ROBERT P. TROUT, ESQUIRE

Oral History Project
The Historical Society of the District of Columbia Circuit

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The Historical Society of the
District of Columbia Circuit

United States Courts
District of Columbia Circuit

ROBERT P. TROUT, ESQUIRE

Interviews conducted by: Stuart F. Pierson, Esquire
October 7, November 13 and December 22, 2014
February 12, March 25 and May 15, 2015

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were recorded digitally or on cassette tape, and the interviewee and the interviewer have been afforded an opportunity to review and edit the transcript.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges of the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Oral history interviews are conducted by volunteer attorneys who are trained by the Society. Before donating the oral history to the Society, both the subject of the history and the interviewer have had an opportunity to review and edit the transcripts.

Indexed transcripts of the oral histories and related documents are available in the Judges= Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C., the Manuscript Division of the Library of Congress, and the Library of the Historical Society of the District of Columbia

With the permission of the person being interviewed, oral histories are also available on the Internet through the Society's Web site, www.dcchs.org. Audio recordings of most interviews, as well as electronic versions of the transcripts, are in the custody of the Society.

Historical Society of the District of Columbia Circuit

Oral History Agreement of Robert P. Trout

1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter, "the Society"), I, Robert P. Trout, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the transcripts of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the transcripts are subject to the same restrictions herein provided.

2. I understand that the Society may duplicate, edit, or publish in any form or format, including publication on the Internet, and permit the use of said transcripts in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I reserve for myself and to the executor of my estate only the non-exclusive right to use the transcripts and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

R.P.T. 2/8/16

Robert P. Trout [date]

SWORN TO AND SUBSCRIBED before me this 8th day of February, 2016.

Notary Public

My Commission expires: Nov. 14, 2016

SHARYN M. ELLERBE NOTARY PUBLIC DISTRICT OF COLUMBIA MY COMMISSION EXPIRES 11-14-2016

Sharyn M. Ellerbe
District of Columbia, Notary Public
My Commission Expires
November 14, 2016

ACCEPTED this 11th day of February, 2016, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Oral History Agreement of Robert P. Trout

Schedule A

Transcripts resulting from six interviews of Robert P. Trout conducted on the following dates:

Interview No. and Date		Pages of Transcript
#1	October 7, 2014	1-30
#2	November 13, 2014	31-62
#3	December 22, 2014	63-85
#4	February 12, 2015	86-118
#5	March 25, 2015	119-151
#6	May 15, 2015	153-184

The transcripts of the six interviews have been retained by the interviewee and are contained on one DVD.

Standard Form

INTERVIEWER ORAL HISTORY AGREEMENT

The Historical Society of the District of Columbia Circuit

Oral History Agreement of Stuart F. Pierson

1. Having agreed to conduct an oral history interview with Bob Trout, for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Stuart F. Pierson, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, digital recordings, transcripts, computer diskettes, and DVDs of interviews, as described in Schedule A hereto, including literary rights and copyrights.
2. Accordingly, the Society may duplicate, edit, publish in any form or format, including publication on the Internet, and permit the use of said tape recordings, digital recordings, transcripts, computer diskettes, and DVDs in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.
3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

S. Pierson

Signature of Interviewer and Date

Subscribed and sworn to before me this 28th day of January, 2016

Barbara G. Hall

Notary Public

My Commission expires: 08/14/2019

Accepted this 12th day of February, 2016, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Oral History Agreement of Stuart F. Pierson

Schedule A

Voice recordings and transcripts resulting from six interviews of Robert P. Trout conducted on the following dates:

Interview No. and Date	Description of Media Containing Voice Recordings	Pages of Transcript
#1 October 7, 2014		1-30
#2 November 13, 2014		31-62
#3 December 22, 2014		63-85
#4 February 12, 2015		86-118
#5 March 25, 2015		119-151
#6 May 15, 2015		152-184

The transcripts of the six interviews have been retained by the interviewee and are contained on one DVD.

ORAL HISTORY OF ROBERT P. TROUT

First Interview
October 7, 2014

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 October 7, 2014, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the first interview.

Stu Pierson: It's October 7, 2014. We're at 1350 Connecticut Avenue, the offices of Trout Cacheris & Janis. And we're here at the first session of the oral history of the esteemed Washington lawyer Robert Trout. It's your nickel.

Bob Trout: I was born in the summer of 1948 in Roanoke, Virginia, part of the baby boom generation. I was the youngest of three children. My sister Page is two years older, and my brother Hugh is seven years older. We enjoyed a privileged, upper-middle-class upbringing. You could say that I was born on third base. My ancestry on both my father's and my mother's side has deep roots in Virginia. My wife, who is originally from New Jersey, jokes that I am a part of the landed gentry, only without the land. My father was a prominent surgeon in Roanoke. His father, my grandfather, was also a prominent surgeon in Roanoke. I come from a family of doctors. My father was the very definition of a nice person. He was very gentle, a real gentleman. He worked very hard, was on call a lot. While we almost always had a family dinner together, I never thought of my father as being omnipresent as I was growing up. We didn't do sports together, or throw the football or baseball. He was not a hunter, nor someone who enjoyed fishing; I don't recall ever going camping with my father. My mother was the wife of a prominent surgeon in Roanoke. She was a much more remarkable person than that suggests; the point is, in spite of her significant talents that would have allowed her to enjoy a successful professional career

had she chosen it, she lived in a time and a place where the wife of a prominent surgeon chose not to work outside of the home. Not necessarily because she didn't want to, but because there probably would have been talk. Certainly in retrospect, and even when I was much younger, I had a sense that my mother was very frustrated that she had not pursued a professional career for herself. She was very smart and very passionate about education. In that regard, because she did not believe that the public schools in Roanoke were good, she and her friend of hers decided to start a private day school. They raised the money and built a school, North Cross, which continues to thrive today, some 50 years after it opened. Later, again because of her passion for education, she became an assistant dean of admissions at Hollins College outside of Roanoke. My mother was strict and demanding. And in keeping with her passion for education, she pushed her children to excel. I was reasonably bright and did well in school, but she wanted me to be better. I was a slow reader, so she spent a lot of time both tutoring me and purchasing gimmicks to help teach me to be a faster reader. I'm not sure I ever became a fast reader, but whatever progress I made when I was young, I regressed considerably when I went to law school and began reading cases. I was always good in math, but that wasn't good enough either, so I received special tutoring after school in math. Probably the thing that has stayed with me longest is the tutoring I received in grammar. I thought that was quite valuable, and sounding a bit like the older generation looking down on the younger, I am amazed at what passes for acceptable grammar today. So my mother was constantly pushing us academically. And she was quite strict about what we were allowed and not allowed to do. She, not my father, was the disciplinarian in our home. I would say that she preferred the company of adults more than children.

Stu Pierson: When did you cross that divide?

Bob Trout: When I was 18, after I graduated from high school. That was still the time that you were old enough to be drafted and to give your life to your country, but you were not old enough to vote. At 18, I think you could buy 3.2 beer in Virginia, but not 6.4 beer, at least not without a fake ID. But when I turned 18, my mother all of a sudden started treating me like an adult. It was almost like a light switch turned off after I graduated from high school. And we got along great; she was really interested in me, I was interested in her. If there was some party that she and my father were going to, she wanted to bring me along. I would go to various events with her, and we'd just hang out in the corner together and talk. And it was very special. So I saw part of her after I was 18 that I really hadn't experienced before then. But before that, I did not find her to be easy. Nurturing was not the first word that would come to your mind. We had a nurturing presence in our life, but my mother was not that person. The nurturing piece came from … we referred to them as maids back then. In the South in the sort of privileged environment in which I grew up, families had maids who took care of the children.

Stu Pierson: You and I have that in common.

Bob Trout: Yes. And it's interesting … this woman I just loved her to death. And she was with us since before I was born, and she died in 1995 at the age of 96. My mother died of breast cancer in 1971 when I was 23. And so my father was essentially then taken care of by this woman. She was part of our household.

Stu Pierson: Sure.

Bob Trout: And he took care of her, and she took care of him.

Stu Pierson: What was her name?

Bob Trout: Her name was Bertha Porter. But my mother, as I say, she was not the easiest person; she was very demanding. And so she would hire this person, and for whatever reason, that didn't work out. And there were a series of hires, and . . .

Stu Pierson: All for that position?

Bob Trout: Yes. And my sister couldn't keep track of all their names; she was under two at the time. And so she referred to them as "you." But she couldn't pronounce "you," so she became . . .

Bob Trout and Stu Pierson (simultaneously): "Oo."

Bob Trout: Right. And so Oo was this person who was part of my life, and she was the nurturer. She had very little education, but she was probably the smartest person in the house. I have a vivid memory that probably best illustrates the difference between my life growing up with my strict and demanding mother around and my life growing up with nurturing Oo around. My parents went to Europe for six weeks, which meant the children were going to be at home with Oo. She was in charge. And I remember I couldn't wait for my parents to leave, for it was like a vacation to get away from the hard-edged environment that my mother presented in our household to the very soft, nurturing environment that Oo provided. Oo was well known in my parents' circle. Even when they knew my parents were not at home, friends of theirs would just stop by our house and hang out in the kitchen and have a cup of coffee with Oo. And they talked because she was interesting, she had great common sense, and she was a wonderful storyteller with a great sense of humor. So she was something of a celebrity in town. But undoubtedly, she experienced a lot of indignity in the South. She had grown up in West Virginia or New York, and I think had come from West Virginia. I think she'd had a husband who was a coal miner, maybe died in the coal

mines. While Virginia was not the Deep South, it was nevertheless part of the South, and segregation was prevalent. I am sure she experienced indignities that I never saw or knew about, but there was not a bitter bone in her body. I do seem to remember as a young boy getting on a bus to go with her to downtown Roanoke and going to the back of the bus. And I'm sure that a great deal of my political attitudes are rooted in guilt that I feel over the way she was treated and the way blacks were treated in my native South. Oo continued to be part of the family, and when my father turned 65, she organized a big birthday party. She basically threw the party for him. And in addition to his being the center of attention, she was also the center of attention. And then eventually she couldn't hear very well, and she couldn't see much at all. When she was 91 she came to D.C. and stayed with us and with my sons. We needed to be careful about where we went, because she was embarrassed about the fact that she couldn't see anything. We wanted to make sure that we always went to some place where she could get a hamburger and just eat with her hands. By that time, my father had died, and there was no one to take care of Oo as she got older and infirm. When she could no longer take care of herself, she went to a nursing home. That was not easy for her and it was not easy on me. I would go back to Roanoke to visit with her a few times a year, but I suspect I will always feel some guilt that I did not do more for her during the last few years of her life. When she died, my siblings and I went to her funeral. We were her survivors, so we made all the arrangements. At the funeral, the minister told a funny story. He said that he was visiting with Oo some time before, when she was still living at home. He asked if she had any children, and she replied with a very large smile that indeed she did. At which time, she pulled out a picture of my siblings and me, three white children. Everyone had a good laugh. After the minister spoke, I gave a eulogy. I

was a blubbering mess, but my family members very generously told me that I had done a great job of honoring Oo. As you can tell, I become very emotional whenever I speak about her. She was very important to me.

Stu Pierson: Yep.

Bob Trout: After my father died, I then . . .

Stu Pierson: When was that about?

Bob Trout: He died on Valentine's Day 1990, following a stroke while he was vacationing in Grand Cayman. In 1974, a couple years after my mother died, my father remarried. The woman he married, Virginia Lynn, whose husband had died two or three years earlier, had three children all more or less about the same age as the three of us. I knew them, but not well. But everyone on both sides immediately embraced their marriage and the relationship, and we have become just like blood family. So it was a great relationship, and I think that everybody in the two families would say those two spouses were happier with each other than they probably were with their prior spouses. So that's just been a real joy to have them in our lives. And everybody has children, and they became—all those children, now cousins—became extremely close. So we've got a very enlarged family, and we get together as often as we can as a great big family. And now with our generation having grandchildren, it's just getting bigger and bigger.

Stu Pierson: Together down in Roanoke?

Bob Trout: We gather here and there. When I was growing up near Roanoke, there a recreational lake called Smith Mountain Lake, a big lake. I think it was around very early '60s, I drove with my parents about 40 minutes from Roanoke, and there was a staked-out piece of overgrown property. My father's surgical clinic had bought a piece of property to

build a house for the benefit of all of the doctors to share. And we looked down at this river way down, barely visible, and my father said, "They're building a dam near that mountain in the distance, and so this is going to be a lake in a few years." And every summer I would go back, and you'd see the lake get bigger and bigger, coming into form. And when it was finally full of water—this would have been early to mid-1960s—my sister and I would leave our summer jobs each day at 5:00 p.m., drive 40 minutes to the lake, and go waterskiing for a couple hours.

Stu Pierson: Is it a water-powered dam?

Bob Trout: Yes.

Stu Pierson: Is it a hydro dam?

Bob Trout: Hydro dam. And it's gotten more and more popular, with big, very nice, sometimes opulent, vacation homes now. In the 1960's, when the lake was not nearly as developed as it is now, if you'd go water skiing on any given day, even on the weekends, it would be like skiing on glass. And then in the 1970's and 1980's, the weekends got a little bit crowded and there would be a lot of chop in the main channel from all the boat traffic; so it would be during the week you could find it skiing on glass, but the weekends were not so much. And then during the 1990's, even during the week, it was pretty crowded, and you'd have to find some coves to find the glass where you could go skiing. And now, there's no glass.

Stu Pierson: Can't be done.

Bob Trout: Can't be done. It's just way too crowded.

Stu Pierson: What are the dimensions of the lake?

Bob Trout: It's about 500 miles of shoreline; I think it's the largest lake in Virginia. It's probably about 20 miles long. It was a very nice place. Still is, I'm sure. I have two sons, Carter and Philip. Carter was born in 1978, and Philip in 1980. And from the year they were born, each year we would spend a week at Smith Mountain Lake with this enlarged family, with all of their cousins. It was the highlight of everybody's year. That's how they forged this great relationship. I think it was very valuable for my children, and for all the children, to experience that intense level of family. And one of the interesting things is they learned from their older cousins how to be. So somebody a little bit younger might think that something was cool and the way to be, and maybe their older cousins would mentor them and let them know, "Nah, that's not so cool." And so it helped them grow up and mature.

Stu Pierson: Effective socialization . . .

Bob Trout: Yes.

Stu Pierson: . . . by a larger family.

Bob Trout: Yes, exactly. So that was part of it, the experience that I had with this enlarged family. Spending time at Smith Mountain Lake was one of my wonderful memories, both growing up and then watching my two sons grow up, also enjoying time at the lake. Events from the distant past become vague, but I have one memory that is as vivid today as it was when I experienced it many years ago. It's a funny story, and more importantly, it probably served as a developmental tipping point, a lesson that however painful the truth may be, it beats the alternative by a wide margin. It was soon after I became a Boy Scout, which I did not so much because it appealed to my interests but more because it was what you did at that age. The first badge you get by just showing up, and it

didn't take much more than that to qualify for the Second Class badge. I had qualified and it was now time for me to receive my Second Class badge. Looming ahead was the First Class badge, which required that you learn the Morse Code. I was not looking forward to that, but as I say, getting the Second Class was not heavy lifting. I showed up for the scout meeting. There I learned that the Scoutmaster and the Assistant Scoutmaster were interviewing each of us before confirming we would receive the Second Class badge. I went into the room, sat down alone at a table, while the Scoutmaster and the Assistant Scoutmaster asked me a few questions. "We have just one more question for you, Bob," the Scoutmaster said. "Have you done your good deed for the day?" Of course I panicked. "Yes," I said, praying that they would not ask me what it was. "What was it?" they asked. Of course the only thing that came to my mind was the Boy Scout trope about helping a little old lady across the street. And so before I could stop myself, the words came out of my mouth: "I helped a little old lady across the street." Well, if the earth had opened up at that moment and swallowed me whole, I would have been happier than I was at that moment. The Scoutmaster and the Assistant Scoutmaster showed remarkable self-control in not breaking up into howls of laughter, and they declared me fit to receive the Second Class badge. As for me, I was so completely ashamed and embarrassed by this obvious lie, I dropped out of the Scouts, never going back to another meeting. As I say, it has been a vivid memory for me, an early but enduring lesson that the truth, however painful, is always better than a lie. Better to learn that lesson early, as I did, rather than later when the price can be very dear. That memory dates back well before high school.

Stu Pierson: Did you graduate from North Cross?

Bob Trout: No, I didn't go to North Cross. I went to Episcopal High School.

Stu Pierson: Oh, did you?

Bob Trout: Yes, I think my grandfather went there. My father went there.

Stu Pierson: So you were a boarder?

Bob Trout: Yes; everyone boards there. I went to the public schools all through the eighth grade. When I went to Episcopal in the ninth grade, I was smallish. It was all boys, and they were pretty much all from the South. The school has changed a lot. It's now coed; it now has a lot of international students. But when I was there, everybody was pretty much like everybody else. And socially I think it was useful for me. In my home, I don't think that I was given a very long leash, socially. As I said, my mother was quite strict. So I would have been the kid who had to be in earlier than other kids and who would not have been able to do all the things that my classmates were allowed to do. I didn't have as long a leash as some of my friends and contemporaries. And that would have been embarrassing, and it would have been awkward, and I would have not liked that at all. At Episcopal we were all locked down pretty hard—everybody was locked down pretty hard. And so, as a result, it was a comfortable place because the rules were the same . . .

Stu Pierson: Everybody had the same leash.

Bob Trout: Yes, exactly. And, while I didn't get to go here or there or be out at this hour or that hour, well, it was the same rules for everybody, and so there was a certain comfort in that. Academically, I did well, not great. Still—I've wondered about the importance of Latin.

Stu Pierson: You are now, or you were then?

Bob Trout: Yes.

Stu Pierson: I'm one of those who believes it's one of the reasons I can speak the language.

Bob Trout: Right, and there are a lot of people who think that. I was at a party one time. This was years ago. And I asked the question, "How many people think that taking Latin was really valuable to them?" And there were several people who thought it was, couldn't have been more important. And I was sitting there wondering, what did I get out of Latin? And I'm not sure I, even today, can think of it. And so, there are people who, like my sons, studied a modern language, like Spanish, because it seemed to have more practical application. I don't know how good their Spanish is today, since I don't know that they use it on a regular basis.

Stu Pierson: Did they go to EHS?

Bob Trout: No, they went to Lawrenceville.

Stu Pierson: There was Latin at Lawrenceville, too.

Bob Trout: Yes, there was. But I didn't push them to take Latin. When I was in high school and college, it was pretty much core curriculum. The first couple of years there were certain things you just need to take, because that's what an educated person knows. Not so much anymore. Today the schools give all this freedom to take whatever the students want, and they haven't a clue as to what they really need, and so they take a lot of courses that probably don't help them. But, returning to my sons' decision to go to Lawrenceville, I was of two minds. I thought that public education is pretty important, including the diversity that you get. When I went to Episcopal, as I say, everybody was pretty much the same. Everybody had the same history. And it was . . .

Stu Pierson: Upper middle class white guys . . .

Bob Trout and Stu Pierson (simultaneously): From the South.

Bob Trout: Right. And I think it was when I was a senior, the headmaster announced at an assembly that Episcopal would be admitting qualified—I don't know whether he used the word "Negroes" or "Blacks" or what, but Episcopal was going to be accepting Black students. And I think everybody looked around and thought to themselves, "Yes, I guess that's right. I guess we don't have any Blacks here."

Stu Pierson: 1966?

Bob Trout: It was 1966. And, I don't think anybody thought anything of it as being remarkable that the school would start accepting Black students, at least I didn't. What now seems so remarkable is that there weren't Black students before and that no one thought that was remarkable. Today Episcopal seems like a very diverse community by comparison. When I was there, it clearly was not. The students were alike and they tended to make similar choices. For example, a lot of the graduates were going to UVA for college. My father had gone to Virginia. My grandfather had gone to Virginia. My brother went to W&L, and so I ended up going to W&L. I applied to Williams and did not get in. I suppose I had become comfortable in a small homogeneous environment, so I applied to small colleges. W&L was simply a larger version at the time of . . .

Stu Pierson: EHS?

Bob Trout: EHS.

Stu Pierson: Yes.

Bob Trout: As it happens, at the time Virginia was really a just larger version of W&L, and not that much larger, because it was all male and had a similar sort of student body.

Stu Pierson: Sure.

Bob Trout: Maybe a little more diverse, but not that much. Both schools are obviously much more diverse now. I loved the experience of the small school experience, the small classes and the personal attention from the professors, who were very good teachers. Today students take whatever courses suit their fancy. When I was in school, the first year, maybe two were filled with core requirements. Not that I necessarily thought so at the time, but I think there is a lot of value to that. Students are not only learning what their courses teach them, they are learning what interests them, where their passions lie, and that means being exposed to different subjects that they might not otherwise pick on their own. I came from a family of doctors, but one semester of chemistry in college convinced me that maybe medical school was not a good choice for me. Still I had another science course to fulfill, and one of the most vivid memories I have from a single class in college was in a science course I was taking in 1967, maybe early 1968. W&L, at least then, did not have a course in environmental sciences. Certainly not the sort of basic course I was taking. I believe I was taking geology, and one day our professor gave a lecture about the increasing levels of CO2 in the atmosphere, how it was warming up the climate, and how the sea levels would be rising. I was absolutely blown away. Needless to say, in 1967 or early 1968, global warming was not a topic that folks were talking about. That same semester I was taking a public speaking course, and one of our assignments was to give an expository speech, in other words a speech explaining something. So I gave a speech warning about global warming, this in 1967 or the first semester in 1968. Needless to say, I did not need any persuading when the politicians, in the past 10 years or so, spoke about the dangers of global warming. For me, this was 40-year-old news. So there was a great deal I loved about W&L and benefited from what it had to offer. But I do think that I missed the diversity in

the student body, and I think there was something about that experience—and something about Episcopal—that seemed slightly off for me, not a perfect fit in retrospect. When I was there, I couldn't put my finger on it. But it seemed a little bit off for me. I was not quite as comfortable and didn't feel quite like I was in my sweet spot as I thought I might. I had a wonderful relationship with an economics professor at W&L, John Gunn; I took every course I could get from him. He was a wonderful mentor. And the other really strong relationship from college was one of my roommates, Tom McJunkin. He and I continued to have a very strong personal relationship until he died a couple of years ago from cancer. Other than that, I didn't leave W&L with the really strong and enduring friendships that I see that my sons, who both went to Virginia, have maintained from their college experience. As I was finishing college, I had applied for a Fulbright Scholarship for the next year; and this was during the Vietnam War.

Stu Pierson: Where are we now? We're in 19…?

Bob Trout: We're in 1970. In 1968, I tried to get into the Navy Reserve, which would have meant that I would go to a facility outside of Staunton, Virginia one weekend a month and then there would be a period during the summer that you would have things you had to do.

Stu Pierson: Like training?

Bob Trout: I was trying to get into the Navy Reserve, but I failed the physical, which came out of the blue to me. I had apparently a high systolic blood pressure. My diastolic was low. That's the second number which is the number the doctors seem to care about the most, but the Navy had a cutoff for the systolic or the first number, and mine exceeded that

cutoff. I was nervous about the fact that, yes, the Navy Reserve is going to kick me out, but the draft . . . they're not going to be quite so fastidious.

Stu Pierson: I know the experience.

Bob Trout: Yes. So I applied for a Fulbright Scholarship, which I think probably would have given me a deferral . . .

Stu Pierson: Maybe.

Bob Trout: Maybe, I'm not sure. And I was led to believe that I was going to get it. I was an alternate, but I was led to believe that if history was any guide, there would be enough people that would have done something else that I was going to make the cut. I had applied to law schools just as a backup because I couldn't think of anything else that I wanted to do.

Stu Pierson: Certainly not the draft.

Bob Trout: Well, there was that, but as it turns out, towards the end of my senior year, we had the first draft lottery. There was a lot of drama surrounding the first draft lottery, which was broadcast nationally. I couldn't decide whether to tune in, which would have been stressful, or just get the news the next day. I went back and forth and finally decided to tune in while the lottery was in process. And three numbers after I turned on the radio, my birthday was announced. I think I was 98 in the draft lottery. As it happened, they were running through about 30 days a month. And somebody woke up and said, well, this isn't working. We're going to basically run through the entire year, so what is the point of having a lottery. And so I think they did something to slow it down. But for at least the first three months, it was 30 days a month, so number 98 in the lottery was definitely going to be drafted. And in due course, I received a notice to report for my draft physical. I went for

my draft physical, and to my utter surprise, I flunked the draft physical, too. When the draft was no longer in my future, I was still waiting to learn whether I was going to be going to . . .

Stu Pierson: Go to Fulbright?

Bob Trout: Yes, go on the Fulbright. Now one of the problems is that I would be going to Lausanne, Switzerland if I got this, so I would have to know French. I had taken French in college, but fluent I was not. So I was thinking I've got to be signing up for a Berlitz course, and I kept waiting to be told, "Okay, you're in," because I was going to need to take this Berlitz course pretty soon; I can't put that off much longer. Long story short, I didn't make the cut. I didn't get the Fulbright. And I didn't do the Berlitz course. And so I started law school—at Virginia. Looking back on it, I had actually worked pretty hard in college and had done reasonably well. But I think I had burned out academically, and so I went to law school really because I couldn't think of anything else to do. I probably approached law school with the same level of energy. I didn't think it was all that hard to do okay in law school, but I didn't work that hard, and while I did fine, I did not excel. I was on one of the minor law reviews, but not on The Law Review. I think in retrospect, I got lucky because when I found myself pursuing litigation, I ended up doing something that was well suited for my skillset and for my natural aptitudes and abilities. But it was dumb luck, I think. And I definitely think I probably should have taken some time off and done other things.

Stu Pierson: Before law school?

Bob Trout: Before law school. And I've actually wondered whether one of the things that would have been good to have done would have been military service. Now, I probably wouldn't have opted for . . .

Stu Pierson: The jungle?

Bob Trout: The jungle. But I think that some of the discipline that you get in the military would have been useful. In the military, you are trained to put one foot in front of the other and charge ahead, and I think that there is probably some value in that. I think that it's important to nurture the creativity, the imagination. At least stereotypically, you think that some of that gets suppressed in a military environment. I don't know whether that is true or not. So, I don't know, it's a mixed bag. But I've often thought about whether a couple of years in the military might not have been . . .

Stu Pierson: Bad for you?

Bob Trout: Yes, or good for me. But in any event, some experience two or three years between college and law school would have probably served me better than going to law school right out of college because I was burned out academically, I think, by the time I got to law school. One important experience I had while I was in school was living in Los Angeles. During the summer while I was in college I went to Los Angeles because my brother was in training there. He was a doctor at UCLA, and so I went out in '68, got a summer job, and stayed with my brother who was single at the time. We hung out in Los Angeles, spent a lot of time in Westwood. UCLA is just an amazing university, beautiful and big. I don't know that I thought about it at the time, but looking back on it, I wonder whether that very enriched diversity might not have been something valuable to have had. After law school, or during law school, after my first year, I went to Los Angeles, got a job

in a law firm. There was a young partner in the Lillick McHose firm, Pam Rymer, whom I got to know. My brother was a friend of hers, and I worked with her.

Stu Pierson: What kind of work did she do?

Bob Trout: She did antitrust work. And there was a more senior partner that she worked with on antitrust cases. And so I was reviewing documents for the client. She was just a great and generous mentor, and I ended up staying in touch with her. She left the law firm with this other partner, and they set up their own firm, Toy & Rymer in Los Angeles. She was fairly politically active in Republican circles, in addition to being a great lawyer, and so President Reagan nominated her to be a judge in the Central District of California, where she sat for several years. Reagan then nominated her to the Ninth Circuit. She didn't get confirmed then because Reagan was a lame duck, but she was re-nominated by President George H. W. Bush, and she served on the Ninth Circuit. She died of cancer about three or four years ago. I stayed in touch with her and last saw her in 2006-2007. I was very fond of her, and she was very helpful to me when I was trying to figure out a career path. And so after my second year, I returned to Los Angeles to work for a law firm for the summer. After my second year, classmates scattered hither and yon for summer clerkships, almost none to D.C. But when it came time to take a permanent job after graduation, we had a tremendous number in our class come to D.C. Myself included.

Stu Pierson: And that would have been 1973?

Bob Trout: Yes, 1973. And I started at the Department of Justice in the Honors Program.

Stu Pierson: In which division?

Bob Trout: In the Criminal Division.

Stu Pierson: Who was the head of the Criminal Division?

Bob Trout: Henry Peterson. Henry was head of the Criminal Division. I had graduated and took the Virginia Bar. The Virginia Bar was, I thought, ridiculously easy. I studied very hard for it, but it was the only exam that I can remember taking, probably since high school, where I finished the exam early. I went back over my answers, I went back over my answers again, and I left with about half of the allotted time still left. After the bar, I went to Europe with my wife for two and a half months. I met my wife when I was in high school. She is actually my third cousin. She was from Charlotte, and she went to St. Catherine's. Her name is Taisie Berkeley.

Stu Pierson: St. Catherine's is just north of Richmond?

Bob Trout: It's actually right in the middle of Richmond. And she was going to be my date for Finals at Episcopal, which was our equivalent of the prom. It's after all the exams, and it's the big dance on campus, and I think it was two nights of partying. You've finished your exams. You're completely free. Life is great. So she was going to be coming to Finals sort of as a blind date. That spring I didn't know who I was going to invite to Finals—which was a big deal. And so I kept putting it off, and putting it off. And I didn't have anybody in mind, so I think my parents, who knew her parents—they were originally from Roanoke before her father went to practice medicine in Charlotte—said, "Why don't you invite Taisie Berkeley." And I kept putting it off, putting it off, putting it off. And I happened to be in Richmond for a tennis tournament one weekend in the spring, and I heard someone say "Taisie." We were playing St. Christopher's in tennis, and St. Catherine's is their sister school. There are not a lot of girls named Taisie. So I looked and I saw this girl who seemed to be responding, and I was thinking, well, that must be Taisie. And then I

decided, well, if that's Taisie, maybe I'll put this off and see about somebody else. And so another week goes by, I was thinking I'm not getting any closer. I'll just go ahead and invite Taisie. Well, it turned out somebody else on our tennis team was dating her roommate. And so on Sunday morning, he said to me, she is going to be in church that the students at Episcopal attended each Sunday. The reason that Taisie and her roommate were at our church that day is that the St. Catherine's choir was singing with our choir. And my friend told me that Taisie knew that I was going to invite her to Finals. And she was going to accept. And so I thought, this is not going to be heavy lifting. I had in mind this other face that I had seen the week before in Richmond. But when I arrived at church and looked at the girls from St. Catherine's, standing next to the person whom I knew to be dating my friend was just the most stunningly beautiful girl I could remember seeing. That was Taisie. So I just hit the jackpot because it was a completely different person from the girl I had seen in Richmond. And so, I was thinking, this is as good as it gets. I'm going to be going to Finals with her. Unfortunately, about three days before Finals, her father dropped dead of a heart attack, so she did not come to Finals. We ended up getting together during the summer at some point, and then we dated while she went to Hollins and I was at W&L. And we dated all the way through college. And then there were fits and starts and pauses and whatnot over the next couple of years, but we were married in 1972. So after the Bar, we went to Europe for three months. And when I got back, I was probably the last person to show up for their job at the Department of Justice, so I was assigned—it's not like I had any choice—to a particular section of the Criminal Division. It was called the Government Regulation Section. And it was a bit of a dumping ground for every statute or enforcement activity that no other section wanted. And so, for example, one of the things that we did

was immigration. We weren't immigration or INS lawyers, we didn't do the INS cases, but we did the petitions for review from the Board of Immigration Appeals to the various Courts of Appeals around the country. And so I arrived in early October 1973, and in early December, two months later, I argued my very first case in the Fifth Circuit in New Orleans. It was an immigration case that somebody else had briefed and I was now arguing. So that was pretty cool.

Stu Pierson: Do you remember who your panel was?

Bob Trout: I don't remember who was on that panel. But I remember that I had Thornberry on a panel, I had Wisdom on a panel, and I had Goldberg on a panel when I was doing these cases. In the course of the two years that I was there, I had about 10 oral arguments and 16 briefs that I wrote in the Courts of Appeals all around the country. One of the other areas that none of the other sections wanted was obscenity cases. The Supreme Court had just handed down an obscenity case that moved the bar a little bit away from utterly without redeeming social value to a little bit more relaxed standard for what the government had to prove. I didn't really have much interest in prosecuting these cases. But I will say this, if you were at the Department of Justice at that time, it was probably the only thing that allowed you to actually try a case because all the other sections were just pushing paper for the U.S. Attorney's Offices. Even the Fraud Section was not trying cases back then.

Stu Pierson: Wonder whether it should be trying them these days?

Bob Trout: No comment. In any event, I arrived and two weeks later Spiro Agnew resigned and entered a nolo plea to tax evasion. And the DOJ lawyers assembled in the Great Hall of Justice in the Justice Department Building, and Elliott Richardson was there

with George Beall, the then-U.S. Attorney from Maryland and the three Assistant U.S. Attorneys, Barney Skolnik, Timmy Baker, and Ron Liebman, who had handled the investigation.

Stu Pierson: I think I remember Skolnik.

Bob Trout: Yes. He was a terrific lawyer. Quirky but very good. And there we were in the Great Hall, celebrating the rule of law, that no one is above the law. And the integrity of the Department of Justice and the fact that it forged ahead and took down . . .

Stu Pierson: The Vice President.

Bob Trout: The Vice President. We just left there so ebullient and full of ourselves and how important we were in the firmament, and it was a very cool thing. And two weeks later, we were back in the Great Hall, and Elliott Richardson gave a speech with the Seal of Justice removed from the podium because he was invited by then-Acting Attorney General Robert Bork to address the troops on the Monday following the Saturday Night Massacre. And as high as we were two weeks before, we were low on that day as we were listening to Elliot Richardson give us a pep talk about going forward and life would go on and this would be just fine. He wanted Robert Bork to have all of our support. So that was my immediate experience in the Department, and then I got down to doing what I was supposed to do, which was handle the appeals from the Board of Immigration appeals, and then eventually I ended up trying a total of two or three obscenity cases.

Stu Pierson: Here?

Bob Trout: In Florida. It was not dissimilar to what goes on today in that the postal inspectors figure out where they want to try the case, and they order the porn to be mailed to them in a particular venue, wherever they wanted to try the case; in this case, it was in

Orlando. And so it is your typical setup that they still do when they want to manufacture venue and create an opportunity for someone to commit a crime. I prosecuted the case. I certainly appreciated the public policy questions about whether that's the way the government ought to be spending its resources. But we were going to spend the resources—the section chief was very, very aggressive on wanting to prosecute obscenity cases—and I wanted to try cases. And so I tried two or three obscenity cases.

Stu Pierson: All to verdict?

Bob Trout: Yes. All to verdict. All convictions. And I was there with the postal inspector. I had nobody else there with me, and I was trying to figure out how to do it as I went along. George Young, who was then the Chief Judge of the Middle District of Florida, for whom I believe the federal courthouse in Orlando is now named, was just very pleasant. He was a good judge, and patient—he had to be for someone who was trying his first case. And the defense attorney, I think in both of them, was an attorney by the name of Joel Hirschhorn, who is, I think, the nephew of the Hirschhorn for whom the sculpture museum is named.

Stu Pierson: Oh, really?

Bob Trout: I think. And he was a very good lawyer and a very nice guy. We got along fine. He was much more experienced than I was, and I was learning how to be a lawyer in a contested case. He couldn't have been more generous and gracious in his dealings with me. We got along just fine and periodically, we'll email each other back and forth. So that was what I did in the Department of Justice.

Stu Pierson: Immigration and porno cases.

Bob Trout: Right. But I realized, where I needed to be was in the U.S. Attorney's Office. And I applied in Los Angeles and I had gotten to know the Assistants in Orlando, so I applied there. I think they were just waiting for a slot to open. And I applied to Baltimore because I was just so taken by what the Baltimore office was doing. At the time, following on the Agnew investigation, they had a big investigation that they were carrying on into Mandel. And so I ended up getting a job with the U.S. Attorney's office in Maryland.

Stu Pierson: Did you have children by this time?

Bob Trout: No. This was 1975. And at the time, I knew that being an Assistant U.S. Attorney was the best job. I had figured that out. But it was a well-kept secret in the industry, I think. You know, people were still coming to go to the big firms and make the money. When I started, I think I made $13,500.

Stu Pierson: Not much more than I was making.

Bob Trout: And the big firm lawyers were starting at $15,000. Those days are long over, when there is just that little disparity.

Stu Pierson: It wasn't little then.

Bob Trout: No. Well, that's right. So I applied in Baltimore. They just had one district to cover the entire state. Jervis Finney was the U.S. Attorney. He had succeeded George Beall. I didn't really know this at the time, and I don't know that he knew it at the time, but Jervis Finney comes from a long line of Baltimore doctors, and I come from a long line of . . .

Stu Pierson: Of Roanoke doctors.

Bob Trout: Exactly. And, it is basically a half-generation apart. I could be mistaken, but I believe the history was that Jervis's grandfather mentored my grandfather, who mentored Jervis's father, who mentored my father. All at Johns Hopkins. They all went to Hopkins to medical school. Jervis ended up being like the black sheep in the family. He became a lawyer. And I was the black sheep in my family. I became a lawyer. I didn't learn about my family's history with Jervis Finney's family until after I already had the job, and for all I know, Jervis doesn't know it to this day, the irony that he ended up essentially carrying on this mentoring role . . .

Stu Pierson: In a different profession.

Bob Trout: In a different profession. So he hired me, and at the time I was handling an interesting case. As I have reflected on it, this case was a lesson in reality. It's a fun anecdote. I had handled a case in the Third Circuit—Board of Immigration Appeals petition for review to the Third Circuit. And I thought it was a pretty cut and dry sort of case. Pretty easy. In some of these cases, you write the brief, there is a per curium decision that comes out, there is no oral argument. So in this seemingly easy case in the Third Circuit, I wrote the brief; I thought I had it figured out. There was a certain logic, a certain common sense to the government's position. There was a little bit of a problem in that there was some dicta in a Supreme Court case that I had to work around. But it was clearly dicta, and it was somewhat old, and it just didn't seem that much of a problem. And I was expecting a per curium decision without oral argument. But they scheduled it for oral argument, and so up I went for oral argument.

Stu Pierson: Which circuit are we in now?

Bob Trout: We're in the Third.

Stu Pierson: We're in Philly?

Bob Trout: In Philly. So Taisie's brother, older brother, Al Berkeley, was married to the daughter of one of the Third Circuit judges. In other words, the father-in-law of my brother-in-law was on the Third Circuit. At my brother-in-law's wedding, I had met the judge, spent maybe two minutes in conversation with him. Al Berkeley was always looking to help people. Still is. That is just part of his nature. And so when I was in law school, he talked to his father-in-law, and one thing leading to another, he had arranged for me to have an interview with a senior judge on the Third Circuit for a clerkship. And it was probably a courtesy interview. I had an interview, but I certainly didn't feel like I had knocked it out of the park.

Stu Pierson: Third year of law school?

Bob Trout: Yes. And I didn't get the clerkship.

Stu Pierson: So this is three or four years on?

Bob Trout: Yes.

Stu Pierson: That you're right here in this case?

Bob Trout: This would have been in 1975, and two years or maybe three years before that, I had interviewed. So with that as background, I showed up in Philadelphia.

Stu Pierson: So they don't send you the panel before?

Bob Trout: No. So I showed up in Philadelphia and the senior active judge sitting in the center is the father-in-law of my brother-in-law. There was another active judge there and seated to the right of the father-in-law of my brother-in-law was the judge—the senior judge—with whom I had interviewed. So I got up and was arguing this case that I'm

surprised they were even having oral argument about. And I was getting hammered by the youngest, the most junior judge on the panel, Judge Aldisert.

Stu Pierson: The one who doesn't know you?

Bob Trout: Yes. And I was getting hammered. And I came back and I said to myself, and then to my colleagues, we're going to lose this case. I can't believe it. We're going to lose this case. And sure enough, the opinion came down and we lost. But the father-in-law of my brother-in-law has written a dissent. And the dissent followed the path that I had charted. So we looked at the way the majority wrote this, and the immigration lawyers were going to see this huge opportunity to just bog down the administrative process.

Stu Pierson: The entire system?

Bob Trout: Yes. In order to get *en banc* review, you had to get the permission of the Solicitor General. So I wrote up a . . .

Stu Pierson: A memo?

Bob Trout: A memo. A memo, which is referred to as an SG memo, and it went up through the process and finally found its way to the SG.

Stu Pierson: Who was the SG then?

Bob Trout: Robert Bork. And . . .

Stu Pierson: Yes.

Bob Trout: And so I wrote an SG memo asking for permission to go *en banc*.

Stu Pierson: Because bad things will happen.

Bob Trout: Bad things will happen. And he granted the permission. So I went back to the drawing board and I filed a different brief. I was into the legislative history—it was really dense and into the weeds. It was just a different take.

Stu Pierson: Does the SJ have to approve the brief?

Bob Trout: I don't think so. And the Third Circuit granted the petition. I was pretty proud of that because it's not the easiest thing to get a Court of Appeals to hear a case *en banc*. They were going to hear argument. It was now September 1975. I had gotten my job in . . .

Stu Pierson: Baltimore.

Bob Trout: Baltimore. And I was about to start work in the U.S. Attorney's Office in Baltimore. But clearly they would bring me back as a Special to argue this in the Third Circuit. I was at home one night and the phone rang. It was my brother-in-law, who said, "I was talking to my father-in-law, who said if he sits on this panel, the other judge is going to make a stink and insist that he recuse himself." And so talking to my brother-in-law, I quickly came to the obvious point: why lose a vote, or potentially a vote, in this case. If I had spent two minutes of social time with this judge—the father-in-law of my brother-in-law—that was probably a lot. I suppose you could say, "Yes, well he promoted me to this other judge as someone to be interviewed." But I regarded it as borderline frivolous. After all, my name was all over the brief the first time. It's not like he said, you can't sit as a member of the panel. Anyway, so . . .

Stu Pierson: So what did you do?

Bob Trout: Well, without telling anyone about the call with my brother-in-law, I said I'm going to be an Assistant U.S. Attorney. Somebody else is going to need to argue this case. And, sure enough, somebody else argued the case, and the government lost again. This time, I think there were like three votes with the dissent—again, the father-in-law of

my brother-in-law wrote the dissent. Now there was no split in the circuits, but for all the reasons that Bork and the Solicitor General's office said . . .

Stu Pierson: We got to go.

Bob Trout: Yes. He said we've got to petition for cert. The Third Circuit, sitting *en banc*, had issued its decision sometime in 1976. And so the government petitioned for certiorari, and in December of 1976, the Supreme Court granted cert. and simultaneously without oral argument . . .

Stu Pierson: Summarily reverses.

Bob Trout: Yes, reverses unanimously. Remember, Thurgood Marshall was on the Court. William Brennan was on the court. These are Justices not known to simply fall in line with the government's position in cases. Obviously, a very, very easy case for the Supreme Court. So it just so happened, within a month of this, I was at some sort of family event and the father-in-law of my brother-in-law was there and we had, by a factor of five probably, a greater and longer engagement than we had ever had before. He was giddy with excitement over this because, again, in the per curiam decision, the Supreme Court quoted liberally from his dissent in the Third Circuit. He just thought this was the greatest thing. He was so excited about this victory and complimentary about me. And I said to him, "Well, you are entitled to be excited about this, but you've got to remember that I'm the idiot who could not even persuade a majority of the Third Circuit of something that was so self-evident that the Supreme Court could unanimously reverse without oral argument. We both laughed. He was very gracious.

Stu Pierson: What's his name?

Bob Trout: His name was Frank Van Dusen. It was interesting because I thought that Judge Van Dusen, maybe once a week, probably once a month, certainly several times a year, had advocates or attorneys appearing in front of him with whom he has some personal and social relationship that was greater than what he had with me. And, as I say, it is not like the other judge complained when it was obvious that I was on the brief and I was going to be coming to argue the case when they set it down for argument. So I viewed it as a lesson in reality, in that it seemed this had not so much to do with judicial propriety, and a great deal more to do with vote counting. And that was a lesson for me.

[END OF FIRST SESSION]

ORAL HISTORY OF ROBERT P. TROUT

Second Interview
November 13, 2014

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 November 13, 2014, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the second interview.

Stu Pierson: We are here at 1350 Connecticut Avenue, Washington, D.C. Today is November 13, 2014. Stuart Pierson's voice here and Bob Trout across the table. This is our second session in the life and times and remembrances of Bob Trout. And, when we last left off, you had finished the rendition of the Supreme Court's summary reversal in the case out of the Third Circuit just as you were going off to the U.S. Attorney's Office in Baltimore.

Bob Trout: I had come to D.C. the way I think a lot of people came to D.C., which is go enjoy the big city for two or three years and then see what happens. And you end up maybe settling down someplace else. And if you were to pick a city where you were probably least likely to settle down, it might be D.C. At that time, anyway. It was . . .

Stu Pierson: 1976, 1975?

Bob Trout: Well, I arrived in D.C. in the fall of 1973. Taisie, my wife at the time, and I traveled in Europe for two or three months after I took the bar, and so I arrived at Justice in early October of 1973. In early October 1975, I left D.C. to go to the U.S. Attorney's Office. I actually left Main Justice to go to the U.S. Attorney's Office in Baltimore. But I actually didn't leave D.C. at that time.

Stu Pierson: How did you land the job in Baltimore?

Bob Trout: Well, when I was at Justice, it didn't take me long to figure out that the action was in the U.S. Attorney's Office. I think a lot of that has changed now where the lawyers at Main Justice can get some good substantive experience and training, not just pushing paper but actually doing things. But back in the early to mid-'70s, and presumably well beyond that, I think a lot of people at Main Justice were just pushing paper; the action was in the U.S. Attorney's Office. And I figured that out pretty early. Now the section that I was in was called the Government Regulations, which doesn't exist any longer.

Stu Pierson: Was it in the Civil Division?

Bob Trout: It was in the Criminal Division. And so one of the things that we did, as I think I mentioned, was that we handled all petitions for review from the Board of Immigration and Appeals, so they were civil in nature. But the section was, as I say, a bit of a dumping ground: where are we going to put this enforcement activity that doesn't naturally belong someplace else? Let's put it here, in the Criminal Division's Government Regulation Section. And so it is not like I viewed myself or my future as being an immigration lawyer, but, then again, I was freshly minted.

Stu Pierson: Somebody gave you a file and . . .

Bob Trout: Right. That's exactly right. And so I did that and wrote a lot of appellate briefs and argued a number of them. As I think I mentioned, I arrived in early October, and in early December, I was standing in front of the Fifth Circuit for my very first oral argument. And I think that was an experience—two months into my first year of a job after law school—that was not shared by any of my friends who were in big firms. As a personal aside, Taisie and I were living in Old Town and we were here to take advantage of living in the big city and have fun; we were foot loose and fancy free. Well when you start

thinking about settling down, having children, raising a family, maybe the big city is not where you want to do that. We were living in Old Town. We would get on the bus in the morning, and we would take the bus into work. At the time, the Pennsylvania Avenue corridor, which is where I was working was pretty shabby. Taisie may have been working closer to the White House, I think. But that whole corridor was like a wasteland in the early to mid 1970's.

Stu Pierson: Mmm hmmm. I remember.

Bob Trout: It was just not where the upper crust was hanging out. And the private sector was all in what is now known as the Golden Triangle, which is where we are seated right now. So we would take a bus to work at the beginning of the day, and then we would get on the bus at the end of the day and go back across the Potomac River to Old Town. And we had been there for six months and realized we never really did anything in D.C. And I would scratch my head why is that? Is it the river that creates some sort of boundary that you just don't think to go back downtown. We were just not doing anything in D.C. And one weekend we were looking at the paper, and there was some ad for a newly developed condominium. It was actually an old building of rental apartments that was spruced up and converted into condominium by a developer. And they were selling these two-bedroom units for $48,000. It was located right across from Montrose Park around the 3000 block of R Street. So it was in Georgetown. It had the park right across the street. It was far enough from M Street and Wisconsin that parking wasn't a big problem. And so we put a contract down on this. I think I told my father what we were paying for this two-bedroom apartment, and he was just appalled that we would pay that much money for an apartment. We moved in, and all of a sudden, we started doing things in D.C. all the time. We would

go to restaurants. We would go to the theater. We would go to the ballet. And we just thought nothing of going all around town. It was electric. We had a great time. My brother, a doctor, had been in California finishing up his residency at UCLA. I spent a total of three summers in LA with him in or around Westwood near UCLA. And he was finishing up and he had a deferment from the Army that allowed him to finish medical school, but also committed him to doing something with the Army. He satisfied his obligation at the Walter Reed Army Institute of Research. And so he came east and we played a lot together. We played tennis. We did a lot socially together. He was single and I was married, but we did a lot of different things together. And he loved being in D.C. also. So . . .

Stu Pierson: D.C. was starting to generate energy.

Bob Trout: It really was. There were nice restaurants, things to do, places were opening up. There was a time when Dupont Circle was probably regarded as a little bit on the scruffy side. Adams Morgan was scruffier still but just starting to get a little bit of interest. And so we started going into places in Adams Morgan and going to Dupont Circle and going wherever we felt like going. We just had a lot of fun, and there was just a lot more energy, I think, in town. I've gone back and forth on this over the years. I think that at various times I had this view that Washingtonians were so full of themselves and self-important that they were just—

Stu Pierson: Well, it's certainly true.

Bob Trout: Yes. That is true, but it is also true, as I have gotten older, that you meet a lot of very genuine, authentic, nice people, many of whom are very, very smart, but are also appropriately humble and great to be around. So my attitude has evolved. I used to think that D.C. was so full of itself that it could be a little bit on the insufferable side. But

we really enjoyed it when we were here to the point that we actually stayed in the D.C. area rather than moving to Baltimore when I became an Assistant U.S. Attorney there. My wife, Taisie, was working at a small financial advisory firm near the White House. Their sweet spot was telling Wall Street what was going on in D.C. that was relevant to Wall Street. Today all the Wall Street firms have their own people doing that. But in the early 1970's, this small boutique—there were probably only four or five principals—made its business by keeping Wall Street informed about what was happening in Washington. One of the persons my wife worked for left the firm in 1974 to become Deputy Chief of Staff of the White House. His name was Dick Cheney. By the fall of 1975, when I got the job in Baltimore, Taisie was probably working on the Hill for a member of Congress. We loved living in Georgetown and playing in D.C. But the law at the time required me to live in the jurisdiction where I was an Assistant. And since I was going to Maryland to be an Assistant U.S. Attorney, that meant I had to live in Maryland.

Stu Pierson: You had to have a Maryland address.

Bob Trout: I had to have a Maryland address. We found a place inside the Beltway in Silver Spring. And moved there in 1976. I commuted up from D.C.

Stu Pierson: By car?

Bob Trout: Yes. There were three other Assistants in the Office who commuted from Montgomery County. There was just one office then, and it was in Baltimore. We commuted up every day. It wasn't so bad. You'd learn a lot about trying a case because everybody had different levels of experience. And so we would be driving up, and you would be talking about a problem that you had, and you could just brainstorm issues as you were driving.

Stu Pierson: Like a law school study group.

Bob Trout: Yes, it was. To the point that the U.S. Attorney actually recruited around maintaining the Silver Spring carpool because—

Stu Pierson: It was good.

Bob Trout: That was a good thing. And then what I found is that we had had so much fun in D.C. after we learned how to do it that I would commute up to Baltimore, come back at night, and I would think nothing of getting in the car and driving down to D.C. and doing something in D.C. at night in the middle of the week, on a "school night." And it was such a contrast to what we had experienced in Old Town. We continued to do things downtown, although we missed living in Georgetown, which at the time was pretty popular.

Stu Pierson: So were you a member of the Maryland Bar?

Bob Trout: I was not member of the Maryland Bar when I went to work in the U.S. Attorney's Office in Maryland. When I accepted a job in the Honors Program at Main Justice, there was a three-year commitment. Within a year of starting at Main Justice, I was angling to find a position somewhere as an Assistant U.S. Attorney. Fortunately, when I received the offer from the U.S. Attorney in Baltimore, the new Assistant Attorney General in charge of the Criminal Division, Richard Thornburg, changed the commitment from three years to two years if you made an intradepartmental transfer to some other office within the Department of Justice. So I no longer had to worry about the three-year commitment, and I was free to leave Main Justice and take the job in Baltimore. So off I went to Baltimore. I think there were 26 lawyers in the Office at the time. There was no Greenbelt Division. It was all in Baltimore. And they were in the Old Post Office Building that was at Fayette and Calvert Streets.

Stu Pierson: I remember.

Bob Trout: The Post Office was on the first floor. On the upper floors, there were courtrooms, very nice old courtrooms. And on the top floor was the U.S. Attorney's Office. So you could walk into the Post Office building on the first floor—there was no security—and you could get on an elevator, and you could go up to the floor that was occupied by the U.S. Attorney. There was a lobby area for the U.S. Attorney's Office, which had some security, meaning the receptionist had to buzz you in so that you could open the door to get into the inner sanctum. The problem was that there was room for only about 20 Assistants. And so the overflow Assistants, that is, the most junior Assistants, ended up in an adjacent corridor. And for that corridor, you could walk in off the street, go to the elevator, take the elevator up, walk out, and walk right into my office where I could be storing evidence for a trial. There was zero security, none at all; and we never thought anything of it. It was a wonderful court. Our judges were generally pretty patient with young Assistants learning how to try cases.

Stu Pierson: Who were they?

Bob Trout: Well, the Chief Judge was Edward Northrop. There were two senior judges, Roszel Thomsen, very, very . . .

Stu Pierson: I remember Roszel Thomsen.

Bob Trout: Yes, Roszel Thomsen was a very smart, very highly regarded district judge, a bit of an iconic figure in terms of being a very, very smart judge. And the law clerk for Roszel Thomsen was a young lawyer by the name of John Bates, now United States District Court Judge in D.C.

Stu Pierson: Now Your Honor.

Bob Trout: Now Your Honor John Bates. Dorsey Watkins was another senior judge. He was affectionately referred to as The Dorse, and he was one of the sweetest men you could imagine. Roszel Thomsen could be abrupt and impatient. You better bring your A game to court. Judge Watkins was the model of patience. He had unlimited patience. He was just a wonderfully nice, generous man. Judge Northrop, very nice man, was Chief Judge. And then there was another judge, Judge Harvey, Alexander Harvey, who was a fabulous judge. He was very smart and appropriately decisive, very thoughtful, and he was right down the middle. And a pleasure to appear in front of. He was just great. There was a judge by the name of Frank Kaufman, who had achieved a certain high profile for having presided over a busing case in Prince George's County. He was an adventure to try a case before, and there wasn't a trial lawyer in Baltimore who didn't have some Frank Kaufman stories to tell.

Stu Pierson: Because?

Bob Trout: He could be demanding. He could be difficult. He might not be paying attention because he was multitasking, and would—

Stu Pierson: Miss things?

Bob Trout: Yes. He'd miss something. He'd want to go off in a different direction. Every trial was an ordeal because whatever unexpected issue might come up in the middle of trial, he would want a brief on the issue the next morning. He was especially hard on the government. But I always got along very well with him. I recall one day I had a status conference scheduled with him, and I became absorbed by something else I was doing and completely forgot to appear in court. The judges had recently passed a rule that there would be a $50 fine for failing to show up on time. I was always very good about that. Until that

day when I had a status conference before Judge Kaufman. About an hour after I was supposed to be there, I remembered the status conference. Panicked, I went to his courtroom. He was in court hearing another matter, so I just sat down in the back. He waved at me to come to the bench, and in a side bar said "What happened? This is so unlike you." I said, "I have zero excuse." I said, "I know you're supposed to fine me and I have no excuse, but if you're handing out any mercy, I am not above accepting it." And he just laughed and sent me on my way, and I never was fined. So he and I got along fine, but as I said, it was always a bit of an adventure appearing before him, and there was no shortage of Kaufman stories around the U.S. Attorney's Office. Another judge was Stanley Blair, a very good judge. He had been part of Agnew's inner circle, which is how he was appointed to the bench. Everybody loved appearing in front of him. Decisive, no nonsense, got things done. He contracted leukemia and died early. Herb Murray was another really fine judge who was a pleasure to appear in front of. Very deliberate. The book on Judge Murray was that he was obsessive about leading questions. The key workaround was to insert "if anything" into any question, and you were home free. So, for example, "What did you do next" was leading because it implied that you did something, whereas "What, if anything, did you do next" was not leading. A story circulated about one Assistant who had become so conditioned from having appeared so often before Judge Murray that once, when he was trying a bank robbery case, he asked the bank teller witness, "What, if anything, was the bank robber wearing." Judge Murray seldom interrupted counsel, but that time he did, telling the Assistant to first think about the question he was asking. Another judge was James Miller who had come from Montgomery County. He was a smart, able judge, but he worked very long hours, and the stress of the job got to him, so he left the bench after just

a few years. As I recall, the last judge when I was there was Joe Young, a very nice man and a good judge. One of the things I loved most about the U.S. Attorney's Office is that it was a much more diverse experience for me, I think, than what I had grown up with. When I started in the office, I believe there was only one African-American lawyer, but there were many Jewish lawyers, and I just loved getting more exposed to Jewish culture and Yiddish expressions. Also, I was probably the only one who grew up in the south, with the sort of WASP heritage that was part of my background. I just loved having such great friendships with people in the U.S. Attorney's office who were different from what I had gotten use to. I think the experience really helped me grow to embrace a multicultural community. Many people get that as part of their normal upbringing, but growing up in Roanoke and going to the schools that I went to, it had not been a big part of my experience. While it may not have been as diverse as it could have been, or as diverse as it probably has become, by comparison with what I had experienced, it seemed pretty diverse. And I loved it.

