ORAL HISTORY OF ROBERT P. TROUT

Fifth Interview
March 25, 2015

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Robert Trout, and the interviewer is Stuart Pierson. The interview is taking place on March 25, 2015, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the fifth interview.

Stu Pierson: So 2005?

Bob Trout: In 2005, there was a very important change for our firm and for me professionally at the very beginning of the year. Unfortunately, I was in New Zealand with my wife for most of the month of January when it was happening. My wife and I had made plans many months in advance to spend an extended period of time on the south island of New Zealand. The flights being as long as they were, we wanted to fly first class. And first class being as expensive as it was, we wanted to use our miles to get the tickets. That meant booking many months in advance, and if I had known what was going to happen in the fall of 2004, I probably would not have scheduled the trip. But having scheduled it and invested the miles and made the arrangements, nothing was going to keep us from that trip. What happened in the fall was that I met with my good friend Plato Cacheris for lunch. I had been thinking that I wanted to find another lawyer who could help our firm develop business. Recall that in 2000, we moved into space that Plato had under lease and we shared space for a few years. In 2003, Plato had decided not to renew his lease in that space at 1100 Connecticut Avenue, so he and John Hundley moved to Baker & McKenzie, one of the largest firms on the planet. Ironic because Plato had never been a big firm sort of lawyer. We moved out of that space to the building we now occupy on Dupont Circle, although then we occupied a suite on the top floor. So one day in the fall of 2004, Plato

and I were having lunch. I thought he might have his ear to the ground and might have some ideas about lawyers who had a nice practice but were unhappy in a large firm. So I asked Plato if he knew anyone who might be interested in joining our firm and who could share the burden of generating business for the firm. Plato responded, "What about me?" He said that the big firm was not really for him—no surprise there—and suggested that he and John Hundley join our firm at the beginning of 2005. We obviously wanted to make this a big deal for our firm, as it was, with an appropriate amount of hoopla in the litigation bar. Obviously it was important to me to welcome Plato and John when they moved in, but it was also important for me to respond promptly to all the congratulatory emails that would be coming in, as they did. Unfortunately, I was on the other side of the world, only periodically accessible to email. One issue we had to address was the name of the firm. John Richards and I had formed the firm over eight years before as Trout & Richards. We were known in the marketplace, but obviously it was important to have Plato's name in the firm. John is a brilliant lawyer, and his legal talents unquestionably were important in our developing our brand and our reputation for quality. But he had not spent a lot of his time marketing himself, and so he was not as widely known, and his referral base was not as robust. He graciously recognized that to maximize what Plato could do for our firm, and to showcase Plato's presence, it made sense to substitute Plato's name in the firm for his. For many years one of my dearest friends has been Roger Zuckerman. He has been a friend, a mentor, a counselor. In fact, when I was single, at our regular lunches, Roger would counsel me on my love life. "Dr. Love," he called himself. So of course after learning about Plato's interest in joining our firm, Roger was one of the first persons I spoke to about it. Roger was thrilled, but he advised me that my name should remain first in the firm name. Plato

was joining our firm, I was younger and would be practicing longer, and our practice, which included commercial litigation, not just criminal, was broader. When I discussed the firm name with Plato, he did not hesitate a second, and so we renamed the firm Trout Cacheris, which in keeping with the trend was without an ampersand. When we sent out announcements, because Plato is such a legal legend, I think many people were surprised that my name came first. That of course did nothing to diminish Plato or our firm, but I think it probably did enhance my professional standing. So that was an important development for our firm in early 2005. Later in 2005, there was another important development. I got a call from Bill Jeffress about a potential new client. Bill had done a lot of work in New Orleans and knew a lawyer there who does a lot of criminal work by the name of Mike Fawer. Mike had been contacted by Congressman William Jefferson after the FBI searched Jefferson's home in New Orleans. I had read the article in the newspaper about the search of the Congressman's home in New Orleans. There was nothing in there about $90,000 in the freezer yet. So it was just a relatively small article. And a day or so later, I received a call from Bill Jeffress, who said that he had gotten a call from this lawyer down in New Orleans, but he was preoccupied with another case that was scheduled for trial. The investigation was being run out of the Eastern District of Virginia, and we do a lot of work there. And so Bill referred William Jefferson to me. And within a day or so, William Jefferson called me. He came to see me, and we met in this very room where you and I are now sitting. He engaged me in that meeting.

Stu Pierson: Did you see all the constitutional issues that reared up?

Bob Trout: Yes and no. I mean, it was not in that first conversation that I spotted any of those issues. But that day or the next day, I received a call from—or maybe I called—

Geraldine Gennet, who was the General Counsel of the House of Representatives. The House had received a subpoena at the same time to produce documents. And so she had called me, or I had called her, and she suggested that we get together so that she could tell me about the way the General Counsel does things when they get these subpoenas. So I did a little bit of looking at the Speech or Debate Clause, which was completely unfamiliar to me. And then I went to the Capitol to meet with Geraldine and Kerry Kircher, who was her Deputy and is now the General Counsel. I came in and we exchanged some pleasantries. I think I introduced the subject by saying, "Tell me everything I need to know about the Speech and Debate Clause." And she said, "Well, the first thing you need to know is, it's not the Speech *and* Debate Clause, it's the Speech *or* Debate Clause." I got it. I never made that mistake again. It's not to say I didn't hear judges refer to it as the Speech and Debate Clause. But the way she handled it, it was one of those things that was indelibly in my brain from that point on. So we sat down and went through it all. She explained that for Members of Congress, these are their records. Committee records are treated differently, but for the Member's records maintained in their office, if a Member wanted to go out and have a bonfire on the Capitol grounds and throw all of their records from their office, there is nothing that stands in the way of them doing that, other than the environmental laws and the like. But the point is they can do with them what they want. And there are no records preservation requirements at all.

Stu Pierson: Who's driving the prosecution or the investigation at this time?

