25:12 Brent 8:10 Breyer 44:17 46:3,20 47:2 49:22 Breyer's 49:8 57:3 brief 16:3 19:24 21:24 22:1,15 28:25 46:10 49:15 briefs 23:3 bright 20:9	C 2:1 3:1 37:19 calculation 48:2 call 30:10 44:19 46:13,13,21 called 12:10 campaign 7:22 13:19 16:4 20:1 21:9,10 51:1 campaigned 28:2,4 candid 39:5 candidate 7:21 candidates 26:24 canons 26:10 32:14 Caperton 1:3 3:4 17:21 cards 45:10 carry 6:23 Carta 25:5 carve 51:9 case 3:4,18,21 3:22 4:25 5:12 5:12,16 6:7,21 6:21 7:5 8:16 8:20,20 9:2,10 9:17,19 10:5,5 10:8,18,20 11:7 12:8,12 12:15 13:16,20 13:24 14:17,23 15:1,12,21 16:3,8,23 19:10,10,16 20:14 21:23 23:18 25:11	cases 3:18,25 4:14 6:15 9:6 9:20 10:9,10 10:13,16,25 11:6,11,15 13:23 16:5 28:6 43:5 55:17 case-by-case 15:22 categorically 24:11,19 categories 11:11 11:11 12:1,5,6 category 11:16 cause 4:21,23 16:17 30:14 41:25 42:5 47:6,14 central 18:1,3,4 18:13,15,18 CEO 8:18 17:22 certain 9:21 34:10,10 certainly 7:11 22:3 31:14 32:24 43:4 52:4 certainty 4:25	certiorari 15:2 cetera 15:15 chairman 8:19 challenge 41:18 challenged 30:23 31:2 chance 4:19,19 change 15:6 changes 5:9 characterizati... 29:21 charge 28:13 30:22 charged 17:21 28:14 chief 3:3,9 4:15 4:18,21 8:24 9:5,9,23 10:7 10:12,23 13:17 13:25 14:1,16 16:1 17:14 18:12 19:20,24 21:2,16 23:24 25:18,22 28:10 29:2 46:9,23 51:16,20 52:10 52:12,16 53:5 53:22 55:9,11 55:20,25 56:9 56:13,17 57:10 choice 43:7 cinnamons 35:9 circumstance 25:11 circumstances 9:8 10:16 12:18 14:2,4 17:4 24:23 29:1 35:3 37:23 44:9 47:14 49:16 52:9 54:12 Citizen 24:8 city 12:12 claim 5:21 claiming 7:13 clarify 34:23	Clause 5:5 27:6 27:20 36:15,18 37:8 45:19,23 53:19 57:7 clear 5:15 7:9 12:22,23 39:16 55:21,24 clearly 28:18 34:3,10 51:2 Clinton 51:12 close 26:1 34:14 56:15 closed 23:19 closer 38:8,24 clothed 41:7 Coal 1:6 3:5 codes 26:11 57:1 Coke 41:7 colleague 39:24 collectively 54:23 come 5:1,2 6:16 10:19 12:12 16:8 19:16 25:5 50:4,6,7 comes 45:23 49:5 55:14 56:18 coming 7:2 8:17 13:3 46:8 commend 30:4 common 34:5 39:16,20,20,20 39:23 40:2,7,9 community's 36:20 companies 9:1,3 9:25 10:2,4 company 1:6 3:5 9:12 10:9 17:22 18:10 30:16 38:6 comparable 19:22 compatible 38:5 complex 9:8 conceptually

<p>39:15 concern 20:8 26:3 concerned 9:22 36:18 concerns 14:14 31:4 conclude 41:2,3 56:1 conclusion 5:1,2 53:10 concrete 24:10 concurrence 53:14 conditions 27:11 conduct 18:8 conducting 11:13 conference 16:1 17:14 19:19,23 23:24 24:2 29:2 51:16 53:5,22 confidence 36:20 37:3 confluence 54:11 confronted 29:16 40:7 connection 16:16 30:8 consideration 13:10 14:24 consistent 50:25 consistently 31:1 consists 7:2,3,4 conspiracy 28:13 Constitution 13:7 33:23 38:21 42:9 43:10,12,17 52:18,19 constitutional 3:12 24:4 27:9 27:16 28:20</p>	<p>32:2 33:22,25 34:7,16 35:11 35:15,20,25 37:16,18 39:7 57:9 constitutionali... 21:6 constitutionally 41:21 contempt 11:13 contemptuous 11:14 contested 15:15 24:14 context 4:14 8:16 14:6 24:24 40:13,19 42:12,14 contexts 4:14 continued 13:4 contribute 23:20 contributed 6:10 20:24 28:12 contributing 8:3 31:14 contribution 6:7 7:6,20 13:18 15:14 17:5,6 20:23 21:11 39:24 45:7 contributions 7:15 13:20,23 14:5,11,19 16:5 17:21 19:15 20:15 21:13,14 24:14 24:17 26:2 50:8 51:1 contributor 6:12 7:7 control 23:1 30:6 39:25 controlled 33:18 controversy 47:9</p>	<p>convincing 32:15 corporate 21:13 48:21 correct 18:5,11 23:13,16 counsel 18:12 25:18 30:9 52:10 53:4 57:10 counter-politi... 