ORAL HISTORY OF ROBERT P. TROUT

Sixth Interview
May 15, 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 May 15, 2015, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the sixth and final interview.

Stu Pierson: Today is May 15, 2015. We are at Bob Trout's office. Bob is across the table from me. When we last met, we resolved that the next topic would be the Jefferson trial.

Bob Trout: We were coming up to the Jefferson trial in June of 2009. We had a wonderful legal team on this case. Amy Jackson, my partner at the time, now a federal judge, and Gloria Solomon, also my partner were trying the case with me. And we were doing some skirmishing right up before trial on this whole issue of the definition of official act and whether in Africa a member of Congress can commit an official act. How can it be that a member of Congress could commit an official act in Africa if what their official duties are is to be a legislator in the United States, in Congress? So there was a lot of legal skirmishing about that leading up to trial. The judge ended up having to back up from a decision that he had made earlier.

STU PIERSON: The judge was?

BOB TROUT: Judge Ellis. He had denied our motion to dismiss, but in his opinion, when he spoke about what "official acts" the bribery statute applied to, he seemed to be ruling out, as an official act, everything that happened in Africa. We said, "Well, if that's your ruling, then all of this Africa stuff goes out." Then the government came back in and

said, “Well, you got it wrong, Judge.” In effect the government was saying it liked the fact that he denied the motion, but they thought his rationale was flawed. The government wanted a more expansive . . .

STU PIERSON: Rationale.

BOB TROUT: Rationale. We basically were trying to take advantage of the judge’s previous opinion to rule out a lot of stuff that happened in Africa, pretty much everything Jefferson was accused of doing related to Africa. So there was a little bit of what we would say was moving the goal post on us, and at the end, the judge basically revised his ruling to make it conform to the way the government was arguing the case. So Africa was now back in the case. They were going to bring in an expert witness, a former Congressman, to say that, whatever it is that Jefferson was doing, it constituted an official act, which the judge defined as anything that members of Congress routinely do in the course of their official duties. We had argued that was broader than the statutory definition in the bribery statute.

STU PIERSON: Would that be a legitimate expert?

BOB TROUT: We argued umpteen different ways that it was not. He was simply trying to fill in a hole that the government perceived in its legal theory, and he was essentially testifying as to the ultimate legal conclusion, as opposed to testifying about the facts. But that argument didn’t win, either. So the government was going to get to put on their expert witness. We were coming up to the beginning of trial, at which time we asked for a jury questionnaire. What we wanted to get was a jury questionnaire that would be sent out to prospective jurors well in advance, which would be returned in time for us to review well in advance. That would give us a couple of weeks to work on it, think about it, and

then everybody would show up and we would do the voir dire. We had a lengthy jury questionnaire that we proposed, and while the judge did not accept our questions, he did approve a jury questionnaire. The way it worked was that the jurors were going to show up on Monday, the first day of trial, and Judge Ellis would then instruct them and give them a couple hours to fill out the jury questionnaire. And once the jurors completed them, they would be available for our review by early afternoon. In the meantime, the government—on the Friday before—had filed something *ex parte* under seal. They had done that periodically—file pleadings *ex parte*—and we complained every time they did it. We raised a fuss about the fact that they were filing things *ex parte* with the judge. But, in any event, as a result of this *ex parte* filing, the judge issued an order asking the government to decide whether or not it was going to call a particular witness, the key witness, the cooperator who had handed Jefferson $100,000 in marked bills. And so we were trying to figure out what in the hell did they file under seal. We knew that it related to the key government witness, whose name was Lori Mody. And so we were scratching our heads. Judge Ellis called for a hearing on something that we were clueless about. So in response to the judge's question—is Lori Mody going to testify?—the government announced that she was not going to testify. Needless to say, by now we were really scratching our heads. Recall that she had been cooperating with the FBI for months. She had put a lot of money into this broadband technology, having been introduced to the investment by William Jefferson whose former staffer was now her employee and guy Friday, Brett Pfeffer. The person who controlled the technology was Vernon Jackson. And although her initial complaint to the FBI was about Pfeffer and Jackson, not Jefferson, the FBI was willing to invest significant resources into making a case because Jefferson was involved. There were

probably 120 hours of taped conversations. They also had a Title III so they could wiretap calls.

STU PIERSON: They got her conversations, but also conversations among others?

BOB TROUT: Yes.

STU PIERSON: They wouldn't need a Title III if she was cooperating.

BOB TROUT: Right. But they wanted to get a Title III on . . .

STU PIERSON: Pfeffer and Jackson?

BOB TROUT: Yes, right. Which they did. So early in 2005, maybe March of 2005, she started setting up meetings with Jefferson, and they went to restaurants where a lot of expensive wine was consumed. And eventually, after many meetings and wine soaked dinners, Mody was able to get Jefferson to agree that he would pay the Nigerian Vice President $100,000 to help guarantee that this broadband technology would be deployed in Nigeria. So, long story short, she was huge as a witness. She was going to be introducing all the tapes. We had gone through all the tapes, and there was a lot that we wanted to introduce. Every piece of every conversation affects every other piece and what people's intent was, and to understand context you cannot just look at an isolated snippet. But obviously it was not going to work at trial to put in 120 hours of tapes. Nobody was going to tolerate that in a trial, and we knew that. So we were picking and choosing our points. We had some tapes that we wanted to play, and some excerpts that we wanted to play, and the government obviously had some excerpts they wanted to play. And we were assuming that she was going to come in and talk about all the things that occurred before she started cooperating with the FBI. And all of the things that happened afterwards, including things that might not have been on tape at all, bearing on her relationship with the FBI, and what

they would have told her, and their instructions for how to ensnare Jefferson. And now we got to the first day of trial, while the jury was filling out their questionnaires, and the issue for the day was, would the government call Lori Mody as a witness?

STU PIERSON: How was that made the issue?

BOB TROUT: Because that was what the judge teed up. In other words, he didn't tell us what they had filed.