Bob Trout: Paul McNulty was the U.S. Attorney. This was being done . . .

Stu Pierson: Out of the Eastern District.

Bob Trout: Out of the Eastern District of Virginia.

Stu Pierson: No Main Justice involved?

Bob Trout: There was some Main Justice involvement. What I understood the investigation was about was the allegation that Jefferson was using his office to further private business activity for his own personal gain. That was essentially what the allegation was. Jefferson had met someone who had developed a technology that supposedly would carry high speed broadband over copper wire. He was helping to find money and opportunities for this technology. One of the opportunities was in Africa, where Jefferson knew a lot of leaders of African countries owing to his interest in the continent and to his leadership in Congress in promoting trade with Africa. As part of the process of finding money, he was introduced to the employer of one of his former staffers. She was an attractive young woman whose father had sold a high tech company for a lot of money. So she was quite wealthy, and she was looking around for ways to invest her wealth. Sometime earlier, she had hired Jefferson's former staffer to help her identify investment opportunities. And that is how Jefferson came to deal with her. But there was a problem. For reasons having nothing to do with Jefferson, or her attitude about him, she became concerned about the investment and whether she was being ripped off by her employee and the person who controlled the technology. And so she went to the FBI, not to complain about Jefferson but rather to complain about the other two. Of course, when the FBI heard a member of Congress was involved, they jumped to the conclusion that there must be a corrupt scheme of some sort, and Jefferson became the focus of their investigation. So she became a cooperator. And as the investigation evolved, at the instigation of the FBI, the cooperator proposed that, to increase the chances that Nigeria would invest in the technology, they should bribe the Vice President of Nigeria, whom Jefferson knew. And

so because it was being put together as an FCPA case—it was a sting operation and it was wired for that—it fell under DOJ Fraud rather than Public Integrity. Fraud is the unit that handles investigations under the Foreign Corrupt Practices Act. And with that as background, my partner Amy Jackson and I went over to Alexandria to meet with the prosecutors. We were trying to straddle two competing ideas of cooperating but not providing anything. Normally in this situation you wouldn't even go through a pretense of cooperating, but Jefferson was a Member of Congress, and we thought it was important to avoid anything that publicly appeared to be stonewalling. There were some aspects of this that are not public and are covered by the privilege obviously, so I cannot discuss them.

Stu Pierson: Sure.

Bob Trout: We met with the prosecutors and had some initial conversations with them. And we got additional time to respond to the subpoena all at the same time that we were trying to figure out what we were going to do about this. And so we were trying to get educated about the Speech or Debate Clause. And we were trying to understand the implications of the idea that the documents in his office are essentially personal documents. At this point we knew—but the public did not—that the FBI had seized $90,000 in marked bills from Jefferson's freezer in his home in D.C. We also knew that originally the cooperator had given Jefferson $100,000 in marked bills with the expectation he would be giving that to the Nigerian Vice President, who had a house in Potomac, Maryland where the Vice President had been visiting in late July or early August of 2005, around the time the cooperator gave the cash to Jefferson for the stated purpose of passing it on to the Vice President. The government had assumed that Jefferson had given the cash to the Vice President, so when they raided Jefferson's homes in early August 2005, they also raided

the Potomac home that the Nigerian Vice President maintained in the U.S. Undoubtedly the FBI was disappointed that they found no cash in the home of the Nigerian Vice President. But since the FBI found only $90,000 at Jefferson's D.C. residence, rather than the $100,000 that the cooperator had given Jefferson, the government was probably wondering what happened to the other $10,000 that they had not recovered. We knew that Jefferson gave about half of it to one of his staffers, who needed some money, and we were able to verify that. And the rest of what he had, which was $4900, he gave to me. So we had some of the cash that the government was missing; it was being stored in our safe deposit box. And the question was, what do we do with this cash? In the beginning we thought that maybe the FBI was thinking that the missing $10,000 had been given to the Nigerian Vice President, in the nature of a deposit. And if that was what the FBI was thinking, maybe the government would pull the trigger on a quick indictment and take that as their theory of the case. And if they did that, we could easily prove that none of it was given to the Vice President. So we wanted to see where the government was going to go with this. At the same time, we had possession of the marked bills, which we knew the government obviously wanted to find. And the question we had to answer was what was our ethical obligation in handling the cash. If it was contraband—something illegal to possess, such as narcotics, illegal weapons, or stolen property—we had a different obligation than if it wasn't. It didn't seem to be stolen property—the cooperator had voluntarily given the briefcase full of cash to Jefferson. Yes, it would be viewed as evidence of an alleged crime, but we had a duty of confidentiality to our client, and we didn't have to turn over evidence to the government just because we knew the FBI would want it. There was also the question whether it was covered by the subpoena.

Stu Pierson: Who was your judge?

Bob Trout: Judge Ellis. But it took us four years to get to trial.

Stu Pierson: No way to persuade the government that they didn't have a case?

Bob Trout: Well, I thought that was just not going to happen. And I knew that we had a relatively thin budget that we would be working with, and I just didn't see that it made sense to squander it all on pretrial stuff. With the FBI discovering $90,000 in the freezer--the allegations he was going to bribe the Vice President of Nigeria, which was basically the setup of the sting—I just didn't see the government walking away from that. William Jefferson is the nicest person. There is a gentility to him, so generous and kind in his manner. It's such a tragedy what happened to him. But it didn't seem realistic that his lawyer could persuade the government not to bring an indictment. But one of the early events was we had to figure out what we were going to do about the subpoena. There were two aspects.

Stu Pierson: The one to the House?

Bob Trout: No. He got one in his personal capacity. He got one as a Member of Congress for all the stuff in his office. And the House got one. So as I said, with respect to the records in his office we were armed with the information that those are viewed as his personal records. The other thing we had to deal with is we were sitting on a certain amount of cash—$4,900. This is all a matter of public record now, although it wasn't at the time. What do we do about the cash that by now was in our safe deposit box? By this time, Jefferson had assembled a team from different firms. And so Amy and I were doing one thing, and there was another lawyer who was going to be doing something else, and so on, including seeing if the political powers could be reached here. And, as I say, I thought that

that was just never going to go anywhere. And I wasn't going to spend my time, and his resources, on that. But there was a lot of internal debate as to whether or not we could appropriately keep the--

Stu Pierson: Keep the funds?