23:6 country 15:7 23:2 counts 48:24 couple 39:3 47:18 55:13 course 3:23 14:3 25:9 26:21 31:20 33:17 34:8,18 35:13 39:11 court 1:1,13 3:10,21 4:2,10 4:13,22 5:5,8,8 5:11,17 6:21 8:1,18 9:14 10:17 12:1,2 12:10,21 13:8 13:10,12 16:16 17:2 19:1 24:17 25:14,23 26:7 29:13 30:4,24,25 31:3,7,7 34:4 35:14 38:10 39:16 41:2,10 41:23 45:24 48:8,14 50:5 50:11 52:20 53:2,13,21 54:21 55:7,16 courtroom 44:20 courts 15:20 17:8 22:11 53:21 57:1</p>	<p>Court's 21:8,9 26:13 36:7 53:13 covered 50:23 create 20:4 28:7 28:18 35:20 created 49:6 creates 34:11 creating 35:3 36:8 criminals 14:13 14:14 critical 54:2 culprit 17:19 current 30:7</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 danger 6:24 dating 34:4 Davis 49:3 day 10:10 deal 40:9,10 dealing 8:25 26:6 37:11 dealt 26:9 debt 37:19,20 39:5,9 40:17 40:25 42:19,22 43:23 44:5,7 45:3 47:16 49:15,17,22,24 49:25 50:7,14 50:16,19,24 51:2,19 decide 9:25 19:11 43:5 46:8 decided 8:21 10:17,17,20 31:1 decides 4:22 deciding 55:14 decision 19:25 26:13 31:5 32:25 35:1 41:12,15 47:3</p>	<p>47:4 decisions 17:8 35:4 53:13 57:1 declared 18:9 declining 19:6 defeat 8:4 defendant 17:18 17:23 44:20 55:1 defendants 44:25 defense 24:18 degree 22:3 deliberate 18:9 delighted 19:14 denied 35:2 depended 31:16 describe 35:23 designed 37:3 detached 54:12 56:1 details 22:14 determine 53:6 difference 13:6 51:14 53:24 54:18,19 different 9:12 11:3 33:3 36:12 37:15 51:23 54:9,11 difficult 6:4 17:9 21:23 32:15 42:13 direct 12:13 directed 38:17 38:19 direction 23:8 directly 8:13 31:23,24 disagrees 52:22 disassociated 49:22 disclosure 8:6 discontinued 14:9 discussed 35:14</p>
--	---	---	---	--

<p>discussing 30:3 43:23 discussion 35:18 disposition 30:7 disqualification 15:7 35:20,21 39:17 40:6,18 disqualified 41:21 disqualify 38:1 disqualifying 10:19 12:2 29:13 37:17,18 distasteful 48:17 distinct 36:3 distinction 10:24 48:24 distinguishable 19:18 distort 6:15 7:23 distorting 7:18 divergence 16:9 divide 9:12 doctors 44:15 51:6 doing 20:20 dollar 18:14 dollars 20:25 40:12 44:10 48:3 donation 9:1 donations 55:12 doubt 31:8 drastically 15:6 drive 18:10 driving 13:21 17:21 Drunk 13:21 due 3:23 4:23 5:5 6:22 16:17 22:4,21 27:6 27:19 29:5,8 35:2 36:14,17 36:21 37:8 38:5,5,22 45:19,23 52:19 52:22 53:19</p>	<p>57:7 DWI 13:22,24 D.C 1:9,16</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 easier 20:12 easy 19:19 economic 24:15 effect 37:13 effective 32:16 effort 18:9 24:9 eight 47:20,22 48:2 either 30:15 47:15 49:14 50:7 elaborate 33:13 elect 8:22 elected 26:18,18 39:21 40:2,3,5 51:15,21 election 6:8,10 9:18 10:10 11:22 15:15 19:5,15 24:14 26:3,5,16,16 26:25 40:19 49:5,18 elections 14:6,7 23:2 40:11,12 electoral 14:15 21:5 elements 41:4 embroiled 38:11 enacted 22:16 23:14 endeavor 4:9 endeavored 3:25 4:3,5,6 endorsements 51:2 endorsing 51:8 engender 7:20 ensure 37:3 ensuring 13:9 entertain 53:16</p>	<p>entire 24:2 entitlement 37:7 entity 55:23 envelope 45:19 45:20,22 equal 4:23 16:18 ESQ 1:16,18 2:3 2:5,8 essentially 37:10 established 34:10,12 et 1:3,7 15:15 ethics 26:10 ethos 22:9 events 22:17 everybody 54:23 evolves 15:22 exact 48:15 exactly 22:1 example 18:6 28:1,9 exception 29:20 exclusively 18:4 Excuse 48:12 executive 54:1,2 exhaustive 16:12 exist 27:20 expectation 49:5 50:8,9,11 expected 6:11 6:14,15,16 Expenditures 8:8 explicitly 20:8 expressed 30:9 extending 26:15 extent 17:16 extraordinary 16:4 20:1 extreme 20:3 28:18 29:9,16 45:18</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 13:11 15:14</p>	<p>17:19 21:12,22 22:8 23:14 32:4 45:11 46:6,7 51:11 factor 17:24 18:13,16,19 31:15 45:6 51:16 factors 14:2,3 16:10,11,11 22:5 24:8,9 51:17 53:9 57:2 facts 5:2 9:15 17:7 20:3 29:10 32:24 34:11,12 53:12 factually 18:11 fair 3:11,11,22 3:22 6:11,13 33:9 36:10 52:22,23,25 53:1 55:2,4 56:1,6,6 fairly 34:3 fairness 3:23 36:18 faithful 6:12,17 far 5:25 11:16 23:7 fast 45:8 favor 5:4 7:2,19 15:5 17:10 28:6,12,17 34:16 52:5 favorable 8:23 28:3 favorably 28:17 fear 55:2 federal 13:8 32:12 54:5 feel 9:16 13:12 51:10 feelings 52:8 feels 33:10 fellow 7:2 figure 42:13</p>	<p>figures 51:7 filed 8:7 16:2 finally 43:22 finance 21:9 financial 8:6 10:25 11:4,15 12:4,9,13,14 23:1 findings 18:7 fine 48:24 fines 10:22 12:11 finger 24:23 finish 25:2 first 3:4 11:25 11:25 13:5 16:1 21:4 25:24 26:24 34:20 48:6 54:4,15 fit 15:12 fits 29:16 five 9:25 16:10 52:12 floodgate 20:6 floodgates 20:7 focus 8:25 follow 27:1 forget 22:14 form 9:1 forward 37:16 49:20 foundation 36:7 36:7 four 24:8 Fourth 41:25 42:2,13,24 framers 13:7 frankly 16:7 31:8 fraudulent 18:9 free 20:19 21:3 freely 25:9 frequently 4:11 4:22 Frey 1:18 2:5 25:19,20,22</p>
