1   COURT OF APPEALS

2   STATE OF NEW YORK

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4   MATTER OF WORKING FAMILIES PARTY,

5   Appellant,

6   -against-
                                          No. 59
7   FERN A. FISHER, et al.,

8   Respondents.
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9   20 Eagle Street
                                      Albany, New York 12207
10   April 29, 2014

11   Before:
                     ASSOCIATE JUDGE VICTORIA A. GRAFFEO
12   ASSOCIATE JUDGE SUSAN PHILLIPS READ
                     ASSOCIATE JUDGE ROBERT S. SMITH
13   ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
                     ASSOCIATE JUDGE JENNY RIVERA
14   ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

15   Appearances:
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24
                                          Sharona Shapiro
25   Official Court Transcriber

1   JUDGE GRAFFEO: Number 59, Matter of

2   Working Families Party against Fisher.

3   Counsel, do you wish to reserve time for

4   your rebuttal?

5   MR. SCHICK: Yes, if I can reserve two

6   minutes, please.

7   JUDGE GRAFFEO: Two minutes, granted.

8   MR. SCHICK: Thank you. May it please the

9   court. Avi Schick on behalf of appellant, Working

10   Families Party.

11   Your Honors, every court that has been

12   confronted with a request for disqualification in the

13   appointment of a special district attorney, with a

14   challenge to a disqualification determination and the

15   appointment of a special prosecutor, has explicitly

16   or implicitly held that courts can and should

17   evaluate the disqualification requests. They are

18   certainly subject to judicial review.

19   JUDGE GRAFFEO: Well, let's - - - let's go

20   first to the procedural vehicle here.

21   MR. SCHICK: Yes.

22   JUDGE GRAFFEO: Is this - - - is this an

23   investigatory function that doesn't - - - that isn't

24   appropriate for Article 78 relief?

25   MR. SCHICK: No, absolutely not. As this

1   court held - - -

2   JUDGE GRAFFEO: Or is it a quasi-judicial?

3   MR. SCHICK: Your Honor, this is absolutely

4   quasi-judicial. As this court held in the Soares

5   case, prohibition under Article 78 is an appropriate

6   vehicle for - - -

7   JUDGE GRAFFEO: What about the McKinley

8   case?

9   MR. SCHICK: McKinley case was tried - - -

10   in both Soares and in Schumer, in both of those

11   cases, the court distinguished between a challenge to

12   a judge - - - appointment of a special prosecutor,

13   which is what happened here, versus in McKinley. In

14   McKinley, what happened was a - - - the governor,

15   under Executive Law 63(12) (sic) - - - (2), not under

16   the county law - - - the governor appointed a special

17   prosecutor. There was no challenge to that

18   appointment. During the course of the special

19   prosecutor's work, a third party received a subpoena.

20   The third party said, Mr. Special District Attorney,

21   the scope of this subpoena exceeds your authority;

22   you can't be issuing such a subpoena.

23   JUDGE GRAFFEO: But didn't - - -

24   MR. SCHICK: In that case, the court - - -

25   JUDGE GRAFFEO: Didn't our court make a

1   pretty clear distinction between when a district

2   attorney is investigating a situation versus

3   prosecuting a situation? Doesn't the language make a

4   pretty clear dichotomy?

5   MR. SCHICK: As I said, in both - - - in

6   Soares and in Schumer - - - in Schumer it was an

7   exact case like this. There was a district attorney

8   who was appointed at the request - - - at the doing

9   of a - - - a special district attorney appointed at

10   the doing - - -

11   JUDGE GRAFFEO: I - - -

12   MR. SCHICK: - - - of a - - -

13   JUDGE GRAFFEO: I'm sorry; I was asking you

14   about the McKinley-Hynes case.

15   MR. SCHICK: In McKinley, the court says if

16   you're not challenging the appointment of the special

17   prosecutor but the work of the special prosecutor,

18   then you cannot use Article 78.

19   JUDGE SMITH: I mean, you - - - you're - -

20   - the respondent in this case, the respondent on the

21   - - - you're seeking prohibition against Judge Fish -

22   - - Justice Fisher.

23   MR. SCHICK: Correct.

24   JUDGE SMITH: So it's not quasi-judicial,

25   it's judicial.

1   MR. SCHICK: Absolutely.

2   JUDGE SMITH: She's a judge.

3   MR. SCHICK: Absolutely. And if I can

4   quote the Soares case, what this court said at 20

5   N.Y.3d, 145, and quote, "Prohibition is an

6   appropriate remedy to void the improper appointment

7   of a special prosecutor when made by a court", close

8   quote.

9   The direct question was presented to this

10 court just a few years ago; they answered it. They

11 discussed McKinley; they said McKinley is not

12 relevant because this is a challenge to the judicial

13 appointment of a special prosecutor, not to the work

14 of a special prosecutor.

15   JUDGE READ: Okay. Where did - - - where

16 did Judge Fisher go wrong? What should she have

17 done?

18   MR. SCHICK: Several ways. Let me - - -

19 the first - - -

20   JUDGE READ: Let's try the most significant

21 way.

22   MR. SCHICK: The most significant way is

23 there was no finding in the record. There is nothing

24 in the record that would establish that District

25 Attorney Donovan is disqualified. County Law,

1   Section - - -

2   JUDGE SMITH: You say that, but you don't

3   actually know that, because there's part of the

4   record you haven't seen.

5   MR. SCHICK: But that's - - - there's

6   nothing in this - - - there's nothing in the record.

7   And in any event, on this appeal - - - on this

8   appeal, District Attorney Donovan takes the position

9   that - - - not that he's satisfied some standard but

10   that this court doesn't have the jurisdiction - - -

11   JUDGE SMITH: Okay.

12   MR. SCHICK: - - - to review it.

13   JUDGE SMITH: Okay. He submitted - - - I

14   don't think I'm giving - - - let me see what he - - -

15   he submitted stuff to Justice Fisher that she sealed,

16   right? And you knew that.

17   MR. SCHICK: I - - - there was an

18   application, correct.

19   JUDGE SMITH: Yeah.

20   JUDGE RIVERA: But you've been trying to

21   unseal it, haven't you? You've made - - - haven't

22   you tried to get access to this more than once?

23   MR. SCHICK: We wrote a letter to the - - -

24   to Judge Fisher a while ago, before the litigation

25   commenced, and it was never responded to.

1   JUDGE SMITH: You - - -

2   MR. SCHICK: There's no point in - - -

3   JUDGE SMITH: You - - - you haven't moved

4   in this court to unseal it, though?

5   MR. SCHICK: No, but - - - but to the

6   contrary, District Attorney Donovan sought permission

7   to proceed here under a sealed record, and this court

8   denied it.

9   JUDGE SMITH: Well, if he sought - - - I

10   think he sought permission to redact his brief and we

11   deni - - - to serve - - - to serve a brief that had a

12   lot of confidential stuff in it that he wouldn't show

13   to you, and we denied that. You did not cross-move

14   to say can I see the secret stuff.