Bob Trout: Retain the funds. No, we weren't going to deposit them anywhere. We had them in a safe deposit box. And as I say, there was some thought that if they were going to return an indictment quickly, and if they were basically going to allege that this $10,000 was delivered to the Vice President, we were going to have this hold card that we could play to prove that did not happen.

Stu Pierson: Not exactly an ace, but . . .

Bob Trout: Right.

Stu Pierson: At least a face card.

Bob Trout: But there was this internal debate including some thinking among the lawyers that we needed to turn the marked bills over to the government, that we had an obligation to turn it over. I was not convinced that we did. As a matter of fact, I think to the contrary—if our client had said, "You're not turning that over. I gave that to you as part of a confidential conversation, and, unless it is contraband, you can't turn it over." We consulted with counsel to advise us as to our obligation. I can't remember whether I talked to Bar Counsel, but I know that there are procedures, if you have contraband, for getting rid of it in a way that does not incriminate your client. Long story short, when the sting did not work as the government expected—the money was not found at the Nigerian Vice President's house in Potomac—the government appeared to settle in for a long

investigation. And Jefferson authorized us to turn over the cash. So the debate over what our obligations were became moot

Stu Pierson: So we're still pre-indictment?

Bob Trout: Oh, yes. The indictment didn't happen for two years. So, anyway, I went over to the U.S. Attorney's Office with my then partner, now a federal judge, Amy Jackson, and we took with us $4,900 in cash. This was the due date for the subpoena. We took with us a letter saying that our client would love to cooperate, but because of the uncertainty of what the investigation is all about, Jefferson has decided that he is going to accept the advice of his counsel and decline to provide any of his personal documents on the basis of "act-of-production" privilege, which the Supreme Court recognized in the Webb Hubbell case.

Stu Pierson: I remember *Hubbell* well. I got into a big debate with someone, I don't know, it must have been about nine months ago, about the meaning of that case and similar cases.

Bob Trout: We delivered the letter, and I think we had had some other conversations with them about seeing if we could work out some sort of an arrangement to address the documents. But it didn't really go anywhere. So we delivered this letter that essentially said these are his records. All of the records in his office are his personal records, and he is not going to produce them. In short, we asserted act-of-production privilege. And we handed them an envelope with the $4,900. I may have the chronology a little bit wrong. We may have just sent them a letter asserting act-of-production privilege, but in any event, we made an appointment with the prosecutors to come see them. And when we got there, we handed them the cash.

Stu Pierson: And how long had *Hubbell* been the law by then? I think *Hubbell* was probably not more than several years old.

Bob Trout: Yes, that's right. That idea had been out there, but it was not until *Hubbell* came along that the Supreme Court really grabbed it and said, "Yes, this is right." Anyway, when we handed them the envelope containing the cash, the prosecutors were incensed. They started out, I think, aghast thinking that we were offering them $5,000, "Can you make this go away?" And even after it became clear what this was, that we were simply turning over to them evidence that they clearly would have wanted, they remained nonplussed. I pointed out that these are all marked bills, it's not like there was going to be a chain of custody issue or that we were going to make any issue about authenticity.

Stu Pierson: They didn't have an agent in the room?

Bob Trout: They didn't have an agent in the room. So they basically insisted we take the money back to the office with us.

Stu Pierson: And come back and meet again?

Bob Trout: No. We'll send the FBI agent to your office. So the next day, the FBI agent showed up and took the money. And that was the end of that. But they were not happy. They thought that this was a stunt on our part. It really wasn't. We were just turning over this cash that we knew that they wanted. And we weren't going to send it to them by FedEx. We were going to deliver it in person. And, frankly, we were going to try to take advantage of the opportunity to have a conversation with the government. But they didn't show much of a sense of humor about it, let's put it that way. There were, as I say, a number of lawyers representing Jefferson who were doing different things. Personally, I just thought that there was just too much time being spent in the coordination among all these lawyers and

debating about what we should do about this and what we should do about that. There was no real person who clearly was lead. It probably wouldn't be a surprise that I wanted to be in the lead, and given the limited amount of available funds to pay fees, and the way we were spending the scarce fees, I was not willing to be involved if I wasn't in the lead. And when we couldn't get clarity on that, I basically said, "I'm not doing this anymore." So I fired myself. Jefferson is a very sweet guy, and we parted on very good terms. I believe the other lawyers pursued the goal of persuading the government not to prosecute since this was really not what they thought it was. That obviously didn't work. In the meantime, the government began grand jury litigation to determine whether the act-of-production privilege applied to the documents subpoenaed from his congressional office. In the spring of 2006, Jefferson called me. By this time he realized that the government was not going away, the case would eventually be indicted. He wants someone who would try the case. So Jefferson came back to me. I think he liked us, and I think he thought it was going to be a more fee-friendly engagement—and surely it was going to be when compared to the large firm. I was thinking the case the government would eventually bring would look more or less like what I thought it was going to look like at the beginning. And that it would be a manageable case. And, yes it would be tough to make it work on the budget that we were talking about. But in a small law firm like ours, we could do some fun things where we don't have the managing partner coming down the hall and beating the tar out of us if we have—

Stu Pierson: Aren't billing or collecting?

Bob Trout: Yes. If we have a variance on our collections. Little did I know how big the variance would be. So what happened in the grand jury litigation is that Judge Ellis—it is

now public, but at the time it was under seal—issued an opinion that said some of these records—those maintained by the office manager as custodian—were producible, but other records—those that Jefferson kept in his personal office in the Capitol—were his documents even if they involved his work a Congressman. Those documents could be withheld under the act-of-production privilege.

