

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HUGH M. CAPERTON, ET AL. :

4 Petitioners :

5 v. : No. 08-22

6 A.T. MASSEY COAL COMPANY, :

7 INC., ET AL. :

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9 Washington, D.C.

10 Tuesday, March 3, 2009

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:15 a.m.

15 APPEARANCES:

16 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 ANDREW L. FREY, ESQ., New York, N.Y.; on behalf
19 of the Respondents.

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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 other 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

1 cases, but our system of law has always endeavored to
2 prevent even the probability of unfairness."

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

4 JUSTICE SCALIA: "Has always endeavored."

5 MR. OLSON: Pardon?

6 JUSTICE SCALIA: "Has always endeavored."

7 The truth -- "has always endeavored."

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

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

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

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

18 MR. OLSON: Well --

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

22 MR. OLSON: It's probable cause, Mr. Chief
23 Justice. The Court frequently decides questions
24 involving due process, equal protection, probable cause,
25 speedy trial, on the basis not of mathematical

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

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

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

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

24 MR. OLSON: Well, it's --

25 JUSTICE SCALIA: You've been around

1 Washington a long time. How far do you think gratitude
2 goes in -- in the general political world?

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

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

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: What if, instead of

1 having the focus on one, we're dealing with a trade
2 group that's making the donation. Ten companies form a
3 trade group. Is the judge recused in the case of every
4 one of those companies?

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, okay. Now,
25 I'm sure you know where I'm going next. What if it's

1 five companies in the trade group? When do you decide
2 that there's a probability? I take it if there are two
3 companies, under your theory there would be a
4 probability of bias?

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, but that's the

1 whole distinction that your friend on the other side
2 makes. Those cases involve financial interest, and the
3 recusal rules are, you know, if you have one share of
4 AT&T stock and it's in AT&T, you have to recuse. But
5 this is different. This is a probability of bias, not
6 financial interest.

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

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

11 MR. OLSON: Yes.

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

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

25 MR. OLSON: Well, let me -- let me answer

1 that in -- there's more parts, there's more than one
2 part to that question. Let me answer the first part
3 first. The Court hasn't said that there are only two
4 categories of disqualifying bias. I submit the Court
5 has said that it's interest in the outcome. That
6 interest in the outcome might be financial --

7 JUSTICE SCALIA: Two categories are the only
8 categories in which it has applied that.

9 MR. OLSON: I respectfully --

10 JUSTICE SCALIA: That broad --

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

1 the balance nice, clear, and true."

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

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

6 JUSTICE SCALIA: And he had a lot of -- a
7 lot of issues coming before me while his presidency
8 continued.

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

22 CHIEF JUSTICE ROBERTS: What about the
23 United Mine Workers? If they give a contribution to
24 somebody's campaign, is that judge then recused in every
25 labor case? Or -- I don't know if they give

1 contributions or not, but a group like Mothers Against
2 Drunk Driving, because they think the other judge is too
3 lenient in DWI cases, so they give contributions. Is
4 their preferred judge recused in every DWI case?

5 MR. OLSON: No, Chief Justice Roberts.

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

8 MR. OLSON: Well, of course, there are
9 factors and circumstances, but the -- when -- when an
10 individual or a group of individuals makes contributions
11 in the context of elections -- and we are going to have
12 State elections of -- of judges. We have them in 40 --
13 39 States, and there's no sign that those are going to
14 be discontinued any time soon.

15 But when a group of individuals or an
16 individual is -- is making contributions because they
17 think the jurist is going to be sensitive to -- to the
18 rights of criminals or sensitive to the rights of
19 victims of criminals, those are generic concerns that
20 people participating in the electoral process --

21 CHIEF JUSTICE ROBERTS: Well, so if there's
22 a big -- a big United Mine Workers case, or not even
23 United Mine Workers, involving particular union members,
24 and the UMW gives large contributions to a judge, that
25 -- that judge is recused?

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

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

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

21 MR. OLSON: It would be --

22 JUSTICE KENNEDY: But your -- your standard
23 of -- of impropriety doesn't, it seems to me, give
24 sufficient -- or "unacceptable risk of bias" doesn't
25 give sufficient guidance to the courts to implement this

1 rule, unless it's just -- it's just going to be one
2 case. Now, I know the law evolves on a case-by-case
3 system. I understand that, but it doesn't seem to me
4 that the standard you offer us is specific enough.

5 MR. OLSON: Well, there are several answers
6 to that. In the first place, the Conference of Chief
7 Justices of all of the States of the United States filed
8 a brief in this case and said that we need a standard
9 with respect to recusals for extraordinary campaign
10 contributions in cases. They also said that --

11 JUSTICE SCALIA: Was their standard the same
12 as yours?

13 MR. OLSON: It's --

14 JUSTICE SCALIA: I mean, that's frankly --

15 MR. OLSON: Yes.

16 JUSTICE SCALIA: -- one of the problems in
17 this case. The various amici and -- and you come up
18 with, you know, a wide divergence of standards. And all
19 of them say: By the way, these seven factors or five
20 factors or six factors, whatever they say, are not
21 exhaustive; there may be others as well.

22 MR. OLSON: That's --

23 JUSTICE SCALIA: Right?

24 MR. OLSON: That's because, Justice Scalia,
25 the -- the jurisprudence of this Court in connection

1 with standards like due process or probable cause or
2 speedy trial or equal protection can't be nailed down
3 with levels of specificity. It would be very inviting
4 --

5 JUSTICE KENNEDY: I want you to articulate
6 some substandards that have -- that are general in
7 nature, that apply to this case, substandards that are
8 more specific than the probability of bias.