15   MR. SCHICK: But it's not - - - with all

16   respect, I do not believe that it's our burden to

17   create a record to demonstrate that - - -

18   JUDGE SMITH: Well, maybe it's - - -

19   MR. SCHICK: - - - the standard - - -

20   JUDGE SMITH: Let's - - - suppose,

21   hypothetically - - - and this is purely hypothetical;

22   I'm not telling you anything about what's in the

23   sealed part of the record - - - but suppose he made a

24   very compelling showing that - - - that he was indeed

25   disqualified. I understand the possible unfairness

1   in your not having seen it, but you're not, at this

2   point, asking to see it. Shouldn't we just - - -

3   shouldn't we just affirm Justice Fisher?

4   MR. SCHICK: No, Your Honor, it's not in

5   the record before this court, I think, in an - - -

6   JUDGE SMITH: Well, I'm suggesting to you

7   that it is in the record before this court; it's just

8   not in the record before you.

9   MR. SCHICK: Again, I - - - I think then

10   we're - - - we're sort of way off into a Star

11   Chamber. If you're saying that, you know, somebody

12   can be the subject of a special prosecutor's targeted

13   investigation without any judicial finding set - - -

14   setting forth a basis for that appointment - - -

15   JUDGE SMITH: Well, not to be too subtle

16   about it; I'm gently hinting that you might want to

17   move to unseal that record, and you seem to be

18   resisting the suggestion.

19   MR. SCHICK: I understand, Your Honor, that

20   - - - that, you know, we - - - we would like to - - -

21   to see the record. Ultimately, what we think should

22   happen here is because there was no basis for the

23   appointment established, this court should vacate the

24   order. It then goes back to District Attorney

25   Donovan, at which point he has a variety of ways to

1   proceed, one of which is to seek a new order under

2   County Law 701, on a real record.

3   JUDGE SMITH: When is the statute of

4   limitations going to run - - - well, maybe you don't

5   know what you're accused of having done, but if you

6   have a general idea, when does the statute of

7   limitations run?

8   MR. SCHICK: I - - - I have no idea. Your

9   Honor, the - - - the appoint - - -

10   JUDGE SMITH: And this - - - this - - -

11   this whole thing started when? You - - - you first

12   heard about it in - - -

13   JUDGE ABDUS-SALAAM: 2009.

14   MR. SCHICK: There are - - - there are two

15   relevant dates, I think. The first is that in Jan -

16   - - on January 12th, 2012, the order was issued

17   appointing a special prosecutor. And then a little

18   more than a year later, on January 31st, 2013, the

19   special prosecutor issued subpoenas to my client.

20   JUDGE GRAFFEO: Well, it involves elections

21   going back to 2009. That at least has been in the

22   newspapers, hasn't it?

23   MR. SCHICK: There has been stuff in the

24   newspapers, but - - -

25   JUDGE SMITH: But what about - - - what

1   about what the subpoena - - - did - - - from - - -

2   from the - - - from the content of the subpoena,

3   could you deduce what transactions they're interested

4   in?

5   MR. SCHICK: No, to the contrary, the

6   subpoena requested, among other things, all e-mails,

7   financial records, communications covering at least

8   three years and fifteen or more employees.

9   JUDGE SMITH: What were the three years?

10   MR. SCHICK: 2008, '9, and '10.

11   JUDGE SMITH: So we're getting - - - so

12   it's - - - it's four years ago already. What's the

13   statute of limitations? I don't know.

14   MR. SCHICK: I don't know that - - - I

15   don't believe there was any crime committed, Your

16   Honor, but that's the problem with doing something in

17   this vein. I'm here - - -

18   JUDGE GRAFFEO: Can - - -

19   MR. SCHICK: - - - supposed to guess.

20   JUDGE GRAFFEO: Can I - - - can I just ask

21   you generally - - -

22   MR. SCHICK: Yes.

23   JUDGE GRAFFEO: - - - what - - - what does

24   it matter to you if the DA's office does this

25   investigation versus the special prosecutor? Just -

1   - - just to give your position on - - - on that

2   aspect.

3   MR. SCHICK: I think we can all acknowledge

4   that there are certain risks and harms associated

5   with the special prosecutor as opposed to the elected

6   prosecutor. Very famously, Justice Jackson, when he

7   was the attorney general, spoke of the risks of

8   picking the man, then searching the law books, or

9   putting investigators to work to pin some offense on

10 him. That's what happens with a special prosecutor.

11   JUDGE PIGOTT: Your - - - your concern - -

12 - it's conceivable; I don't know that it happened in

13 this case - - - that the DA who made the application

14 might have said, and by the way, I have a good idea

15 on who you should appoint as a special prosecutor.

16   MR. SCHICK: It doesn't - - -

17   JUDGE PIGOTT: And you would not know that,

18 and you wouldn't then be able to address it.

19   MR. SCHICK: Yes, but it doesn't even

20 matter about that. The point is like this. An

21 elected district attorney has the Constitutional

22 authority to investigate. He or she has to make all

23 sorts of prosecutorial decisions, has to use their

24 discretion, has to assess priorities and budget, has

25 to figure out about manpower, has to do a whole bunch

1   of things - - -

2   JUDGE SMITH: Granted - - -

3   JUDGE RIVERA: Your issue is that they're

4   accountable - - -

5   JUDGE GRAFFEO: You think it's more - - -

6   JUDGE RIVERA: - - - to the voter, and the

7   special deputy attorney - - - the district attorney

8   is not.

9   So let me just - - - because your light

10   went on; could you just very quickly comment on the

11   standard by which you argue that a - - - a court

12   faced with a request from the DA is supposed to

13   determine whether or not to appoint - - -

14   MR. SCHICK: Sure, two things. What - - -

15   JUDGE RIVERA: - - - a special DA?

16   MR. SCHICK: What this court has said,

17   since the Schumer case and consistently since then,

18   is that the standard is actual prejudice - - -

19   prejudice arising from a demonstrated conflict of

20   interest.

21   JUDGE PIGOTT: Well, that's - - - that's

22   the standard if a defendant goes after a - - - a

23   district attorney. But isn't it - - - a district

24   attorney has, within his or her own conscience, the

25   right to say, you know, I - - - I'm going to step off

1   this case. Whether - - - whether the defendant likes

2   it or not, I'm getting off this case because my

3   daughter works for the law firm that's going to be

4   representing the defendant, or any number of reasons.

5   And - - - and you can't challenge that.

6   MR. SCHICK: Two things. The case in which

7   the court articulated the standard, the Schumer case,

8   was a case in which the district attorney sought

9   disqualification.

10   JUDGE READ: Yes, but it was - - - but that

11   - - - that - - - that was dictum in that case, wasn't

12   it? I mean, this - - -

13   MR. SCHICK: It - - -

14   JUDGE READ: The DA in that case didn't go

15   to the court, for one thing.

16   MR. SCHICK: But it was not dictum for the

17   following reason. The court - - - both the trial

18   court and the Appellate Division, in that case, had

19   actually decided the question of disqualification.

20   JUDGE READ: Well, dictum or not, what

21   should be - - - what - - - why would it be - - - why

22   is it a better rule to have your - - - the rule

23   you're proposing, which is the substantial prejudice,

24   rather than just saying the DA, if he feels as Judge

25   - - - as Judge Pigott said, that for some reason he

1   can't prosecute the case, why shouldn't he just be

2   able to recuse himself.