Stu Pierson: So the act-of-production is part of his decision?

Bob Trout: Yes. No question.

Stu Pierson: Was he the Chief Judge at the time?

Bob Trout: No.

Stu Pierson: How is it that he was hearing this as a grand jury matter?

Bob Trout: I don't know.

Stu Pierson: Okay.

Bob Trout: In this federal court here in D.C., it is the Chief Judge. Over there in Alexandria federal court, I don't know. In any event, he ended up with the case. And as I recall, in a footnote he said that, of course, there is nothing that stops the Department from executing a search warrant. You can always execute a search warrant. And he presumably was thinking out loud, that if you can't get what you want from a subpoena to a corporation, you can go in and search it and get what you want.

Stu Pierson: Assuming you have probable cause?

Bob Trout: Yes. Now as I recall, at the time that Paul McNulty was the U.S. Attorney, Jim Comey was the Deputy Attorney General. I don't know whether this is true or not, but I had heard that back in 2005, when we refused to turn over documents based on the act-of-production privilege, the U.S. Attorney's Office, headed by Paul McNulty, wanted to

execute a search warrant at that time and had been turned down by the Deputy AG, presumably on Speech or Debate grounds. Congress is different. They have certain privileges, and we, the Department of Justice are just not going to go there. That is what I heard. I don't know whether it is true or not. By the time Judge Ellis had made his decision, Jim Comey had resigned as Deputy Attorney General and Paul McNulty was the new Deputy Attorney General. And so I think, armed with this footnote from Ellis, they went back to the Deputy Attorney General with a request to authorize the search warrant. Now this is . . .

Stu Pierson: McNulty?

Bob Trout: McNulty. And they got approval. It was around Memorial Day. In the meantime, the press had initiated litigation to get access to the affidavits in support of the search warrants from August 2005. I believe Judge Ellis had authorized access to that material. I can't really remember the chronology exactly. But, long story short, the Saturday night of Memorial Day weekend, I went out to dinner with my wife, and when I got back home—I don't know why I wouldn't have had my cell phone with me—there was a very excited voicemail from my partner, Amy Jackson, who was telling me that the FBI was at the Capitol searching the office. It was a Saturday night. And she said that she had called up the prosecutor and had said that she was going to the Capitol, and the prosecutor had said, to the effect, "You will not be admitted; the FBI has been instructed to keep you out of the Capitol, so it would be a waste of your time." Around this time, I was getting all sorts of calls from the press. And Amy and I are furiously drafting a press release and press responses to send out. It was a firestorm. It was a very big deal. And so about two o'clock in the morning, it had finally calmed down. And then bright and early Sunday morning, we

went in and started working on the motion under Rule 41 for the return of seized property based on the violation of the Speech or Debate Clause. Because the search was done here in the District, the matter would be handled by then Chief Judge Hogan, who had approved the search warrant. Congress was in an uproar over this invasion of the Capitol by the Executive Branch. So everyone was in uncharted territory, and because the Executive was by now a bit under siege for what it had done, for the first time in our history, I believe the prosecutors were themselves treading lightly. I think we got on file by the Wednesday after Memorial Day. In addition to asking for the return of the seized documents, we sought a temporary restraining order prohibiting the government from reviewing the documents while the matter was pending. We talked to the lead prosecutor, and probably because they knew they were operating in uncharted territory, they agreed not to look at the documents until the judge had decided our motion for a TRO. Members of Congress were going crazy. Denny Hastert was very, very angry, and they really raised a stink.

Stu Pierson: I remember that.

Bob Trout: So we filed our motion on Wednesday, and the firestorm just continued. And then around Friday, President Bush basically ordered a freeze of his own, and ordered that the Solicitor General take possession of all of the documents and not let anybody see them for at least 30 days. Amy Jackson came into my office and said, "Have you heard?" I said, "Heard what?" And she said, "President Bush just entered a freeze of the status quo," which was essentially the very order that we asked for when we asked for a TRO. And then she said, "It's not every day that a lawyer gets his motion granted by the President of the United States." And no more than two minutes later, the *Washington Post* reporter called me to discuss the President's order and to ask me for a comment. So we chatted off the

record. And then he said, "Can you make a comment for the record?" And I said, "Well, it's a good start." And then I repeated Amy's line. And so my comment, including Amy's clever line, were printed in the *Washington Post* the next day. About a week later I was attending the D.C. Circuit Judicial Conference in Nemacolin, PA, and I had any number of lawyers and judges come up to me to talk about what a great line that was. And of course I let everyone think that I was the clever lawyer who came up with that line, and I didn't set the record straight until telling the story in the speech that I gave about five years later at Amy's investiture as a federal judge. Judge Hogan scheduled a hearing on our motion within the 30-day period, and you could see that he was staging it to make sure he had time to make a decision within the 30 days. We had a hearing in front of Judge Hogan. And it was electric. The hearing was in the ceremonial courtroom. And it was packed.

Stu Pierson: Who was arguing for the government?

Bob Trout: Roy McLeese.

Stu Pierson: Was he with the Criminal Division?

Bob Trout: He was the head of Appellate in the U.S. Attorney's Office here. He is now on the D.C. Court of Appeals. So he was making the argument for the government. And I had such a good time with this argument. It was such a pleasure. Chief Judge Hogan, whom I know, is a real pleasure to appear before. And he is just a nice, nice person. At oral argument, when I was introducing the procedural background, Judge Hogan interjected with my line—really Amy's line—about the President granting the motion for a TRO. We shared a nice chuckle about that on the record. The government had shifted their position as to the procedures they were intending to employ to review the documents that they

argued respected the Speech or Debate Clause. They had set up these protocols to justify why this was an appropriate search. They had set up some protocol as a search team.

Stu Pierson: A taint team.