9 MR. OLSON: Well, I -- I -- the reason we --
10 we approached it from that standpoint, Justice Kennedy,
11 is the probability of bias is something that this Court
12 has said repeatedly. But let me answer your question
13 this way: When the circumstances, including the timing
14 of the contribution, the magnitude and proportion of the
15 contribution are such that it would lead a reasonable
16 person in possession of all of the facts -- these are
17 all words from these courts' decisions -- to believe
18 that the judge would have a difficult time being other
19 than biased in favor of one of the parties, that would
20 be the standard that would be applied. It's a general
21 standard, but --

22 JUSTICE GINSBURG: To what --

23 MR. OLSON: -- the Conference of Chief
24 Justices --

25 JUSTICE GINSBURG: To what extent do you

1 rely on -- and this is a very unusual situation -- that
2 you have a defendant in the ongoing litigation who is in
3 fact a prime culprit from the point of view of the
4 plaintiff? That is, Blankenship, who made all these
5 contributions, is charged with driving Caperton out of
6 business. So he is not simply the CEO of the company
7 that's named as the defendant, but he is targeted as the
8 perpetrator. So that's an -- an additional factor.

9 Is that just one of a laundry list, or is
10 that central to your view that there is really an
11 appearance of impropriety here?

12 MR. OLSON: It is very much central, but
13 it's not exclusively central. If the -- and -- and that
14 is absolutely correct, Justice Ginsburg. On pages 63
15 through 65a of the joint appendix, for example, are the
16 specific post-trial motion findings of the judge saying
17 that the prime mover in the -- in the conduct that was
18 declared to be fraudulent and a deliberate effort to
19 drive this company out of business was Mr. Blankenship.
20 So factually that's correct.

21 CHIEF JUSTICE ROBERTS: Counsel --

22 MR. OLSON: That is a central factor. If he
23 had given one dollar, we --

24 JUSTICE SCALIA: But not the only central
25 factor.

1 MR. OLSON: It's not --

2 JUSTICE SCALIA: You said it's one central
3 factor.

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

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

8 MR. OLSON: I submit, Justice Scalia, you're
9 going to have to wipe out a lot of jurisprudence from
10 this Court that uses terms like "appearance of bias,"
11 "likelihood of bias." Your -- the --

12 JUSTICE SCALIA: Not -- not for situations
13 that have such an infinite variety as -- as the
14 appointment of judges and the election of judges and --
15 and funding your opponent or -- or declining to fund or
16 joining some agglomeration of -- of other institutions
17 that fund.

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

22 MR. OLSON: Well, it would be -- it would be
23 -- I would be delighted to say that the standard was 50
24 percent of the contributions in an election, and we
25 would come along in a case where there would be a very

1 small amount of money, and someone -- that -- that all
2 of those situations are distinguishable.

3 I admit this is not easy, but the Conference
4 of Chief Justices specifically said, to get back to
5 Justice Kennedy's question, what did they propose and
6 are they proposing something comparable to us? They are
7 -- they are -- and this is on page 4 of the Conference
8 of Chief Justices' brief. They are the judges who would
9 have to live with this decision. They said: (a) We
10 need it. "Extraordinarily out-of-line campaign support
11 from a source that has a substantial stake" in the
12 outcome of the proceedings where those "extreme facts
13 create a 'probability of actual bias.'"

14 And then they go on to say, to answer the
15 floodgate problem that my opponent raises -- this is
16 going to open the floodgates, and you will have nothing
17 but recusal motions. They explicitly state that concern
18 is not -- is "unfounded." "No bright-line rule can or
19 should be attempted." These are the judges who --

20 JUSTICE SCALIA: Don't you think it would be
21 easier to solve the problem, as some States have done,
22 not by having this -- this raffle for -- for whatever
23 judge gets -- gets stricken from the case or not, but
24 simply limiting the amount of contributions that can be
25 made? Isn't -- isn't that a much more sensible

1 solution?

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

4 JUSTICE SCALIA: And some of them are doing
5 that.

6 MR. OLSON: Let me make this point, Justice
7 Scalia. The contribution limit in West Virginia is
8 \$1,000. Mr. Blankenship contributed \$1,000, and then he
9 put up three million additional dollars, 3,000 -

10 CHIEF JUSTICE ROBERTS: Are the States --
11 are the States really free to do that? We have
12 recognized First Amendment interests in participating in
13 the electoral process before. I mean, would your
14 approach constitutionalize McCain-Feingold at a State
15 level?

16 MR. OLSON: I -- I think that this Court's
17 -- this Court's campaign finance jurisprudence
18 acknowledges the appropriateness of campaign
19 contribution limits, the very point that Justice Scalia
20 just made, and other limits. And in -- and, in fact,
21 States have limits against corporate contributions,
22 limits against union contributions. I think the United
23 Mine Workers incident came up. But --

24 CHIEF JUSTICE ROBERTS: Well, this --

25 MR. OLSON: But the -- and -- and the States

1 do have limitations with respect to what litigants can
2 do, but --

3 JUSTICE SOUTER: All right. Mr. Olson, the
4 very fact that they do raises what I think is one of the
5 difficult issues in this case, and it's raised by --
6 specifically by the brief of -- excuse me -- the nine
7 States, Alabama and so on. And -- and I would put it
8 this way. It's not exactly the way that brief did, but
9 I see the problem that you are -- that you are
10 addressing as -- as not only a procedural, but certainly
11 to a degree a substantive due process kind of problem.