--	---	--	---	--

<p>26:21 27:7,10 27:17,19,25 28:8,21 29:3,7 29:11,20 30:1 30:19,23 31:11 31:18 32:3,5,9 32:17 33:2,21 34:2,20 35:8 36:2,17,22 37:4,9 38:7,18 38:24 39:2,11 39:14,22 40:1 40:14,25 41:22 42:2,6,15,17 43:1,4,10,13 43:20,24 44:3 46:1,23 47:1 47:23,25 48:5 48:12,14 49:1 49:9,14 50:2 50:20,22 51:13 51:22 52:11 56:3 friend 10:24 friends 56:15 front 14:23 full 33:13 function 36:14 fund 19:6,8 fundamental 3:12 funding 19:6 further 33:6 future 30:7 46:5 47:16,17 50:8 50:9</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 game 55:18 garnering 49:11 general 6:1 15:13 16:22 17:11 34:5 generic 14:14 getting 28:16 51:7 55:18</p>	<p>Ginsburg 5:6,9 17:13,16 18:5 26:12 27:22 30:13,20 31:9 34:23 37:24 38:16,20 40:10 give 9:21 10:17 13:18,20,23 15:13,18,20 19:9 33:25 39:8 55:12 given 18:14 45:7 gives 14:19 40:15 go 6:20 20:5 23:23 32:8 33:6 34:15 47:14 48:1 53:5 57:2 goes 4:2 6:1 22:5 41:6 going 8:17 9:7 9:24 12:24 13:1 14:6,8,12 15:21 18:25 19:11 20:7 22:13 23:6,23 25:1 42:20 43:22 47:11 48:1,2,3 51:9 55:21,22,24,25 56:5 good 6:17,19 7:11 22:19 27:5 44:22 47:3 grand 35:2 grateful 11:20 11:21 12:24 gratitude 5:22 5:25 6:13,18 7:1,3,4,20 37:19,20 39:5 39:9 40:17,25 42:19,22 43:23 44:5,7 45:3,9 47:16 49:15,17</p>	<p>49:23,24,25 50:7,15,17,19 50:24 51:3,10 51:19 great 44:14 greater 44:15 45:7,20 greatest 6:23 ground 28:2 38:13 39:17 50:22 56:14 group 9:1,2,16 9:25 13:21 14:5,10 groups 26:2,5 26:20 guarantee 3:13 3:19 guidance 15:20 24:3</p> <hr/> <p style="text-align: center;">H</p> <p>half 44:10 hand 22:20 36:24 handle 57:1 hands 22:11 hang 19:10 happen 47:11 happened 23:10 happy 39:11 hard 12:20 headed 24:16 hear 3:3 15:13 15:14 50:18 hearing 56:2 hears 54:1 held 3:16 help 39:20 hesitate 24:21 24:22 hey 45:15 highest 6:23 historical 36:7 hold 5:14 6:4 holding 12:21 24:11</p>	<p>honor 3:18 6:23 6:25 7:14 hope 26:7 30:1 37:21 47:16,17 hopes 48:10,13 48:15 hotly 24:14 hugely 45:6 HUGH 1:3 human 45:9 hundred 55:13</p> <hr/> <p style="text-align: center;">I</p> <p>illustrate 39:12 ill-advised 36:6 immense 19:9 impartial 6:11 6:13 36:24 41:12 56:1 impartiality 30:11 41:6,8 53:17 56:25 implement 15:20 implicated 32:24 imply 31:24 importance 54:2 important 25:16 30:12 36:21,23 41:6 54:25 impossible 25:14 53:4 improper 34:15 34:19 impropriety 15:11,18 18:2 26:17 27:8,11 28:7,18 33:5,8 34:11,13 inappropriate 39:7 incapable 41:12 41:14 incident 21:15 inclination 33:20</p>	<p>including 17:4 53:13 incumbent 7:17 independence 13:9 indicated 49:16 indirect 12:13 individual 5:3 9:11 14:4,11 23:21 44:12 46:7,12 51:1 individuals 14:5 14:10 26:2 individual's 9:11 inevitable 45:13 45:14 infinite 19:4 inherent 4:12 injury 25:8 injustice 6:24 inquire 33:16 inquiry 56:10 insisting 30:17 institutional 12:16 institutionally 13:14 institutions 19:8 integrity 27:20 interchangeably 5:9 35:5 interest 10:20 10:25 11:4,6,7 11:15 12:3,3,9 12:10,13,14 13:13 26:19 34:6 35:16,16 35:19 49:6 interested 9:19 28:6 interesting 38:7 interests 21:4 52:7 interrupt 32:6 invite 8:1 inviting 16:19</p>
---	---	---	---	--