Bob Trout: Yes, a taint team, and then they made an adjustment. And they basically said, "Okay, we won't do it the way we said we were going to do it in the papers, we're going to do it this other way in response to what Jefferson had argued." I know Chief Judge Hogan had signed the search warrant, and here we were making the argument …

Stu Pierson: Reconsider.

Bob Trout: Yes, you shouldn't have done it. So in my argument, I used the fact that the government had changed its position as to the proper procedure for reviewing the documents, to express two thoughts. One was what a wonderful thing our adversary system is that only with the benefit of the adversary system can you really understand that your first reaction is not necessarily the right answer. I was looking for a hook that might convince the judge that just because he had approved the search warrant didn't mean he should not accept our argument that the government had led him to make the wrong call. And I said that the other reaction that I had recalled the old Mel Brooks TV show, *Get Smart*, "Okay if you don't believe our original procedures are constitutional, would you believe our new procedures are constitutional." And that drew a big laugh from the audience. I just had a ball during oral argument. I knew what the outcome was going to be, that the search was going to be upheld. We didn't believe for a moment that there was really anything that the government was going to get from the search that they didn't already have. But we decided that we were going to spend our time and effort doing this because it was a fun legal issue. It had never happened before in the history of the United

States. There had never before been a search of a congressional office. This was a case truly of first impression. And that doesn't come around for lawyers every day. And it was high profile. The other thing is we also thought we could win it in the court of appeals. We didn't think we were going to win it in the district court, but we thought that we could win it. And we were doubtful that we were going to have a lot of wins in this case, so we said, "Let's go for this because maybe it will alter the equilibrium." There had been a D.C. Circuit case that had been decided by Judge Silberman. He had written an opinion involving the tobacco company, Brown & Williamson. It was very hard to see how this search worked if *Brown & Williamson* was the law. And if we could have picked the judge to be the judge we were citing to in this circumstance, it would have been Judge Silberman, because we knew how respected he was by some of the judges who we thought might not be on our side. Well we didn't win it in the district court, so we asked for a stay in the district court so we could take the issue to the court of appeals. Chief Judge Hogan denied our request for a stay. And then we asked for a stay in the court of appeals, and they granted us a stay that was a little bit different. It basically said, "Okay, here is what is going to happen because the government says we want to look at this stuff now." And they said, "We're not ready to decide the merits right now, but what is going to happen is Jefferson and his counsel get to look at the documents first, and the documents they say are not covered by Speech or Debate Clause—the legislative privilege—the government can see those now, while the case is pending. And the documents that the defense lawyers say are legislative in nature and are covered by the privilege, those will then go to Chief Judge Hogan for his review. And when he makes a decision yes or no, then you'll get the results of that." And so that is the procedure that was set up. It was time consuming. We had a

lawyer here who went through the documents. First we had to figure out how much are we talking about because they had all these computer records. And Judge Facciola was going to be handling this for . . .

Stu Pierson: The details.

Bob Trout: The details for Chief Judge Hogan. Well, they did an initial cut with the search terms that they wanted. And one of the individuals who was of interest was a guy by the name of Vernon Jackson, who went by the name Vern. And so one of the search terms was Vernon, and one of the search terms was Vern. A mutually agreed upon vendor was going to do all the search terms. Well, the initial cut came back with, I don't know, two or three terabytes of documents, which caused Judge Facciola to say he believed that would fill up, in paper, both of the twin towers of the World Trade Center. And so we needed to do something to whittle this down. Well, one of the funny things was that when the vendor did a search for "Vern" the computer picked up the word "government," so little wonder that the initial search yielded an unmanageable number of documents. Long story short, when we whittled the search terms down, we ended up with about 50,000—I don't know whether it was pages or 50,000 documents—that had to be reviewed. And we agreed on a protocol. We actually worked reasonably well with the prosecutors on this. We would receive a certain amount of documents and would have a certain period of time to review those documents before the next batch would arrive. So this process of our document review probably took close to six months. Chief Judge Hogan was getting these, but it was not like he was spending his time reviewing all the documents on which we were claiming legislative privilege. It was always our point of view that all of this was personal business unrelated to his legislative activities. This was not a crime. This was just personal business.

So it would have been inconsistent with everything we had been saying about this for us to say that any of this was covered by the privilege—the legislative privilege. So we made no claim of privilege as to anything the government wanted. All of that went to the government. They were scratching their heads thinking about what we might be holding back. There wasn't anything being held back related to what they were investigating because that was totally inconsistent with everything that we were saying about the matters under investigation. And in the same time period, we were briefing up the legal issue before the court of appeals. We had a great team of brief writers on this brief. Amy Jackson, now Judge Jackson, is a superb writer. And we also had our partner, Gloria Solomon, who is as good a lawyer, as clear a thinker, and as clear a writer, as you could find. I also had a hand in writing the brief. It was a collaborative process. We wrote a very good brief. Within a day or two after filing it, I saw some folks from DOJ at an Inn of Court event, and they came up to me and said that the word in the Department was that we had written a hell of a brief. So it was a good brief. I can't remember, but I think it is true that the brief for the government was written in the Solicitor General's Office by Michael Dreeben.

Stu Pierson: I would have thought perhaps that the S.G. would have been involved even at the district court stage.

Bob Trout: No.

Stu Pierson: I mean, that's against their tradition and their practice, but if you've got a Presidential declaration, that's pretty important stuff.

Bob Trout: Right. So anyway, we had our oral argument. Michael Dreeben, who is a friend whom I've known for some time, was arguing for the government. He is a brilliant lawyer, and I was proud just to be on the same stage with him. We argued the case before

Judge Doug Ginsburg and Judge Rogers and Judge Henderson. And as far as I was concerned, my trump card, at least in the D.C. Circuit, was this *Brown & Williamson* opinion that Judge Silberman had written. I remember Judge Rogers asked me whether the courts were even allowed to get into this, since we were arguing this was legislative privilege and the material was off limits to the executive. When we first started briefing the issue in the district court, this issue had come up, whether the Speech or Debate Clause was so absolute that neither of the other two branches, the executive and judiciary, had any business in this at all. And there were some very strong arguments from people representing the interests of Congress that we should be arguing that separation of powers meant that the judiciary had no more right to get involved in this than the executive did. I did not see how that would work, and I did not think that could win. After all, we would have to get a court to say that. So we never argued that, and probably in our brief we basically conceded that, yes, the courts get to be the final say on this. But at oral argument, Judge Rogers asked me about this—are we allowed to see this, are we allowed to decide this?