Stu Pierson: Were there any women in the Office?

Bob Trout: There were a couple when I started, but then there came to be more and more. And that was great. Gale Rasin, Jane Moscowitz, Cathy Blake, and Lynne Battaglia were among the women who joined the office in 1977 or 1978. Gale became a Circuit Court judge in Baltimore, Cathy Blake became a federal judge in Baltimore, and Lynne Battaglia, after serving for a period as U.S. Attorney in the 1990's, became a judge on the Maryland Court of Appeals. Jane Moscowitz, who is now a prominent attorney in Miami and still a good friend, tried a couple of cases with me as a second chair. We got along great. She was Jewish, and so she would teach me Yiddish. And that served me very well

when Amy Jackson—now Judge Jackson on our federal bench here—joined my firm as a partner in 2000. Amy and I would share Yiddish idioms. But getting back to Baltimore, when I joined the office, we had something like 26 lawyers. We handled both criminal and civil cases, and we handled our own appeals. I just found there was so much energy. Everybody realized we had the greatest job in the world. It was something of a well-kept secret because a lot of young lawyers wanted to go to the big firms and make a lot of money. And people didn't really focus on what an amazing job it was to be an Assistant U.S. Attorney. And now that secret is out big time, and so that is where everybody wants to be, even though the experience today is different, with fewer trials. Our caseload at that time allowed us to try a lot of cases. Obviously there were some white-collar cases, but we handled bank robbery cases.

Stu Pierson: Theft from interstate shipment?

Bob Trout: Absolutely. Forging and uttering, counterfeiting, gun cases, a lot of stuff that doesn't get as much attention in the federal system anymore. But it gave us a lot of opportunities to try cases, which doesn't happen as much anymore. And so the reality is that I don't think I second chaired a case the entire time I was there. It was just me or, in time, as I became more senior, I was lead and I would have a second chair. But when I started there, I was expected to be second chair on a couple of cases. It was interstate transportation of stolen property. There was a big theft ring that was stealing off the road tires for big construction equipment, like Caterpillars. The cost of each tire could be as high as $3,000 apiece, this back in the mid-70s. And they would steal them from these construction sites, and sell them to a fence. They were operating in West Virginia, Pennsylvania, and Maryland primarily, and a little bit in Virginia—a big ring—out of

Hancock, Maryland, I think. So we had a number of 30 different heists, with some individuals participating in some, others participating in others, and we broke them down into different cases and there was probably, I don't know, 10 cases that came out of that. I was working with another Assistant U.S. Attorney who was more senior than I, who is now a federal judge in San Francisco, Jeff White.

Stu Pierson: I know the name.

Bob Trout: So we were coming up to trial, and before you know it, Jeff had other things that he had to do. So I ended up trying all these cases. Some of them would plead out, but there were probably six different cases that went to trial. And there was one case where we were jurisdictionally close in terms of the value of the stolen goods to whatever was the felony level. I thought we were in pretty good shape. The evidence was in on what the values were, and right before closing argument, the defense lawyer argued that it ought to be wholesale value versus retail value and we had done all these calculations based on retail. And, sure enough, Judge Murray decided that the correct calculation was wholesale. At which point he asked for the jury to be brought in for closing argument. I had not done the wholesale calculation, so I found myself standing before the jury in the middle of closing argument, for the first time, doing the addition on the various stolen items on the easel.

Stu Pierson: Did you have the wholesale prices in evidence?

Bob Trout: We had the wholesale prices in evidence. But I was writing down the numbers on the board for the first time and I had no idea—

Stu Pierson: Where it was going to end up.

Bob Trout: Where it was going to end up. And I was trying to do simple arithmetic—add two, carry three, that sort of thing—and I was in such a panic I could not get it done. Here I was standing before a jury, and I could not do simple addition of probably six to ten numbers. It was embarrassing. And, finally, I got it done—I was probably sweating by this time—and I ended up with about $100 to spare. But I was in such a panic as I was trying to figure out how to do this—because I was thinking, holy cow, if I end up doing this math and it comes out $100 short, what am I going to do? It was one of those memorable experiences in trial.

Stu Pierson: Did you ever talk to the judge about it, or say to him, "Didn't you see me sweating?"

Bob Trout: No, I didn't. Surely he was able to see that I was completely flummoxed by simple arithmetic. And I suppose if I'd have had more maturity and gumption, I would have tried to figure out a way to engage the judge on that. In any event, the jury convicted the defendant. So that was one of those experiences at trial that stick with you. There was another case that I vividly recall from my first year in the U.S. Attorney's Office. This was a theft from the mail case. The postal inspectors had arrested a heroin-addicted prostitute for forging and cashing numerous welfare checks that had been mailed out to all the welfare recipients. So the question was, how did she get these checks? When the postal inspectors squeezed her, she said that she had gotten the checks from the letter carrier who was delivering the checks in the neighborhood. He would give her checks, which she would then forge and cash to feed her heroin habit, and in return she would turn tricks for him. I am sure that we had more evidence than the word of the prostitute for making the decision to prosecute the letter carrier, but we had some concerns about the strength of the case. The

prostitute was African American and the letter carrier was white, and back in the ‘70s interracial relationships were not as common as they are today. Lots of heroin plus the prostitute’s lifestyle had left her with a pretty ragged and unattractive appearance, whereas the letter carrier was married and outwardly seemed to be a very religious man. The idea that these two had a continuing sexual relationship seemed counterintuitive. So we were looking for some persuasive way to corroborate the prostitute’s story. She told us that when they were having sex, she couldn’t help but laugh whenever she saw his feet. She thought they looked really funny. And whenever she would laugh, he reacted very defensively about his feet. I assumed there was something very unique about his feet that she would be able to easily identify. And so I filed a motion to require the defendant to submit to a foot lineup. As you can imagine, the postal inspectors had a big laugh about this. They thought it was great sport and very funny that we were going to have a foot lineup. The judge ordered the lineup, and at the appointed time we had about seven barefooted men—other postal inspectors—plus the defendant behind a screen for the prostitute to pick out the feet of the letter carrier with whom she had been having sex. The only thing you could see were the bare feet behind the screen. I took one look at the lineup and was amazed at the collection of weird looking feet the postal inspectors had included in the lineup. I had thought they would’ve done a better job of screening the feet for the lineup so we would have seven pairs of completely normal looking feet, plus the defendant’s. Long story short, the witness could not do better then narrow it down to three sets of feet. Fortunately, she at least included the defendant’s among the three. In the end, I think the lineup was as valuable to the defense as it was to the prosecution, presumably more so because the defendant was acquitted at trial. For a good while, the story of the foot lineup was quite the

talk within the U.S. Attorney's Office. I hated losing that case, but of course, in time, the foot lineup was the sort of unusual situation that forges such rich memories of your time in the office. You can't make this up, so these are the stories that make a legal career interesting and fun. When I was in the U.S. Attorney's Office, I had one case that ended up in the Supreme Court. It grew out of a statute, since repealed, called the Youth Corrections Act. Its purpose was to rehabilitate youth offenders, not punish them, and so imprisonment was not an option for youths whose offense came under the Youth Corrections Act. The statute was silent about a fine. The Fourth Circuit had not addressed the issue, but all of the other circuits had said that a fine was punishment and hence inconsistent with the rehabilitative purposes of the Act. There was a Magistrate Judge in Baltimore, Paul Rosenberg, who had a point of view about this, and he was just gunning for the case that would present this issue because he saw the path that would take the issue to the Supreme Court. One day a youthful offender was arrested on a misdemeanor, and I was assigned to handle the case. Mike Frisch, then an Assistant Public Defender, later Assistant Bar Counsel in D.C. and now a professor at Georgetown Law School, was handling the defense. The case went to arraignment before Magistrate Judge Rosenberg, and you could just see in his eyes, this is the one. And when we left court after the arraignment, Mike Frisch and I were saying to each other, this was the one. And so we worked out a plea, and the defendant ended up with a fine. I'm not sure that a fine was part of the plea deal, but everyone knew Rosenberg was going to impose a small fine. And he did. At that moment, everyone—Magistrate Judge Rosenberg, Mike Frisch, and I—we all had the feeling that this would end up as a test case in the Supreme Court. The reason is that we knew the fine would be appealed to the Chief Judge, Edward Northrup, who was

conservative, generally pro-government. We expected he would affirm the decision imposing a fine, notwithstanding the case law from all the other circuits. And from there the case would go to the Fourth Circuit, also viewed as conservative, a court likely not to be persuaded by the fact that the other circuits had previously ruled that fines were not permitted under the Youth Corrections Act. So we were expecting the Fourth Circuit's decision would create a split in the circuit and that this pipsqueak little misdemeanor case would end up being decided by the U.S. Supreme Court. And that is exactly how it played out. When the Supreme Court granted cert. and set the case down for oral argument, I knew the case would be argued for the government by someone in the Solicitor General's office, but Mike would handle the argument for the defendant. He actually didn't have enough years in the Bar to qualify as a member of the Supreme Court Bar so he had to be specially admitted. But he did a wonderful job of arguing against Wade McCree, the Solicitor General, who argued the case for the government. Mike and I had a private bet. It was not whether he would win or lose. We both thought he would lose, that the Supreme Court would agree with all the judges below—that a fine has a rehabilitative purpose because it teaches accountability and that actions have consequences—but the question was whether he would get a vote. I won the bet; the Supreme Court upheld the fine with a unanimous decision. Again, this was at a time when some very strong liberals—Thurgood Marshall and William Brennan—were on the Supreme Court. You can probably tell how much I loved being an Assistant U.S. Attorney in Baltimore. I would wake up every day just pinching myself at how lucky I was to be doing what I was doing. And I couldn't imagine why anyone would stop doing this. It is ironic as I think about it now, but I remember thinking, what would it be like to be a defense lawyer? I don't think I could imagine doing

that. And again, I probably had those thoughts at a less mature time when I was without a lot of the experience that I have had since. I just thought that this was the greatest job—you sit on the right hand of God, you wear the white hat—why wouldn't you do this for the rest of your life? But of course, things change. In 1978, my wife and I had a baby boy, Carter Trout. Having children changes things. And the other thing that changed is that I had completed the typical tour of duty that Assistants have before they think about leaving the office. At around the same time, the First Assistant came to me asking me to handle either of two matters, both involved working with an Assistant technically senior to me but someone who was viewed, I think, as needing some supervision. I was supposed to provide that supervision, so it was understandably going to be awkward, since this Assistant had greater seniority. There could be tension. One of the matters would involve a potentially lengthy investigation. The other would involve a trial of a case that had been remanded for retrial following the Fourth Circuit's reversal of a conviction from an earlier trial. Again, because I didn't know how I felt about committing to a long investigation, I decided on the trial. The case was a bombing case. I don't think anyone had been killed, but I think someone was injured. There was a single defendant who had been convicted in an earlier trial of either trying to or succeeding in placing bombs in two cars on separate occasions. In a unanimous decision, a panel of the Fourth Circuit had reversed the earlier conviction, ruling that there should have been a severance, that the two bombings should have been tried separately. The other Assistant with whom I was now going to try the case, had been second chair to Jeff White at the original trial, and after Jeff left the office, she handled the appeal, which led to the reversal. So now I was going to have to try this case after it was remanded from the Fourth Circuit. As I studied the case to figure out how to try it, I realized

the case could not be tried unless we could use evidence from both bombings, because it was evidence from the first bombing that would allow us to prove that it was the defendant who committed the second bombing; and it was evidence from the second bombing that would allow us to prove it was the defendant who committed the first bombing. So the Federal Rules of Evidence should have allowed evidence relating to both bombings to be admitted, and there should not have been reason to require a severance of the two. Unfortunately, this argument was never made in the original appeal. I was convinced if the government had included that argument in the original appeal, the outcome might have been different, the Fourth Circuit might have affirmed the conviction. So I decided to seek a rehearing from the original panel of the Fourth Circuit. I didn't need the Solicitor General's approval to file for a rehearing because I wasn't going to ask for *en banc* review by the entire court. If I was going to ask for *en banc* review, then I would have to go to the S.G. But I said, "Let me take a run at this," because I didn't see how I could retry this case, that we couldn't get the evidence in that we would need to get in in order to get the conviction. And so I wrote a brief . . .

Stu Pierson: Did you tell the U.S. Attorney you were going to do it?

Bob Trout: Yes. The front office signed off on it. And so I wrote this petition for rehearing to the three judges—all three judges had agreed that the conviction needed to be reversed. And I basically apologized. I said it's our fault. We didn't tell you the argument that you needed to hear. And, sure enough, they reversed themselves three-zip.

Stu Pierson: Did you try the two together?

Bob Trout: No, they unanimously reversed themselves and affirmed the conviction.

Stu Pierson: That's a sleight of hand.

Bob Trout: Yes. So, I put that as one of my better legal efforts. And so I had been thinking, well, I'm going to be trying this case down the road or I'm going to be doing this investigation that is going to take a while. And none of that happened. "I wonder whether I ought to be thinking about leaving."

Stu Pierson: So how long were you in the U.S. Attorney's Office?

Bob Trout: Four years.

Stu Pierson: And then?

Bob Trout: Well, around the time of I began thinking it might be time to consider leaving, I got a call from a friend, John Foley, whom I had gotten to know through one of my dearest friends in life—I just loved him so much—Sandy Mayo, a law school classmate who was at Hogan & Hartson. John Foley's wife, Jan, had been at Hogan with Sandy, and that is how I had gotten introduced to Jan and John. John was working as of counsel for a firm called Dunnells, Duvall, Bennett & Porter. And one of the young lawyers at that firm—John Keith, who had been a couple years ahead of me at Episcopal—had left the firm to join Hugo Blankingship in forming Blankingship & Keith in Fairfax. John Foley called me up to tell me that Bob Bennett was looking for someone to help him in his practice. Well, I had met Bob Bennett because John and Jan had hosted an annual Christmas party at their house, and I had met Bob two or three times at the Foley Christmas party. Bob had been at Hogan and knew them. So we were acquainted. I called up Bob and came down and interviewed with Dunnells, Duvall, Bennett & Porter and they offered me a job. All of a sudden the question whether I should consider leaving the U.S. Attorney's Office collided with the reality of leaving the greatest job a young lawyer could possibly have. I was really torn. It occurred to me that this could be a really unique opportunity, a

small, young firm, with a nice litigation practice, including criminal work. It was exactly the sort of firm I thought I would be happy at, and one that did not seem to have many peers. But as I said, I was very torn, because it is one thing to muse about what might be out there after the U.S. Attorney's Office, and it another thing to leave a place that you have loved so much. And I think what happened is I asked for a lot of time to think about it—like six weeks to think about it—and they said okay. And then I went back to the U.S. Attorney, Timmy Baker by this time, who said he did not want me to leave, and he asked me to give him time to consider whether there was anything in the pipeline that he thought I should stay for. And while that was going on, one day the First Assistant came into my office to ask if I would try a bank robbery that was scheduled for trial. I was no longer trying bank robberies, but the Assistant who had been handling the case was unable to try it for whatever reason. I had about a week to prepare. I got the witnesses and exhibits all prepared, and on the morning of trial, I drove up from Silver Spring to start the trial. I have always been someone who believes there is nothing so important in the trial of a case as the opening statement. But on that day as I was driving up, I realized I was preparing my opening for the first time in the car, no more than an hour or two before trial is scheduled to begin. And I remember thinking: this is not good; this is wrong; you're mailing it in. You're not taking this seriously the way you need to; this is not the way to try a case. It was an eye-opening experience for me, and that was the time it really hit me, it is time to leave. And it was about that same time that Timmy Baker came into my office and told me he had nothing in the pipeline that was so sexy or intriguing that I should stay. So I left.

Stu Pierson: And what year are we in now?

Bob Trout: This is October ’79. I was at Justice—Main Justice—for exactly two years and the U.S. Attorney’s for exactly four years.

Stu Pierson: So Watergate had pretty much run its course? So you were actually watching that from . . .

Bob Trout: Yes. And, well, no. The President resigned in August of 1974, while I was at Main Justice.

Stu Pierson: But then there was all the follow-on.

Bob Trout: Yes. And I was following that. Bill Hundley, who had represented former Attorney General John Mitchell in the Watergate prosecution in the District of Columbia, later represented one of the principal defendants in the Mandel prosecution in Maryland, which was going on when I was in the U.S. Attorney’s Office there. Bill and Plato were then partners in the firm of Hundley & Cacheris, and of course Plato and Bill’s son, John, are now my partners in this firm. So it really is a small world. The Mandel case was obviously a very high profile case, especially in the Washington and Baltimore areas. So it was a very interesting time to be an Assistant in the office when that case was going on. One of the prosecutors on the Mandel team, the third chair, was an Assistant by the name of Dan Hurson.

Stu Pierson: Yes, I know Dan.

Bob Trout: Do you know Dan?

Stu Pierson: Yes. Dan actually was—he was at Verner Liipfert for a while and I saw him not too long ago at a Securities Litigation . . .

Bob Trout: Is that right? So Dan was like the third guy on the team. He is a very smart guy, very funny, very good, and he was part of the carpool. And so we would talk about

what was going on in the trial while carpooling. Generally, it was about what had gone on, because the entire team was very closemouthed about the case because they were very fastidious about not having any leaks. But one day, without telling us anything more, Dan simply said, "You guys might want to come in to watch today." That was going to be Barney Skolnik cross-examining Governor Mandel in his corruption trial. In a nutshell, the government's case related to things that the governor had allegedly done to help his friends, the owners of the Marlboro Race Track, get more value out of their investment through certain actions of the legislature. The government was able to prove that these friends had bestowed a lot of personal financial benefits on the governor, and the government was able to show that the friends had an ownership interest in the racetrack. But the defense position was that they had kept secret from the governor their ownership interest and their interest in legislation that would have given additional racing days to their racetrack. And so after Dan Hurson suggested we attend the trial that day, we saw Barney Skolnik's cross of the governor. Barney locked the governor into the defense story that the governor didn't know about his friends' ownership in the racetrack and their interest in the legislation to increase the race days. The governor said that he rarely spoke with his friends over the phone. And that was true, except for one day when there were something like over 20 phone calls between the governor and his friends. And that was either the day of or the day before the day when the legislature was considering whether to grant additional racing days to the racetrack. The governor had denied such contact so it was very dramatic when Barney presented the phone records that showed otherwise. It was very powerful. The governor and his co-defendants were convicted. And as a federal prosecutor, I casually and naturally jumped to the conclusion that Mandel was a bad guy. That's a mistake prosecutors often

make. They see things in black and white, seldom in shades of gray. Some time later, after his conviction was ultimately overturned, I spent a lot of time with Mandel, for we worked together on behalf of a mutual client who was being investigated for securities fraud in Maryland.

Stu Pierson: This is an SEC enforcement proceeding?

Bob Trout: No. It was like the state version of the SEC.

Stu Pierson: Oh, Yes.

Bob Trout: And so I spent a lot of time with Marvin Mandel. I never told him what my background was, and I don't know whether he knew that I had been in the U.S. Attorney's Office at the time that he was not feeling very good about the Office. But a nicer man you just couldn't meet.

Stu Pierson: Who was his lawyer during the criminal case?

Bob Trout: Arnold Weiner.

Stu Pierson: Arnie and I got into some case together. I can't remember what it was. But I also had a witness in the Mandel case, just somebody who came in and said I saw such and such.

Bob Trout: Right.

Stu Pierson: Arnie was an unusual guy.

Bob Trout: Yes. And he and I have had cases together and we've had cases against each other.

Stu Pierson: He used to call himself "Never Plead 'Em Arnold."

Bob Trout: Well, he is a very good lawyer, very thorough and very good. When I was working with Marvin Mandel now in the early 1990's, he took me to a couple of bars where

he would meet his wife, whom he just adored. It was very sweet to see how much they were in love. He couldn't have been a more gracious or nicer person to deal with.

Stu Pierson: Did you fix the enforcement problem?

Bob Trout: Well, it depends on how you define "fix." It ended. Yes, we worked it out.

Stu Pierson: So Dunnells Duvall, you're there for how long?

Bob Trout: Well, I arrived in 1979 and I was working with Bob Bennett a lot, and then I also wanted to learn civil practice. And Dick Duvall was really doing a lot of that work, and so I was working with both of those guys.

Stu Pierson: All defense?

Bob Trout: No. Some civil plaintiff's work—Bob and I tried a medical malpractice case on the plaintiff's side—and some civil defense work. We had a small firm. I believe I was the fifteenth lawyer in the firm when I joined. I became a partner in 1981, so that took a couple of years. And we were just doing a lot of Bob's white-collar criminal work. And I was having fun. I was enjoying it. Bob, I think, figured out the Department of Justice was starting to look at corporate . . .

Stu Pierson: Malfeasance.

Bob Trout: Yes. As I said, when I started at the U.S. Attorney's Office, it was bank robberies, it was drugs, it was guns, it was interstate transportation of stolen property—there were different cases like that—trials lasting no more than a few days—with some political corruption, but not a lot of corporate malfeasance. I think Bob found himself in a place where the large corporate law firms, when they got these criminal matters, they would say, "Okay, we don't want to dirty our hands with . . ."

Stu Pierson: We need someone who knows how to do that.

Bob Trout: Yes. Right. And so he was getting a lot of that. He started getting a lot of that work. And it was great work with well-heeled and well-financed clients. And Bob really started to develop that as one of the go-to people, I think, in the white-collar practice. Carl Rauh joined our firm. He had been First Assistant under Earl Silbert, and after Earl left, Carl was Acting, or Interim, U.S. Attorney appointed by the court.

Stu Pierson: Carl Rauh is the only lawyer in government who has ever given me a written deposition.

Bob Trout: Is that right?

Stu Pierson: Stunning.

Bob Trout: Chuck Ruff came in as U.S. Attorney, and Bob and Carl had a long personal and professional history together, from the U.S. Attorney's Office. They were very close. And so Carl joined our firm, and they had a really great deal going. I think Bob was in the CEO role and Carl was in the COO role because he could really manage the cases. They were a great team. By then I was starting to move out of Bob's orbit. I was working with Dick Duvall and I was also trying to develop and work on my own cases and create a persona for myself. I think Bob was a better partner to me than I was to Bob because I am sure I chafed in the role of his second. And where I wanted to . . .

Stu Pierson: Spread your wings.

Bob Trout: Spread my wings. Bob couldn't have been more generous to me. Bob had a very nice network from the U.S. Attorney's Office here in D.C. And so when I arrived here having been in the U.S. Attorney's Office in Baltimore, which is where my professional contacts were, Bob spent an incredible amount of time and energy introducing me into his network to the point where it became my network, even though I hadn't been in the U.S.

Attorney's Office here. And I am forever grateful. Although I'm not sure, at the time—I think he knows how I feel about him now—but I'm not sure, at the time, that I conveyed my appreciation the way I should have. So, anyway, I moved a little bit out of his orbit. The very first case I ever had in private practice was a referral from my current partner and dear friend, Plato Cacheris, and my former colleague in the U.S. Attorney's Office, Barney Skolnik. Barney had left the U.S. Attorney's Office some time before me, and he was on his own but sharing space with Bill Hundley and Plato Cacheris. And Plato and Barney were representing two principals in a company that was being investigated in Harrisburg, Pennsylvania. They had a couple of employees that needed representation, and so the very first case that was referred directly to me was from Plato and Barney. That reminds me of my first encounter with Plato. When you're in the U.S. Attorney's Office and you are handling these cases and you tend to measure your progress in your career with . . .

Stu Pierson: How good the guys on the other side are.

Bob Trout: Bingo. And I had a case with Plato when I was in the U.S. Attorney's Office. And so I was starting to think that I was getting somewhere when I had a case against Plato. And there was another investigation that I was handling, a white collar case, and Bill Hundley was representing the putative target. I would see Bill and he would chuckle, tell some funny stories, but seemed content to have me simply conduct the investigation to the end. He was not the least bit aggressive. As I looked at the case and what we had, it seemed that the FBI had heard something about this target, had decided he was dirty, and was certain if we kept digging we'd find something. He may have been a sharp operator, but what I thought was missing was evidence of a crime. So we didn't go forward on that one. But that is how I came to know both Plato Cacheris and Bill Hundley. I stayed in touch

with Plato and with Bill. They were fast friends and enjoyed a great practice together in the firm of Hundley & Cacheris. In the mid to late 1980's, with sons going off to college, Bill decided he wanted to make some more money so he decided to join a large firm. And then one thing led to another, and Plato decided he was going to talk to us at Dunnells, Duvall, Bennett & Porter. He joined our firm around 1987 or 1988. This was about the time we moved our offices at 1220 19th Street to more elegant space at 2100 Pennsylvania Avenue. Plato was now working there, and when there was a civil case that came to him, he typically would ask me to get involved in the matter. There was one such case that was filed in federal court in Alexandria that ranks as one of the more unusual and fascinating civil cases that I've had. Our client was a Saudi-American businessman who was sued by a couple of former partners on a deal that supposedly had gone bad. There was something about the suit that didn't make sense; it seemed more pre-textual rather than a genuine business dispute. One of the former partners was connected to a very wealthy Arab businessman and the other was connected to the Saudi royal family. We were able to establish facts that allowed us to bring a counterclaim, and with the benefit of an affidavit from a witness in London, we were able to put ourselves in the driver's seat. One Sunday I was at home with my children, about to take them back to their mother's, and my client called me from London. "Can you come to London tonight?" he asked. So that night I flew to London and for the next two weeks I stayed at the Dorchester Hotel as we tried to settle the dispute. This involved daily meetings alone with my client and daily meetings alone with someone who I was told was a confidant of the Saudi King, someone not officially connected to the King but who supposedly spoke for him. I spent many hours with this person—we developed a nice working relationship—but I never received confirmation that

the intermediary was representing the King. He spoke only about "his principal." Over the course of the two weeks there were many ups and downs in the negotiations, but in the end we were able to get it settled. I never knew the amount my client received in the settlement of the lawsuit that began as a suit against him. But he became a very rich man. Apart from having two weeks in London staying at the Dorchester Hotel, on a professional level the shuttle diplomacy over an extended period made for one of the most interesting two weeks I've had in the practice. My big regret was that I did not maintain a journal of each day's activities. I am forever grateful to Plato that he asked me to handle that civil case. Getting back to the Dunnells Duvall firm, by about 1990 we had close to 60 lawyers. And Bob Bennett had a pretty robust practice. The old Ill Winds investigation was going strong, and there were a lot of procurement fraud cases. They were coming Bob's way. And so we would do what firms do when they are trying to look at their belly button and figure out what life is all about. And what's the future.

Stu Pierson: What's our strategic plan?

Bob Trout: Yes. What is our strategic plan? And so we booked a hotel room and spent a Saturday there seated around the table trying to talk about what the future holds for us. And by this time, I think the legal consultants from Hildebrandt were pushing the idea that mid-size firms were dinosaurs. There was no way that mid-size firms are going to survive. And we read all that. But we thought we were different. It was true of every other mid-size firm, but it wasn't true of us, because we were special. I remember this group therapy exercise, the retreat about what do we want to be when we grow up and how do we want to get there. And I remember looking at Plato. Plato was a good sport, and I knew this was not his first choice of how he wanted to spend his Saturday, and it certainly wasn't mine.

But Plato was a good sport. He was there. And in due course, after a couple of years, Plato announced that he was leaving to go back to the townhouse practice that he had had before with Bill Hundley, although it wasn't with Bill. It was with another lawyer.

Stu Pierson: Named?

Bob Trout: David Tuohey. David had been at Arnold & Porter, and I can't remember more particulars about how they came to know each other or decided to practice together. But I think Plato was really ready to go back to a small setting. And so I went into Plato's office and I said to him, "Plato," I said, "I remember looking at you at this Saturday retreat that we had, and I remember thinking, 'What is Plato thinking about all this?'" And he says, "Well, I'll tell you what I was thinking. I was thinking, I want to be out of here." And he was no more specific about whether "out of here" meant "I don't want to be in this hotel room right now" or whether he was saying "I don't want to be in this law firm."

Stu Pierson: This is something I don't like.

Bob Trout: He didn't get specific about that, but it was ambiguous enough that you could go either way. So he left and at some point later, not that long after that, Bob Bennett announced that he was leaving and a number of lawyers—a large number of lawyers—were going with him over to Skadden Arps. I think that he realized that the large firms had now woken up to the fact that they needed to . . .

Stu Pierson: This is business.

Bob Trout: This is business. And they're going to keep the corporate criminal practice in-house. And if Bob didn't snap it up, somebody else would, and then Covington would do the same thing, and Kirkland & Ellis would do the same thing, and Sidley and so on. And of course that is exactly . . .

Stu Pierson: What happened.

Bob Trout: What happened. And so not only would there be business for him if he left for the big firm, conversely, if Bob stayed at a smaller firm, a significant part of his practice might dry up because the large corporate law firm would keep that work in-house rather than refer it out, as they had before. So, if we had been smart, I suppose, we would have realized then, when Bob Bennett left, that the law firm consultant Hildebrandt had it right, a firm our size could not survive. But we didn't figure that out when Bob and the other lawyers who were part of his practice migrated to a big firm. And so we all decided, let's just suck it up and stay the course. And with some empty offices to fill and some business void to fill, we haphazardly recruited other lawyers to join our firm. While our body count grew, the quality was diminished, as was the cohesion and culture within the firm. And a couple of years after Bob Bennett and his team left for Skadden, the leader of our transactional practice, Steve Porter, announced that he and the lawyers who were part of his group were leaving to go to Arnold & Porter. And at that point, we figured it out. During this period of uncertainty for my firm, I was experiencing my own professional uncertainties. Divorced and single, I was trying to make my way in a new personal life, and I was more than a little distracted in my law practice. I suspect that's not uncommon in that situation.

Stu Pierson: No, I understand as well.

Bob Trout: So I was not as focused, I think, on my practice. And I'm sure I was not as productive and I didn't pay attention as much to the internal marketplace. Dick Duvall was a generous mentor when I joined the firm and became a good friend of mine. He talked about how often people neglect the internal marketplace. Everybody is trying to figure out

how to make rain in the external marketplace, but people oftentimes ignore the internal marketplace, that is, making sure that your partners and colleagues think of you in the first instance for whatever it is that is going on. And I'm sure I neglected that marketplace, too. I was a little bit at sixes and sevens during that time, so I went off in 1991 to gaze my navel on a trek to Nepal. And I did it literally at the last minute. I didn't really have a lot going on. I think we were still trying to figure out how do we recover from this loss of Bob Bennett?

Stu Pierson: And Steve Porter.

Bob Trout: Well, Porter hadn't left yet. This was '91. Porter left around '93, I think—the beginning of '93. So I basically—within about two weeks—all of a sudden said I want to do this. And so I put this trip together with about two weeks' notice and left for a month.

Stu Pierson: On your own.

Bob Trout: Yes. I went with a group called Mountain Travel, but, yes, I didn't know anyone else in the group. And it was too abrupt and probably irresponsible in terms of my relationship with the firm, I think, because I just left. I left for a month, and that is unusual.

Stu Pierson: Did you get your head straight?

Bob Trout: I think so. It was great. It was a wonderful time. I don't know that it was immediate. I was in different relationships with women, so I was also trying to sort those things out. And I was trying to take care of my children. So I had a lot of distractions. It's not like I just came back and there was this switch that had turned. But it was definitely a good thing to have done. I had a good friend whom I had been seeing. She was very entrepreneurial and knew a lot of people. She was very helpful as I worked on what I ought to be doing. Did I even want to be continuing to practice law? And so I spent some time,

at least a couple of years, musing about that issue. And I probably wasn't all that productive, I think, as a partner and a lawyer. I wasn't all that engaged. And I wasn't having that much fun.

Stu Pierson: Okay. So what year are we in?

Bob Trout: That would have been—call it the end of '92—let's say the end of '92.

Stu Pierson: The merger with Holland & Knight was when?

Bob Trout: That was effective beginning of 1994. [END OF SECOND SESSION]

ORAL HISTORY OF ROBERT P. TROUT

Third Interview
December 22, 2014

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 December 22, 2014, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the third interview.

Stu Pierson: Okay. December 22, 2014. We're at 1350 Connecticut Avenue. Bob Trout across the table. Stu Pierson here. This is our third session into Bob's life and times, and I think where we left off last time we were going to talk about the domestic side of your life and your first marriage.

Bob Trout: Well, I grew up in the South and it was a bit of a transition period where society was moving away from a world where the wives were the homemakers and stayed at home; and the husbands worked and provided the financial security for the family. And probably in the South, they were later in that transition, I would guess. But in any event, I think when I was going to college, a lot of people were finding mates in college, and then they finished college and they got married—or soon thereafter. And I would say that was what happened for my wife and me. We graduated from college at the same time. I went to Washington & Lee. She went to Hollins College. We dated all through college. We basically didn't have a lot of experience meeting different people with different interests and backgrounds. And so we settled into that world together. Her name is Jane Cocke Berkeley, also known as Taisie. That's her nickname, and everybody knows her as Taisie. We were married in 1972 in Charlotte, North Carolina. And we came to Washington. We were trying to figure out what the future held for us. We wanted to experience the city. I think I mentioned earlier that we came to Washington and lived in Old Town for about six

months or so and really weren't doing anything in the city. And so we moved to Georgetown, and then had an absolute ball. But then I got a job in the U.S. Attorney's Office in Baltimore. The law at the time required me to live in Maryland, so we moved to Silver Spring. We continued to do a lot of social activities downtown. And then we had two sons, Carter in 1978 and Philip in 1980. And that obviously changes your life when you have children. And it did ours. My perspective on it was that Taisie was trying to figure out her world. She had gotten a job when we came to Washington. At a certain point she went to work on Capitol Hill for Jim Martin, who was a Congressman from Charlotte, her hometown. And I think as you get to a point where you're trying to figure out what's next, you've experienced these transitional periods. For example, we go to kindergarten for a couple of years, and then we go to elementary school for what, five or six years. Then you go to junior high and after that you go to high school. And then you go to college. And in my case, I then went to law school; and then to a job for a couple years in the Department of Justice; and then to the U.S. Attorney's Office, which is typically for a stint of no more than a few years. And there are all these discrete breaks that are experienced as just discrete steps in the path to the rest of your life. And then you leave the Department of Justice or you leave the U.S. Attorney's Office, as I did, and you take what appears to be the career decision to go work at a law firm. And, at least at the time, I think there was some notion that you go to that law firm and that is where you work for the rest of your life. We figured out in the meantime that it really doesn't need to be that way. But I think when you've had these discrete stages for the first thirty or so years of your life, you get use to periodic change in your life. But then you settle upon what, for the first time, is viewed as a permanent job, all of a sudden you get to that place where you say to yourself, "so this is

the way the rest of my life is going to look." It can be—disconcerting is not the right word, but it can be . . .

Stu Pierson: Unsettling?

Bob Trout: Unsettling, yes. And I think I experienced that and I don't know whether you call that a midlife crisis, but my guess is Taisie was going through the same thing. She was looking at what is her life going to be like? She had grown up in Charlotte, and after high school her mother was her only living parent. Her mother was of a generation, I think, where the girls were expected to go to college, to get the credential that was needed to attract someone who was going to be successful in life. And then they marry that person and then they're in good shape. They have financial security. They would do all the volunteer stuff and take care of the children and live a bit of the social life. At least as I was able to perceive it, that was the world our parents generation—at least in the South—inhabited. And I don't think that is what Taisie really wanted. But at the same time, it's not like she had developed a particular career. So I think there were some frustrations there for her, some personal frustrations. We were both looking at this situation where we had arrived at a place where we were supposed to be settled and have a settled view as to the future. But I don't think that we did. And I think that was probably in part because we had so little experience in relationships. It was the only relationship each of us had ever really had. And so I think we drifted apart. And struggled. And in 1984 we separated. The children were six and four. And we worked all of that out. I wasn't making a lot of money at the time. By now I was a partner in a small law firm, Dunnells Duvall Bennett & Porter, but I was not making a lot of money. And certainly, even in the large law firms, they weren't making money the way they came to make money in big firms. So we separated. We

remained friendly and cordial, and we, I think, were both very committed to the idea that both parents were really important to the children. And we needed to support each other in that. And so as difficult as these things can be and as angry as you can get at various different points in time, I think we were both pretty careful to keep that between us and not expose the children to any of that. We ended up getting divorced in 1987. We actually started a trial. Our home had been in the Old Farm section of North Bethesda, and Taisie and the children were still living there. Farmland Elementary School was right across the street from the house that Taisie and I had bought in about 1980, shortly after I left the U.S. Attorney's Office to take the job in Washington. That is where Carter was in school. Philip was in the first grade, at Green Acres School. Philip was born in August and Green Acres had a pretty rigid approach and philosophy that if it is a young boy who's born after June, they need an extra year, so he needed to be . . .

Stu Pierson: Slipped back.

Bob Trout: Slipped back. And I was not in favor of that, although I was clearly wrong about that and believe Philip benefited a great deal from being held back a year. But at the time, I had a different view and that was one of the issues that we were confronting. I also felt it was important for Philip to have the community of his classmates at the school across the street so that he would be fully integrated with his classmates in the neighborhood. So we had our differences about what to do. But Taisie got to make the call on that because they were living with her. She was still in the house. I had moved to a rental house in Chevy Chase, Maryland, very near the Brookville Market. I had the kids with me every other weekend, plus a couple of nights during the week, when they came over to my house. So we are going to trial.

Stu Pierson: Same side or opposite sides?

Bob Trout: We're on the opposite sides. We're going to trial—

Stu Pierson: Concerning the divorce?

Bob Trout: Concerning the divorce. We drew Judge Latham for our judge. Warren Donahue was my lawyer. Marna Tucker had started out as Taisie's and then, when they went to Montgomery County, Rita Bank represented Taisie. I had started out with Peter Sherman, but when it appeared we were headed to court, Peter suggested that I hire Warren Donahue, who later became a Circuit Court Judge in Montgomery County. He was a wonderful person. Very level-headed. So we went to trial and Taisie took the witness stand as the first witness and started talking about this issue of the private school, Green Acres, versus the public school, Farmland. Well, it turned out that Judge Latham lived in that area. And he, I think, thought that Farmland Elementary School was probably, if not certainly, the best elementary school in the universe. And so he stopped the proceedings and he said, "Is this an issue in the case?" And the answer was, "Oh, yes, it is an issue. You know, we've got to figure out where the children are going to go and what the costs are going to be," etc., etc., etc. And Judge Latham said, "I can't hear this case. Farmland Elementary School is absolutely the best elementary school in the world." And, of course, because we separated at the end of 1984 but we not able to get a trial date until 1987, I was concerned that we were going to be put back at the end of the line if we couldn't try the case that day. I didn't think more delay was in anyone's interest. And so Warren asked him to intercede with the assignment office to make sure that we got a new judge quickly. Judge Latham said he would do that, at which point everybody was getting ready to leave. By now I was admitted to the Maryland Bar, and I had appeared in court in Montgomery County, but I

did not know Judge Latham. But as we were leaving the courtroom Judge Latham said, "Bob Trout, can I see you in chambers for a minute?" And I said, "Sure." No one else was invited. And I went into his chambers, and he wanted to talk about the Little League baseball team that I was coaching and the local Farmland kids. It had nothing to do with the law, or with the case, or with anything else. He just wanted to talk about what was going on with the kids in the neighborhood and the Little League team. I've never discussed this with Taisie, although we're good friends and see each other regularly, but I've wondered if that meaningless little secret sidebar with Judge Latham may have spooked Taisie and her lawyer into thinking I must know every judge in Montgomery County, because within two days of leaving Judge Latham's courtroom, we got a settlement proposal that was completely different from anything that we'd gotten before. And we quickly resolved the case. The children, as they got older and had more challenging academic burdens, became a little bit too much for me to pick them up when they had homework, for this involved my picking them up in North Bethesda, driving them back to my house in Chevy Chase, getting dinner going, serving them dinner, and driving them back in the morning. It became a bit much. Then it became one night a week and then eventually, when they got into junior high and high school, my time with them during the week amounted to my just going out and taking them out for dinner. But I would spend a lot of time with them on weekends. And even if it wasn't my weekend, I would go to every sporting event I could manage to go to.

Stu Pierson: Where were they in high school?

Bob Trout: Well, they started out at Walter Johnson. Carter was in the ninth grade. He had some cousins, Taisie's nieces in Baltimore, who had gone away to school and had a

terrific experience. Taisie and I had both gone away to school, but I don't know that we thought that this is what they needed to do. It occurred to me that since they were not in my house, there might be some benefit to male role modeling that they might get going away to school. So they started thinking about it, and Taisie—because her nieces had this great experience and were encouraging them—was certainly thinking along the same lines. My godchild, the daughter of my college roommate, was at Lawrenceville. She was a year older than Carter, and she was encouraging him to come to Lawrenceville. He went up and looked at it and really liked the school. And I believe Taisie took him on some other tours. The school was three hours away, and so it was away, but it was still close enough to get to. So that is where Carter went. Philip could not understand why anyone would do that. He was now in junior high and had no interest in that at all. He would visit and go to events up there, Parents' Weekend, football games and the like. And so he became a little bit more open to it. And then when he was a ninth grader at Walter Johnson, I think they had close to 40 students for each teacher. He would get back a paper with a grade, but otherwise there wouldn't be a mark on the page. He was getting really no feedback: so if that is a B, what do you need to do to get an A? And by the time he finished his freshman year of high school, he was pretty much committed to the idea of going away. He toured some schools. He really liked Andover, and they really liked him. But then he visited Lawrenceville, and they put on a big push. Maybe it was as simple as Lawrenceville was the last school he visited, but in any event, that is where he went. I think they both had a great experience there; it was really valuable. By the time my sons were in high school, my parents had both died. My father and stepmother had bought a timeshare in Grand Cayman where they spent three weeks each winter as a break from the cold weather in Roanoke. In 1990, my father

had a massive stroke while in Grand Cayman, he was brought to Miami where he died on Valentine's Day that year. He was 77. And so we came back to Roanoke and started making funeral arrangements. Taisie was actually quite close to my father. And so I invited her to come down and she replied, "No, I don't think that's a good idea," for whatever reason. And then on the day of the funeral, she called me, just in tears, and we had a very emotional call. She was very sorry that she had not come down, and I would say we haven't had a cross word between us ever since that day, ironically Valentine's Day. Between 1984 and that day in 1990, we did.

Stu Pierson: There were plenty.

Bob Trout: There were plenty. But it was amazing. It was like a light switch. So it really changed—the relationship was fine before that day—but it became really pretty special after that. She is really a remarkable person.

Stu Pierson: Does she live in the D.C. area?

Bob Trout: She does. She remarried—well I remarried in 1995. She remarried probably in the mid-2000s. But it didn't last; it was short-lived and rightfully so. It lasted about a year. And for a good number of years, she and Rod Boggs of the Washington Lawyers' Committee have been together. We see them around town a lot. And my wife, Janet Studley, is an extraordinary person—an extraordinarily generous person—and she has gotten along with Taisie, and Taisie has gotten along with her. They're both really nice people, and so they get along like two peas in a pod. So that has been great. And we've got—we now have grandchildren and so we'll have grandchildren visiting from California.

Stu Pierson: Who's in California?

Bob Trout: Carter is in California.

Stu Pierson: What's he doing there?

Bob Trout: He is now with Mozilla. For a number of years, he was with Yahoo. He went to the University of Virginia for college. He then went out to San Francisco afterwards.

Stu Pierson: What does he do at Mozilla?

Bob Trout: Business development. While he was at Yahoo, he started an executive MBA program at Berkeley and Columbia, and received an MBA from both schools. He would spend time in New York at Columbia, and time at Berkeley. Carter's wife, Lindsay, was originally from Charleston, South Carolina, and she also went to UVa, but the two of them did not start seeing each other until a year or so after graduating. She had started out in New York, but made her way to California where she received her MBA at Stanford. She is with an executive search firm, Egon Zehnder. So both Carter and Lindsay are engaged in business, primarily focused on high tech.

Stu Pierson: And Philip is at Hogan?

Bob Trout: Philip is at Hogan. He also went to Virginia. He was President of the Inter-Fraternity Council at Virginia. In light of the *Rolling Stone* magazine article about rape in a fraternity house, the issues he had to deal with were a walk in the park compared with that. There was an incident that he had to deal with, and I think it may have influenced him in considering a career in the law. There was a blackface incident—it was Halloween—and it created quite a stir, including some national press about it. It was a fraternity guy, and the President of the University, John Casteen, said to him, in effect, "Fix it." And so he set about trying to figure out how to fix it. There were some interesting issues—can the University or can the Inter-Fraternity Council take action against such expression? The

University of Virginia being a state university, there are First Amendment issues involved. So he talked to me about that. And he talked to the lawyers at the University of Virginia about that. And he really started to get into this whole issue about legally what can they do. I can't remember what they did to solve the problem, but apparently everybody agreed it was a good solution. And he got a lot of credit for it. The editorial page of the school newspaper was very complimentary about the way they dealt with it. I think that planted the seed for his interest in the law. But, as I say, that was a walk in the park compared with what they are dealing with now, with allegations of rape in a fraternity house, even if that *Rolling Stone* article has now been debunked. Philip graduated in 2003 and was interested in working on a political campaign. There was some sort of an Indian gaming referendum on the ballot in Maine. He was on the side of trying to get it approved. So there was money there, and they got paid. He spent a summer in Maine until the referendum, which was in the fall of 2003. So he was in Maine at a pretty good time to be in Maine. And then he came off of that, and he went to work for Howard Dean, who at the time was leading the Democratic field for President. He was in New Hampshire for that primary, and he would take Howard Dean around to various homes.

Stu Pierson: So he was there for the primal scream?

Bob Trout: Yes. And they sent him home and basically said, "We'll get back to you when we need you." And they didn't need him again. So from there he went to the Kerry campaign. And that is where he met Rachel Cotton, who is now his wife. Philip was involved in communications on the Kerry side of the campaign, and Rachel was involved in communications on the Edwards side of the phone. After the campaign they continued to see each other, and in due course she started law school at Yale, and he started law school

at Virginia. They maintained that relationship over the course of three years. Then they both came back to Washington. After working for a year at Covington, she clerked for Henry Kennedy on the federal district court here and then for Diana Motz on the Fourth Circuit. He was going to work at Hogan—it was right at the 2009 financial meltdown—and they basically had over-subscribed for associates. So they were offering deferrals—stay away for a year, and we'll pay you half what we were going to pay you. And while it was part of the deal that you could not work for another law firm if you're going to take our money, they made an exception allowing him to work at our small firm. So he worked here for that year and it was great for me and I think for him. He got to work with his dad. I got to work with my son. He didn't need to make a career choice, but he had the experience of seeing what it was like.

Stu Pierson: Real exposure?

Bob Trout: Yes. And he had the experience of working in a small firm to see what that was like, again without making a career choice, and so he was able to taste these experiences. While Philip was here, we had a very fun case come in the door that involved doing some pro bono work for the District of Columbia. The Council of the District of Columbia asked me to serve as Special Counsel to the Council, performing an internal investigation into allegations of corruption in certain construction projects involving the Department of Parks and Recreation. The matter involved a great deal more work than I had been led to believe when I was called to see if I would take this on. As it developed, my partners, Amy Jackson and Gloria Solomon, worked with me on this. And so did Philip. He did great work, so when Amy was nominated to be a federal judge, she asked him to be . . .

Stu Pierson: Be her clerk?

Bob Trout: Be her clerk. Which he did. He didn't want to clerk for more than a year anyway, and there were a lot of judges who really were insisting on two-year clerkships, and so that eliminated a lot of potential clerkships for him. But this was perfect because, while Amy wanted two-year clerks, she needed someone to be a one-year clerk so she could stagger it. And so he was her first law clerk. Actually, by the time she was confirmed, it was less than a year, but he got the value of it, I think, and really enjoyed it. And she has just been a wonderful mentor for him.

Stu Pierson: How long was she here?

Bob Trout: She was here for eleven years.

Stu Pierson: And before that?

Bob Trout: She had been at Venable after she left the U.S. Attorney's Office in, I want to say, the mid-1980s. At a certain point, she took a leave of absence to take care of her children. We had had a case against each other years before and hadn't seen each other in a long time. But in 1999 I saw her at a reception, and she came up to me and said she wanted to pick my brain about opportunities for lawyers to work part-time in the District. She said that she was not asking me about anything at my firm, but really just to talk to someone in the Bar and get a sense of what is out there. So we had lunch. She was very well regarded at Venable. She had worked with Ben Civiletti a lot. And her husband at the time was a lawyer at Arnold & Porter. We had gotten a lot of work from Holland & Knight. My former partner, Dick Duvall, had been very, very generous, always thinking about how he could help me. With that in mind, I thought that her relationships with a couple of big firms would help us. And so when we had lunch, it was always my intention to persuade

her to join our firm. Amy is incredibly bright and efficient and a wonderful lawyer. So she joined us, and she was just a huge asset for our firm. We worked together on many matters, we became the dearest of friends. I consider it one of the blessings of my professional life that I had the opportunity to work with Amy as my partner.

Stu Pierson: Was she part-time the whole 11 years?

Bob Trout: Pretty much, although you wouldn't know it from the amount of work that she would crank out. She was very disciplined about it. She left at a certain hour. Whereas many people who say that they intend to go part-time say that it doesn't work out being part-time. She . . .

Stu Pierson: Kept to a schedule.

Bob Trout: Right. Now there were times when we needed to take trips. There were times when we were going to be in court. And she would know that sufficiently in advance that she would make arrangements to deal with that. Everything she does is very, very efficient. So if it is organizing her time, she is efficient about knowing how to go about doing that—lining things up sufficiently in advance so that it all ends up working. We never had a snafu owing to her schedule. By the time we were trying the Jefferson case—that was two months in trial—both of her sons could take care of themselves and deal with Mom not being there.

Stu Pierson: When was the Jefferson trial?

Bob Trout: The Jefferson trial was in the summer of 2009. Early that year, after Obama was inaugurated, Amy came into my office to tell me that she had decided that she wanted to be a judge. And if that didn't work out, she said—and I think it's true—that she couldn't imagine being any place other than practicing with us. But she wanted to give this a shot.

And so she applied to the Commission that would be making a recommendation to Delegate Eleanor Holmes Norton, and she asked me to support her. So I wrote a letter to Greg Craig, who was White House counsel, and I wrote a letter to the Commission that would be making recommendation to Delegate Norton. And after the Senate confirmed her, she asked me to speak at her investiture. It was a proud moment for me. I remarked on that occasion that I was as certain as I've ever been that she was going to get this because she is so good. And I said that she probably thought I was being generous by writing all the letters that I wrote. But I said I've been living in this town for 40 years, and I know how this game is played: when the outcome is certain, you jump on board so you can take credit when it happens. That got a good laugh. Amy was just a really special lawyer with us, so it was great having her here. One of her dearest friends now is my partner, Gloria Solomon, who is in serious competition with Amy as being the smartest person that has been at this firm. That's a competition they would have at any firm. I had known Gloria since the early 1980's when she was a summer associate and then associate at Dunnells Duvall Bennett & Porter. At the time there were probably about 20 or 25 lawyers at the firm. We used to tease her that she doubled the firm's IQ when she joined us. She is just super, super smart. In 2005, after leaving a large firm, she joined our firm, I like to believe because she enjoyed working with me. And once Amy and Gloria got to know each other, they bonded in a very serious way. And every weekend they were taking walks together and spending time together. And Gloria, Amy, and I tried—the three of us tried the Jefferson case together. It was a hoot. But going back to 1980, I had left the U.S. Attorney's Office, and I joined Dunnells Duvall Bennett & Porter with the idea of taking the Maryland Bar. By then lawyers who had a number of years of practice who wanted to waive into

Maryland were required to take a lawyer's bar exam—a short session focused on Maryland procedure. The problem for me was that the rule required that your prior practice have been in a state where you were admitted to practice. In my case, my prior practice ironically had been as an Assistant U.S. Attorney in Maryland, so I did not qualify for the lawyer's bar exam. I had to take the full exam, which meant one day of the Multistate—I had not taken a Multistate before—and the next day essay questions. Happily, I passed. My next challenge was to figure out a way to get into the Eastern District of Virginia, the so-called Rocket Docket. And in those days, it really was a Rocket Docket. We had enough cases there that it made sense to become of member of that federal court, but even though I was a member of the Virginia bar, there was some bar to my admission based on the fact that either I was not a resident of Virginia or did not have my principal office in Virginia. But as I examined the fine print, I could waive into the Eastern District of Virginia if I was a member of the bar of the Western District of Virginia. And in the Western District, I could waive in if I were simply a member of the Virginia Bar. So one day I flew to Roanoke, was admitted to the Western District, flew back to D.C. and in due course, used my Western District membership to waive into the Eastern District. And happily I've been able to maintain a practice in that federal court.

Stu Pierson: So Dunnells Duvall until . . .

Bob Trout: 1993. That was when the other shoe dropped. By that I mean, after Bob Bennett and his group left for Skadden in 1990, Steve Porter and his transactional group left for Arnold & Porter in 1993. And so there we were with a bunch of empty offices and with a depleted business base. We had dealt with that previously with Bennett's departure, and now we were dealing with it with Porter's departure. And we had a bank loan, a real

estate lease, and we didn't want to go through this again, so we decided—Dick Duvall, I think, was the wise man in this—that we had to merge. There were other suitors out there, but, as you probably know, being interested and actually being able to close the deal were very different things. I think Dick perceived that, and he realized we had to keep our eye on the ball, trying to make a deal with the firm most likely to close. There was a firm, Holland & Knight, which at the time, except for a small office in D.C., was exclusively located in Florida. They wanted to go national. Chesterfield Smith was the iconic leader at Holland & Knight; he had a high profile owing in part to his role as President of the ABA when the Saturday Night Massacre occurred, when he appeared on one of the Sunday news shows condemning Nixon's action. Chesterfield came to Washington to try to develop the D.C. office. There were probably only about six to eight lawyers in D.C. when he arrived, and one of the longest-serving lawyers was a woman by the name of Janet Studley. She did their lobbying work. When Chesterfield came up with license to grow the Washington office as a first step in creating a national firm, he basically grabbed different lawyers and put them into Holland & Knight with the idea that it will either work out or it won't. But let's bring people in, and see how it works out. In due course, it will sort itself out, people will leave or stay depending on their success with the firm. It's not necessarily the way a lot of law firms do it, but that is the way Chesterfield decided he was going to do it. But in the meantime he saw this opportunity to bring a firm in that had a certain brand already and so could establish a beachhead for a more credible presence in D.C. and beyond. Dick Duvall and Chesterfield got along very well, and the two of them really put the merger together. Effective January 1, 1994, the two firms merged. Janet Studley and I had met during the course of those merger discussions. We then started going out. And in 1995, we

got married at the Hay Adams. What a blessing that was. Janet is very smart but also down to earth, not full of herself. She is extraordinarily generous, and has forged a great relationship with her stepsons and their spouses. I've been very much the beneficiary of the fact that everyone likes Janet and likes being with her. And of course I like being with Janet. Pretty much every nice trait you could think about someone would apply to Janet, but if there is one trait that stands out for me is that she is very quick witted and funny. She constantly makes me laugh. She is still a partner in Holland & Knight, although she has slowed down. She was the head of one of their three practice groups for a few years and burned out on that.

Stu Pierson: Litigation or transactional?

Bob Trout: No, it was referred to as the government section, which was really the lobbying and regulatory practice. And so she did that. And then she burned out. Her mother was quite elderly. She was probably 93 at the time. Janet wasn't sure how much longer her mother was going to be around. It turns out she was around for another eight years. Janet decided she wanted to spend more time with her mother. So she took a leave of absence and was spending at least a week or more a month with her mother. And when she returned to the practice after a year, she has had a reduced load.

Stu Pierson: Where was her mother?