3   MR. SCHICK: Well, it's not that he can't

4   prosecute the case. If he can't prosecute the case,

5   it is certainly a decision for the court to make

6   before - - - before District Attorney - - -

7   JUDGE GRAFFEO: Counsel - - -

8   MR. SCHICK: - - - Donovan - - -

9   JUDGE GRAFFEO: - - - if I could ask you,

10   our more recent case, Adams, can you address that?

11   Because we used a lesser standard than actual

12   prejudice in Adams.

13   MR. SCHICK: Adams was a case of actual

14   conflict. Adams was not a case where you were

15   worried about a hypothetical risk. Adams - - - Adams

16   was not a pre-investigation case; it was actually a

17   case in which there was a record of several years in

18   which the action of the DA demonstrated a conflict.

19   In Adams, it was a district attorney - - - it was a

20   judge - - -

21   JUDGE GRAFFEO: So where there's - - -

22   MR. SCHICK: - - - in the county - - -

23   JUDGE GRAFFEO: - - - where there's actual

24   conflict, we can apply a - - - a lesser standard?

25   MR. SCHICK: If there's actual conflict,

1   there's reason for concern.

2   To answer Judge Pigott's question from

3   before, if the judge wanted to recuse - - - if the DA

4   wanted to recuse himself, he's entitled to do that.

5   And under 702 - - - under County Law 702, there's an

6   order of succession. That's not something that

7   happens case by case where you say get a special

8   prosecutor. Under the County Law, the district

9   attorney - - - every district attorney has to file

10   with the county clerk a list of the senior officials

11   in his or her office who will handle the case if the

12   district attorney recuses herself.

13   JUDGE SMITH: Even - - - even though you're

14   - - - you're out of time, if I could get one more - -

15   - one more question. Suppose - - - suppose you win

16   this case - - -

17   MR. SCHICK: Yes.

18   JUDGE SMITH: - - - and the special

19   prosecutor is eliminated, and Mr. Donovan's back in

20   action, and you then - - - the next day you find out,

21   either because it's unsealed or you find out from

22   other source, what the basis for his application was,

23   and you say that's an outrage; he has a conflict; he

24   can't pr - - - can you move to disqualify?

25   MR. SCHICK: Your Honor, we're on record in

1   this litigation, the law of the case, that the

2   standard is actual conflict.

3   JUDGE SMITH: Okay, but - - -

4   MR. SCHICK: He has said - - - he has said

5   that there isn't actual conflict; it should be a

6   lesser standard.

7   JUDGE SMITH: So unless - - - unless - - -

8   unless he - - - unless he's been misrepresenting, you

9   say you will - - - you - - - you're perfectly happy

10   with it; you won't complain about Donovan no matter

11   how - - - how bad the appearance is?

12   MR. SCHICK: We have said from the get-go,

13   this case ought to be handled by the district

14   attorney who three times went to the people of

15   Richmond County and said elect me and swore the oath

16   of office. If the case goes back, he can do one of

17   many things. He can do the case himself, as Judge

18   Smith suggested; we're fine with that. He can recuse

19   himself and fall to the order of succession under

20   County Law 702; we're fine with that.

21   JUDGE SMITH: Okay. Let me - - - I know I

22   said it would be only one more, but I - - - I can't

23   control myself. Suppose - - - go back to the time

24   when - - - suppose no special prosecutor had been

25   appointed; if you - - - you - - - suppose you had

1   made a motion based on appearance - - - appearance of

2   impropriety - - - lawyers have made such motions - -

3   - and he takes a look at the motion and he says - - -

4   the motion to disqualify the office, the Staten

5   Island District Attorney's Office. He takes a look

6   at the motion and he says, it's a close case; I might

7   be disqualified, I might not; I'm going to reso - - -

8   I'm going to avoid the fight and step out. Is that

9   okay?

10   MR. SCHICK: If you ask me what happens in

11   an uncontested case, lots of things happen in

12   uncontested cases where courts don't have a record

13   before them and - - -

14   JUDGE SMITH: Well - - -

15   MR. SCHICK: - - - and nothing's contested.

16   JUDGE SMITH: - - - my question then is why

17   can he not, anticipating that happening - - -

18   MR. SCHICK: No, but - - -

19   JUDGE SMITH: - - - step out in advance - -

20   -

21   MR. SCHICK: But - - -

22   JUDGE SMITH: - - - and not have the fight.

23   MR. SCHICK: But to take it - - - there's

24   two parts of the question, Judge Smith, and I - - - I

25   got to the first part of your question but not to the

consequence of it. The consequence of your question

is not is he permitted to step out but is the court

permitted to appoint a special prosecutor. And the

answer would still be that the court would have a

duty to determine whether the standard is met. If

you look at - - - if you look at the Rice case, in -

- - in the Rice case, a well-known case, just a few

years ago, Nassau County DA Rice ask - - - petitioned

the court for a special prosecutor because it was an

investigation necessary into widespread alleged fraud

in the Nassau County police lab. She said, given my

working relationship with the police, I cannot do

this investigation. I work with them; I call them as

witnesses. The police department agreed with that.

Nevertheless, the court said no; it may be

uncomfortable, you may not want to do it, but that's

the job to which you were elected, and you have to do

it.

JUDGE READ: Well, bottom - - -

JUDGE GRAFFEO: Okay, counsel - - -

JUDGE READ: - - - bottom line - - -

JUDGE GRAFFEO: I - - - we're going to - -

-

JUDGE READ: Bottom line, your position is

there's - - - it doesn't make any difference whether

1   the defendant asks or whether the DA self-recuses,

2   same standard?

3   MR. SCHICK: Yes, and Your Honor, and in

4   fact, if one thinks about - - -

5   JUDGE GRAFFEO: Quickly - - -

6   MR. SCHICK: - - - the Schumer case - - -

7   JUDGE GRAFFEO: Quickly, counsel.

8   MR. SCHICK: If one thinks about the

9   Schumer case, after District Attorney Holtzman went

10   to the Court of Appeals on the position that she

11   couldn't do the case, and the court vacated the

12   appointment of the special prosecutor, she then went

13   and did the case.

14   JUDGE GRAFFEO: You'll have your rebuttal

15   time, counsel.

16   MR. KLEINBART: Good afternoon, Your

17   Honors. Morrie Kleinbart for respondent, Donovan.

18   I'm just going to begin by suggesting that

19   Article 78 relief does not lie at all in this case.

20   As demonstrated by Matter of Rice, which counsel

21   discussed, it's clear that the decision by a judge

22   who makes an appointment of a special district

23   attorney is a discretionary matter; insofar as a

24   discretionary matter, and there's thus no legal right

25   to have one or not have one in a particular case, we

1   would submit that 78 - - -

2   JUDGE SMITH: So suppo - - -

3   MR. KLEINBART: - - - does not lie.

4   JUDGE SMITH: So we - - - you say we should

5   dismiss the proceeding without deciding whether the

6   district attorney's - - -

7   MR. KLEINBART: That you could - - -

8   JUDGE SMITH: - - - disqualified?

9   MR. KLEINBART: Yeah.

10   JUDGE SMITH: Supp - - - and then that - -

11   - and that issue would then be litigated in some

12   other context.