12 One of the factors that goes into the
13 recognition of at least a substantive limitation when
14 there has been none before is -- is the issue of timing.
15 Is the political process in fact working now toward a
16 solution? Because if it is, that kind of ethos of total
17 unreasonability is -- is still being worked out, and --
18 and the courts ought to stay their hand.

19 So my question is, what do you say to the
20 argument that there is a political process going on
21 addressing this issue? And I forget the details, but my
22 recollection is that it may well have been that brief
23 pointed out that the State of West Virginia itself has
24 enacted some legislation since these events began to
25 transpire.

1 So the nub of the question is, is the
2 political process in process and is that a good reason
3 for us to stay our hand in recognizing a new procedural
4 or substantive due process right at this point?

5 MR. OLSON: I think there are -- there are
6 more than one answer to that question. One, the
7 political process to which you refer is spiraling out of
8 control. There is a financial arms race in judicial
9 elections in various States throughout the country, and
10 the briefs --

11 JUSTICE SOUTER: Oh, I think we all
12 recognize that. Is there -- is there a
13 counter-political process going on?

14 MR. OLSON: I -- it hasn't done the job so
15 far, and the trend seems to be in the opposite
16 direction, but even if it --

17 JUSTICE SOUTER: What happened in West
18 Virginia?

19 MR. OLSON: Pardon me?

20 JUSTICE SOUTER: Is my recollection correct
21 that West Virginia has, in fact, enacted some kind of
22 limiting legislation?

23 MR. OLSON: I -- I believe that is correct,
24 but I don't think that would have addressed the problem
25 in this case because --

1 JUSTICE SCALIA: Why? I thought they closed
2 the 527 loophole that allowed him to contribute so much
3 above the individual limit.

4 MR. OLSON: Irrespective of that, I was
5 going to go on and answer this in response to Justice
6 Souter's question. The Conference of Chief Justices, I
7 think, provide a second answer to that question. They
8 are the ones where the rubber meets the road, so to
9 speak. They are saying, and the entire conference is
10 saying, we need some guidance here with respect to a
11 constitutional limit --

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

1 categorically in any of those situations that your rule
2 would not apply?

3 MR. OLSON: I would hesitate -- I would
4 hesitate to do so, Justice Alito. I think you've put
5 your finger on some of the circumstances that would take
6 it out of the context of the appearance of justice for
7 sale.

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

18 This circumstance in this case involves the
19 appearance of judges being bought. Now, we're not
20 saying that there's actual bias because there's actual
21 -- as this Court has repeatedly said, that's impossible
22 to prove, and that's why the appearance of probability
23 of bias is so important to the respect that we need to
24 have for the judicial system.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Frey.

2 ORAL ARGUMENT OF ANDREW L. FREY

3 ON BEHALF OF THE RESPONDENTS

4 MR. FREY: Mr. Chief Justice, and may it
5 please the Court:

6 First of all, just on the West Virginia
7 statutory amendment, they did, as Justice Scalia
8 suggested, close the 527 loophole and limit
9 contributions by individuals to 527 groups to \$1,000
10 after the 2004 election in response to the concern about
11 the amount of money that was being spent through 527
12 groups in that election.

13 So I think this is a situation where the
14 States are dealing with it legislatively and, and as I
15 hope to get to in a minute or two, the Court has
16 recognized that this is -- repeatedly recognized that
17 this is something that is meant to be dealt with through
18 legislative or canons of judicial ethics or codes --

19 JUSTICE GINSBURG: And how --

20 MR. FREY: -- not through --

21 JUSTICE GINSBURG: -- is it -- is it -- this
22 Court's decision in Republican Party of Minnesota said
23 that judges could say anything, just as a legislator.
24 Are you extending that notion that an election is an
25 election to this area of the appearance of impropriety?

1 I mean, is it your position that the judge is elected
2 just like a legislator is elected, and legislators all
3 the time are beholden to interest groups?

4 MR. FREY: Well, of course I don't agree
5 that Justice Benjamin was in the least beholden to
6 anybody in this case. But the Republican Party case was
7 a case about the First Amendment right of candidates in
8 an election to speak their position on issues. I'm not
9 sure that I follow what this has to do with this case.
10 But I will say that this is not a case about
11 appearances. The petition was about appearances.
12 They've -- the other side has withdrawn or it has
13 abandoned an appearance argument, and with good reason
14 because the Due Process Clause --

15 JUSTICE STEVENS: Well, Mr. Frey, is it your
16 position that the appearance of impropriety could never
17 be strong enough to raise a constitutional issue?

18 MR. FREY: Well, we might have appearance of
19 impropriety overlapping with conditions that would
20 justify --

21 JUSTICE STEVENS: I'm assuming appearances
22 only. Are you saying that appearances without any
23 actual proof of bias could never be sufficient as a
24 constitutional matter?

25 MR. FREY: I think we are.

1 JUSTICE STEVENS: Is that your position?

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

5 JUSTICE GINSBURG: Why --

6 JUSTICE STEVENS: That's not an answer to my
7 question.

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

9 JUSTICE STEVENS: Supposing, for example,
10 the judge had campaigned on the ground that he would
11 issue favorable rulings to the United Mine Workers, and
12 the United Mine Workers campaigned, raising money
13 saying, we want to get a judge who will rule in our
14 favor in all the cases we're interested in. Would that
15 create an appearance of impropriety?