<p>involve 10:25 38:9</p> <p>involved 9:17 28:13</p> <p>involves 25:11</p> <p>involving 4:23 9:6 14:18 35:1 41:13 53:18</p> <p>Irrespective 23:22</p> <p>issue 22:7,13 24:15,15,15,16 27:9 28:3,20 29:6,8 30:3,24 40:3,4,4,5,7 48:24</p> <p>issues 13:3 21:23 26:25</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job 23:7</p> <p>Johnson 12:14</p> <p>joining 19:7</p> <p>joint 8:2 18:6 47:12</p> <p>judge 5:2,14 6:4 6:5,11,13,17 6:19 7:7,17,23 9:2 10:19 11:6 11:12,14,20 12:8,12,15,19 12:20 13:19,22 13:24 14:19,20 17:9 18:7 20:14 26:18 28:2,5,12,16 28:25 30:14 31:5 36:24 37:17,18,25 38:1,11,17,22 39:17 45:7 46:5,8 51:25 54:1 55:22 56:5,7,15</p> <p>judges 9:20 11:15 13:11 14:7 19:5,5,24</p>	<p>20:10 24:13 25:12 26:14 28:25 29:2 36:20 39:21 40:2,3,5,12 41:7 42:7 45:14 49:10 51:8,10,14,15 51:20 54:5,16</p> <p>judge's 53:16</p> <p>judgment 28:19</p> <p>judgments 37:3</p> <p>judicial 23:1 25:17 26:10 27:21 36:13</p> <p>judiciary 13:8,9</p> <p>July 30:4</p> <p>juries 12:16</p> <p>jurisprudence 16:16 18:25 21:9 25:4,5</p> <p>jurist 5:3 14:12</p> <p>jurors 44:25</p> <p>jury 35:2 44:21</p> <p>justice 3:3,9,15 3:19 4:3,5,8,15 4:18,22 5:6,8 5:21,24 6:3,9 6:25 7:11,15 8:4,5,14,21,22 8:24 9:5,9,23 10:7,12,23 11:8,10 12:5,7 12:18,23 13:2 13:17,25 14:1 14:16,25 15:17 16:6,14,15,21 17:1,13,16 18:5,12,15,18 18:21,24 19:3 19:21 20:11,20 20:22 21:2,11 21:16,21 23:4 23:10,13,19,23 24:5,22,24 25:6,9,18,22 25:25 26:12,22</p>	<p>27:7,13,18,22 27:23 28:1,9 28:10,24 29:4 29:9,14,22,24 30:2,13,20 31:2,9,13,22 31:25 32:4,8 32:13,19 33:5 33:12,24 34:8 34:18,23,25 35:22 36:16,19 37:1,2,6,24 38:2,16,20 39:2,12,19,23 40:10,20 41:3 41:10,16,17,24 42:4,11,16,21 43:2,7,11,14 43:22,25 44:4 44:10,17,22 46:3,16,20,23 47:1,6,7,19,21 47:24 48:1,6,7 48:10,13,20 49:3,3,4,7,12 49:21,22 50:14 50:18 51:13 52:3,6,10,12 52:16,17 53:1 53:9,24,25 54:7,7,13,14 55:9,11,20,25 56:9,13,17 57:3,3,10</p> <p>justices 13:11,14 16:2 17:15 19:20,24 23:24 29:2 46:9 51:16 52:8 53:5,22</p> <p>justification 41:16</p> <p>justify 27:12 32:1</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 45:11</p>	<p>50:15</p> <p>Kennedy 14:25 15:17 16:21 17:1 33:12,24 35:22 37:2,6 50:14 53:9</p> <p>Kennedy's 19:21 54:13</p> <p>key 41:4</p> <p>Kiff 35:1</p> <p>kind 22:4,9 23:14 29:12 35:10 45:16</p> <p>kinds 36:8</p> <p>king 25:6</p> <p>knew 47:10</p> <p>know 9:24 11:1 13:20 15:4,4 15:22 16:9 19:10 24:6 29:18 33:14,19 35:5 36:4 39:19 44:18 50:22 55:20 56:19,20</p> <p>knowing 5:1 9:15 53:11</p> <p>knows 39:16</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>L 1:18 2:5 25:20</p> <p>labor 13:20 51:6</p> <p>language 3:20 35:12,17 46:14 46:17 53:12 54:25 55:7</p> <p>large 14:19 50:25</p> <p>larger 8:15</p> <p>largest 45:5</p> <p>Laughter 29:19 44:2 46:25 48:11 50:21</p> <p>laundry 17:25</p> <p>Lavoie 5:16 12:12</p> <p>law 3:25 7:18,23</p>	<p>8:7 15:5,22 25:9 34:5 39:16,20,20,20 39:23 40:2,7,9 48:21</p> <p>lawyer 56:15</p> <p>lawyers 44:9 51:5</p> <p>lead 17:6 46:5</p> <p>leads 11:7</p> <p>led 49:18 53:10</p> <p>legal 25:4</p> <p>legislation 22:16 23:15</p> <p>legislative 26:10 34:6</p> <p>legislatively 26:6</p> <p>legislator 26:15 26:18</p> <p>legislators 26:19</p> <p>legislature 35:16</p> <p>lenient 13:22</p> <p>let's 9:9 24:17 40:16,16,16</p> <p>level 21:7</p> <p>levels 16:19</p> <p>liability 8:20</p> <p>lie 6:15</p> <p>life 13:8 54:4</p> <p>lifetime 54:16</p> <p>likelihood 4:12 5:7,19 11:7 19:2 34:24 35:3,6 46:18 55:6</p> <p>limit 20:23 23:21 24:4 26:1 44:6 57:9</p> <p>limitation 22:6</p> <p>limitations 21:19</p> <p>limited 50:25 54:8,18</p> <p>limiting 20:15 23:15</p>
---	---	--	--	---