13   MR. KLEINBART: It could certainly be.

14   JUDGE SMITH: As a practical matter, hasn't

15   - - - I mean, suppose we - - - you know, suppose you

16   find out a year from now that the district attorney

17   is disqualified, or that the special district

18   attorney doesn't exist, and the district attorney has

19   to come back; I mean, the statute's going to have

20   run. Is that an acceptable answer - - -

21   MR. KLEINBART: Well, that's - - -

22   JUDGE SMITH: - - - let's just go and on?

23   MR. KLEINBART: Well, yes, it is; indeed,

24   it is, because there is a - - - what - - -

25   essentially, by petition for Article 78 relief, at

1   this stage of the proceeding, before any criminal

2   action has been instituted, we're really doing

3   precisely what the - - - what this court has

4   repeatedly said should not be done.

5   JUDGE PIGOTT: Well, one of the problems

6   here is - - - as they raise, is it's all done in

7   secret. I mean, what's going on here? I mean, this

8   is the United States of America, for goodness sake;

9   it's not the FISA court. And we have - - - we have a

10   case, apparently, of a political party that's alleged

11   to have done stuff. And if there's going to - - - if

12   this district attorney, for one reason or another - -

13   - maybe it's the year he's running and he says I

14   don't want to get involved in this stuff at that

15   time, and the judge agrees, that's fine. But it at

16   least ought to be - - - the cards ought to be face

17   up. If - - -

18   MR. KLEINBART: Well - - -

19   JUDGE PIGOTT: If, on the other hand, the -

20   - - the district attorney is running to the judge and

21   saying, protect me, protect me, because, you know,

22   I'm - - - you know, I've got - - - I've got issues

23   and I don't want anybody to know 'em but I need you

24   to appoint a special prosecutor, you're saying

25   there's no remedy.

1   MR. KLEINBART: Well, with all due respect,

2   Your Honor, we have to make clear there are two kinds

3   of appointments. There's the kind of appointments

4   made when an accusatory instrument is pending.

5   JUDGE PIGOTT: When what?

6   MR. KLEINBART: When an accusatory

7   instrument is pending.

8   JUDGE PIGOTT: Um-hum.

9   MR. KLEINBART: And that's the one - - -

10   that's the kind of appointment we see most of the

11   time. There are the time - - - there are occasions,

12   such as this one, when an appointment is sought for

13   an investigation.

14   Now, when it's at the investigative stage,

15   if the district attorney himself would keep the case,

16   defendant would have no idea what's going on. And

17   that - - - we don't consider that a Star Chamber; we

18   don't consider the grand jury a Star Chamber. And

19   that's precisely what we do in the normal course.

20   There is no reason, when a special district attorney

21   is appoint - - - is appointed to handle an

22   investigation, the rule about confidentiality should

23   be changed, because the same concerns will apply.

24   JUDGE RIVERA: Can you explain why you're

25   saying that it's discretionary and therefore the writ

1   of prohibition does not lie?

2   MR. KLEINBART: Well, as a general rule,

3   unless there's a clear legal right to the relief

4   sought - - -

5   JUDGE RIVERA: That's what I'm saying. So

6   - - - so if - - -

7   MR. KLEINBART: So there is - - - so - - -

8   JUDGE RIVERA: But if the judge determines

9   that indeed there is a conflict, that is, they should

10   be and are disqualified, don't you have to order - -

11   - do you have to order? Or do you have to - - -

12   MR. KLEINBART: I don't - - -

13   JUDGE RIVERA: - - - appoint the special

14   DA?

15   MR. KLEINBART: That's true.

16   JUDGE RIVERA: Can you refuse to do so?

17   MR. KLEINBART: But - - - but - - - well,

18   that's true, and it's interesting you raise that

19   question, because as I was preparing for this, I

20   thought of precisely that circumstance. You can have

21   a circumstance - - - yes, a district attorney - - - I

22   think it was as Judge Pigott just suggested - - - may

23   want to duck the question - - -

24   JUDGE RIVERA: Um-hum.

25   MR. KLEINBART: - - - and have - - - get

1   the judge to protect him by having an appointment.

2   JUDGE RIVERA: Um-hum.

3   MR. KLEINBART: Well, you might be in a

4   county in which you have a judge who gets an

5   application that's perfectly okay, but the judge is

6   friendly with the defendant; the district attorney

7   will never go forward on this case because of the

8   conflict. The judge can refuse to make the

9   appointment. And you're - - - where are you left?

10   The case cannot go forward in that circumstance.

11   JUDGE SMITH: You say that's a good case

12   for Article 78?

13   MR. KLEINBART: Well, I'm not sure, because

14   I think I would have to concede - - - if I suggest

15   that the tar - - - the subject of the investigation

16   can't under Article 78, I can't do it either, even if

17   I believe that my application - - -

18   JUDGE GRAFFEO: So - - -

19   MR. KLEINBART: - - - justifies - - -

20   JUDGE GRAFFEO: So what's the rule - - -

21   because your light is on - - - what's the rule that

22   you are propounding here as to when Article 78 is or

23   isn't appropriate?

24   MR. KLEINBART: Well, Article 78 is

25   appropriate when a DA is tossed off the case.

1   JUDGE PIGOTT: And not - - -

2   MR. KLEINBART: And you said that in Soares

3   v. Herrick.

4   JUDGE ABDUS-SALAAM: When the DA is what?

5   I'm sorry.

6   MR. KLEINBART: Is tossed off the case.

7   And you said that in Soares v. Herrick.

8   JUDGE PIGOTT: But not if it's - - - I

9   mean, if it's - - -

10   MR. KLEINBART: But if it's - - - but

11   remember, a defendant will always have an option,

12   because the case can go forward - - -

13   JUDGE PIGOTT: But if it's secret - - -

14   MR. KLEINBART: - - - and there can be a

15   criminal action. And if that's the case, that's when

16   the time to make the motion is.

17   JUDGE PIGOTT: If it's secret - - -

18   MR. KLEINBART: That's what we do in every

19   context.

20   JUDGE GRAFFEO: I'm sorry, counselor. You

21   have additional time. They got confused - - -

22   MR. KLEINBART: Oh.

23   JUDGE GRAFFEO: - - - because the order was

24   changed from our calendar.

25   MR. KLEINBART: Oh, I'm sorry.

1   JUDGE GRAFFEO: So - - -

2   MR. KLEINBART: Well, that's - - -

3   JUDGE GRAFFEO: - - - you can - - - you can

4   continue.

5   MR. KLEINBART: Oh, I - - -

6   JUDGE GRAFFEO: So can you - - - can you

7   recite that again? I'm sorry.

8   MR. KLEINBART: Oh, God.

9   JUDGE PIGOTT: Well, try this.

10   MR. KLEINBART: All right.

11   JUDGE PIGOTT: One of the problems is

12   that's it secret. I mean, it's - - -

13   MR. KLEINBART: Yes, it is. And - - -

14   JUDGE PIGOTT: It's one thing for - - - for

15   a - - - for a public official to go in and say, you

16   know, I want a court order, you know, ex parte, which

17   you can do, right? But ex parte and not tell anybody

18   the basis of it raises issues, and - - - and why

19   shouldn't someone be able to say this is wrong - - -

20   MR. KLEINBART: Well - - -

21   JUDGE PIGOTT: - - - you can't - - - you

22   can't do this and say I'm going to appoint somebody

23   and no one's going to know about it until three

24   months from now.