Stu Pierson: Do we have jurisdiction?

Bob Trout: Yes. And I said in response, "For 35 years, I have yearned for a case where I could cite *Marbury vs. Madison*, so yes, the courts have a say." They all smiled. The other exchange I remember was a question from Judge Henderson to Michael Dreeben. If I recall correctly, she asked something like, "How do we get around *Brown & Williamson*?" And I think everyone interpreted that as expressing her point of view that she wanted to uphold the search. I think there may have been a murmur in the audience, so I think she may have tried to rephrase the question. I don't remember how Michael handled the question, but as far as we were concerned, there was no way to get around the holding in *Brown &*

Williamson in the D.C. Circuit. *Brown & Williamson* was basically a disclosure case, the point being that Members of Congress have a privilege not to disclose legislative material. In the Speech or Debate context, the easy case is whether material protected by Speech or Debate Clause can be introduced as evidence against a member of Congress? That's easy. There was plenty of Supreme Court precedent on that. Then the question was, what about a disclosure obligation? This is not about whether the evidence will be used. That is for the trial court. The disclosure question is, can a member of Congress be forced to disclose legislative material protected by the Speech or Debate Clause? That issue had never before been decided in the context of an FBI search of a congressional office. This was the first such search in the history of the Republic. But *Brown & Williamson* addressed it in the context of a subpoena. What happened in *Brown & Williamson* is that there was a paralegal working for the law firm that was representing Brown & Williamson in tobacco litigation. And that paralegal had taken documents incriminating or adverse to Brown & Williamson in private litigation relating to smoking, and the paralegal had given them to Congress. And so Henry Waxman was having hearings about these scalawags at the tobacco companies. And Brown & Williamson was suing the law firm, or at least the paralegal. And so with a lawsuit pending, the tobacco company subpoenaed to get their own stolen records back from Congress. They actually said, "Just give us copies." And Judge Silberman, writing for the court—the unanimous court—said, "No, Speech or Debate Clause. You don't get it. They don't have to turn it over." The Speech or Debate Clause is implicated just as much by a member being forced to disclose privileged information as having it be used in evidence against the member. So we had the benefit of that precedent in the D.C. Circuit.

Long story short, in due course we got a two to one decision against the government on that upholding our position.

Stu Pierson: Ginsburg is the one?

Bob Trout: No, Judge Henderson. So the government basically reacted, "This is a problem," and they were counting the ways that it was really going to be a huge problem for the government in rooting out corruption. There was a lot of Chicken Little, the sky was going to fall. And Members of Congress were going to be able to—

Stu Pierson: Engage in fraud with impunity.

Bob Trout: Yes. And, of course, we were sitting there saying, "Well for two hundred and some odd years, they had never searched a congressional office before. Really?"

Stu Pierson: And the Republic is still standing.

Bob Trout: Yes. So they petitioned for rehearing *en banc*. And I think, by something like a five to four vote, the vote was not to rehear it. At that point the government petitioned for a writ of certiorari. And they basically said, "This is a really big deal. You need to grant cert because . . ."

Stu Pierson: Who was the AG at this point?

Bob Trout: It would have been Mukasey. And by this time, Nancy Pelosi had become the Speaker. Denny Hastert was no longer the Speaker, and Irv Nathan was the House General Counsel. I've known Irv a long time. He's a good friend. So we had been working together to fashion the arguments. In the court of appeals, we had a number of amicus briefs that I think Irv helped organize. I think there were three amici for us, and I think the government had one or two on their side. So it was a big deal. It was such a fun case. But now we were in the Supreme Court, and we needed to write our opposition. Gloria Solomon

really took the lead on that. And I would say in her first two pages, where she set the stage, she won it. It was really good. And so we wrote our brief. And then we had one of those frightful occurrences. We had finished our brief. It's not like it couldn't take another edit. But we had gone through a number of edits. And somehow we thought we had the word count right. I can't figure out what the problem was, but we got a call from the printer at about 5:00 p.m. on the day it was due to be filed by midnight. We were over the word count.

Stu Pierson: And you had to file that day?

Bob Trout: Yes, but we had until midnight.

Stu Pierson: I know about those.

Bob Trout: And so we were in panic mode. So the three of us separately sat down and we had in mind that, if worse came to worse, we could take out those first two pages and the brief would still hang together. But those first two pages that set the stage were really, really good. So I really didn't want to do that. I thought those two pages said it all. It's not like what was in the first two pages couldn't be found in the rest of it. But it was so well-expressed in such a condensed package. So we divided up the brief, and the three of us went through cutting everywhere we could. And by about seven o'clock, we had it down within the page limit, and we got it filed by the midnight deadline. And some time later, we were coming up to the Justices' Friday conference where they were going to consider the government's petition. That Friday afternoon, after the conference, I called up Michael Dreeben and I said, "Michael, do you have any intelligence as to what they did?" And he said, "No, we'll find out the same way you'll find out. On Monday morning we'll go on Scotusblog.com at about 10:15 and find out." And we chatted for a while, and as we were

about to hang up, he said, "One more thing, you guys wrote a hell of a brief." Coming from Michael, that meant a lot. It was a very generous thing to say. But he was right. It was a really good brief. And they denied cert. And many in the press and the cognoscenti who had been following the issue had assumed the Supreme Court would grant cert. and decide the issue.

Stu Pierson: Well, it was such a juicy case.

