IN THE SUPREME COURT OF THE UNITED STATES

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HUGH M. CAPERTON, ET AL. :

Petitioners :

v. : No. 08-22

A.T. MASSEY COAL COMPANY, :

INC., ET AL. :

- x

Washington, D.C.

Tuesday, March 3, 2009

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

APPEARANCES:

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

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

C O N T E N T S

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

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

And in that paragraph, the Court goes on --

JUSTICE SCALIA: "Has always endeavored."

MR. OLSON: Pardon?

JUSTICE SCALIA: "Has always endeavored." The truth -- "has always endeavored."

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

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

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

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

MR. OLSON: Well --

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

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

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

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

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

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

MR. OLSON: Well, it's --

JUSTICE SCALIA: You've been around

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

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

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

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

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

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

JUSTICE SCALIA: They're certainly not good buddies.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: What if, instead of

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, but that's the

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

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

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

MR. OLSON: Yes.

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

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

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

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

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

MR. OLSON: I respectfully --

JUSTICE SCALIA: That broad --

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

the balance nice, clear, and true."

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

MR. OLSON: And I was going to --

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

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

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

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

MR. OLSON: No, Chief Justice Roberts.

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

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

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

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

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

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

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

MR. OLSON: It would be --

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

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

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

JUSTICE SCALIA: Was their standard the same as yours?

MR. OLSON: It's --

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

MR. OLSON: Yes.

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

MR. OLSON: That's --

JUSTICE SCALIA: Right?

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

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

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

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

JUSTICE GINSBURG: To what --

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

JUSTICE GINSBURG: To what extent do you

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

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

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

CHIEF JUSTICE ROBERTS: Counsel --

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

JUSTICE SCALIA: But not the only central factor.

MR. OLSON: It's not --
JUSTICE SCALIA: You said it's one central factor.
MR. OLSON: Well, that's --
JUSTICE SCALIA: You really have no test other than probability of bias. We can't -- we can't run a system on -- on such a vague standard.
MR. OLSON: I submit, Justice Scalia, you're going to have to wipe out a lot of jurisprudence from this Court that uses terms like "appearance of bias," "likelihood of bias." Your -- the --
JUSTICE SCALIA: Not -- not for situations that have such an infinite variety as -- as the appointment of judges and the election of judges and -- and funding your opponent or -- or declining to fund or joining some agglomeration of -- of other institutions that fund.
The -- the variety is immense, and you give us nothing to hang onto except, you know, case by case we're going to have to decide whether there's a probability of bias.
MR. OLSON: Well, it would be -- it would be -- I would be delighted to say that the standard was 50 percent of the contributions in an election, and we would come along in a case where there would be a very

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

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

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

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

solution?

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

JUSTICE SCALIA: And some of them are doing that.

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

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

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

CHIEF JUSTICE ROBERTS: Well, this --

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: What happened in West Virginia?

MR. OLSON: Pardon me?

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE RESPONDENTS

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

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

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

JUSTICE GINSBURG: And how --

MR. FREY: -- not through --

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

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

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

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

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

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

MR. FREY: I think we are.

JUSTICE STEVENS: Is that your position?
MR. FREY: We are saying that the Due Process Clause does not exist to protect the integrity or reputation of the State judicial systems.
JUSTICE GINSBURG: Why --
JUSTICE STEVENS: That's not an answer to my question.
MR. FREY: Well, I thought I said --
JUSTICE STEVENS: Supposing, for example, the judge had campaigned on the ground that he would issue favorable rulings to the United Mine Workers, and the United Mine Workers campaigned, raising money saying, we want to get a judge who will rule in our favor in all the cases we're interested in. Would that create an appearance of impropriety?
MR. FREY: Well --
JUSTICE STEVENS: Or take another example. The Chief Justice asked what if there are ten members of a trade association and would all -- and they all contributed to get a judge to vote in their favor in a case that involved a conspiracy charge among the -- charged the ten of them for violations of the Sherman Act, something like that. And if all ten of them raise money publicly for the very purpose of getting a judge who would rule favorably in their favor, that would

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

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

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

MR. FREY: That I don't --

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

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

JUSTICE STEVENS: No matter how extreme the facts?

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

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

said "I know it when I see it."

(Laughter.)

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

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

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

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

I think that's a very important point.

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

MR. FREY: Well, that --
JUSTICE GINSBURG: -- wasn't -- well, maybe you can tell me what that 1983 suit was. It was a charge about --
MR. FREY: Yes, it challenged the procedure. That's not an issue that's before the Court here, and our -- our position today is that this Court has consistently allowed recusal matters to be decided by a -- the single justice who is challenged. I don't think the Court thinks it's unconstitutional to do that.
I understand the -- the concerns about having the judge making the decision about whether recusal is required, but that is not the practice of this Court, and if it's not the practice of this Court, I frankly doubt it's unconstitutional.
JUSTICE GINSBURG: But it was the position that Blankenship took?
MR. FREY: Well, it was -- no, not Blankenship. Massey. Massey --
JUSTICE SOUTER: Well, it may not be per se unconstitutional, but it is certainly one contributing factor, it seems to me, to the argument that the system that we have depended on up to this point is not working very well.
MR. FREY: Well, I don't think -- I don't

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

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

MR. FREY: Yes, but --

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

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

JUSTICE SOUTER: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Why not?

MR. FREY: Because I think the Due Process

Clause is concerned with the fairness of the --

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

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

JUSTICE SOUTER: But --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Because that may illustrate the point.

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

Now --

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

MR. FREY: No, but --

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

MR. FREY: No, but it had --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Amendment context?

MR. FREY: I'm not --

JUSTICE STEVENS: Or is it?

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

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

MR. FREY: Well, you could --

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

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

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

MR. FREY: It's in the Constitution.

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

MR. FREY: Yes.

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

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

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

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

JUSTICE SCALIA: I've been waiting and waiting.

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

JUSTICE SOUTER: I mean --

MR. FREY: But you wouldn't --

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

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

JUSTICE SOUTER: Well, one has hopes.

(Laughter.)

MR. FREY: Excuse me?

JUSTICE SOUTER: One has hopes.

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

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

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

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

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

(Laughter.)

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

MR. FREY: Therefore --

JUSTICE SOUTER: -- and it seems to me that

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

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

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

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

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

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

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

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

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

MR. FREY: Well, okay.

(Laughter.)

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. FREY: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Olson, five minutes.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS

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

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

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

And so the question is what is -- is someone

likely to be biased, likely to be unfair?

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

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

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

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

Secondly, was that appointment made specifically --

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

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

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

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

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

again?

CHIEF JUSTICE ROBERTS: What about --

MR. OLSON: Ask yourself this question --

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

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

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

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

subsidy by your opponent?

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

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

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

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

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

MR. OLSON: I think --

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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