25   MR. KLEINBART: Well, that's precisely the

1   problem I'm suggesting. At this stage of the game,

2   the special district - - - the special district

3   attorney stands in the shoes of the district

4   attorney. If the district attorney himself is doing

5   the investigation, the subject would have no idea

6   that this is even going on. The mere fact that an

7   appointment is made to have somebody do this

8   investigation should not give a subject or a

9   defendant more rights than he would have - - -

10   JUDGE GRAFFEO: But if they - - -

11   MR. KLEINBART: - - - when - - -

12   JUDGE GRAFFEO: - - - if they believe they

13   have more exposure with a special prosecutor, because

14   that's the only function the special prosecutor has

15   is to investigate their situation versus, you know,

16   the hundreds of other cases that the district

17   attorney's office deals with, do they not have the

18   ability to - - - to challenge that appointment?

19   MR. KLEINBART: I would suggest they do

20   not, and they would - - - they - - - at this stage -

21   - - at the seventy - - - at the stage before any - -

22   -

23   JUDGE GRAFFEO: Well, at - - -

24   MR. KLEINBART: - - - crim - - -

25   JUDGE GRAFFEO: - - - at what stage would

1   they be able to?

2   MR. KLEINBART: Arguably - - -

3   JUDGE GRAFFEO: They have to wait until - -

4   -

5   MR. KLEINBART: - - - after - - -

6   JUDGE GRAFFEO: They have to wait until an

7   indictment - - -

8   MR. KLEINBART : - - - after - - -

9   JUDGE GRAFFEO: - - - comes out?

10   MR. KLEINBART: Yeah, after an accusatory

11   instrument has been filed or an indictment is filed

12   and it would be - - -

13   JUDGE GRAFFEO: And then what do they - - -

14   MR. KLEINBART: - - - part of the normal -

15   - -

16   JUDGE GRAFFEO: What do they allege at that

17   time? That - - - that the - - -

18   MR. KLEINBART: If the appointment is

19   incorrect - - -

20   JUDGE GRAFFEO: - - - that the special

21   prosecutor wasn't properly authorized to issue that -

22   - -

23   MR. KLEINBART: Right, that's - - -

24   JUDGE GRAFFEO: - - - indictment?

25   MR. KLEINBART: Yes, that's correct. And

1   I believe in People v. Zimmer, that's exactly what

2   happened.

3   JUDGE SMITH: So you - - -

4   JUDGE RIVERA: Sounds quite - - -

5   JUDGE SMITH: Well, you - - -

6   JUDGE RIVERA: Sounds quite wasteful, but

7   can I ask you, just - - - because your time is

8   running out, this time - - - to discuss the - - - the

9   - - - the authority, the review power of the court on

10   a 701, because I - - - I took your brief to say that

11   it was basically unreviewable. Your executive

12   decision to recuse is practically unreviewable.

13   MR. KLEINBART: Well - - -

14   JUDGE RIVERA: Is that so?

15   MR. KLEINBART: Yes, I believe it is.

16   JUDGE RIVERA: Why is that?

17   MR. KLEINBART: I believe it is at this

18   stage, certainly at this stage. I would - - - I may

19   be willing to concede - - - I ha - - - I'll be

20   honest; I haven't fully thought it out - - - maybe

21   the rule is different once the action - - - criminal

22   action is commenced.

23   JUDGE RIVERA: So - - -

24   MR. KLEINBART: And - - -

25   JUDGE RIVERA: Even if they've issued

1   subpoenas?

2   MR. KLEINBART: Yes.

3   JUDGE RIVERA: Okay.

4   JUDGE SMITH: But you didn't - - -

5   JUDGE RIVERA: But I'd like to go - - - I'm

6   sorry.

7   JUDGE SMITH: Go ahead.

8   JUDGE RIVERA: I'm sorry; let me just

9   finish this line. So I'm just trying to understand.

10   So what is the point, then, of 701? Is it just a

11   mechanical appointment process?

12   MR. KLEINBART: Yes.

13   JUDGE RIVERA: And the court has no role?

14   MR. KLEINBART: The court has a role; it

15   does. But it's clear, it seems to me, that - - -

16   that 701 doesn't provide for disqualification.

17   And I have to say, Judge Smith, you were

18   the one who gave me this - - - who gave me this idea.

19   I watched the ar - - - when I was watching the

20   argument in People v. Adams, my colleague from Monroe

21   County, Kelly Wolford, said - - - had suggested that

22   she didn't understand how the case was even before

23   you if what was being reviewed was a county law

24   order, because that, sort of, was not coming up for

25   review on a direct appeal from a judgment of the

1   local criminal court. Your response was I thought

2   that too, but they told me I was wrong. And I have

3   to be honest, it took - - - I never - - - it took me

4   a long time - - -

5   JUDGE SMITH: But let me see if I

6   understand what you're saying now. You're saying a D

7   - - - a special prosecutor gets appointed wrongly;

8   the judge makes a mistake; he should never have been

9   appointed. He investigates for seven years. He

10   finally brings an indictment. At that point - - -

11   MR. KLEINBART: Yes.

12   JUDGE SMITH: - - - the defendant moves to

13   dismiss the - - -

14   MR. KLEINBART: Yes.

15   JUDGE SMITH: - - - to dismiss the

16   indictment. The statute of limitations has run; the

17   defendant lucks out. That's a good system? Or

18   that's - - -

19   MR. KLEINBART: Whether that's - - -

20   JUDGE SMITH: - - - the system we got,

21   whether it's good or bad?

22   MR. KLEINBART: Whether that's a good

23   system or a bad system, that's the only way the

24   criminal justice system - - -

25   JUDGE SMITH: Okay. Assume - - -

1   MR. KLEINBART: - - - can work under the

2   CPL.

3   JUDGE SMITH: Okay. I think this was Judge

4   Rivera's question, but I'm not sure - - - part of

5   Judge Rivera's question. Assume we were to disagree

6   with you on the procedural matter; assume we want to

7   reach the merits here and decide whether a special

8   prosecutor should have been appointed or not. How do

9   we decide that, especially since you've chosen not to

10   disclose any facts?

11   MR. KLEINBART: Well, the record on appeal,

12   as I understood it, as was subpoenaed by my

13   adversary, comes up to this court with the sealed

14   material, and no different than when you - - - in a

15   case where there's a search warrant - - -

16   JUDGE SMITH: You say we can - - -

17   MR. KLEINBART: - - - the search warrant -

18   - -

19   JUDGE SMITH: - - - we can rely on - - - we

20   can rely on the sealed material?

21   MR. KLEINBART: You can certainly rely on

22   the sealed material if - - -

23   JUDGE SMITH: Can you give us - - - I - - -

24   can you, without betraying any of your secrets, give

25   us a hint as to what you think we ought to make of

1   the secret material?