Bob Trout: Yes. That was in 2008 when the Supreme Court denied cert. But in the meantime, the investigation had been proceeding. We had our oral argument in the D.C. Circuit in May 2007, and I was assuming the government would not indict the case until the D.C. Circuit decided the case. And I was thinking it would be a while. In June of 2007, I got on a plane one Monday morning to go meet with a client in California. And when the plane landed, while it was still taxiing to the gate, I turned on my phone, to pick up message. And there are like 18 voicemails for me, from my office, from various news outlets including *The Washington Post*. I was literally waiting in the aisle to deplane, listening to messages that my client, William Jefferson, was being indicted that day. The press wanted to know if I had any comment. And so I called my office. At the time we were working with Judy Smith, who did crisis management and communications. She was pretty well known at the time and she is even better known today as the inspiration behind the hit TV series, *Scandal*. She is very nice and she was very generous helping us with Jefferson, who knew Judy. Judy had also done some work with Plato. That's how she was introduced to me. Judy is a lawyer herself, so we were very much in sync, and she never made a recommendation that was at all inconsistent with what we the lawyers thought was in the best interest of the client. Judy spends a lot of time in D.C., but her permanent residence is

in Los Angeles, which is where my plane had landed when news arrived that Jefferson was being indicted that day. I was literally still on the plane waiting to get off. And she was telling me, "You need to have a press conference. The Deputy Attorney General is having a press conference this afternoon at 2:00. You need to have a press conference at 4:00." She told me she could arrange for it from D.C. where she was. She suggested that I go to her house in Hancock Park where her husband was working and where there would be access to a computer and the internet. She would arrange for a press conference there. And so I got in a cab and I went to her house, where her husband, a television producer, was working at home. She has one of the most elegant, beautiful, tasteful homes you can imagine. So with the advantage of a computer and the internet, I got a copy of the indictment, and we began to exchange ideas and talk about what we wanted to convey. One of Judy's assistants in L.A. arrived to help with logistics. As the time approached for my press conference, the press trucks started rolling up to the curb of this ritzy neighborhood in L.A., setting up their cameras. I'm sure the neighbors were horrified, or at least curious. And then right at the appointed time, Judy's assistant cued me out the door, down the walkway, to a live press conference.

Stu Pierson: Facing the mikes.

Bob Trout: Facing the mikes. As I say, Judy and her assistant really made it happen. I didn't have to do much.

Stu Pierson: What did you say?

Bob Trout: I can't remember what I said. I remember I said something like they indicted an innocent man. Lawyers are prone to legalese, and I know that typically rather than speak in terms of innocence, a lawyer in that situation speaks about the client being "not guilty."

I knew I wasn't going to be making press statements in the future, that this would probably be the only time I would make such a statement to the press. So I wanted my statement to be stronger, and I wanted it to sound less like a lawyer wrote it and more like how I wanted my audience to think about it. Paul Friedman, the judge who is a good friend of mine, later said to me, "Bob, innocent?" And I said, "Paul, I thought everybody was presumed innocent until proven guilty beyond a reasonable doubt." And he laughed, and he said, "You are absolutely right." Frankly, I was more than a little surprised that the prosecutors with whom I had been dealing for many months would not have given me a heads up. I still don't really know why they did it this way. Maybe they were concerned that I might say something to the press in advance. I don't know. Not that I would have. But I was surprised they didn't call me up and say, "Bob, we've reached that point. We're going to be going to the grand jury next week. I just wanted to give you a heads-up. You know, let's talk about issues . . ."

Stu Pierson: Particularly in a case of that kind.

Bob Trout: Yes. I think I probably said something to them about it.

Stu Pierson: I would have.

Bob Trout: Yes. I'm pretty sure I did.

Stu Pierson: They wanted to manage the PR.

Bob Trout: Yes. In any event, we were able to work out issues of bail and some issues relating to an asset freeze. Currently, in the Fourth Circuit, the only circuit in the country, mind you, that allows this, the government can get a pretrial asset freeze on assets that are entirely unrelated to the criminal offense. Just on the basis of the indictment and a request for an asset freeze. That can be a huge problem when the government freezes a defendant's

assets that the defendant was planning to use to hire a lawyer. But we were able to make arrangements about that and work it out. At the arraignment in June, trial was schedule for early in the following year. We had a date for filing pretrial motions in 2-3 months. I think we filed 13 very substantive motions in the Eastern District of Virginia. It was Amy, Gloria Solomon, and myself, we divided them up. One of the motions was based on *Batson*.

Stu Pierson: In the grand jury.

Bob Trout: No, the *Batson* argument was based on the government's selection of venue in the Eastern District of Virginia. Every member of Congress who had been indicted before this on corruption charges had been indicted either in Washington, D.C. or in their home district, until now. For the most part, the recorded meetings that the cooperator had with Jefferson were in Washington. The meeting where the cooperator gave Jefferson the cash was also supposed to take place in D.C., but the FBI used a ruse to get the meeting changed to the Pentagon City Ritz Carlton. And so we came to refer to that as the Monica Lewinsky Ritz Carlton. It was where the FBI arranged for Monica Lewinsky to meet Linda Tripp on the day that the FBI ended up holding Monica for hours in an effort to get her to cooperate. We use to joke that the FBI probably had a permanent surveillance set up at the Pentagon City Ritz, for whenever they want to do one of these stings. So they had that connection to Virginia and they also had the fact that when Jefferson flew to Africa as part of trying to help promote this business, he flew out of Dulles. But basically the center of gravity of the case was clearly in D.C. And so we were essentially arguing that they had selected Virginia as the venue based upon race. We weren't accusing anybody of being a racist. We were basically saying that was what . . .

Stu Pierson: Get them away from a venue that was likely to have more black jurors.