STU PIERSON: What the under seal was?

BOB TROUT: Right. He just asked the question, "So, is she going to be a witness?" We were trying to figure out what was going on. We were thinking that she had some sort of mental meltdown. The government said, "No, we're not going to call her as a witness. We're going to put on the tapes through the FBI agent who was essentially her minder—the lead agent—who was her minder throughout, who was there when she went to meet with him, and the person who was there when she came back and who received the tape, and so …

STU PIERSON: A dicey evidentiary proposal?

BOB TROUT: Yes. So we started the trial. I have to say that before the trial started, we wanted to make sure the client was prepared for what was coming. "Now, Jeff"—that's what his friends called him—"Now Jeff, we're going to have some bad days. We'll have good days. But there are going to be bad days." If anything we sugarcoated it, because we thought there were going to be a lot of bad days and not many good days. While we believed in our legal theory that as a technical matter, what Jefferson had done did not meet the definition of bribery in the bribery statute, we knew the government was going to put on many cooperators talking about what would be described as many different bribery

schemes. And there were a lot of very ugly recordings, including a videotape of Jefferson accepting a briefcase full of $100,000 in cash for the supposed purpose of paying the Nigerian Vice President a bribe. So we were expecting a lot of bad days. The government put on Vernon Jackson as its first witness. And every day it seems like we came back from court and remarked that it was a good day. The witnesses were not as strong as we thought. Many days ended with us on cross-examination or having just finished a cross. In other words, the timing was working for us, and we had good crosses. And every day, it seemed, we were feeling like that was a good day. That was much better than we had reason to expect. And then at a certain point—I can't remember whether it was at the beginning of trial or early in the trial before any tapes were played—the government moved to preclude our being able to play any tapes or excerpts of tapes. We had spent an interminable amount of time going over the tapes figuring out those portions that we wanted to play to provide context or clarity. In fact as the parties were heading for trial we had discussions with the government in which the government acknowledged that we would be playing some excerpts of tapes ourselves. So this was a complete surprise when the government, at the beginning of trial, took the position that they got to play the excerpts that they wanted to play, but we didn't get to play . . .

STU PIERSON: Because you didn't have anybody to authenticate them?

BOB TROUT: No. The theory was that they didn't need her to authenticate the tapes, the case agent could do that. And whatever it is that was on the tapes, from her perspective, was not being admitted for the truth. And whatever the government wanted to put in of his statements were statements of the defendant and therefore not considered hearsay. But whatever we wanted to put on, the government argued that those statements

were self-serving hearsay. And therefore we should not be allowed to put it on. The government analogized it to an accused at the police station who says, "I'm not guilty. I was here or I was there," and offers up an alibi, and then at trial the defendant wants to put in his self-serving statements to the police. They said, "That's all this is." We said, "No, that is not what this is about." The government was saying that this was a corrupt bargain, a corrupt agreement. We said, "This is like the *corpus delicti*. You're not letting real time evidence in as to the complete discussion, including the defendant's side of the conversation that the government was claiming was a corrupt conversation." We argued it is like the bank surveillance photo in a bank robbery. If Patty Hearst is arguing that she was under duress because some guy had a gun pointed at her back, threatening to shoot her if she didn't act in a certain way, you can't show only the part of the bank surveillance photo that shows her holding a gun, if there is another part of the photo or some other photo showing someone else pointing a gun at her. You cannot exclude the photo that shows it all, just because it backs up the defense. We argued best evidence—these are the actual conversations that you say were corrupt. There was a 2006 Supreme Court case, *Holmes v. South Carolina*, holding that the Constitution guarantees that the defendant have a meaningful opportunity to present a complete defense. It prohibits the exclusion of defense evidence under rules that serve no legitimate purpose, or are disproportionate to the ends that they are asserted to promote. So we argued that. And we argued the catchall Federal Rules of Evidence exception to the hearsay rule. We argued everything, and nothing worked. The best we could get was the judge deciding he would consider it again after the government had concluded its case. So we couldn't do it on the cross of the . . .

STU PIERSON: Agent.

BOB TROUT: Of the agent. I don't know how many briefs we filed on this. We had a lot that we wanted to play when the agent was on the stand and the excerpts we wanted would have been close in time to the excerpts the government wanted. But as we saw our chance to put in anything hanging by a thread, we began to whittle down what we wanted to use. And so rather than six to eight hours of tapes, we whittled it down to maybe four hours, then maybe two hours. But there was a lot of briefing on this, and nothing we were arguing was working. All of this really impeded our ability to address the Lori Mody allegations in the case, which was the major part of the case. But recall that the government alleged that there were a bunch of other bribery schemes. When they discovered that the FCPA case that they were building with Lori Mody was not a laydown, because they realized Jefferson had never delivered the cash to the Nigerian Vice President, they began looking at other things Jefferson had been involved in. And what led them to those other things was their search of Jefferson's house in New Orleans. The search warrant was very limited and was related to the broadband allegations. But when the agents were searching the home, they proceeded to take photos of anything that they saw of interest. We likened it to rolling a Xerox machine into the house and essentially conducting a general search. Yes, they only took these documents, but they--

STU PIERSON: But they visually searched.

BOB TROUT: They visually searched everything and took with them copies of anything of interest, regardless whether it was specified in the warrant. We had filed a suppression motion in which we argued that the evidence pertaining to the so-called other schemes was the fruit of an illegal search. The government first argued that the agents were entitled to take the documents under the plain view exception to the warrant requirement.

They actually put on agents at the suppression hearing to testify about it. We thought that was laughable. Yes, the documents looked like they pertained to some sort of business ventures in Africa, but there was no way one could seriously assert that on their face any of the document were evidence of a crime. The FBI agents may as well have been testifying that it was a crime for a member of Congress to be in possession of documents relating to a private business. The government's backup argument was they discovered these other business deals in Africa independently of the documents that they had taken from the search. It seemed clear to us that the FBI knew they were on thin ice with these documents, that they knew what their end game was, and with that end game in mind, they retrofitted their investigation to figure out how to develop evidence that they could then argue was independently derived. In other words, now that the FBI knew what it had, they figured out how to collect the independent evidence that would allow them to get from independent means the same documents that they had seized illegally. We argued that essentially, they figured out what they needed to get . . .