Bob Trout: Her mother was in Florida. She was a very nice woman and lived on her own until she was about 93 or 94, something like that. So—

Stu Pierson: So Holland & Knight until?

Bob Trout: Until July 1, 1996. When we were confronted with the demise of the Dunnells Duvall firm, I talked to Dick Duvall about setting up a small litigation boutique.

And Dick's response was that a boutique sounds good, but we have this very sizeable lease obligation. And, oh, by the way, while it sounds good, we have this very sizeable bank loan. And so we need to find someone to merge with who will take our space, take over our lease, and allow us to deal with this bank loan. And we didn't need to have that conversation more than once for me to figure that out as well. That was just not going to work. So I decided to give the big firm a chance, let's see how it goes. They were very generous. I developed some wonderful relationships there—not just my wife—but I met a lot of great people, a lot of great lawyers. It was good. And the senior management of the firm was very loyal to me and conveyed to me that they appreciated me and what I was doing. But by now Janet and I were married, and I really didn't want to be married to my law partner. Some people do that—Brooksley Born and Alex Bennett have pulled that off, and others as well—but that wasn't what I wanted to do. And Janet was much more plugged in to the firm than I was. She had leadership and management roles, not that I necessarily wanted to be doing that, I just wanted to be in a different setup. I also found the email traffic to be very distracting. I was overwhelmed by the internal email traffic. I was not very good at putting blinders on and doing my work and not getting distracted by all the incoming.

Stu Pierson: That related to the entire firm and its practice.

Bob Trout: Yes. And so there were always internal email solicitations for people to help on some project, maybe a new outreach effort or marketing a particular expertise. I wanted to be a good soldier, so I volunteered for this or signed up for that. I just hadn't really developed a way, yet, for filtering this stuff out so that it didn't get in the way of doing what I needed to be doing. At least I felt distracted by it. And the other issue that just kept

coming up was conflicts. For example, Holland & Knight in Florida was the go-to firm for A-list corporate clients who had matters in Florida. But when those same clients had a matter in D.C., they were more likely to use one of the well-established Washington firms, like Covington or Hogan or one of the other large firms. So when one of those A-list clients brought suit against a client that wanted to hire one of the lawyers at Holland & Knight in D.C., there would be a conflict. Sometimes, we could get a waiver, sometimes not. In any event, I was just bumping up against conflicts a lot. And it was new to me. If you grew up in a large law firm, and that was just the way it was, it probably wouldn't have been such a shock to you. But for me it was new. So I began to consider something different. In 1996 there was an entrepreneurial fervor sweeping the land. Roger Zuckerman and I have been very close for many years, and I was also a good friend of his longtime partner, Roger Spaeder. I saw what they had created in their firm. And I was a good friend of Hank Schuelke and later of his partners, Dick Janis and Larry Wechsler. They had a wonderful small firm. So when I was exploring the idea of leaving Holland & Knight to set up my own firm, one of the first persons I talked to, in addition to Roger Zuckerman, was Hank Schuelke. We went out to lunch and he said, "Come on in, the water is fine." And after we opened our doors on July 1, 1996, one of the very first referrals of new business we received was from Hank. So for all of those reasons, I decided I'd like to do something different. Janet, of course, saw I had two sons who were now incurring private school tuitions and also approaching college tuition, and yet I was talking about leaving the financial security of a big firm. She had every reason to be concerned, but she faked it pretty well. She was completely supportive of my going off and starting a firm of my own. There was a lawyer, John Richards, a young lawyer whom I had worked with. John had been a summer clerk

with Plato when Plato and Bill Hundley had their townhouse practice. After John finished law school, he first clerked for then Chief Judge Bryan in the Eastern District of Virginia, and then he came to the Dunnells Duvall firm in the late 1980's when Plato was there. John's a very, very smart guy, very analytical, and a wonderful and careful lawyer. We started working together at the Dunnells, Duvall firm, and he would do brilliantly and eagerly all the stuff that I wasn't really that good at or didn't like to do. And so between the two of us we could really do—

Stu Pierson: Manage.

Bob Trout: Yes. We could do well. John was an associate and he was just very, very good. And he knew as well as anybody did how to navigate the Eastern District, which could be its own . . .

Stu Pierson: It is almost byzantine.

Bob Trout: Yes. So we had some cases that we got involved in that turned out very successfully. And then we started developing a reputation around the firm, when there was a sick case or a case that just wasn't going well, or wasn't being well managed, we would be brought in to try to turn things around. Dick Duvall, who was managing the litigation practice, had a lot of confidence in me and he had a lot of confidence in John. So he would call me up and he would say, "Well, we've got this case. This person is handling this case. It's not in a good place. I'm thinking you guys might need to . . ".

Stu Pierson: Fix it.

Bob Trout: Fix it. "Can you guys get involved?" And we had a lot of success fixing sick cases. And so, when it came time for me to think about how to be successful in a small practice, I went to the person whom I had been working with for a long while. He had just

been made a partner at Holland & Knight. I talked to him about leaving, and he was all in. And I talked to my assistant, Barbara Nichols, about leaving. And she was all in. She was a couple of credits shy of a law degree, but she decided she didn't want to be a lawyer. So she was my secretary, my assistant. And so the three of us on July 1 . . .

Stu Pierson: 1996.

Bob Trout: 1996. And the Friday night—

Stu Pierson: And you go to N Street, right?

Bob Trout: Yes. I had walked out of the Holland & Knight office that Friday night. We were moving over the weekend, and that Friday night Janet and I had dinner with Paul and Liz Friedman at Ruppert's Restaurant, which was then on 7th Street across from where the convention center is today.

Stu Pierson: Was Paul on the bench by this time?

Bob Trout: Yes, he was on the bench. And so we had dinner, and I remember very well the exhilaration from the sense of adventure that I had at the moment. Paul has been a dear friend of mine over the years, and he has always been very supportive, most especially with my decision to start my own firm. The following Monday we opened the firm of Trout & Richards in a townhouse located at 1742 N Street. I brought some matters with me when I moved, but the first day we were in business we opened a new matter. I had known it would be there a couple months before, when I received a call from a friend, Hal Murry, who was then practicing at Howrey before he moved to Baker Botts. The call was out of the blue. I was at Holland & Knight. He said, "I'm representing this large German chemical company that has a issue with the Antitrust Division, and we have an individual who needs

representation. Do you have any sort of conflict?" I said, "Well, let me do a conflicts check . . ."

Stu Pierson: This is when you were at Holland & Knight?

Bob Trout: This is when I was at Holland & Knight. And so I did a conflicts check and it turned out that Holland & Knight was in a really bitter battle with this same company. Not that there was necessarily a conflict, because I would not be representing the company. I would be representing the employee.

Stu Pierson: A business conflict?

Bob Trout: But there would be a business conflict. And the company had zero interest in writing a check to Holland & Knight for any services, even if just for the services to one of its employees. But I mentioned to Hal that I was going to be leaving in a couple of months—I hadn't announced it yet—but that I was making arrangements to leave. And he said, "Well, this can wait." And so literally the Friday before we were starting business on Monday, the boxes of documents for this new client showed up at 1742 N Street.

Stu Pierson: You were living right.

Bob Trout: That was certainly client number one that we had not previously represented. And then probably client number two was a matter that Hank Schuelke sent us. So . . .

Stu Pierson: So who is with you at this point?

Bob Trout: John Richards and Barbara Nichols. And Barbara is incredibly efficient, incredibly smart. She has got a fair amount of New Jersey in her, so she can be pretty aggressive. And she has, as much as anybody that I've been around, an owner's mentality. She would beat us up if we were more than one day late …

Stu Pierson: Getting the bills out.

Bob Trout: Getting our bills out. She would not tolerate that. So we had our bills go out the first of each month. And she was just very, very efficient in getting us organized and getting us to do what we needed to do.

Stu Pierson: This is a good place to break, don't you think?

Bob Trout: Yes, I do.

[END OF THIRD SESSION]

ORAL HISTORY OF ROBERT P. TROUT

Fourth Interview
February 12, 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 February 12, 2015, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the fourth interview.

Stu Pierson: Okay. It is February 12, 2015. We're at Bob Trout's law office in Washington, D.C. This is our fourth session. And when we last left off you, Bob, were talking a little bit about a reflection back to your projection of what your legal career would be and how your reflection and your projection may be different and what that tells you about your life in the law.

Bob Trout: Yes, I left a big law firm and I don't know whether I was having fun or not. I certainly enjoyed many relationships that I had, and some of the cases were more fun than others. Holland & Knight was very generous to me, and I certainly felt very welcome there when Dunnells Duvall firm merged into Holland & Knight. But I don't think I felt as fulfilled as I thought that I should feel in the practice. That plus the fact that I had met my future wife, my wife now, through the merger, and I didn't want to be married to my law partner. She was very prominent in the firm. And it just made more sense for us not to be practicing in the same firm. So it occurred to me, the more I thought about it, I thought it would be a challenge—but it would be interesting to just set up a small firm. So John Richards and Barbara Nichols and I started out together in our small firm, and we have been practicing together ever since. We will be going on 19 years this July the 1st. I don't think there is any question about it, I have enjoyed more success outwardly and more satisfaction inwardly in the small firm setup that we have created. And I think there are a

number of reasons for that. I think when you're in a big firm, you can get comfortable with the way it is: whereas in a small firm, if you don't get the business in, you can't pay the light bill and you can't pay people and you can't pay your mortgage. So it forces you to be more entrepreneurial and be more aggressive about getting out there and networking and making relationships and staying in touch with people. In a small firm practice, they are really not coming to the firm so much; they're coming to the lawyer. And there are certain cases that you are just never going to get. The general counsel of a major corporation is never going to hire a small firm to handle a big case, in part because a large case usually requires more bandwidth than a small firm can provide, and in part because the general counsel can never be criticized by the CEO or the Board for hiring the name brand large firm. And so in a small firm you have to figure out what is your sweet spot; it is very much dependent upon a referral practice, I think, at least in the nature of a litigation practice that we have. We do not have, and have really never had, an insurance company coming to us to handle all of their cases of a certain stripe. That is just not the nature of the practice that we have had. And, frankly, if we had that sort of practice, they would be driving down our rates a lot. So it is not to say that we haven't gotten repeat business, but it is to say that it is not routine. So you have to work hard to develop the business. I didn't know anything about the Edward Bennett Williams Inn of Court, for example, and a friend, Laurie Miller, mentioned that I ought to think about doing that. And so I did that. While I certainly knew many lawyers in town, including many lawyers who were in the Inn, I was able to meet a lot of people that way whom I had not known before, including judges. Who knows, for example, whether I would have been able to practice law with Amy Jackson if I had remained in a large firm. I suppose one can ask what people I might have met or

opportunities that I might have had if I had remained in a big firm. You never know. When I left Holland & Knight, John Richards and I had spent a fair amount of time making sure that we left correctly. We saw a lot of people who we thought really didn't. And we didn't understand why you wouldn't. We understood that there were people who were unhappy with a given situation and they would leave in a huff. And we just didn't understand why you would do that.

Stu Pierson: It's a small town.

Bob Trout: Yes, it is. I think I mentioned before that when Chesterfield Smith arrived in Washington with the goal of building the Washington office, and before the merger with the Dunnells Duvall firm, he had thrown a hodgepodge of lawyers together with the hope that it would all work out but with the knowledge that some would not make it, and others would decide it was a bad fit. Some people thrived and some people didn't. And some of the people who didn't, as I said, would leave in a huff. And so John and I made a conscious effort that they were going to be regretful that we were leaving, as opposed to glad that we were leaving. Of course it wouldn't have been good form if I left in a huff with my wife still there. But I don't think that was really a motivating factor. I think John and I both recognized that we had had a good run at Holland & Knight. They had been good to us. There was no point to be served by leaving on bad terms or in a selfish sort of way. So if they wanted us to stay for thirty days because that is what the partnership agreement said, we would stay for 30 days without complaint. At the end of that time, the members of the Directors Committee of the firm came to Washington and took me out to dinner as a goodbye. It was a very nice thing. We were actually going to be taking, with the blessing of the firm, several of the cases that I was then working on. And there were some cases

where I was working with other people besides John. And so we would work collaboratively together on those cases. It was just a very easy transition out of the firm. And I have often said—I don't know whether it is still true—but I have often said that when we left the firm, Dick Duvall would wake up every morning wondering what he could do to help us. And we continued to get very good work as referrals from the firm. If they had a conflict situation, we would get a call. It was very important to us, and we ended up getting—really in collaboration with them—into some sizeable cases that were very good income producers for our firm, cases that we probably wouldn't have gotten into if we had not maintained such a warm relationship with our former firm.

Stu Pierson: So did Amy come during the first five years?

Bob Trout: Yes, she came in 2000.

Stu Pierson: And by the time she came, what was the mix of types of cases you had?

Bob Trout: We had some criminal cases, but probably more civil. One of our earlier cases was a referral from Hank Schuelke. It involved representing the Deputy Director of the Immigration Service in Miami. There was a big scandal relating to the fact that a congressional delegation had gone to Miami to review the situation—crowding, how customs was handled, what the crowds were like, what the waits were like. It was a congressional fact-finding mission. The Deputy Director was involved in arranging the visit and making sure everybody was well taken care of. At the same time there was apparently a union leader or activist, I gather, who was about to be fired and decided that the best defense was a good offense. He decided he needed to be a whistleblower. And so the congressional delegation came to Miami, they had a nice visit, and then this guy throws in this whistleblower complaint that they had created a "Potemkin village," and had

essentially defrauded members of Congress into thinking that things were hunky dory when they really weren't. You can imagine, there was all outrage on Capitol Hill. And so at the Department of Justice the IG decided he needed to get in the game and sort it all out. There was an Assistant U.S. Attorney from the Southern District who was assigned by the Inspector General to go down and investigate it.

Stu Pierson: Which Southern District?

Bob Trout: No, I'm sorry. From the Southern District of New York.

Stu Pierson: Don't trust those folks in Florida.

Bob Trout: Right. So she went down and took a ton of depositions, did just a huge amount of work. And she came back and laid it all on this woman who would become our client, the Deputy Director, and she was going to be fired.

Stu Pierson: So the IG goes and gets somebody from the Southern District to go down to Florida to do the investigation.

Bob Trout: Right. And as anybody that has thought about the way Independent Counsel investigations go—and how these task force investigations go—well, the outcome was writ at the moment that Congress decided they were going to hold hearings and express outrage. And so, sure enough, they came down on this woman. And she was to be fired.

Stu Pierson: And she was to be fired because she hid bad stuff?

Bob Trout: That was the allegation. And so she was going to be fired, and there was going to be some sort of criminal investigation, and there was going to be a congressional investigation. And that is when Hank called me and said, "You're just starting out. You're going to charge her less than I am going to charge her. And, so I think I'll send this over to you." So she came in, and we got a modest retainer. It was probably not so modest back

then, but by today's standards, it would be. And, of course, it didn't last all that long. In time, she maxed out on every credit card. We started looking into it, and we saw what they had relied on to make these findings. And we thought, this is ridiculous. They had spun every fact, they had taken a torque wrench to turn every fact into something that was nefarious when, in fact, the natural meaning wouldn't have been so nefarious. It was so typical. With the political headwinds we were facing, the facts didn't matter. We couldn't make any headway. We had a meeting at the Office of the Deputy Attorney General.

Stu Pierson: Who was that?

Bob Trout: That was Jamie. We actually didn't have a meeting with Jamie—Jamie Gorelick—but we had a meeting with her assistants, and we made a lengthy submission, with extensive documentary backup, explaining just how wrong the IG's report had been. We didn't get to first base. So then we were going to go to a hearing before an ALJ from the Merit Systems Protection Board. We were basically warned that the person who was going to be our ALJ was . . .

Stu Pierson: Not inclined to listen to you.

Bob Trout: Right. And so we could forget this process. We had our hearing before the ALJ, and Dave Margolis testified for the government as to the decision-making to fire her. In the meantime, she had been put on administrative leave with pay. And she had been allowed to get other work, or do other work, while she was staying away from her job. So she decided that she was going to become a real estate agent. So all this time, she got the cash flow from her salary while pursuing this alternative career, which was a wonderful thing. She could develop her business while still . . .

Stu Pierson: Having an income stream.

Bob Trout: Right. So, as predicted, we lost. Now, by this time we were so far underwater in terms of fees. And John Richard's attitude was, in for a dime, in for a dollar, so let's keep going here. And having lost before the ALJ, I said, "Well, I'm done here." And John basically said, "Well, I've got time."

Stu Pierson: Let me keep on.

Bob Trout: Let me keep on. And so we went before the Merit Systems Protection Board. And damn if we didn't finally win up there and get her essentially reinstated. We prevailed. We didn't win 100 percent—we should have—but we won enough to prevail. She got what she needed, and then we got the attorney's fees as the prevailing party. And we ended up negotiating our fees with a young lawyer at the Department of Justice, whom I knew because she had been a paralegal at the Dunnells firm. We recovered 100 percent of our fees, which at the time was the largest single fee that we had collected. By now it was about 1999, some three years after the matter began. It was a fun story. I've never had a conversation with Jamie Gorelick about it, because I chose not to, but it was a lesson that if you keep at it, who knows? So it was fun. Even if you call that case part of the criminal practice, I would say it was still not 50/50 civil/criminal. We were probably mostly civil at that point. As I say, we got some really good civil work from . . .

Stu Pierson: Holland & Knight.

Bob Trout: From Holland & Knight. We had a case that caused us to need some additional talent, so we looked to a temp agency, which led us to Patricia Connelly, who had been in practice here for a while and then had left to go to New Mexico with her husband. Her relationship there ended, and she came back to D.C. And to reintegrate, she was just working on a contract basis. Eventually we hired her from her agency, so that she

joined our firm. We were starting to outgrow our space. And that was particularly true when Amy discussed joining us. We were in a townhouse on N Street; we had started with two of us, plus Barbara Nichols, and now there were four of us, plus Barbara. We needed to move. And with the four of us, for Barbara that is just making the treadmill go a little bit faster, doing it all, not just for two people, but for four people. I happened to be having lunch with Plato Cacheris. Plato had been my law partner at the Dunnells law firm and we continued to stay in touch with each other and deal with each other and do cases with each other, and so we were having lunch. Phil Inglima had left, and a couple of other people had left. Preston Burton was still there. John Hundley was still there. But he had a bunch of empty offices in the suite that he was committed to, at least through the end of his lease, and he was complaining about that and thinking, "Maybe I'll go to Virginia; I'm not sure what I want to do about carrying too much office space." And I said, "Why don't we move into your extra space? That might work for us." And from the happenstance of having lunch with Plato, we found ourselves essentially working side by side with Plato with all the benefits that come with that.

Stu Pierson: What year are we in now?

Bob Trout: We are in the year 2000.

Stu Pierson: Right about the time that Amy comes, right?

Bob Trout: Yes. She arrived, and we literally were out of room. I would say we were primarily doing civil work at that point. And then I got a call to represent an individual in a corporate criminal investigation being run out of the Eastern District of Virginia. And I was going to be representing one of the employees. And there were a whole bunch of other lawyers who were involved representing different clients, either corporations or

individuals. This may have been the only criminal case I had at this time. I was representing an individual who had a marginal role, so it was not going to be a big money maker for our firm. And then September 11, 2001 came. I remember thinking to myself, "It's a really good thing that we're not known as a white collar shop because those FBI agents are going to be chasing terrorists; they're not going to be doing white collar work." So that was September 11, 2001, but within six weeks, Enron starts to melt down. As you may know, a lot of the Enron subjects, targets, you name it, were coming to D.C. for representation. There were going to be congressional investigations as well as criminal investigations and parallel SEC investigations being run out of Washington. I got a call from a lawyer in Houston who was representing a very senior officer at Enron. They needed . . .

Stu Pierson: Did you know the lawyer?

Bob Trout: I did not. But I guess he had called someone in Houston, who called his partner in D.C., who gave him my name. And so I received a call from this lawyer in Houston, who was calling me to team with him as Washington counsel in representing the client, who was scheduled to testify before the Congress, about a week later.

Stu Pierson: Is the testimony in the Senate or in the House?

Bob Trout: Probably Senate. And so I got this call, and as I considered why we were being hired—simply to assist in the congressional hearing—I was thinking to myself about the upcoming congressional hearing, "This is not about fact finding; this is about theater." That was one thought I had. The other was that I didn't know what was out there in terms of the facts that might bear on the client. I knew that there were going to be criminal charges brought, and this person was very senior. And I couldn't imagine why he would testify, or should testify. Or at least I didn't know enough to say he should and, in that circumstance,

my view was he shouldn't. I'm not going to be able to advise someone knowing as little as I knew.

Stu Pierson: Where the risk is so high.

Bob Trout: Where the risk is so high. I think the lawyers were looking for some comfort from me that there was really not a meaningful risk from his testifying, since I assume they were starting with the idea that taking the Fifth was not an option for reasons related to the client's self-image. I didn't know enough to give them the comfort they were looking for—and given the circumstances, I probably would have advised any high-ranking Enron official to take the Fifth, regardless of the depth of my understanding of the facts. In any event, the client was just not of a frame of mind to accept our advice on the matter. And so we disengaged. Happily we had not had enough . . .

Stu Pierson: Involvement.

Bob Trout: Involvement, or exposure to client confidences that we were going to be conflicted out of future matters related to Enron. And as luck would have it, a short time later, I got a call from an individual in Houston, who had gotten my name from a lawyer in Houston, who gotten my name from his partner in D.C. And this was an individual who was a very senior banker at Merrill Lynch. As it happened, his wife also wanted our representation because she was a very senior executive at Enron. And so they came up and they hired us, and we got clearance from the previous client that they were perfectly happy for us to take this engagement. No problem. About two weeks later I got a call from the former President of Enron, but couldn't do it because . . .

Stu Pierson: You were already engaged.

Bob Trout: We were already engaged in the matter. Both this banker from Merrill and the former President of Enron been involved in one of the transactions under investigation, so there was no way we could represent both clients. That was fine, because Merrill was standing behind its employee. The person who was really at risk was the banker from Merrill. He was the head of the Houston office and probably their largest producer in investment banking in the firm. Although his wife had been a senior executive, she was far removed from the financial side of Enron's business and had no real involvement in anything under investigation. They both reeked of integrity. They are a wonderful couple, as straight as you can imagine.

Stu Pierson: And he knew nothing about the accounting?

Bob Trout: No, he had nothing to do with the accounting. There were transactions that Merrill Lynch engaged in with Enron. His role was more as senior relationship manager on the Enron account. One of the other bankers in the office was, by title, the designated relationship manager, but he was the senior guy in the office. And he and his wife had a friendship with Andy Fastow and Andy Fastow's wife. Given all the entanglements, it was understandable that they felt exposed even though neither had done anything wrong. With all the various proceedings—a criminal investigations, a New York Stock Exchange proceeding, a suit brought by the SEC, numerous civil suits—the client matter did not finally conclude for close to ten years. It was just one of the most wonderful engagements that I have enjoyed in the practice of law, because they were both such wonderful people and great clients. And it went on and on and on.

Stu Pierson: And they didn't get sucked in?

Bob Trout: Um . . .

Stu Pierson: Or did they?

Bob Trout: They got sucked in about as close as you could want to get. They had figured it out that they needed a lawyer, and with Congress conducting investigations, they had figured out that they wanted a Washington lawyer. Merrill Lynch had long since identified who needed lawyers and had hired lawyers for them. But because Merrill was located in New York and the lawyers handling the matter for Merrill were in New York, the lawyers who were being hired to represent its employees were New York lawyers. And when Merrill was hiring lawyers for their employees, they were not thinking of this banker in Houston, the head of the Houston office, because he was not operationally involved in doing the deals, and besides, he was as straight as an arrow, he was not the first person one would think of as needing a lawyer. So Merrill didn't immediately put him on the list of someone who needed a lawyer. But he figured it out on his own that he was going to need a lawyer, and that he was going to need a lawyer in D.C. because there were going to be congressional hearings and the like. And so he ended up with me. And about two weeks after he hired me, the light went off at Merrill, and they said to my then client, "I think you need a lawyer, and we'll bring in a lawyer to represent you." And he said, "I've already got a lawyer." In the meantime, after initially hiring me—Amy and I had the initial meeting with the clients so I don't discount the importance of Amy's involvement in getting this business to me—I think the client wanted to double check his judgment in hiring us; he wanted to be sure that was the right call. Happily, he ended up talking to or having someone talk to Bob Bennett, and Bob was very supportive. And so they stuck with our small firm, rather than going to some large brand name firm. In due course, it was the investment banks' time to give testimony before the Senate's Permanent Subcommittee on

Investigations about transactions in which the banks had been involved. This was in July 2002. And the subject was going to be the so-called Nigerian barge deal. My client had been very much involved in that. Not really operationally. He was supportive of the transaction as a way to build a stronger relationship between Merrill Lynch and Enron, which at the time was flying high. So he had just put the parties together, and then he had gone skiing at the end of the year. He is a very impressive person, very articulate, very smart, very well spoken, very attractive-looking person; he has it all. And so I think they had in mind that he was such a presentable person, reeking of integrity, that he was going to be the guy Merrill wanted to talk about this. And I was listening to the story and I was thinking that there didn't seem to be a problem here.

Stu Pierson: No problem with the deal or no problem with his perspective?

Bob Trout: Yes, I would say. I mean, I understand why they would look at it. But if you looked at it, based on everything that we knew and what all the evidence was that I could see, there was no problem with this transaction and certainly no problem with whatever he did. So we sat down with the investigators from the Permanent Subcommittee and went through everything during an informal interview. The actual testimony before the Permanent Subcommittee would come later. In the meantime, two other banks, CitiBank and Morgan Chase, had their day in the sun before the Permanent Subcommittee talking about prepays, which was a particular type of transaction that these banks had helped devise for Enron. These were incredibly rich for Enron. But those transactions had been blessed by Arthur Andersen. To get a sense of what was in store for Merrill and my client two weeks later, I went to the hearing about the prepays, where CitiBank and Morgan Chase were in the hotseat. And it was incredibly ugly . . .

Stu Pierson: Who was the Chair of the Committee at this point?

Bob Trout: As I recall, it was Carl Levin.

Stu Pierson: Probably.

Bob Trout: Anyhow . . .

Stu Pierson: The Democrats were the nasties.

Bob Trout: Yes, as I recall. So, anyway, we were there, and there were all these emails that were being showcased, much worse than any email that I had seen in the Merrill transactions, and I was thinking, "Why are these people testifying?" So my eyes were bulging, and the in-house lawyer from Merrill was also there. And I was looking at him and he was looking at me, and we were looking with crooked brow about, holy cow, how ugly is this? And happily, probably two days later I got a call from the Deputy Chief of the Enron Task Force at the Department of Justice saying that he was looking at the Nigerian barge deal as a criminal case. He didn't identify my client as a target.

Stu Pierson: He called you.

Bob Trout: But it was clear that he thought this was a bad transaction and that my client was a champion of it. And so this began a very difficult conversation, because we were scheduled to give testimony about this transaction two weeks hence.

Stu Pierson: Two weeks hence.

Bob Trout: Two weeks hence before the Permanent Subcommittee on Investigations, televised nationwide. It was to be followed two days later by an appearance before the SEC.

Stu Pierson: Two days later?

Bob Trout: Yes. And he was going to be the face of this transaction, the Nigerian barge deal. So there was really only one call at this point. It was clear. And I knew the consequences of his refusing to cooperate. Because Merrill was insisting that all of its employees cooperate with the government's investigation, he was going to be fired. And so one of the reasons he was such a wonderful client is he had to get his head around, in a very short period of time, the idea that he had to take the Fifth in front of a nationwide audience, where essentially his social group—the people he would hang around with, the people that he cared about—would assume taking the Fifth meant he committed a crime. Oh, and by the way, this brilliant career that you have started at Merrill where you are among the most, if not the most, successful banker in the entire organization, it is about to end. And oh, by the way, you've got family members who are prominent lawyers, not experienced in criminal investigations, who can't imagine that you would ever take the Fifth if you hadn't done something wrong. As hard as it would be to get your head around that idea in a matter of a few days, he got it. So the Friday before he was to testify on the following Monday, we made the decision he would not testify. The Subcommittee then issued a subpoena, at which time we advised Merrill and the Senate that he would invoke his Fifth Amendment privilege. Merrill then placed him on administrative leave, which I was later told was almost never done—usually Merrill fired anyone who took the Fifth—but was done in this case because our client was viewed as such a superstar. So the next Monday, we appeared in a very crowded committee hearing room, and our client took the Fifth. We had a statement for him, briefly explaining his decision. The lead Senate investigator on Levin's staff was a pro. We had very candid, very cordial, very professional conversations, and the committee staff wasn't hell-bent to make it worse than it had to be.

And so we made our statement and then we were excused. Someone who had nothing to do with the transaction was put up to be the Merrill mouthpiece. That afternoon the New York Stock Exchange issued a subpoena for him to come testify, because they supposedly were going to do an investigation. They weren't really going to do an investigation. All they were going to do was . . .

Stu Pierson: Hammer him.

Bob Trout: Yes. We're going to get this guy out. The way we're going to get him out is, he is going to come in and he is going to refuse to answer questions. And because we are a self-regulatory organization, not a government entity, we are not bound to respect his Fifth Amendment privilege. If he refuses to answer our questions, we can suspend him. And so they sent him a subpoena and went through the charade of saying that they were doing an investigation of their own. Well, in the meantime, as more and more people from Merrill started taking the Fifth, Merrill was feeling the heat. So Merrill fired my client after first putting him on administrative leave. We saw it coming, and so we resigned. And they said, "You can't resign; we're going to fire you." It didn't matter. They were not going to try to take away whatever his financial . . .

Stu Pierson: Indemnification?

Bob Trout: Yes, indemnification, options, retirement, whatever it is that he was entitled to—they weren't messing with that. So I didn't much care whether they called it a termination or a resignation at that point. At this point, there were a number of bankers who had asserted the Fifth and were then being subpoenaed by the New York Stock Exchange. Others just blew off the New York Stock Exchange, thinking, what's the point? They were not only suspended, they also received a reprimand. I suppose you could say,

what difference did that make. In our case, we decided to engage with the New York Stock Exchange. We actually went there and our client answered a number of background questions, refusing to answer only those questions that dealt with Enron. So at the end of the day we didn't get a reprimand, we got a suspension. As it happens, it might not have made any difference. But we didn't know what the future would hold, and we couldn't rule out the possibility that we would soon get greater clarity that our client had no criminal exposure so that he could then testify and have the suspension lifted. But we didn't get that clarity, so after a year of being suspended and without any employment in the industry, he lost his Series 7, he lost his licenses. In the meantime, a number of Texas plaintiffs who had sued Merrill had also named him as a defendant for the purpose of defeating diversity jurisdiction in federal court. Working in tandem with Merrill, we were able to get those cases removed anyway, under the theory of federal question relating to Enron's bankruptcy.

Stu Pierson: What was the principal federal court?

Bob Trout: Houston. The main class action, together with many civil cases were consolidated in Houston federal court. In the meantime, the Nigerian barge deal continued to be investigated, and we received a Wells notice from the SEC. The other individuals who received Wells notices basically blew it off, waste of time—there is nothing we are going to be able to say that is going to change what they are going to do here. And we decided we would put in a Wells submission. It would cause us to organize our own thinking about this, cause us to really drill down and understand all the facts and documents that were there to be understood, and cause us to really organize the narrative that we thought was true and completely, utterly innocent. And so we did that, and we put it in. We

didn't have any expectations. But we also had in our minds that this is not just going to be about the SEC. We're going to be dealing with the Department of Justice at some point. And so how would we talk about it if we were to make a submission to the Department of Justice? So at this point I would say we went pretty much overnight from a situation where a small fraction of our practice was criminal to a very large fraction was criminal in nature, if you lump all of Enron into the criminal field, even if there were civil parts of it. So that's what really moved a lot of our brand, if you will, from much more civil into a little bit more weighted white-collar criminal. It was only in the last year or two that all aspects of Enron were finally resolved for our client. What happened is that we put in the Wells submission at the end of 2002. I was supposed to go on the annual ski trip the following February, and I got a call from the Deputy Chief of the Enron Task Force saying he was going to . . .

Stu Pierson: Indict your guy?

Bob Trout: Yes, the next week. So we went in and we met with the Deputy Chief of the Enron Task Force. We provided him with a copy of our Wells submission. And then we followed it up with a meeting with him and the Chief of the Enron Task Force.

Stu Pierson: Who was that?

Bob Trout: Leslie Caldwell was the Chief. She is now the Assistant Attorney General. She runs the Criminal Division. Andrew Weissmann was the Deputy Chief. He is now the Chief of the Fraud Section—newly appointed. Anyway, I thought that we had successfully pushed back. By that time the pattern was that the Department of Justice would file a criminal indictment and the SEC would simultaneously file civil charges. In this case, the SEC brought civil charges against Merrill, which Merrill simultaneously settled. And they charged three other individuals, including my client, with involvement in the Nigerian

barge deal. There was another transaction that was also the subject of the SEC investigation. There were no simultaneous criminal charges, so we were convinced that we had been able to thwart a criminal case. But a few months later, as Merrill continued to look for documents that responded to the government's discovery requests, they stumbled upon a document, an email, that was a couple of years after the Nigerian barge deal. It was written by one of the people who was involved in structuring the Nigerian barge deal for Merrill, and in this later email he had referred to the earlier deal in a way that was different from how he had described it in his grand jury testimony and seemed more in keeping with the government's view of the transaction. And all of a sudden, it kick-starts the investigation. And they were back at it. So in the summer of 2003, it became pretty clear they were going to go after the Nigerian barge deal after all. And I had some further communications with the Enron Task Force. Our client unquestionably had a role—the government thought an important role—in influencing Merrill to go forward with the Nigerian barge deal, which the government was claiming was a parking transaction designed to keep the Enron share price artificially inflated when Enron's year end financials were reported early in the new year. Clearly the government was going to allege that Merrill and Enron management participated in a scheme to defraud the shareholders of Enron. We had a unique fact in our favor. As I mentioned, our client's wife had been a very senior executive at Enron. And she was paid a very sizable bonus at the end of the year. And their employees were allowed to get their bonus in cash or they could get their bonus in Enron stock. And at the very time that Enron was reporting its financial statements that the government was alleging to be falsely. . .

Stu Pierson: Inflated.

Bob Trout: Inflated. She took her bonus in stock. As it turned out, in the very first part of the government's opening statement in the trial of the criminal case that they eventually brought against certain individuals at Merrill and Enron for the Nigerian barge transaction, they were talking about how these defendants had defrauded the Enron shareholders. I was in the courtroom, but happily not as one of the defendants' attorneys. There were four individual bankers from Merrill who were on trial, but my client was not charged. And while I would like to think it was because I was such an effective attorney, I suspect it was because the government realized in the very first part of my opening statement, I would have been identifying my client as one of those shareholders.

Stu Pierson: The victim.

Bob Trout: Yes, the victim. It didn't come to that. Everybody around him was charged, and he was not.

Stu Pierson: Because?

Bob Trout: Because he had not testified before Congress. And because he hadn't given any statements himself, and because he was not operationally involved in any of the transactions.

Stu Pierson: Lack of knowledge.

Bob Trout: Yes. We made that point in our Wells submission, and I think they understood that they would have a hard time proving he thought there was anything wrong there, that he believed that these were fraudulent financial statements or that they were inflated or that Enron was in any way deceiving the shareholders. After all, he and his wife made an investment themselves—a very sizable investment in Enron stock at that very moment. I haven't had a conversation with the people who made that decision not to indict

my client, but he was not charged—which is not to say that he was completely out of the danger zone at that point—but he was not charged. Tragically, there were individuals who were charged. They went to trial in Houston. I would say that there was an appalling absence of the application of the hearsay rule, and they were all convicted. Everybody was convicted. So . . .

Stu Pierson: It was a conspiracy trial?

Bob Trout: Yes. So you have that element that gets in the way of the hearsay rule, the exception to the hearsay rule that says statements in furtherance of the conspiracy are admitted, an exception that seems to swallow the rule. It seems there was no hearsay that was kept out of that case. And so they were all convicted. At sentencing the government was making an outrageous demand for lengthy prison sentences. Fortunately, the judge did not follow the prosecutors' recommendation. Still, in my view, the sentences—substantial prison time—were excessive. And because the judge couldn't see the serious legal issues that were unquestionably going to be part of an appeal, he denied bail pending appeal. And these people went off to prison. And that is where they were until the afternoon of the oral argument before the Fifth Circuit, at which time the Fifth Circuit issued an order releasing them on bail.

Stu Pierson: Now these defendants included Arthur Andersen employees as well?

Bob Trout: No. I think that the government brought the Nigerian barge case—it was miniscule compared with the prepays—because Arthur Andersen could argue that they were not involved, they didn't bless this transaction. When the case was indicted, it turned on a conversation between senior folks at Enron and senior folks at Merrill, and Arthur Andersen could claim they had no knowledge of that conversation. Enron was coming to

the end of the year and they expected to sell an asset, barges off the coast of Nigeria that were going to be used to produce electricity, as part of their effort to meet their earnings target. Apparently there was a snag in the deal with the prospective purchaser, so Enron asked Merrill to buy the barges. This was not the sort of asset that Merrill typically invested in, but Enron was assuring them that there shouldn't be any trouble finding a buyer early in the new year, either the original purchaser who couldn't get the deal done by year end, or some other purchaser. There was some dissent within Merrill, including a view that there was a reputational risk to Merrill if the transaction was viewed as aiding Enron in managing earnings. But there was another view that this would help the relationship between Merrill and Enron and help Merrill secure investment banking work from Enron, which generated large fees for the investment banks with which it did business. The key event in the case was the conversation between senior bankers at Merrill Lynch and their counterparts at Enron. The key participant was Master of the Universe, Andy Fastow, the Enron CFO who obviously had an interest in Enron meeting its earnings targets. The idea was that Merrill would convey its point of view that the only reason it was doing this was as a favor to Enron, obviously trying to enhance the relationship. In turn, Merrill wanted Enron to know that it did not want to hold the asset long term and was looking for Enron to commit to help Merrill find a buyer early in the new year. It was important for Fastow to hear that. So there was this conversation and there were several people on that call, including . . .

Stu Pierson: Your guy.

Bob Trout: My client. And then what happened was they were getting down the road and they didn't have a buyer. There was an affiliate of Enron that Andy Fastow was . . .

Stu Pierson: Controlling.

Bob Trout: Controlling. And so that affiliate ended up buying the barges from Merrill, and it was legally speaking an independent operation, but he had given the government enough to argue that this was a parking transaction, that the conference call at the end of the year was really a guarantee that Enron or an affiliate would buy the barges back if they couldn't find another buyer so that Merrill would not really be at risk. It turns out that that the affiliate, within two or three months, actually sold the barges to a completely different operation for essentially the same amount that had been paid. My client really had nothing to do with anything that happened after the year-end conference call. Right after the call he went skiing with his family so he had nothing to do with structuring or closing the deal at the end of 1999 or with anything that happened later. After Enron unraveled and the government began its criminal investigation, Fastow entered into an agreement to cooperate with the government and enter a guilty plea. The government had obviously gone after the accountants, it was going after Enron and its senior executives, and it clearly wanted to find a transaction that would allow them to prosecute the bankers. Although the Nigerian barge deal was peanuts compared with many of the transactions that led to Enron's demise, I think the government was thinking it was bite size, it could be made understandable to a jury, and the fingerprints of Arthur Andersen could not be found, so no outside accountants approved the deal. I think that is the reason they focused on the Nigerian barge deal. But there was a lot of ambiguity in the evidence, in particular what was said during the year-end conference call with Andy Fastow. The government had some sort of ersatz consolidated 302, which was a memo of various interviews that Fastow had given the FBI and the prosecutors during his cooperation sessions. Normally there is a separate 302 or interview memo for each session. But the government came up with this

ill-conceived idea of a consolidated 302. And it was clear from this so-called consolidated 302 that Fastow was trying to give the government something that was not inconsistent with their theory of the Nigerian barge deal, which was that he had guaranteed Merrill it wouldn't lose anything on the deal. But he stopped short of describing it as a guarantee. Who knows what he actually said to the FBI, versus how the FBI wrote it down. But I think that we do know that there was a difference between what was in the 302 and what was in the FBI notes. Much later, in connection with the case against Skilling and Lay, some notes ended up getting produced that showed that there was a different . . .

Stu Pierson: Retained FBI notes?

Bob Trout: Yes. My recollection is that in the Nigerian barge transaction, they tried to get the notes and the judge in that case refused to order the government to produce them to the defense.

Stu Pierson: And the Bureau was retaining the notes and not destroying them?

Bob Trout: Yes. And so eventually, I think, the notes got produced in the Lay and Skilling case, and after the convictions in the Nigerian barge case were all reversed on appeal and before the government decided, wisely, I think, to just dismiss the case on their own, there was a lot of *Brady* litigation . . .

Stu Pierson: This is after they blew up Arthur Andersen?

Bob Trout: Yes, long after that. All this discovery of the FBI's raw notes of the interviews with Fastow occurred well after everyone was convicted in the original Nigerian barge trial in the fall of 2004. And while my client was never indicted in that case, it was clear we were not entirely out of the woods. Shortly before the trial the government discovered a witness in London who had been a freshly minted banker for Merrill at around

the time of the Nigerian barge transaction. She had left Merrill and was working in London, I believe for another bank. She described an internal Merrill conference call among the senior people at Merrill who were deciding whether to buy Enron's interest in the Nigerian barges. This was just an internal call. It did not involve any Enron people. The government thought this was a very powerful piece of evidence, consistent with the theory of the government's case, which they said that they had not had at the time of the indictment. This witness who was young and inexperienced was apparently invited to join the call and she did. This young banker and my client did not know each other, but she placed him on this conference call. When the government brought the original indictment they did not have this evidence. I was in Houston for various parts of the trial and from sidebar comments that the prosecutors made to me, it seems that if they had known about this witness at the time of the indictment, they might have made a different decision about leaving him out of the indictment. So while my client had not been charged in the original indictment and therefore was not convicted as the other Merrill bankers were, I was nevertheless concerned. A short time after the original trial, our family had arranged for a big family reunion for Thanksgiving. We had rented several cabins near Montreat, North Carolina. I think we were flying out either Tuesday or Wednesday to Charlotte to then drive to Montreat. Shortly before I was to leave for the airport, I was in my office and I got a call from Bill Dolan, who represented the former President of Enron, who had been on the critical conference call with Andy Fastow related to the Nigerian barge deal. And he said, "I have heard that your client, my client, and this other person are going to be indicted next week on the barge deal. And it comes from a reliable source, or someone who has always been reliable." This was very unwelcome news, needless to say. So I got a cab to

the airport. When I arrived at the airport, there was an email message from a lawyer in Houston who represented the third individual. I called him. He said, "I have heard from a reliable source that your client, my client, and this other guy represented by Dolan are going to be indicted next week." And we talked, and my blood pressure was starting to go up. I then got on a plane and flew to Charlotte. I got off the plane, and there was a voice mail from in-house counsel at Merrill. I called him back, and he conveyed the same message, that three other people who had been involved in the Nigerian barge deal, including my client, were about to be indicted. Again, it was attributed to a source who had always been reliable in the past. I think it was a reporter for the *Houston Chronicle*. No one ever told me who, but that is what I think. And I decided I was not going to ruin my client's Thanksgiving, so I didn't tell him. I think we all agreed that we were not going to ruin our clients' Thanksgiving. I think if I got four hours of sleep the entire Thanksgiving weekend, that would probably be a generous estimate.

Stu Pierson: This is all within your own brain.

Bob Trout: Yes. And I don't think, even the next week I called my client about this. I just figured, well, I would just wait for them, the prosecutors, to call me. I was sure they were going to call me. I was just going to wait for that call. But then it didn't happen

Stu Pierson: We've gone through to 2004.

Bob Trout: Right. Which is exactly five years after the deal, the year-end deal. And then we came to, I think, January 2005, and we were now past—

Stu Pierson: The statute.

Bob Trout: So I say. We were now five years past the time when the purpose of the so-called conspiracy had been achieved. Enron had issued its financial report in mid-January

2000, and that would have accomplished the goals of the alleged conspiracy. But there was a theory that said Merrill's sale of the barges back to this Enron affiliate was an overt act in the alleged conspiracy that did not occur until June 2005. So we had our theory that the statute has passed, but there was also another theory that, no, the statute would not expire until June 2005. I want to say that sometime in about March 2005, I received a call from the Enron Task Force, from Kathy Ruemmler, who at the time was the Deputy Chief of the Task Force. She and I are friends so we were able to have candid conversations about the case. She told me that the government was thinking about bringing another criminal case on the barge. She told me they needed to hear from me the next week, specifically addressing the evidence the government had found so powerful, the testimony from the banker from London who had participated in the internal conference call where the barge deal was discussed. Well, I had a vacation or some trip planned for the next week. So I pushed back pretty hard, and because Kathy and I knew each other and were able to communicate, I think she agreed to a pause. She told me not to do anything or change any plans, she would call be back if they needed to hear from me. In the meantime, I started putting together a submission addressing once again why they shouldn't charge my client and in particular this new witness whom the government did not know about when it brought the original indictment relating to the Nigerian barge deal. Obviously I was hoping not to hear from her again. And, happily, I didn't. And so June 30th came and went, and I think everybody recognized that the statute had passed. So he was off the hook on the criminal case. There were still a number of civil suits as well as the SEC's suit that had been stayed for quite a while at the government's request since Andy Fastow was cooperating and the government did not want the civil suit to serve as an opportunity for

the defendants to take his deposition. Because of the various appeals and also because the Lay and Skilling case was still pending, nobody was seeking to get that case reinstated. And so in the meantime, we were working on civil cases. And the class action was going forward. My client was not himself named as a defendant in the class action, but there were a number of opt-out cases or separate direct action cases that had been brought naming him as well. So we were working at this point with Shearman & Sterling, which was representing Merrill and was very aggressive in fighting the plaintiffs' claim that the banks could be found liable in a private right of action for aiding and abetting securities fraud. This was large multi-district litigation being run out of federal court in Houston, and the parties arranged for large deposition centers in New York—in the Chrysler Building—and in Houston. One party or the other would schedule the deposition of a witness and they would then negotiate the amount of time a particular party could depose that witness. Lawyers from all over the country would then travel, say to the Chrysler Building, to attend the videotaped deposition. There would be banks of tables, with maybe 30 lawyers or more sitting at these tables—not paying attention to the deposition but instead staring at their Blackberries—while one lawyer questioned the witness for a period of time, until it was time for the next lawyer to ask questions. And while I was not attending every deposition, nor even most of them, I was going to depositions in both New York and Houston. Very late in the process, and to the surprise of the defendants who had not settled, Fastow made an agreement to cooperate with the plaintiffs in the civil cases. The plaintiffs knew that the money was with the banks, and they were therefore anxious to prove that the banks were not mere aiders and abettors but were primary actors with Enron in its fraud. So they made a deal with Fastow where they let him keep what was left of his money—or most of it—

and he would provide evidence against the banks. It truly was a devil's bargain. Some of the financial institutions had already settled. Merrill was not going to do that, and so, all of a sudden, we got this affidavit from Fastow that specifically targeted the financial institutions and, more particularly, targeted Merrill and, more particularly still, described conversations supposedly with my client, once a good friend of his. By this time he has started serving his sentence so he was in custody. The plaintiffs made arrangements to pay for his security for him to come to the deposition center in Houston for up to nine days of depositions.

Stu Pierson: They being the plaintiffs?

Bob Trout: The plaintiffs. They had him locked in, so this was going to be nine days of . . .

Stu Pierson: Cross-examination.

Bob Trout: Cross-examination by the various other people, primarily the banks. Well this was a lawyer's dream. Andy Fastow had become almost this mythical figure in one of the largest corporate meltdowns in history, and he's going to be deposed. I think I was allocated 45 minutes. And I think that Merrill would have preferred for me not to ask any questions, because they clearly didn't want me screwing it up. But I was not going to do that. I was going to take advantage of my time to cross-examine Fastow. And I had no intention of screwing it up. My time came on something like day four. I had a pretty good cross lined up for this guy. But one of the key pieces of evidence was this conference call that my client was on with Fastow and others from Merrill and from Enron. From Merrill's perspective, there were no guarantees, Merrill would be at risk, the only assurance they got from Fastow was that he and Enron would use their best efforts to find a buyer that would

buy the Nigerian barges from Merrill within the next six months. The plaintiffs, like the government before in the criminal case, were trying to prove that Fastow had made a guarantee that Merrill would not own the barges more than six months, that Merrill had no risk in the transaction. Such a guarantee would have killed the accounting treatment for the transaction. Essentially, it would have been treated as not a bona fide sale so that the sale should not have been booked as part of the year end earnings. So when I finally had Fastow on cross, among the questions I had in mind to ask him were a couple that I knew presented a risk, but I thought were worth the risk because I thought he would deliver what I wanted. I asked him, "When you got on the call with the bankers from Merrill, did you want to make sure that you didn't say anything that would blow the accounting?" He said, "Yes." My next question was, "And when you hung up the phone after the call, were you satisfied that you hadn't said anything that would blow the accounting?" And he said, "Yes."

Stu Pierson: Your witness.

Bob Trout: Yes. Done. For the deposition, all the lawyers were using Realtime or LiveNote for simultaneous transcription. By the time this deposition was occurring, the criminal convictions in the Nigerian barge case had been overturned and the case had been sent back for retrial. The defendants were engaged in collateral *Brady* litigation, trying to get additional discovery that they hadn't had previously, and also engaging with the government to persuade them not to retry the Nigerian barge case. And while the Fastow deposition was going on, I was in touch with Larry Robbins, who was then representing one of the defendants who was facing possible retrial of the Nigerian barges criminal case. By email, I was sending excerpts of the transcript to Larry. And when I sent him that little segment from the cross of Fastow, Larry was thrilled. I don't know whether, at the end of

the day, that may have made an impact in the government's decision to just drop the criminal case and not retry the case. The momentum had turned, I think, a little bit in favor of the defendants. The government had brought a criminal case against Arthur Andersen, which had caused the company to go out of business and had created unemployment for many thousands of innocent people, and then the Supreme Court unanimously held, in effect, that the case should never have been brought. For the Enron Task Force a number of their initial victories had turned into not victories. And one of those had been the original criminal case involving the Nigerian barge deal. I was not privy to what the government was thinking and why they decided not to retry the Nigerian barge case. But what happened is that those individuals entered into a settlement with the SEC—probably paid them a little bit of money, I don't know—and then they dismissed the criminal case. So the Nigerian barge criminal case just went away. It ended up being dismissed.

Stu Pierson: And the shareholder litigation was settled eventually?

Bob Trout: No, Merrill had made the right bet, that legally under 10(b)(5) it would shake out that Merrill could not be found liable in a private securities fraud case for aiding and abetting the primary actor. But the district court was basically giving the plaintiffs whatever they were looking for. The defendants seemed never to win in the district court. So it went up to the Fifth Circuit. And around this time there was litigation headed to the Supreme Court on this very issue—could a third party in a private action brought under 10(b)(5) be found liable for aiding and abetting. The Supreme Court eventually made it clear that there was no such aiding and abetting liability. And the Fifth Circuit, I think maybe in anticipation that the Supreme Court would rule that way, said that there was no such aiding and abetting liability. So the Fifth Circuit reversed the decision of the district

court that had certified the class. And it just ended. The Supreme Court ruled in a related case, and the case went away for Merrill. Everything was done as far as my client was concerned, except the SEC case was still pending against him. It had been stayed because Fastow was cooperating, but that was long since over. A couple of the Merrill people had settled with the SEC as part of the government's agreement to drop the criminal case rather than retry it. So there was this loose end, the SEC suit, with my client. The lead lawyer for the SEC who had brought the case had long since left the government. It was probably in 2012 that I received a call from his successor at the SEC. He suggested that maybe my client should settle with the SEC. It was a short and frank conversation. By this time there had been the financial meltdown, and there was a lot of talk about why weren't any of the individuals—the miscreants who were involved in the subprime debacle—why hadn't they been called to task. So there was a lot of criticism about how the SEC was doing its job, or more pointedly not doing its job. And I'm sure I conveyed that if they pursued this, they would not hear the end of criticism from me about the utter waste of proceeding with this 10-year-old case and about how the government was choosing to deploy its resources. My client had been basically barred from the industry since 2002. He hadn't had his license. He had been out of the industry. They could not seriously be thinking about using scarce resources to go after this deal. As I say, it was a frank conversation, and I conveyed we were not interested. Of course I called my client to let him know about the conversation, and he approved. And I didn't hear anything back from the SEC. About six months later, the SEC formally entered a dismissal of the SEC case against my client. So my client avoided the criminal case, and any personal liability in the civil cases, and the SEC suit. Of course, he didn't avoid all of pain. There was a lot of stress, undoubtedly. There were a

lot of close calls. There was a lot of very bad publicity. But he is an elegant person, and he is very well grounded, so he survived. In fact, he has thrived. He has a great family, and he got to spend time with his children that he wouldn't have otherwise spent. And so he has been very philosophical about it. He has a wonderful life, and we continue to see each other.

Stu Pierson: So are we right about 2009 or '10?

Bob Trout: Yes, on that case. But the real serious work in that case was really done through June of 2005 when we knew that we were in the clear of the criminal case.

Stu Pierson: So why don't we take a break now and we'll do the next ten years in the next session?

[END OF FOURTH SESSION]

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]

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.

Oral History of Robert P. Trout

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Biographical Sketch

Robert P. Trout

Bob Trout was born July 17, 1948 in Roanoke, Virginia. After graduating from Washington & Lee University in 1970, and University of Virginia School of Law in 1973, he joined the Criminal Division of the U.S. Department of Justice as a trial attorney. After two years at the Criminal Division, Bob became an Assistant United States Attorney in Baltimore, Maryland, where he served for four years. In 1979, Bob returned to Washington to practice at the firm of Dunnells, Duvall, Bennett & Porter. He became a partner in 1981.

In 1994, Bob became a partner in Holland & Knight following the merger of the Dunnells, Duvall firm into Holland & Knight. He left Holland & Knight in 1996 to form his own firm, Trout & Richards, with John Richards, another partner from Holland & Knight. The name of the firm was changed to Trout Cacheris when Plato Cacheris joined the firm in 2005. Since 2014, with the arrival of Dick Janis, the firm has been known as Trout Cacheris & Janis. Bob's entire career has been focused on civil and criminal litigation and trial practice.

Bob is a Fellow of the American College of Trial Lawyers, and he has served as a member as well as Chair of the College's State Committee for the District of Columbia. One of the original members of the Steering Committee of the Litigation Section of the District of Columbia Bar, Bob served as Chair of the Litigation Section in 1984-85. He previously served for six years, including one year as Chair, on the Attorney Grievance Committee of the United States District Court for the District of Columbia.

Bob is married to Janet Studley, who is also a lawyer. He has two sons, Carter (married to Lindsay) and Philip (married to Rachel Cotton), and three grandchildren (hopefully, more to come).

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United States Department of Justice:
Civil Rights Division: 1968-1971
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Private Practice:
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Troutman Sanders: 1998-2013
Morvillo LLP: 2013-present

Notable Representations:
United States v. Washington: 1974 declaration of the off-reservation treaty rights of Washington State Indian tribes, sustained repeatedly by the Supreme Court.
Martin Marietta v. The Evening Star: successful defense of newspaper for article about a defense contractor's party for military officials, establishing that corporations may be public figures under the First Amendment.
Manuchar Ghorbanifar: Representation of the alleged Iranian middle man in the Iran-Contra investigation.
Charlie Willson: Representation of Texas congressman in response to government investigations.
Marsha Scott: Representation of deputy assistant to President Clinton in congressional and other investigations of the President's personal conduct.
Stiles Kellett; Defense of chair of the compensation committee of Worldcom in multiple suits arising out of the bankruptcy of the company.
Volt Information Sciences: representation of staffing and technical company in response to SEC investigation of its revenue accounting.
Phaedra Almajid: representation of the whistleblower who first disclosed direct evidence of corruption in FIFA.

