

ate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." ⁷⁴²

(4) Confrontation and Cross-Examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." ⁷⁴³ Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny." ⁷⁴⁴

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in *dictum* that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." ⁷⁴⁵ Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so. ⁷⁴⁶ There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization. ⁷⁴⁷

⁷⁴² 556 U.S. ___, No. 08-22, slip op. at 14. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, asserting that "a 'probability of bias' cannot be defined in any limited way," "provides no guidance to judges and litigants about when recusal will be constitutionally required," and "will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be." Slip. op. at 1 (Roberts, C.J., dissenting). The majority countered that "[t]he facts now before us are extreme in any measure." Slip op. at 17.

⁷⁴³ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). See also *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 93-94 (1913). Cf. § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

⁷⁴⁴ *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). But see *Richardson v. Perales*, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). Cf. *Mathews v. Eldridge*, 424 U.S. 319, 343-45 (1976).

⁷⁴⁵ *Greene v. McElroy*, 360 U.S. 474, 496 (1959), quoted with approval in *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

⁷⁴⁶ RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 571 (1968-1970).

⁷⁴⁷ *FMC v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964).