Bob Trout: Yes. And so we grounded it in *Batson*. Judge Ellis denied the motion, but I thought it was a good argument. And well after we lost the issue in court, we wrote a letter to the Attorney General urging that the Department to change its policy to prohibit venue selection that could reasonably be regarded as having been motivated by race. It's no secret that for far too long, the African American community has regarded the criminal justice system as not serving them. This would be an easy way of trying to remove race as a consideration in one of the discretionary judgments that prosecutors are called upon to make. In any event, it never really went anywhere. We received a polite response from an assistant to the Attorney General thanking us for our views. And that was that. With our other motions we had some very interesting legal issues, most pointedly relating to the definition of official act in the bribery statute. In the federal bribery statute, there is a very specific definition of official acts. And when you line it up, what it is that they were saying were the official acts that he committed, it just didn't seem to fit the definition that was in the statute.

Stu Pierson: So is this general fraud statute no longer FCPA?

Bob Trout: Well, they did include an FCPA count. They alleged a conspiracy. They alleged basically, yes, he had an agreement with the Vice President. And so their theory was he had gotten the money to pay the Vice President. He just never got around to completing it. So they had a conspiracy count related to the money in the freezer. When they found the cash at Jefferson's residence rather than at the Nigerian Vice President's house in Potomac, they realized they didn't have the locked-down case that they thought they were going to have on the FCPA. So they started looking at everything else they could find that Jefferson might have been involved in. They found other instances where

Jefferson was talking to businessmen about opportunities in Africa. And these would involve opportunities in which family members of Jefferson would have a role that would include compensation or a financial stake for the family member. We learned that the government leaned pretty hard on these businessmen, who initially denied that there was any quid pro quo, but later changed their story. So as part of the indictment, apart from the charges arising from the sting operation related to the broadband opportunity in Africa, the government alleged a number of other bribery schemes involving these other business ventures in Africa. So on the issue of bribery, in their indictment the government alleged that Jefferson had committed all these official acts. And it seemed to us they had actually never focused on the statutory definition of official acts in the bribery statute. Yes, there were things that Jefferson did when he had his Congressman's hat on. But when you look at the definition of what constitutes an official act, it just didn't seem to line up in the statute. So we filed a motion to dismiss on that basis, that whatever the public official does, to constitute an official act under the bribery statute it really has to be within their jurisdiction to . . .

Stu Pierson: Act.

Bob Trout: Act. And so there was actually some case law that if someone uses their influence with some other agency—in other words, they don't have the authority to make the decision themselves, but they use their influence with that other agency which does have the authority to act—that doesn't constitute an official act under the bribery statute. And so we filed our motion, and thus began what we regarded to be an evolving theory of the prosecution where they scratched their head and said, "We've got to come up with something." So they came up with a theory of constituent services, that he was helping his

constituents. Now actually none of these people was his constituent. They were businessmen who had interests in matters that he was interested in. But they weren't from his district; they weren't voters for him. Anyway, we could not move Judge Ellis from his common sense belief—which we argued was not in keeping with the specific statutory definition—that if you pay someone to use their influence with someone else, because it sounds corrupt, it must be bribery. And Judge Ellis kept probing about that. And we basically said, "Yes, that is what it sounds like, but that is not what meets the definition. And you're really bound by what is in the definition." The other thing is that there was a Supreme Court case, *Sun-Diamond* …

Stu Pierson: I remember it vaguely.

Bob Trout: It was a gratuities case. Justice Scalia wrote the opinion, and it was very similar. Yes, all of what is in there sounds like what ought to be illegal under the gratuities statute. But if you look at the definition, it doesn't work. And they threw out the conviction. So we were working with that, and that ultimately ended up being the basis for the appeal following the trial. But before we went to trial, we had two other appeals in the Fourth Circuit. Recall that a short time before the search of Jefferson's office, Judge Ellis had ruled that the subpoena of records from his office was not enforceable to get what was in his personal office. Judge Ellis basically said, "They can have part, but not all." We appealed the part where he said, "They can have some," and the government appealed the part where he said, "You don't get what's in his office." That ruling was under seal for a good while, and Amy Jackson argued the appeal in the Fourth Circuit. We and the government both won and lost. Basically, the Fourth Circuit affirmed Judge Ellis's decision. That happened before the indictment. And then we had the litigation in D.C. and

in the D.C. Circuit related to the search of the Congressional office. For the most part, that litigation took place before the indictment. After the indictment came down, we obtained evidence showing that government had introduced evidence in the grand jury material that we believed was covered by the Speech or Debate Clause. As part of its theory of the case, the government wanted to prove that Jefferson had a lot of influence in Africa. And so in the grand jury the government introduced evidence that Jefferson was very influential in Africa owing to his sponsorship of legislation in Congress that provided for increased trade with Africa. This was information that classically fit the definition of Speech or Debate material. As I mentioned, we had filed a good number of motions, and Judge Ellis dealt with them all, except for our motion to dismiss the indictment on the grounds that it had been tainted by the introduction of material protected by the Speech or Debate Clause. This was one of the few situations where the law allowed for an interlocutory appeal by a defendant if the judge denied the motion. So the government and we had to remind Judge Ellis that he had not ruled on this motion, and we needed a ruling because even a denial of the motion would cause a delay in the trial if we took an interlocutory appeal. The law was clear on this, and probably in an earlier era, the courts would have clearly recognized that this was Speech or Debate material and that the indictment was tainted by its introduction before the grand jury. But I don't have a sense that the courts are as steeped in this issue as they may have been in the past. We were thinking we had a really great motion. But we couldn't get any traction at all—not before Judge Ellis, not before the court of appeals. There were a number of Supreme Court Speech or Debate opinions back in the '60s that would have led you to believe that the Supreme Court wouldn't have had any trouble saying, "This was out of bounds, the indictment needs to be dismissed" But nobody else

seemed to be getting it. We took our interlocutory appeal and, long story short, it was another year and a half before we actually went to trial in June of 2009. So the search where they found the money in the freezer was in August of 2005, and it was in August 2009 when jury's verdict came back, I think to the day, four years after the money was found in the freezer. It was a very interesting trial.

[END OF FIFTH SESSION]