Report of the Special Counsel

to the

Special Committee on Investigation of Capital Projects of the Department of Parks and Recreation

March 11, 2011

Robert P. Trout
Gloria B. Solomon
TROUT CACHERIS, PLLC

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INTRODUCTION AND EXECUTIVE SUMMARY

In October 2009, members of the Council of the District of Columbia became aware that the District of Columbia Housing Authority was overseeing multi-million dollar contracts for the construction and renovation of city recreation centers, ball fields, and parks. Groundbreakings had been announced for multiple projects on a schedule that did not seem to correspond with the DPR capital budget with which the Council members were familiar. They discovered that the funding and authority for the capital expenditures had been transferred from the Department of Parks and Recreation (DPR) to the Deputy Mayor for Planning and Economic Development (DMPED), and from there to the Housing Authority (DCHA), which then assigned responsibility for the projects to its wholly-owned subsidiary, District of Columbia Housing Enterprise (DCHE). Moreover, a $4.2 million dollar contract to manage the construction of all of the projects had been awarded to a single firm, Banneker Ventures, whose principal, Omar Karim, was reportedly a close ally and friend of then-Mayor Adrian Fenty. This came as a surprise to the Council members since under the Home Rule Act, contracts that exceed one million dollars or are to be performed over multiple years are supposed to be submitted to the Council for approval, and no parks contracts had been presented to them. Adding to the Council's concerns, Banneker, as project manager, was entitled to receive a 9% mark-up on the amounts it paid consultants such as architects and engineers, and it had awarded the engineering work on all of the parks to Liberty Engineering and Design (LEAD), whose principal, Sinclair Skinner, was also known to be close to the Mayor.

All of these facts raised the question: why? Why had the funding taken such a circuitous route, so that parks and recreation projects were now being managed by the independent agency responsible for public housing? The Council learned that DCHA took the position – and that

DMPED also understood – that DCHA contracts were not subject to the requirement of Council approval. Were the funding transfers simply a sleight of hand, then, designed to avoid Council oversight? Was the lack of transparency the bi-product of a decision to transfer the projects for a legitimate reason, or was the circumvention of Council review rooted in a concern that the Council would scrutinize and possibly disapprove valuable contracts that had been awarded to firms with ties to the Mayor?

The Council members also wanted to know: had the program management procurement been steered to Banneker or manipulated in some other way to give Banneker an advantage? Was the engineering work appropriately awarded to LEAD? In other words, were the contracts the outcome of a fair and lawful procurement process, or grounded in cronyism or something worse? And finally, were the public and private entities and individuals tasked with providing the necessary oversight performing their functions? Were taxpayer dollars for DPR capital projects being appropriately managed and spent?

After the Council began looking into the matter in late October, more questions arose. If, as the Attorney General found on Friday, October 23, 2009, DCHA was actually bound by the Home Rule Act when it contracted to spend the city's money, did the Attorney General correctly advise DCHA the following Monday that the Banneker contract was valid and could proceed? The Council froze the flow of funds in November, so why did DMPED and DCHA agree to increase the number of parks and the amount of funds to be transferred at the beginning of December? Why did DCHA issue a check to Banneker for $2.5 million on Christmas eve, even though by then, the Council had formally disapproved and cancelled the project management contract altogether? And why did the Mayor remove the Chair of the DCHA Board of Commissioners – a critic of the Banneker contract – from his position?

Faced with these questions, the Council appointed Special Counsel to undertake an investigation that would attempt to answer them and to aid the Council in determining whether any further legislative action or inquiry was warranted. This Report is the result of that investigation.

Background

We note at the outset that the public discussion of the DPR capital projects issues has often included references to "90 million dollars' worth of contracts," but the amount of money that was actually transferred or spent before the Council halted the projects was considerably lower than that. By the time the Council inquiry began, DPR had transferred *authority for* the expenditure of approximately $87 million of capital funds to DMPED. The actual amount of money sent from DPR to DMPED, however, was $18,413,500.[1] And the actual amount transferred from DMPED to DCHA was only $6,200,000. Moreover, Banneker did not receive all of the contracts for construction of the projects; instead, it was awarded the project management contract, which represented only a small portion of the total construction budget. By December 24, 2009, a total of $4,483,578.77 had been paid to Banneker – not only for management fees, but also for hard costs and amounts due to its consultants.[2]

As will be described in greater detail in the body of the Report, based on the scope of the investigation we were authorized to conduct, and the information that was provided to us, we came to the following findings and conclusions:

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[1] Ex. 1, Letter from Barbara Roberson, DPR Fiscal Officer, and Conrad Bridges, DMPED Fiscal Officer, to then Chairman Vincent C. Gray (Nov. 23, 2009) with DPR project funding chart attached.

[2] Ex. 2, DCHE charts showing a breakdown of invoices paid.

The Transfer of Funds

Our investigation uncovered no wrongdoing on the part of the Mayor, and we found that the DPR capital funds were not transferred for the purpose of avoiding Council oversight.

- The transfer of funds for the DPR capital projects from DPR to DMPED, and from there to DCHA, was prompted by a sincere desire on the part of administration officials to expedite the completion of long-awaited public projects.

- The Fenty administration identified the renovation of parks and community centers as an important priority, and the Mayor's office and DPR officials were frustrated by the backlog of stalled projects. Speed was considered to be imperative, and it was generally understood that DPR was ill-prepared to deliver it.

- DPR is required to conduct its solicitations through the Office of Contracting and Procurement (OCP), which delegated authority for construction procurements to the Department of Real Estate Services (DRES). The OCP process can be slow and deliberate. DPR also believed that its in-house construction management capacity was insufficient to handle multiple large scale projects involving the building of new facilities as opposed to the ongoing repair and maintenance of existing parks.

- Before the funds were transferred to DCHA, city officials attempted to transfer responsibility for the DPR capital projects to the Office of Public Education Facilities Management (OPEFM), which had independent procurement authority and was not tied to OCP. In November 2008, though, the Council intervened and prohibited the transfer.

- OPEFM would have utilized its existing project management team, so there would have been no need to procure a construction management firm for that function. Moreover, since the agency is bound by the Home Rule Act, any contracts that exceeded the million dollar threshold would have been submitted to the Council for review had the projects remained under OPEFM's control. The fact that city officials initially sought to transfer the DPR projects to OPEFM is therefore a significant factor in our conclusion that the projects were not transferred for the purpose of avoiding Council review.

- The execution of a memorandum of understanding (MOU) to move funds to another agency – including to DCHA to obtain its assistance on construction projects – was lawful, and it was consistent with prior practice that predated the Fenty administration. In fact, DCHE had been specifically created to generate revenue for DCHA by providing construction services to other entities, and what it proposed to offer them was efficiency.

- The Fenty administration utilized the procedure, though, to an unprecedented degree. Prior to the DPR projects, DMPED implemented an MOU process culminating at DCHE for two major projects that far exceeded the cost of anything transferred to the housing agency before: the completion of a combined public school, library, and recreation center project at the Walker Jones educational campus in Northwest D.C., and the construction

of the Deanwood Community Center in N.E. Those projects were then viewed as possible templates for the DPR capital projects.

The Selection of Banneker

- Banneker Ventures was not selected alone, but rather, it was teamed with a seasoned construction management firm with significant experience in public projects, Regan Associates, Inc. And it was the Banneker-Regan team that had previously managed both Walker Jones and Deanwood.[3] Thus, there were reasonable grounds for choosing the Banneker-Regan team on the merits to assume the project management role on the DPR capital projects.

- When the Regans were first seeking a local, minority-owned firm with which to partner, Banneker was brought to their attention through a referral from DMPED's David Jannarone. But there was no evidence in the bank records of any benefit flowing to Jannarone from Banneker or from Karim or Skinner's other businesses. And no participant in the DPR project manager selection process reported being subjected to any improper influence or even advocacy on the part of Jannarone, or anyone else in city government, in favor of Banneker.

- DCHE issued a Request for Qualifications ("RFQ") to which a number of firms responded. Their submissions were fairly reviewed by a selection panel made up of representatives from DPR, DMPED, and DCHE, and the Banneker-Regan team in fact received the highest score. We found no evidence of improper influence in the selection and scoring process. We have therefore concluded that the award of the contract to Banneker is not a matter that calls for further investigation.

The Failure to Obtain Council Approval

Many of the questions that were raised at the time the Council became aware of the Banneker contract concerned the issue of the failure to obtain Council approval.

- DCHA is an independent agency, and it did not view itself as bound by the D.C. law requiring Council approval of certain contracts. Thus, when DMPED decided to transfer funding for the DPR projects to DCHA, it was with the expectation that DCHA would not be submitting the resulting contracts to the Council. While administration officials responsible for the decision indicated that they were well aware that Council review typically takes additional time they did not want to spend, they stated that the MOU was not prompted by a desire to evade Council review. Officials on both sides of the DMPED/DCHA transfer testified that the move was inspired by DCHA's capacity to manage construction efficiently and that Council approval was not discussed.

[3] The circumstances surrounding those procurements were outside the scope of this investigation.

- We conclude, though, that DCHA was wrong in its judgment that the contracts were not subject to Council review. DCHA did not receive a formal opinion from the Attorney General until October 23, 2009, after the Council expressed dismay that it had been bypassed in this instance. But DCHA's general counsel, Hans Froelicher, was aware as early as 2007 that the Attorney General's Office was of the view that DCHA was subject to the requirement, particularly when District funds were involved. In 2008, the Attorney General expressed himself unambiguously and in writing on the subject, and he cited the authority underlying his opinion. Although we believe that DCHA can be faulted for its refusal to acknowledge the Council's authority to approve contracts involving city funds, we note that there was no evidence that DCHA's legal position grew out of the intent to shield any particular contract or contracts from review.

- When the Attorney General declared on October 23 that DCHA was indeed bound by the Home Rule Act when contracts encumbering District funds were awarded, he premised his opinion in large part upon a formal opinion that had been issued in 1996 applying the same ruling to a different independent agency. We therefore question the basis for the memorandum the Attorney General sent to DCHA on October 26, which stated that since his October 23 opinion was not retroactive, the Banneker contract remained in force. Based on the law set forth in the October 23 opinion, we conclude that absent Council approval, the contract was not valid.

Questions Related to the Procurement

Records related to the procurement revealed other anomalies that prompted questions from the Council.

- Jacqueline Glover, who had been offered a job at Banneker before taking a position at DMPED, served as a DMPED representative on the selection panel that considered the responses to the RFQ for the project manager. We find that her limited interaction with Banneker did not disqualify her. Moreover, her participation in the procurement made no difference to the outcome, since Banneker-Regan would have been the top scorer even if Glover's scores were excluded entirely.

- Even before the Banneker-Regan team was formally selected as program manager for the DPR capital projects, there appears to have been an assumption within DMPED, at least on the part of David Jannarone, that Banneker would be involved in the program management for the projects. Jannarone was the DMPED official with primary responsibility for overseeing the projects, and he was a close friend of Sinclair Skinner's. Initially DMPED considered adding the DPR capital projects to the Walker Jones contract through the execution of a change order. Even after that concept was abandoned, Jannarone acted as if it was a foregone conclusion that Banneker would be awarded the contract. After DCHE issued the RFQ, but before the proposals were due, Jannarone directed Karim to prepare cash flow projections for DPR capital projects. It was inappropriate for an official involved in the procurement to communicate with a single bidder about the work while the procurement was pending, and the exchange bespeaks a bias on Jannarone's part in favor of Banneker. But we concluded that neither the subject

matter of the communication nor Jannarone's apparent mindset gave the Banneker-Regan team an actual advantage given the manner in which the procurement was carried out, the scores fairly awarded by disinterested panel participants, and the fact that budget information played no role in the procurement.

- Another question that arose was why, if the selection panel chose "Banneker-Regan" as the project manager, was the contract executed with Banneker alone? That circumstance arose out of the terms of the mentoring relationship Regan established with Banneker, over which city officials exerted no control. Pursuant to agreements between the two private parties, Regan was the signatory on the project management contract on Walker Jones, and it executed a subcontract bringing Banneker on as a consultant for 33% of its fee. The roles were reversed on Deanwood and the DPR projects, and Banneker's share was increased, as Regan was committed to Banneker's advancement to the leadership position.

Although we conclude that no further investigation is warranted into the decision to transfer funds from DPR through DMPED to DCHA or the selection of Banneker as project manager, certain of the explanations given for those decisions did not hold up under close scrutiny.

Review of Justifications Provided to the Council

- One reason for the transfer of the projects to DCHA that was advanced by city officials at the initial Council hearings was DMPED's need to utilize the superior construction management expertise available at the housing agency. But this explanation did not align with the plain terms of the MOU or the manner in which the arrangement was actually implemented. The MOU between DMPED and DCHA engaged DCHA only to perform contract administration services and serve as a "pay agent." DCHE staff reviewed Banneker invoices for accuracy, but they compared them to budgets that had been supplied to them by DMPED and Banneker, and they relied on DMPED – which they referred to as DCHA's "client" – to verify that the work had been performed and the expenditures were reasonable and necessary. DMPED remained in full control of the projects: it negotiated the terms of the project management contract with Banneker, approved Banneker's invoices, and directed and oversaw Banneker's work. Indeed, DMPED resisted DCHE's attempts to provide guidance on the terms of the contract. So while we did not uncover evidence establishing that the capital funds were transferred for the purpose of avoiding Council oversight, there was little evidence to support the publicly proffered justification that DMPED wanted to utilize the superior construction management expertise available at DCHA.

- Similarly, DMPED and Banneker took the position that the 9% mark-up on amounts due consultants was a reasonable fee – even on top of the $4.2 million fixed fee – since it was Banneker that would be responsible for procuring and contracting with the design professionals and that would be at risk for their negligence or breach of contract. But in

fact, the Banneker contract specifically relieves the project manager of any liability for the consultants' performance or misconduct.

- DMPED and other city officials publicly defended the Banneker contract on the grounds that it had been "competitively bid." But the decision to proceed by RFQ – while not unusual or inherently improper – did not provide for any price competition at all. It is our view that the District would have been better served by a process that solicited price proposals, either at the outset or after the most qualified firms had been identified via the RFQ. The total to be paid once the mark-up on consultants was added to the fixed fee sparked a great deal of public second-guessing and discussion; price competition would have opened the process to other bidders and established some basis for confidence that the work was actually being performed at the lowest cost.

- Finally, while the Banneker procurement and the terms of its contract were explained at the Council hearings as the replication of a formula that had previously worked well at Walker Jones and Deanwood, in March of 2009, it was premature to assess the success of Deanwood, and in fact, Deanwood was handled quite differently. The MOU from DPR to DMPED in that instance expressly recognized the need for Council approval; DMPED, and not DCHA, conducted the procurement for the project manager; the project management contract was awarded after a procurement process that solicited competitive price proposals; and the contract did not include the controversial 9% mark-up.

Events Occurring After the Council Inquiry Began

We also reached conclusions about questioned events that transpired after the Council inquiries were underway.

- On December 9, 2009, DMPED and DCHA amended their MOU to increase the number of parks and the total amount of capital funds transferred to the housing agency. On the same date, DCHE and Banneker executed a change order to the project management contract, expanding the scope of the work and revising the fee arrangement, while reducing and capping the controversial 9% mark-up. We found that these actions were simply part of an effort led by DMPED to present a complete package to the Council for approval at that time. The parties took steps to ensure that the paperwork finally reflected the full scope of the work, and they amended the contract to address Councilmembers' concerns in the hope of securing approval so that work could proceed. While the effort was ultimately unsuccessful, there is nothing about it that warrants further investigation.

- There were some within DCHA who agreed that moving forward to seek Council approval was the right course of action. There were others, in particular, William Slover, then Chair of the DCHA Board of Commissioners, who felt that in light of the Council's decision to cut off the flow of funds for the projects, the agency would be better advised to terminate its MOU with DMPED and conclude its involvement in the projects. Slover had also raised a number of questions about the terms of the Banneker contract. The Mayor made the decision to remove the Chair in November, but we did not find that the personnel action was motivated by a desire to silence a critic. The Mayor's action was

prompted by the Attorney General, who was frustrated at the time that the General Counsel of DCHA was proposing a course of action other than the one that the Attorney General had recommended. The Attorney General suggested that therefore, a change in leadership at DCHA was required. The Chair served at the will of the Mayor in any event.

- The $2.5 million payment to Banneker on Christmas eve came as a shock to Council members who had formally disapproved the contract nine days before. We found that DCHA made the decision to pay the outstanding invoices, under some prodding by David Jannarone at DMPED, in a good faith effort to make contractors who had already performed work whole and to bring the agency's involvement in the projects to a close. While the CFO of DCHA expressed reservations at the time, and the report raises questions about the legal underpinnings for the settlement agreement and the decision to issue the payment without broader notification or consensus, the matter does not require further examination. We found no evidence that the Mayor or the Attorney General were involved.

Banneker's Management of the Projects

Our investigation went on to reach certain findings and conclusions concerning Banneker's management of the DPR projects: in particular, its selection of LEAD to perform engineering services and its procurement of certain general contractors to build the individual projects. It is with respect to these issues that we conclude that further investigation is warranted.

The Selection and Payment of Liberty Engineering & Design

- Banneker selected LEAD to perform all of the engineering work on all of the projects. LEAD was a year-old, two-man firm, and only one of its two principals was a licensed professional engineer. LEAD had not previously been hired to provide the full range of civil engineering services on a large scale public recreation project.

- Immediately after it was notified of DCHE's intent to award it the project management contract, Banneker hired LEAD on a sole source basis to provide consulting services and to survey the sites. There was no licensed surveyor at LEAD.

- Banneker subsequently issued an RFQ seeking a firm to perform all of the civil engineering services – civil engineering, geotechnical engineering, environmental assessments, structural engineering, testing and inspection, and also, the surveys – for all of the parks. The RFQ required participation by a firm identified by the Department of Small & Local Business Development as a "Certified Business Enterprise."

- While LEAD met few of the limited set of other criteria set out in the RFQ, Banneker selected it on the grounds that it was the only respondent that met the CBE requirement. Price played no role in the procurement.

- LEAD's response to the RFQ was false in several material respects. In particular, LEAD misrepresented its capacity, and it provided resumes falsely identifying individuals who worked elsewhere as LEAD employees. Based on facts uncovered about the relationship between Skinner and Karim, and Banneker and LEAD, there is reason to believe that Karim knew or should have known that LEAD's RFQ response was inaccurate and that it significantly exaggerated LEAD's qualifications.

- Banneker did not involve Regan – which was supposed to have responsibility for half of the parks – with respect to either the original sole source arrangement or the subsequent consulting services contracts with LEAD. Banneker assumed sole responsibility for the pricing and procurement of the engineers.

- After LEAD was awarded the engineering work, it did little of the work itself. It engaged other, non-CBE firms to perform the surveying and civil engineering and to draft the environmental site assessments while it provided "management, direction, and supervision."

- While LEAD's "management" of the other engineers amounted to little more than scheduling and transmitting their work product, it submitted invoices to Banneker that marked up its payments to those engineers by more than 125%. Surveys were marked up by more than 400%. Thus, Banneker's selection of LEAD, as opposed to a firm with the capacity to perform the work itself, added an extremely expensive layer of management to the projects, resulting in, at the very least, considerable waste to the taxpayers.

- While Banneker was on notice of LEAD's reliance on other engineering firms, there is no evidence that Banneker required LEAD to produce records of its costs before applying its 9% markup and transmitting LEAD's invoices to DMPED and DCHE for payment.

- There is no evidence that Banneker negotiated with LEAD before accepting its proposed pricing structure; indeed, Banneker submitted LEAD's overpriced invoices for the first five surveys to DMPED – applying the 9% mark up – before it had even executed a contract with LEAD determining what the survey prices would be.

The Relationship between Skinner and Karim
and the Witnesses' Testimony on those Matters

How did this happen? The investigation has uncovered multiple ties between Skinner and Karim that may bear on the questions presented to the Special Counsel. At one time, Skinner represented himself as being affiliated with Banneker Ventures: he was issued a Banneker Ventures business card with a phone extension and email address there, and he testified in an unrelated matter that Banneker was one of the clients for whom he sought to develop government business opportunities. Karim and Skinner also worked together through their sole

proprietorships – Liberty Law Group and Liberty Industries – which they started in 2007. According to one of their clients, their efforts were also related to assisting would-be city contractors. Bank records reflect that Karim's Liberty Law Group paid Skinner's Liberty Industries more than $1,000,000 between 2008 and 2010 for services that neither witness could or would explain. The businesses had separate bank accounts, but they utilized the same office address – an address that was also used by Banneker Ventures and LEAD. Indeed, Karim's Liberty Law Group was paying at least some portion of the rent for the office suite at the very time that LEAD was obtaining work from his construction firm.

These connections and transactions were not fully clarified in the course of the investigation, but the inability to plumb the depths of the issues cannot be attributed to any lack of effort on the part of the Council or the Special Counsel. The Council was forced to resort to court proceedings to secure Sinclair Skinner's appearance at the hearings to which he had been subpoenaed. But when Skinner testified pursuant to the court order, his counsel objected to questions related to Liberty Industries and the payments from Liberty Law Group on relevance grounds, and he directed Skinner not to answer them. Karim appeared for his deposition, but he also refused to answer questions or produce documents related to Liberty Law Group or Liberty Industries. Ultimately, Skinner agreed to answer the questions, and the court granted the Council's motion to compel Karim to do so. But despite the court order and the promise of cooperation, the witnesses did not answer the questions in any substantive way when they appeared a second time. Instead, they repeatedly responded: "I don't recall."

Karim, Skinner, and Skinner's partner at LEAD, Abdullahi Barrow, professed to be unable to remember basic facts about their businesses, such as how many people they employed, how they came to work with each other, how they spent their time, or the nature of the work they

performed for their clients. The obfuscation was particularly comprehensive when the questions turned to the relationship between Skinner and Karim and the connections between Banneker Ventures, Liberty Law Group, and Liberty Industries. Karim failed to produce any records related to Liberty Law Group. He could not recall why anyone had ever hired his firm for anything other than "community consulting," which he defined as "consulting in the community." Skinner could not recall the specific reason behind a single payment he received at Liberty Industries from Liberty Law Group, but he swore that none had anything to do with the DPR capital projects. The only thing Karim and Skinner could say about the million dollars that changed hands was that Liberty Industries had performed unspecified "consulting" services for Liberty Law Group. The witnesses' claimed failure of recollection was so extensive and so complete that it was unworthy of belief. Karim and Skinner essentially thwarted the investigation, and their performance left us with the clear impression that they believed they had something to hide.

The Selection of the General Contractors

The problems went beyond possible improprieties in Banneker's selection of LEAD. Our investigation also discovered that Banneker led the procurement of the general contractors, even for the parks within Regan's portfolio, and that it recommended that contracts be awarded to several firms with financial ties to either Karim or Skinner: Blue Skye Construction, AF Development, Capital Construction, and District Development Corp. Bank records revealed that all of these successful bidders made substantial payments to either Liberty Law Group or Liberty Industries close in time to procurement of the general contractors, but the payments were not disclosed during the selection process, and neither Karim nor Skinner would explain to us the reasons behind those payments.

The Need for Further Investigation

Thus, the testimony that was provided and the records we reviewed give rise to concerns about the arms length nature of Banneker's award of DPR work to LEAD and to others. We find that LEAD submitted a false proposal in connection with its effort to obtain city contracts, and that its invoices were grossly inflated, and that there is reason to believe that Karim knew or should have known about LEAD's lack of capacity and its unsupportable profits. In their refusal to offer any satisfactory explanation for their financial dealings, Karim and Skinner have left open the question of whether Karim's payments to Liberty Industries or the fees paid to Liberty Law Group by other contractors indicate the existence of undisclosed conflicts of interest, or worse, an unlawful scheme. A reading of the witnesses' unresponsive testimony in its entirety also raises the question whether the "I don't recall" incantation was knowingly false or designed to obstruct the investigation. For these reasons, while we express no view as to the likely outcome of a future inquiry, given the limits on the investigative tools available to us as Special Counsel, we recommend that the Council refer these matters to the United States Attorney for further examination.

Conclusions about Government Oversight

Finally, we conclude that Banneker was able to direct such a large proportion of the dollars expended on the DPR projects in 2009 to LEAD because of a failure of oversight on the part of DCHE and particularly, DMPED. DCHE personnel reviewed Banneker's invoices to ensure that project expenditures were in accordance with project budgets, and they checked for arithmetic errors and supporting documentation. But they deferred to their "client," DMPED, to assess whether the work claimed in the invoices was actually performed and properly priced. Even in its limited role, DCHE should have asked more questions about LEAD's invoices when

there was no indication that Banneker had sought approval to hire LEAD under the terms of the project management contract DCHE was being paid to administer.

DMPED, for its part, simply relied on Banneker to review the invoices submitted by its consultants, and it took no action to question LEAD's charges even though the DMPED project manager, Jacqui Glover, observed that they were high. She was well aware that LEAD was actually subcontracting the work to other firms, but she signed off on the invoices even in the absence of records reflecting LEAD's costs for those subcontractors.

Ultimately, while we are recommending further investigation with respect to Banneker, LEAD, and Skinner and Karim's other business entities only, our review uncovered areas for improvement across the board as many government officials share responsibility for what took place. District officials gave priority to the need for speed while ignoring the preference for price competition that is embodied in both District and DCHE procedures and would have better served the District's interests. DMPED was operating under an assumption that Banneker would end up with the project management contract, and when the time came to negotiate its terms, there was a lack of hard bargaining on the city's side. Terms from previous contracts that were favorable to Banneker were repeated without an exploration of their continued justification, and DMPED brushed aside DCHA's attempts to take time to improve the contract. This combination of expedition, inattention, and inertia left the city vulnerable to complaints that there had been at least an appearance of impropriety, and the use of the RFQ left city officials unable to point to proof that would dispel complaints that the deal was too rich for Banneker.

The Council was told that funds and authority were transferred from DPR to DMPED in an effort to supplement DPR's construction management capacity. But DMPED was just getting its construction team off the ground, so it transferred funds and authority to DCHA – and agreed

to pay DCHE $700,000 – to tap into *its* superior construction management expertise. But DMPED turned a deaf ear when DCHE tried to offer that input. And in the end, DCHE was not expected to serve as the project manager either. At DMPED's direction, DCHE paid to engage a private firm to hire and manage the consultants and contractors, and Banneker, once selected for that role, selected an engineering firm that did little more than hire and manage its own contractors. All of these multiple layers of management led to a significant waste of taxpayer funds.

In addition, the successive hand-offs resulted in such a diffusion and dilution of responsibility that in the end, no one in government took ownership of the projects, and Banneker was presented with an opportunity it may have exploited for the benefit of LEAD and possibly others. Banneker was considered and selected for the award in combination with Regan, but the firm took advantage of its lead position. DCHE held Banneker's contract, but DMPED retained control of the projects and the project manager, and neither agency paid sufficient attention. Both agencies fell short in their roles and both promptly pointed fingers at the other when problems with the contracts first came to light.

In light of all of the facts and circumstances to be set forth in detail below, we recommend that the Council refer the matters related to Banneker, LEAD, and Banneker's selection of the general contractors to the United States Attorney for further investigation and that the Council consider the additional legislative recommendations set forth at the conclusion of this report.

SCOPE OF THE INVESTIGATION

A. How It Began

On October 22, 2009, four members of the Council of the District of Columbia ("Council") wrote a letter to Mayor Adrian M. Fenty, stating that it had come to their attention that week that "tens of millions of dollars in contracts are being awarded through the District of Columbia Housing Authority."[4] They noted that "Funding for these contracts appears to be directed from District government agencies for projects related to parks, recreation centers and fields." The Council members voiced their concern that the "transfer of procurement authority may circumvent District procurement laws" and was not sufficiently transparent.[5] They also pointed out that "work appears to have been started or completed on projects over $1 million without Council approval."[6]

One of the questions raised by the Council and in ensuing media reports was why funding for DPR projects was transferred from DPR to the Deputy Mayor for Planning and Economic Development ("DMPED"), and then again from DMPED to DCHA and its wholly-owned subsidiary, District of Columbia Housing Enterprises ("DCHE").[7] Questions were also raised about the award of the multi-million dollar project management contract to Banneker Ventures

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4 Ex. 3, Letter from Kwame Brown, Chair, Committee on Economic Development, Marion Barry, Chair, Committee on Housing and Workforce Development, Mary Cheh, Chair, Committee on Government Operations & the Environment, and Harry Thomas, Jr., Chair, Committee on Libraries, Parks & Recreation, to Adrian M. Fenty, Mayor of the District of Columbia (Oct. 22, 2009).

5 *Id.*

6 *Id.*

7 Nikita Stewart, D.C. Council Questions Parks Projects It Didn't Approve, Wash. Post, Oct. 23, 2009, at B1.

LLC ("Banneker Ventures" or "Banneker"), a company owned by Omar Karim, a fraternity brother of Mayor Fenty's,[8] and about Banneker's award of the civil engineering contract for the projects to a company owned in part by Sinclair Skinner, also a friend and fraternity brother of the Mayor's.[9]

In light of these questions, the four Council members, each the chair of a committee with relevant oversight responsibility, convened a joint public oversight roundtable on October 30, 2009 to examine the DPR capital projects.[10] At the roundtable, City Administrator Neil Albert and several other District officials testified about the projects. In addition, community members spoke out about their concerns over the contracting and procurement process.[11]

B. The Authorizing Resolution

Based in part on testimony presented at the October 30 roundtable, the Committee on Libraries, Parks and Recreation ("the Committee") found that the circumstances surrounding the

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8 *Id.*

9 Stewart, Wash. Post, Oct. 31, 2009.

10 Pursuant to Council Rule 501(c), "a committee may hold a roundtable on any matter related to the affairs of the District that is properly within the committee's jurisdiction." In essence, a roundtable meeting is similar to a hearing except for the notice requirements involved. Rules for the Council of the District of Columbia, Council Period 18 Resolution of 2009, effective January 2, 2009 (Res. 18-1, 55 DCR 784) ("Council Rules"). The roundtable was convened by Kwame Brown, Chair, Committee on Economic Development, Marion Barry, Chair, Committee on Housing and Workforce Development, Mary Cheh, Chair, Committee on Government Operations & the Environment, and Harry Thomas, Jr., Chair, Committee on Libraries, Parks & Recreation.

11 Joint Public Oversight Roundtable on the Contracting Process Related to Parks and Recreation Before the Committee on Economic Development, the Committee on Housing and Workforce Development, the Committee on Government Operations & the Environment, and the Committee on Libraries, Parks & Recreation (hereinafter "Joint Roundtable"), 18th Council Period (D.C. Oct. 30, 2009); *see also* Nikita Stewart, *Contractor Chose Firms Linked to Fenty, D.C. Council Told*, Wash. Post, Oct. 31, 2009, at B1.

transfer of DPR funds demonstrated "inadequate controls and accountability over the budget process," and that the "unanswered and potentially inappropriate involvement of [DPR] and other District agencies" warranted an investigation.[12] Accordingly, on November 2, 2009, the Committee passed the Committee on Libraries, Parks and Recreation Budget Transparency Investigation Authorization Resolution of 2009 ("Authorizing Resolution").

The Authorizing Resolution directed the Committee to investigate the following:

- "A determination of policies, procedures, or other practices surrounding the transfer of funds or authority via memoranda of understanding, or any other instrumentality, for Department of Parks and Recreation capital projects;"
- "All funds concerning Department of Parks and Recreation capital projects;" and
- "All relevant facts and circumstances related to the matters listed above to determine what, if any, legislative action may be appropriate."[13]

[12] Ex. 4, Committee on Libraries, Parks and Recreation Budget Transparency Investigation Authorization Resolution of 2009, effective November 2, 2009 (56 DCR 8724) (the "Authorizing Resolution"). The Authorizing Resolution was amended by the Committee on Libraries, Parks and Recreation Resolution Budget Transparency Investigation Amendment Resolution of 2010, effective March 9, 2010 (57 DCR 3210) (Ex. 5, the "Special Counsel Resolution").

[13] Ex. 4, Authorizing Resolution § 3(1)-(3).

The Authorizing Resolution granted the Committee authority to use subpoenas to compel the attendance of witnesses, to obtain testimony, and to require the production of documents or other information or tangible items.[14]

The Committee then held a series of joint roundtables on November 5, 2009, November 16, 2009, December 2, 2009, December 10, 2009, January 8, 2010, and January 27, 2010.[15] Among the witnesses that appeared before the Committee were representatives of DPR, DMPED, DCHA, DCHE, the Office of Contracting and Procurement ("OCP") and the Office of the Chief Financial Officer ("OCFO"). In addition, Omar Karim testified on behalf of Banneker Ventures, alongside two representatives of Regan Associates LLC, the firm that shared project management duties with Banneker. Several members of the public also testified.

The Committee also sought the testimony of Sinclair Skinner. Skinner was a founder and principal of Liberty Engineering & Design ("LEAD"). LEAD was hired by Karim's company, Banneker Ventures, to perform civil engineering, geotechnical, environmental, and surveying services for the DPR capital projects. After Skinner failed to appear to testify,[16] the Council

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[14] Ex. 4, Authorizing Resolution § 4. In addition, on November 5, 2009, Councilmember-at-Large Brown formally requested that the District of Columbia auditor conduct an audit of the contract and procurement practices related to the DPR capital projects. Ex. 6, Letter from Deborah K. Nichols, District of Columbia Auditor, to Adrianne Todman, Interim Executive Director, DCHA (Nov. 16, 2009).

[15] Like the October 30, 2009 joint roundtable, these roundtable meetings were also conducted jointly with the Committee on Economic Development, the Committee on Housing and Workforce Development, and the Committee on Government Operations & the Environment.

[16] Ex. 7, Letter from Harry Thomas, Jr., Chair, Committee on Libraries, Parks and Recreation, to Sinclair Skinner, Liberty Engineering and Design, PLLC, Dec. 8, 2009; Ex. 8, Subpoena to Sinclair Skinner issued by Council member Harry Thomas, Jr., Chair, Committee on Libraries, Parks and Recreation of the Council of the District of Columbia, Jan. 14, 2010.

moved to enforce its subpoena in the Superior Court of the District of Columbia.[17] On February 26, 2010, the Superior Court granted the Council's petition, and ordered Skinner to appear and provide testimony before the Committee, subject to a $5,000 fine for the day of his non-appearance and a $1,000 fine for every subsequent day that he failed to appear.[18] Skinner appeared before the Committee on April 15, 2010.

C. The Special Counsel Resolution

In light of Skinner's recalcitrance, the Committee sought the assistance of outside counsel in taking Skinner's testimony. The Committee also requested assistance in reviewing the facts relating to the DPR capital projects and determining whether further action was warranted. Accordingly, on March 9, 2010, the Committee unanimously approved the Committee on Libraries, Parks and Recreation Resolution Budget Transparency Investigation Amendment Resolution of 2010 ("the Special Counsel Resolution"). The Special Counsel Resolution appointed Robert P. Trout of Trout Cacheris PLLC as Special Counsel,[19] and directed him to do the following:

- "Review all material he deems appropriate concerning this investigation;"
- "Conduct a thorough review of District laws to determine if the circumstances surrounding the transfer of capital funds, the subsequent awarding of contracts, or the approval and expenditure of funds warrant further review of the United States Attorney for the District of Columbia or any other investigative or enforcement agency;"

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17 Pursuant to D.C. Official Code section 1-204.13, which authorizes the Council to petition the Superior Court of the District of Columbia to enforce a Council subpoena on a witness, the Committee adopted the Enforcement of Subpoena of Sinclair Skinner Resolution of 2010, effective February 2, 2010 (Res. 18-379). *See* Ex. 9.

18 Ex. 10, *Council of the District of Columbia v. Sinclair Skinner*, No. 1122-2010 (D.C. Super. Ct. Feb. 26, 2010) (order granting consent motion).

19 Ex. 5, Special Counsel Resolution, § 3a.

- "Make any recommendations that he may have for any necessary changes to District laws;" and
- "Examine any other areas or matters that may be necessary to assist the Committee as determined by the Chairman."[20]

The Special Counsel Resolution also provided that the "Special Counsel is permitted, through the Committee, to utilize subpoenas to obtain testimony and documents" and provided that the Special Counsel may take testimony of witnesses by deposition.[21] It noted that the Chairman of the Committee may "retain and delegate investigative duties to Mr. Trout," and that Mr. Trout would provide his services on a *pro bono* basis.[22] Finally, the Special Counsel Resolution directed Mr. Trout to issue a report within 60 days of the conclusion of the investigation.[23]

Other attorneys from Trout Cacheris assisted Mr. Trout in this investigation.

D. Methodology

At the outset of the investigation, we were briefed by Council staff on District budgeting and contracting policies and procedures and on the status of the Committee's investigation. We researched the applicable laws governing contracting, procurement, and budgeting in the District of Columbia. We reviewed the information already collected by the Committee, including numerous documents and the testimony taken at the seven hearings held by the Council between

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[20] Ex. 5, Special Counsel Resolution, § 3a(c)(1)-(4).

[21] Ex. 5, Special Counsel Resolution, § 3a(e)-(f).

[22] Ex. 5, Special Counsel Resolution, § 3a. The Committee did not authorize or provide funding for forensic accountants or experts in construction management or government contracts.

[23] Ex. 5, Special Counsel Resolution, § 3a (c)(5).

October 30, 2009 and January 27, 2010. Approximately 45 witnesses appeared during these roundtables (some more than once), providing more than 45 hours of testimony.

Using that information as a baseline, we proceeded to gather facts and evidence by means of document subpoenas and requests, Committee hearings, depositions and interviews.

1. Document collection and review

After reviewing the documents gathered by the Committee, we issued 14 document subpoenas pursuant to our authority under the Special Counsel Resolution and Council Rule 611 and made additional document requests.[24] We collected and reviewed thousands of documents from a variety of sources, including District agencies and private contractors and subcontractors who worked on the DPR capital projects. We also subpoenaed bank records of Banneker Ventures and LEAD, as well as Liberty Law Group, a law and consulting firm owned by Omar Karim, and Liberty Industries, a consulting firm owned by Sinclair Skinner.

Our efforts to obtain documents were at times hindered by incomplete and delayed productions. For example, on April 7, 2010, we issued a subpoena to Sinclair Skinner for documents relating to LEAD's activities, to be produced at the time of his appearance before the Council on April 15, 2010.[25] Skinner made a partial production on April 15. He made a second production on April 26 and a third production on April 27, which he described as final and

[24] Council Rule 611 states: "The Council, any standing committee of the Council, and, if authorized by the Resolution establishing it, any special committee, may subpoena the attendance and testimony of witnesses and the production of documents and other tangible items at meetings, hearings, and depositions in connection with an investigation…."

[25] Ex. 11, Subpoena to Sinclair Skinner issued by Council member Harry Thomas, Jr., Chair, Committee on Libraries, Parks and Recreation of the Council of the District of Columbia, Apr. 5, 2010.

complete.[26] Skinner then appeared before the Council a second time on April 28, and during that appearance we requested several specific documents that had not been produced.[27] Skinner then made a fourth production of documents on May 7[28] and a fifth production on May 24, [29] representing again that this was a final and complete production.[30] Yet on May 28, 2010, Skinner produced a *sixth* set of responsive documents,[31] and still failed to produce documents that should have been in LEAD's possession if its records had been adequately maintained.

We also experienced delays and a seriously inadequate response in our efforts to obtain documents from Omar Karim and Banneker Ventures. Banneker's initial production of documents to the Council was notably incomplete. To take one important example, e-mails were produced with critical attachments missing. We issued a follow-up subpoena to Karim, which was met with the assertion that no production could be accomplished without significant delay.[32] In the end, no additional documents or records were provided by Karim or Banneker, and we did

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[26] *See* Ex. 12, Letter from A. Scott Bolden, Counsel for Sinclair Skinner, to Robert Trout, Special Counsel to the Council of the District of Columbia, Apr. 27, 2010.

[27] Joint Roundtable (April 28, 2010) 6:2-11; 136:17-137:14.

[28] *See* Ex. 13, Letter from A. Scott Bolden, Counsel for Sinclair Skinner, to Robert Trout, Special Counsel to the Council of the District of Columbia, May 7, 2010.

[29] *See* Ex. 14, Letter from A. Scott Bolden, Counsel for Sinclair Skinner, to Robert Trout, Special Counsel to the Council of the District of Columbia, May 24, 2010.

[30] *See* Ex. 15, Letter from Robert Trout, Trout Cacheris PLLC, to A. Scott Bolden, Reed Smith, June 4, 2010.

[31] *See* Ex. 16, Letter from A. Scott Bolden, Reed Smith, to Robert Trout, Trout Cacheris PLLC, May 28, 2010.

[32] *See* Ex. 17, E-mail from Lawrence Sher, Reed Smith, to Robert Trout, Trout Cacheris PLLC (July 20, 2010, 11:55 EST).

not receive any indication that they made any effort to search for documents in response to our subpoena.

The process of obtaining documents from District agencies also moved slowly, for a number of reasons. First, facts learned during the investigation caused us to issue more than one document request to certain agencies. Second, some agencies took a significant amount of time to provide documents, requesting successive extensions to our deadlines. Third, some agencies produced e-mails without attachments, and other agencies produced documents in a manner that made it difficult to correlate e-mails with their attachments, adding additional time to our review.[33] We also do not believe that we received complete productions from any of the agencies involved since, among other things, we received many e-mails where a copy was produced by the sending or receiving party but not by the other.

2. Skinner's testimony before the Council

Shortly after the Special Counsel was appointed, we took the lead in questioning Sinclair Skinner, one of the principals of LEAD, during his court-ordered testimony before the Committee on April 15, 2010 and again on April 28, 2010. During both appearances, Skinner, through his counsel, refused to answer questions that he claimed were outside of the scope of the investigation.[34] Among other things, these questions related to the activities of Liberty Industries, LLC, a company solely owned by Skinner, and its relationship to Liberty Law Group, a firm solely owned by Omar Karim. Special Counsel pursued these inquiries because the evidence showed close ties between Skinner and Karim through their companies, including transfers of

[33] *See, e.g.*, Ex. 18, E-mail from Amy Jackson, Trout Cacheris PLLC, to Kelly Kramer, Nixon Peabody LLC (Oct. 28, 2010, 1:35 PM EST).

[34] *See, e.g.*, Joint Roundtable (Apr. 15, 2010) 143:11-145:3 (refusing to answer questions about Liberty Industries or Liberty Law Group).

more than one million dollars from Liberty Law Group to Liberty Industries between 2008 and April 2010. The relationship between Skinner and Karim raised serious questions about whether the contracts for engineering work were awarded in a fair and open manner. Although Skinner's objections to our inquiries about Liberty Industries and Liberty Law Group were overruled,[35] Skinner's counsel nevertheless directed him not to answer or provide related documents. The Committee held Skinner's appearance open at the conclusion of the April 28, 2010 hearing subject to resolving these objections.[36]

After meetings with Skinner's counsel, we were advised that Skinner had changed his position and would testify about the subjects he had previously claimed were outside the scope of the investigation. By agreement, the follow-up testimony was taken by deposition. Because of Skinner's continuing objections and scheduling conflicts, that deposition was not held until October 6, 2010, nearly six months after Skinner's original appearance before the Committee. As will be discussed in more detail below, however, Skinner's professed willingness to testify proved illusory.

3. Depositions and interviews

In addition to Sinclair Skinner, we deposed 14 witnesses, either through their voluntary

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[35] *See, e.g.*, Joint Roundtable 145:4-145:15 (Apr. 15, 2010); *see also* Council Rule 621 (providing that a witness may claim statutory or common law privileges recognized by the Superior Court of the District of Columbia, but if the presiding member determines the claim of privilege is not warranted, he or she shall direct the witness to answer the question, and a continued claim of privilege constitutes contumacy by the witness).

[36] Joint Roundtable (Apr. 28, 2010) 137:15-19.

cooperation or testimonial subpoenas.[37] The deponents included District government employees, as well as contractors and subcontractors for the DPR capital projects. Several depositions were conducted in executive session, [38] but have since been released for use in this Report.

We filed a motion to compel with regard to one witness: Omar Karim. Karim appeared for a deposition, but refused to answer questions or to produce documents related to Liberty Law Group and his relationship with Sinclair Skinner and Liberty Industries. Karim, like Skinner, claimed that these questions were irrelevant to the investigation.[39] Karim similarly refused to answer questions about ties between Liberty Law Group and other companies that also were awarded contracts to work on the DPR capital projects. Accordingly, Special Counsel sought permission from the Council to file a motion to compel, which was granted in a resolution passed unanimously on August 12, 2010.[40] On September 17, 2010, the Superior Court entered an order finding that these issues were within the bounds of the investigation, and ordering Karim to

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[37] Depositions were taken at the Council's chambers in the John A. Wilson Building and, as is the Council's practice, were preserved by audiotape recording, using the technology made available to us by the Council. After each deposition, electronic copies of the audiotapes were provided to the witness or their counsel. The audiotape of each deposition was subsequently transcribed. We learned after the fact that due to errors in the operation of the recording equipment during four of the depositions, some portions of the witnesses' testimony were not captured on the recordings. We advised counsel for each of these deponents of the recording issues, and provided them with the opportunity to propose solutions that would leave each deponent satisfied that the record accurately reflected his or her statements. We also provided counsel for these deponents with copies of our detailed notes of the depositions and with the opportunity to review this Report before final submission to the Council. We have not been advised of any inaccuracies in our descriptions of the witnesses' statements. Where we rely on any portions of the testimony that were not recorded, we treat that testimony as an un-sworn interview, and cite to them as "Dep. Notes."

[38] *See* Ex. 19, Council Rule 504.

[39] Deposition of Omar Karim (August 5, 2010) at 76:1-14. Karim, Skinner and their companies were represented by the same counsel in this investigation.

[40] Ex. 20, The Enforcement of Subpoena of Omar Karim Resolution of 2010, effective August 12, 2010 (Res.18-615).

answer questions and to produce the documents relating to Liberty Law Group that he had previously refused to provide.[41] Karim, however, did not produce any additional documents. He was re-deposed on September 21, 2010. But as described more fully below, his testimony was more evasive than responsive, and he provided virtually no meaningful information about the activities of Liberty Law Group or Liberty Industries.

In addition to taking depositions, we interviewed 30 witnesses, including contractors, architects and engineers who worked on the DPR capital projects, employees and former employees of a number of District agencies, Councilmember Harry Thomas, Jr., and Attorney General Peter Nickles. Because the projects were originally slated in 2008 to be managed by the Office of Public Education Facilities Modernization (OPEFM), and were again transferred to OPEFM after the Council's action in December 2009, we interviewed Allen Lew, then Executive Director of OPEFM, and the two OPEFM project managers who were assigned responsibility for the projects: Will Mangrum of Brailsford and Dunlavey and Marcos Miranda of McKissack & McKissack, about those circumstances.[42] Since, as noted above, the appointment of Special Counsel did not provide for the engagement of independent experts in construction management or any other field, we asked the project managers, engineers, architects, and others we did interview to shed light on industry practices in general and their practices in particular, and while

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[41] Ex. 21, *Council of the District of Columbia v. Omar Karim*, No. 1122-2010 (D.C. Super. Ct. Sept. 17, 2010) (order granting motion to compel testimony and compliance with Council subpoena duces tecum).

[42] While the projects were originally assigned to OPEFM, Brailsford and McKissack worked on the RFP for design-build services that was issued by OPEFM on February 2, 2009. *See* Ex. 22, D.C. Office of Public Education Facilities Modernization, Request for Proposals, Design-Build Renovation Services, Recreation Centers, Solicitation #: GM-09-M-0204-FM (Feb. 2, 2009). Brailsford also submitted a response to the project management RFQ issued by DCHE on March 9, 2009, but was not chosen. McKissack did not respond to the DCHE RFQ.

we do not proffer these comments as expert opinion, we include them in the report where relevant.

We also requested the opportunity to depose or interview Mayor Adrian Fenty. Responding on behalf of the Mayor, the Attorney General asserted that the Council did not have the authority to compel the Mayor to testify, and declined our request for a deposition.[43] However, he indicated that the Mayor would answer a limited number of written questions:

> … in the spirit of transparency and cooperation, I am informed that the Mayor is willing to answer certain specific questions that are neither privileged nor repetitive of questions already addressed by other witnesses in the investigation. In order to preserve precedent, however, I propose that the questions be submitted in writing and answered in writing. Given these parameters, I'm certain such questions would number no more than between 5-10 separate queries.[44]

After consultation with the Committee and in light of the evidence already gathered, Special Counsel decided to accept the Mayor's offer to answer written questions in lieu of a deposition or interview. A copy of the written questions and the Mayor's answers is attached to this Report.[45]

E. Limitations of the Investigation

Pursuant to the Special Counsel Resolution, our investigation focused on the transfer of funds and authority for the DPR capital projects to DMPED and then to DCHA, the awarding of contracts to carry out the work on those projects, and events relating to termination of the contracts and the December 2009 payment. We did not have the benefit of forensic accounting expertise in our investigation. While the Joint Roundtable hearings exposed possible funding

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43 *See* Ex. 23, Letter from Peter J. Nickles to Robert P. Trout (Dec. 3, 2010).

44 *Id.*

45 Ex. 24, Letter from Peter J. Nickles to Robert P. Trout (Dec. 30, 2010).

deficiencies, questions about DMPED's decisions to authorize spending in excess of amounts budgeted for particular parks or allocated for the particular fiscal year,[46] and inconsistencies between the list of projects DMPED directed Banneker to manage and the list of projects covered by the MOUs, the Committee agreed that since the D.C. Auditor was conducting a parallel investigation into those matters, questions related to reprogramming and anti-deficiency act concerns fell outside the scope of our investigation. For the same reason, we did not undertake an audit of Banneker's invoices.

One question we were asked to address was whether any of the circumstances warranted further review by the United States Attorney for the District of Columbia or any other enforcement agency.[47] As Special Counsel, we had the investigative tools provided under the Council's rules, but we did not have access to the government's full range of investigatory resources, and we could not exercise the powers available to a public prosecutor conducting a grand jury investigation, including the power to grant immunity to certain witnesses. Thus, we do not represent that we have uncovered every fact relating to the DPR capital projects. Where we have uncovered sufficient facts to give rise to a concern that potential violations of law may have occurred, or there are questions that cannot be answered without the tools available to a

[46] David Jannarone operated under the mistaken impression that DMPED had "pool authority" to move funds between projects and between fiscal years. Jannarone Dep. 93:5-94:2. DPR employees were troubled by DMPED's approach to funding and brought their concerns to Jannarone's attention on several occasions before he sought legal guidance on the issue. Ex. 25, E-mail from Bianca Fagin (DPR) to Jacquelyn Glover (EOM), Bridget Stesney (DPR), and David Janifer (DPR) (Aug. 3, 2009 2:40 PM EST); Janifer Dep. 105:5-106:10. DCHE personnel did not track this issue at all, and instead saw their task as managing the budgets provided to them by DMPED. Interview with Asmara Habte, Contractor, DCHA (Jul. 27, 2010).

[47] Ex. 5, Special Counsel Resolution.

prosecutor, we have recommended that the issues be referred for investigation by the appropriate authorities.

LEGAL BACKGROUND

This section briefly outlines several legal and regulatory issues that are relevant to the events under investigation: (1) the requirement of Council approval for District contracts of more than one million dollars; (2) the differing procurement rules applicable to different District agencies; (3) procurement requirements relating to small, local, and disadvantaged business enterprises; and (4) the use of memoranda of understanding (MOUs) as a means of transferring authority and budgetary funds between District agencies.

A. The Council Approval Requirement

Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act") in part to delegate certain legislative powers to the District of Columbia.[48] The Home Rule Act, in a provision now codified as Section 1-204.51 of the D.C. Code, requires the Council to approve certain types of contracts to be entered by the District and its agencies before those contracts can be valid. The Mayor must submit to the Council for approval any contract for goods and services "involving expenditures in excess of $1,000,000 during a 12-month period."[49] The Mayor must also seek Council approval for

[48] *See* D.C. Code § 1-201.02(a).

[49] D.C. Code § 1-204.51(b)(1) ("No contract involving expenditures in excess of $1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council).").

multiyear contracts for goods and services.[50] In the D.C. Court of Appeals' 2007 decision in *Fairman v. District of Columbia,*[51] dealing with the multiyear contract approval provision, the court held that any contract requiring Council approval that is not so approved is "invalid."[52]

DCHA is an independent authority of the D.C. government, created in 2000 to construct and manage public housing in the District. The majority of DCHA's activities are funded by the U.S. Department of Housing and Urban Development. DCHA has also formed a wholly-owned subsidiary called D.C. Housing Enterprises ("DCHE"). DCHE carries out real estate development and construction activities on a fee basis, with its earnings going to support DCHA's mission.[53] Until the Committee began investigating the DPR capital projects, DCHA took the position that as a federally-funded independent authority, neither it nor its subsidiaries were subject to the Council approval requirement. As a result, Banneker's program management contract with DCHE was not submitted to the Council for approval – even though the contract amount was well in excess of $1 million, and it involved District money, not federal funds.

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50 Congress authorized this requirement as part of the District of Columbia Appropriations Act of 1996, Pub. L. No. 104-134, § 134, Apr. 26, 1996, 110 Stat. 1321-92. It is now codified at D.C. Code section 1-204.51(c), which provides, in part: "No [multiyear contract] shall be valid unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council). The Council shall be required to take affirmative action to approve the contract within 45 days. If no action is taken to approve the contract within 45 calendar days, the contract shall be deemed disapproved."

51 934 A. 2d 438 (D.C. 2007). While *Fairman* focused on the language of the multiyear contract provision, the same policies underlie the requirement for Council approval of contracts in excess of $1 million.

52 *Id.* at 448.

53 According to Michael Kelly, who was the Executive Director of DCHA when DCHE was created, DCHE's purpose was to use available engineers and project managers to earn non-federal dollars to supplement the funds received by DCHA from HUD. Interview with Michael Kelly, former Executive Director, DCHA (Nov. 4, 2010).

DCHA took this position despite a 1996 opinion of the District's Corporation Counsel concluding that independent agencies were governed by the Council approval requirement,[54] and despite being advised by the Attorney General's Office in 2007 and 2008 of its view that DCHA was subject to the requirement. DCHA only changed its position in October 2009, after the Attorney General issued a formal opinion concluding that "without any doubt," DCHA must abide by the Home Rule Act and its Council approval provision with respect to contracts involving District funds.[55]

Because of the importance of this issue to the events under investigation, it is discussed in detail in Section VI below.

B. Laws Governing District Procurements

The Procurement Practices Act ("PPA") is the District's primary procurement law. It is implemented through Title 27 of the District of Columbia Municipal Regulations.[56] The statute and regulations set the standards and procedures for purchases of goods and services by the District. The PPA was amended in 1997, primarily to centralize procurement authority and activities in the Office of Contracting and Procurement ("OCP"), headed by the District's Chief

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[54] Ex. 26, Opinion of Corporation Counsel, *Is Council review required for proposed contracts of independent agencies in excess of one million dollars during a 12-month period?*, May 10, 1996 ("1996 Opinion").

[55] Ex. 27, Opinion of the Attorney General of the District of Columbia, Whether the DCHA must seek approval of the City Council for contracts for goods and services involving expenditures in excess of $1,000,000 during a 12-month period, Oct. 23, 2009 ("October 23 Opinion"). The Attorney General's opinion does not explicitly address the applicability of the Council review requirement to DCHA contracts involving federal funds, and this remains an open question.

[56] D.C. Code § 2-301.1 *et seq*.

Procurement Officer.[57] OCP personnel issue solicitations and enter contracts on behalf of District agencies. If Council approval is required, OCP submits the contract to the Council prior to execution.[58]

Most, but not all, District agencies are obligated to follow the PPA and to conduct procurements through OCP.[59] However, some of the agencies that are subject to the PPA have their own procurement authority and may enter contracts without going through OCP. And certain agencies are exempt from both the PPA and OCP and may do their own contracting following their own procurement policies and procedures.

Each of the three agencies involved in the DPR capital projects falls into a different procurement regime. DPR is subject to the authority of both the PPA and OCP. DMPED is subject to the PPA but has its own procurement authority by delegation from the Mayor, and may enter contracts without going through OCP. DCHA is exempt from both the PPA and OCP.[60] It has the authority to "[a]dopt and administer its own procurement and contracting

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57 44 D.C. Reg. 1423 (Jan. 3, 1997), codified at D.C. Code § 2-301.05.

58 Interview with David Gragan, Chief Procurement Officer of the District of Columbia, Office of Contracting and Procurement (Jul. 28, 2010).

59 D.C. Code § 2-301.04(a) ("Except as provided in § 2-303.20, this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions . . . .").

60 There is one exception to this exemption, regarding the Contract Appeals Board, but it is not applicable here. D.C. Law 13-105 (2000); D.C. Code § 6-219; D.C. Code § 2-303.20(m) ("Nothing in this chapter shall affect the authority of the District of Columbia Housing Authority, except that subchapter IX of Unit A of this chapter shall apply to contract protests, appeals, and claims arising from procurements of the Housing Authority.").

policies and procedures in accordance with" D.C. Code section 6-219.[61] Its subsidiary, DCHE, also has its own procurement policies.