STU PIERSON: From the photos.

BOB TROUT: From the illegally obtained documents. And then went out and put together a strategy to go get it. They reverse engineered obtaining the evidence independently. And I still believe that that was the more persuasive case, but that one didn't get traction either. So these other so-called schemes were also part of the case, in addition to the main part of the case, which was the broadband copper wire, Lori Mody and Vernon Jackson piece of it. The way we divided it up is I was going to be the person taking the lead on the broadband piece of it. And Amy Jackson and Gloria Solomon were each going to take primary responsibility for these other schemes. And eventually we moved into that

phase of it. And as we were driving back to the office at the end of each day, it seemed like every day we were saying, "This was another good day. We had another good day." But before we got to that other piece of it—the so-called other schemes—and while the FBI agent was on the witness stand authenticating the Lori Modi tapes, Judge Ellis had a conference at the bench where he expressed discomfort with our remaining in the dark about what the government had filed *ex parte* at the beginning of the trial. So we were given a copy of the pleading that had been under seal. We could not discuss it with anyone, not even with our secretary. And that was when we finally discovered what it was that was behind the government's *ex parte* submission at the beginning of trial. Early in Lori Mody's cooperation with the FBI, she had gone to New Orleans for Jazz Fest as part of the FBI's plan to get close to Jefferson. They had met late one night in her hotel room. Nothing inappropriate happened, and there was nothing on the tape that was incriminating. But that weekend, when she was in New Orleans, she had sexual relations with an FBI agent who was her minder. This was all made public after the trial, but during the trial it remained under seal. We filed a motion under seal to allow us to explore this with the lead agent who was on the stand. The FBI clearly knew about this. This guy, the errant agent, was no longer in the Bureau, as he had been fired when it was discovered he had had sex with another witness. Some six to nine months before, when the agent was first caught having sex with another witness in another case, he admitted to having done the same thing with a cooperating witness by the name of "Lori." Now even the Keystone Cops would have had no difficulty figuring out who that was, but apparently the FBI never followed up on this information. So it did not come to the attention of the prosecutors in the Jefferson case until the Friday before trial was going to start. That's when Lori Mody, apparently realizing that

this case was really going to go to trial and she was definitely going to be a witness, called the lead agent and admitted to having had sex with the FBI agent during Jazz Fest.

STU PIERSON: And it was already in the FBI records for six months.

BOB TROUT: Yes.

STU PIERSON: Who was the director at the time? Was it Louie Freeh?

BOB TROUT: No, it would have been Mueller. But they just didn't bother to follow through on it. To her credit, she brought it to the attention of the case agent. We were sitting on a bunch of emails between her and the lead agent that were provocative and very flirtatious. Professional they were not. These are emails between her and the lead agent.

STU PIERSON: And not the agent who authenticated the tapes.

BOB TROUT: No. The lead agent is the one who authenticated the tapes. But the agent who had had sex with Lori Mody was no longer an agent. And he was never anything other than one of several minders on the team. So there was the lead agent, and he is the one that is authenticating the tapes. And he was testifying. But we had some . . .

STU PIERSON: Some salacious emails.

BOB TROUT: Yes. We had some juicy emails that were . . .

STU PIERSON: They were suggestive.

BOB TROUT: Yes. They were suggestive. The lead agent had exchanged these suggestive, flirtatious emails with Lori Mody, who we now know had sex with a different FBI agent who had been supervised by the lead agent. The lead agent was now testifying, and one of the things he testified about was the various policies they followed because it was really important to maintain the integrity of the investigation, and the credibility of the investigation. And that was why the FBI had this very disciplined process. So I was

thinking maybe he just opened the door to getting in to the fact that one of his agents was having sex with . . .

STU PIERSON: The witness, the chief witness.

BOB TROUT: Yes, the chief witness. And so I started to develop this line on cross with the idea that if it was so important for the integrity and credibility of the investigation to follow all the right policies and discipline, what did it say about the integrity and credibility of the investigation he was supervising that one of his agents was having sex with the key cooperating witness. But as I was creeping up to the punch line, the judge saw where I was going. And even though the government never objected . . .

STU PIERSON: You didn't get to third base.

BOB TROUT: Right. I didn't get to third base. He said, "Bob Trout, come to the bench." And so we went to the bench, and he basically said, "No, you're not going to go there." So we argued about it a while, and he cut me off. So with that, I went back to get into the emails, the suggestive emails. The government was not objecting.

STU PIERSON: And the timeframe here of the suggestive emails are during all the periods when the tapes were . . .

BOB TROUT: Were being made. And you can see Judge Ellis was just very fidgety. And he was essentially inviting them to object. And they didn't object. And finally he just couldn't stand it, and he said, "No more." And so he wouldn't let me go any further. I think I got a lot in. I'm not sure that I got everything in that I wanted.

STU PIERSON: But enough to argue that . . .

BOB TROUT: Yes. So that was the iGate side of the case, the part that dealt with the broadband investment. Amy Jackson and Gloria Solomon did just a fabulous job on

their parts of the case, which were the so-called other schemes. Gloria was just a civil litigator when she joined the firm. After she joined the firm, and it became clear that we could use her substantial talents, I asked her to help us with it? As I mentioned, she did a brilliant cert. opposition in the Supreme Court—just really first class. I'm not sure whether she had tried a case before, but her cross-examination at trial was terrific, like she had done it countless times before. We remembered one day when a witness assigned to Gloria was testifying. We had nothing on this guy—he was testifying without immunity or any other deal with the government—and we ended the day with him still on direct. It had really not been good for us, so we ended the day with some bad evidence. That may have been the first day when we said to ourselves, "This was a bad day." The government finished its direct early the next morning, and Gloria had only about 45 minutes of cross before our first break. That's all she wanted. So we took the break after her cross, and it was fabulous. The courtroom security officer came back, and he commented, sotto voce, "You all are smoking." He meant it in a good way. He was very complimentary of our work. We had a wonderful relationship with all the courtroom personnel, always appropriate. But there were times when we felt that Judge Ellis, overstepped the role of the judge. And . . .