2   MR. KLEINBART: Well, I will say that - - -

3   well, let me suggest this. One of the reasons I

4   don't believe it was necessary to discuss it was - -

5   - is this. The way my adversary chose to litigate

6   this matter in this court was to suggest that we did

7   not establish actual prejudice. That's why I thought

8   it would not be inappropriate to not discuss that at

9   all because, frankly, it's not - - - I would suggest

10   that it's really a question of what the appropriate

11   standard is. We disagree. I don't believe it's

12   actual prejudice. I believe it's something else.

13   And I think, if you take a look at People v. Leahy -

14   - -

15   JUDGE RIVERA: Well, you bel - - - you

16   believe - - -

17   MR. KLEINBART: - - - Leahy - - -

18   JUDGE RIVERA: - - - you believe there's no

19   review.

20   MR. KLEINBART: No, no, no, no, no, no, no,

21   I'm - - - assuming there is rev - - - assuming

22   there's rev - - - assuming there's review, it becomes

23   a question of what the standard is.

24   And I would point you to People v. Leahy.

25   There's something very interesting that is often

1   overlooked, I think, in that case. Yes, what it's

2   about is - - - was the - - - was the appointment - -

3   - did that include Leahy himself. But there is a - -

4   - a separate discussion in that case that it - - -

5   what apparently happened, the Nassau County District

6   Attorney had made an application to have the special

7   jurisdiction expanded to include Leahy. The special

8   didn't wait and went ahead. And this court has

9   discussion in the opinion of you should have waited

10   and that appointment - - -

11   JUDGE RIVERA: What's the - - -

12   MR. KLEINBART: - - - and the appointment

13   would have been made.

14   JUDGE RIVERA: What's the review?

15   MR. KLEINBART: And the appointment - - -

16   so essentially it's was there a valid reason to

17   appoint the special, because Leahy's appointment had

18   nothing to do - - - there was absolutely no - - - at

19   least as the cour - - - as the - - - as is recited in

20   the opinion, there's no reason to disqualify the DA

21   with respect to Leahy himself. Nevertheless, the

22   court suggested, yeah, it'd be a good idea if it had

23   gone on and - - -

24   JUDGE RIVERA: And - - - and if the - - -

25   and if the judge, doing this 701 analysis, I guess

1   you're suggesting, disagrees that there's an actual

2   conflict, but believes that there could be a

3   perception of such a conflict, is that enough to give

4   you - - -

5   MR. KLEINBART: On whose application?

6   JUDGE RIVERA: - - - to satisfy - - -

7   MR. KLEINBART: On the district attorney's

8   application?

9   JUDGE RIVERA: On the DA - - - no, no, this

10   is what we're talking about - - -

11   MR. KLEINBART: Yes, absolutely.

12   JUDGE RIVERA: - - - the DA's application.

13   MR. KLEINBART: Absolutely, yes.

14   JUDGE RIVERA: So that would satisfy - - -

15   MR. KLEINBART: Yes, absolutely.

16   JUDGE GRAFFEO: - - - the standard you're

17   suggesting.

18   MR. KLEINBART: Absolutely.

19   JUDGE GRAFFEO: Thank you, counsel.

20   MR. KLEINBART: Absolutely. Thank you.

21   JUDGE GRAFFEO: Counsel, you have three

22   minutes, just so we keep our - - - our clock

23   accurate.

24   MR. ADLERSTEIN: Yes, I understand. Lee

25   Adlerstein for Judge Fisher.

1   JUDGE GRAFFEO: And what are you proposing

2   should be the analytical framework that we use to

3   resolve this case?

4   MR. ADLERSTEIN: Well, we - - - we agree

5   that this is not the case where the court should

6   entertain these larger issues through an Article 78

7   proceeding. And the reason, primarily, is - - - is

8   that - - -

9   JUDGE SMITH: As a policy matter, isn't it

10   desirable to get the issue decided whether this

11   special prosecutor exists or not after all these

12   years?

13   MR. ADLERSTEIN: Well, we - - - we think

14   that the special prosecutor issue can be decided in

15   due course, within either the criminal proceeding, to

16   go to the judge in the particular county who is

17   supervising whatever is occurring in the grand jury,

18   or later on, as Mr. Kleinbart suggests, after there's

19   an accusatory instrument, to go ahead and to

20   challenge the validity of the special prosecutor.

21   JUDGE PIGOTT: That brings me to a more

22   fundamental question that was touched on briefly by

23   the - - -

24   MR. ADLERSTEIN: Yes.

25   JUDGE PIGOTT: - - - by the appellant, and

1   that's the - - - how it was that Judge Fisher ended

2   up making this appointment.

3   MR. ADLERSTEIN: Yes, Your Honor. Judge

4   Fisher is the deputy chief administrative judge - - -

5   JUDGE PIGOTT: Right.

6   MR. ADLERSTEIN: - - - for the five

7   counties of New York City.

8   JUDGE PIGOTT: Right.

9   MR. ADLERSTEIN: So she has overall

10   supervision over the courts that are within the

11   United Court System - - -

12   JUDGE PIGOTT: Right.

13   MR. ADLERSTEIN: - - - within the City of

14   New York. She has said in her affidavit that she

15   regularly assigns judges specially - - -

16   JUDGE PIGOTT: Right.

17   MR. ADLERSTEIN: - - - depending on

18   circumstances, to any or each of the five counties,

19   including herself.

20   JUDGE PIGOTT: So where does it - - - where

21   - - -

22   MR. ADLERSTEIN: And she said - - -

23   JUDGE PIGOTT: Where does it show that she

24   complied with - - - with NYCRR 200.15, which says

25   that "Any party filing with the superior court an

1   application for appointment of a special district

2   attorney, pursuant to Section 701, shall make the

3   application to the chief administrator" - - - or

4   judge of the courts; that would be Judge Fisher.

5   "The chief administrator, in consultation and

6   agreement with the presiding justice of the

7   appropriate Appellate Division, then shall designate

8   a superior court judge to consider the application as

9   provided by law."

10   MR. ADLERSTEIN: Okay.

11   JUDGE PIGOTT: I didn't see anything in

12   here, nor did I see anything in Judge Fisher's brief

13   or affidavit that says that she - - - that she

14   conferred with the presiding justice of the Appellate

15   Division and that the two of them agreed on a third

16   judge that would then preside.

17   MR. ADLERSTEIN: Well, Your Honor, I think

18   the court, in connection with that issue, should take

19   into consideration that the Working Families Party,

20   in their papers to the Appellate Division, which

21   Judge Fisher's affidavit answered, didn't pose that

22   issue.

23   JUDGE PIGOTT: Well, it was alluded to, but

24   - - -

25   MR. ADLERSTEIN: They didn't mention

1   200.15.

2   JUDGE PIGOTT: Assuming they did, would you

3   - - - would you agree that that provision was not

4   complied with?

5   MR. ADLERSTEIN: No, I would not agree that

6   that provision was not complied with. That's why - -

7   -

8   JUDGE PIGOTT: Then why did she say, in her

9   affidavit, that she, as - - - as chief administrator,

10   did what she always does, is she appointed the

11   special prosecutor? She never says that she

12   appointed it, and there's nothing in the - - - in the

13   order that says I, in consultation with the presiding

14   justice, am appointing a judge. And it could be her,

15   I suppose, but I don't think that's what the statute

16   contemplates.