Like the Home Rule Act, the PPA requires Council approval for multiyear contracts and for contracts in excess of one million dollars. Unlike the Home Rule Act, however, these provisions only apply to contracts governed by the PPA, and therefore do not apply to DCHA.[62]

C. Local, Small and Disadvantaged Businesses

The Department of Small & Local Business Development ("DSLBD") was established with the goal of fostering greater opportunities for local, small and disadvantaged businesses to participate in District contracting and procurement.[63] One of the ways it does this is through the Certified Business Enterprise ("CBE") program. Local business enterprises that are also small or disadvantaged, or meet certain other criteria, may be certified as CBEs.[64] Each District agency is required to meet the goal of procuring and contracting 50% of the dollar volume of its goods and services to small business enterprises.[65] Of particular importance here, CBEs are entitled to

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61 D.C. Code § 6-203(16).

62 D.C. Code § 2-301.05d ("Pursuant to § 1-205.51(b) the Mayor and all independent agencies and entities of the District government shall submit to the Council for approval any proposal to contract out services *covered by this act* that involves expenditures in excess of $1,000,000 during a 12-month period." (emphasis added)). The Home Rule Act requirement applies to contracts of any District agency whether covered by the PPA or not.

63 D.C. Code § 2-218.13(a).

64 D.C. Code § 2-218.31 through 218.37. To qualify as "local," a business must have "its principal office located physically in the District of Columbia," and must require "that its chief executive officer and the highest level managerial employees of the business enterprise maintain their offices and perform their managerial functions in the District," as well as meeting other standards. D.C. Code § 2-218.31.

65 D.C. Code § 2-218.41.

receive certain preferences from agencies when they are evaluating bids or proposals.[66] In the case of proposals, points are added to a business's score, with the number added depending on which LSDBE categories the business falls into; in the case of a bid, the statute provides for a deemed reduction in the bidder's price.[67] The statute also provides for mandatory set-asides of small contracts for small business enterprises.[68] In addition, the statute imposes requirements on the dollar volume of subcontracts to be awarded to small business enterprises or CBEs under construction contracts greater than $250,000.[69]

D. Memoranda of Understanding

District law permits District departments, offices and agencies to place orders with other District agencies for goods or services.[70] Such orders are documented in Memoranda of Understanding ("MOUs") between the agencies.

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66 D.C. Code § 2-218.43.

67 *Id.*

68 D.C. Code § 2-218.44. David Gragan also noted that set-asides are permissible even where not mandatory. Interview with David Gragan.

69 D.C. Code § 2-218.46.

70 D.C. Code § 1-301.01(k)(1) ("The Mayor may authorize the heads of District departments, offices, and agencies to place orders with any other department, office, or agency of the District for materials, supplies, equipment, work, or services of any kind that the requisitioned department, office, or agency may be in a position to supply or equipped to render; provided, that the Mayor shall submit annually to the Council a report of all Memoranda of Understanding between District agencies involving an exchange of materials, supplies, equipment, work, or services of any kind. …"). Effective October 22, 2009, D.C. Law 18-63 amended the first sentence of subsection (k)(1), which had required the District's Chief Procurement Officer to authorize MOUs. 56 D.C. Reg. 3053 (Jul. 28, 2009). This change was proposed by CPO David Gragan. He felt that if two agency heads had already agreed that an MOU was appropriate, his review used resources and added delay, but little value. Interview with David Gragan.

Until the statute was changed effective October 2009, all MOUs had to be approved by the Chief Procurement Officer. David Gragan, the CPO through the relevant period, estimated that he signed 3 or 4 per week.[71] MOUs are used for many different purposes, and often involve relatively small sums. Gragan indicated that a typical MOU might involve an agency that needs to provide a certain type of training to its employees and procures that service from another agency that has trainers on its staff.[72] According to Gragan, MOUs are not treated as open market procurement contracts.[73] They are not required to be submitted to the Council for approval.

Not only did the MOUs in this case – from DPR to DMPED and then from DMPED to DCHA – transfer millions of dollars in parks funding, they also had the effect of moving procurement for the parks projects to DCHA and DCHE, which were subject to different procurement regulations than DPR and DMPED, and which took the position that they were exempt from the Council review requirement. These actions spawned the concerns that underlie this investigation.

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71 *Id.*

72 *Id.*

73 *Id.*

CHRONOLOGY OF KEY EVENTS

Date	Event
February 27, 2009	MOU between DPR and DMPED for up to $40,350,000 for DPR Capital Projects.
March 9, 2009	Request for Qualifications ("RFQ") for Project Management issued by DCHE.
March 11, 2009	DCHA Board authorizes entry into an MOU with DMPED (but the MOU is not signed until July).
March 12, 2009	DCHA assigns its tasks under the MOU to DCHE.
March 18, 2009	David Jannarone (DMPED) asks Omar Karim (Banneker) to prepare budget spreadsheets and cashflows for DPR projects.
March 27, 2009	13 bidders, including a team made up of Banneker Ventures and Regan Associates, submit responses to the Project Management RFQ.
April 29, 2009	Contractor selection panel recommends that Banneker Ventures-Regan Associates be awarded the project management contract.
April 30, 2009	DCHE sends notice of its intent to award the project management contract to Banneker-Regan.
May 4, 2009	Banneker hires LEAD under a letter agreement for consulting and surveying work on parks.
May 15, 2009	LEAD retains Currie and Associates, LLC to complete 5 surveys.
June 2, 2009	Banneker issues an RFQ for architects/engineers for the DPR projects.
June 3, 2009	Banneker issues an RFQ for civil engineering and surveying for the DPR projects.
June 10, 2009	Banneker submits invoice #1 to DMPED.
June 11, 2009	LEAD responds to Banneker's RFQ for engineering services.

Date	Event
June 26, 2009	Banneker submits invoice #2 to DMPED.
July 14, 2009	DCHE Board authorizes entry into project management contract with Banneker-Regan "joint venture;" resolution references flat fee but not 9% mark-up.
July 14, 2009	DCHE signs Project Management Services contract with Banneker (effective date May 1, 2009). Project management fee is fixed fee of $4,212,600, plus bonuses, and a 9% mark-up on consultants' fees.
July 20, 2009	Banneker issues RFQ for general contractors
July 20, 2009	Banneker and Regan Associates execute consulting agreement; Regan will receive 48% of Banneker's fee, not including the 9% mark up.
July 22 & 25, 2009	Consulting Services Agreements between Banneker and LEAD for LEAD to provide surveying, civil engineering and geotechnical services.
July 31, 2009	First amendment to MOU between DPR and DMPED, adding parks and increasing amount to $68,394,795.64.
July 31, 2009	MOU between DMPED and DCHA for $40,350,000 for DPR capital projects. DCHA to receive $700,000 fee.
July 31, 2009	Banneker submits invoice #3 to DMPED.
August 11, 2009	Banneker issues Requests for Proposals (RFP) to qualified general contractors for large, medium, and small projects.
Sept. 2, 2009	Banneker submits invoice #4 to DCHE and DMPED
Sept. 14, 2009	Second amendment to MOU between DPR and DMPED, adding parks and increasing amount to $86,854,000.
Sept. 21, 2009	Consulting Services Agreement between Banneker and LEAD for LEAD to provide environmental site assessments.
October 6, 2009	Banneker submits invoice #5 to DCHE and DMPED.
October 22, 2009	Councilmembers send letter to Mayor Fenty raising questions about DCHA's award of contracts for DPR projects.

Date	Event
October 23, 2009	Attorney General issues formal opinion, in response to request from DCHA general counsel made the same day, concluding that DCHA must obtain Council approval for contracts over $1 million.
October 26, 2009	Attorney General issues memorandum stating that his October 23 opinion is not retroactive, so any previously executed DCHA contracts are valid and binding.
October 30, 2009	First Joint Roundtable Hearing on the DPR contracts
November 3, 2009	Banneker submits invoice #6 to DCHE and DMPED.
November 3, 2009	DC Council passes Budget Transparency Emergency Act to cut off flow of funds from DPR to DCHA.
November 12, 2009	DCHA Board Chair William Slover proposes a resolution terminating the MOU with DMPED due to insufficient funds.
November 20, 2009	DCHE issues stop work notice to Banneker, effective on November 30.
November 20, 2009	Mayor Fenty removes Slover as Chair of DCHA Board.
November 30, 2009	Work stops.
December 8, 2009	Banneker submits invoice #7 to DCHE and DMPED
December 9, 2009	DCHE and Banneker execute Change Order No. 1 to the Banneker contract, expanding the scope of the projects and adjusting compensation. New fixed fee of $3,778,488 with a 5% mark up on consultants, capped at $350,000.
December 9, 2009	The MOU between DMPED and DCHA is amended, to transfer up to $99,354,000.
December 9/10, 2009	The revised project management contract is submitted to the Council for approval.
December 15, 2009	DC Council disapproves the Banneker contract for project management services on DPR projects; authorizes OPEFM to handle the DPR projects.

Date	Event
December 24, 2009	DCHE enters into a Settlement Agreement with Banneker/Regan and pays Banneker $2,554,071 for invoices 5 - 8 (portions of invoice #7 left open for further negotiation).
January 5, 2010	Banneker sends a settlement proposal for contract close-out amounts.
January 14, 2010	Banneker submits “final” invoice #9 to DMPED and DCHE.
February 25, 2010	Banneker issues cease and desist letters to project architects, claiming ownership of drawings.
July 8, 2010	Attorney General and Banneker sign settlement agreement providing for $550,000 payment to Banneker; no payment made as of March 1, 2011.

FACTS AND ANALYSIS

This portion of the report outlines the facts that we found through our investigation, and provides answers, where possible, to the key questions raised by the DPR capital projects transactions.

I. BACKGROUND: DPR, WALKER JONES, DEANWOOD, AND THE BANNEKER-REGAN TEAM

In order to understand why the DPR capital projects were handled as they were, it is important to examine DPR's prior experience with the construction and procurement process, and particularly with Walker Jones and Deanwood, two major projects that also involved DMPED and DCHE.[74]

A. DPR's Inability to Move Capital Projects Forward

There is a consensus that during the 2007-2008 time period, DPR was unable to construct capital projects in a timely manner. Clark Ray, the director of DPR from August 2007 through April 2009, acknowledged that there were a number of funded projects, particularly recreation centers – which are bigger, more complex and more expensive than parks – that were in the "queue" for construction but had not moved forward.[75] Witnesses offered a number of reasons for this problem, including the lack of qualified staff and insufficient "drive" on the part of DPR management. Although DPR had about 10 full time positions in its capital projects division at

[74] For background purposes, this report discusses other DPR projects, and particularly Walker Jones and Deanwood, but those projects were not within the scope of our investigation. We did not undertake to examine the propriety of any transactions relating to those projects.

[75] Interview with Clark Ray, former Director of D.C. Department of Parks and Recreation, (Oct. 26, 2010).

that time, half of those were planners and architects, not construction managers.[76] Of the remaining positions, in mid-2008 only one was filled with an experienced construction engineer, and he was overextended.[77]

Another significant reason for delay was the procurement process.[78] Because DPR does not have independent procurement authority, it could not handle on its own any of the many contracts that are required for a construction project. Instead, DPR, like other agencies without procurement authority, was supposed to turn to the Office of Contracts and Procurement (OCP) for its contracting.[79] OCP's function is to buy goods and services for all covered agencies, including DPR. For various reasons, however, the OCP process was slow, and particularly ill-suited for handling complex construction projects.

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[76] Interview with Jason Turner, former Chief of Capital Projects and Planning, D.C. Department of Parks and Recreation (Oct. 19, 2010).

[77] *Id.; see also* Deposition of David Janifer, Capital Projects Division, DPR (Jul. 20, 2010) at 18:12-14: "… DPR has … project management capability, but it doesn't have the capacity for the number of jobs that we have to manage."

[78] Interview with Clark Ray; Interview with Jason Turner.

[79] David Janifer of DPR's capital projects division described the process as follows:

> … DPR requests money for a construction budget. All of the actions or the contracts are negotiated by a procurements office, which was formerly named Office of Contracts and Procurements and now it's the Department of Real Estate Services.
>
> DPR identifies projects that it would like to engage in. It provides all that information to the procurement office and the procurement office actively solicits all the vendors or contractors who actually perform services, perform the construction services.

Janifer Dep. 12:18-13:5.

David Gragan became the District's Chief Procurement Officer, and head of OCP, in June 2007.[80] When he started, OCP had approximately 150 employees; as of mid-2010, it had approximately 100. OCP is responsible for procurement for construction as well as other types of goods and services. According to Gragan, this structure is unusual. Due to the complexity of construction contracting, in other jurisdictions it is usually assigned to a separate, specialized agency. In an effort to concentrate expertise, Gragan decided to delegate authority for construction procurement to the Department of Transportation ("DOT") for "horizontal" construction (roads and bridges) and to the Office of Property Management ("OPM") – renamed the Department of Real Estate Services ("DRES") in August 2009 – for "vertical" construction (buildings). According to Gragan, OPM initially did not embrace the procurement function because it did not feel it had appropriate capability. Gragan revisited the issue and in 2008 assigned all OCP employees focused on construction to OPM.[81] DRES now has both a construction procurement group and a construction management group. Like procurements done through OCP, DRES procurements are subject to the PPA.[82]

Gragan described OCP's procurement process as "built for deliberation, not for speed." The process is purposefully slow to some degree, in order to provide for control over the expenditure of public funds. The DRES employees we interviewed agreed that working under the PPA slowed the construction process down because of the many upfront approvals and

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80 Interview with David Gragan.

81 Interview with David Gragan; Interview with Diane Wooden, Procurement, D.C., DRES, and Gerick Smith, Deputy Director Construction Division, DRES (Dec.7, 2010).

82 While the DPR capital projects are now being handled by OPEFM, DRES does construction procurement for other DPR projects, with project management handled by DPR. Interview with Diane Wooden and Gerick Smith.

compliance documents required to issue a solicitation and then to award a contract.[83] Issues with internal OCP processes, capacity and staff capabilities also affect the pace of OCP procurements.[84]

OCP's problems were well known to the administration. Albert noted that as early as the transition to the Fenty regime, "there were serious conversations about how do we make OCP a better functioning agency to support the District government?"[85]

Clark Ray and others also pointed to the types of contracts that OCP entered as a source of delay. One key distinction they saw was between "design-build" and "design-bid-build" contracts. Under a design-build contract, one firm or team (referred to as the design-builder) is hired to both design and construct a project. In a design-bid-build procurement, the architect is hired first, and the procurement of the general contractor cannot begin until the drawings are complete. Although each method has advantages and disadvantages, many witnesses expressed the view that using a design-build contract can reduce the time it takes to complete a project because, among other things, the contractor can start to mobilize before the drawings are complete. Ray noted, however, that OCP was reluctant to enter design-build contracts, and some District employees believed that OCP was precluded from doing so. In fact, D.C. law does not prohibit the use of design-build contracts.[86] However, Ray's perception that OCP was reluctant to use such contracts was correct. The DRES employees we interviewed stated that the District

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83 *Id*.

84 Interview with David Gragan; Deposition of Neil Albert, City Administrator and former Deputy Mayor for Planning and Economic Development (Oct. 19, 2010) 89:5-91:3.

85 *Id.* at 89:1-3.

86 *See* D.C. Code § 2-303.11.

typically does not use the design-build method on larger projects because it leaves the city with less control over the design process, and OCP does not presently have a standard form design-build contract. As will be discussed further below, OCP also does not use "guaranteed maximum price" contracts, which also can facilitate early mobilization.

B. DPR Looked to Other Agencies for Help with Construction.

Faced with these issues with OCP, Clark Ray looked for ways to make parks construction move more quickly. He determined that he could bypass OCP by partnering with other district agencies that had independent contracting authority.[87] Ray identified DCHA, OPEFM and DMPED as agencies with procurement authority that he could work with to get projects built. And while OPEFM and DMPED were subject to the PPA, DCHA was not. Instead, DCHA was governed by its own procurement policies. Its subsidiary, DCHE, also had its own set of policies.

The partnering arrangements were created via MOUs between the agencies. According to Ray, he obtained David Gragan's approval to handle parks projects in this manner.[88] For example, DPR entered into the following MOUs for parks-related construction:

- MOU between DPR and DCHA, effective date July 6, 2007, signed by DPR and DCHA in August, 2007, for demolition of the existing facility at the Wilson Pool.[89]
- MOU between DPR and DCHA for field lighting, signed in August 2008.[90]

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87 Interview with Clark Ray.

88 *Id.*

89 Ex. 28, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the District of Columbia Housing Authority (Jul. 6, 2007).

90 Ex. 29, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the District of Columbia Housing Authority (Aug. 21, 2008).

- MOU between DPR and OPEFM in August 2008 for the development and construction of a new Stoddert Recreation Center at 39th and Calvert Streets, N.W.[91]

- MOU between DPR and DCHA in November 2008 for redevelopment of the park at 14th and Girard Streets, N.W.[92]

From DPR's point of view, use of an MOU was not seen in itself as a means for evading the Council approval requirement. The current and former DPR employees that we spoke to were well aware that contracts in excess of $1 million had to be submitted to the Council. Further, it was their understanding that involving DMPED or DCHA in a project would not change that requirement. The MOUs listed above contained language referencing the necessity of compliance with the Council approval requirement. DPR's then general counsel told us that she was aware that DCHA was not subject to the PPA, and inserted this language to be sure that the Council approval requirement was met.[93]

For example, the MOU for the park at 14th and Girard addressed the Council approval issue in its termination provision, stating that "This MOU shall automatically terminate if the Council fails to approve the construction contract for the 14th & Girard Playground Project or at any time lawfully appropriated funds are not available." [94] The MOU between DPR and DCHA for field lighting specifically assigns to DCHA the responsibility to

> Insure compliance with all District of Columbia laws and regulations and secure advance approvals, if any, relative to the award of any contract hereunder

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91 Ex. 30.

92 Ex. 31, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the District of Columbia Housing Authority (Dec. 11, 2008).

93 Interview with Marie Claire Brown, former General Counsel, DPR (Sep. 9, 2010).

94 Ex. 31, at 7. DCHA, however, did not believe that it had any obligation to take contracts to the Council for approval.

> including, but not limited to, Council approval pursuant to D.C. Official Code §1-204.51 of any contract involving expenditures in excess of $1,000,000.[95]

We have not reviewed the contracts awarded for the field lighting project, but because the total budget under the MOU was $1,023,000, it is unlikely that any of the contracts met the $1 million threshold for Council review. However, we note that inclusion of this provision obligated DCHA by contract to take on the responsibility for obtaining Council approval – an approach that was not used in the DPR capital projects MOUs.

C. Walker Jones

In addition to MOUs for smaller projects, DPR was involved in two significantly larger projects with other agencies prior to the capital projects MOU: Walker Jones and Deanwood. Both of these projects, and particularly Walker Jones, are frequently cited as models for many aspects of the DPR capital projects procurements. Although an examination of these projects was outside of the scope of our investigation, key background facts are discussed below.

The Walker Jones project involved the redevelopment of two school sites in the Northwest One neighborhood of Ward 6 into a new school, library and recreation center. Walker Jones was part of the "New Communities" initiative, for which DMPED was the implementing agency.[96] Because Walker Jones had school, library and parks components, its funding came from three agencies (D.C. Public Schools, D.C. Public Libraries and DPR), with coordination provided by DMPED.[97]

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95 Ex. 29 at 5.

96 Albert Dep. 41:4-11.

97 DMPED's general mission is promoting economic development in the District. *See* Deposition of Valerie Santos, Deputy Mayor for Planning and Economic Development (Sept. 27, 2010) at 15:1-3. It does that by trying to get property owned by the District into productive uses, and by negotiating tax increment financing and other public finance tools. *Id.* at 15:14-22.

DMPED sought DCHA's assistance in constructing the Walker Jones project. According to Neil Albert, who was Deputy Mayor at that time, DMPED involved DCHA in Walker Jones because DCHA "had the capacity to – and the history and the track record of getting things done quickly."[98] Albert also believed that involving DCHA was a way of "getting program management oversight to augment the puny program management … expertise that I had within DMPED."[99] At the time, David Jannarone was the only DMPED employee with construction management experience.[100]

DMPED and DCHA had also worked together on other New Communities issues. As explained in a memorandum from Michael Kelly, then-Executive Director of DCHA,

> DMPED and DCHA have been partners in the New Communities initiative. The New Communities Initiative focuses on the District's most distressed neighborhoods and contemplates methods to transform them into vibrant and productive areas, by focusing on the physical and human capital needs of residents. This wide reaching initiative aims to leverage DMPED spending to direct $1 billion in public and private funds to some of the most troubled neighborhoods in Washington, D.C.
>
> One of the communities to be revitalized through this program is the Northwest One Neighborhood in Ward 6. … To date, DCHA has worked closely with the District on the New Communities Initiatives including providing under various memoranda of understanding with DMPED services that include master planning, facilitation of community planning and resident participation, assistance with resident tracking and program evaluation, various predevelopment work, and

98 Albert Dep. 41:14-16.

99 *Id*. at 41:19-21. Although real estate development is part of DMPED's portfolio, most of its real estate related activities involved private developers who were constructing projects on land owned or sold to them by the District. *Id.* at 35:14-36:8; Santos Dep. 36:9-22. According to Albert, DMPED was just "standing up" its own construction management function in 2007 when the Walker Jones project was getting underway. Albert Dep. 32:20-33:3.

100 From Special Counsel's notes from the unrecorded portion of the Deposition of David Jannarone, former Development Director for DMPED taken on September 29, 2010 (hereafter, "Jannarone Dep. Notes").

> the management and joint ownership of Temple Courts, a troubled Project-based Section 8 HCVP property.
>
> * * *
>
> Because of DMPED's favorable experience working with DCHA and DCHE in similar endeavors and DCHA's active participation in the Northwest One redevelopment effort, DMPED has asked DCHA to redevelop the Walker Jones Elementary School and R.H. Terrell Junior High School sites. DCHA intends to assign the MOU to its wholly-owned subsidiary, DCHE, for DCHE to perform in an expeditious and cost-effective manner.[101]

DMPED and DCHA signed the MOU for Walker Jones in September 2007.[102] DMPED was to provide DCHA with funds from the three agencies involved, and DCHA was responsible for using the funds "to perform or cause to be performed the demolition, development and construction services necessary for the Project, at the request and direction of the DMPED."[103] DMPED retained "programmatic and policy jurisdiction" over the activities under the MOU.[104] Other than the general statement that "[t]he Parties agree to comply with all applicable laws, rules and regulations whether now in force or hereafter enacted or promulgated,"[105] there is no reference in this MOU to the requirement for Council approval of any contracts exceeding $1 million. The budget for the project was $47,200,000, and DCHA was to receive a $200,000 fee for its services, to be paid by DMPED.[106]

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101 Ex. 32, Memorandum from Michael Kelly to DCHA Board of Commissioners (Sept. 12, 2007), at 1-2.

102 Ex. 33, Memorandum of Understanding between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority (Sept. 13, 2007).

103 *Id.* at § 2(B)(1).

104 *Id.* at § 2(A)(2).

105 *Id.* at § 8.

106 *Id.* at § 5(A).

Prior to Walker Jones, DCHA had entered into other MOUs with District agencies. A chart provided by DCHA lists 12 other MOUs involving DCHA between 2003 and 2007.[107] But the $47 million Walker Jones MOU was by far the largest. Of the prior 12, two were for $2.5 million, three were for $1 million, and the rest were under $1 million.[108]

DPR and DMPED entered into an MOU for the Walker Jones project in February 2009; although $2 million was provided by DPR to DMPED in 2008, there does not appear to have been an MOU executed in 2008.[109] The February 2009 MOU provides that DPR will transfer up to an additional $8 million for the recreation center portion of the project, which DMPED was to construct "per DPR specifications."[110] There is no mention in this MOU of the Council approval requirement, or of DCHA. According to Clark Ray, he was never made aware of DCHA's involvement in the project.

1. The Banneker/Regan Associates team

The team of Banneker Ventures and Regan Associates, which was awarded the project management contract for the DPR capital projects, first came together on the Walker Jones project.

Regan Associates was originally formed in 1995 as the Highland Company. It does project management work, consulting for school systems and universities, and property

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107 Ex. 34, Chart: "MOU With District Agencies."

108 David Gragan, who at the time was required to approve all MOUs, told us that he noted the unusual magnitude of the $40 million DPR capital project MOU, but did not make any further inquiry about it. Interview with David Gragan.

109 Ex. 35, Memorandum of Understanding Between the Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Feb. 25, 2009).

110 *Id*. at § II (B)(1).

development. According to the Regans, the company has been involved with approximately 50 projects on the east coast, primarily in the Washington, D.C. area.[111] Sometime prior to 2007, Regan Associates was involved with the Capitol Hill Community Development Foundation on a project to renovate elementary and middle school libraries on Capitol Hill. This experience led the Regans to become concerned about the condition of the city's schools; they became supporters of Mayor Fenty's campaign because of that issue. At the same time, they decided to explore the possibility of doing business with the District. In order to comply with District CBE requirements, they sought out minority partners. According to the Regans, they were looking for a CBE firm they could "mentor,"[112] and considered a number of different firms, including firms on the D.C. Public Schools facilities division approved contractor list. Banneker was not on the list. Instead, the Regans recall that in the course of talking to many people about potential CBE partners they were given the name of David Jannarone at DMPED, and he referred them to Banneker.[113]

After meeting with Banneker representatives, the Regans thought Banneker was appropriate for the mentoring relationship they had in mind: big enough to take on work but small enough to need training. They envisioned giving Banneker a small stake in their first project together, and a bigger role in subsequent projects, so that Banneker could eventually stand on its own.[114] The Regans learned that Omar Karim, the Banneker principal, had

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111 Interview with Sean M. Regan and Thomas J. Regan, Regan Associates LLC (Apr. 20, 2010).

112 *Id.*

113 Interviews with Sean Regan and Thomas Regan, Regan Associates LLC (Apr. 20, 2010; Nov. 12, 2010).

114 *Id.*

previously worked for a construction company with which they were familiar.[115] They were also aware of Karim's work on Mayor Fenty's campaign. During their interview, they reported that Karim made it known to them that he was in the same fraternity as the mayor. They acknowledged that as businesspeople, they viewed this relationship with the Mayor as something that "can't hurt."[116]

No other witness could provide any helpful information as to how Banneker and Regan Associates got together. Karim testified that he could not recall how Banneker came to work with Regan Associates, and that he did not think Jannarone had recommended Regan to him.[117]

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115 Karim's education and experience as an engineer and an attorney, including his previous experience at Bundy Development Corporation and work on The Jazz @ Florida Avenue and The Residences @ Thayer Avenue, among other projects, are detailed in the resume attached to Banneker-Regan's response to DCHE's RFQ. *See* Ex. 36, Response to Request for Qualifications for Capital Projects – District of Columbia Parks and Recreation Project Management, submitted by Banneker Ventures LLC and Regan Associates LLC (Mar. 27, 2009).

116 *Id.*

117 Q: How did Banneker Ventures come to work with Regan and Associates?
A: I think the Walker Jones project was our first project together.
Q: And how did it come about that you all ended up working together on that?
A: … I don't recall, it was a couple years ago.
Q: Did you call them? Did they call you?
A: I don't recall.
Q: Had you heard of Regan and Associates before working together on Walker Jones?
A: I don't recall. I might have.
Q: Do you remember how it was that the name Regan and Associates first came to your attention?
A. No.
Q: Did David Jannarone recommend Regan to you?
A: I don't recall.
Q: Is it possible that David Jannarone recommended Regan to you?
A: I don't – I don't think so.
Q: What is your best recollection as to how it was that Regan and Associates came to your attention?
A: Well, you gotta ask him. We were a subcontractor to them on Walker Jones.
(footnote continued on next page)

Karim denied that he told the Regans that he was a fraternity brother of Mayor Fenty's or that he had a relationship with the mayor that could be helpful.[118]

> Q: Well, I understand. What I'm trying to find out is how did you come to first have dealings with each other. I understand that once you connected up you ended up in a subcontractor relationship with them. But they didn't pick you out of the blue.
> A: I don't – you gotta – I mean, you talk to them. You gotta ask them. What do they say? You know. I don't recall.
> Q: Well, I'm trying to get your understanding of how it was that you all came to work together.
> A. I don't recall. …

Deposition of Omar Karim (Aug. 5, 2010) 81:1–82:16.

[118] *Id.* at 85:8-86:8.

Jacquelyn Glover, who interviewed for a job with Banneker Ventures in the summer of 2008, testified that during her interview Karim told her that "he was friends with the Mayor and he had gotten quite a few projects in the D.C. government." Deposition of Jacquelyn Glover, Construction Manager, DMPED (Sept. 13, 2010) at 79:6-7. Karim denies that this conversation occurred.

In our written questions to Mayor Fenty, he was asked, "Were you aware that Omar Karim told prospective business partners and employees, among others, that his relationship with you would help him get business with the District? Do you believe that it would be appropriate for you to help Karim get District business or contracts?" The Mayor responded "No to both questions." Ex. 24 at 2, No. 5.

Another answer provided by the Mayor does suggest, however, that he may have had some general conversations with Karim about doing business with the city:

> Did you ever talk to Omar Karim … about opportunities for Banneker Ventures, LLC, or any other business he had an interest in, to do work for the District of Columbia or on District of Columbia projects? If so, describe each such conversation in detail.

(footnote continued on next page)

When Jannarone was asked whether he had recommended Banneker to Regan Associates, he responded, "Not that I remember," and added that he did not remember specific conversations.[119] We find the Regans' clear recollection of their introduction to Banneker to be credible.[120]

DCHE issued a Request for Qualifications (RFQ) for a project manager to oversee the Walker Jones project on June 29, 2007. The team of Regan Associates and Banneker Ventures was selected for the award. Although they were proceeding as a team, Regan Associates and Banneker did not form a joint venture for the project management work. Instead, only Regan Associates was a party to the project management contract with DCHE. It was to receive a flat fee of $1,410,000, plus a 9 percent mark-up on certain consultants' costs.

Banneker was identified in the contract as a consultant who would work with Regan on all aspects of project management. The Regans explained that entering into a joint venture was more of a commitment than they wanted to make, and that they could satisfy CBE requirements

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> ANSWER: Over the course of the last four years, I have had frequent occasion to talk to businessmen/developers who have inquired about opportunities to work with the District on various projects. Generally speaking, I would suggest that these businessmen/developers talk to the relevant agencies and pursue their requests in accordance with the standard procedures. I don't recall any conversations with Omar Karim that would have gone beyond this type of conversation.

Id. at 1, No. 1.

[119] Jannerone Dep. Notes.

[120] A full examination of the Walker Jones project was outside of the scope of this investigation. Accordingly, we do not offer any conclusions about the propriety of the introduction by Jannarone or about any other matters relating to the selection of the Regan Associates/Banneker team as the project manager for Walker Jones.

through a contractual relationship with Banneker.[121] Their consulting relationship was memorialized in a letter agreement between Regan Associates and Banneker, which provided that Banneker would receive 33% of Regan Associates' fees, exclusive of mark-ups.[122]

Because the Walker Jones contract was used as the model for the project management contract for the DPR capital projects, its terms will be discussed in more detail below.

The Walker Jones program management contract was not submitted to the Council for approval in 2007, nor was the construction contract between DCHE and Forrester Construction Company. Both contracts were submitted in December 2009, after the Council's investigation began, and were approved as of January 4, 2010.[123] Although we have not independently verified it, numerous witnesses have stated that the Walker Jones project was completed on time and on (or under) budget.

D. Deanwood

Deanwood Community Center is a recreation center and library located at 49th and Quarles Streets, N.E. This was a large project that had been in DPR's "queue" for a number of years.

In 2008, DMPED took on the task of managing the construction of the Deanwood project. The evidence as to how this came about is somewhat inconsistent. Clark Ray and Jason Turner recalled that the impetus for DMPED's involvement came from DMPED.[124] According to Neil Albert, who was then the Deputy Mayor for Planning and Economic Development and had

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121 Interview with Sean Regan and Thomas Regan (Apr. 20, 2010).

122 Ex. 37, Letter Agreement between Regan and Banneker (Sep. 4, 2007) at 3.

123 D.C. Act 18-258.

124 Interview with Clark Ray; Interview with Jason Turner.

formerly been the director of DPR, he made the decision in conjunction with Ray and then-City Administrator Dan Tangherlini, because DPR did not have the capacity to do a project of this magnitude.[125]

The MOU between DPR and DMPED for Deanwood was signed by Ray and Albert on April 2, 2008.[126] It states that DPR will provide approximately $31 million to DMPED, with $8.8 million to be transferred immediately and the remaining amounts in subsequent fiscal years. DMPED was to use the funds to construct the project. The MOU provides that DMPED will obtain a delegation of construction authority from the Mayor and a delegation of procurement authority from the Chief Procurement Officer prior to the transfer of funds. A written delegation of contracting authority to DMPED signed by David Gragan accompanies the MOU.[127] However, Gragan believed that DMPED already possessed procurement authority delegated to it by the Mayor, and could not explain why this additional delegation was necessary.[128]

Unlike the Walker Jones MOUs, the Deanwood MOU expressly recognizes the Council approval requirement, providing that:

> This MOU shall automatically terminate if the City Council fails to approve the construction contract for the New Deanwood Community Center or at any time lawfully appropriated funds are not available.[129]

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125 Albert Dep. 59:22-60:19.

126 Ex. 38, Memorandum of Understanding Between the Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Apr. 2, 2008).

127 *Id.*, Delegation of Contracting Authority (Apr. 3, 2008).

128 Interview with David Gragan.

129 Ex. 38 at § IX(B).

1. The Deanwood program management RFQ

Deanwood also differed from Walker Jones in other respects. First, DCHA was not involved in the project at the outset, and it was DMPED, not DCHA, that procured the program manager. On April 28, 2008 DMPED issued a Request for Proposals ("RFP") for project management, not an RFQ. DMPED's RFP was a 71-page, detailed document that specifies the contractual provisions that would govern the program manager's performance.[130] It also required responding companies to provide pricing information as well as qualifications.[131] According to Albert, either OCP or a contracting officer within DMPED was involved in preparing the RFP.[132] Jannarone recalled that it was the OCP employee assigned to DMPED.[133]

Banneker and Regan submitted a joint response on June 6, 2008. They followed up with a Best and Final Offer submitted on June 24, 2008, offering a total not-to-exceed contract amount of $579,456 for the first year and $509,184 for the second option year.[134]

2. Banneker as program manager

The program management contract for Deanwood was signed by Omar Karim on behalf of Banneker and by Jonathan Butler, DMPED's Director of Contracts, on July 23, 2008. Unlike

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130 Ex. 39, Request for Proposals, Solicitation No.: DCEB-DMPED-080R-Deanwood (Apr. 28, 2008).

131 *Id.* According to the RFP, the drawings and specifications for Deanwood were already 100% complete, which could account for the decision to seek price submissions from bidders for this project. *See id.* at 8.

132 Albert Dep. 66:10-67:4.

133 Jannerone Dep. Notes. Although DMPED had independent procurement authority, it was still subject to the PPA and all of its procedures, and used assigned OCP personnel to assist with its procurements.

134 A full examination of the Deanwood project was outside of the scope of this investigation. Accordingly, we do not offer any conclusions about the selection of the Banneker-Regan team or the terms of the project management contract.

the Walker Jones contract, this contract is on a standard government contract form. It states that the contract is a Firm Fixed Price Contract in the amount of $579,456 for the first year, and incorporates by reference the RFP, standard contract clauses, and Banneker-Regan's proposal. One year later, Karim and Butler signed a contract modification adding another year to the contract, for a firm fixed price of $509,184.00. Neither contract was submitted to the Council for approval, presumably because neither exceeded the $1 million mark. Unlike Walker Jones, there was no mark-up for consultants in the Deanwood contract. Karim testified that he was not sure why, but thought that it was because DMPED used a different form contract than DCHE.[135]

The Regan-Banneker proposal for Deanwood asserted that "If selected, Regan and Banneker will complete this project on a 50-50 basis where we will split staff and responsibilities."[136] The project management contract, however, was executed solely by Banneker.[137] As they did on Walker Jones, Banneker and Regan Associates entered into a consulting agreement. This time, however, Banneker was the contractor and received 51% of the fees, and Regan Associates was the consultant, receiving 49% of the fees. According to the Regans, giving Banneker the lead on this project was in furtherance of the Regans' mentoring role; they also believed the city would look more favorably on their team with Banneker, the CBE, at 51%.[138]

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135 Karim Dep. (Aug. 5, 2010) 99:14-100:3.

136 Ex. 40, Letter from Regan Associates and Banneker Ventures, LLC to Office of the Deputy Mayor for Planning & Economic Development regarding Program Management Services for Deanwood Project Solicitation # DCEB-DMPED-08-R-Deanwood (June 6, 2008).

137 Ex. 41, Letter from Jonathan R. Butler, Director of Contracts, DMPED, to Omar A. Karim (July 11, 2008).

138 Interview with Sean Regan and Thomas Regan.

3. DCHA's role on Deanwood

After the construction drawings for Deanwood were completed, the project stalled because of funding issues, but was restarted in 2008.[139] Jannarone stated that the initial plan was for DMPED to procure the general contractor itself, but that discussions with OCP as to how DMPED could handle this were frustrating.[140] For Walker Jones, DCHE used a guaranteed maximum price ("GMP") contract, which Jannarone described as the most advantageous type of contract from an owner's point of view.[141] Although DMPED has independent procurement authority, Jannarone believed that under District procurement policies, DMPED could not enter into a GMP contract, while DCHE operated under different procurement policies that permitted it to do so.[142] In fact, as with the design-build versus design-bid-build issue, D.C. law does not preclude the use of GMP contracts, but OCP and DRES had never used one, and did not have a form GMP contract that was compliant with the PPA.[143] So Jannarone was correct as a practical matter that even though a GMP contract might help control costs and decrease the total time needed to complete the project, it would have been very difficult for DMPED to attempt to utilize one. Involving DCHE, however, meant that they could use the same form of GMP contract that had been used for Walker Jones. Jannarone commented that a point came when

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139 Janifer Dep. 65:10-66:6; Jannarone Dep. Notes.

140 Jannarone Dep. Notes.

141 *Id*. Under a GMP contract, before the design drawings are complete, the contractor offers to do the job for no more than a fixed maximum price. Cost savings are split with the owner, while the contractor is at risk for costs that exceed the GMP. The contractor will begin work before all of the drawings are complete, resulting in a faster job. Interview with Diane Wooden, and Gerick Smith.

142 Jannarone Dep. Notes.

143 Interview with Diane Wooden and Gerick Smith.

DMPED decided they should go back to something they knew had worked.[144] With DCHE and the Walker Jones GMP contract, they could move forward to get bids for the Deanwood construction work "without re-inventing the wheel."[145]

The DCHA/DMPED MOU for construction of the Deanwood Community Center was signed by Michael Kelly for DCHA on November 21, 2008, and by Deputy Mayor Neil Albert on March 5, 2009.[146] It provides for a project budget of up to $27.3 million, and a contract management fee for DCHA of $100,000.[147] There is no reference to a Council approval requirement.

A joint venture between Forney Enterprises and Manhattan Construction Company was selected as the general contractor for the Deanwood Community Center. The construction contract with DCHE was not submitted to the Council for approval when entered; instead, it was submitted in December 2009 and approved by the Council as of January 4, 2010.[148] The facility opened on June 25, 2010.[149]

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144 Jannarone Dep. Notes.

145 *Id*. Although he recalled conversations about getting the project moving, Neil Albert testified that he did not know why DCHA got involved with Deanwood at this point. Albert Dep. 71:17-71:18.

146 Ex. 42, Memorandum of Understanding Between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority (Mar. 5, 2009).

147 *Id.* at § 6(A).

148 D.C. Act 18-528.

149 *See* "Fenty Officially Opens Deanwood Recreation Center and Library," DPR Press Release (Jun. 25, 2010), http://dpr.dc.gov.

II. THE DPR CAPITAL PROJECTS AND THE MOU TO DMPED

A. The Attempted Transfer to OPEFM

As discussed above, during 2008, DPR was attempting to work with other agencies to increase the pace of parks construction in line with the "significant emphasis" placed by the Mayor "on moving parks construction quickly."[150] But the Mayor and then-City Administrator Tangherlini continued to be dissatisfied with DPR's efforts: "the Mayor was constantly frustrated [be]cause he would be in the community and get broadsided. The Parks Department would give the community dates for a project and will miss the dates until … within the executive offices of the Mayor, there were conversations about how to help Parks and Rec deliver its projects on a timely basis."[151] They considered the possibility of using other agencies and of requesting independent procurement authority for DPR. [152]

At a meeting to discuss the status of capital projects in October of 2008, the Mayor and Tangherlini decided that the DPR projects should be moved to OPEFM.[153] In mid-November 2008, DPR and OPEFM executed an MOU under which OPEFM agreed "to oversee and manage DPR's capital projects that directly or indirectly relate to the District of Columbia Public

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150 Ex. 24 at 3.

151 Albert Dep. 87:11-87:18.

152 *Id.* at 87:21-88:1.

153 Interview with Jason Turner.

Schools."[154] The MOU contemplated that up to $35 million in FY 2009 funds would be transferred by DPR to OPEFM.[155]

Although OPEFM has independent procurement authority, it is subject to the Council approval statute (except with respect to Convention Center contracts) and routinely submits contracts to the Council for review.[156] There is no suggestion that any of the parties involved in the decision to transfer the projects to OPEFM expected it to bypass this requirement.

On February 2, 2009, OPEFM issued a Request for Proposals for contractors to provide design-build services for the renovation and modernization of four recreation centers: Rosedale, Kenilworth, Guy Mason and Bald Eagle.[157] On February 5, 2009, OPEFM held a pre-proposal conference to discuss the solicitation.[158]

But OPEFM was not permitted to proceed. On November 17, 2008, Councilmember Harry Thomas, Jr. introduced legislation to limit construction by OPEFM to D.C. public school facilities only.[159] According to Councilmember Thomas, he was concerned that moving projects

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154 Ex. 43, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of Public Education Facilities Modernization (Nov. 21, 2008), § II.

155 *Id.* at § II (A)(1).

156 Interview with Allen Lew, Executive Director, OPEFM (Jul. 16, 2010).

157 Ex. 22 at 2.

158 Ex. 44, Government of the District of Columbia Office of Public Education Facilities Modernization, Design-Build Renovation Services, Recreation Centers, Solicitation #: GM-09-M-0204-FM, Preproposal Conference Sign-in Sheet (Feb. 5, 2009). Neither Regan Associates nor Banneker appears on the sign-in sheets for the conference.

159 Office of Public Education Facilities Modernization Clarification Emergency Amendment Act of 2008; Office of Public Education Facilities Modernization Clarification Temporary Amendment Act of 2008; Office of Public Education Facilities Modernization Clarification Congressional Review Energy Amendment Act of 2008.

to OPEFM would cause the Council to lose oversight of how budgeted funds were spent, and would waste the 11 fully-funded employees in DPR's capital projects division. He was also concerned about what he saw as a disparity in OPEFM's level of spending in different areas of the city. Finally, he believed that OPEFM should not become the capital development center for all of DC unless there was legislation to that effect.[160] Thus, on February 18, 2009, OPEFM cancelled the recreation center procurement. [161]

In our view, the administration's decision to assign the DPR projects to OPEFM – although rescinded as the result of Council action – is significant evidence that the Fenty administration was not attempting to structure the projects to avoid Council review or to permit project contracts to be steered to particular companies. OPEFM operates with its own procurement authority and utilizes its own project managers. OPEFM is subject to the Council approval requirement and routinely submits contracts to the Council for approval.[162] The initial effort to assign the projects to OPEFM is simply inconsistent with an intent to manipulate the projects to benefit associates of the Mayor or to otherwise bypass the Council. These facts support the conclusion that transferring the projects out of DPR was done in an effort to move construction forward and not for an improper purpose.

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160 Interview with Harry Thomas, Jr., D.C. Councilmember (Ward 5), Chair, Committee on Libraries, Parks & Recreation, (Sep. 28, 2010).

161 Ex. 45, Office of Public Education Facilities Modernization, Design-Build Services, Recreation Centers Solicitation #: GM-09-M-0204-FM, Addendum No. 5, Issued: February 18, 2009.

162 Interview with Allen Lew.

B. DMPED's Involvement

After the projects were removed from OPEFM, DPR needed another "partner" agency to get the projects moving. Deputy Mayor Neal Albert offered DMPED's assistance in constructing the projects.[163] Ray was willing to work with DMPED because he knew it had independent procurement authority, and because DMPED was already handling the Deanwood recreation center project.[164]

In his written responses to our questions, the Mayor explained the move to DMPED as follows:

> My original idea to ensure that projects important to the citizens of the District moved quickly was to have Allen Lew take over such projects. When the Council rejected my request, I discussed with senior officials of the Administration how we could move the DPR capital projects forward as quickly as possible. It would have been in the context of those discussions that I received the recommendation that we follow the lead of former Mayor Williams and transfer the DPR capital projects to DMPED. I generally approved the transfer, but had nothing to do with the implementation of any such transfer.[165]

C. DMPED Looked to Banneker from the Start

Banneker and Regan Associates were already working with DMPED on Walker Jones and Deanwood, and the evidence suggests that DMPED personnel assumed that they would work on the DPR capital projects as well. On February 17, 2009, Ayris Scales of DMPED sent an e-mail to confirm a meeting for the next day, described in the "re" line as "Rosedale and

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163 Interview with Clark Ray.

164 *Id.*

165 Ex. 24 at 2.

Kenilworth-Parkside Rec Centers Kick Off Mtg," to be held at the Walker Jones trailer.[166] The e-mail was sent to Omar Karim, Larry Dwyer of DCHA, Duane Oates of Banneker, David Jannarone and Jacquelyn Glover of DMPED, and David Janifer and Jason Turner of DPR. The e-mail identifies the agenda for the meeting as "SOW; Solicitation process and requirements for."[167] None of the witnesses we spoke to had a specific recollection of what happened at this meeting,[168] but Banneker's inclusion suggests that they were expected to have a role in the Rosedale and Kenilworth projects, two of the parks that "came back" from OPEFM. David Jannarone's suggestion that the Banneker employees were included on the e-mail simply to advise them that their construction trailer would be used for the meeting[169] does not ring true.

Neil Albert testified that consideration was given to doing the DPR capital projects as an add-on to the Walker Jones contract.[170] Although both Jannarone and Karim testified that they were unaware of such a plan,[171] the documents support Albert's testimony. On February 19, 2009, Jannarone sent an e-mail to Omar Karim, requesting that Karim prepare a change order to

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166 Ex. 46, E-mail from Ayris Scales (EOM) to Omar Karim; Lawrence Dwyer; Duane W. Oates; David Jannarone (EOM); Jacquelyn Glover (EOM), David Janifer (DPR); Jason Turner (DPR) (Feb. 17, 2009 5:01 PM).

167 *Id.*

168 Deposition of Larry Dwyer, Director of Planning and Development, DCHA; President, DCHE (Aug. 6, 2010) 90:1-90:6; Glover Dep. 45:12-46:3; Janifer Dep. 38:8-39:4; Jannarone Dep. 5:9-6:5.

169 Jannarone Dep. 5:9-6:5.

170 Albert Dep. 92:13-93:20.

171 Jannarone Dep. 8:9-8:14; Karim Dep. (Aug. 5, 2010) 101:10-108:8.

the Walker Jones program management contract based on an enclosed project list.[172] The version of the e-mail originally produced to the Council by Banneker Ventures did not include a project list, but the subject line indicates "DPR Capitol project list enclosed."[173] At his deposition, Omar Karim testified that he could not recall the e-mail, but would not agree that it referred to the DPR capital projects; instead, he stated that it looked like it related to other DPR projects being handled by Regan Associates.[174] David Jannarone testified that he was not sure what this e-mail was about, but thought it referred to the Emery Football Field (which was done as an add-on to the Walker Jones contract), and several other smaller projects.[175]

After Jannarone's deposition, DMPED, through the Attorney General's Office, provided the attachment, which confirms that the e-mail does relate to the particular projects at issue here. The attachment is a chart entitled "MOU for DPR Capital Projects – EXHIBIT A," which includes the four projects covered by OPEFM's RFP – Rosedale, Kenilworth, Guy Mason and Bald Eagle – as well as two additional projects – Chevy Chase Ballfield and Justice Park.[176] It indicates that the program management contract for each project except Kenilworth will be handled by a change order to Walker Jones;[177] for Kenilworth, the chart provides for an "RFP

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172 Ex. 47, E-mail from David Jannarone (EOM) to Omar A. Karim; Duane Oates; Thomas Maslin (Feb. 19, 2009 3:38 PM).

173 *Id.*

174 Karim Dep. (Aug. 5, 2010) 103:22-105:22.

175 Jannarone Dep. 6:17-7:20.

176 Ex. 48, E-mail from David Jannarone (EOM) to Omar A. Karim; Duane Oates; Thomas Maslin (Feb. 19, 2009 3:38 PM) with attachment "MOU for DPR Capital Projects – Exhibit A."

177 Regan Associates was the signatory on the Walker Jones program management contract. On that contract, the fees were split 67% to Regan Associates and 33% to Banneker, with the 9% soft cost mark-up going to Regan Associates.

through DCHE."[178] However, the change order idea was not pursued. Albert could not recall the reason why.[179]

Instead, on February 27, 2009, Clark Ray and Neil Albert signed the MOU for the DPR Capital Projects.[180] The MOU obligates DPR to provide DMPED with up to $40,350,000 for the projects, and obligates DMPED to "use the funds from DRP to facilitate the repair, construction, and/or modernization of DPR recreation facilities per DPR specifications."[181] There is no specific reference to the requirement for Council approval of contracts in excess of $1 million, and the MOU does not provide that it will terminate if Council approval of construction contracts is not obtained. A chart attached to the MOU lists seven projects to be constructed by DMPED: Chevy Chase, Rosedale, Kenilworth, Guy Mason, Bald Eagle, Justice Park and Barry Farms.[182]

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178 Ex. 48, Exhibit A.

179 Albert Dep. 95:7-95:9.

180 Ex. 49, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Feb. 27, 2009).

181 *Id.* at § II (A)(1); (B)(1).

182 *Id.* at attachment: "DMPED Projects."

Even after the February 2009 MOU was signed, DPR continued to ask DMPED to add additional parks to its list. In May of 2009, for example, Ximena Hartsock, who had recently succeeded Clark Ray as director of DPR, was advised about an issue at the Watts Branch Recreation Center: "… the Mayor is adamant that he wants the resurfacing of the basketball courts completed before he returns to the community on June 18th, 2008 at 4pm." Ms. Hartsock's response was to forward the e-mail to Deputy Mayor Albert with the following message:

(footnote continued on next page)

The evidence we have reviewed does not support the claim that this MOU had an improper purpose. The Mayor first attempted to move the capital projects to OPEFM, which had independent contracting authority, utilized its own project managers, and routinely brought contracts to the Council for review. DMPED only became involved after the Council disapproved OPEFM's participation in the projects, and it too was subject to the Council approval requirement. The evidence supports the consistent testimony that DPR teamed with DMPED in order to move the projects forward.

III. THE MOU FROM DMPED TO DCHA

Although it does not appear to have been discussed with DPR, it is clear that DMPED expected from the beginning that DCHA would be involved in the DPR capital projects. Jacquelyn Glover, DMPED's project manager for the DPR projects, testified that she understood that DCHA would be involved at the time the DPR/DMPED MOU was being put together.[183] Larry Dwyer, the president of DCHA's subsidiary DCHE, recalled learning around March 2009 that DMPED would request DCHE's assistance on projects that DPR could not get done on a timely basis.[184] Dwyer understood that DMPED wanted DCHE's help to expedite the work: "I was told the work was – the schedule was lagging behind severely and that expectations weren't

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> I keep coming back to you because DPR cannot do fast enough. I would love to discuss how we can find a way to get work done faster. In the meanwhile, can you help us to get this one done? We do have the funds.
>
> Thanks so much. Sorry for being a pest.

Ex. 50, E-mail exchange dated May 12, 2009, 5:27 PM.

183 Glover Dep. 51:20-52:1.

184 Dwyer Dep. (Aug. 6, 2010) 13:5-14:7.

being met and that they were trying to accelerate the development process of the Parks and Recreation project process." [185]

Although DCHE initially anticipated that it would handle project management on the DPR projects, in fact DMPED asked it to play a much more limited role.[186] DMPED tasked DCHE only with procuring the project manager and providing financial and accounting support for the projects.[187] Dwyer described DCHE's function as merely "contract administration." Project management services were assigned to an outside project manager, and program coordination and decision making were to be handled by DMPED in conjunction with DPR.[188] Asmara Habte, DCHE's primary representative on the project, described DCHE's role similarly.[189] Under this division of responsibilities, DCHE personnel thought of DMPED as their "client."[190]

On March 11, 2009, the DCHA board passed a resolution authorizing entry into an MOU with DMPED. The memorandum recommending approval of the resolution described DCHA's limited role:

> Under the MOU, DCHA would conduct the primary project management's solicitation for the repairs, provide oversight of the project management process, and process payments between DMPED and the project contractors.[191]

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185 *Id.* at 14:16-14:20.

186 *Id.* at 20:16-21:17.

187 *Id.* at 17:9-17:18.

188 *Id*. at 17:9-17:18; 33:12-33:19.

189 Interview with Asmara Habte.

190 Dwyer Dep. (Aug. 6, 2010) 30:7-30:8, 33:1-33:4.

191 Ex. 51, Memorandum from Michael Kelly to the Board of Commissioners District of Columbia Housing Authority (March 11, 2009) at 1.

The MOU between DMPED and DCHA, which was not actually signed until July 31, 2009, further defined DCHA's role:

> As an agent for DMPED, DCHA will coordinate procurement of a Project Manager, provide administrative oversight to the Project Manager and act as financial manager and "pay agent" with District of Columbia Government funds provided by DMPED, all in coordination with DMPED.[192]

For these functions, DCHA was to be paid an administrative fee of $700,000.[193] DCHA assigned its functions under the MOU to its for-profit subsidiary, DCHE.

It appears that DPR was never formally advised that DMPED was bringing DCHA into the project. Clark Ray, who was the director of DPR until April 19, 2009, told us that he had no knowledge that DCHA would be involved.[194] Other DPR employees became aware that DCHE had a role only when they saw DCHE representatives at project meetings.[195]

A. Why DCHA?

One of the key questions raised by these events is why DCHA and DCHE were involved in the DPR capital projects. It has been suggested that DMPED moved the projects to the independent agency as a means to avoid Council review of the contracts for the project, possibly to shield the contract with Banneker Ventures from scrutiny, or to avoid any delay Council review might entail. But we did not find either to be the case.

It is true that DMPED personnel were aware of DCHA's position that it was not required to bring contracts to the Council for approval. Neil Albert stated that DCHA "constantly

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192 Ex. 52, Memorandum of Understanding Between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority, § 2.

193 *Id.* at § 6(A).

194 Interview with Clark Ray.

195 Janifer Dep. 47:3-7; Stesney Dep. 44:2-16.

articulated" that they did not need to take contracts over $1 million to the Council.[196] David Jannarone said that he was told by DCHE that they had a legal opinion stating that Council approval was not required.[197] Glover testified that Jannarone told her that DCHA was not subject to the Council approval requirement.[198]

However, we did not find evidence that DMPED personnel involved DCHA in the DPR capital projects in order to evade review of the Banneker contract or otherwise provide improper advantages to Banneker, Karim or Skinner. We reviewed bank records from Karim's and Skinner's businesses, and saw nothing to suggest that payments were being made to Jannarone or anyone else at DMPED. Nor was there other evidence suggesting that DMPED's decision was improperly influenced.

The Council approval process can increase the amount of time it takes to carry out a procurement. According to several witnesses, obtaining Council approval takes up to approximately one month, and sometimes longer.[199] Avoiding this step would have been consistent with the Mayor's goal of expediting construction of parks and recreation centers. It is plausible that avoiding Council review as a time saver was at least a consideration in the use of DCHA, even if it was not the primary motivation. However, none of the witnesses pointed to the

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196 Albert Dep. 44:9-44:13.

197 Jannarone Dep. Notes.

198 Glover Dep. 40:17-40:20.

199 David Gragan noted that when OCP sent a contract package to the Wilson Building, it would be reviewed and then sent to the Secretary of the Council; if the Council did nothing, the contract would be deemed approved in 10 days. Interview with David Gragan. Jason Turner said the Council approval process took approximately one month, although he described means he used to shave the time down. Interview with Jason Turner. Neil Albert recalled one contract taking nine months to get approvals while he was at DPR. Albert Dep. 45:18-46:9.

Council approval issue as a reason for involving DCHA in the capital projects, even in the interests of speed. When asked, Albert and Jannarone specifically denied that it was a consideration.[200]

Instead, the witnesses who offered testimony on this issue asserted that the reasons for involving DCHA were that it had the ability to move projects along more quickly and efficiently than DMPED or DPR, as exemplified by its work on Walker Jones and Deanwood. Further, they stated that DCHA had capabilities, particularly in financial administration, that those agencies did not have.