STU PIERSON: Not in your favor.

BOB TROUT: Yes, definitely not in our favor. I get along fine with Judge Ellis. But I believe there were probably five or six times during the course of the trial when we objected, outside the presence of the jury, to his conduct before the jury. There were several times when we scored points on cross-examination, only to have Judge Ellis interrupt the cross with softball questions to try to rehabilitate the witness. So we objected, although perhaps not as often as we could have and maybe should have. All of our objections were

overruled, and he made it clear that he was going to continue to jump in—as he described it, to get the truth out. I don't know if he would have injected himself more if I hadn't repeatedly made an issue of it. And I'm not sure anything I said did any good. My general approach to objections before a jury is that I don't normally object unless I think it matters and I think it will be sustained, or if I feel an objection needs to be made to make a point. Almost never will a jury verdict be overturned on appeal based on most of the evidentiary objections that a lawyer might make. I didn't expect to get very far with my objection to Judge Ellis injecting himself in the presentation of the evidence. But the jury wasn't present, and I wanted to place a marker. In any event, we came to the end of the government's evidence, and it was now time to put on our case. Jefferson did not testify. We had tried to deal with this whole issue of the expert witnesses. We had a former member of Congress who was a Republican who was prepared to testify for us. Jefferson is a very nice, elegant man. Very courteous. Just a sweetheart of a man. And so it was unsurprising to us that he would have very good relations across the aisle. He was not a flaming liberal, especially on economic issues, and he was well-liked as a person. Our expert was prepared to testify about what Jefferson had done in relation to the definition of "official act" in the bribery statute. But given the way the government's expert had testified, which was much broader, we were concerned that our expert might end up agreeing to many of the points that the government's expert had testified to. So we elected not to put on our expert. We had a couple of witnesses to discredit testimony that a couple of the cooperating witnesses had given as to dates or conversations, and that was about it. Except for the tapes. Now we were making our final plea for the tapes. We were feeling so much better about our chances in the case than we had thought at the beginning of the trial. We had so many of what we

regarded as good days that I would say, "We had drunk the Kool-Aid." We were starting to think we might just win this case. So now we were trying to get in the tapes. And the client was anxious to get in the tapes. We made one final push to get in the tapes. We had whittled down what we wanted to play to the barest minimum, no more than a couple hours. We made our arguments, and the judge left the bench to consider what he was going to let in. He had the transcripts, and he was going to go back and figure out what could come in and what couldn't come in. It was taking a while. And so as all the lawyers were sitting in the courtroom, I was basically chewing on the prosecutor about how they were really making a mistake by objecting to our putting in portions of the conversations that we wanted, that this had to be reversible error. I was telling them that they were really being greedy, that they couldn't seriously think that in a criminal case only the government's evidence of what was said in a recorded conversation should be admissible.

STU PIERSON: Who was the lead prosecutor?

BOB TROUT: Mark Lytle was the lead and Becky Bellows was also on the team. Chuck Duross was the third prosecutor, on assignment from Main Justice. He had been an AUSA in Miami, and then had come to the Fraud Section, which was involved because it was being run as an FCPA case. So anyway, I was beating on Mark Lytle, and eventually the judge came back, and he went through what he is going to let us play. And it was like, "I'll let you play this clause and this phrase from this one, and over here you can play this sentence."

STU PIERSON: No continuity.

BOB TROUT: None. It was completely incoherent, and when he was done, I stood up and I said, "Your Honor, playing those tapes the way you would let us play those tapes

is completely incoherent. Your ruling eviscerates the defense." And it was as though a light bulb went on. And he turned to Lytle and he said something like, "Mr. Lytle, you've had seven, eight weeks to put on the government's case, and they want to put in two hours," and he said, "I think I've got it right, that I've made the correct ruling, but if I'm wrong, we have wasted all this time." And this was after I'd been chewing on Lytle about how he was building reversible error into the case. I looked at Lyle, probably whispered something like "Mark, come on," maybe with a begging or pleading tone of voice. He hesitated and then said, "All right, we'll withdraw our objection." So now we had our two hours' worth of tapes that we played. It just didn't--

STU PIERSON: Do anything.

BOB TROUT: It didn't. It really didn't. I don't know if it might have made a difference if we'd been able to play what we wanted, when we wanted. Perhaps not. But we all agreed that we didn't get much out of the tapes the way they were played. And so after a weekend break, we had closing oral arguments. Our theory of the case was that with its vast power, the government had seized on conduct that was at most a violation of congressional ethics, and had reshaped it into a crime. They did it after discovering the crime they were hoping to manufacture—the FCPA case involving a payment of $100,000 of marked bills to the Nigerian Vice President—had not panned out as they had hoped. And so I argued that when they realized they had a lemon on their hands, they decided to make lemonade out of lemons, and to do that, they had to squeeze a lot of lemons. In other words, they squeezed some witnesses to get them to change their story, offering them immunity or promises of leniency. So speaking truth to power was my theme in closing. And as part of that theme, I wanted to lead with an attack on one of the counts in the