17   MR. ADLERSTEIN: Well, the fact of the

18   matter is I think that there - - - there is two

19   issues there. Number one is it wasn't broached, and

20   counsel, in addressing the papers that were put

21   together by Working Families Party - - - and there

22   were many issues that the Working Families Party

23   posed to the Appellate Division, which of course was

24   the court of first instance in this case. Counsel,

25   in addressing those issues, addresses them seriatim,

1   and works with the client on what is needed in an

2   affidavit.

3   JUDGE PIGOTT: So you're saying it's

4   unpreserved?

5   MR. ADLERSTEIN: I'm saying it was

6   unpreserved, yes. And one of the last things you

7   want to do as a lawyer is to ask a judge how the

8   judge made a decision and what the thought processes

9   were and what the consultations were, unless it's

10   absolutely necessary or unless it's put at issue.

11   JUDGE SMITH: So you're - - - you're also

12   saying, essentially, that if there were some minor

13   procedural defects, the remedy is not to - - - to

14   extinguish the special prosecutor.

15   MR. ADLERSTEIN: Well, that would be

16   another issue, Judge Smith, because I think that - -

17   - that was a second issue that I was about to - - -

18   to mention. It wasn't posed to the Appellate

19   Division. There was no suggestion to the Appellate

20   Division that 200.15 was not complied with, and - - -

21   JUDGE SMITH: And presumably, if they had

22   raised that issue, you could have gone back and done

23   it again at that time.

24   MR. ADLERSTEIN: We would have, yes, and

25   Judge Fisher could have spoken on the issue.

1   JUDGE SMITH: What's the purpose of

2   requiring consultation with the presiding - - - was

3   it with the presiding justice she's supposed to

4   consult?

5   MR. ADLERSTEIN: Yes.

6   JUDGE SMITH: I mean, isn't that - - - I

7   guess what I was visualizing was she calls up and

8   says, hey, I want to appoint so and so, is - - - is

9   he too busy this week or is there some problem with

10   appointing him. But when you're appointing yourself,

11   maybe that's not such a big deal.

12   MR. ADLERSTEIN: Well, I think that the - -

13   - it's recognition of the fact that there is a joint

14   sense of responsibility; there's responsibility

15   that's exercised by the deputy chief administrative

16   judge and by the chief administrative judge for the

17   courts. But there's also recognition that the

18   Appellate Division has a strong interest to make sure

19   that justice is done and that procedures are properly

20   complied with within the field of the Appellate - - -

21   particular Appellate Division and the counties that

22   that Appellate Division is responsible for.

23   JUDGE GRAFFEO: If we - - -

24   MR. ADLERSTEIN: But - - -

25   JUDGE GRAFFEO: If we disagree with you on

1   whether or not the Article 78 lies at this juncture,

2   what are you proposing is our standard of review?

3   MR. ADLERSTEIN: We feel that the very fine

4   brief in amicus that was presented by the District

5   Attorneys Association, which basically points this

6   court toward a reasonableness standard, would be an

7   appropriate one for this court to adopt, if the court

8   wishes to reach that issue. We think that it's

9   appropriate, given the fact that there should be a

10   differential between situations where a party is

11   seeking to disqualify a district attorney and

12   situations where - - -

13   JUDGE RIVERA: Why - - -

14   MR. ADLERSTEIN: - - - a district attorney

15   - - -

16   JUDGE RIVERA: Why should - - - why should

17   they be treated differently? Isn't the court still -

18   - - of this separate branch, isn't the court still

19   injecting itself into this executive process of this

20   investigation?

21   MR. ADLERSTEIN: Well, because I think that

22   that is a separation-of-powers - - -

23   JUDGE RIVERA: Yes.

24   MR. ADLERSTEIN: - - - concern that this

25   court gave recognition to - - -

1   JUDGE RIVERA: Right. I'm asking what's

2   the difference who - - - who requests the special DA?

3   Isn't it still the court exercising power that still

4   raises a separation-of-powers question? I'm ju - - -

5   just a question.

6   MR. ADLERSTEIN: Yes, I - - - I - - - I

7   agree - - -

8   JUDGE RIVERA: Um-hum.

9   MR. ADLERSTEIN: - - - that the court needs

10   to review the application, needs to take that

11   application into consideration. But the standards

12   can be somewhat different between situations where

13   someone is seeking to disqualify a district attorney

14   and situations where a district attorney is self-

15   disqualified.

16   JUDGE READ: Could it be a situation where

17   certain factors are weighed differently, in the one

18   dist - - - in the one instance, rather than the

19   other?

20   MR. ADLERSTEIN: Certainly, and there - - -

21   there are separation-of-powers concerns because, as

22   Mr. Kleinbart has pointed out, district attorneys

23   have responsibilities, as attorneys and as officers

24   of the court, to identify conflict situations.

25   And one of the reasons why confidentiality

1   in these applications is somewhat necessary is that

2   some of these applications can involve highly

3   confidential material. And one thing that I don't

4   think this court would want to do would be to

5   discourage district attorneys, or other attorneys

6   throughout the state, in identifying conflicts that

7   they may have. And yet, if you go ahead and you

8   identify a conflict, knowing that it's going to be

9   put in the hands of opposing counsel, that could very

10   well discourage - - -

11   JUDGE PIGOTT: Why?

12   MR. ADLERSTEIN: - - - people from coming

13   forward.

14   JUDGE PIGOTT: What's the big deal? I

15   mean, people get off cases all the time. I mean, if

16   the - - - if the district attorney said, you know,

17   like I suggested, I have a relative that works over

18   there, or I've got - - - I'm running for office this

19   year and I don't want to take on any political thing,

20   I - - - you know, what's wrong with saying that? Is

21   that - - - is that a hard - - - you know, absent - -

22   - absent something that I - - - I can't envision, you

23   know, a - - - a health concern or something, but even

24   that, it would seem to me - - - I don't know why

25   we're being secretive.

1   MR. ADLERSTEIN: Well, there's a lot of

2   variations on the - - - on the theme, I think - - -

3   JUDGE PIGOTT: Pick one.

4   MR. ADLERSTEIN: - - - in terms of the - -

5   -

6   JUDGE PIGOTT: What - - - what do you want

7   - - - what do you want to have a DA say that is so

8   secret that it - - - that the public shouldn't know -

9   - -

10   MR. ADLERSTEIN: Well, there are personal -

11   - -

12   JUDGE PIGOTT: - - - shouldn't apprise the

13   public - - -

14   MR. ADLERSTEIN: - - - relationships; there

15   are business relationships.

16   JUDGE PIGOTT: You can say that; I have a

17   personal relationship with certain people that are -

18   - - that are part of this investigation. I have

19   business relationships with some people who may be

20   the subject of this investigation.

21   MR. ADLERSTEIN: Well, some - - - some

22   relationships do get very sensitive, depending on

23   what's going on between the people involved.