At the October 30, 2009 Council Roundtable, Neil Albert testified that DCHA had been a partner with DMPED on a variety of capital projects in both the Williams and Fenty administrations. He stated that DCHA had experience in design, construction and construction management, and had a "nimble and efficient" system that allowed projects to be designed, permitted and built quickly. He pointed to Walker Jones and Deanwood as successful projects that were constructed in partnership with DCHA.[201] At the Roundtable on December 2, 2009, David Jannarone testified that partnering with DCHA was the fastest, cheapest and most efficient way to get projects done, and offered Walker Jones as the prime example. He also testified that DCHA had accounting resources that DMPED did not have, and that DCHA applied these resources to accounting for the projects, reviewing invoices, and tracking line items in the budget.[202] Larry Dwyer, the president of DCHE, understood that DMPED wanted DCHA's

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200 Albert Dep. 98:13-98:18; Jannarone Dep. Notes. The Mayor was asked whether he instructed anyone in his administration to structure the DPR capital projects procurements in a way that would avoid Council review of the contracts, and answered "No." Ex. 24 at 3.

201 Skinner Dep. 37:3-37:7, 38:1-39:10 (Oct. 30, 2009).

202 Joint Roundtable 56:5-58:18 (Dec. 2, 2009).

assistance on the DPR capital projects "to do the job faster, just to move the projects."[203] The March 11, 2009 memorandum from the executive director of DCHA recommending approval of the MOU with DMPED noted that "DMPED has indicated that the MOU is of some urgency and requests the Board of Commissioner's prompt consideration."[204]

There is no doubt, as the Mayor acknowledges in his written responses to our questions, that the administration wanted to accelerate the pace of park and recreation center construction. This was the reason for the effort to move the parks to OPEFM, and the sense of urgency imposed by the Mayor is also supported by the record throughout the period when the projects were underway. For example,

- In a May 12, 2009 e-mail regarding the Watts Branch Recreation Center, DMPED advised DPR that "we completed a Walk-Thru with the Mayor and the NE Boundary Civic Association yesterday. We discussed all of the upcoming projects to be completed at the center, and the Mayor is adamant that he wants the resurfacing of the basketball courts completed before he returns to the community on June 18, 200[9] at 4pm."[205]

- In a May 14, 2009 follow-up e-mail to David Jannarone and David Janifer, Deputy Mayor Albert said, "let's piggyback on an existing contract to meet the Mayor's deadline."[206]

- In a July 7, 2009 e-mail about the 7th and N Street Park, Jacquelyn Glover said, "Per David Jannarone's meeting with the Mayor this morning, we

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[203] Dwyer Dep. (Aug. 6, 2010) 16:16-17:4 ("motion was basically most of the conversation").

[204] Ex. 51 at 2.

[205] Ex. 53, E-mail from Demetria Harris (EOM) to Bridget Stesney (DPR) (May 12, 2009 5:16 PM).

[206] Ex. 54, E-mail from Neil Albert (EOM) to David Jannarone (EOM); David Janifer (DPR) (May 14, 2009 9:28 AM).

have to move quickly to get 7th and N done .. The Mayor wants a ground breaking in September, which we can do."[207]

- In a September 4, 2009 e-mail, Jannarone told Glover, Karim and others: "The Mayor told me to have the groundbreakings on the following dates:

  Justice park Oct. 13
  Kennilworth Nov. 1

  He's pissed we missed the dates we told him per the original draw schedules. I took the bullet, but you guys must figure out how to make the dates listed. Next week I want a plan on how you will accomplish this. …"[208]

Increasing the pace of construction activity had public relations value for the administration, but it also would bring needed facilities to District residents more quickly. However, the witnesses did not agree on precisely why adding DCHA to the projects when DMPED was already involved would result in greater speed or efficiency, and the evidence does not support some of the explanations they offered for seeking DCHA's assistance.

For example, in the public hearings in October 2009, DCHA's capacity and capability in construction management was highly touted, and witnesses such as Neil Albert and David Jannarone explained the move to DCHA on those grounds.[209] But this expertise was not actually used. The MOU limited DCHA's role to contract administration. Negotiations for the program management contract were carried out by DMPED, not DCHE, and DCHE's attempts to comment on the terms of the contract were cut off by David Jannarone of DMPED. DCHE does not appear to have overseen the work of the program manager. While DCHE reviewed and paid

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[207] Ex. 55, E-mail from Jacquelyn Glover (EOM) to Bridget Stesney (DPR); David Janifer (DPR) (Jul. 7, 2009 11:36 AM).

[208] Ex. 56, E-mail from David Jannerone (EOM) to Jacquelyn Glover (EOM); Cc to: Omar Karim; Sean Regan; Tom Maslin; Erin Jackson (EOM) (Sep. 4, 2009 6:12 PM).

[209] *See, e.g.* Albert Dep. 41:13-42:4, 43:5-16, 82:18-19.

the invoices submitted by Banneker, its personnel relied on Jacquelyn Glover of DMPED to determine whether the work had been satisfactorily done.[210] DCHE personnel did not participate in weekly project meetings or project specific meetings,[211] did not participate in the selection of architects, and did not participate in the selection of general contractors for the DPR projects.[212]

Indeed, Neil Albert testified that he tasked David Jannarone with managing the project for DMPED, and that Jannarone "had the experience and the skill-sets to manage all aspects of the project."[213] When asked in his deposition, then, what DCHE's role was supposed to be, Albert testified, "it is fuzzy right now. You know, but, again, you know, sort of just broad, sort of program management responsibilities. … Just making sure the projects got delivered on time, good quality and within the budget."[214] When asked how DCHE would do that, Albert responded, "we hired them because … they had a track record of doing it … And we had someone from DMPED who was sort of the liaison to them … David [Jannarone] was the one keeping their feet to the fire." [215]

Some witnesses pointed more persuasively to the different procurement rules that apply to District agencies and DCHA to explain why they would turn to DCHA when speed was required. DMPED and DPR employees believed that DCHA and DCHE could enter into types of

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210 Interview with Asmara Habte.

211 Glover Dep. 99:2-17; Deposition of Bridget Stesney, Planning and Design Officer, DPR (Nov. 10, 2010) at 74:11-75:5.

212 *See* Glover Dep. 169:11-169:21; Stesney Dep. 110:10-111:9.

213 Albert Dep. 129:11-12.

214 *Id*. at 129:19-130:6.

215 *Id.* at 130:8-13.

contracts that reduced the time needed to complete a project, and that DCHA's procedures allowed for greater efficiency and ease in the procurement process. As discussed above, it is true that design-build contracts are rarely used in procurements conducted by OCP/DRES, and GMP contracts have never been used. Although DMPED had independent contracting authority, it was still subject to the PPA and, as the Deanwood example shows, worked with OCP contracting officers in conducting its procurements. DCHE, by contrast, does not conduct procurements through OCP and is not subject to the PPA. It is plausible, therefore, that involving DCHE could speed up procurements and decrease project completion times.

In sum, even though the explanations offered do not all hold up under scrutiny, we credit the consistent testimony that DMPED brought DCHA into the DPR capital projects in order to increase the speed with which the projects could be constructed and to supplement DMPED's team. DMPED personnel believed that what had worked before would work again: they wanted to follow the pattern established on Walker Jones and Deanwood, successful projects where DCHA, through its subsidiary DCHE, was involved. While the actual value of DCHE's involvement in the DPR projects can be questioned, and while the combination of a lack of Council review and diffused responsibility between DMPED and DCHE may have provided Banneker and LEAD with an opportunity to abuse the contracting and payment process, the evidence does not support the conclusion that the MOU with DCHA was entered for an improper purpose.

IV. THE SELECTION OF BANNEKER VENTURES AS PROJECT MANAGER

A. The Project Management RFQ

On March 5, 2009, about a week after the DPR/DMPED MOU was signed, Glover e-mailed a project list to DCHA. Shortly thereafter, on March 9, DCHE issued a Request for

Qualifications (RFQ) for a program manager for the DPR Capital Projects.[216] The RFQ was prepared by an outside consultant to DCHE.[217] Glover was the only witness from DMPED or DPR who acknowledged playing any role in the RFQ. She said that she provided scopes and budgets to DCHE and reviewed a draft of the RFQ, but offered no changes.[218]

The RFQ required prospective contractors to provide their qualifications and experience, but, unlike a request for proposals (RFP), it did not require them to provide cost or fee information. Instead, the RFQ provided that "DCHE and/or DMPED will negotiate fee proposals with finalists and may request a Best and Final fee proposal from qualified respondents or solicitation finalists."[219] It further stated:

> DCHE and DMPED will conduct price negotiations with the highest qualified offeror(s) and anticipate that the successful bidder's compensation will be based on a fee structure that is reasonable and within normal industry standards for similar work. If DCHE/DMPED cannot negotiation [sic] an acceptable price, negotiations will be conducted with the next highest ranked offeror(s) who has been determined to have sufficient qualifications.[220]

Glover stated that the suggestion to use an RFQ rather than an RFP came from DCHE,[221] while Dwyer and Habte recalled that the idea was discussed in a conference call between

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216 While the RFQ was issued on March 9, the DCHA board did not approve entry into the MOU with DMPED until March 11 (and the MOU was not actually finalized until months later). Dwyer testified that it was not unusual for DCHA to issue a solicitation based on anticipated board approval. Dwyer Dep. (Aug. 6, 2010) 44:1-12.

217 Ex. 57, E-mail from Jack Geary to Anthony Gilardi (Mar. 8, 2009 16:23:48).

218 Glover Dep. 57:3-12.

219 Ex. 58, Request for Qualifications for Capital Projects, District of Columbia Parks and Recreation Project Management, Solicitation No.: 2009-5 (Mar. 9, 2009) at 4.

220 *Id.* at 9.

221 Glover Dep. at 58:13-15.

DMPED and DCHE staff and the decision was made to proceed by RFQ to facilitate DMPED's goal of expedition.[222] When she was asked who made the decision, Habte pointed out that DMPED was DCHA's "client." Dwyer did not remember the specifics of the discussion, but he did not believe it was a "huge source of debate."[223] He indicated that DCHA occasionally utilizes RFQs to accelerate the selection process because they provide a means to weed out unqualified bidders. He did not have a particular objection to proceeding by RFQ for the project manager function as long as there would ultimately be a competitive RFP process for the high cost construction contractors.[224]

It is not clear, however, whether DMPED and DCHE had authority to proceed solely by means of an RFQ. The PPA, which governs DMPED's contracting, does not list RFQs as a permissible method of procurement.[225] And DCHE's procurement policy contemplates that major procurements will be handled by solicitations for bids or proposals, which would include a price component.[226] While price need not be determinative, "[p]rice comparability is expected to be a major factor in the selection of vendors and contractors."[227] Moreover, paragraph 3(C)(1) of the MOU between DMPED and DCHA provides that DCHA will procure a project manager "through a competitive bidding process." This language would exclude the use of an RFQ, which

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222 Dwyer Dep. (Aug. 6, 2010) 47:5-14; Interview with Asmara Habte.

223 Dwyer Dep. (Aug. 6, 2010) 47:2-49:12; Interview with Asmara Habte.

224 Dwyer Dep. (Aug. 6, 2010), 47-49.

225 *See* D.C. Code § 2-303.02; *see also* Interview with David Gragan.

226 Ex. 59, DC Housing Enterprises Procurement Policy (April 2009 Revision) at 5.

227 *Id.* at § 2002.1.

does not call for bids. However, the MOU was not executed until July 31, 2009, long after Banneker had been selected as project manager via the RFQ process.

Various industry witnesses offered different views about the use of RFQs. Architect Dale Stewart of CORE indicated that it is *not* unusual for government solicitations to omit a price component, particularly in the case of federal solicitations; and that "the city does it both ways."[228] He noted that when price was not requested in an RFQ, the selection could be made based on qualifications, with a fee negotiation to follow. Will Mangrum of Brailsford said that while competitions for project managers typically include a price component, it was not usual not to ask for price, particularly very early in a project when budgets have not been established.[229] Allen Lew stated that at OPEFM, he might start a procurement with an RFQ but would always follow up with an RFP.[230]

Even if an RFQ was used at the outset here to narrow the field quickly to the most qualified, DCHE could have proceeded to solicit prices from the top qualifiers. We believe that the District was ill-served by the decision not to obtain price information from a range of potential project managers.

B. Communications between Jannarone and Karim while the RFQ was pending

Responses to the RFQ were due on March 27, 2009. The evidence shows that between March 9 and March 27, while the RFQ was "on the street," DMPED and Omar Karim were communicating about the budgets and cash flows for the capital projects. Their e-mails fueled

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228 Interview with Dale Stewart, Principal, CORE Architects (Oct. 29, 2010).

229 Interview with Will Mangrum, Vice President of Brailsford and Dunlavey, and Marcos Miranda, program director from McKissack & McKissack (Oct. 1, 2010).

230 Interview with Allen Lew.

concerns expressed at the Joint Roundtables that the project management contract had been steered to Banneker. Without condoning private communications between procuring officials and one prospective contractor, based on our review of the selection panel's activities, we do not believe that these communications ultimately affected the procurement, and we do not find that further investigation of the award to Banneker is warranted.

On March 18, 2009, Karim sent an e-mail to Jacquelyn Glover and David Jannarone, with the subject line "Cash flows – DPR Projects" and the following text: "As requested, attached please find in Excel a combined as well as individual cashflows for the DPR projects. Please let me know if you have any questions."[231] This e-mail was produced to the Council by Banneker without any attachments. When questioned about it at his deposition, Karim asserted that he did not know whether this e-mail related to the capital projects included in the DPR MOU, or to other DPR projects.[232] David Jannarone similarly stated that he did not think these cash flows related to the DPR capital projects.[233] Glover, however, testified that this e-mail did relate to the DPR Capital Projects, and that Jannarone asked Karim to provide cash flows so that DMPED would know how money would be spent throughout the duration of the projects. [234]

Subsequently, DMPED produced the attachments to the March 18 e-mail. They consist of spreadsheets showing draft draw schedules for Bald Eagle, Guy Mason, Kenilworth, Chevy

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231 Ex. 60, E-mail from Omar A. Karim to Jacquelyn Glover (EOM) and David Jannarone (EOM) (March 18, 2009 10:31 AM) with attachments.

232 Karim Dep. 108:12-110:16.

233 Jannarone Dep. 10:11-14.

234 Glover Dep. 62:1-10.

Chase, Justice Park, and Rosedale.[235] Each schedule is labeled "Regan-Banneker Team" in the upper left-hand corner. Each spreadsheet identifies an amount labeled "Cash in Agency Estimated" for the particular project, and shows estimated expenditures on soft costs and hard costs over a series of months (the number of months varies per project).[236] Jannarone responded to Karim's e-mail, saying "Great work."[237]

This e-mail exchange appears to have been followed by a conversation between Jannarone and Karim. The next day, Jannarone sent Karim an e-mail with no text, and the following subject line: "Where are the revised spreadsheets front loading the bell curve like we discussed? You were supposed to get them to me yesterday."[238] Karim responded that they had been sent and would be re-sent, to which Jannarone replied, "You modified them per our conversation? You had edits to make, the ones you sent at 4pm didn't work. Come on dude, we talked about this."[239] At his deposition, Karim suggested that these e-mails might refer to

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235 *See* Ex. 60, E-mail from David Jannarone (EOM) to Omar A. Karim (Mar. 18, 2009 12:11 PM) at attachments.

236 *Id*.

237 Ex. 60.

238 Ex. 61, E-mail from David Jannarone (EOM) to Omar A. Karim (Mar. 19, 2009 4:01 PM).

239 Ex. 62, E-mail exchange between David Jannarone (EOM) and Omar A. Karim (Mar. 19, 2009 4:48 PM; 4:56 PM).

"generic" bell curves.[240] But in a March 20, 2009 e-mail, which was provided to us by DMPED after Karim's deposition, Karim sent Jannarone updated draw schedules for Kenilworth, Justice Park, Guy Mason, Chevy Chase, Bald Eagle and Rosedale.[241]

Thus, it is evident that Banneker was working with DMPED on budgeting issues for the DPR projects at the same time as it was participating in the solicitation for the project management contract. While it does not appear that Banneker obtained any direct advantage in preparing its response to the RFQ as a result of this work, it can be inappropriate for a prospective responder to have private communications with the procuring officials while a solicitation is in progress or to receive information that would give it an unfair advantage.[242] It appeared to us that both Jannarone and Karim were determined to avoid acknowledging that DMPED was talking to Banneker about the DPR projects before the procurement was complete. The fact that they consistently denied it even in the face of the subject line on the e-mails suggested to us that they were uncomfortable about the communications.

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[240] Karim Dep. (Aug. 5, 2010) 111:2-13; 112:12-13; 118:15-120:4. Asked what he recalled about the conversation with Jannarone referenced in the e-mail, Karim responded: "I don't remember. I mean we were working on a lot of stuff with them. Walker Jones was going full blast at the time. Deanwood was going full blast and these were these, you know, to put together some generic bell curve cash flows." *Id*. at 112:9-13. Karim also evasively described these e-mails as referring to "generic" bell curves in his testimony before the Council without agreeing that they related to the DPR projects in particular. (Dec. 10, 2009 hearing transcript at 190-193, 295-296).

[241] Ex. 63, E-mail from Omar A. Karim to David Jannarone (EOM) (Mar. 20, 2009 12:58 PM) with attachments.

[242] *See generally*, 27 DC ADC § 1602.3 (in the context of competitive sealed proposals, "The contracting officer shall furnish identical information concerning a proposed procurement to all prospective contractors receiving the RFP."). Neil Albert commented that although he did not know the full context of this e-mail exchange, he would not do it that way. Albert Dep. 120:14-121:10.

C. The Banneker-Regan Response to the RFQ

On March 27, 2009, thirteen firms submitted responses to the project management RFQ. Banneker and Regan Associates submitted as a team. According to the Regans, their response was put together by Banneker;[243] Karim stated that they worked on it together with Regan Associates.[244] The response stressed their experience on Walker Jones and Deanwood. In his cover letter, Karim wrote, "We believe that no other responder has more experience or familiarity with large-scale, complex, District of Columbia recreation center and parks projects than the Banneker-Regan Team."[245] He also stated,

> As you may know, we are currently working on two large-scale, recreation center projects (Walker Jones and Deanwood) and to date, have been successful in meeting both our schedules and budgets. If selected to provide Project Management Services for the Capital Projects listed in this RFQ, we expect to deliver these projects on schedule and within budget as well.[246]

The cover letter indicates that Banneker will lead the Banneker-Regan team.[247]

The response includes a chart of relevant project experience for Banneker and Regan. Walker Jones, Deanwood and Emery Recreation Center are identified as joint projects of the team.[248] The other projects listed for Banneker are The Residences @ Thayer Avenue; Pattern

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243 Interview with Sean Regan and Thomas Regan.

244 At his deposition, Karim testified that after they saw the RFQ advertised in the Washington Post, his firm "spent thousands of dollars putting it [a response] together and hundreds of hours putting it together as well." Karim Dep. (Aug. 5, 2010), 113:20-22. *See also* 124:18-125:3.

245 Ex. 64, Response to Request for Qualifications for Capital Projects – District of Columbia Parks and Recreation Project Management, submitted by Banneker Ventures LLC and Regan Associates LLC (Mar. 27, 2009) at 2.

246 *Id*.

247 *Id.*

248 *Id.* at 10, "Matrix of Relevant Project Experience."

Shop Lofts; The Jazz @ Florida Avenue; a project in connection with the Park Morton Master Plan; and a role as "co-master developer," as well as the developer of residential/retail space and commercial space, for the Northwest One Redevelopment.[249] The remaining projects on Banneker's chart are described as "staff involvement," apparently meaning that they were projects undertaken by Bundy Development Corporation while Karim was employed there. Regan's experience is also detailed in the RFQ response.

D. The Selection Process

Questions have been raised about whether the program management contract was deliberately steered to Banneker. As noted above, some DMPED personnel seemed to assume from the beginning that Banneker would be involved in the DPR Capital Projects. However, we did not find that the selection process was manipulated to reach this result.

The responses to the RFQ were reviewed by a committee of 5 members. Initially, DMPED proposed a committee consisting of 3 DMPED employees (Clint Jackson, Jacquelyn Glover and David Jannarone) and two DPR employees (David Janifer, Bridget Stesney).[250] No DCHE representatives were included in DMPED's proposed committee even though DCHE had been specifically tasked with doing the program management solicitation. Within several days, two DCHE employees – Asmara Habte and Christopher Regan[251] – were put on the committee in place of Clint Jackson and David Jannarone.[252]

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249 *Id.* at 11. The chart shows a Fall 2001 completion date for the Thayer Avenue and Florida Avenue projects, but that is obviously incorrect.

250 Ex. 65, E-mail from Jacquelyn Glover (EOM) to Jack Geary (Apr. 1, 2009 3:42 PM).

251 Christopher Regan of DCHE is no relation to the Regans of Regan Associates.

252 *See* Ex. 66, E-mail from Anthony Gilardi to Christopher Regan and Asmara Habte (Apr. 3, 2009 1:17 PM).

1. Did Glover have a disqualifying relationship with Banneker?

Questions have been raised about Glover's participation on the selection committee because Banneker's Best and Final Offer for the Deanwood contract, submitted on June 24, 2008, identifies Jacqueline Glover as a Banneker project engineer who is expected to spend 100% of her time on Deanwood. Banneker also listed Glover as an employee on the Employment Plan submitted as part of its First Source Employment Agreement, also dated June 24, 2008.[253]

However, Glover was never employed by Banneker. At her deposition, Glover testified that while working for another contractor, she met Karim at a networking event.[254] In mid-2008, she interviewed with Banneker, which offered her a position as a project manager.[255] Glover turned the job down in July 2008, deciding that she was not interested in working for a small company.[256] Glover also testified that no one from Banneker had asked whether they could list her in a submission to the government.[257] At the Joint Roundtable on December 2, 2009, however, Glover testified that while she was considering Banneker's offer, she gave them permission to list her name on its proposal, but that they later included her name on a DOES form without her permission.[258] At the Joint Roundtable on December 10, 2009, Karim testified that they thought they had an agreement with Glover to join Banneker, and that her name was

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253 The First Source Employment Agreement relates to the contractor's obligations to use the Department of Employment Services as its first source of employee recruitment and to hire District residents.

254 Glover Dep. 11:18-12:10.

255 *Id.* at 12:16-13:5.

256 *Id.* at 13:4-11.

257 *Id.* at 15:9-14.

258 Joint Roundtable (Dec. 2, 2009) 67:14-67:19.

included on their Best and Final Offer with her authorization.[259] He stated that including her name on Banneker's later DOES form was a mistake.[260]

Glover was called for an interview at DMPED in late July or early August of 2008, after giving her resume to a headhunter.[261] She started working at DMPED in late October 2008.[262]

Based on these facts, we do not believe that Glover had a relationship with Banneker Ventures that disqualified her from participating on the selection committee for the DPR projects program manager.

2. Was the selection committee or its scoring manipulated to favor Banneker?

The Special Counsel deposed or interviewed each member of the selection committee, and reviewed the score sheets and other documents related to the selection process. As described in detail below, the selection committee evaluated the RFQ responses on four criteria, and while there were three respondents with relatively close high scores – Banneker/Regan, KCI Technologies, Inc. and Brailsford & Dunlavey, Inc. – the Banneker-Regan team led the scoring at that time. CBE scores, which were obtained from the Department of Small & Local Business Development and were not subject to the panelists' judgment, were then added. They solidified Banneker/Regan's lead, resulting in the decision to award the project management contract. We do not find that the selection process was manipulated to favor Banneker.

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259 Joint Roundtable (Dec. 10, 2009)165:19-166:1.

260 Joint Roundtable (Dec. 10, 2009) 166:2-166:9, 234:7-234:8. As noted above, however, Banneker's Best and Final Offer and its DOES form have the same date.

261 Glover Dep. 16:12-16:15.

262 *Id.* at 21:10-21:14. There was a report that Glover introduced herself as a Banneker employee at a community meeting about the projects. Glover testified that she never introduced herself this way (Glover Dep. 192:4-193:5), and we view this testimony as credible.

The committee members' recollections of the selection process were not consistent in all their details. Some members recall the responses being sent to them at their offices,[263] while one remembers picking them up at the initial meeting of the committee.[264] Most of the members recalled that the committee met twice. It appears that the first meeting took place on April 6, 2009.[265] Glover thought that the proposals were discussed at that meeting, and that the Banneker/Regan response was identified as a "good proposal."[266] Other members of the committee did not think that any substantive discussions took place at the first meeting.[267]

The selection committee members used a score sheet created by DCHE based on the criteria in the RFQ.[268] Each respondent was to be rated on 5 evaluation factors:

- Demonstrated Experience & Qualifications
- Demonstrated ability to coordinate complex projects
- Familiarity with applicable DC and Federal Laws

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263 Glover Dep. 76:16-19; Interview with Asmara Habte.

264 Stesney Dep. 47:17-48:17. The documents show that on April 3, 2009, Anthony Gilardi of DCHE e-mailed copies of the responses to the two DCHE members of the selection committee, Chris Regan and Asmara Habte. *See* Ex. 67, E-mail from Anthony Gilardi to Christopher Regan and Asmara Habte (Apr. 3, 2009 5:21 PM). Chris Regan then asked for all of the responses to be printed and made available at the meeting. *See* Ex. 68, E-mail from Christopher Regan to Anthony Gilardi (Apr. 3, 2009 7:04 PM). We have no documents showing transmittals to the other members.

265 Ex. 66.

266 Glover Dep. 77:10-78:1.

267 Interview with Christopher Regan, Project Manager, DCHE (Jul. 22, 2010); Interview with Asmara Habte; Stesney Dep. 48:18-49:1. David Janifer testified that the selection committee received over 20 proposals, narrowed them down to 5 on which they focused, and heard oral presentations from the candidates. Janifer Dep. 53:6-53:17. We believe that Janifer's testimony was a mistaken reference to a different selection process.

268 Interview with Asmara Habte.

- Experience with publicly funded projects
- Business Enterprise Designation (MBE, WBE, etc.)[269]

It is not clear when the score sheets were provided to the committee members.

The committee held its second meeting on April 22, 2009.[270] The witnesses did not agree on whether the committee members filled out their score sheets before the meeting[271] or at the meeting.[272] There was agreement, which is supported by the documents, that at the April 22 meeting, each member read their total scores for each proposal out loud, and that Larry Dwyer of DCHE took notes of each score and calculated totals for each respondent.[273] Those totals did not include CBE points (the fifth evaluation factor) for any of the respondents.[274] According to Glover, the fact that Banneker was the top scorer at that point was discussed at the meeting.[275]

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269 Ex. 69, Proposal Evaluation and Scoring Sheet, DCHE Solicitation No. 2009-05, DMPED Capital Projects – DC Parks and Recreation Project Management Services (Apr. 22, 2009).

270 Interview with Asmara Habte; *see* Ex. 70, Handwritten tally of scores (2 pages), initialed "LD" and dated Apr. 22, 2009.

271 Glover Dep. 89:3-6; Stesney Dep. 68:5-7; Interview with Christopher Regan.

272 Interview with Asmara Habte.

273 *See* Ex. 70.

274 A comparison of Dwyer's handwritten scores, *see* Ex. 70, and the scores on the final score sheets, *see* Ex. 71, minus the CBE points, which were not known at the time of Dwyer's tally, reveals that they are generally consistent. Dwyer's notes list 5 scores for each of the 13 contractors. Although the notes do not indicate which member gave which score, it seems clear that Dwyer listed the scores from the committee members in this order: Glover, Janifer, Stesney, Regan, Habte. There are 3 instances where the score sheets and Dwyer's notes do not match: Glover's score for Eller Group DC, and Janifer's scores for Banneker and KCI. However, the scores on the score sheets match the totals on the combined score sheet attached to Dwyer's selection memo, Ex. 72, so the 3 discrepancies do not appear to have made any difference.

275 Glover Dep. 94:12-14.

Other witnesses did not recall this, and beyond the reading of the scores, we have not been able to get a full picture of any discussions that took place at the April 22 meeting.

Both Banneker and Regan Associates' qualifications were presented in their proposal, and according to the committee members we interviewed, they assessed them together. Glover testified that the fact that it was a joint proposal was particularly important to her:

> Banneker is not a large company. Regan has definitely got a significant history and good work performance in construction management. So the team made them stronger.[276]

She also indicated that she would have evaluated a proposal from Banneker alone quite differently: "Alone they could not handle the large volume of projects that we had."[277]

After the April 22 meeting, Habte went to the District's LSDBE website and determined the business enterprise points for each responder.[278] She e-mailed the LSDBE points to the other committee members that evening.[279] It appears that the members entered the points on their score sheets and then determined the final totals for each proposer.[280]

DCHE collected signed score sheets from each member of the selection committee. They are dated as follows:

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[276] Glover Dep. at 85:5-8.

[277] *Id*.

[278] Interview with Asmara Habte.

[279] Ex. 73, E-mail from Asmara Habte to Jacquelyn Glover (EOM); David Janifer (DPR); Bridget Stesney (DPR); Lawrence Dwyer; Christopher Regan (Apr. 22, 2009 7:33 PM).

[280] Ex. 71.

Habte	April 14, 2009
Janifer	April 22, 2009
Stesney	April 22, 2009
Regan	April 23, 2009
Glover	June 1, 2009[281]

The June 1 date on Jacquelyn Glover's score sheet has raised questions about whether her scores may have been changed after the fact to enable Banneker to win.

The witnesses' accounts of what happened to Glover's score sheet are not consistent. Glover testified that she turned in her score sheet on April 22, the day of the second meeting, but that either Dwyer or Habte told her that DCHE had lost it.[282] Habte stated that it was Glover who lost her score sheet. Habte said that she asked her for it several times and that she ultimately went and picked up another score sheet from Glover.[283] Chris Regan thought that Habte found an arithmetic error in Glover's score sheet and asked Glover to re-do it. At the time, Chris Regan and Glover were working together on another project, and Regan recalled that Glover brought him the score sheet and he gave it to Habte.[284] Neither Bridget Stesney nor David Janifer, the other members of the selection committee, had any knowledge about Glover's score sheet.[285]

It is clear that Glover's June 1 score sheet was created after the fact. Glover testified that Habte provided her with the scores she had originally awarded each contractor as they were recorded at the April 22 meeting, and that she used these scores to fill out a new score sheet.[286]

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281 *Id.*

282 Glover Dep. 89:14-17, 91:2-11.

283 Interview with Asmara Habte.

284 Interview with Christopher Regan.

285 Stesney Dep. 70:15-71:6; Janifer Dep. 58:19-60:2.

286 Glover Dep. 91:17-92:9.

Habte did not give her the scores for each evaluation factor; instead, Glover filled those in based on her memory.[287]

While Glover's score sheet was mishandled, we did not find any evidence that Glover's scores were manipulated after the fact to allow Banneker to win. The comparison between Glover's June 1 score sheet and Dwyer's handwritten notes from the April 22 meeting is particularly important in this regard. Although there was one score on Glover's June 1 score sheet that differed from her score in Dwyer's notes, it was a score for a contractor that had no chance in any event. After accounting for CBE points, which were not within Glover's control, all the other scores on Glover's sheet, including the score for Banneker, matched Dwyer's April 22 notes. Moreover, Banneker had the highest combined score from the other four committee members and would have won even without Glover's score.

None of the members of the selection committee reported experiencing anything inappropriate about the process, or reported knowledge of any facts suggesting that the contract might have been steered to Banneker.[288] None of the panelists recalled that Glover, Jannarone or anyone else advocated for Banneker in particular or pressed them to vote in a particular way. We found no evidence of financial or other ties between any of the selection committee members and Banneker that would suggest improper bias or favoritism. As discussed above, we do not believe that Glover's job offer from Banneker was meaningful in this regard. Several of the committee members viewed the experience of the Banneker/Regan team on Walker Jones and Deanwood as

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287 *Id.* at 92:10-15.

288 Glover Dep. 219:2-9; Stesney Dep. 71:10-72:2; Janifer Dep. 60:14-61:11; Interview with Asmara Habte; Interview with Christopher Regan.

particularly significant in their consideration of the proposals,[289] but this was not an improper advantage.[290] In short, the facts we have found do not support a conclusion that the selection process was manipulated.

In a memorandum dated April 29, 2009, Dwyer recommended the selection of Banneker to the DCHE board. It is not clear how this memorandum, which purports to attach all of the evaluation forms,[291] could have been written and sent on April 29 when Glover's score sheet was dated June 1. While it thus appears that the recommendation was made before the supporting paperwork was fully in place, it was consistent with what Dwyer knew to be the results of the selection process.

V. THE BANNEKER PROJECT MANAGEMENT CONTRACT

Questions have been raised about whether the program management contract provided excessive compensation to Banneker or terms that were otherwise unfair to the District. Based on the evidence we have reviewed, we do not believe this issue warrants referral for further investigation. But the manner in which the contract negotiations were handled does raise concerns about the appropriateness of the compensation to Banneker and whether the District's interests were adequately protected. Banneker was entitled to negotiate the most favorable terms

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289 Glover Dep. 255:8-20; Stesney Dep. 56:4-10. Glover testified that after the RFQ responses were received, she talked with DMPED project managers about some of the responding companies. Knowing that Banneker was working on Walker Jones and Deanwood, she spoke with the project managers for those projects, who had nothing negative to say and were pleased with Banneker's work. Glover Dep. 255:19-20.

290 The decision to proceed by RFQ alone, rather than to solicit price proposals from the most qualified bidders, compounded the advantage, though, as no other contractor had an opportunity to compete with the Banneker/Regan team on the basis of price.

291 Ex. 72.

it could, so if the contract was overly favorable to Banneker, it is the government officials, not Banneker, who should be faulted.

A. The Intent to Award Letter; Work Begins

By letter dated April 30, 2009, DCHE notified Banneker that the program management contract would be awarded to the Banneker/Regan team.[292] According to the letter, DCHE – consistent with the responsibilities assigned to it under the MOU – expected to be handling the contract negotiations:

> DCHE Project Manager, Asmara Habte, will be contacting your office over the next few days to finalize the contractual agreement and to schedule the work for this project. In the meantime, please provide us with a proposed budget for your services based on the scope of work detailed in the DCHE solicitation No. 2009-05.[293]

Although the project management contract had not yet been signed, DMPED directed Banneker to begin work. A kick-off meeting for the DPR projects was held on May 1, 2009.[294] As will be discussed in more detail below, on May 4, 2009, without any competitive solicitation, Banneker issued a letter to Liberty Engineering & Design, informing LEAD that it would be receiving a contract for consulting and surveying services for the DPR capital projects, and authorizing LEAD to begin performing consulting and surveying work immediately.[295] On May 14, 2009, representatives of Banneker, Regan, DMPED and DPR held a planning meeting, at which, among other things, they scheduled site visits to Kenilworth, Bald Eagle, Guy Mason and

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[292] Ex. 74, Letter from Larry Dwyer to Omar A. Karim (Apr. 30, 2009).

[293] *Id.*

[294] Ex. 75, E-mail confirmation regarding DPR Projects Kickoff Meeting scheduling (May 1, 2009).

[295] Ex. 76, Letter from Duane W. Oates, Banneker Ventures, L.L.C., to Abdullahi Barrow, P.E., Liberty Engineering and Design, PLLC (May 4, 2009).

Chevy Chase for the following week.[296] Banneker continued to move forward, and to invoice the District, during the two and a half months it took for the parties to finalize the program management contract.

While it may have been advantageous to the District to allow Banneker to begin before contract execution, it also could have made it more difficult for the District to reject contract demands from Banneker and begin negotiations with another contractor. At the same time, Banneker was technically at risk of not being compensated for work done, or of being compensated at less than its anticipated rate, if its negotiations with the District did not result in an executed contract.

B. DMPED controlled the contract negotiations

Both the MOU and the award letter to Banneker contemplated that DCHE would have responsibility for negotiating Banneker's program management contract. It is clear, however, that the negotiations, such as they were, were controlled by DMPED, and that DMPED largely regarded attempts by DCHE to have input into the terms of the contract as an unwanted annoyance.

1. The fixed fee

Jacquelyn Glover of DMPED was the District employee primarily responsible for negotiating fees with Banneker. She described her role as "a representative for DPR, just making sure that we get, in a sense, our best bang for our buck."[297]

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296 Ex. 77, E-mail from Jacquelyn Glover to Bridget Stesney (DPR); David Janifer (DPR); Omar A. Karim; Duane Oates; Tom Maslin; Bernard Guzman (EOM); David Jannarone (EOM); McClinton Jackson (EOM) (May 14, 2009 4:04 PM).

297 Glover Dep. 100:13-15.

It appears that the first document presented to the District as part of the contract negotiations was a fee proposal, which Glover described as a "funding sheet that basically outlined how much their monthly billing would be."[298] Despite requests, we have not received a copy of the initial fee proposal. According to Karim, the fee proposal was prepared by Regan Associates, and was based on the staffing plan included in the Banneker-Regan response to the RFQ. Although Glover thought that the proposal was also provided by Banneker to DCHE, and possibly to DCHE first,[299] Karim testified that the initial fee proposal went to DMPED,[300] which seems more likely.

On May 18, 2009, Glover sent Karim a response to the fee proposal, copying representatives of Banneker, Regan, DPR and DMPED, but not DCHE.[301] Glover's e-mail indicates that the proposal was based on a monthly fee of $44,000 per "project." "Project" in this context did not mean an individual park; instead, the parks were grouped for purposes of calculating workloads.[302] Banneker calculated that it would be working on 4 "projects" during months 1-15 of contract performance, and 3.1 "projects" during months 16-28, for a total fee

298 Glover dep. at 100:22-101:3.

299 *Id.* at 101:4-7.

300 Karim Dep. (Aug. 5, 2010) 138:14-15.

301 Ex. 78, E-mail from Jacquelyn Glover (EOM) to Duane Oates; Sean Regan; Tom Maslin; David Janifer (DPR); David Jannarone (EOM); Jacquelyn Glover (EOM) (May 18, 2009 5:59 PM).

302 Glover dep. at 109:19-110:9. The contract included 10 different parks and recreation centers (3 more than were in the initial DPR/DMPED MOU).

over 28 months of $4,413,200.[303] Glover testified that she discussed the calculation of the monthly fee with Karim, and that it was based on "units of work per project."[304]

According to the Regans, Banneker's fee was based on expected staffing levels, and was calculated in the same manner as their fee on Walker Jones.[305] On the earlier project, the Regans priced 3 full time employees at $45,000 per month, and then priced the work by determining how many full time employees would be needed in total.[306] They said that the same analysis was applied here.[307]

In her response, Glover offered a lower monthly fee of $40,000 per project group, but added a bonus of $250,000 for successful completion of certain parks in the first 15 months and a second bonus of $300,000 that could be earned at the end of 28 months.[308] Although both Glover and Karim describe Banneker's fee as having been negotiated down,[309] in fact Glover's proposal provided for a total potential fee of $4,562,000, which was $148,800 *more* than Karim requested. Glover testified that the reason for the increase in the total fee was to create an incentive for Banneker to move quickly and meet the "very aggressive" schedules imposed by DPR.[310]

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303 *Id.* at 110:2-9.

304 *Id.* at 103:15-22.

305 Interview with Sean Regan and Thomas Regan (Apr. 20, 2010).

306 *Id.*

307 The Regans indicated that contract negotiations with the city were handled by Banneker, which consulted with them; "we had to be comfortable with what the fee would be." Interview with Sean Regan and Tom Regan. According to Karim, representatives of Regan Associates met with Glover to explain the fee proposal.

308 *See* Ex. 78.

309 Glover Dep. 104:20-105:9, 108:17-109:12; Karim Dep. (Aug. 5, 2010) 139:4-5.

310 Glover Dep. 105:19-106:1.

Glover and Karim compromised on a monthly fee of $42,000 per "project" (with the workload calculated at 4 projects in the first 15 months and 3.1 projects in the subsequent thirteen months),[311] resulting in a contract amount of $168,000 per month from May 2009 to July 2010, and $130,200 from August 2010 to August 2011. Glover reduced the bonus amounts to $150,000 and $200,000, which resulted again in a total potential fee of $4,562,600 – again, more than Karim had originally proposed.[312]

It appears that no one in DMPED other than Jannarone reviewed this decision. Neil Albert testified that he was not aware of the fees being negotiated, and that it was David Jannarone's responsibility to manage the project.[313] Jannarone did not conduct an in-depth review. He testified that he discussed the fees with Glover after Banneker's proposal came in. Glover was "going to go back and try to negotiate the lower fees, which she did successfully."[314] They also discussed whether the fees were consistent with other projects and fair and reasonable.[315] However, Jannarone rejected the suggestion that he was responsible for the final

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311 Glover Dep. 109:17-110:1; Ex. 79, E-mail from Jacquelyn Glover to Omar A. Karim (May 19, 2009 7:34 PM) ("Omar, Per our conversation, we will meet in the middle and adjust your monthly fee … from $44,000 to $42,000/month/project. Then adjust the Bonuses accordingly to ensure the Grand Total Fee is 4,562,600, as shown in my original Proposed Fee Calculation …."). These numbers were carried through into the contract. *See* Ex. 80, Contract for Services between DCHE and Banneker Ventures, Contract No. 2009-05 (Jul. 14, 2009) at 4. The bonus targets were based on two groups of parks: Part A, the smaller parks that were expected to be completed first (Barry Farms, Justice Park, Parkview Community Park, 7th and N Street), and Part B (Bald Eagle, Chevy Chase, Fort Stanton, Guy Mason, Kennilworth-Parkside, Rosedale Community Center). Ex. 80 at 35; Glover Dep. 104:20-105:18, 109:19-110:9. Note that the contract covered 3 parks that were not included in the DPR/DMPED MOU.

312 *See* Ex. 79.

313 Albert Dep. 129:9-18.

314 Jannarone Dep. 36:7-8.

315 *Id.* at 36:9-11.

numbers: "[Glover] did what she had to do, and when she ended up in a place that she felt comfortable with[,] her and I talked about it."[316]

Once the fee issue was concluded, Glover requested that Karim send her his contract, in terms that suggested DCHE's role was only a formality: "Please send over your contract, with these amounts included, for review, and we will then send it to DCHE for formal execution."[317]

2. The 9% mark-up

The contract proposed by Banneker was largely based on the program management contract for Walker Jones: "Banneker had an existing contract on Walker Jones with DCHE so pretty much they used the same template, just changed the scope and the funding portions of it."[318] In addition to the monthly fee and bonuses, Banneker was entitled to be paid "Amounts due to Consultants under the Contractor's contracts with the Consultants (other than Regan Associates), plus a mark-up of nine percent (9%) thereof for the Contractor's overhead and management (Consultant Payments)."[319]

The contract includes construction contractors in the definition of Consultant[320] During some of the hearings, this 9% mark-up was described as mark-up on the entire construction

316 *Id.* at 36:19-22.

317 Ex. 79.

318 Glover Dep. 101:19-22.

319 Ex. 80, at § 9(A)(11). The PPA prohibits the use of the "cost-plus-a-percentage-of-cost contract system of contracting." D.C. Code, § 2-303.09. While DCHA and DCHE are not governed by the PPA, we understand that the D.C. Auditor is looking into whether including the 9% mark-up made the Banneker contract a cost-plus-percentage-of-cost contract, and if so, why DCHE would issue such a contract. *See* Ex. 81, E-mail from Francis Bonsiero, Senior Analyst, Office of the District of Columbia Auditor to Hans Froelicher (Feb. 3, 2010 4:45 PM).

320 *Id.* at § 5.

budget. However, the parties understood the mark-up to apply only to "soft cost" consultants, primarily engineers and architects, and not to the construction contractors.[321]

The 9% mark-up is a term that was included in the program management contract for Walker Jones and stayed in the version used by Banneker for the DPR Capital Projects.[322] Although Glover testified that she discussed the mark-up with Karim, it does not appear to have been the subject of serious negotiation, nor was it reviewed by anyone other than Glover. She thought it was standard for a mark-up to be added when a contractor, as opposed to the owner, would be holding contracts with consultants or sub-contractors.[323] She stated that the mark-up was justified because the contractor was taking on additional liability, both for paying the consultant and for the work done by the consultant.[324] Jannarone did not recall any specific discussions about the 9% mark-up, and pointed to the Walker Jones contract as justification.[325] Asked about the mark-up in the Walker Jones contract, Karim stated that it was normal to charge a fee for holding a contract and that the 9% amount was "industry standard."[326]

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321 *See e.g.* Jannarone Dep. 43:6-46:16; Dwyer Dep. (Aug. 6, 2010) 109:5-9, 138:15-141:22; Interviews with Sean Regan and Thomas Regan (Apr. 20, 2010, Nov. 12, 2010).

322 There was no similar provision in the Deanwood project management contract.

323 Glover Dep. 106:20-22.

324 *Id.* at 107:1-108:16.

325 Jannarone Dep. 37:1-12.

326 Karim Dep. (Aug. 5, 2010) 97:6-7. Karim's explanation was as follows:

> [Regan and Associates] had to manage those contracts. They have to manage those staff. They had to negotiate the contracts. They had to negotiate invoices every month and submit them and oversee them and when – if the District didn't pay, they're the ones who get those emails and phone calls and reputations are on the line when all of those consultants begin to ask where's our money.

(footnote continued on next page)

During the investigation, we spoke to numerous people in various positions in the construction industry. Based on those discussions, it appears that it is not unusual for a contractor to add a percentage fee when it holds a contract, and we heard various estimates of a standard mark-up amount, ranging from 2 to 10%.[327] But in this case, the mark-up was being added on top of a significant fixed fee.

More importantly, the purpose of such a mark-up is to cover costs to the contractor of managing the sub and assuming additional liability.[328] But Banneker did not take on that liability in this case. The language of the contract does not support Karim's claim that Banneker retained

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> And then you have reputations on the line and all of those things. Similarly, the same situation that we're in under the – our contract with DCHE and all the subcontractors who aren't paid. It's a major, major burden on us because we don't have the funds to directly pay those consultants. They have to come from the government.
>
> So I think a nine percent fee is certainly industry standard. It's regular. General contractors charge the same thing. Architects charge the same – they charge more for this.

Karim Dep. (Aug. 5, 2010) 96:12-97:9.

[327] Interview with Dale Stewart; Interview with Mangrum and Miranda. Larry Dwyer testified that in DCHE's view, a mark-up of 4 to 6% would be more in line. Dwyer Dep. (Aug. 6, 2010) 55:10-13. During the negotiations, Habte recommended a 4% mark-up on Banneker's subs.

At the Council hearing on Nov. 16, 2009, Valerie Santos, who became Deputy Mayor for Planning and Economic Development in June 2009, testified that 9 percent was in line with industry standards for taking on liability and risk associated with the work. Council Hearing (Nov. 16. 2009) 161:10-16. At her deposition, Santos testified that she got this explanation from Dwyer and Jannarone, who advised her that the program manager was bearing all the risk if anything went wrong with the work of the consultants. Deposition of Valerie Santos, Deputy Mayor for Planning and Economic Development (Sep. 27, 2010) at 45:18-46:9.

[328] Interview with Mangrum and Miranda; Interview with Dale Stewart.

liability for the work of its consultants.[329] The contract states that Banneker "is responsible for its own negligence and willful misconduct."[330] But it also provides that "Notwithstanding anything else in the Contract Documents, however, the Contractor is not responsible for the performance of Enterprises [DCHE], of the Consultants, or of construction contractors, as such performance is solely the responsibility of those firms."[331] Banneker is not relieved of responsibility "for coordinating efforts of or managing Consultants as set forth in the Contract Documents or for administration of Consultant contracts" – which are its obligations under the contract. But it is expressly relieved of liability for the consultants' acts:

> To the extent a claim by Enterprises involves or relates to the performance, breach of contract, negligence, or intentional misconduct or any other act or omission by a Consultant, Enterprises (at its own expense, including attorneys' and experts' fees) will pursue its claim either through the Contractor (i.e., in the name of the Contractor) or directly against the Consultant, and Enterprises will be limited in its recovery to the amount that Enterprises recovers from the Consultant. ….[332]

Asked about the meaning of this provision in the project management contract for Walker Jones,[333] which was the model for the Banneker contract, Karim stated that it did not disclaim

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329 The 9% mark-up also cannot be justified as compensation for Banneker's taking on the risk of having to pay the consultants. Its contracts with LEAD and the architects expressly state that the consultants are not entitled to any payment from Banneker unless and until Banneker has received payment from DCHE. *See, e.g.*, Ex. 82, Consulting Services Agreement between Banneker and LEAD (Jul. 22, 2009) at 8, Schedule 2 "Contract Sum."

330 Ex. 80, at § 5.

331 *Id.*

332 *Id.* at § 5.B.

333 *See* Ex. 83, Contract for Services between DCHE and Regan Associates, LLC (Aug. 3, 2007) ("Walker Jones Contract") at § 5B.

liability for the work of the consultants.[334] But the Regans, who negotiated the Walker Jones contract with DCHE, acknowledged that in return for reducing their original demand for a 15% mark-up, they were able to obtain contract language relieving them of claims.[335]

Because the Banneker contract was disapproved long before completion, the total amount that would have been paid to Banneker due to the 9% mark-up is unknown. For analysis purposes, we looked at a set of project budgets produced by DCHA dated June 8, 2009.[336] Applying a 9% mark-up to the soft cost category entitled "Program Manager Contracts" in each budget (some of which appear to be missing architects' fees) yields $388,823. Using this amount, the total fee payable to Banneker under the contract would have been $4,601,423 without bonuses, and $4,951,423 with bonuses. With a total estimated project budget of $53,150,000, as indicated in the scopes of work for each of the 10 parks covered by the contract, Banneker's fee without bonuses could have totaled 8.7% of the budget; with bonuses, 9.3%.[337]

It is outside of the scope of the Special Counsel's responsibilities to set compensation standards for project management. But the absence of price competition in the original award, the manner in which the negotiations for the contract were conducted, the lack of hard bargaining on the price components, and the inclusion of the 9% mark-up on consultants' costs, when

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334 Karim Dep. (Aug. 5, 2010), 92:9-93:5.

335 Interview with Sean Regan and Thomas Regan (Aug. 2, 2010).

336 Ex. 84, Projected Budget tables for Rosedale, Kenilworth, Bald Eagle, Guy Mason, Chevy Chase Field, Barry Farms, Justice Park, Park View, 7th and N (Cash Flow as of 5/4/2009), Fort Stanton (Jun. 8, 2009).

337 The total project budget is higher than the $40 million MOU amount because parks were added to the projects after the MOU was executed. As happened throughout these projects, documents authorizing additional funding or work were prepared after the fact.

Banneker was relieved of liability for the consultants' performance, give rise to the view that the District's interests could have been better served.

C. Finalizing the Contract

On May 26, 2009, Karim sent Jacquelyn Glover and David Jannarone an e-mail attaching a draft of the contract between DCHE and Banneker Ventures.[338] Karim noted that "[i]t is essentially the same contract that was signed for Walker Jones." He also indicated that he would provide the contract attachments once the scopes of work were finalized; they appear to have been sent to Glover on June 9, 2009.[339] Later that same day, Glover forwarded the draft and attachments to Asmara Habte[340] with no comments.[341]

DCHE took steps to review the language of the contract. Its insurance analyst provided comments on June 16, 2009.[342] The analysts noted the sentence in paragraph 5 of the contract providing that Banneker was not responsible for the performance of the Consultants or the construction contractors, and commented "We believe the Contractor SHALL be responsible for the performance of the Consultants and of construction contractors."[343] They noted the language of the insurance provision, section 10, which as drafted provided that the insurance maintained by Banneker would cover "the Contractor's own operations (and not the operations of

338 Ex. 85, E-mail from Omar A. Karim to Jacquelyn Glover (EOM) (May 26, 2009 7:04 PM).

339 *Id.;* Ex. 86, E-mail from Jacquelyn Glover (EOM) to Asmara Habte (June 9, 2009 3:50 PM). We have not been provided with a copy of the draft attached to this e-mail or the contract attachments that were subsequently forwarded.

340 *Id.*.

341 Glover Dep. 115:4-6.

342 Ex. 87, E-mail from Julie Ellis to Jack Geary; Nancy Ahrens (June 16, 2009 1:36 PM).

343 *Id.*

Consultants or anyone else)," and commented that Banneker *should* be responsible for the consultants and contractors, and that the insurance requirements should be extended by Banneker to the Consultants and contractors.[344] They also recommended other specific language changes to the insurance provisions of the contract.[345] However, none of these recommendations or changes were incorporated into the contract.[346]

On June 24, 2009, Asmara Habte advised Karim that "there are many issues in the contract that we need to discuss and change."[347] David Cortiella of DCHE was asked to review the contract by Larry Dwyer.[348] On June 25, Cortiella sent Karim a red-lined copy of the contract with DCHE's comments.[349] Among the proposed changes were edits to paragraph 5 that appear to have been intended to make Banneker responsible for the work of its consultants.[350]

Cortiella's efforts provoked a flurry of dismissive responses from DMPED. At 12:38 pm, David Jannarone sent him an e-mail stating "Jacqui will get you the contract we approve."[351]

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344 *Id.*

345 *Id.*

346 *See* Ex. 80, at 6-7.

347 Ex. 88, E-mail from Asmara Habte to Omar A. Karim (Jun. 24, 2009 4:15 PM); Habte was concerned that Banneker would have minimal responsibility for the work, and also thought that 4% would have been a more appropriate management mark-up fee. Interview with Asmara Habte.

348 Ex. 89, E-mail from David Cortiella to David Jannarone (EOM) (Jun. 25, 2009 10:18:51).

349 Ex. 90, E-mail from David Cortiella to Jacquelyn Glover (EOM); David Jannarone (EOM); Omar A. Karim (Jun. 25, 2009 2:10 PM) with attachment ("Contract for Services").

350 *See id.*, attachment at 2-3. In other words, DCHE tried several times to require Banneker to carry the liability that might have justified its 9% mark-up.

351 Ex. 91, E-mail from David Jannarone to David Cortiella; Omar A. Karim; Jacquelyn Glover (EOM) (Jun. 25, 2009 12:38 PM).

Glover followed up at 12:44 pm, indicating that they had reached agreement with Dwyer on certain changes and would make no more:

> Banneker is revising their contract to reflect the revisions suggested to the Insurance Section only which we discussed and agreed upon with Larry this morning. They will send the updated agreement this afternoon for Larry to promptly review and approve.[352]

Jannarone continued to e-mail Cortiella:

- June 25, 2:07 pm: "To be clear, we will send you the contract we would like you to sign as I said earlier. If Larry has issue with what we send, he will call me."[353]
- June 25, 2:08 pm: "You are wasting your time, we have a path forward. We will be in touch."[354]
- June 25, 3:05 pm: "Larry has our copy that we want him to sign. Thanks for your hard work."[355]

When asked about these exchanges, Jannarone said that the negotiation of the terms of Banneker's contract should have been straightforward, because the parties had already agreed on a form of project management contract for Walker Jones.[356] Jannarone described Cortiella's proposed edits as "minor stuff that didn't make one difference one way or the other. That was a

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[352] Ex. 92, E-mail from Jacquelyn Glover (EOM) to David Cortiella (Jun. 25, 2009 12:44 PM).

[353] Ex. 93, E-mail from David Jannarone (EOM) to David Cortiella; Jacquelyn Glover (EOM) (Jun. 25, 2009 2:07 PM).

[354] Ex. 94, E-mail from David Jannarone (EOM) to David Cortiella; Jacquelyn Glover (EOM) (Jun. 25, 2009 2:08 PM).

[355] Ex. 95, E-mail from David Jannarone (EOM) to David Cortiella; Larry Dwyer; Jacquelyn Glover (Jun. 25, 2009 3:05 PM).

[356] Jannarone Dep. 61:14-62:20, 65:3-9.

lot of time."[357] As long as Dwyer was comfortable with the language, that was the end of it as far as Jannarone was concerned.[358]

Dwyer, however, testified that he was primarily interested in including language making it clear that DCHE was responsible only for the $700,000 worth of work it would perform, and not on other substantive issues in the contract.[359] Dwyer was aware at the time that DMPED was not being particularly responsive to DCHE's other comments, but chose not to press the issue, for fear that the discussions were becoming unproductive.[360] The contract was not reviewed by DCHA's Office of General Counsel, contrary to agency standard practice.[361]

Thus, the only change that was made in the final version of the contract was the one requested by Dwyer – the addition of an introductory sentence in the insurance section in which DCHE disclaimed responsibility for negligent or wrongful acts of the contractor or its subcontractors, agents or employees.[362] But this change did not alter the language relieving Banneker of liability for its consultants' work. The project management contract was signed by Omar Karim on June 25, 2009[363] and e-mailed by him to Larry Dwyer on the same day.[364]

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357 *Id.* at 73:12-14.