indictment, a charge of obstruction of justice. The government had charged him with obstruction of justice because they had given him a subpoena when they were searching his house. While the search was going on, he had a document on his person, and he put the subpoena over top of the document. The FBI agent saw him do that, so she asked him, "What is that?", and he said, "It is just a document," and he handed it to the agent. And they accused him of obstruction, apparently thinking he was trying to hide the document from them, even though the agent was looking at him the entire time. That was the obstruction count. It was an absurd charge, one we regarded as an obvious overreach. We made our Rule 29 motion for judgment of acquittal. But we were concerned that the judge was going to grant our motion on the obstruction count. We wanted that count in the case for the jury to consider because the government overreach fit so nicely with our theme that the government was exercising its power to make a crime out of something that wasn't. We made our argument without pushing it and without arguing it much. Even without any argument from us, it was obvious that the judge was really troubled by that count. He thought it was really thin. The government pushed it and pushed it and pushed it, and so the judge denied the motion as to all counts. And so we had the obstruction count in for closing argument. And that is what I led with in the closing argument. That was a count for which we had no legal defense, and the jury acquitted him on the obstruction count. And the other count for which we had no legal defense was the FCPA count. That was the money-in-the-freezer count. Because none of the money was paid to the Nigerian Vice President, the government was arguing that there was a conspiracy to bribe the Vice President. Because Lori Mody was acting as a government agent, she could not be a co-conspirator. So the government's case on the money-in-the-freezer count was that the Vice

President, and maybe his wife, who also had conversations with Jefferson, were the co-conspirators. All the government had on that was Jefferson's statements to Mody on tape that the Vice President was in on it. But Jefferson also told Mody on tape that he had passed the money to the Vice President, and that was clearly not true. We argued that Jefferson was never going to bribe the Vice President, he was just telling her that because she wanted to do it since she was reluctant to invest her money unless she was assured, through bribery, that the Vice President would back the venture in Nigeria. So we argued that in order to keep Lori Mody in the game, Jefferson was going to play along with this idea, her idea, of bribing the Vice President. But the . . .

STU PIERSON: He had no intention.

BOB TROUT: He had no intention of doing that. Now we left unaddressed the question of what was he going to do with the money. Was he going to just pocket the $100,000 and lead her to believe that he had paid the bribe when in fact he hadn't? Or, when all was said and done after the venture succeeded, or not, would he basically say, "Here is your money back on the $100,000"? That issue was left open. We didn't address it. Whatever they thought he was going to do with the money, that was not what he was charged with. So that was the theory of the defense on money-in-the-freezer count. The jury acquitted him on that count. So he was acquitted on the obstruction count, and he was acquitted on the money-in-the-freezer count.

STU PIERSON: The FCPA count.

BOB TROUT: The FCPA count. Those were the only two counts that we had no legal defense, we had to win on the facts. And we did. He was acquitted on two or three other counts that were hard to understand what the jury was thinking when they made that

decision, given that he was convicted on other similar counts. The jury was out for about five days, so the length of deliberations was also giving us reason to be encouraged. But on the fourth day the jury had a question, shared with the lawyers but not in open court, that told us that there was not going to be good news. Up until then, we were hopeful. And when the jury finally came back a day later, although we were prepared for what was to come, it was still like a punch to the gut. We had spent almost four years of our lives with this case, we had been in a fight for our client's life, or at least his freedom, for two months straight, working 18-hour days, and it was a painful thing when the jury came in with a guilty verdict. And if that was not enough, the next day we had to go back and argue over forfeiture issues and what was the proper forfeiture amount.

STU PIERSON: They didn't step him back and . . .

BOB TROUT: No. They did not. I think they asked to. I can't really remember, but I think they may have asked that he be stepped back. But the judge wouldn't hear anything of that. After the verdict came down Bob Bennett called me up to offer his condolences. It's a gesture that's in keeping with the bond that is shared by trial lawyers. As I say, we had drunk the Kool-Aid, and we thought we might just win that case. So we were obviously quite down over the verdict. When I got back to my office right after the jury verdict, there was a voicemail from Bob saying, "Don't give any thought to whether the outcome could have been any different. This case was over the second the FBI agents opened the freezer." That was a nice gesture, and I think what he said was probably true, the money in the freezer was such a toxic image, it infected pretty much everything in the case. As I've said, Jefferson is a very nice man, but it just put him in such an awful light. In this work you get to see individuals not only at their worst, but also at their best. And there were plenty of

occasions when we saw him at his best as a human being. He was very admirable in many ways. So it is one of the rich things about doing the work that we do, you get to see that. A short time after the trial, the material that had been under seal was made public, which meant that the facts relating to Lori Mody's relationship with the FBI agent all became a matter of public record. We filed a motion for a new trial trying to once again reargue that issue, but none of it worked. Se we had to prepare for sentencing. We looked at all of the members of Congress who had been prosecuted on corruption charges, as far back as we could find. The sentences ranged from not much to a maximum of eight years for Duke Cunningham. Now Cunningham had pled guilty, but he also had very explicit bribe menus. For example, if you want this, this is how much it is going to cost you. If you want that, it would cost something different. It was very unambiguous and very raw. There was none of that in Jefferson's case. Our theory was that, yes, he had done some things that violated congressional ethics, but what was really in play here was the government using its immense power to bend the facts and bend the law to fit what was really nothing more than ethics violations into a criminal offense. There was really no way to avoid the ethics issues that were in the case, and we were very upfront about that, even in the opening statement. In its sentencing memorandum, the government asked for 27 years, which was its Guidelines calculation. We were arguing for no more than 10 years. One of the problems that we had was that the cooperators, Vernon Jackson and Brett Pfeffer, had been sentenced before trial to eight years. Oftentimes the judges withhold sentencing with cooperators until after the cooperation is complete because that's the way the government wants it. The government wants to use the uncertainty of its recommendation and sentence over cooperators as leverage to make sure the cooperators deliver at trial. Judge Ellis doesn't

wait, or at least he didn't do that in this case. He said explicitly he wanted to protect the government from the argument that defense counsel routinely makes, based on the very harsh sentencing guidelines, that these people are facing what amounts to as much as a life sentence unless they testify the way the government wants them to. And this way, by imposing sentence before they testify, the judge was protecting against the argument that they are facing ridiculously long prison sentences. Because Brett Pfeffer and Vernon Jackson were each sentenced to eight years in prison, we knew going in that was surely the floor. Neither was a public official. They were accused of bribing a public official, and they had come in, pled guilty, and cooperated. By contrast, Jefferson was a public official who had gone to trial. So we knew what we were dealing with there. We were trying to get it to no more than 10 years. The judge ended up imposing a 13-year sentence, which we regarded as excessive, particularly when compared to sentences imposed on other members of Congress who had been convicted on corruption charges. On the other hand, it was a far cry better than what the government was arguing for, which was 27 years. And after sentencing, when the judge imposed a lengthy prison sentence, we asked for bail pending appeal. And probably to everybody's surprise, the judge granted it. The government had opposed the motion as though to say, "Yeah, this is a no-brainer. We're going to win this because we've won every other one."