<p>limits 21:11,12 21:13,14 57:5 line 20:1,9 list 17:25 listed 46:9 Liteky 53:14,14 litigant 14:22 38:11,13 55:17 litigants 21:20 37:7 litigation 17:18 live 19:25 logic 53:19 logical 46:2,3 long 5:25 36:23 47:21,23,23 look 8:2 14:2 41:23 47:11 49:14,15 looked 28:23 looking 44:13 49:20 50:3 looks 45:12 loophole 23:20 26:1 loose 4:16 lot 10:9 11:21 13:2,2 18:25 24:7 34:22 37:15 44:12 48:14 49:18 L-I-T-E-K-Y 53:15</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:3 Magna 25:5 magnitude 10:6 10:6 17:5 45:6 main 49:19 major 8:19 making 9:1 14:11 31:5 43:12 56:10 manacle 44:20 44:25 March 1:10</p>	<p>Marshall's 35:1 Massey 1:6 3:5 10:8 30:15 31:12 38:6,19 41:13 47:9,10 47:21 48:18 52:5 massive 24:13 24:17 mathematical 4:24 matter 1:12 6:25 27:16 29:9 30:17 32:17,20 46:16 57:13 matters 31:1 34:6 37:11 Matthew 38:1 mayor 10:21 McCain-Fein... 21:6 McGraw 8:4,21 44:10 mean 5:6 16:7 21:5 26:17 31:20 32:6 37:24 45:6,15 46:21 47:24 51:11 54:15 55:21 means 3:12 4:20 15:5 33:16 52:22 meant 26:9 measure 52:1 meet 28:24 meets 24:1 member 48:8 members 13:7 14:18 28:10 48:14 50:11 men 6:22 mentioned 13:11 41:5 52:17 mentioning 46:4 merits 34:21</p>	<p>mess 45:24 met 7:7 million 6:7 20:25 44:9 48:3 49:13 54:21 55:13 56:7 millions 40:12 mind 44:18 mine 13:18 14:17,18 21:15 28:3,4 49:8 Minnesota 26:14 minute 26:7 37:21 minutes 52:13 Mississippi 12:15 mixing 51:22 moment 48:22 money 6:10 8:4 8:13 9:10 11:21 12:10 19:17 26:4 28:4,16 44:12 49:6,19 54:22 Monroeville 10:20 12:8 morning 3:4 mother 46:15 Mothers 13:21 motion 15:5 18:7 motions 20:8 37:25 moved 38:1 47:8 mover 8:19 18:8 multifactor 24:7 Murchison 3:18 3:21</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 nailed 16:18 named 12:15 17:23</p>	<p>nature 16:23 necessarily 7:3 39:7 49:19 need 15:11 16:3 20:1 24:3 25:16 47:15 50:16 54:21 neutral 50:25 never 7:7 27:8 27:15 29:15 31:23 35:24 new 1:18 22:20 25:3 43:16 newspaper 51:1 51:3 nice 5:15 6:5 12:22,23 nine 21:24 Nixon 51:12 nonconstitutio... 32:10 normal 45:9 notion 26:15 novel 40:8 number 3:18 49:16 53:12 54:3 nut 22:18 N.Y 1:18</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objective 4:25 9:15 33:17 53:10,15 objectivity 30:11 objects 52:21 obscenity 29:23 observer 4:25 9:15 53:15 54:12 56:1 obviously 34:14 34:19 51:14 offer 15:24 offers 30:7 office 45:11</p>	<p>Oh 23:4 okay 9:23 44:23 50:20 56:13 Olson 1:16 2:3,8 3:6,7,9,17,20 4:4,7,10,17,21 5:8,23 6:2,20 7:9,13,25 9:4 9:14 10:4,11 10:14 11:5,9 11:23 12:7 13:1,5,25 14:3 14:21 15:16,25 16:13,15,25 17:14 18:3,13 18:17,20,24 19:13 20:18,22 21:8,18,21 22:23 23:7,12 23:16,22 24:21 35:18 52:12,14 52:16 54:3,10 54:20 55:10,16 55:24 56:11,16 56:22 Olson's 50:23 Once 34:9 ones 9:12 24:1 ongoing 17:18 open 20:7 35:13 open-ended 36:8 opinion 30:3,4,9 32:18,20 33:9 44:22,23 45:24 opponent 5:4 19:6 20:6 48:17 52:21 55:3 56:8 opponents 57:6 opponent's 6:7 oppose 8:9 opposed 8:4 34:6 opposite 23:8 opposition 7:16 oral 1:12 2:2 3:7</p>
---	--	---	---	---

<p>25:20 order 6:16 45:6 ordinary 6:3 other's 56:19 ought 22:11 43:3 outcome 9:18 12:3,4 13:16 20:3 outside 45:22 overcomes 41:9 overlapping 27:11 owed 38:6</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 8:2,5,8 8:11,12 19:23 47:11 pages 18:5 panoply 9:20 12:17 paragraph 4:2 Pardon 4:4 23:12 part 7:25 8:15 10:16 11:24,25 15:8 33:15 36:21 45:5 participating 14:15 21:4 particular 9:19 14:18 55:23 parties 17:10 30:9 partisan 12:10 parts 11:24 party 9:17 10:5 11:12 26:13,23 30:6 36:10 51:3 pecuniary 35:16 35:19 pendency 6:6 pending 10:6,8 10:9,10,13</p>	<p>54:24 people 14:15 33:3 percent 4:19,19 19:15 percentage 4:16 perception 15:11 55:6 perfectly 20:18 42:23 43:18 perform 7:5 performing 7:4 perpetrator 17:24 person 6:3,10 7:4 11:21 12:20 17:7 45:8 53:11 56:10,14,18 personal 7:14 9:18 12:9 30:7 30:8 33:7 38:11 52:7 personally 9:17 34:16 Peters 35:1 petition 15:1 27:3 Petitioner 34:21 Petitioners 1:4 1:17 2:4,9 3:8 52:15 place 13:5 16:1 54:4 plaintiff 17:20 51:5 plaintiffs 7:19 24:18 44:9 play 45:10,23 please 3:10 25:23 34:23 point 8:3,15 17:19 20:22 21:11 22:22 