358 *Id.* at 73:5-74:7.

359 Dwyer Dep. (Aug. 6, 2010) 57:3-20.

360 *Id.* at 64:20-65:6.

361 Interview with Hans Froelicher, General Counsel DCHA (Sep. 14, 2010).

362 Ex. 90, attachment at 7; Ex. 80, at 6.

363 *Id.* at 15.

364 Ex.96, E-mail from Omar A. Karim to Asmara Habte (Jun. 26, 2009 11:17 AM).

Banneker and Regan Associates subsequently signed a letter agreement under which Regan Associates was retained as a consultant to Banneker on the DPR projects.[365] The agreement provides that Regan Associates will receive 48% of Banneker's contract amount (excluding consultant mark-ups) and will play the lead management role for half of the projects.

D. DCHE Approval of the Contract

On June 18, 2009, while contract negotiations were still ongoing, Larry Dwyer circulated a DCHE board resolution proposing approval of the contract.[366] But DCHE did not act on the resolution at its June 18 meeting because it lacked a quorum.[367] The MOU between DCHA and DMPED had not been finalized at this point.

By the end of June, although the contract had not been signed by DCHE and the MOU was not in place, Karim had already submitted Banneker's first invoice for work done in May to DMPED, and would soon submit a June invoice. Asmara Habte advised him that DCHE could not make any payments without a signed contract.[368] Karim pressed DCHE to approve the contract and the MOU so payments could begin.[369] On June 29, Glover told Karim that the issue

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365 Ex. 97, Letter from Sean M. Regan, Regan Associates to Omar A. Karim, Banneker Ventures (Jul. 20, 2009) (consulting agreement).

366 Ex. 98, Memo from Larry Dwyer to DCHE Board of Directors (Jun. 18, 2009).

367 *See* Ex. 99, E-mail from Larry Dwyer to Omar A. Karim (Jun. 28, 2009 22:29:57); Dwyer Dep. (Aug. 6, 2010) 71-72; Ex. 100, E-mail from Asmara Habte to Omar A. Karim (Jun. 25 2009 10:36 AM).

368 Ex. 101, E-mail from Asmara Habte to Omar A. Karim (Jun. 25, 2009 10:36 PM).

369 *See* Ex. 102, E-mail from Omar Karim to Asmara Habte (June. 29, 2009 9:51 AM); Ex. 103, E-mail from Omar Karim to Lawrence Dwyer (Jul. 1, 2009 5:22 PM); Ex. 104, E-mail from Omar A. Karim to Lawrence A. Dwyer (Jul. 6, 2009 6:48 PM).

of DCHE's fee still needed to be resolved before the MOU could be finalized.[370] Glover offered to look for other ways to pay Banneker in the interim:

> Once the fees have been approved the MOU can be executed and the money can be transferred. Since DCHE is delayed with providing their fee information, I'll talk with David Jannarone today to see if there are other mechanisms to issue payment in order to prevent delay on work that is already in play.[371]

It appears that one of the options considered was adding the DPR invoices to Deanwood. But after receiving Banneker's second invoice, Glover told Karim that would not work:

> Your invoices are very very high and as a result we can't add to Deanwood because that would put your contract over $1 Million forcing it to go to council, per the conversation I had with Jonathan Butler. Plus you want to modify your contract to add more money today and I'm sure you'll be doing so again before next summer.[372]

At her deposition, Glover testified that she described the Council approval requirement as a problem because Banneker was looking to get paid quickly: "there is no way to put in the whole – put in a change order over a million dollars, put it through Council and then have it be paid quickly."[373]

As noted, the fees to be charged by DCHE to DMPED were an issue between the agencies, which was finally resolved on July 10, 2009.[374] According to Jannarone, the $700,000 fee for DCHE was the result of negotiations he had with Larry Dwyer.[375] Dwyer said that the amount was a combination of actual costs that DCHE would incur for its role in the project and a

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370 *See* Ex. 102, E-mail from Jacquelyn Glover to Omar Karim (Jun. 29, 2009 9:57 AM).

371 *Id.*

372 Ex. 105, E-mail from Jacquelyn Glover to Omar A. Karim (Jul. 7, 2009 4:11 PM).

373 Glover Dep.127:1-5.

374 *See* Ex. 106, E-mail from Jacquelyn Glover to Omar A. Karim (Jul. 10, 2009 6:07 PM).

375 Jannarone Dep. Notes.

percentage fee.[376] By comparison, DCHE's fee on the Walker Jones project was $200,000. Jannarone explained the disparity by noting that Walker Jones was one project, while the DPR Capital Projects involved multiple parks, commenting that the $700,000 fee sounded like a "good deal."[377]

A resolution approving the project management contract was presented to the DCHE board for its July 14 meeting.[378] The resolution stated that the contract would be awarded to "Banneker Ventures, LLC and Regan Associates, LLC (a joint venture)," and that it would be a "firm fixed price contract … in the amount of $4,562,600."[379] No mention was made of the 9% mark-up, and the contract itself was not attached to the resolution.

By this point, William Slover, who was appointed chairman of the DCHA board in May 2009, was seeking information about DCHE's role in the DPR capital projects and the procurement of the program management contract.[380] According to Slover, none of the board members ever saw the actual contract.[381] At the July 14 meeting, Slover voiced concerns about

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376 Dwyer Dep. (Aug. 6, 2010) 27:21-28:2.

377 Jannarone Dep. Notes. Glover testified that she thought the $700,000 fee was high. She believed she discussed it with Asmara Habte of DCHE and with David Jannarone, and was told that the fact that multiple parks were involved explained the size of the fee. Glover Dep. 120:19-122:13.

378 Ex. 107, DC Housing Enterprises Resolution 09-09, effective July 14, 2009.

379 *Id.*

380 Interview with William Slover, former Chair of the DCHA Board (Apr. 19, 2010).

381 *Id.*

the contract, including the process by which it had been awarded and the size of the fees.[382] One of the four DCHE directors recused himself from the vote because of a potential conflict of interest. Slover stated that he would not vote for the contract, and ultimately abstained.[383] The resolution passed on the votes of just two directors, Michael Kelly and William Knox. Without a copy of the contract or full disclosure of its terms, however, the board's review cannot be described as meaningful, and the terms of the contract it ostensibly approved were not the terms of the contract that DCHE signed. Larry Dwyer signed the program management contract on behalf of DCHE on July 14, 2009.[384]

The DCHA board had approved entry into an MOU with DMPED by resolution dated March 11, 2009.[385] The MOU was finally signed by Valerie Santos on July 31, 2009; Michael Kelly's signature for DCHA is undated.[386] Although the amount of the DMPED/DCHA MOU was $40,350,000, the number of projects to be handled for DPR had already increased. At the end of July, DPR and DMPED entered a first amendment to their MOU, adding projects and

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382 *Id.* Michael Kelly, who was then the Executive Director of DCHA, recalled that Slover asked a series of questions, but did not remember the specific concerns he raised. Interview with Michael Kelly.

383 According to Slover, he voted no, but Dwyer asked if he wasn't sure if he wanted to abstain, so Slover said he would abstain because it was the same thing as voting no. Interview with William Slover. According to Dwyer, Slover said he wasn't going to go forward. Dwyer asked him to clarify his vote, and Slover then abstained. Dwyer stated that he did not encourage Slover to abstain. Dwyer Dep. (Aug. 6, 2010) 74:19-75:6.

384 Ex. 80, at 15. Dwyer also sent Karim a notice to proceed dated July 14, 2009. Ex. 108, Letter from Larry Dwyer to Omar A. Karim (Jul. 14, 2009). Karim testified that he was unaware that the notice had been sent. Karim Dep. (Aug. 5, 2010) 140:5-142:9.

385 Ex. 50.

386 Ex. 52.

increasing the total funding to $68,394,795.64.[387] In September 2009, DPR and DMPED executed a second amendment, further increasing the funding to a total of $86 million.[388]

VI. THE BANNEKER CONTRACT WAS NOT SUBMITTED TO THE COUNCIL.

In large part, this investigation concerns the fact that the transfer of funds to DCHA resulted in the execution of a multi-million dollar contract that was not submitted to the Council for review. DCHA took the position that neither it nor its subsidiaries were subject to the Council approval requirement in D.C. Code Section 1-204.51. DMPED appears to have believed it was relieved of any responsibility to take the contract to the Council itself because the contract was executed by DCHE. Had the Council been apprised of the contract at the outset as it should have been under Section 1-204.51, its questions and concerns about the award and terms of the contract and the involvement of DMPED and DCHE could have been addressed before the projects were underway.

It is our view that the required review would have taken place if the legal issues relating to the Council review statute had been addressed in a careful and timely way by DCHA's general counsel and the Office of the Attorney General. Questions about the applicability of the statute to

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387 Ex. 109, Amendment No. 1 to Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Jul. 31, 2009), § II.A.1. This amendment was signed by Valerie Santos for DMPED on July 30, 2009 and by Ximena Hartsock for DPR on July 31, 2009. *Id.* at 2. It added Parkview, 7th and N Street, 10th Street Park, Fort Stanton, Woodland Tigers, Walker Jones, Emery Ball Field and Watts Branch to the list of projects. *Id.* at 3. Emery Ball Field and Watts Branch were shown as having no funds available.

388 Ex. 110, Modification No. 2 to Memorandum of Understanding between the District of Columbia Department of Recreation and Parks and the Office of the Deputy Mayor for Planning and Economic Development (Sep. 14, 2009).

independent agencies had been discussed since at least 1996, and were the subject of specific discussions between DCHA and the Attorney General's Office in 2007 and 2008:

- In 1996, the Council submitted a memorandum to the District's Corporation Counsel, Charles F.C. Ruff, specifically asking whether the Council approval statute applied to independent agencies. In a formal opinion that addressed independent agencies in general and the Washington Convention Center Authority ("WCCA") in particular (the "1996 Opinion"), the Corporation Counsel concluded that "Congress intended that the Council review the proposed contracts of all District government entities, including executive independent agencies like WCCA, that exceed one million dollars during a 12-month period."[389]
- DCHA, whose activities are largely HUD-funded, was formed in 2000. In 2007, the Attorney General's Office looked into the question of why DCHA had never submitted a contract to the Council for approval.[390] In a meeting with OAG, Hans Froelicher, DCHA's general counsel, stated DCHA's view that as an independent agency it was exempt from the requirement.[391]
- In a subsequent memo to the Attorney General dated October 23, 2007, OAG's Legal Counsel Division, relying on the 1996 Opinion and a 2006 opinion

389 Ex. 26.

390 Ex. 111, Memorandum from Legal Counsel Division, OAG, to Linda Singer, Attorney General (Oct. 23, 2007) at 2.

391 *Id.*

concerning the legal status of the National Capital Revitalization Corporation, concluded the DCHA *was* subject to the Council review provision.[392]

- DCHA asked an outside law firm to review the OAG's October 23, 2007 memo and conclusions. In a memo dated February 11, 2008, the firm concluded that:

> While we note there is no definitive authority as to whether DCHA must submit all contracts involving expenditures in excess of $1 million dollars during a 12-month period to the Council for approval, there is precedent for exempting contracts governed by federal contracting procedure from aspects of the District's procurement laws. … To the extent that DCHA contracts are required to follow federal contracting procedures, there is a significant rationale for exempting contracts involving expenditures in excess of $1 million dollars from Council approval. However, to definitively establish that DCHA contracts are exempt from Council approval, appropriate legislation granting the exemption should be considered.[393]

Thus, while the law firm opined that the issue was unresolved as to all contracts, its arguments that DCHA contracts could be exempt related only to contracts involving federal funds.

- For reasons that are not clear, the firm's memo to DCHA did not analyze or even mention the 1996 Opinion. Hans Froelicher stated that he did not see the 1996 Opinion until October 2009, after the Council's first inquiries were made, although he acknowledged that it might have been mentioned in one of the early OAG memos.[394]

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392 *Id.*

393 Ex. 112, Office Memorandum from ElChino Martin, Nixon Peabody LLP to Hans Froelicher (Feb. 11, 2008) at 3.

394 Interview with Hans Froelicher.

- The Attorney General's Office continued a dialogue with DCHA about the Council approval issue through mid-2008, insisting that DCHA's contracts were subject to the Council approval requirement. But for reasons that are again not clear, the 1996 Opinion was not expressly raised by OAG in these exchanges.
- In an April 22, 2008 letter to Attorney General Peter Nickles, Froelicher reacted to a suggestion made by OAG that the agencies had agreed that the issue would be resolved by legislation. He drew a distinction between federally-funded and District-funded contracts:

> DCHA does not agree that the contract approval issue is resolved. We do believe DCHA would bring any contracts that exceed the one million dollar threshold or the multi-year requirement and are funded by District funds to the City Council. The LCD has relied on the suggestion that legislation could resolve this issue in Nixon Peabody's memorandum to me dated February, 2008 [a]s a concession that legislation is necessary. We do not agree. That is not the only resolution and our suggestion regarding contracts funded with District money is what will provide the council with the opportunity to review how its money is spent. Most of DCHA's funding comes from federal funds appropriated to HUD to operate the federal programs DCHA administers. DCHA's use of those funds is regulated and audited by HUD. Clearly the legislation separating the DCHA as a line agency of the District was to, in part, put it in charge of its federal funds and their use. …[395]

- Froelicher's language could be read as an agreement that DCHA would bring all District-funded contracts to the Council. But according to Froelicher, his statement was only meant as an offer of compromise, not an acknowledgement of

[395] *See* Ex. 113 at 1-2 (emphasis original).

the correctness of OAG's view or a commitment to obtain Council review in the future.[396]

- In a June 16, 2008 memo to Froelicher, Nickles noted Froelicher's statement about District-funded contracts without clarifying whether he took it as an agreement.[397] Nickles continued to disagree about the legal analysis applicable to federally-funded contracts.[398] He concluded:

> OAG is not opposed to DCHA's being exempt from the contract approval requirements. We have even suggested that the Authority seek that relief from Congress. Nixon Peabody, in its February 11, 2008 memorandum, has also suggested that "appropriate legislation granting the exemption should be considered." Is the time right, then, to work from this standpoint of apparent agreement and discuss a proper legislative plan of action?[399]

- In the last piece of correspondence on this issue before the investigation, Froelicher reiterated his position that DCHA was not subject to the Council approval requirement, but agreed that the prudent approach was to modify the law.[400] But neither agency moved forward on legislation, nor did they clarify the ambiguity left by the correspondence with regard to DCHA's position on District-funded contracts.

The Council approval issue was not raised again until October 23, 2009, the day the Council notified DCHA of its concerns about the award of the DPR project management contract

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396 Interview with Hans Froelicher.

397 Ex. 114, Memorandum from Peter J. Nickles to Hans Froelicher (Jun. 16, 2008) at 2.

398 *Id.*

399 *Id.*

400 Ex. 115, Letter from Hans Froelicher to Peter Nickles (Jul. 24, 2008) at 1.

to Banneker Ventures. At 5:30 p.m. on that day, a Friday, DCHA asked Nickles for an "Opinion of the Attorney General of the District of Columbia" on the applicability of the review requirement to DCHA contracts involving District funds.[401] It is not clear why Froelicher thought this step was necessary, since he was already well aware of the Attorney General's position. The Attorney General responded immediately, issuing an opinion that same day (the "October 23 Opinion"). Relying heavily on the 1996 Opinion, he concluded that "without any doubt," DCHA must abide by the Home Rule Act and its Council approval provision.[402] The Attorney General stated that DCHA occupied a legal position within the District government that was similar to that of WCCA, discussed in the 1996 Opinion, and therefore was bound by the conclusions in the 1996 Opinion.[403] The Attorney General concluded that "DCHA, as part of the District government, must submit its covered contracts for Council review."[404] Under this Opinion and

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401 Ex. 116, E-mail from Hans Froelicher, General Counsel, District of Columbia Housing Authority, to Peter Nickles, Attorney General, District of Columbia (Oct. 23, 2009, 17:27 EST).

402 Ex. 117, Opinion of the Attorney General of the District of Columbia, Whether the DCHA must seek approval of the City Council for contracts for goods and services involving expenditures in excess of $1,000,000 during a 12-month period, Oct. 23, 2009 ("October 23 Opinion"). Nickles had no specific recollection of why or how there was such a quick turnaround (i.e., the same day) for the issuance of the opinion following Froelicher's request. Interview with Peter Nickles, former Attorney General of the District of Columbia (Dec. 1, 2010).

403 *Id.* at 2. The Attorney General also noted the binding nature of AG opinions, citing Reorganization Order No. 50 of 1953, as amended, Part II.A(a) (written opinions of the Attorney General, "in the absence of specific action by the Commissioner or Council to the contrary, or until overruled by controlling court decision, shall be the guiding statement of law, to be followed by all District officers and employees in the performance of their official duties.") *Id.*

404 *Id.*, at 2. The October 23 Opinion does not address whether the Council review requirement applies to contracts in excess of one million dollars, or multiyear contracts, when those contracts are funded by *non-District* funds. Answering that question is outside the scope of our investigation, but it is an important distinction because many DCHA contracts involve non-District funds, such as federal funds.

applying the 2007 Court of Appeals decision in *Fairman v. District of Columbia*,[405] therefore, any DCHA contract involving over one million dollars of District funds that is not approved by the Council would be invalid.

But the following Monday, October 26, Attorney General Nickles issued a memorandum to "clarify" the October 23 opinion.[406] Stating that retroactivity was not favored in the law, the October 26 memorandum asserted that the prior opinion "was not intended as a pronouncement that any such past or current DCHA contracts that were awarded without Council approval are unlawful. Indeed, such contracts should be regarded as legal and binding."[407] The Attorney General concluded by confirming that his October 23 Opinion "is to operate prospectively only."[408]

In our interview, Nickles asserted that the October 26 Memorandum was written after several people expressed "consternation" about the impact of the October 23 Opinion on existing contracts.[409] He stated that the October 26 memorandum was a response to his general concern about interfering with DCHA's 10-year procurement history and the impact that his October 23 opinion might have on existing DCHA contracts. Nickles disclaimed any link between the October 26 memorandum and the Banneker contract, and denied having any communication on this issue over the weekend of October 24-25 with the Mayor or with anyone representing

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405 Note 48.

406 Ex. 118, Opinion of the Attorney General of the District of Columbia, *Council Approval of DCHA Contracts*, Oct. 26, 2009 ("October 26 Memorandum").

407 *Id.*

408 *Id.*

409 Interview with Peter Nickles.

Banneker. Indeed, he claimed he had no knowledge of the existence of the Banneker contract until January of 2010,[410] although that statement is difficult to square with comments Nickles made to the press on October 23 that reflect his knowledge that it was the Banneker contract in particular that was being discussed,[411] or with his subsequent letter of November 13, 2009, in which he referenced the DCHE/Banneker contract.[412] While we accept that Nickles was genuinely concerned about DCHA's many existing contracts when he wrote the October 26 memo, it seems unlikely that the Banneker contract was not part of his thinking.

The retroactivity analysis in the October 26 memorandum is questionable at best. Although the law does disfavor retroactivity, a retroactive statute or rule is one that "attaches new legal consequences to events completed before its enactment."[413] The October 23 Opinion

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410 *Id.*

411 On Saturday, October 24, 2009, Nikita Stewart of the Washington Post reported on the opinion the Attorney General had issued the previous afternoon, quoting him as saying on Friday: "I have made my position clear," and "The mayor agrees with me." The article goes on to recount the Attorney General's reaction to specific questions about the Banneker contract as well as general contracts awarded to Keith Lomax's RBK Landscaping and Construction:

> Nickles dismissed some council members' concerns that the contracts went to Fenty's friends. "I have no reason to believe there was a problem with them. They were all competitively bid," he said. "The fact that the mayor has friends, has fraternity brothers and goes to a ball game [with them], that doesn't exclude someone from competing for a contract."

http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/AR2009102303974.html?nav=emailpage

412 Ex. 119, Letter from Peter J. Nickles to Adrianne Todman (Nov. 13, 2009). As discussed further below, in the November 13 letter, Nickles advised DCHA "to inform the Council of the potentially devastating impact of its emergency and temporary legislation on the DCHE/Banneker contract, specifically, and recreation projects in general, and submit the contracts on an emergency basis for approval at the Council's December 1, 2009 legislative session."

413 *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).

was not a new enactment but an analysis of existing precedent dating from 1996 applying a statute dating from 1995. For ten years, DCHA had simply been wrong – "without any doubt," as the Attorney General put it – and for at least two years, it had been aware that the Attorney General thought so. Moreover, the October 26 memorandum did not grapple with the 2007 D.C. Court of Appeals decision in *Fairman v. District of Columbia*, which addressed the consequences of failure to obtain Council approval of a multiyear contract and held that any such contract lacking required approval is "invalid."[414]

The Council did not accept the Attorney General's retroactivity analysis. It passed the Unauthorized Contract Stop Payment Temporary Act of 2009, which provides, among other things, that "The memorandum of opinion of the Attorney General, dated October 26, 2009, which states that contracts entered into unlawfully are nonetheless legally binding, is contrary to the clear letter of the law and of no effect."[415] The Council also expressly disapproved the Banneker program management contract when it was finally submitted for approval in December 2009 as a result of the investigation. The Attorney General has since acknowledged that this disapproval action rendered the Banneker contract void.[416]

We do not believe that DCHA's refusal before October 2009 to submit District-funded contracts to the Council was well-founded, given the 1996 Opinion, of which DCHA was on notice, the fact that DCHA's own lawyers had found no authority for that position, and the clear statements by the Attorney General's Office in 2007-2008 (which Froelicher acknowledges

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414 Note 48, 934 A.2d at 448.

415 Unauthorized Contract Stop Payment Temporary Act of 2009, effective March 23, 2010 (D.C. Law 18-0139).

416 Ex. 120, Letter from Peter J. Nickles to Councilmember Phil Mendelson (Oct. 28, 2010), at 8.

would have been binding on DCHA if expressed in a formal opinion). Moreover, while those discussions were ongoing, and well before the Banneker contract was signed, DCHE executed a $1,410,000 project management contract for Walker Jones and an MOU with DMPED for construction of the $47 million Walker Jones project, as well as a $31 million MOU for Deanwood which specifically referenced the need for Council approval of the Deanwood construction contract. DCHA should have focused on its obligations with regard to District-funded contracts when confronted with these projects, and should have done so again when it became involved with the DPR capital projects.

DMPED too is accountable here. It was bound by the Home Rule Act, and under its MOU with DPR it retained primary responsibility for the DPR projects. Yet DMPED took no action either to seek Council approval or to require DCHE to do so, as DPR had done in prior MOUs it negotiated directly with DCHA. The Attorney General also could have taken steps to clarify the situation, but he stated that he turned to other matters and chose to work on the issue gradually rather than "put his foot down."[417] Had the Council review issue been handled more responsibly by DCHA and DMPED or with more attention by OAG, the Council could have approved or rejected the contract before it was underway, and the consequences associated with the Council's discovery of the issue in October, after months of performance, could have been avoided.

VII. BANNEKER'S SELECTION AND MANAGEMENT OF LIBERTY ENGINEERING & DESIGN

It was the project manager's function to engage the engineering and design professionals who would be responsible for the design of the buildings and exterior spaces in compliance with

[417] Interview with Peter Nickles.

all building code and legal requirements. While Banneker submitted its qualifications to perform this function as "the Banneker-Regan team,"[418] it went about choosing and paying the engineers on its own.

One of Banneker's very first acts after it received notice of its selection was to retain an engineer on a sole source basis. On May 4, 2009, it hired Liberty Engineering and Design (LEAD) to survey the sites and provide "consulting services" for ten of the projects. Banneker subsequently contracted with LEAD to perform all of the civil, survey, geotechnical, and environmental engineering services on all of the projects. LEAD's selection followed an RFQ process that called for no pricing information. And although the project management contract required Banneker to obtain DCHE's prior approval of the consultants it retained, both DCHE and Banneker treated the prior approval requirement as inapplicable to the engineering contracts.

A. Liberty Engineering & Design

LEAD was formed in March of 2008 by Sinclair Skinner and Abdullahi Barrow, and it was designated that year as a "Certified Business Enterprise ("CBE") by the Department of Small and Local Business Development. While Skinner obtained his undergraduate degree in engineering, he is not licensed as a professional engineer in the District of Columbia or any other jurisdiction.[419] Abdullahi Barrow has an M.S. degree in engineering. He had served as a

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418 *See* Ex. 64, Banneker-Regan Response to the RFQ.

419 According to the resume submitted to DSLBD with LEAD's CBE application, Skinner worked in the engineering field before he obtained his college degree, he served as an operations engineer for the Architect of the Capitol for two summers, and he worked as a mechanical engineer in HVAC for two years after college. He then operated a dry cleaning business from 1999 to 2005, and worked in city politics as an ANC commissioner and part of Mayor Fenty's campaign. LEAD's response to the Banneker RFQ did not list Skinner as one of its key personnel and did not attach his resume or describe his experience. *See* Ex. 121, Letter from Abdullahi Barrow, LEAD, to Banneker Ventures, LLC, submitting proposal in response to the RFQ (Jun. 11, 2009).

structural engineer at the D.C. Department of Consumer and Regulatory Affairs and had also been employed by private engineering firms, but at the time LEAD was formed, he was not a licensed professional engineer either. He failed the licensing examination on multiple occasions,[420] and first received a P.E. license on April 25, 2008 on the basis of eminence in the field.[421]

Neither Skinner nor Barrow is a licensed surveyor, and LEAD did not employ a licensed surveyor when it was engaged by Banneker to survey the park sites. At the time it was selected to serve as the engineering contractor on the DPR projects, LEAD had not previously served as the chief engineer on the construction or renovation of any public recreation centers or parks,[422] and it had little or no prior experience providing the full range of engineering services on any other types of projects.[423]

LEAD itself lacked the capacity to carry out the work assigned to it. Indeed, LEAD promptly contracted out virtually all of its work on the projects to other engineering firms.

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420 Ex. 122, Department of Consumer and Regulatory Affairs, Business and Professional Licensing Administration Examination Candidate Abstract Printout, Abdullahi Barrow (Oct. 25, 2007).

421 Ex. 123, Government of the District of Columbia Board of Professional Engineering Minutes (Apr. 24, 2008). Licensure based upon established and recognized standing in the engineering profession was available at that time to an engineer with more than 12 years of experience pursuant to D.C. Code §47-2886.08(2)(A)(v). Barrow had worked at DCRA since 2004, and he was supported in his application by officials there. Ex. 124, Government of the District of Columbia Occupational and Professional Licensing Administration Application, Abdullahi Barrow (Aug. 13, 2007). While DCRA was unable to produce any witnesses with any personal knowledge about, or recollection of, Barrow's application or the decision to grant him a license, the investigation and review of DCRA records unearthed no reason to conclude that any improper influence was brought to bear in his case. Barrow's engineering experience is detailed in the resume he included in LEAD's response to Banneker's RFQ. *See* Ex. 121.

422 Deposition of Abdullahi Barrow (Sep. 30, 2010) 71:2-72:1.

423 *Id.* at 72:2-77:19.

LEAD applied significant mark-ups to the amounts due those subcontractors, and our review of LEAD's invoices reveals gross overcharging, which was passed through to the District by Banneker – subject to Banneker's own 9% mark-up – without challenge. Furthermore, the investigation has revealed that LEAD's proposal in response to Banneker's RFQ was false and misleading in multiple respects that could very well have been known to Karim.

The evidence thus gives rise to significant concerns about LEAD's selection and performance and Banneker's expenditure of city funds. These concerns are magnified by contemporaneous, unexplained financial dealings between Karim, Skinner, and their wholly owned "consulting" companies, Liberty Law Group and Liberty Industries. Since the connections between Skinner and Karim form the backdrop for Banneker's interactions with LEAD, they will be described in more detail below, and it is our conclusion that the combination of all of these circumstances warrants further investigation. The facts also, at the very least, raise questions about the adequacy of Banneker's management of the DPR capital projects as well as the quality of the oversight that was provided by DMPED and DCHA.

B. The Relationship between Karim and Skinner

Banneker's decision to retain LEAD for the DPR capital projects must be viewed in the context of the larger set of relationships between Sinclair Skinner and Omar Karim.[424]

[424] According to Karim, the two had a long term relationship that went back 20 years, prior to their days in engineering school.

1. Banneker Ventures

Karim founded Banneker Ventures in 2005.[425] Although he and Skinner have both testified that Skinner was never employed at Banneker, Skinner has distributed Banneker business cards with his name printed on them.[426] The card identifies a phone extension and an e-mail address for Skinner at Banneker Ventures. Skinner testified that he was a "volunteer," who offered to perform undefined "community outreach" for Banneker.[427]

> I mean one of the things with small businesses, there are so many hats you wear. I mean you have to be everywhere at one time. There are so many different things you've got to do. At the end of the day I thought that he needed help in that area, in getting, you know, just having folks, a person that could, you know, volunteer and talk to folks in the community.[428]

Banneker is a for-profit company, but Karim also explained the business card by saying that Skinner was a "volunteer" for a short period of time in 2007.[429]

2. Liberty Law Group

Banneker Ventures is not Omar Karim's only business interest. He has a law degree, and during the time period involved in the investigation, he operated a business he called Liberty

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425 Karim testified during his deposition on August 5 that the company had no other investors or owners, Karim Dep. (Aug. 5, 2010) 37:22-38:2, but during the deposition on September 21, he indicated that it had "numerous owners at different times." Karim Dep. (Sep. 21, 2010) 49:15-16.

426 Ex. 125, Sinclair Skinner printed business card for Banneker Ventures, LLC.

427 Joint Roundtable (Apr. 15, 2010) 117:8-15.

428 *Id.*

429 Joint Roundtable (Dec. 10, 2009) 162:17-163:13, 182:15-17, 183:8-9, 184:2-5.

Law Group, which Karim states was formed in 2007 and dissolved in 2010.[430] It maintained bank accounts in the name of Law Offices of Omar A. Karim, PLLC, d/b/a Liberty Law Group, with an address at 700 12th Street in Washington, DC. When the Special Counsel investigation began in March of 2010, Liberty Law Group had no website or presence on the internet. While Omar Karim was listed as member in good standing on the D.C. Bar's website in 2010, his entry there identified Banneker Ventures in Silver Spring, Maryland, and not Liberty Law Group in D.C., as his professional address.

Karim was asked about Liberty Law Group during his December 10, 2009 testimony before the Committee. He stated that he ran the firm as its sole partner, but his description of the nature of his work was quite vague. "If our clients ask for legal advice we render it, but it's mostly consulting.… Maybe community consulting and that type of thing, business consulting."[431] At his deposition on August 5, Karim refused to answer questions about Liberty Law Group, often interposing the objections himself.[432] After the court granted the Council's motion to compel him to answer, Karim appeared for a second deposition session. But despite the Court's order, Karim provided no additional detail, and his answers were as uninformative as his previous refusals to respond.

Q: Describe the business of Liberty Law Group.
A: What about it.
Q: What business does it do?

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430 According to the opposition to the motion to compel that Karim filed on his own behalf, he founded Liberty Law Group in 2007 and dissolved it in May 2010. When Judge Winfield granted the motion to compel on September 17, 2010, she ordered Karim to produce formation and organizational documents of Liberty Law Group. None were provided.

431 Joint Roundtable (Dec. 10, 2009) 176:16-177:1.

432 Karim Dep. (Aug. 5, 2010) 43:8-19.

A: It's no longer in existence…. The firm provided consulting services and legal services.
Q: What sort of consulting services?
A: Community consulting services.
Q: So Liberty Law Group was in the business of providing community consulting services?
A: You said that, I didn't.
Q: You said they provide community consulting.
A: And legal services.
Q: What clients asked for community consulting?
A: I don't recall. [433]
Q: What do you mean by "community consulting?
A: That's exactly what I mean, consulting, you know, in the community. [434]

3. Liberty Industries

Sinclair Skinner also purports to be providing consulting services, and also began using a "Liberty" moniker to do so in 2007. Skinner is the sole owner of a business called Liberty Industries LLC, which he formed in February 2007, one month after Mayor Fenty was sworn into office. Skinner has been vague in describing the nature of its work. He told the Committee on April 15, 2010 that it was business consulting, "filling a need" in the community: "…[A]s the small business person on Georgia Avenue, I ended up having a unique set of skills that I had so many people coming to me and saying I need some help, I need some help with this, and I thought it was just, again, about filling a need."[435]

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433 Karim Dep. (Sep. 21, 2010) 28:14-29:22.

434 Karim Dep. (Sep. 21, 2010) 23:6-8. The investigation revealed that the boundaries between these various business entities are rather indistinct. Not only did the record include a Banneker business card for Skinner, but one of Karim's Liberty Law Group clients, Brian "Scott" Irving of Blue Skye Construction, testified that Skinner and Karim provided services to him after he hired Liberty Law Group, and that Skinner gave him a Liberty Law Group business card. Irving Dep.27-28. Documents that Irving produced include Liberty Law Group invoices transmitted to him from sinclair.skinner@att.net in December of 2009 and January of 2010. Ex. 126, E-mails from Sinclair Skinner to scott@blueskyeconstruction.com (Dec. 21, 2009, Jan. 25, 2010) with The Liberty Law Group invoices attached.

435 Joint Roundtable (Apr. 15, 2010) 126:18-22.

Skinner was deposed in an unrelated Council inquiry in September 2009, at a time when LEAD was actively engaged in the DPR work. But he testified that he was self-employed, and he identified his company as Liberty Industries. Skinner seemed flummoxed when asked to describe what Liberty Industries did, responding that Liberty Industries was involved in unspecified "business endeavors" and "entrepreneurial activities" such as "business development," "consulting," and "helping," including work for clients seeking to do business with the District of Columbia. [436] When asked to provide a "concrete example" of the work that Liberty Industries performed, he could offer only this:

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[436] There is no official transcript of the September 2009 deposition, which was tape recorded at the Council's offices. The transcript of the following excerpts was prepared by Special Counsel:

> Q: "When you say you're self-employed, could you describe what the nature of your business is?"
> A: "Well, I'm an entrepreneur."
> Q: "Could you be more specific?"
> A: "Um, um."
> Counsel for Skinner: "What's the name of your business?
> A: "Um, Liberty Industries."
> Q: "And what does Liberty Industries do?"
> A: "Just different business endeavors, and, just entrepreneurial activities as far as different, really, a variety of [inaudible]"
> Q: "I would you ask for some more specifics. Could you give me some of the nature of the business that you do?"
> A: "Just like business development, and helping, like, consulting."…
> Q: "Okay. Now, I want to get back to this matter about the income earned by this business. You say that the projects that you take on, some of the groups that you take on to facilitate their work in some fashion or other are seeking work with the District of Columbia?"
> A: "Can you be more – can you rephrase it?"
> Q: "You said that, you know, groups come to you, developers who develop projects, right, and the nature of what they ask you to do, if I'm understanding this correctly, is to provide them with experts in various fields, typically engineering. Is that what you said?"
> A: "No, I didn't say development, it could be anybody that, you know, who has a project or something they're trying to get done, and they need somebody to

(footnote continued on next page)

> Concrete example. Um. Ah. What's a good, good, good example? Um. Organizing, um, an opportunity to, ah, work with, um, I've got a project right now working with engineering and helping to do some geotechnical studies and, ah, what else, ah surveys, and kind of coordinating, you know, where to find good survey folks and, where to, you know, stuff like that. Most of it is engineering related.[437]

Skinner's September 2009 description of Liberty Industries seems to embody what it was that Liberty Engineering was doing at the time on the DPR projects. When asked whether his company actually did the engineering work, though, Skinner replied, "no, no, no."[438]

As discussed further below, this investigation uncovered business dealings and significant transfers of funds between Karim's firm, Liberty Law Group, and Skinner's firm, Liberty Industries. But at his deposition in this matter, Skinner was virtually incapable of describing the business of Liberty Industries or its work for Liberty Law Group:

> Q: [W]hen did you form Liberty Industries?
> A: I don't recall.
> Q: What was the purpose for … forming Liberty Industries?
> A: Consulting.
> Q: What sort of consulting did you intend to do?
> A: General consulting.
> Q: Well, did you provide, through Liberty Industries, consulting services to Liberty Law Group?
> A: Yes.
> Q: And how did that come about?
> A: I don't recall.
> Q: Who did you have conversations with at Liberty Law Group to discuss the consulting services or the possibility of providing consulting services?
> A: I don't remember those conversations.
> Q: Well you were a friend of Mr. Karim's?
> A: Yes.

> come and help them kind of figure out what are some good folks to work with as far as, or what's a good way to do a particular project…."

[437] From untranscribed Deposition of Sinclair Skinner before the D.C. Council (Sep. 3, 2009).

[438] *Id.*

Q: Are you saying that you didn't have any conversation with Mr. Karim about providing consulting services to Liberty Law Group?
A: I just don't remember.
Q: Well was there any written agreement between yourself or Liberty Industries on the one hand and Liberty Law Group on the other about providing consulting services?
A: I don't recall.
Q: Were there any invoices that Liberty Industries provided to Liberty Law Group for the consulting services that were rendered?
A: I don't recall.
Q: Was there any work – written work product or documents that were created reflecting the consulting services that were provided to Liberty Law Group by Liberty Industries?
A: I don't recall.
Q: In connection with your services to Liberty Law Group, who did you meet with?
A: I don't recall any meetings.[439]

Deputy Mayor Valerie Santos was able to shed more light on Skinner's activities than Skinner himself. She testified that Skinner had been to the Deputy Mayor's office "a number of times," requesting that she meet with CBE companies interesting in bidding on opportunities with the city.[440] She was unaware of whether Skinner was being compensated for making the introductions, and she did not recall whether he indicated that he was acting as a consultant, but she estimated there had been half a dozen meetings. She particularly recalled one meeting with "two guys from Ward 8 who had a construction business."[441] Santos also specifically recalled a meeting when Skinner introduced Abdullahi Barrow and his engineering firm to her. According to her, the upshot of the meeting was: "here's this up and coming person who's trying to get a firm off the ground."[442]

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439 Skinner Dep. (Oct. 6, 2010) at 8:3-10:1.

440 Santos Dep. Notes.

441 *Id.*

442 Santos Dep. 54:12-56:12.

City Administrator Neil Albert also testified that Skinner would seek to introduce him to people interested in doing business with the city.[443] He likened Skinner's role to that of a "lobbyist," and he could particularly recall that Skinner spoke to him about an insurance company.[444]

David Jannarone testified, though, that Skinner's promotional activities did not extend to him. He testified that he considered Skinner to be a personal friend and had traveled with him to the Dominican Republic and Brazil, but he stated that Skinner never talked to him about Liberty Industries.[445] "I knew he was a consultant, but we never talked about business. I don't talk about business with any of my friends."[446] According to Jannarone, Skinner did not speak with him in his position at DMPED on behalf of any client.[447] When asked if Skinner brought any clients to meet with him about city business, Jannarone replied, "not that I recall."[448] Jannarone said he did not know whether Skinner brought business people in to meet with Santos, and he did not think that Skinner would have set up such meetings through him.[449]

During the unrelated September 2009 deposition, before public attention had been focused on Banneker Ventures and its relationship with him, Skinner testified that Banneker

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443 Albert Dep. 133:22-34:3.

444 Albert Dep. 134:5-35:4.

445 Jannarone Dep. Notes

446 *Id.*

447 *Id.*

448 *Id.*

449 *Id.*

Ventures was a Liberty Industries client that was attempting to do work with the District.[450] However, during his deposition in connection with the Special Counsel investigation a year later, Skinner could no longer recall whether he did any consulting for Banneker Ventures or not.[451]

For his part, Karim denied discussing city business opportunities with Skinner.[452] And he was emphatic that Liberty Industries did no work for Banneker Ventures and did not help it secure its contracts:

> Liberty Industries provided service to Liberty Law Group. It never provided any services to Banneker eve[r]. … Be very, very, very clear about that.[453]

> So if what you're trying to get to is that Liberty provided or we paid Liberty because they got us a contract on Walker Jones, it's 1,000 percent false. It's inaccurate. It's not true. It's somewhat irresponsible for you to say that.[454]

4. The 12th Street address

Liberty Law Group, Liberty Industries, and Liberty Engineering are tied together by more than just their similar names. Liberty Law Group's bank records identified 700 12th Street,

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450 From Untranscribed Skinner Dep. (D.C. Council Sep. 2009):

> Q: You were asked how many clients are attempting to work with the District government. You answered, I don't know. Do you have any clients that are attempting to or happen to work with the District?
> A: I can't recall right now.
> Q: I just want to make sure I understand. You cannot recall whether you have any clients that have attempted to do work with the District government?
> A: Banneker Ventures.
> Q: So Banneker Ventures is a client of Liberty Industries?
> A? Yes.

451 Skinner Dep. (Oct. 6, 2010) 47:15-17.

452 Karim Dep. (Aug. 5, 2010) 80:19-22.

453 Karim Dep. (Sep. 21, 2010) 28:10-13.

454 *Id.* at 46:21-47:3.

N.W., Suite 700, as the firm's address. The bank records for Liberty Industries identify 700 12th Street, N.W., Suite 700, as that firm's address. When Banneker Ventures submitted its response to the request for qualifications for the DPR capital projects contract in March of 2009, it provided 700 12th Street, N.W., Suite 700 as its address. And Liberty Engineering and Design utilized the same address on its bank account as of April 2008, listed the address on its CBE application in May 2008, and provided it, along with another address on Martin Luther King Avenue, S.E., on its 2009 proposal for the DPR engineering subcontracts and subsequent invoices.

The 700 12th Street location houses executive office suites, and according to records provided to the Committee by the landlord, three of these companies – Banneker Ventures, Liberty Law, and LEAD – have alternated as the tenant of a single office ("office 61") within suite 700 from January 2007 until at least November 2009.[455] And although Liberty Industries is not formally listed as a tenant in any Office Service Agreement executed with the landlord, the landlord's records do contain references to the "Liberty Industries account."[456] Thus, all four entities have ties to the same single office within the suite over the course of at least two and a half years.

There is nothing inherently improper, of course, about small companies using the same office space or using a corporate suite as a mail drop. But the documents that track the usage of

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[455] LEAD is identified as the tenant from February to July 2008 on the Office Service Agreement dated January 31, 2008. Ex. 127, Metro Offices Office Service Renewal Agreement (Jul. 31, 2008).

[456] *See e.g.* Ex. 128, E-mail from Korie Bedsole, Metro Offices, to Sinclair Skinner (Aug. 12, 2009 12:43 PM EST) (referencing "your Liberty Industries account"); Ex. 129, One Metro Center Exercise Facility Agreements ("Sinclair Skinner/Liberty Industries" listed as the employer).

the 12th Street address raise questions about the relationship among these companies. According to the landlord's records, it was Liberty Law Group that first entered into an agreement with Metro Offices to lease Office Number 61 in January of 2007, but the contact information provided on the lease was not for Karim, but for Skinner: sinclair@fenty06.com.[457] When the lease was renewed in the name of Banneker Ventures,[458] the contact person again was shown as Sinclair@fenty06.com. And at the time LEAD was first engaged by Banneker to perform engineering work on the DPR projects, the landlord was billing Banneker for the office space, and Karim's Liberty Law Group was paying the bills.[459]

5. The financial relationships between Karim and Skinner

The most significant ties between Skinner, Karim, and their Liberty entities were financial. Bank records obtained during the investigation establish that over $1,130,000 was transferred from Liberty Law Group's bank account to Liberty Industries from 2008 to April 2010. Yet neither Skinner nor Karim could provide a single reason why. Through a combination of blanket assertions of failure of recollection and flippant, non-responsive remarks, the two effectively stonewalled the investigation.

Liberty Law Group made transfers to Liberty Industries of more than $610,000 in 2008; more than $440,000 in 2009 (including tens of thousands of dollars during the months that Banneker and LEAD were working on the DPR capital projects); and more than $65,000 in

457 Ex. 130, Metro Offices, Office Service Agreement (Jan. 12, 2007).

458 Ex. 131, Metro Offices, Office Service Renewal Agreement (May 25, 2007).

459 Ex. 132, LLG check # 1077, dated Apr. 29, 2009, to Metro Office ("May rent"); Ex. 133, LLG check # 1084, dated Jun. 2, 2009, to Metro Office ("June rent").]

2010.[460] The transfers were accomplished through approximately 70 different transactions. The purpose of these payments was described on the face of checks as being for "services rendered." In addition, at least $16,000 was transferred from Liberty Law Group directly to Sinclair Skinner in 2008.[461] And in 2008 Liberty Industries made two payments to Karim or Liberty Law Group, denominated as "loans," totaling $55,000.[462]

Karim testified that Liberty Industries did "community consulting" for Liberty Law Group, whose business he also described as providing "community consulting services."[463] But he elected to shed no light on the matter beyond that.

> Q: …[W]hat did he [Skinner] say that Liberty Industries could do for you?
> A: … I'm not sure what you're referring to. This is – this thing that was two and a half years ago, almost three years ago, that's a long time…. I'm sure you don't remember a conversation that you had in January 2008 with one of your law partners or an employee or consultant or – your – the lady that cleans your home even.
> Q: Well… you made another $13,000 payment to him. What was that for?
> A: To Liberty Industries. Again, as I indicated, they did community consulting for my law firm.
> Q: Can you describe what you mean by "community consulting"?
> A: Just what it says.
> Q: Well, I'm not sure I understand it. I mean, I'm not sure I understand why it would be worth over a million dollars over a couple year period…. [I]f you

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460 *See* Ex. 134, Liberty Law Group bank statements and cancelled checks showing payments and wire transfers from the Liberty Law Group account (Law Office of Omar Karim) to Liberty Industries in 2008, 2009 and 2010. In some instances – August 2008, for example – transfers were made directly from the Liberty Law Group account to the Liberty Industries account. The account numbers on the bank statements and checks have been redacted. *See also* Karim Dep. (Sep. 21, 2010) 24:12-25:7.

461 Ex. 135, "Official Check" in the amount of $16,000 drawn on the account of Liberty Law Group to Sinclair Skinner dated Mar. 27, 2008. The check memo states "Gift for purchase of 1737 Webster St. NW."

462 Ex. 136, Check #1033 from Liberty Industries, LLC, to Liberty Law Group in the amount of $50,000 dated Sep. 9, 2008 ("loan").

463 Karim Dep. (Sep. 21, 2010) 23:2-5, 29:3-19.

look at the – all of the checks and payments, wire transfers over the course of a couple of years to March 2010, you will see that a total of over $1.1 million was transferred to … Liberty Industries. Do you see that? … Can you tell us what these payments were for?

A: I just told you.

Q: So all of the payments related to what? Community?

A: As I indicated, you know, they did community consulting for us. Whether you think that's worth a million dollars or not, it's not up to you to determine that. Your clients might not think you're worth what … they pay you.

* * *

Q: Well, try to describe if somebody had a question as to what "community consulting" meant. Describe that.

A: I already did.

Q: Well, I think you said community consulting is community consulting.

A: Yep.

Q: Can you be more specific as to what community consulting is?

A: Nope.[464]

Skinner similarly declined to offer a single fact that would explain why it was that he received more than a million dollars from Liberty Law Group. Instead, he came to the deposition that was scheduled for the specific purpose of obtaining testimony on that issue armed with a copy of the Council resolution authorizing the investigation into the DPR capital projects. When asked questions about his work for Karim, he claimed that he could not recall anything beyond the fact that it was not related to the subject matter of the investigation. For example, when he was shown an exhibit, he answered, reading from the resolution:

Q: Mr. Skinner, there are a series of checks. The first one is for $30,000. A week later there's another check for $20,000. Within the next month there are two checks, one for $20,000 and one for $90,000. These are checks, all checks going from Liberty Law Group to Liberty Industries, and my question is: why were these payments made from Liberty Law Group to Liberty Industries?

A: I don't recall, but I know that it had nothing to do with the determining of policies and procedures or any other practices surrounding the transfer of funds or authority via memorandum of understanding or any other instrumentality for the Department of Parks and Recreation capital projects or funds concerning

[464] Karim Dep. (Sep. 21, 2010) 23:6-25:7; 26:6-15.

> Department of Parks and Recreation Capital Projects. I know that for certain.[465]

Skinner gave some variation of that answer 19 times.[466] He declared, "I'm glad to be here to help,"[467] but responded to 90 other questions with a flat "I don't recall."

Skinner was accorded every opportunity to enhance the state of the record, and he was specifically warned that his failure to provide responsive answers would affect the investigators' assessment of his credibility.[468]

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[465] Skinner Dep. (Oct. 6, 2010) 35:2-18.

[466] Skinner Dep. (Oct. 6, 2010) 10, 11, 12, 13, 16, 17, 21, 23, 35, 37, 40, 44, 45, 46, 51, and 54.

[467] Skinner Dep. (Oct. 6, 2010) 24:7-8.

[468] Karim was provided with a similar admonition, but he persisted in his evasions:

> Karim: …I just want to make a statement. Liberty Industries did provide no services to me or my firm in connection with the DPR capital project. A hundred percent clear about that, nor did my law firm do any work in connection [with] the DPR capital project.
> Q: And Mr. Karim, just so you know, as I made clear to Judge Winfield on Friday, we want to test the credibility of that denial by trying to find out, well, what is it that Liberty Industries did do for your company, and my understanding is that you have said they did community consulting. And I've asked you what does that mean, and you've said community consulting…. And I asked you can you recall any specific conversation and you said could not.
> A: Yeah.
> Q: …[D]o you recall the conversation that you had with him when he first basically was talking to you about providing these community consulting services?
> A: I don't. Three years ago, conversation, nope.
> Q: …[D]o you recall any conversation with Mr. Skinner regarding these what you've identified as community consulting services?

(footnote continued on next page)

Q: Mr. Skinner, as I mentioned to you, the Court has previously made clear, when this matter was put to the court, that it was appropriate for us to make inquiry regarding the very substantial payments that were made from Liberty Law Group, Mr. Karim's company, to Liberty Industries, your company, over a million dollars over the course of a two, maybe a little bit more than a two year period. And we're trying to get answers to these questions, because it is a fair inquiry to make an assessment as to whether these payments were related. I understand there's been testimony from you that they were not related, but we're trying to make credibility determinations on how we see it. And my question to you is: is it your testimony, under oath … that you have no recollection about any of these events? Is that true that you have no recollection or is it simply you think that's a way that you can avoid answering the question?

A: No, I don't recall. What I do recall though, and I do recall something, and nothing that I participated in involved a determination of policies, procedures or other practices surrounding the transfer of funds or authority via memorandum of understanding or any other instrumentality of the Department of Parks and Recreation Capital Projects. I think that's a fair assessment.

Q: Well, and just so you know, we are going to have to make some credibility assessments and so I want to be absolutely fair to you and make sure that I am clear about your testimony. And is it your sworn testimony here today, as you sit here, that you have no memory of any of the services that you provided to earn over a million dollars from Liberty Law Group?

A: I don't recall the services that were rendered. At this time, I don't recall. And I'm not going to do anything that doesn't give you the facts that I can substantiate clearly. I want to be as open and forthcoming with facts, not speculation, guesses. I want to give a complete answer when I have those answers. And I think I've given complete answers and I've done my best to – with the documents that I've submitted were – almost probably three thousand-some-odd documents. I've given hours and hours of sworn testimony in all types of environments. I've – my bank statements and everything that I've done of the last years that even went beyond the scope of the time frame of these Parks projects has been reviewed. If my credibility is somehow in question, after doing all these things, I think it's not an issue of anything that I

A: Not that I can recall six months ago.
Q: So why did you stop making these payments?
A: We no longer needed their services.
Q: And describe the conversation that you had with Mr. Skinner about that.
A: I don't recall.

Karim Dep. (Sep. 21, 2010) 42:7-43:10; 45:5-9; 57:7-15.

> have said or done, it's an issue of something else that I don't – I'm not aware of.
>
> But I've done everything, as a business person, that is I think beyond reasonable. And I've had no reluctance in coming in. I've done what I've been asked to do….[469]

The Special Counsel gave Skinner one final chance to provide truthful, helpful information, but he declined the invitation.

> Q: Well Mr. Skinner, as I say, we have questions about these payments from Liberty Law Group to Liberty Industries. This is really your opportunity to give us your side of the story, that's why we asked the questions. You've just said what you said. And my question is: is there anything else you'd like to tell us to help us understand better why these payments were made from Liberty Law Group to Liberty Industries that you haven't already said? Now's your opportunity.
>
> A: All of the things that I've done, none of these things have anything to do with the policies, procedures or any other practices surrounding the transfer of funds or authority via memorandum of understanding or any other instrumentality for the Department of Parks and Recreation capital projects. At all.[470]

C. "I Don't Recall"

This testimony (or lack of testimony) about Liberty Industries and Liberty Law Group was part of a pattern that characterized all of Skinner and Karim's responses to questions from the Special Counsel. In addition to providing evasive and minimally substantive responses, Karim and Skinner answered a significant portion of the questions posed during their depositions with the assertion: "I don't recall." Barrow, who was questioned on two occasions, did the same. The witnesses' professed failure to recall was so extensive and so complete that it appeared to be part of an orchestrated strategy to withhold information, and raised serious questions about their credibility.

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469 Skinner Dep. (Oct. 6, 2010) 50:13-53:2.

470 Skinner Dep. (Oct. 6, 2010) 54:10-55:4.

Karim deflected numerous questions with responses such as:

- "I don't recall. You're talking about three years ago;"
- "Two years. Over two years ago? ... I certainly don't recall;"
- "It's been a year and a half ago. I don't recall;"
- "This is over a year ago;" and even,
- "Not that I can recall six months ago."[471]

Karim was unable to remember what percentage of his time was devoted to construction management or how much of his time he devoted to the practice of law.[472] He even claimed he could not recall whether Liberty Law Group had any employees.[473]

Barrow and Skinner could not recall such fundamental things as how it was that the two got together, how they planned to function as an engineering firm when neither had a P.E. license, or whether they launched their business with bank loans or funds from other investors.[474] When Barrow was asked if he had failed the P.E. exam more than once, he would only say: "Possibly."[475] Barrow claimed in September 2010 that he could not remember the names of employees supposedly working at LEAD the previous July, or when it was that LEAD last employed anyone at all.[476]

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[471] Karim Dep. (Aug. 5, 2010) 41:2-3; 50:10-13; 114:8-9; and 183:1; Karim Dep. (Sep. 21, 2010) 57:10.

[472] Karim Dep. (Aug. 5, 2010) 40:19–42:5.

[473] *Id.* at 42:11-13.

[474] Barrow Dep. (May 20, 2010) 13:2-19, 18:9-14; Joint Roundtable (Apr. 15, 2010) 62:2-68:3.

[475] *Id.* at 11:22.

[476] *Id.* at 53:12-53:8.

While Barrow was unresponsive and vague, Skinner exhibited a fundamental lack of seriousness. Although Liberty Law Group is a one man operation owned by his friend Karim, Skinner claimed he could not recall who he spoke with at Liberty Law Group about providing consulting services.[477] He swore that he was unable to recall whether or not he was familiar with Karim's signature.[478] Skinner even refused to identify his own signature whenever it appeared on a document he claimed not to remember.[479] This persisted throughout a deposition that had been scheduled for the very purpose of discussing Liberty Industries' bank records:

> Q: Now if you'd look at the next page … this is dated October 2, 2009 and it's from Liberty Industries to Liberty Engineering and Design …. Do you recognize the signature?
> A: I don't recall this check.
> Q: Well I understand your testimony is that you don't recall the check, my question is, do you recognize the signature?
> A: I don't want to speculate because I don't recall the check.
> Q: So is it your testimony you can't, as you sit here, recognize that that is your signature?
> A: I'm saying I don't recall.[480]

The unexplained financial ties between Omar Karim and Sinclair Skinner and the failure of either witness to provide substantive answers about those matters, coupled with the manner in which Banneker selected and managed LEAD on the DPR capital projects, which is discussed in detail below, raise serious questions about the fairness of the procurement of the engineer and Banneker's use of District funds. Accordingly, we recommend that the Council submit this

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477 Skinner Dep. (Oct. 6, 2010) 8:19-22.

478 *Id.* at 28:13-18.

479 *Id.* at 31:13-33:14, 36:5-20.

480 *Id.* at 38:4-19. If Karim, Skinner and Barrow truly had a failure of recollection as profound as what they described under oath, then there are serious questions as to whether the three possess the fundamental competence to perform multi-year government contracts.

aspect of the investigation to the United States Attorney. We do not express a view as to the outcome of a further investigation, but without access to the tools available to a prosecutor, the Special Counsel cannot comfortably advise the Committee that no further investigation is warranted.