STU PIERSON: Gosh, I wouldn't have been surprised if it was granted.

BOB TROUT: The official act issue was litigated to a fare-thee-well. I can't count the number of briefs that got filed dealing one way or another with the proper definition of official act. And that issue was embedded in every single count on which he was convicted. Not the FCPA count and not the obstruction count.

STU PIERSON: Both of which he was acquitted.

BOB TROUT: He was acquitted on those. So we had the argument that every single count would stand or fall, depending on the outcome of this one issue. And after reflecting on it for a while, Judge Ellis acknowledged it was unsettled, and he said that he was going to grant bail pending appeal. The prosecutors must have been surprised so they immediately moved for reconsideration but were simply re-arguing the same points. And eventually the judge figured it out and said, "Well, if you want me to reconsider, file a motion." And they never did. And so that was the Jefferson trial. By this time, I believe Jefferson had filed for bankruptcy. Our unpaid receivable was then a matter of public record, I think, somewhere between five and six million dollars. The matter had by then gone on for over four years. It was four years to the day from the time the FBI showed up at his house in New Orleans to the day the jury came back with their verdict. We had three interlocutory appeals. Obviously, we had invested a great deal in this case. So we felt duty bound to follow through and do the appeal even if as CJA counsel. Jefferson reached out to Larry Robbins at the Robbins Russell firm, a very good firm that does a lot of appellate work. Larry is a terrific lawyer, a friend, and Jefferson had been able—through friends—to put together a little bit of a war chest that was probably not going to be adequate for an appeal, but Larry, I think, was interested in the case, and so was willing to do it a little bit on the skinny. Jefferson was very gracious about essentially acknowledging that if money was to be found for legal fees, it rightfully ought to go to us. That said, unlike so many criminal defendants who find themselves on the wrong side of a guilty verdict, he never once criticized us or the way we tried the case. He couldn't have been more generous and more gracious about the effort that we put in and the quality of our work.

STU PIERSON: Your receivable was wiped out in the bankruptcy.

BOB TROUT: It was wiped out in the bankruptcy. From our perspective, yes, I would like to have gotten more money, but at the same time I was actually more interested in his finding another lawyer to handle the appeal because we were going to get paid CJA rates if we did it. And, frankly, I was much more interested in Larry coming in and doing it. And that is what happened. We were in on the briefs and reviewed the briefs and commented. And I was at counsel table for oral argument. We had the same panel that we had had for an interlocutory appeal. And as soon as we saw the panel, we knew . . .

STU PIERSON: And the panel was?

BOB TROUT: I cannot remember all the names, but we knew that it was . . .

STU PIERSON: Not good.

BOB TROUT: It was not going to be good, and it wasn't. In due course they ruled. And then . . .

STU PIERSON: And it was unanimous?

BOB TROUT: It was unanimous. Shortly after that he had to report for the beginning of his prison term.

STU PIERSON: Have you had contact with him?

BOB TROUT: I have.

STU PIERSON: How is he doing?

BOB TROUT: He seems to be doing fine. We talked the day after the most recent midterm election. And he said that he had been up all night watching the election returns. It had been something of a nightmare for the Democrats. I'm sure he would have kept up. Even if he wasn't watching the returns, he was probably stewing about them.

STU PIERSON: So during the time that you had the Jefferson trial, were you here at this address on Connecticut Avenue, or had you left N Street?

BOB TROUT: We left N Street in 2000. We came here to Dupont Circle in 2003. So we were here in this office throughout that period of time when we were involved in the Jefferson case. I would say that on the Jefferson case we obviously spent a fortune in legal fees that were not compensated. We fortunately had other work at our firm that we were able to do that kept the bills paid and the lights on and allowed us to pay our mortgages and educate our children and do all the things that we needed to do. But it was a huge financial sacrifice. On the other hand the non-monetary rewards were incomparable.

STU PIERSON: Huge.

BOB TROUT: Yes, they really were. The legal issues were so rich, doing this very unique, first-time-in-history challenge to the search of a congressional office. And the litigation over that was very high profile, very historic. Those cases just don't come along every day. And I was really blessed to be involved. It was hard to beat. No regrets.

STU PIERSON: I'm sure. So life after the Jefferson case?

BOB TROUT: Well, I was working on various matters, and Bob Bennett called me and said that he had just finished doing an investigation of Marion Barry for the City Council. And he said that the Council had called him up because something else had come up. There was an investigation that they were doing relating to cronyism and possible corruption relating to construction contracts for the City's Department of Parks and Recreation. He said that he had given my name to Vince Gray, who was then the Council Chair, to help them out with this because he had done his duty. As he understood it, the only thing they wanted me to do was to examine at a Council hearing a squirrely witness