29:14 30:12,17 31:16 37:5 39:3,13,14</p>	<p>40:1 43:23 45:22 pointed 22:15 pointing 30:2 political 6:1 22:8,13,19,25 51:7 position 26:17 26:25 27:8,18 30:25 31:9 40:23 50:12 53:1 possession 17:7 possibility 5:13 5:19 10:18 11:17 37:12 44:19 49:11 possible 5:14 35:12 38:13 56:2 post-trial 18:7 potential 12:14 14:22 Potter 29:17 practice 15:5 31:6,7 34:4 precedents 36:8 precise 33:18 predict 47:13 preferred 13:23 premise 8:1 prepared 38:25 presidency 13:3 president 51:11 52:6 presidents 13:14 president's 52:7 presumption 41:6,8,9 pretrial 15:8 pretty 46:17 prevent 4:1 prime 8:19 17:19 18:8 principle 25:2 29:23 40:18,21 40:22,24 41:1</p>	<p>42:20 44:6 46:2,3 47:6,15 47:15 principled 47:5 principles 50:25 probability 3:14 4:1,11,15 10:1 10:3 11:3 16:24 17:2 18:22 19:12 20:4 25:15 34:25 35:6 36:5 37:14 39:4,6,15 41:18,20 42:12 42:13,20,23 43:3,17 44:14 44:19 46:13,18 46:21 50:5 55:6 probable 4:16 4:19,21,23 5:10 16:17 36:4 41:25 42:4 probably 5:3,10 9:5 53:12 57:8 problem 20:6,12 22:2,4 23:17 32:1 36:25 44:5,23 45:2 45:18 47:12 problems 16:7 36:9 48:6 procedural 22:3 22:21 procedure 5:13 30:23 proceedings 11:13 20:3 process 3:23 4:23 5:5 6:22 14:15 15:8 16:17 21:5 22:4,8,13,19 22:19,21,25 23:6 27:6,20</p>	<p>29:6,8 35:2 36:15,17,21 37:8 38:5,6,22 45:19,23 52:19 52:22 53:19 57:7 prohibited 57:7 promised 7:22 25:6 proof 27:15 proportion 17:5 propose 19:21 24:5,7 proposing 19:22 24:12 protect 27:20 protection 4:23 16:18 34:1 protective 55:12 prove 25:15 53:4 provide 23:25 43:6 Public 24:8 publicly 28:16 purpose 13:9 28:16 put 6:2,6 20:25 21:25 24:9,22 37:15 46:14 54:23</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify 39:5,10 question 8:1 10:15 11:25 15:1 17:3 19:21 22:12,18 22:24 23:24,25 27:24 29:11,24 30:1,11 33:22 35:9,18 37:12 38:8,8,9 40:15 40:16 42:12 44:4,8 49:22 49:25 51:23,25 53:2,7 54:16</p>
--	--	--	---	--

54:17 55:3,10 55:19 56:2,4 56:24 57:3 questions 4:22 34:5 35:14,16 50:23 53:16 54:4 quibble 37:12 quite 35:22 39:16 quoted 35:18	56:14,18,24 reasonableness 42:3,3 43:8 reasons 13:15 33:10 37:21 47:19 REBUTTAL 2:7 52:14 recall 49:24 receive 10:22 recognition 22:6 recognize 23:5 recognized 21:4 26:8,8 29:12 29:13,15 38:10 recognizing 22:20 recollection 22:14 23:13 recommend 33:15 record 52:4 recusal 11:1 20:8 30:3,17 31:1,6 32:10 32:11,25 37:25 38:14 56:14,21 56:23 recusals 16:4 recuse 11:2 13:13 30:5 38:2,4 42:7 47:9 49:10 50:13,13 55:15 recused 9:2 13:19,24 14:20 recusing 56:23 reelection 44:11 refer 22:25 reference 25:2 referred 39:24 refused 38:4 regard 43:8 regulating 45:21 relationship 7:14 38:12 rely 17:17	remained 38:23 remedy 25:9 rendering 41:12 41:15 repeated 5:17 5:18 25:7 45:10 repeatedly 4:13 17:3 25:14 26:8 52:21 53:3 replaced 13:12 report 8:12 reports 8:6 Republican 26:13,23 reputation 27:21 36:13 require 9:7 required 8:6 31:6 requirement 3:23 requirements 33:22 requires 3:24 reserve 25:1 resolution 34:7 respect 13:6 16:4 21:19 24:3 25:16 49:21 53:20 respectfully 12:7 respond 54:17 Respondents 1:19 2:6 25:21 responding 40:22 response 23:23 26:3 31:25 54:15 rest 51:15 restated 25:7 right 3:12 10:8 16:14 21:21 22:21 26:24	34:12 35:8,23 36:10 45:10 50:2 rights 14:13,13 rise 8:20 9:21 10:17 40:15 risk 15:10,19 46:11,12 road 24:1 42:18 Roberts 3:3 4:15 4:18 8:24 9:5,9 9:23 10:7,12 10:23 13:17,25 14:1,16 18:12 21:2,16 25:18 46:23 52:10,12 55:9,11,20 56:9,13,17 57:10 Ronald 11:18,20 12:25 rubber 24:1 rule 14:21 15:21 20:9 24:19 28:5,17 34:4 34:16 36:5,6,9 39:15 55:22 rules 4:8 11:1 ruling 15:4 rulings 28:3 run 18:23 running 47:19 48:16 50:15 54:20	36:5 56:18 scale 34:17 Scalia 3:15,19 4:3,5,8 5:21,24 6:3,9,25 7:11 7:15 11:8,10 12:5,8,18,23 13:2 16:6,14 16:15 18:15,18 18:21,24 19:3 20:11,20,23 21:11 23:19 25:25 29:22 34:8 43:7,11 43:14,22,25 46:16 50:18 52:17 54:14 se 31:13 search 9:6 52:18 second 23:25 51:25 54:17 Secondly 54:6 section 53:18 56:25 see 22:1 24:9 29:18 33:9 39:6 49:4 seizure 9:7 52:18 selected 56:7 self-sacrifice 6:23 sell 25:6 semantical 37:11 seminal 5:12 6:21 sensible 20:16 43:18,21 sensitive 14:12 14:13 separate 13:10 48:19 series 4:14 43:4 serious 46:11,12 set 34:10,12 setting 40:11,11	