24   JUDGE RIVERA: Well, I - - - I assume, in

25   part, your argument is that the target inves - - - of

1   the investigation may be put on notice, even if

2   they're not named, because of - - - because of the

3   nature of their relationship, they may assume that

4   they're the target and that that may somehow

5   undermine the integrity of the investigation. People

6   may destroy evidence or whatever. I - - - am I

7   misunderstanding your argument?

8   MR. ADLERSTEIN: No, I think that's - - -

9   that's all - - -

10   JUDGE RIVERA: A concern?

11   MR. ADLERSTEIN: - - - a part of it.

12   JUDGE GRAFFEO: Okay, counselor.

13   Mr. Schick, you have your - - -

14   MR. ADLERSTEIN: If I just may - - - may

15   take one moment - - -

16   JUDGE GRAFFEO: I'm sorry - - -

17   MR. ADLERSTEIN: Oh, I'm sorry.

18   JUDGE GRAFFEO: - - - counselor.

19   MR. ADLERSTEIN: Go ahead.

20   MR. SCHICK: Thank you. With respect to

21   the court's review power, I want to quote from

22   District Attorney Donovan to the Appellate Division.

23   And here's what he says; it's on page 121 and 122 of

24   the record: "When an elected district attorney

25   concludes, at the outset of a prosecution or an

1   investigation, that proceeding with the matter would

2   create a conflict of interest that would violate his

3   or her ethical obligation, in such a circumstance,

4   the district attorney applies to the appropriate

5   court for an order appointing a replacement. Should

6   the court agree that there is a conflict, it goes on

7   to disqualify the district attorney and appoints a

8   special district attorney in his stead."

9   Indisputably, until this court said that

10   the DA could not file in secret sealed papers in this

11   court, that was his position. He applies; the court

12   decides. He only changed it when you said in

13   February that he could not file sealed papers.

14   In addition, the next sentence is he says,

15   "When the" DA seeks - - - "When the district attorney

16   seeks to disqualify himself, the burden of proof is

17   sustained by a good-faith application containing

18   reasonable grounds for his belief."

19   Now, I disagree with that standard, but he

20   himself acknowledges it's his burden of proof. It's

21   extraordinary to be sitting here saying that in a

22   case in which he understands he has the burden of

23   proof, he has not met it. He asked - - -

24   JUDGE SMITH: Well - - -

25   MR. SCHICK: - - - this court whether he

1   could file under seal; the court said no. In no case

2   - - - there is no special rules for filing under

3   seal. There are court rules.

4   JUDGE SMITH: He only - - - he only asked

5   to file his brief under seal, and we said no. He

6   says the sealed record is still before us.

7   MR. SCHICK: But there's - - -

8   JUDGE SMITH: He may have a point. You

9   have not moved to unseal it.

10   MR. SCHICK: But there - - - it's - - -

11   this court said that he could not file under seal.

12   There's nothing that prevented him from saying

13   anything. The only thing that's under seal is the

14   physical piece of paper, the application. There was

15   nothing that prevented District Attorney Donovan from

16   providing any reason that he wanted that exists. He

17   chose not to, and any litigant who tried to do that

18   would be summarily ruled out of this court. I

19   respectfully suggest that a district attorney has no

20   greater rights.

21   JUDGE RIVERA: Well, he - - -

22   MR. SCHICK: With respect - - -

23   JUDGE RIVERA: Just - - -

24   MR. SCHICK: Yes.

25   JUDGE RIVERA: - - - can you just speak to

1   this question of the separation of powers? He's

2   saying that the - - - the separation-of-powers

3   concerns is not equivalent when it's the DA, him or

4   herself, who concludes that they have a conflict and

5   they are therefore disqualified, and they're the one

6   seeking the appointment of the special district

7   attorney.

8   MR. SCHICK: That's not disqualification.

9   The - - - the statutes expressly provide for that in

10   County Law 702, the next section. If the district

11   attorney decides that he or she is recused, that is

12   not a reviewable decision and it falls to the order

13   of succession that County Law 702 and Public Officers

14   Law 9 requires them to file.

15   JUDGE RIVERA: If he concludes he and his

16   whole office cannot participate, doesn't that fall

17   under 701?

18   MR. SCHICK: If he said there's something

19   to disqualify - - - that would disqualify every sing

20   - - -

21   JUDGE RIVERA: Correct.

22   MR. SCHICK: - - - all forty-nine lawyers -

23   - -

24   JUDGE RIVERA: Correct.

25   MR. SCHICK: - - - in his office?

1   JUDGE RIVERA: Correct.

2   MR. SCHICK: I suppose that there'd be - -

3   - that would be like a vacancy, and 702, you know,

4   speaks to that as well. If he said - - - there are

5   forty-nine lawyers, I believe, as of today, at least

6   forty-nine assistant district attorneys in the

7   Richmond County DA's office. If he said he - - - all

8   of them are disqualified, it's hard to imagine that

9   such a thing could happen.

10   I want to get back to something that he

11   said about waiting, and I understand the policy

12   reasons why this court should not wait - - -

13   JUDGE GRAFFEO: Your - - -

14   MR. SCHICK: - - - till the end.

15   JUDGE GRAFFEO: Your light's on, so if you

16   could just - - -

17   MR. SCHICK: Yeah - - -

18   JUDGE GRAFFEO: - - - summarize, please.

19   MR. SCHICK: Yes. What - - - what Justice

20   - - - what Judge Rivera and Judge Smith were asking

21   about has in fact been held in Dondi v. Jones at 40

22   NY2d, 14, where the court said, "The harm to

23   petitioner in requiring him to proceed to trial and

24   then testing the jurisdictional issue on appeal,

25   should there be a conviction, should be considered an

1   additional reason warranting prohibition." So the

2   express question that we're considering here was

3   decided by this court.

4   With respect to the County Law 701 issues,

5   in addition to the ones discussed, Justice Fisher is

6   not, with all respect, a superior criminal court in -

7   - - in Richmond County, which is another requirement

8   of the statute.

9   And more importantly, this court has said

10   in Leahy that the particular case requirement of 701

11   should be subject to a hypertechnical reading. What

12   the order says is that a city council election in

13   2009. As we stated in our papers and the - - -

14   JUDGE ABDUS-SALAAM: I'm sorry, counsel - -

15   -

16   MR. SCHICK: - - - affidavits, there were

17   at least five city council - - -

18   JUDGE ABDUS-SALAAM: So you're saying - - -

19   MR. SCHICK: - - - elections in 2009.

20   JUDGE ABDUS-SALAAM: - - - that a Supreme

21   Court justice of the State of New York who may be

22   elected from one county can't sit in another county?

23   Is that what you're saying?

24   MR. SCHICK: The person may be assigned to

25   sit there, but if the person is not sitting there,

1   then the person can't introduce an order.

2   JUDGE SMITH: You're saying she didn't - -

3   - she had to sign a piece of paper assigning herself.

4   MR. SCHICK: Correct, Your Honor.

5   JUDGE GRAFFEO: Okay.

6   MR. SCHICK: And she did not do so.

7   JUDGE GRAFFEO: Thank you very much.

8   MR. SCHICK: Thank you.

9   JUDGE GRAFFEO: Thank you, gentlemen.

10   (Court is adjourned)

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4   I, Sharona Shapiro, certify that the

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