16 MR. FREY: Well --

17 JUSTICE STEVENS: Or take another example.
18 The Chief Justice asked what if there are ten members of
19 a trade association and would all -- and they all
20 contributed to get a judge to vote in their favor in a
21 case that involved a conspiracy charge among the --
22 charged the ten of them for violations of the Sherman
23 Act, something like that. And if all ten of them raise
24 money publicly for the very purpose of getting a judge
25 who would rule favorably in their favor, that would

1 clearly create a very extreme appearance of impropriety.
2 Would that be sufficient, in your judgment, to raise a
3 constitutional issue?

4 MR. FREY: If you were -- if -- if you
5 thought there was no basis for believing there was
6 actual bias, but it looked bad --

7 JUSTICE STEVENS: No, it would meet the test
8 in the -- in the judges' brief of an average judge would
9 be tempted under the circumstances. That's the test
10 that the Conference of Chief Judges --

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

12 JUSTICE STEVENS: And do you think that
13 could ever, just appearance, could ever raise a due
14 process issue?

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

17 JUSTICE STEVENS: No matter how extreme the
18 facts?

19 MR. FREY: The question is whether there is
20 actual bias of a kind that is recognized as
21 disqualifying. The Court has recognized --

22 JUSTICE STEVENS: The whole point of this
23 case is it has not been recognized -- we have never
24 confronted a case as extreme as this before. This fits
25 the standard that Potter Stewart articulated when he

1 said "I know it when I see it."

2 (Laughter.)

3 MR. FREY: I would take exception to the
4 characterization of this case as "extreme."

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

7 JUSTICE STEVENS: The question is not
8 whether we have, but whether we should.

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

20 I think that's a very important point.

21 JUSTICE GINSBURG: What about the view that
22 Benjamin should not be the judge of his own cause?
23 Wasn't -- wasn't it -- it was either Massey, the
24 company, or Blankenship that brought a 1983 action
25 insisting on that very point, that in recusal matter --

1 MR. FREY: Well, that --

2 JUSTICE GINSBURG: -- wasn't -- well, maybe
3 you can tell me what that 1983 suit was. It was a
4 charge about --

5 MR. FREY: Yes, it challenged the procedure.
6 That's not an issue that's before the Court here, and
7 our -- our position today is that this Court has
8 consistently allowed recusal matters to be decided by a
9 -- the single justice who is challenged. I don't think
10 the Court thinks it's unconstitutional to do that.

11 I understand the -- the concerns about
12 having the judge making the decision about whether
13 recusal is required, but that is not the practice of
14 this Court, and if it's not the practice of this Court,
15 I frankly doubt it's unconstitutional.

16 JUSTICE GINSBURG: But it was the position
17 that Blankenship took?

18 MR. FREY: Well, it was -- no, not
19 Blankenship. Massey. Massey --

20 JUSTICE SOUTER: Well, it may not be per se
21 unconstitutional, but it is certainly one contributing
22 factor, it seems to me, to the argument that the system
23 that we have depended on up to this point is not working
24 very well.

25 MR. FREY: Well, I don't think -- I don't

1 think the system -- I don't -- I don't agree that the
2 system is not working well. I mean, of course there are
3 adjustments --

4 JUSTICE SOUTER: Well, I -- as I understand
5 it, although you never directly -- I don't think you
6 ever directly answered it, I -- I understood you to
7 imply in response to Justice Stevens that there would be
8 no appearance problem that would ever justify a
9 constitutional standard.

10 MR. FREY: Yes, but --

11 JUSTICE SOUTER: And in fact, if that's --

12 MR. FREY: -- but appearances -- but
13 appearances -- I don't mean to interrupt you if -- I'm
14 sorry.

15 JUSTICE SOUTER: Go ahead.

16 MR. FREY: Appearance is a standard for
17 recusal, a nonconstitutional statutory standard for
18 recusal in virtually every State, so we already have --
19 and in the Federal system, so --

20 JUSTICE SOUTER: Yes. And we have -- we
21 have an appearance standard under the ABA canons, but I
22 think it would be difficult to make a very convincing
23 argument that that standard was effective in this case.

24 MR. FREY: Well, that -- that's a matter of
25 opinion. I -- I --

1 JUSTICE SOUTER: Well, it's -- it's the
2 matter of opinion that brings the case before us. And
3 would you agree -- I am not -- I am not asking you to
4 agree that the ABA standard was violated. That's not
5 what you're here for. But would you agree that the ABA
6 standard is certainly implicated by the facts of this
7 case, whatever the ultimate recusal decision should have
8 been?

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

19 JUSTICE KENNEDY: I want you to be able to
20 elaborate your full theory of the case, but just so you
21 know, it -- it does seem to me that the appearance
22 standard has -- has much to recommend it. In part it
23 means that you don't have to inquire into the actual
24 bias; it's -- it's more objective. Now, of course, it
25 has to be controlled. It has to be precise. But I just

1 thought that you know that I -- I did have that
2 inclination.

3 MR. FREY: But -- but we're here on the
4 question of constitutional requirements, and the
5 Constitution --

6 JUSTICE KENNEDY: And we're asking -- but
7 we're asking what substance we can give to the
8 constitutional protection.

9 MR. FREY: Well, what you're really asking
10 is whether you should abandon what is a fairly clearly
11 stated rule and practice of the -- of this Court, dating
12 back to the common law, that questions of bias in
13 general as opposed to interest are matters for
14 legislative resolution and not for -- not for
15 constitutional --

16 JUSTICE SCALIA: Of course, the appearance
17 standard is -- is wonderfully ratchetable. Once it is
18 clearly established that a certain -- a certain set of
19 facts creates the appearance of impropriety that is
20 solidly established, then the set of facts right next to
21 that suddenly acquires the appearance of impropriety
22 because it's so -- it's so close to what is obviously
23 improper. And -- and so we go down and down and down.
24 And I -- I personally don't favor a constitutional rule
25 that is a sliding scale like that.