R					
R 3:1 race 23:1 54:22 54:23 racial 12:16 raffle 20:13 raise 27:9 28:15 28:19 29:5,8 38:7 raised 21:23 raises 20:6 21:22 raising 28:4 ratchetable 34:9 rationale 49:17 read 33:8 44:21 Reagan 11:19 11:20 12:25 real 37:12 really 18:1,21 21:3 34:2 37:10 40:4 41:11 46:19 50:18 reason 6:15 16:25 22:20 27:5 35:24 41:1 47:3 48:15 55:2 reasonable 9:6 9:15 12:19 17:6 33:3,8 42:8 44:6 50:10 52:18 53:11,16 56:9					
			S		
			S 2:1 3:1 sacrifice 7:1 sale 24:25 25:10 satisfied 6:22 saying 18:7 24:2 24:3 25:13 27:14,19 28:5 41:16 50:2 52:2 54:18 55:21 says 3:15,21 8:8		

seven 16:10 51:17	Souter 21:21 23:4,10,13	43:16,19,21 50:5 53:11	37:13	31:20 32:12
seven-factor 24:6	31:13,22 32:4 32:8,13,19	55:4 56:10,11 56:24	subject 24:7 25:8	36:14 37:2 39:24 55:18
share 11:1	37:1 39:2,12 39:19,23 40:20	standards 15:12 16:9,17 37:15	submit 5:5 11:5 12:2,7,19	systemically 36:23
Sherman 28:14	47:21,24 48:1 48:6,10,13,20	43:6	18:24 53:2	systems 27:21
short 3:14	49:4,12,21	standpoint 17:1	submitted 57:11 57:13	<hr/> T <hr/>
shot 46:24	Souter's 23:24	Starcher 38:2,2 38:21	subsidy 56:8	T 2:1,1
showing 6:13,18	speak 24:2 26:25	start 30:2 42:18	substance 33:25	take 9:10 10:1 24:23 25:8
shown 52:4	speaking 38:4	state 7:18,24 14:6 20:8 21:6	substandards 16:22,23	28:9 29:20 40:17,20,21
shows 8:12	specific 15:12,24 16:24 18:7	22:15 27:21 32:11 57:1	substantial 20:2 35:19	46:24
side 10:24 27:4 37:5 41:5	24:16	stated 25:7 34:4	substantive 22:4 22:6,21	taken 14:24 51:17
sign 14:8	specifically 3:21 19:20 21:24	statement 33:10	suddenly 34:13	takes 49:9
significant 13:6	54:7	States 1:1,13 4:9 14:8 15:6 16:2	sufficient 5:4 15:19,20 27:15	talk 7:1 10:13 35:25
simply 7:21 17:22 20:15	specificity 16:19	16:2 20:12,18 21:2,3,13,19	28:19	talked 51:6
single 31:2 45:8 46:7	speedy 4:24 16:18	21:24 23:2 26:6 45:21	suggested 26:1 51:16	talking 36:3 44:24,24 52:20
sit 33:11 52:8	spell 46:15	statutory 25:25 32:10	suggests 8:16	52:24
sitting 33:5 45:16	spent 8:13 11:21 26:4 40:12	stay 22:11,20	suit 12:16 30:21	tapes 51:12
situation 12:19 14:22 17:17	48:4,7 49:7	Stevens 27:7,13 27:18,23 28:1	support 8:8,9,13 20:1 44:10	targeted 17:23
26:5 40:8 41:11 45:12	spiraling 22:25 39:25	28:9,24 29:4,9 29:14,24 31:25	49:2,3,11	tell 12:24 30:21
53:25,25 57:4	spoke 48:22	34:18 36:16,19 41:17,24 42:4	supporting 8:5	temptation 5:14 5:19,22 35:12
situations 19:3 19:18 24:12,19	spoken 38:3	42:11,16,21 43:2 51:13	suppose 42:8 44:11	37:13
six 16:11	square 6:5	57:3	Supposing 28:1	tempted 29:1
size 46:5,6	stake 9:18 14:23 20:2 52:7	Stevens's 44:4	Supreme 1:1,13 8:18	ten 9:1,12,13 24:8 28:10,14
sliding 34:17	standard 5:10 5:15,17,18	Stewart 29:17	sure 9:24 27:1 38:15 42:17,18	28:15
small 19:17	15:3,9,10,13 15:17,24 16:3	stock 11:2	47:23	tenure 13:8 54:4 54:16
social 24:15	16:6 17:11,12 18:23 19:14	stockholder 8:19	surely 42:24	term 4:16 54:8 54:18
socialize 56:18	29:17 32:2,9 32:10,14,16,22	stop 10:7 34:18	suspect 12:20	terms 19:1 24:10 35:5
solidly 34:12	32:24 33:15 34:9,22 35:10	stricken 20:14	suspicion 4:13	44:13 48:22
solution 20:17 22:9	35:11,13 39:4 39:7 41:18,19	strong 27:9 38:15	sympathic 48:9	terrible 45:24
solve 20:12	41:23 42:3,5,6 42:23 43:8,9	stronger 38:14 50:10	sympathized 44:23	test 18:21 24:6 28:24 29:1
somebody 41:2 55:13		subconscious	synonyms 34:25 35:7,9	53:20 55:5
somebody's 13:19			system 3:25 15:22 18:23	tests 24:7
