

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.   :

8   - - - - - x

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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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THEODORE B. OLSON, ESQ.	
4	On behalf of the Petitioners	3
5	ANDREW L. FREY, ESQ.	
6	On behalf of the Respondents	25
7	REBUTTAL ARGUMENT OF	
8	THEODORE B. OLSON, ESQ.	
9	On behalf of the Petitioners	52
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:15 a.m.)

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

6 Mr. Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

19 JUSTICE SCALIA: A guarantee against even --

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

1 prevent even the probability of unfairness."

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

3 JUSTICE SCALIA: "Has always endeavored."

4 MR. OLSON: Pardon?

5 JUSTICE SCALIA: "Has always endeavored."

6 "Has always endeavored."

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

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

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

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

17 MR. OLSON: Well --

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

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

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

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

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

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

23 MR. OLSON: Well --

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

1 goes in -- in the general political world?

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9                   MR. OLSON: Yes.

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

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

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

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

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

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

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

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

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

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

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

25 MR. OLSON: No, Chief Justice Roberts.

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

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

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

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

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

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

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

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

16 MR. OLSON: It would be --

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

25 MR. OLSON: Well, there are several answers

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

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

13 MR. OLSON: That's --

14 JUSTICE SCALIA: Right?

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

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

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



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

13 JUSTICE GINSBURG: To what --

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

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

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

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

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

12                CHIEF JUSTICE ROBERTS:  Counsel --

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

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

17                MR. OLSON:  It's not --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1    --

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE SOUTER: What happened in West  
11 Virginia?

12 MR. OLSON: Pardon me?

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

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

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

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

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

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

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



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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Frey.

20 ORAL ARGUMENT OF ANDREW L. FREY

21 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

17 MR. FREY: I think we are.

18 JUSTICE STEVENS: Is that your position?

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

22 JUSTICE GINSBURG: Why --

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

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

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

8 MR. FREY: Well --

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

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

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

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

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

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

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

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

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

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

19 (Laughter.)

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

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

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

1 MR. FREY: I hope to address that question.

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

12 I think that's a very important point.

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

19 MR. FREY: Well, that --

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

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

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

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

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

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

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

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

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

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

3 MR. FREY: Yes, but --

4 JUSTICE SOUTER: And in fact --

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

8 JUSTICE SOUTER: Go ahead.

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

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

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

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



1     been?

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

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

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

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

1 protection.

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

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

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

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

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

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

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

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

1     that?

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

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

16                  JUSTICE STEVENS:   Why not?

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

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

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

1 JUSTICE SOUTER: But --

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

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

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

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

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

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

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

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

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

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

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

1 even then.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

1 case?

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

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

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

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

15 MR. FREY: I'm not --

16 JUSTICE STEVENS: Or is it?

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

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

1 MR. FREY: Well, you could --

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

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

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

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

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

13 MR. FREY: Yes.

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

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

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

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

25 JUSTICE SCALIA: I've been waiting and

1 waiting.

2 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

25                   (Laughter.)

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

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

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

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

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

24                   JUSTICE SOUTER: I mean --

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

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

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

10 JUSTICE SOUTER: Well, one has hopes.

11 (Laughter.)

12 MR. FREY: Excuse me?

13 JUSTICE SOUTER: One has hopes.

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

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

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



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

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

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

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

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

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

1 theory.

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

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

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

20 MR. FREY: Well, okay.

21 (Laughter.)

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

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

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

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

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

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

1 measure that?

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. FREY: Thank you.