1 JUSTICE STEVENS: Of course, you can stop at
2 what's obviously improper.

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

6 JUSTICE GINSBURG: Would you please clarify
7 that? Because I was taking "appearance," "likelihood,"
8 "probability" as all synonyms, and I think of Justice
9 Marshall's decision in Peters and Kiff, involving a
10 grand jury, and he said that due process is denied in
11 circumstances creating the likelihood or the appearance
12 of bias. And there are other decisions, too, that use
13 those terms interchangeably. So I don't know that
14 "probability of bias," "likelihood of bias,"
15 "appearance" -- that -- those seem to me synonyms.

16 MR. FREY: All right. Well, if you're
17 viewing them as cinnamons -- synonyms, then the question
18 is whether that kind of standard is a -- is the
19 constitutional standard. And let me say about the Tumey
20 case which -- the "possible temptation" language in the
21 Tumey case, which is of course a wide open standard:
22 That was discussed only after the Court said questions
23 of bias are not constitutional, they're for the
24 legislature; questions of interest, pecuniary interest
25 in the Tumey case, are. And then the language that Mr.

1 Olson quoted came in the discussion of the question of
2 whether the pecuniary interest was substantial enough to
3 create a disqualification, constitutional
4 disqualification.

5 JUSTICE KENNEDY: I -- I think you're quite
6 right in the way you describe Tumey, but I wonder why is
7 that the reason -- why is appearance never
8 constitutional? Why should that be? Can you talk about
9 that?

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

20 Appearance is addressed to a different
21 thing. It's addressed to the reputation of the judicial
22 system, which is not, I think, the function of the Due
23 Process Clause to address.

24 JUSTICE STEVENS: Why not?

25 MR. FREY: Because I think the Due Process

1 Clause is concerned with the fairness of the --

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

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

9 JUSTICE SOUTER: But --

10 JUSTICE KENNEDY: But our whole system is
11 designed to ensure confidence in our judgments.

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

14 JUSTICE KENNEDY: And it seems -- it seems
15 to me litigants have an entitlement to that under the
16 Due Process Clause.

17 MR. FREY: Well, I don't think so, but I
18 don't think it -- I don't think it really essentially
19 matters. We're -- we're dealing with a semantical
20 quibble here, where the real question is, is possibility
21 of bias, a temptation of bias, a subconscious effect
22 that -- even a probability of bias, whatever -- there's
23 a lot of different standards that have been put
24 forward -- is that a constitutional basis for
25 disqualifying a judge (a)? (b) If it is sometimes a

1 constitutional basis for disqualifying a judge, is it a
2 basis under the debt of gratitude theory? And (c) if
3 the debt of gratitude theory is a viable theory -- and
4 for reasons I hope to have a minute or two to address, I
5 think it's not viable -- does it apply on the
6 circumstances of this case?

7 JUSTICE GINSBURG: May I ask you -- I mean,
8 there were a few recusal motions in this case. Judge, I
9 think it was, Matthew moved to disqualify Judge
10 Starcher, and Judge Starcher did indeed recuse himself.
11 He had spoken out against what went on here. If he had
12 refused to recuse after speaking out as he did, would
13 that be compatible with due process, the due process
14 owed to the Massey Company?

15 MR. FREY: That would raise an interesting
16 question and I think a much closer question than this
17 case, because that would involve the question of whether
18 -- there is -- the Court has recognized that where a
19 judge is embroiled with a litigant and has a personal
20 animosity arising out of the relationship with the
21 litigant, that is -- that is a possible ground for
22 recusal. So it's a -- it's a stronger case. I'm not
23 sure it's strong enough.

24 JUSTICE GINSBURG: I thought the animosity
25 was directed at Judge Benjamin?

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

3 JUSTICE GINSBURG: So you think that the
4 Constitution might have been violated if Starcher -- you
5 think due process might have been violated if that judge
6 had remained on the bench?

7 MR. FREY: I think it's a closer case. I'm
8 not prepared to say that it would have been violated
9 even then.

10 JUSTICE SOUTER: Mr. Frey, you've tried a
11 couple of times to get to -- to your -- your point that,
12 even if we assume probability of bias is the standard,
13 the debt of gratitude would not qualify. I'll be candid
14 with -- to say that I don't see why probability of bias
15 is necessarily an inappropriate constitutional standard,
16 whether we should adopt it or not. But would you give
17 your argument on why the debt of gratitude could not
18 qualify?

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

20 JUSTICE SOUTER: Because that may illustrate
21 the point.

22 MR. FREY: Let me say just one point about
23 probability of bias, which is conceptually -- the rule
24 is quite clear at common law, as the Court knows, that
25 that was not a ground for disqualification of a judge.

1 Now --

2 JUSTICE SOUTER: Well, but I know what
3 common law -- how much help common law is. Common law
4 didn't have elected judges.

5 MR. FREY: No, but --

6 JUSTICE SOUTER: Common law did not have
7 this contribution system --

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

9 JUSTICE SOUTER: -- which your colleague
10 referred to as spiraling out of control.

11 MR. FREY: That's the point I wanted to
12 make, that while -- while common law did not have
13 elected judges, it had the issue of bias. After all,
14 elected judges are not really the issue here. The issue
15 is not whether judges should be elected; the issue is
16 whether -- whether there should be disqualification for
17 bias. That is an issue that the common law confronted.
18 This is not like some novel situation that has arisen
19 that the common law didn't deal with.