whom they had a hard time getting under subpoena. They were apparently concerned that they didn't have an experienced interrogator for this hearing. It was going to be pro bono, but I had the impression it would be bite-size, examining a single witness at a Council hearing. I spoke with my partners, and we said, "Sure, why not?" So I went down to meet with Vince Gray and Harry Thomas, who was then on the Council—it was his committee that had responsibility, so he was running it. It was about ten minutes before the press conference when I was to be announced as Special Counsel to the City Council to do this investigation, and I was thinking it would involve appearing at a hearing, doing an examination and be done. But in the meeting a few minutes before I was to be announced, I learned they had in mind this huge investigation that they needed to get done. Obviously, there was a communication problem, but at this point, it was too late for me to back out of it. So I was basically signing my firm up to do this. Vince Gray had a press conference where he announced that I would be doing this. This was early April in 2010. The allegations related to Mayor Fenty and whether his buddies were getting favorable treatment and were basically corruptly awarding and getting a piece of the construction work for Department of Parks and Recreation projects. It was very political as the mayoral primary election was in September. This matter happened to come to our firm when my son Philip was working for us, before he started full time at Hogan Lovells. When this investigation for the City Council came in, we were able to keep him really busy. Amy, Gloria, Philip and I spent a lot of time working together on this interesting investigation into allegations of corruption in the D.C. government. Over the course of close to a year, we did this investigation, and when we finished, we prepared a length report. It's probably no secret that the allegations that we were investigating touched the Mayor's office,

because the primary subject were cronies of Mayor Fenty, and the question was whether these cronies had been able to get construction contracts with the City because of their relationship with the Mayor and whether the fix was in. While we didn't find any evidence of wrongdoing by the Mayor, we did have some harsh things to say about individuals who were close to him. I was concerned about making accusations without at least giving an opportunity to respond to those who were being criticized in our report. I decided that in many respects this was similar to the investigations performed under the now discredited Independent Counsel statute. In Independent Counsel investigations, subjects or targets of the investigation were given an opportunity to review and comment on the findings in the Independent Counsel's report. As far as I'm concerned, that's about the only part of the Independent Counsel statute that was sound. So I made the decision that we ought to give them an opportunity to . . .

STU PIERSON: To respond.

BOB TROUT: Yes. And to see it in draft. There had been a number of these City Council investigations. And I don't think that had been done before. We had a robust debate--internal debate--as to whether that was something we should do or not. But I decided that we should do it. And I actually was pretty pleased about that. I think that the abiding assumption is that, whenever one of these independent counsel gigs or special counsel gets hired, they come into it with an agenda to find a certain way, and they always end up coming out that way. I think Peter Nickles, speaking for the Mayor, was absolutely convinced that we were going to come out and hammer the Mayor. I think he thought this was all political on the part of the Council and that it was a foregone conclusion that we would come down hard on Fenty. As I say, we had some harsh things to say about some

individuals and some harsh things to say about the way the government had worked or not. But we did not find anything that the Mayor had done that was improper or inappropriate. Nickles came over and read a copy of the draft report. And he called me up and congratulated me on doing a nice job. And we did do a good job. By that time, Adrian Fenty was history anyway, and Vince Gray was the Mayor, and so it was a little bit of an afterthought by the time we actually completed the investigation and issued our report. I would say our findings were something of a mixed bag in that different people could look at it and find different things. For example, on the one hand, we didn't find anything that implicated Fenty in any wrongdoing. At the same time, it is not true to say that we didn't find . . .

STU PIERSON: Irregularities.

BOB TROUT: Yes, any wrongdoing. Just not by Fenty, the Mayor. I think *The Washington Post* editorial page pitched our findings as demonstrating that this was all political anyway. That he never should have been . . .

STU PIERSON: Targeted.

BOB TROUT: Yes. Well, and he should still be Mayor. As part of our investigation, we talked to a number of people who seemed to have their ear pretty close to the ground of politics, and very early on we were given to understand that Fenty didn't have a chance in the election. He had so squandered his advantages with his constituencies--

STU PIERSON: By his own behavior.

BOB TROUT: Not wrongful behavior. Just arrogance and not paying attention to what politicians ought to be doing to pay attention to their constituencies, some of it being easy stuff. There was a straw vote, I believe in June, that he lost badly. And everybody was

really surprised by that except the people I was talking to. For them it was not a surprise at all. It was totally predictable.

STU PIERSON: So now Bob Bennett has a Mayor for a client. Have you been involved in that at all?

BOB TROUT: Yes. But not in a way that I can talk about.

STU PIERSON: Or you can't say. Okay. So, reflections for 10 or 15 minutes.

BOB TROUT: Yes, a few observations. First, it may have been calculated or it may have been happenstance, but when I either chose or drifted into a litigation practice—and more particularly a trial practice—I think I ended up doing something that played to my strengths. And that obviously increased the chances that I could succeed as a lawyer. Trying cases is hard work and high stress. When you're in the middle of it, working late at night and long days during weekends when friends are relaxing on the golf course or doing whatever they enjoy, you think to yourself, "Why am I doing this? There must be an easier way." But then you get to court, you get the adrenalin rush that comes with trying a case, and you realize why you do it. When you finish a trial, you're pretty well spent, but after a while, you find yourself complaining that you haven't had a trial in a while. For me, it's all consuming. I've developed some of my best cross-examinations and arguments while lying in bed, stewing at 3:00 a.m. So I've loved it, even when I was complaining about it. Second, I think it is really important to have strong mentors. And I've had the best. Plato, of course. We first met almost forty years ago. He has been a dear friend, a law partner—twice—and a wonderful supporter of mine for many years. Bob Bennett and Dick Duvall in the Dunnells Duvall firm were both very generous mentors. They have remained wonderful friends. I can't say enough for them. Paul Friedman, since well before he was a

judge, has been a good friend and supporter. Thanks to Paul I served on the Grievance Committee for the U.S. District Court, which was a rewarding professional experience for me and allowed me to get to know some really interesting and talented lawyers. Roger Zuckerman, who was the founder and remains the glue for a very successful litigation firm, is one of my dearest friends. I cannot count the number of times that I have called on Roger for advice. And that is especially true as I transitioned from a large firm to the small firm that I founded almost 20 years ago. I am completely convinced that I was more successful in the small firm than I would have been had I stayed at Holland & Knight. I don't know that I can point to any single reason that would account for that. But there is not a doubt in my mind that it's true. I've probably had more interesting cases, certainly more high-profile cases. I've probably learned and grown in the practice, more and better, as a result of that. Oftentimes it is the folks in the larger firms who have the platform that allows them to flourish. Maybe it's the person and not the platform, but in any event I have been more successful in this platform, by a wide margin, than I would have been if I stayed in a big firm, any big firm. Maybe it's luck. But I also think it is in keeping with what can come from a more entrepreneurial environment. In a small firm, you cannot survive, much less thrive if you are not constantly hustling, working hard to make your business succeed. In a large firm, it's easy, maybe inevitable, to fall into an employee's mentality. But if you start a small firm, you can't help but have an owner's mentality. And that might have been the difference for me. So my legal career has been enriched by change. A small firm also gave me the flexibility to get involved in some cases that I probably couldn't have taken on in a large firm, even if I had gotten the call. Unquestionably that was true for the Jefferson case. I was also able to stay active not just litigating cases, but trying cases. And that probably