soon 14:9			25:17 31:15,19	Thank 3:9 25:18 52:10,11,16
sooner 48:16				
sorry 32:7 46:2				
source 20:2				

<p>57:10 THEODORE 1:16 2:3,8 3:7 52:14 theory 10:2 33:13 37:19,20 37:20 40:17 44:18 45:4 49:24 50:1 51:19 thing 5:7 36:13 49:19 things 9:20 45:17 46:4,9 46:10 48:19 49:18 51:23 think 5:10,25 6:15 9:4,4,14 10:11,14 13:22 14:12 20:11 21:8,14,22 22:23 23:4,17 23:25 24:22 26:5 27:17 29:4,7,22 30:12 31:2,18 31:19,23 32:15 33:2,6,9 34:20 34:25 35:22 36:6,14,17,19 36:22,23,25 37:4,9,10,10 37:22 38:1,8 38:20,22,24 40:25 41:11,19 41:22 42:19 43:6,20 45:3 47:2,7,13,15 48:23 50:24 51:21,22,24 52:2,4,21 53:14,19 54:10 54:25 55:16 56:6,14,16,17 57:2,8 thinks 31:3 45:9 third 30:5</p>	<p>thought 7:17 8:21,23 23:19 27:25 28:22 33:19 38:16 40:22 46:4 thoughtful 33:10 thousand 20:25 55:13 three 20:25,25 48:3 55:12 time 5:25 12:21 13:15 14:9 15:2 17:9 25:2 26:19 47:23,23 50:15 56:19,23 57:2 times 39:3 timing 17:4 22:7 today 30:25 42:9 52:20,24 tort 7:18,23 total 22:9 totally 47:18 51:18 touch 45:19,20 town 10:21 track 52:4 trade 8:25 9:2 9:16,25 28:11 transpire 22:17 trend 23:8 trial 3:11,22,24 4:24 6:6 16:18 36:11 52:22 55:3 tribunal 3:11,14 3:22 52:23,25 56:6 tribunals 57:6 tried 39:2 true 5:15 6:5 12:22,23 44:12 45:15 try 55:18 trying 44:3 Tuesday 1:10</p>	<p>Tumey 5:12 6:21 10:18 35:11,13,17,23 55:1 turn 8:11 40:16 40:16 two 10:1 11:10 11:11 12:1,5 26:7 37:21 48:19 51:22 types 8:10</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate 32:25 ultimately 10:19 UMW 14:19 unacceptable 15:10,19 unbiased 41:15 unconstitutio... 31:3,8,14 underlie 40:18 underlies 45:4 49:7 underlines 8:9 understand 7:16 15:23 31:4,22 36:4,9 40:14 40:23 46:20 49:23 understood 31:24 unfair 3:14 53:8 unfairness 4:1 unfavorable 8:22 unfounded 20:9 union 14:18 21:14 unions 51:6 United 1:1,13 13:18 14:17,18 16:2 21:14 28:3,4 unreasonability 22:10 unseat 8:21</p>	<p>unusual 17:17 unworkable 41:19,22,25 51:18 urged 43:16 use 35:4 46:14 46:17 54:12 55:7 uses 19:1</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 5:16 12:14 vague 18:23 46:17 valid 43:18 value 36:23 variety 13:15 19:4,9 various 16:8 23:2 vast 10:6 viable 37:20,22 47:18 victims 14:14 view 17:19 18:1 30:13 33:3,7 viewing 35:9 violated 32:22 38:21,22,25 violations 28:14 Virginia 8:7,17 20:23 22:16 23:11,14 25:24 virtually 32:11 53:4 vote 28:12 47:8 47:10 51:7</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait 54:14 waiting 43:25 44:1 48:4 want 16:21 28:5 33:12 44:19 45:11 46:14 55:14</p>	<p>wanted 6:16 40:1 Washington 1:9 1:16 5:25 48:23 wasn't 30:15,15 30:20 way 6:2,16 7:4 9:21 12:11 16:10 17:4 21:25 22:1 33:3 35:23 36:20 45:22 47:7,14 48:18 51:21 55:18 ways 54:15 weddings 56:19 wellspring 51:24 went 38:3 West 8:7,17 20:23 22:16 23:10,14 25:24 western 25:4 We'll 49:4 we're 7:13 8:25 19:11 25:3,12 28:6 33:21,24 33:24 36:3 37:11,11 43:15 52:20 we've 48:22,25 51:6 wide 16:9 35:13 willing 24:10 wipe 18:25 withdrawn 27:4 won 44:11 wonder 24:10 35:23 wonderfully 34:9 word 8:9,10 words 6:21 12:21 17:8 52:17,19 54:13 work 15:3</p>
---	--	---	---	---

worked 22:10	39 14:7			
Workers 13:18				
14:17,18 21:15	4			
28:3,4	4 19:23			
working 22:8	40 14:7			
31:16,20	455 53:18 56:25			
world 6:1 25:4	5			
worried 46:21	50 4:18,20 19:14			
wouldn't 42:9	52 2:9			
47:25 54:10,19	527 23:20 26:1,2			
write 45:25	26:4			
wrote 44:22				
X	6			
x 1:2,8	63 18:5			
Y	65a 18:6			
years 5:17 47:20	692 47:11			
47:22 48:3				
York 1:18				
\$				
\$1,000 20:24,24				
26:2				
\$12 10:18				
\$3 6:7 54:21				
56:7				
\$508,000 8:13				
\$750,000 44:15				
0				
08-22 1:5 3:4				
1				
10 4:19				
10:15 1:14 3:2				
11:18 57:12				
188a 8:2,5				
1983 30:16,21				
2				
200a 8:11				
2004 26:3				
2009 1:10				
25 2:6				
3				
3 1:10 2:4 49:12				