20 JUSTICE GINSBURG: But we don't deal with an
21 abstract setting. We have the setting of elections, of
22 elections of judges and millions of dollars spent on
23 them. That's the context in which this case arises.

24 MR. FREY: Yes, I understand, and the
25 question is whether that -- that gives rise to bias. So

1 let's -- let's turn -- let's turn to the question of
2 whether the debt of gratitude theory, which I take it is
3 the principle that would underlie disqualification in
4 the election context --

5 JUSTICE SOUTER: I don't take it as the
6 principle, but I take it as an application of the
7 principle. And I thought if you get to responding to
8 the application, I may understand your position better
9 on the principle.

10 MR. FREY: Debt of gratitude I think is a
11 principle. You have to ask yourself what is the reason
12 why somebody would conclude -- why a court would
13 conclude that Justice Benjamin is -- is not biased.

14 And let me say that one of the key elements
15 which is not mentioned by the other side which is very
16 important is the presumption of impartiality. It goes
17 back to Coke and Blackstone. Judges are clothed with a
18 presumption of impartiality. There has to be something
19 that overcomes that presumption.

20 And let me say that -- I ask the Court to
21 ask yourselves if you were in Justice Benjamin's
22 situation, do you really think you would be incapable of
23 rendering an impartial decision in a case involving
24 Massey? Because if the answer to that is no, if the
25 answer to that is you would not be incapable of

1 rendering an unbiased decision, then there would --
2 there's no justification for saying that Justice
3 Benjamin would --

4 JUSTICE STEVENS: May I ask you whether your
5 challenge to the probability of bias as a standard --
6 do you think it's an unworkable standard or that even if
7 there is a probability of bias, that should not be
8 constitutionally disqualifying?

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

11 JUSTICE STEVENS: Why is it any more
12 unworkable than probable cause in a Fourth Amendment
13 case?

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

16 JUSTICE STEVENS: Well, it has probable
17 cause as a standard.

18 MR. FREY: If there was a standard that said
19 judges should recuse themselves when it would be
20 reasonable to suppose that there was bias, if the
21 Constitution said that, we wouldn't be here today or we
22 would be here arguing about whether --

23 JUSTICE STEVENS: Let me get back to the
24 question. Why is probability in this context any more
25 difficult to figure out than probability in the Fourth

1 Amendment context?

2 MR. FREY: I'm not --

3 JUSTICE STEVENS: Or is it?

4 MR. FREY: I'm not sure of the answer to
5 that. What I am sure is that if you start down the road
6 of debt of gratitude, which I think is the animating
7 principle if there's going to be a probability of bias
8 --

9 JUSTICE STEVENS: Well, I'm not -- I'm not
10 asking you about debt of gratitude. I'm asking you why
11 isn't the probability standard perfectly administerable,
12 just as it is in the Fourth Amendment? And surely you
13 would agree --

14 MR. FREY: Well, you could --

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

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

20 JUSTICE SCALIA: But we have no choice with
21 regard to the reasonableness standard. We -- it's not a
22 standard we made up --

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

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

1 MR. FREY: Yes.

2 JUSTICE SCALIA: We have to make the most of
3 it, do the best we can do with it. But here we're being
4 urged to adopt out of nowhere a new standard of
5 probability of bias. That's not in the Constitution,
6 and it's perfectly valid to ask, is that a sensible
7 standard?

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

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

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

13 JUSTICE SCALIA: I've been waiting and
14 waiting.

15 (Laughter.)

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

18 The problem with debt of gratitude is that
19 it's not a principle with any reasonable limit. If you
20 apply it here, if you say there's a debt of gratitude
21 here, then you have the question about all the other
22 circumstances. The plaintiffs' lawyers gave a million
23 and a half dollars to Justice McGraw to support his
24 reelection. Suppose he had won? What -- what do you
25 do? It's true that no one individual gave a lot of

1 money, but it's -- but if you're looking at it in terms
2 of what is the probability of bias, it's at least as
3 great, if not greater than here. The doctors gave
4 \$750,000 to Benjamin.

5 JUSTICE BREYER: But that isn't the only
6 theory. That is, in my own mind -- I don't know if you
7 want to call it "probability" or "possibility," you
8 don't manacle a defendant in a courtroom even though
9 this jury may not have been affected. I read the
10 opinion Justice Benjamin wrote. It was a very good
11 opinion. I sympathized with his problem. Okay? So I'm
12 not talking about him. I'm talking about we don't
13 manacle defendants because many jurors, maybe not this
14 one, would have been affected, and that seems the
15 problem here.

16 The debt of gratitude I think, no, that
17 isn't the theory that underlies it, though it may in
18 part. It's that you have here the largest amount by a
19 factor -- an order of magnitude perhaps, I mean hugely
20 greater than any other contribution given to a judge by
21 a single person. It doesn't just affect the fast
22 through gratitude. A normal human being also thinks, if
23 I play my cards right, maybe it will be repeated, and
24 they'll want to keep me in office. And we have the fact
25 of how it looks, and we don't have a situation where the

1 something like this is inevitable, where you appoint
2 judges. It's inevitable that there will be an
3 appointment. I mean, hey, but that isn't true of
4 sitting on this kind of case.

5 So we have all those things that make it
6 extreme. So what is the problem? If we say there is an
7 envelope that the Due Process Clause doesn't touch, and
8 that envelope is greater, and we touch less, if the
9 States are regulating it themselves. Where they're not
10 -- and this is way outside the envelope -- at that point
11 the Due Process Clause comes into play. Now, end of
12 opinion. Now, what terrible mess will the Court get
13 into if they write just that?