led to my being selected for induction in the American College of Trial Lawyers, a genuine honor that not only enhanced my self-esteem but probably enhanced my credibility among my peers. When I was a prosecutor, I thought this is the greatest job in the world. Why would anybody leave this? And there are so many former prosecutors who say the same thing. You get so much responsibility at such a young place in your career that everybody—maybe not everybody—but so many people look back at that time and say, "Best job I ever had." And I remember thinking, why would anybody leave this? One of the very senior lawyers in the office when I was in Baltimore, Barney Skolnik, was very well known because of his involvement as the lead prosecutor in the cases against Vice President Agnew and later Governor Mandel. Barney had been there forever, it seemed, and I thought of Barney as a career prosecutor. And because I loved the job so much, I was convinced that is what I was going to do. And then Barney left, and it was a little bit of a jolt to me because I was thinking this guy was a career prosecutor, and I was thinking that is what I wanted to be. Until I didn't. I got to a point where, yes, I need to move on. And I have no regrets about that. I have thought from time to time, as I've seen people go in and out of the government, whether that is something I would do. I certainly don't quarrel with the idea of going into the government. I don't know whether the Department of Justice would be right for me now. I actually have come around to the value of having someone who pushes back on the power of government. It really is true that we have this wonderful government and so many people who are really trying to do the right thing in government. But I do think that there is a tendency for government to use its power to fill any void. Perhaps that is especially true now, when the threats to our national security and cyber security loom so large. There was a time, it seems to me, when we wanted our government,

our police, those with authority to stop short of the outer limits of what our constitution said was permissible. In other words, there was a difference between so called "best practices" and what we were willing to tolerate from our government as being within the bounds set by the constitution. Today and probably since 9/11, it seems we have come to the view that the best practices are those that reach as far as our constitution will allow. The constitutional limits, whatever they are, are the best practices. Especially when that is the case, I think that there is real value in always having a counterforce against government power, that the government will perform better. And so I think that the role that I've come to really embrace is to be a constructive force pushing back against government power. A concluding observation, I think, is that our adversary system has really been degraded by the high cost of litigation. Civil litigants cannot afford to go to trial. The ongoing legal fees are exorbitant, and the risks of an adverse verdict can be huge. At least in the settlement of civil cases, the parties are simply making self-interested calculations rooted in economics. In criminal cases, the sentencing guidelines and the collateral consequences to corporations have seriously eroded the adversary system. Today, prosecutors have more say in sentencing than judges do, from the way they charge the case, to the plea deals they strike, to benefits they bestow on those who agree to cooperate with the criminal case the prosecutor is trying to make. Sentencing guidelines are an abomination, at least in their current form, and they have created an environment where fewer and fewer people are willing to challenge the government and to go to trial and let the chips fall where they may. The price for going to trial is huge. There was a recent sentencing in Alexandria. A couple of years ago, I represented an individual by the name of John Kiriakou, who was a former CIA agent who was prosecuted for leaking the name of a covert agent, basically the same

issue that came up with Valerie Plame. It was a fairly high-profile case. Kiriakou had been on television, ABC, and he was the first agent, or former agent, to speak on the issue of waterboarding. And so he had a little bit of a target on his head from the agency. They didn't like that. And he screwed up. He disclosed to a member of the press the identity of a covert agent. It was never publicly disclosed. And before he retained counsel, he was interviewed by the FBI, and during that interview he essentially closed off all of the escape hatches. And so we concluded he had no realistic chance of winning at trial. He pled guilty and was sentenced to 30 months. It was a stipulated sentence, in other words, the parties agreed to what the sentence would be, so that if the judge accepted the guilty plea, the judge was bound to the agreed sentence. At Kiriakou's sentencing, the judge said she would have imposed a much longer sentence if she could have. But she agreed to accept the plea under the stipulation that she would impose a 30-month sentence. I thought the sentence was certainly fair, and I didn't think that a sentence any longer would have been appropriate. But she thought it would. What was interesting is that recently in the similar case of Jeffrey Sterling, who was convicted following a trial, the government wanted him hammered. And under the Guidelines, the paint-by-the-numbers Guidelines, the government was seeking a lot of years. And to her credit, Judge Brinkema felt constrained by the 30-month sentence she had imposed on Kiriakou. So while Sterling was going to have to pay a price for going to trial, rather than pleading guilty as Kiriakou had, the 42 month sentence that Sterling received was well short of the sentence that the government was urging. The Sentencing Guidelines, certainly when they were mandatory, and even now, they scare the hell out of people. You're normally going to pay a much, much higher price if you go to trial and lose.

STU PIERSON: When you challenge the government.

BOB TROUT: Right. So I think that has really degraded our adversary system. I don't know what is to be done about it. But I definitely think we are worse off for it.

STU PIERSON: Perhaps the only antidote is lawyers who are willing to take on cases even though they are not compensatory.

BOB TROUT: Yes. Well, I think there is certainly that. And I think you find that all the time. And in the CJA cases, the lawyers are getting a fraction of what their normal rate would be. Some of them are doing it because they just enjoy it. Some of them are doing it because they recognize that it is a valuable service that lawyers need to provide.

STU PIERSON: I think that is a good place to end.