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

14 REBUTTAL ARGUMENT OF THEODORE B. OLSON

15 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

6 Secondly, was that appointment made --

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

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

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

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

25 Now, the language that I think is important

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

9 CHIEF JUSTICE ROBERTS: What about --

10 MR. OLSON: Ask yourself this question --

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

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

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

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

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

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

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

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

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

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

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



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

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

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

12 (Whereupon, at 11:18 a.m., the case in the  
13 above-entitled matter was submitted.)  
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<b>A</b>	<b>adopt</b> 39:8 43:16	<b>answering</b> 44:4 46:24	21:10	<b>back</b> 6:20 19:20 34:4 41:7
<b>ABA</b> 24:8 32:14 32:22,23	<b>adopted</b> 29:22	<b>answers</b> 15:25	<b>area</b> 26:16 29:23	42:11 57:3
<b>abandon</b> 34:3	<b>advance</b> 5:11	<b>anxious</b> 50:18	<b>arguing</b> 42:10 49:23	<b>bad</b> 28:23
<b>abandoned</b> 27:5	<b>advanced</b> 34:21	<b>anybody</b> 26:23	<b>argument</b> 1:13 2:2,7 3:4,7	<b>balance</b> 5:15 6:5 12:21 25:1
<b>ability</b> 53:20	<b>Aetna</b> 5:16,16	<b>anyway</b> 46:17	6:22 22:12	<b>balanced</b> 33:9
<b>able</b> 33:12	<b>affect</b> 13:16 45:8	<b>appeal</b> 8:16	25:20 27:5	<b>bar</b> 7:19 24:18 24:18
<b>above-entitled</b> 1:12 57:13	<b>agglomeration</b> 19:7	<b>appearance</b> 4:12 18:2 19:1 24:24 25:12,15	31:15 32:16	<b>based</b> 7:6,14,16 49:25
<b>absence</b> 3:13,24	<b>aggrieved</b> 11:12	26:16 27:5,8	39:9 50:24	<b>basic</b> 3:22
<b>absolutely</b> 18:5	<b>ago</b> 5:17 48:22	27:10 28:7,18	52:14	<b>basis</b> 4:24 7:14 28:22 30:5
<b>abstract</b> 40:11	<b>agree</b> 26:21 31:19 32:21,22	29:5,7 32:1,9	<b>arisen</b> 40:8	37:16,18,19 56:20,22
<b>accepted</b> 50:5	32:23 33:2,5	32:14 33:4,14	<b>arises</b> 40:13	<b>began</b> 22:17
<b>account</b> 51:17	42:25 47:1	34:8,11,13,22	<b>arising</b> 38:12	<b>behalf</b> 1:16,18 2:4,6,9 3:8
<b>acknowledge</b> 7:6	<b>ahead</b> 32:8	34:24 35:3,6	<b>arms</b> 23:1	25:21 52:15
<b>acknowledges</b> 21:10	<b>AL</b> 1:3,7	35:24 36:3,12	<b>articulate</b> 16:21	<b>behave</b> 36:20
<b>acquires</b> 34:13	<b>Alabama</b> 21:25	46:14,18 55:6 57:8	<b>articulated</b> 29:17	<b>beholden</b> 26:19 26:22
<b>Act</b> 28:15	<b>Alito</b> 24:5,22 53:24 54:7	<b>appearances</b> 1:15 27:3,3,13	<b>articulating</b> 25:3	<b>believe</b> 17:8 23:16
<b>action</b> 30:16	<b>allow</b> 55:17	27:14 32:5,6	<b>asked</b> 28:10 30:5	<b>believing</b> 28:22
<b>activist</b> 7:17,23	<b>allowed</b> 23:20 31:1	<b>appendix</b> 8:2 18:6 47:12	<b>asking</b> 15:8 32:21 33:24,25	<b>bench</b> 6:6 11:18 38:23
<b>activities</b> 30:5	<b>amendment</b> 21:4 25:25	<b>application</b> 40:21,23 53:20	34:2 42:22,22	<b>benefit</b> 10:18 30:8 47:16,17
<b>actual</b> 3:13,24 20:4 25:13,13	26:24 41:25	<b>applied</b> 12:6 17:11	50:6,15 56:3	<b>benefits</b> 50:8,9 54:21
27:15 28:23	42:2,14,24	<b>apply</b> 16:23 24:12,20 37:22	<b>asks</b> 55:4	<b>Benjamin</b> 8:5,10 8:14,22 26:22
29:12 33:16	<b>amici</b> 16:8 24:6	44:7 49:17	<b>assessed</b> 12:11	30:2,14 33:5
36:4 53:3 55:5	<b>amount</b> 9:10 15:14 19:17	53:21	<b>association</b> 28:11	38:17 41:3,16
<b>add</b> 12:18	20:15 26:4	<b>appoint</b> 45:13	<b>assumes</b> 39:4 48:2 50:10	44:16,22 47:6
<b>adding</b> 45:1	45:5	<b>appointed</b> 11:18 24:13 51:8,11	<b>assuming</b> 27:13 50:4	47:8 48:7 49:2
<b>additional</b> 17:24 20:25	<b>amounted</b> 54:22	51:14 52:6,6 54:1	<b>attempt</b> 13:15	50:10 52:3 54:8
<b>address</b> 7:25 30:1 36:15	<b>amounts</b> 14:23	<b>appointing</b> 13:14	<b>attempted</b> 20:10	<b>Benjamin's</b> 41:11 47:19
37:21	<b>analysis</b> 9:7 49:8	<b>appointment</b> 19:5 45:15 54:6	<b>attend</b> 47:10	49:18 53:1
<b>addressed</b> 23:17 36:10,12,13	<b>ANDREW</b> 1:18 2:5 25:20	<b>approach</b> 9:20 21:6	<b>AT&amp;T</b> 11:2,2	<b>best</b> 43:15
<b>addresses</b> 8:2	<b>animating</b> 42:19	<b>approached</b> 17:1	<b>average</b> 28:25	<b>better</b> 40:23
<b>addressing</b> 22:2 22:13	<b>animosity</b> 38:12 38:16,18	<b>appropriateness</b>	<b>avoid</b> 47:9	<b>bias</b> 3:13,24 4:11,12,12,13
<b>adjudicator</b> 10:21	<b>answer</b> 9:5 11:23,25 17:3		<b>a.m</b> 1:14 3:2 57:12	
<b>adjustments</b> 31:21	20:5 22:24		<b>A.T</b> 1:6	
<b>administerable</b> 42:23	23:23,25 27:23		<b>B</b>	
<b>admit</b> 19:19	41:13,14 42:17		<b>B</b> 1:16 2:3,8 3:7 37:17 52:14	
	<b>answered</b> 10:15 31:24			

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

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

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

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

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

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



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

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

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

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

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