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

16 JUSTICE BREYER: A logical principle or, I
17 thought, if I was mentioning, all those things that
18 might lead a judge in the future, because of the size,
19 in the past, because of the size, in the fact that it's
20 a single individual, in the fact that there's a case
21 coming up that's likely that the judge will decide --
22 all those things that are listed by the chief justices
23 in their brief, all those things together make it a
24 serious risk that there will be bias, even though an
25 individual might not be. There is a serious risk.

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

4 JUSTICE SCALIA: It doesn't matter what
5 language you use because it's pretty vague anyway --
6 "probability," "likelihood," "appearance" -- it doesn't
7 really --

8 JUSTICE BREYER: Don't you understand what I
9 mean? I'm not worried about what you call "probability"
10 --

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

13 (Laughter.)

14 MR. FREY: I don't agree with you, Justice
15 Breyer. I think you have to -- you have to have a
16 reason. You don't have a decision that's good for this
17 case only. You have to have a decision that's
18 principled, and -- and when you ask what is the
19 principle, what is it that would cause Justice Benjamin
20 -- and by the way, let me say that I think if Justice
21 Benjamin was moved to do anything, it's to vote against
22 Massey or to recuse himself to avoid the controversy
23 that would attend a vote for Massey that he knew was
24 going to happen. And if you look at page 692 of the
25 joint appendix, he actually discusses that problem.

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

5 As to the hope of future benefit in this
6 case, that is totally not viable for a couple of
7 reasons. One is Justice Benjamin's not running for
8 another eight years.

9 JUSTICE SOUTER: How long has Massey been in
10 business, eight years?

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

12 JUSTICE SOUTER: I mean --

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

14 JUSTICE SOUTER: If one is going to go into
15 that calculation, one is going to assume that in eight
16 years, there's going to be another three million dollars
17 waiting to be spent.

18 MR. FREY: That -- well, there's several
19 problems with that, Justice Souter. The first is
20 there's no more likely to be spent on Justice Benjamin
21 than on any other member of the court who might be
22 sympathetic, and --

23 JUSTICE SOUTER: Well, one has hopes.

24 (Laughter.)

25 MR. FREY: Excuse me?

1 JUSTICE SOUTER: One has hopes.

2 MR. FREY: Well, a lot of members of the
3 court would have the same -- exactly the same hopes, and
4 with more reason: They might be running sooner, they
5 might end up with an opponent who is more distasteful to
6 Mr. Blankenship.

7 And by the way, Mr. Blankenship is not
8 Massey. They are two separate things --

9 JUSTICE SOUTER: Well, you say that and I
10 say that because we took corporate law. But in -- in
11 terms of my brother a moment ago spoke of we've been
12 around Washington for a while, and I don't think that
13 fine distinction counts very much on the issue that
14 we've got.

15 MR. FREY: But why would -- why would
16 Blankenship be more likely to support Benjamin than to
17 support Justice Davis or Justice --

18 JUSTICE SOUTER: We'll have to see when the
19 next election comes along.

20 (Laughter.)

21 JUSTICE SOUTER: An expectation has been
22 created that if there is an interest, the money will be
23 spent --

24 MR. FREY: Therefore --

25 JUSTICE SOUTER: -- and it seems to me that

1 underlies Justice Breyer's analysis just as it does
2 mine.

3 MR. FREY: Where that takes you is that all
4 the judges have to recuse themselves because they all
5 have the possibility of garnering support.

6 JUSTICE SOUTER: They all have not had the
7 three million.

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

15 JUSTICE SOUTER: No, but with respect, your
16 -- Justice Breyer dissociated his question from debt of
17 gratitude. I understand you -- you are arguing against
18 a debt of gratitude theory, but if I recall his
19 question, it was not based upon the debt of gratitude
20 theory.

21 MR. FREY: Right, but what I'm saying is you
22 can't -- if you're looking at -- at where -- where would
23 the bias come from, and I'm assuming now that some
24 probability of bias standard is accepted by the Court,
25 and I'm asking where would the bias come from? It

1 either would come from a debt of gratitude for past
2 contributions or an expectation of future benefits. If
3 it's an expectation of future benefits, it is not
4 reasonable to assume that Benjamin has any stronger
5 expectation than other members of the court. So it
6 seems to me you're in a position where if he has to
7 recuse, they all have to recuse.

8 JUSTICE KENNEDY: And then debt of
9 gratitude -- we keep asking but your time is running
10 out. Have you said what you need to say on debt of
11 gratitude?

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

14 MR. FREY: Well, okay.

15 (Laughter.)

16 MR. FREY: I don't know. Some of the ground
17 is covered already by questions during Mr. Olson's
18 argument. I think the debt of gratitude cannot be
19 limited consistent with neutral principles to large
20 individual campaign contributions. You have newspaper
21 endorsements. Clearly, you could have a debt of
22 gratitude there. A newspaper could be a party in the
23 case. You have the plaintiff lawyers and the doctors
24 which we've talked about. You have labor unions getting
25 out the vote. You have political figures endorsing.

1 And you have appointed judges and -- and to
2 say that there's no -- to say that you're going to carve
3 out the gratitude that the judges feel toward the
4 president who appointed them -- I mean, the fact is in
5 the Nixon tapes case, and in Clinton against Jones --

6 JUSTICE STEVENS: Mr. Frey, there is
7 obviously a difference between appointed judges and
8 elected judges. But why do we have to rest on just one
9 factor? The Conference of Chief Justices suggested
10 their seven factors should be taken into account. Why
11 is that totally unworkable? Why does it have to be just
12 one theory, debt of gratitude and nothing else?

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

15 MR. FREY: I think you're mixing up two
16 different things. What is the -- one question is what
17 is the wellspring of the bias? Where -- why do we think
18 the judge has bias? And the second question is how do
19 we measure that?

20 And what I'm saying is if you think that
21 Justice Benjamin would be biased in this case -- which I
22 certainly don't, and I think his track record has shown
23 no bias in favor of Massey -- then why would -- why
24 would an appointed justice, appointed by a president in
25 a case where the president's personal interests are at

1 stake not have the same feelings of bias? And yet
2 justices sit in those circumstances.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. FREY: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Olson, five
6 minutes.

7 REBUTTAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONERS

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

10 Justice Scalia, you mentioned that the words
11 "reasonable search and seizure" are in the Constitution.
12 The words "due process" are in the Constitution, and
13 that is what we're talking about today. And this Court
14 has repeatedly said -- and I don't think my opponent
15 objects or disagrees -- that due process means a fair
16 trial in a fair tribunal.

17 So what are we talking about today? What is
18 a fair tribunal? He said ask yourself, could you be
19 fair if you were in Justice Benjamin's position? That,
20 I submit, is not the question, because this Court has
21 repeatedly said actual bias is something that's
22 virtually impossible to prove, the Council of -- the
23 Conference of Chief Justices said don't go there. We
24 can't ever determine that.

25 And so the question is what is -- is someone

1 likely to be biased, likely to be unfair?

2 And, Justice Kennedy, one of the -- one of
3 the factors that led us to the conclusion that an
4 objective standard, that a reasonable person knowing all
5 of the facts would probably be biased is language from a
6 number of these court -- this Court's decisions,
7 including your concurrence in the Liteky case -- I think
8 it's Liteky, L-i-t-e-k-y -- in which you said the
9 objective observer would entertain reasonable questions
10 about the judge's impartiality.

11 Now, that's a case involving section 455 and
12 not the Due Process Clause, but I think the logic with
13 respect to the application of the test and the ability
14 of this Court and other courts to apply it, as the
15 Conference of Chief Justices said they could, is the
16 same.

17 JUSTICE ALITO: What is the difference
18 between this situation and a situation where a justice
19 or a judge is appointed by an executive and then hears a
20 case that is of critical importance to the executive?

21 MR. OLSON: The -- the -- there's a number
22 of questions. In the first place, there's life tenure
23 for federal judges.

24 Secondly, was that appointment made
25 specifically --

1 JUSTICE ALITO: If Justice Benjamin were
2 term-limited, would this case be different?

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

7 JUSTICE SCALIA: Wait, you can't have it
8 both ways. I mean, if your response to the first
9 question is judges have lifetime tenure, you then can't
10 respond to the second question would it make a
11 difference if he was term-limited by saying, no, it
12 wouldn't make a difference.

13 MR. OLSON: He might be running for another
14 court. He might be -- he might need the benefits. This
15 was \$3 million in a race in which that amounted to more
16 money than everybody else collectively put into this
17 race while this case was pending.

18 Now, the language that I think is important
19 is from the Tumey case: "Might not a defendant with
20 reason say that he feared he would not get a fair
21 trial?" So instead of the question that my opponent
22 asks, would you be fair, which is not the standard
23 because actual bias isn't the test, would there be a
24 perception, likelihood, probability, appearance of bias,
25 to use the language used by this Court over and over

1 again?

2 CHIEF JUSTICE ROBERTS: What about --

3 MR. OLSON: Ask yourself this question --

4 CHIEF JUSTICE ROBERTS: What about

5 protective donations? You actually give, not three
6 million, but a couple hundred thousand to somebody you
7 don't want deciding your case. And it comes up, and you
8 say, you have to recuse yourself because --

9 MR. OLSON: As this Court has said, I think,
10 in one of the cases that you can't allow a litigant to
11 try to game the system in that way. But what I was
12 getting to instead of the question --

13 CHIEF JUSTICE ROBERTS: Well, how do you
14 know? I mean, are you saying it's going to be clear in
15 every case that a judge is going to rule against the
16 particular entity?

17 MR. OLSON: It's not going to be clear in
18 every case, Mr. Chief Justice. It's going to be would a
19 detached observer conclude that a fair and impartial
20 hearing would be possible? So instead of the question
21 that Mr. Frey was asking, whether you, yourself, could
22 be -- I'd like to ask you to ask this question: If this
23 was going to be the judge in your case, would you think
24 it would be fair and would it be a fair tribunal if the
25 judge in your case was selected with a \$3 million

1 subsidy by your opponent?

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

4 MR. OLSON: That is the standard that
5 this --

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

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

10 CHIEF JUSTICE ROBERTS: You don't think so?
11 A reasonable person comes up and says, they're --

12 MR. OLSON: I think --

13 CHIEF JUSTICE ROBERTS: -- they socialize
14 all the time, you know, they were at each other's
15 weddings, whatever it is, we know that that's not a
16 basis for recusal.

17 MR. OLSON: Well, then if it was a basis for
18 a recusal, you would have to be recusing all the time,
19 because that is a standard that's -- reasonable question
20 of impartiality is in section 455, it is in many of the
21 State codes. The courts handle these decisions all of
22 the time. These are factors -- and I think I'd go back
23 to Justice Stevens's and Justice Breyer's question.
24 This is a situation where there has got to be some
25 limits.

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

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

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