D. Banneker's Selection of LEAD

1. The initial sole source contract

On April 30, 2009, DCHE notified Banneker of its intent to award the project management contract to the Banneker/Regan team.[481] By a letter agreement dated May 4, 2009, Banneker authorized LEAD to begin performing consulting and surveying services, with the understanding that the parties would negotiate and execute an agreement covering those services later.[482] While Banneker was not yet under contract with DCHE, it committed to pay LEAD consulting fees up to $25,000 ($2,500 per project) and an amount to be determined per site for the surveys – despite the fact that LEAD employed no licensed surveyors. Although prior approval of the hiring of consultants was provided for in the project management contract, Banneker did not obtain DCHE's consent to its retention of LEAD. Karim was of the view that

[481] Ex. 137, Letter from Larry Dwyer, President, DCHE, to Omar A. Karim, Banneker Ventures, LLC (Apr. 30, 2009).

[482] Ex. 138, Letter from Duane W. Oates, Banneker Ventures, to Abdullahi Barrow, P.E., Liberty Engineering and Design, PLLC (May 4, 2009).

the contract, which he said had been based upon the Walker Jones contract, required prior approval only for the hiring of general contractors, and not the architects or engineers.[483]

During his deposition, Karim was asked to explain LEAD's role in the DPR projects:

> There are two aspects of Liberty's involvement. The first aspect came, we engaged them to do some limited consulting services and some survey services, because we needed someone to come on board once we found out …how much was involved and the timetables behind it, you can't just go get an architect, find him, and have him build a rec center on a 20 acre site without knowing where the site [is] going to be, who['s] got soil issues and that type of thing. So we brought them on in the early, limited engagement for that, I think, no more than $2500 per site for the consulting services, and then to do limited survey services on an as needed basis for some of the projects that were … done early on.
>
> And then there was a second aspect of it once we realized how much, how many projects were involved and the scopes of those. We thought it was appropriate not to just sole source Liberty the other survey work and the other work associated with it. So we thought it was appropriate to issue a competitive request for qualifications, which we did. And then once we got some response of some people who asked us to send the RFQ to them, not many of them were LSDB, so we extended the period so as to get LSDB's involved. And then, ultimately we selected Liberty.[484]

Karim testified that LEAD was initially selected to do the surveys because the firm had successfully done survey work for Banneker on at least one previous project.[485] Karim could not

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[483] Karim Dep. (Aug. 5, 2010)153:4-19. Despite the plain language of the contract, Larry Dwyer also testified that he expected Banneker to manage the design process and soft costs itself, and that he only intended to pre-approve the construction contractor selections. Dwyer Dep. (Aug. 6, 2010) 107:7-108:21. He understood that Banneker would handle the procurement of the architects and engineers and he was not interested in taking on the administrative burden of approving Banneker's selections in advance. He did expect, though, that DCHA would receive the appropriate documentation, which did not happen in this case until after the Council inquiry began. *Id.* at 79:6-81:8.

[484] Karim Dep. (Aug. 5, 2010) 148:21-150:4.

[485] *Id.* at 153:4-154:13. Karim identified a private project called The Jazz as the site for which LEAD had previously completed a survey. *Id.* at 153:18-154:3. As was the case for the DPR projects, LEAD subcontracted the survey work on the Jazz to Anthony Currie, a licensed surveyor located in Maryland.

recall who made the decision in May to hire LEAD to prepare surveys, but he stated that he would have signed off on it.[486] Duane Oates, a top Banneker project manager for the DPR projects, could not recall who selected LEAD to perform the initial surveys either. He indicated that it is not unusual for engineering firms to rely upon subcontractors for particular subspecialties, but he stated that he would have assumed that a firm that professed to be able to provide surveys had the ability to stamp them.[487]

While Oates fully appreciated the need to have a credentialed surveyor involved in a construction project, his boss did not appear to be aware of that fundamental requirement.

> Q: Were you aware that Mr. Barrow was not licensed to perform surveys?
> A: Licensed to perform surveys. Are individuals licensed to perform surveys? Is that what you're – I mean are you making that statement that individuals have licenses to perform surveys?[488]

Nonetheless, Karim was comfortable that LEAD was fully qualified.[489] For his part, Skinner declared LEAD to be "overqualified" since Barrow was a civil engineer.[490]

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[486] Karim Dep. (Aug. 5, 2010) 150:18-151:12.

[487] Interview with Duane Oates, Project Manager, Banneker Ventures, LLC (Nov. 9, 2010).

[488] Karim Dep. (Aug. 5, 2010) 55:8-13.

[489] *Id.* at 153:3-6; 159:3-10.

[490] Joint Roundtable (Apr. 28, 2010) 22:14-17, 47:1-5. "We're an engineering company. Survey work falls underneath that. Now I'm not saying underneath says it's beneath it, but much like a doctor might have someone who does lab tech work or x-ray technician work … that might be a licensed person to take x-rays, but a doctor can – will take that information and decide what ails you and what the problems are. So even though our principal engineer is not a licensed surveyor, as a P.E., as a professional engineer, he oversees the surveys. He takes that information and uses it just like a doctor uses an x-ray to determine what's the best course of action… So even though we didn't have a licensed surveyor, as a professional engineer, we're overqualified, really, to do that work." *Id.* at 21:17-22:17.

Banneker's contract with Regan Associates provided that the more experienced contractor would participate in "identifying professional service firms (architects, engineers, and other consultants) to serve on the project team," and "working with Banneker to evaluate bids and proposals [and] negotiate major contracts."[491] But it does not appear that Banneker solicited Regan's input. Members of the Regan team indicated during their interview that they were not consulted when Banneker initially brought LEAD on board, and they did not know who made the decision. They were well aware that it is necessary to have a licensed surveyor's stamp on construction plans, and they did not know what the $2,500 per park consulting fee was supposed to be for.[492]

DMPED's Jacqui Glover testified that Banneker advised her of the need to get some early survey work done, and that she had no objection to its retention of LEAD for that purpose.[493] But she was unaware of the firm's capabilities or limitations and did not educate herself before giving her consent .[494]

Larry Dwyer was not asked to approve Banneker's choice of LEAD or its plan to retain LEAD on a sole source basis. He was shown the May 4 agreement between Banneker and LEAD during his deposition and asked, "how does that fit with standard practice in a construction project?" He answered:

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491 *See* Ex. 97, Banneker/Regan consulting agreement.

492 Interview with Sean Regan and Thomas Regan, Regan Associates, LLC (Nov. 12, 2010). Two other Regan Associates employees, Ray Nix and Bonnie Vancheri, were also present and participated in the interview.

493 Glover Dep. 128:15-129:17.

494 *Id.* at 131:20-133:4.

> It doesn't – it doesn't fit other than in an emergency situation. It doesn't fit with what our expectation would have been in terms of how the project manager would've handled the solicitation of third parties.[495]

But Dwyer's main concern at that time was protecting DCHE's interest:

> [W]hat I was told was that there was a lot of pressure to get some … some preliminary work really needed to be done so the project could hit the ground running, and I just simply said – I didn't get into the weeds. I just simply said, "I want you to understand that we're not liable for any of that activity that takes place. I understand that you might want to do it. I do it with my own stuff, but we have no liability financially or otherwise."[496]

2. The engineering RFQ

In early June – still before its own contract had been executed – Banneker initiated the procurement of the design professionals for the parks. On June 2, it published a request for qualifications ("RFQ") for architects, seeking design firms for each of the parks.[497] On June 3, it issued a one page RFQ for an engineering firm to provide the civil, survey, geotechnical, and testing and inspection services for all of the projects.[498]

> The engineering RFQ set out the following requirements:
>
> The Contractors must be able to demonstrate proficiency in working on projects that require an understanding of local (District of Columbia) and federal government regulatory processes and knowledge of District of Columbia land surveying and District of Columbia public facilities.
>
> * * *

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495 Dwyer Dep. (Aug. 6. 2010) 99:22-100:4.

496 *Id.* at 100:13-21.

497 Ex.139, Request for Qualifications for Architect/Engineering Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities by Banneker Ventures, LLC (Jun. 2, 2009).

498 Ex. 140, Request for Qualifications for Civil, Geotechnical and Testing and Inspection Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities by Banneker Ventures, LLC (Jun. 3, 2009).

> This RFQ *requires* the participation of District of Columbia Certified Business Enterprises ("CBE") … with a minimum of 51% CBE participation in the Contractor team. In the selection process, preference points will be considered based on the Contractor's certification by the DSLBD.
>
> At minimum, the Qualification package shall include: Contractor's experience working with new construction or renovation of public recreation centers, parks or fields; and resumes of key personnel.[499]

The CBE requirement in this RFQ is noticeably different from the treatment of CBE status in the June 2, 2009 RFQ for architects, also prepared by Banneker. The architects RFQ stated: "This RFQ **strongly encourages** the participation of [DC CBE]s … with a minimum of 33% CBE participation in the Design Team…"[500]

Karim could not say who drafted the RFQ or whether he played any role in its creation. Other than the CBE requirement, he could not identify any other particular credentials he was looking for:

> Q: Did you discuss with anyone certain things you wanted in the RFQ?
> A: I think we had – we made sure that all of our RFQ's required CBE participation … I'm not sure what other stuff I might have looked at.[501]

Other witnesses questioned the manner in which the RFQ handled the issue of CBE participation. Glover testified that the RFQ appropriately reflected DMPED's clear policy to promote the hiring of CBE's, but she acknowledged that CBE status usually operates as a preference, through which a contractor would be awarded points in a competitive procurement,

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499 *Id.* (emphasis added).

500 *See* Ex. 139, RFQ, (emphasis in original). In addition, while the RFQ for architects, issued on June 2, gave applicants until June 19 to respond, the engineering RFQ called for responses within 5 days. Banneker extended the time once in an effort to hear from more CBEs, but even the extended period was 8 days shorter than the response time for the architects.

501 Karim Dep. (Aug. 5, 2010) 162:22-163:5.

not as a prerequisite that would eliminate non-CBE's from consideration.[502] Dwyer was also unfamiliar with the concept of a 51% CBE "requirement:" "generally … there's encouragement, bonus points, and other things…. And certainly that's a percent that [is] higher than generally what I'm accustomed to seeing because I think the targets are usually 35."[503]

Will Mangrum and Marcos Miranda, project managers for OPEFM, indicated that they typically require at least some CBE participation, but in their view, merely making an award to a CBE is not enough. They indicated that 51% participation in a solicitation is supposed to mean that the CBE will actually be doing 51% of the work and earning 51% of the dollars. They would expect a project manager issuing such a solicitation to monitor compliance with any requirement it set out in its RFQ through the imposition of reporting requirements and review of the subcontractors' invoices.[504]

David Jannarone explained that it is "not unreasonable for a company that has real capacity to leverage outside companies to increase the capacity that they have," and he indicated that joint ventures and teaming agreements are quite prevalent.[505] But he observed that the CBE program could be abused.

> I think one of the historic flaws with the CBE program where a lot of times you have people who don't have real capacity – I'm not suggesting that this is that situation, but – for example, like on a construction project … where you get like a middle man to supply steel to a project, but he's not really a steel guy. He's like a broker who is a CBE … That's not the intent of the CBE program, but, you know, there's – I'm sure there's a lot of problems like that.

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502 Glover Dep. 135:21-37:3.

503 Dwyer Dep. (Aug. 6, 2010) 101:11-102:10.

504 Interview with Mangrum and Miranda.

505 Jannarone Dep. 86:19-87:3.

> We conscientiously in everything that we've done have – have tried to prevent that from happening. You know … our staff and the program managers are supposed to be watching to make sure that companies we hire have real capacity.[506]

According to witnesses, the engineering RFQ was quite thin. Larry Dwyer testified that he would have expected a project manager soliciting proposals to evaluate the respondents on multiple factors, including capacity and price.[507] Allen Lew observed that the RFQ should have had much more in it.[508] Mangrum and Miranda were also struck by the lack of substantive information on the nature and scope of the work, even taking the evolving nature of the projects into account. They characterized the RFQ as "rather generic" and "not sufficient" to solicit reasonable proposals in response.[509]

The original deadline for response to the engineering RFQ was June 8, 2009. On June 8, Banneker extended the deadline to June 12, 2009.[510] According to a memorandum prepared by Banneker after the investigation began, they extended the deadline "in order to give firms more time to submit as well as to allow for more CBE participation," after discovering that of the 10 firms that requested a copy of the RFQ, only two were CBEs.[511]

The combination of the singular emphasis on CBE participation, coupled with the paucity of specific requirements other than familiarity with local regulatory practices, gives rise to the

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506 *Id.* at 86:3-19.

507 Dwyer Dep. (Aug. 6, 2010) 103:9-12.

508 Interview with Allen Lew.

509 Interview with Mangrum and Miranda.

510 Ex. 141, E-mail from Cheo Hurley, Banneker Ventures, to Duane Oates, S. Godley, Banneker (Jun. 8, 2009 4:57 PM EST).

511 Ex. 142, Memorandum from Duane W. Oates to Larry Dwyer (Nov. 20, 2009).

impression that Banneker prepared an RFQ that was tailor-made for LEAD. In his testimony, Karim denied that LEAD had any edge in the procurement.[512] But even if one takes the RFQ at face value, it is difficult to understand how it was that LEAD was selected. Beyond its CBE credentials, LEAD's proffered qualifications fell far short of even the paltry list of requirements set out in the RFQ. The RFQ stated: "*At minimum,* the Qualification package shall include: Contractor's experience working with new construction or renovation of public recreation centers, parks or fields."[513] (emphasis added). While LEAD had been retained to perform testing and inspection services at Deanwood, it did not list Deanwood or any other public recreation projects in its response.[514] And the response had significant other problems that the investigation suggests should have been known to, or discovered by, Karim.

3. LEAD's proposal

LEAD submitted its response to the Banneker RFQ for engineering services on June 11, 2009. The investigation has revealed that the proposal was false and misleading in multiple

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512 Karim Dep. (Aug. 5, 2010) 166:4-6.

513 *See* Ex. 139.

514 *See* Ex. 121, LEAD response to the RFQ. LEAD's response identified the following as "past performance and references for LEAD:" The Jazz at Florida Ave, Washington, D.C., described as an "ongoing" project with the nature of the engineering work unspecified; Strand Theater, Washington, D.C., described as an "ongoing" project, "presently in the design stage," for which LEAD would be performing the civil, structural and construction management work; Congress Heights School Redevelopment, Washington, D.C., for which LEAD "will perform the civil, structural, and construction management," and 6425 14th Street, Washington, D.C., an ongoing project for which "LEAD performed the structural assessment and civil engineering …. We are currently retained to provide construction code consultations and construction management." Banneker would also have been aware that it had previously engaged LEAD to perform testing and inspection services on Deanwood, but LEAD brought in GC&T for that assignment. Interview with Sean Regan and Thomas Regan (Apr. 20, 2010); Barrow Dep. (May 20, 2010) 103:9-104:4.

respects, and the referral to the United States Attorney should include a request for a determination of whether criminal charges should be brought on those grounds.[515]

The problems with LEAD's response begin with the cover letter. In his transmittal of LEAD's qualifications to Banneker Ventures, Barrow states:

> Our company has been in business since 2007. Although we are a newly formed company, the founders and the professional staff bring 60 to 80 years combined experience in all areas of civil engineering and design/analysis…[516]

But LEAD had no "professional staff" and only one of its founders, Barrow, had any significant professional engineering experience: 15 years, according to his resume.[517] Since Barrow left his government position in March of 2008, the company had not been providing engineering services since 2007.

The overstatement continues in Section 1 – Professional Qualifications. The proposal sets out the qualifications of a team to be comprised of LEAD and GC&T, a geotechnical engineering firm in Woodbridge, Virginia. But the statements that purport to describe LEAD alone bear no resemblance to the two-man firm:

> LEAD is a Washington, DC based company with over twenty full and part-time technical and non-technical employees. The company is organized as a Professional Limited Liability Company (PLLC), and has been operating since 2007…. LEAD staff has over 60+ years of combined experience in analysis in civil engineering and condition assessment of various types of facilities.[518]

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515 D.C. Code §22-2405, the criminal false statements statute, covers statements made directly *or indirectly* to any instrumentality of the D.C. government.

516 Ex. 121, LEAD response to RFQ.

517 *Id.* at 5.

518 *Id.* at 5.

According to LEAD's response to the RFQ, the services it could provide included geotechnical engineering, environmental services, civil site development and surveying, construction material testing and inspection, structural engineering, project management, and third party inspections.

LEAD's RFQ response includes an expansive organizational chart which depicts a "business development director" and a "technical operation director" at the top, but also depicts a host of other personnel including an Administrative Assistant; a Legal Department/Contract Manager; an Accountant/Chief Marketing Research; an Engineering Services Director; three project managers; and seven divisions for multiple engineering disciplines.[519] The organizational chart is a work of fiction.

As was called for by the RFQ, the response identifies the key personnel being proposed by Liberty and GC&T, and it states that the Liberty team will include Barrow; Mounir A. Abouzakhm, M.S., P.E.; Dawit Zena, P.E.; and Mesfin Madhin, P.E.[520] However, besides Barrow, none of these individuals was actually employed by LEAD at the time. LEAD reinforced the misimpression by providing resumes that described those individuals as current LEAD employees with falsified dates of employment.

- Abouzakhm's resume lists his most recent employment as: "Senior Project Engineer, Liberty Engineering and Design (LEAD) … May 2008 to Present";[521]
- The most recent entry on Zena's resume is: "Senior Structural Engineer, Liberty Engineering and Design (LEAD) … May 2008 to Present";[522] and,

519 *Id*, at 8.

520 *Id.* at 10-11.

521 *Id.* at 16.

522 *Id.* at 19.

- Medhin's resume identifies him as a LEAD "Senior Mechanical Engineer/Project Manager … August 2008 to Present."[523]

But as of June 11, 2009, when the resumes were transmitted in support of LEAD's effort to obtain city dollars, none of these engineers had left their places of employment to work for LEAD.

According to both Skinner and Barrow, it was Barrow who was responsible for preparing the response to the Banneker RFQ.[524] Skinner testified that he "reviewed it."[525] But neither LEAD principal could justify the blatant exaggeration and outright falsehoods in their RFQ response.[526]

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[523] *Id.* at 21.

[524] Barrow Dep. (May 20, 2010) 101:14-18.

[525] Joint Roundtable (Apr. 15, 2010) 180:20-181:1; Joint Roundtable (Apr. 28, 2010) 50:7-9, 62:5-7.

[526] LEAD persisted in misrepresenting itself even after it was retained. Barrow and Skinner attended a kick off meeting with the Banneker and Regan project managers in the Walker Jones trailer, and they presented them with a bound notebook of materials that outlined how they planned to staff the DPR projects. *See* Ex. 143, copy of LEAD notebook materials. It stated, "our professional team includes fifteen technical and non-technical staff," and repeated the claim of more than 60 years of combined experience. *Id.* at 3. The presentation included a different organizational chart, and this one clearly depicted the role that subcontractors such as LSA and GC&T would play. But for both the civil engineering and the surveying, it identified someone named Abdurashid Yahia Sheikh-Ali as the LEAD engineer in charge. *Id.* at 5. No such person worked at LEAD. The chart also identified Dawit Zena and an Emmanuel Foseh as LEAD team members in charge of other disciplines when neither was at LEAD then or at any time that LEAD worked on the projects. *Id.*

(footnote continued on next page)

Barrow took the position that the reference to LEAD's 20 "employees" included subcontractors and consultants,[527] and he expressed his view that it was appropriate to identify as an employee anyone who would ultimately be working on the project under his direction.[528] Skinner would not agree that the statement was false, but he could not explain it either. "The reason why the defense of it, I'm not sure what he was referencing in that. I didn't write that particular line, but I'm thinking that he's referring to the folks that were included in the submission."[529]

> Q: And who – what members of your staff had over 60 years of combined experience?
> A: Again, I would have to say, I think we were referencing the engineers that we included in the submission. But I can get back to you with that information.[530]

Skinner further indulged in LEAD's penchant for overstatement during his testimony before the Committee on April 15, 2010. Among other representations, Skinner swore that his firm had expended more than 29,000 man hours on the DPR projects in the six months between May and November of 2009. Joint Roundtable (Apr. 15, 2010) 45:13-15; Ex. 144, LEAD information and material, at 27. That would mean that for each of the 30 weeks that LEAD was engaged, its employees and subcontractors put in 966 hours per week, which would amount to 24 people working 40 hours a week each for the entire period. LEAD itself never had more than Barrow and one or two project managers, Michael Florence or Timothy White, on board. *See* Joint Roundtable (Apr. 15, 2010) 220:5-14**.** And the company has no time records for Barrow or any subcontractors.

527 Barrow Dep. (May 20, 2010) 113:5-22.

528 Barrow Dep. (May 20, 2010) 121:7-10.

529 Joint Roundtable (Apr. 28, 2010) 50:3-6.

530 *Id.* at 51:4-9. Skinner did not identify his own experience as part of the calculus, and this explanation falls short. While adding in the careers of the GC&T principals would have significantly enhanced the experience of the entire team being proposed, the RFQ did not represent that LEAD and GC&T together had a certain number of employees or a certain number of years of experience. It attributed all of that capacity to LEAD alone, and GC&T touted its own credentials in a different section of the response.

Neither witness could provide much insight into the organizational chart either. Barrow was asked:

> Q: Well can you just explain to me what this organizational chart is and what it was designed to convey to the person who received your RFQ response?
>
> A: Any response to an RFQ, there's some relevant and there's some irrelevant, and you can put as much information as possible to respond to the request.[531]

Skinner was also unfamiliar with what the chart meant to convey, and he testified that he was not sure who would be filling the various positions depicted in the boxes, such as "legal department."[532] "I'd say in [the] organizational chart that I'm looking at, the people who were going to perform those tasks for this project I'm sure were identified, I just don't know who they – the particular persons would have been for this particular case."[533] Skinner supposed that in creating the chart, "when we were referencing these different departments and different staff members, we were speaking to contractors and subcontractors that would have that capacity."[534] He added, "I think also since they're functions, that these functions could have been performed by the same person. … So there might have been some duplication. It might have been more than one person or it might have been one person doing more than one task."[535]

Barrow repeated the duplication theory:

> One thing you have to remember, it's a small company, sometimes I wear different hats, so I might be in that box one day and I might be in another box one

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531 Barrow Dep. (May 20, 2010) 117:22-18:5.

532 *See* Joint Roundtable (Apr. 28, 2010) 62:10-63:22.

533 *Id.* at 66:16-21.

534 *Id.* at 63:14-18.

535 *Id.* at 66:7-10.

day…. [W]hen I made the drawing I know that at any time any service that's needed for the company being small I can play that role.[536]

Skinner was unable to provide any information about the key personnel LEAD proposed – Abouzakhm, Zena, and Mesfin – beyond the fact that they were "probably" contractors hired to work on the job.[537] Barrow explained that he listed the three because they "might" be members of the team who would eventually do the work.[538] He was untroubled by the fact that the resumes he submitted specifically identified them as current LEAD employees:

> Q: Can you turn to page 16 of Exhibit 14 where Mr. Abouzakhm's resume begins; under professional experience where it says senior project engineer, Liberty Engineering and Design, May 2008 to the present. Was Mr. Abouzakhm a professional, a senior project engineer at Liberty Engineering from May 2008 to June 2009?
> A. I'll say it again, as I said it before, Mr. Abouzakhm was working as a consultant and his role was senior engineer who [was] going to have the second eye on some of the product we produce.
> Q: Well directly below that it says, president, Geotechnical Environmental and Testing, GE&T, August 1988, '98, to 2007.
> A: Right.
> Q: Isn't it true that he was still at [GE&T] in 2008 and 2009 when this document was prepared?
> A: You got to remember, Mr. Abouzakhm, this company GE&T is his own company, personal company. While I have my own company, you can call me and say hey, I need your expertise, I need you to come on board to help me out certain hours, certain days. So it doesn't mean that he was going to quit his GE&T, but he's just come in here on his own time, weekends, after work to provide anything that's asked.
> Q: Well why didn't you simply list him as a consultant as opposed to indicating that he was a senior project engineer at your company from May 2008 to the present?

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536 Barrow Dep. (May 20, 2010) 115:10-12.

537 Joint Roundtable (Apr. 28, 2010) 74:6-78:4.

538 Barrow Dep. (May 20, 2010) 118:12-19:9.

A: Well, as far as I was concerned and as far as Mr. Mounir was concerned, anybody, whether he's a consultant or subcontractor working under direction is working for the company.[539]

According to Karim, the RFQ response had the desired effect. "I looked at the RFQ and these people here have decades and decades and decades of experience."[540] When confronted during the deposition with the fact that the individuals listed were not actually LEAD employees, Karim did not express any concern about the way they had been described in their resumes.

A: As I indicated, I believe nothing that they submitted was inaccurate. And sometimes people even submit people who they're going to have on projects if they get awarded it or that type of thing. It's a common practice in the construction industry, design industry, architect industry, particularly if it's a very very large project where you have to pull resources from different places.
Q: …[W]hen you make representations as to who is going to be on your staff, do you expect those representations to be accurate?
A: All I can speak to is my firm and the representations we make. If you want to ask Barrow or whoever completed this RFQ, you gotta ask them about that.[541]

But no other witness with any connection to government contracting and construction found it to be an acceptable practice. Duane Oates, a Banneker project manager working for Karim and the owner of his own construction company, indicated that he would have understood the Abouzakhm, Zena, and Medhin resumes to be representing that those engineers were currently employed at LEAD. He was not surprised that an engineering firm might subcontract out particular specialties and identify those outside contractors as part of the proposal package,

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539 Barrow Dep. (May 21, 2010) 119:18-21:10. Barrow testified that Abouzakhm had provided him with a resume and that he was free to use it in proposals whenever he chose to do so. Barrow Dep. (May 20, 2010) 121:21-122:1. Abouzakhm confirmed that account. While he confirmed that he had never been employed at LEAD and that the representation in the resume included in the RFQ response was false, as far as he was concerned, Barrow was free to present him in that fashion. Interview with Mounir Abouzakhm, President, GE&T (May 21, 2010).

540 Karim Dep. (Aug. 5, 2010) 173:14-16.

541 *Id.* at 177:10-178:2.

as LEAD did with GC&T, but he opined that the LEAD key personnel resumes should have been handled differently.[542]

When Will Mangrum and Marcos Miranda, the OPEFM program managers, were shown LEAD's RFQ response, they stated that they would have understood the key personnel resumes to be representing that the three engineers were in fact LEAD employees. They deemed that representation to be "important." They indicated that as program managers in receipt of an RFQ response, they would "absolutely" want to know if the engineering firm under consideration was planning to perform the work itself or to outsource it.[543]

William C. Gridley, the principal of Bowie Gridley Architects, explained that when his firm puts together a proposal including engineers, it clearly identifies the employment status of any outside consultants.[544] Carlos Ostria and Stephan Goley, engineers with Loiederman Soltesz Associates ("LSA"), also indicated during their interview that if they were preparing an engineering proposal, they would attach any subcontractors' resumes and not represent those individuals to be employees of LSA.[545]

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542 Interview with Duane Oates.

543 Interview with Mangrum and Miranda. DCHE's Larry Dwyer did not find it unusual that the lead firm in a proposal might not have sufficient capacity. He indicated that "usually, people will create an LLC, and then you'll get the qualifications of all of the team members who are party to the LLC." Dwyer Dep. (Aug. 6, 2010) 112:9-11. He did not express an opinion as to whether it would be appropriate to identify subcontractors as actual employees in a proposal. "[T]o me, that's more of a technical question. You know, I, -- I wouldn't necessarily care whether they were employees or not if an LLC was formed and it had the relevant partners, and they had the qualifications, you know … I don't know what was represented or not represented quite frankly in the proposal because I didn't see it." *Id.* at 112:16-13:2.

544 Interview with Bill Gridley, Bowie Gridley Architects (Oct. 13, 2010).

545 Interview with Carlos Ostria and Steven Goley, Engineers, Loiederman Soltesz Associates ("LSA") (Jul. 15, 2010).

Karim testified that he did not know the representations were false and that he was unaware of the size of LEAD's staff.[546] But David Jannarone testified that it was Banneker's responsibility as program manager to determine whether the engineering firm it selected had the necessary capacity.[547] In light of the relationships between Skinner and Karim, it is reasonable to believe that if anyone besides Skinner and Barrow was aware of the false and misleading nature of the LEAD proposal, it was Karim. Certainly he should have known. If Karim knew LEAD's proposal did not accurately describe the firm and its capacity but thought that it didn't matter, then he had a fundamental misunderstanding of the role and duties of a program manager. And if he knew that LEAD's proposal gave a grossly exaggerated picture of the firm, that raises the question of whether LEAD's proposal was intended simply as a cover in the event the selection of LEAD was later challenged.

In any event, Jannarone also acknowledged that DMPED staff was "supposed to be watching" to ensure that contractors had "real capacity."[548] The record reflects that DMPED fell down on that job in this instance, and DCHE neglected its oversight responsibilities as well.[549]

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546 Karim Dep. (Aug. 5, 2010) at 175:3-17; 176:1-6: 177:10-11.

547 Jannarone Dep. 90:7-15.

548 *Id.* at 86:16-19.

549 While the record revealed a close relationship between Skinner and Jannarone and a previous connection between Glover and Banneker, the review of the documents and bank records produced to date showed no benefit flowing to Glover or Jannarone that would prompt a criminal referral as to them. While they did not oppose the selection of LEAD, there is no evidence that they encouraged Banneker to take LEAD on, and there is no evidence that the Mayor weighed in on the matter in any way.

4. LEAD's selection based on CBE status

In addition to LEAD, responses to the RFQ were submitted by three more established firms: Hillis-Carnes Engineering Associates, Inc., Charles P. Johnson and Associates, and Froeling & Robertson, Inc.[550] Banneker selected LEAD to receive the engineering contracts for the DPR projects. Banneker did not interview the respondents, and there was no evidence produced to indicate that it scored the proposals. Instead, Banneker pointed to LEAD's CBE status to justify its selection. Karim testified, "I reviewed the [LEAD] response and thought it was thorough and addressed the CBE participation that we required."[551] Since none of the other firms that responded to the RFQ included any CBE participation, according to Karim, LEAD was the only contractor that was responsive.[552]

Duane Oates provided some feedback on the responses at the time, and he thought that the Regan team did as well.[553] But the Regan project managers stated that they did not have a voice in the decision. According to Sean Regan, Banneker and Regan had divided up responsibility for individual parks and also for certain tasks, and Banneker took responsibility for all of the civil engineering. It prepared the RFQ. Sean Regan recalled being shown the responses at a meeting with Karim and Hurley, but the decision to utilize LEAD was made by Banneker alone. Regan did not recall seeing any formal scoring sheets or tallies,[554] and no such documents

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550 *See* Ex. 142, Memorandum from Duane W. Oates to Larry Dwyer; *see also* Ex. 145, Response to RFQ from Charles P. Johnson & Associates, Inc., and Information from Hillis-Carnes Engineering Associates, Inc.

551 Karim Dep. (Aug. 5, 2010) 182:11-17.

552 *Id.* at 166-67; 166:19-167:2.

553 Interview with Duane Oates.

554 Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

have been produced by Banneker. The Regans also had no input into negotiating the amounts to be paid to LEAD under its contracts.[555]

Neither DMPED nor DCHE weighed in on the question of which engineering firm should be selected. Glover testified that she directed Banneker to issue the RFQ quickly, and that she reviewed the document before it went out "and told them it was fine."[556] Jannarone testified that he had not seen either the RFQ or LEAD's response prior to his deposition.[557] No one at DMPED participated in the review of the responses; Glover was not provided with a copy of LEAD's submission until after the firm had been selected.[558] Indeed, it was not until October 28,

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555 *Id*.

556 Glover Dep. 131:3-12; 134:18-19.

557 Jannarone Dep. 77:5-7, 80:9-10.

558 Glover Dep. 138:5-7, 140:2-8. Glover thought she had been given a copy of LEAD's proposal, but in all likelihood, what she saw was the notebook LEAD put together for its kick-off meeting with the project management team. *See* Ex. 143. She testified:

> Glover: I saw their proposal and it had legitimate companies that I was familiar with working with them so their team was appropriate for what we required.
> Q: When you say legitimate companies that you were familiar with, working with them, who were you referring to?
> A: They partnered with LSA and I worked with them on a previous project before so they had companies that I was familiar with.
> Q: And so you didn't know any – you didn't really know anything about the individuals who owned or were employed by Liberty but you were comfortable because of the other companies they were working with, is that a fair statement?
> A: Yes.

Glover Dep. 140:19-141:12. However, the proposal LEAD submitted to Banneker to obtain the subcontract did not mention LSA; the firm was introduced at a kick-off meeting after LEAD was on board.

2009, after the newspaper articles appeared, that Glover asked Karim to send her the scores and back up for his architect and engineer selections.[559]

DCHE did not participate in the selection of the engineers, and there were no documents transmitted at any time from May through October notifying the agency of the decision or seeking its approval. Documents received by the Committee do include three memoranda dated November 20, 2009 that purport to be from Duane Oates to Larry Dwyer "recommending" that LEAD and the architects be engaged. The documents seek belated approval of the selection of LEAD in May to perform the initial survey and consulting services,[560] the procurement of the architects,[561] and the choice of LEAD for all of the engineering work.[562] Neither Oates nor Karim could say why or how the documents came to be created or whether or not they had ever been transmitted to DCHE.[563] Oates did not remember the memos, and he surmised that it was

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559 Ex. 146, E-mail from Jacquelyn Glover (EOM) to Omar Karim and Duane Oates (Oct. 28, 2009 11:14 AM); Glover Dep. 201:11-22. Glover testified that she believed that Banneker ultimately sent her not only LEAD's proposal but a score sheet evaluating all of the bidders and tabulating the results, but neither DMPED nor Banneker has produced such a document. Glover Dep. 202:15-203:18. By the time of her deposition, she could not recall whether or not she had concluded, based on what she received, that Banneker had a sufficient basis to select LEAD as the engineer for the projects. Glover Dep. 206:18-207:3.

While Jannarone and Glover had little or no personal involvement in the selection of LEAD, they took steps to assure the media in January of 2010 that the LEAD engineering contract had been "competitively bid." *See, e.g.*, Ex. 147, E-mail from Jacquelyn glover (EOM) to Sean Madigan (EOM) (Jan. 11, 2010) and related e-mails. In fact, that was not true of LEAD's initial survey and consulting contract, and the description hardly applies to the abbreviated process that led to the four engineering contracts with LEAD.

560 Ex. 148, Memorandum from Duane W. Oates to Larry Dwyer (Nov. 20, 2009).

561 Ex. 149, Memorandum from Duane W. Oates to Larry Dwyer (Nov. 19, 2009).

562 *See* Ex. 142, Nov. 20, 2009 Memorandum.

563 Karim Dep. (Sep. 21, 2010) 126:8-127:18; Interview with Duane Oates.

possible that someone else had drafted them to go out under his name.[564] Dwyer expressed genuine surprise when they were shown to him during his deposition, and he was confident that he had never seen them before.[565]

After selecting LEAD for the engineering work on the projects, Banneker and LEAD executed four consulting services agreements: a July 22, 2009 agreement to perform surveys on 10 parks;[566] a July 22, 2009 agreement for civil engineering services;[567] a July 25, 2009

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564 *Id*.

565 Dwyer Dep. (Aug. 10, 2010) 13:18–14:10. It is likely that the memos were created as part of the effort organized by DMPED in November and December of 2009 to get all of the contract paperwork in order so that the DPR contracts could be submitted to the Council for retroactive approval. *See* Section IX, *infra*. Jannarone's to-do list assigned Banneker the action item of sending "all civil proposals and selection back up" to DMPED and DCHA**.** Ex. 150. Oates could only speculate, and he thought that the memos might have been written because it was brought to Banneker's attention at that time that DCHE approval had been required. He recalled that they assembled a huge binder of materials to transmit to DCHA but could not remember if that was in connection with the Council hearings or in response to earlier requests from DCHA for supplementary material. Interview with Duane Oates.

566 Ex. 151, Consulting Services Agreement between Banneker Ventures and LEAD, (Jul. 22, 2009) (surveys).

567 *See* Ex. 82, Consulting Services Agreement (civil engineering).

agreement for geotechnical evaluations;[568] and a September 21, 2009 agreement for environmental site assessments.[569]

E. LEAD's Performance and Invoices

Once LEAD was in place, it performed primarily by transmitting the work of others, but it charged excessive prices that were sanctioned by Banneker. While the referral to the United States Attorney is necessary to determine whether those circumstances arose out of any malfeasance or complicity on Karim's part, our review of the role LEAD played on the projects and the invoices it submitted has uncovered, at the very least, a pattern of nonfeasance on the part of both the private and government project managers that resulted in a significant waste of the taxpayers' money.[570]

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[568] Ex. 152, Consulting Services Agreement between Banneker Ventures and Lead (Jul. 25, 2009) (geotechnical).

[569] Ex. 153, Consulting Services Agreement between Banneker Ventures and Lead (Sep. 21, 2009) (environmental). Each Consulting Services Agreement states in Article 1 that the Consultant shall provide the services specified in an attached Schedule 1 – Scope of work, and provides in Article 4 that "Banneker Ventures shall pay Consultant on a time-and-materials basis as per the attached Schedule 2." But the schedule 1 for each of these agreements is LEAD's proposal to Banneker, and the schedule 2 for each also refers to the proposals, none of which price the work on a time and materials basis. Rather, each proposal includes a Table A, which is a spreadsheet breaking out a flat projected fee per park. LEAD submitted no back-up reflecting how the prices were derived, and the record did not reveal any negotiation with Banneker over the prices. The Regans were not asked to review the proposals or to weigh in on the fees before the agreements were consummated.

[570] LEAD proposed flat fee prices for the engineering work, and Banneker accepted those prices and contracted to pay them, so, based on the evidence gathered to date, we cannot conclude that LEAD's invoices under those contracts provide grounds for an action against LEAD for "false" claims under the District's civil or criminal false claims statutes, D.C. Code §2-308.14 and §2-308.21, even though the law covers subcontractors' invoices.

1. LEAD's role on the projects

LEAD performed little substantive work on the DPR capital projects. Instead, it subcontracted the vast majority of the work for its four contracts – surveying, civil engineering, geotechnical engineering, and environmental site assessments – to third parties.

Banneker was on notice from the start that LEAD would not be performing the bulk of the work. There was a kick-off meeting convened shortly after the engineers had been selected, at which LEAD presented a chart depicting its staffing. It showed that the civil engineering and the surveying were going to be performed primarily by LSA and the geotechnical work by GC&T.[571] LEAD introduced an engineer from LSA named Steven Goley to the project managers at the meeting, and Ernest Njaba of GC&T attended as well.[572] It became clear to Sean Regan that LEAD "was sort of a quarterback," and that they were subcontracting the actual work out to LSA and other firms.[573]

While LEAD secured the contracts by virtue of its status as a CBE, the bulk of the work and the accompanying fees flowed out of the District to non-CBE firms. None of LEAD's third party subcontractors were located in the District of Columbia, let alone were qualified as

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571 *See* Ex. 143, LEAD notebook materials.

572 Njaba Dep. 49:8-11.

573 Regan recalls thinking at the time that he knew who Goley was, and that he was very relieved to know that there was going to be a decent civil engineer involved. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010). Duane Oates reported having the same reaction, stating in the interview that he became comfortable when he learned that LSA was going to be utilized. Interview with Duane Oates (Nov. 9, 2010). It was LSA that made Jacqui Glover comfortable as well. Glover Dep. 141:4-12.

CBE's.[574] According to Barrow, the 51% CBE requirement Banneker included in the RFQ would be met as long as the non-CBE subcontractors doing the job were working under his direction.[575] As noted above, other construction managers disputed this assertion.[576] LEAD's use

[574] LEAD subcontracted with the following entities: Loiederman Soltesz Associates, Inc. (Maryland); Currie and Associates, LLC (Maryland); Accurate Infrastructure Data, Inc. (Maryland); Anabell Environmental, Inc.(Maryland); Chesapeake Geosciences, Inc. (Maryland); Environmental Data Resources (Connecticut); GE&T Consultants, Inc. (Maryland); Geomatrix Drilling, Inc. (Maryland); Hillis-Carnes Engineering Associates, Inc. (Maryland); and Insight, LLC (Virginia). LEAD also hired Ernest Njaba, an employee of GC&T, a company located in Virginia.

[575] Barrow Dep. (May 21, 2010) 134:15-21. Jacqueline Glover also stated that it was not a problem if all of LEAD's subcontractors were non-CBE, as long as the company submitting the invoice was a CBE. But she did not explain why she found that practice to be acceptable. *See* Glover Dep. 171:1-19.

[576] Interview with Mangrum and Miranda. The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*) (the "Act"), governs CBE. Section 2346 of the Act provides that certain types of contracts for which a CBE is selected as a prime contractor through Sections 2343 or 2344 must include requirements for the amount of work to be performed by the CBE itself. Because LEAD was not a prime contractor and therefore Banneker did not procure LEAD pursuant to Sections 2343 or 2344 of the Act, we cannot conclude that those sections were violated when LEAD subcontracted out the lion's share of its work to non-CBE firms.

However, the arrangement undermined the purpose of the CBE preferences that Karim was purporting to implement. The goals of the Department of Small and Local Business Development, which administers the CBE program, are to (1) stimulate and expand the local District of Columbia tax base; (2) increase the number of viable opportunities for District residents; and (3) extend economic prosperity to local business owners, their employees, and the communities they serve. D.C. Official Code § 2-18.13(a)(1). When LEAD was selected based on its CBE status but then directed city funds to firms outside of the District, and when Banneker took no steps to enforce the stated condition of its own procurement, Banneker and LEAD frustrated these objectives.

of out of state subcontractors was also inconsistent with the First Source Employment Agreement it submitted to the D.C. Department of Employment Services on October 29, 2009.[577]

a. LEAD contracted out the surveying work

Banneker selected LEAD on a sole source basis to launch the projects by surveying the sites, but LEAD had no licensed surveyor and did not actually perform the survey work. LEAD was brought on board for this purpose on May 4, and Barrow immediately contacted a licensed surveyor from Maryland, Anthony Currie.[578] Skinner followed up and faxed Currie a list of the five surveys he was to complete – Kenilworth, Rosedale, Guy Mason, Ft. Stanton, and Parkview – and he directed Currie to complete the work in 8 days.[579] Currie found the proposed schedule to be unreasonable. He stated in his interview that when he spoke with Skinner and Barrow, he was surprised to discover how little LEAD understood about the fundamentals of what was

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[577] Ex. 154, First Source Employment Agreement, Contract No. S/C722-2009, LEAD (Oct. 28, 2009). In the agreement it signed pursuant to D.C. law, LEAD agreed to use DCDOES as its first source for the recruitment of employees and to require any of its own subcontractors receiving over $100,000 to sign similar agreements. LEAD imposed no such requirement. When asked to list its "current employees," LEAD falsely identified Mounir Abouzakhm, Dawit Zena, and Mesfin Medhin, and it also listed Timothy White, whom LEAD has identified elsewhere as an independent contractor, and not an employee. *Id.*

[578] Interview with Anthony Currie, President and CEO, Currie and Associates, LLC (Apr. 22, 2010). Currie explained that he met Barrow in July of 2008, when Barrow informed him that he was starting a company called Liberty and he was looking for someone who could do survey work in Maryland and the District of Columbia. After the meeting, Barrow retained Currie to survey a Banneker project on Thayer Avenue in Silver Spring, MD and 600 Alabama Avenue, in Southeast, D.C. Later, LEAD hired Currie to survey the Strand Theater site in Northeast D.C. But LEAD identifies the Alabama Avenue and Strand Theater jobs, as examples of its own "prior performance" in its response to the Banneker RFQ. *See* Ex. 121 at 43-44.

[579] Ex. 155, Facsimile to Anthony Currie (May 15, 2009 15:07 EST). It is notable that at that time, neither Fort Stanton or Parkview had been included in the MOU from DPR to DMPED, DMPED had not yet executed its MOU with DCHA, and DCHE had not yet executed a contract with Banneker.

involved.[580] Currie had to explain that the surveys would require several weeks of work. He also found that he had to question both men about whether certain features of the surveys that LEAD requested were even necessary for the DPR projects.[581]

Barrow communicated with Currie to prioritize the work and to convey requests from project managers or architects to add information to the drawings, but Currie stated that he completed the surveys – which bear his seal – himself. The documentary record supports his testimony. Currie's files contain his original drawings and work product, and there is no indication in the records provided by LEAD that LEAD added anything to them. Barrow simply directed Currie to the sites to be surveyed. He also provided Currie with a LEAD title block to be utilized on the drawings. Currie's invoices list the steps he performed in connection with each survey,[582] and when the OPEFM project managers were shown the invoices, they indicated that

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580 Interview with Anthony Currie.

581 For each site, LEAD asked Currie to provide an "ALTA" (American Land Title Association) survey, a complex, relatively costly exercise that is generally required when commercial property is transferred. An ALTA survey provides the lender or the title company with the detailed legal and title information necessary for the issuance of title insurance. http://www.landsurveyors.com/resources/definition-of-an-alta-survey; http://www.alta.org. The LSA engineers retained to survey other parks also expressed surprise that LEAD requested ALTA surveys on all of the parks. Interview with Carlos Ostria and Steven Goley (Jul. 15, 2010). While some of the witnesses indicated that for some individual parks, there may have been issues of ownership necessitating this type of inquiry, Barrow was unable to explain clearly why he included that service in his proposals to Banneker in every instance. Barrow Dep. (May 21, 2010) 147:15-149:22.

582 Ex. 156, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Kenilworth); Ex. 157, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Guy Mason); Ex. 158, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Rosedale); Ex. 159, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Parkview), Ex. 160, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Fort Stanton).

the lists were complete.[583] Currie was later hired to survey five more parks: Chevy Chase, Justice Park, 7th and N, Raymond Recreation Center, and the 10th Street park. LEAD also engaged LSA to survey Bald Eagle and Barry Farms. Like Currie, the LSA surveyor, stated that Barrow played no role in completing the work.[584]

b. LEAD contracted out the civil engineering work

After the RFQ process, Banneker hired LEAD to perform the civil engineering on all of the projects, but LEAD immediately engaged LSA to do that work as well.[585] During his deposition, Barrow repeatedly stated that he provided "management," "direction," and "coordination" for this engineering work, and he insisted that LEAD thereby added value to what LSA and Currie provided.[586] He also claimed that he had to verify his subcontractors' work product, including the surveys.[587] He testified that he would go to the project sites and to

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583 Interview with Mangrum and Miranda.

584 Interview with Carl Ostria and Steven Goley. The documents gathered during the investigation confirm the witnesses' description of LEAD as a mere pass-through. *See e.g.*, Ex. 161, E-mail from Shamika M. Godley to Abdullahi Barrow (Jul. 2, 2009 2:09 PM) scheduling meeting with environmental regulators on Rosedale ("At a minimum, both myself and your civil engineer (Carlos Ostria, I believe) need to attend."); Ex. 162, Email from Abdullahi Barrow to Anthony Currie (Jul. 14, 2009 6:43:53 PM EDT) (asking Currie to send him responses to architects' comments on a survey; Ex. 163, E-mail from Abdullahi Barrow to Steve Goley, P.E. (LSA) (Jul 30, 2009 12:09 PM EST) ("Please perform the survey operation …"); Ex. 164, E-mail from Abdullahi Barrow to Steve Goley, P.E. (Aug. 31, 2009 2:22 PM), forwarding architects' requests for civil engineering specs for Barry Farms and Fort Stanton ("Steve, as requested below, would you start working on the Civil Spec. Thank you Abdullahi."); Ex. 165, E-mail from LEAD project manager Michael Florence to Banneker project manager, Cleo Hurley (Jul 30, 2009) ("The surveyors have finished 7th and N."); Ex. 166, E-mail from Abdullahi Barrow to Bonnie Vancheri at Regan Associates (Sep. 3, 2009).

585 *See* Ex. 82; Interview with Carlos Ostria and Steven Goley.

586 Barrow Dep. (May 20, 2010) 175:9-12; 176:6-8; 189:15-19; 205:21-206:2.

587 *Id.* at 91:14–94:4.

government agencies to take measurements and verify information, which would take "days, sometimes weeks."[588] Yet LEAD produced no documents reflecting this work or any input Barrow offered, and despite Barrow's testimony that he regularly recorded the hours he worked on slips of paper, LEAD informed the Special Counsel through its attorneys that the company had no such time records.[589] Moreover, CORE architects who used a Currie survey observed that the drawing had errors that should have been corrected if Barrow had actually verified the work.[590]

The LSA engineers stated that Barrow would obtain information about the scope of work to be performed and then pass it along to them, giving them free reign to then complete the engineering tasks. They did not see him on the sites performing any measurements and could not say that he verified any of their work.[591] With respect to the surveys in particular, they indicated that Barrow played no role beyond asking them to get them done in a timely manner.[592] Ultimately, the investigation produced no documentary evidence or witness testimony that verified Barrow's account that he participated in or enhanced the quality of the civil engineering

588 *Id.* at 93:13–94:15.

589 Barrow Dep. (May 20, 2010) 29:18-30:13; Ex. 16 at 3.

590 Interview with Dale Stewart.

591 Interview with Carlos Ostria and Steven Goley.

592 *Id*.

or the surveys. Instead, the record revealed, as CORE's Dale Stewart put it, that LEAD acted as "just a conduit" passing along other engineers' work.[593]

c. LEAD contracted out much of the geotechnical and environmental engineering work

Banneker also hired LEAD to complete the geotechnical and environmental engineering.[594] Barrow's previous experience had been in geotechnical and structural engineering,[595] and there is evidence that LEAD played a larger role in connection with those aspects of the engineering for the parks. But LEAD did not do this work alone.

For the parks that required geotechnical analyses, Barrow hired a subcontractor to take soil borings and submitted the samples to another subcontractor for laboratory testing.[596] Barrow stated that he used the results to write the geotechnical reports himself, and that he paid Ernest Njaba, an employee of GC&T working on an individual basis in his personal time, to look over

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[593] Notwithstanding these circumstances, Skinner presented the surveys and civil engineering drawings during his testimony on April 15, 2010 as examples of LEAD's "accomplishments," and of the work it "completed and coordinated" on the DPR projects. *See* Ex. 144.

[594] *See* Ex. 152, Consulting Services Agreement between Banneker Ventures and LEAD (geotechnical); Ex. 153, Consulting Services Agreement between Banneker Ventures and LEAD (environmental).

[595] Barrow specialized in geotechnical engineering in graduate school and performed work related to structural and environmental engineering for the District of Columbia. Barrow Dep. (May 20, 2010) 5:15-20; 9:12-10:2. Although Barrow claims he does not have a specialty within the field of civil engineering, several witnesses describe him as specializing in geotechnical or structural engineering. Njaba Dep. 18:16-20 (stating that Barrow specialized in geotechnical engineering); Interview with Bonnie Vancheri, Regan Associates, LLC (Nov. 12, 2010) (describing Barrow as having some competence in geotechnical and structural engineering); Interview with Carlos Ostria and Steven Goley (describing LEAD as specializing in geotechnical and structural engineering).

[596] Barrow Dep. (May 20, 2010) 76:1-15; Ex. 167, Geomatrix Drilling, Inc. invoice # 141-09 (Jul. 3, 2009); Ex. 168, Hillis-Carnes Engineering Associates, Inc. invoice # 83407 (Aug. 12, 2009).

the drafts and provide a second set of eyes.[597] Njaba, who described himself as a longtime personal friend of Barrow's, confirmed Barrow's account.[598]

GC&T, a Virginia company with particular geotechnical expertise, had been identified as part of LEAD's team in LEAD's response to the RFQ.[599] But Njaba testified that GC&T was not asked to perform any geotechnical engineering on the DPR projects, and that he provided input individually as part of his "consulting business on the side."[600] He indicated that after the soil boring and lab tests had been completed, his friend Barrow contacted him:

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[597] Barrow Dep. (May 20, 2010) 76:18-21.

[598] Njaba Dep. 57:5-7; 69:19-22; 99:22-100:2.

[599] Ex. 121.

[600] Njaba Dep. 58:2-4. LEAD obtained the DPR engineering contracts based on a proposal that represented that GC&T would be its partner on the projects, and it was GC&T's credentials and experience that added the necessary heft to the response to the RFQ. Njaba attended the kick off meeting with Banneker, but LEAD did not actually utilize the company to perform any of the geotechnical work. Njaba testified that he anticipated that GC&T would have been engaged to handle a more significant portion of the engineering work – the construction materials testing – had the projects continued. *Id.* at 58:11-21.

Njaba's deposition was revealing since the engineer also testified that it was GC&T that had been solely responsible for the construction materials testing work that LEAD had been hired to provide for Deanwood:

> Njaba: I had a technician present at the site that did all the work. He would write a field report. He's going to submit it to our secretaries. They will type it. It's going to our field manager. He's going to review it. Then he's going to come to me for my final review and I put my seal and stamp…
> Q: And so would Mr. Barrow have a role in actually writing the reports?
> A: Writing the field reports?
> Q: Yeah, or any of the reports you were writing?
> A: No. I mean we are doing the service work and we submit it to Mr. Barrow. Mr. Barrow is with Liberty Engineering and they are my client.

Njaba Dep. 24:19-25:18; *see also* 29:8-30:7. So the Deanwood work, which Karim pointed to as an example of LEAD's prior experience, *see e.g.*, Karim Dep. (Aug. 5, 2010) 53:2-4, was not actually work performed by LEAD at all.

> He put together the package and he was looking for my second – he was looking for a second eye on the project. He was looking for somebody to give him a – to review their work and in my private time and mostly on weekends, I went to his office on 18th Avenue. I reviewed the work, suggested any recommendations that I felt – I felt that was much more appropriate.[601]

Banneker also entered into a contract with LEAD to perform Environmental Site Assessments.[602] With respect to the environmental engineering, Barrow initially testified that he had obtained the necessary data and prepared the reports himself, calling upon another experienced engineer and friend named Mounir Abouzakhm only to review them.[603] But the investigation established that it was Abouzakhm, the owner of Geotechnical Engineering & Testing Consultants, Inc. ("GE&T") in Virginia, who was primarily responsible for drafting the ESA's. Abouzakhm said that he worked with Barrow to complete the Phase I ESA reports for Barry Farms, Justice Park, Ft, Stanton, and 10th Street Park. They researched the project sites together: walking the property and making observations for up to a few hours.[604] Based on their research, Abouzakhm said he wrote reports, which Barrow then reviewed and approved.[605] Barrow ultimately conceded at the end of his deposition that it was Abouzakhm who drafted the Phase I reports in the first instance.[606]

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601 Njaba Dep. 56:15-22.

602 *See* Ex. 153, Consulting Services Agreement (environmental).

603 *See, e.g.*, Barrow Dep. (May 20, 2010) 209:22–210:3 ("Mr. Mounir played a limited role as far as just doing a site reconnaissance and also reviewing the report prior to submitting to the client."); *Id.* at 217:6-224:14.

604 Interview with Mounir Abouzakhm; Barrow Dep. (May 20, 2010) 206:8-21.

605 Interview with Mounir Abouzakhm; Ex. 169, GE&T Invoice # 465 (Jan 2, 2010) ("Performed site reconnaissance and submitted the required report.").

606 Barrow Dep. (May 20, 2010) 226:19-228:21. Earlier, he claimed that nobody really "wrote" the reports. *Id.* at 208:2-6.

Justice Park required a more extensive report, known as a Phase II ESA. For that work, Abouzakhm performed field work and took soil samples to a laboratory for further testing.[607] After receiving the laboratory results, Abouzakhm sent the results to Barrow and the two discussed them.[608] Abouzakhm drafted the Phase II ESA report, and worked with Barrow in revising it.[609]

d. LEAD used consultants for the "management" function too.

While Barrow was thus involved in coordinating the surveying and civil engineering work performed by others, and he collaborated on the geotechnical and environmental engineering, Skinner, by his own admission, played no role in the engineering aspects of his business at all. When asked what he did at LEAD, he testified: "I mean, all the non-technical management functions and trying to coordinate activities, following up with people, look for deadlines, if necessary, taking out the trash – I mean, with a small business you do everything, but I am saying as it relates to the engineering work, that's Abdullahi Barrow."[610] Barrow agreed. "Well most of the meetings would be held in our office and [Skinner] might be in the office just stop by and sit down in the office. But mainly he was, if I recall correctly, he was not participating that much, he would just sit in there if he had the time; most of the time he was involved in something else."[611] Steven Goley, the LSA engineer who worked extensively on the

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607 Interview with Mounir Abouzakhm; Barrow Dep. (May 20, 2010) 207:1-5.

608 Interview with Mounir Abouzakhm.

609 *Id.*

610 Joint Roundtable (Apr. 15, 2010) 163:11-16.

611 Barrow Dep. (Sep. 30, 2010) 84:14-19.

projects, stated that he had no contact whatsoever with Skinner, and other subcontractors and project managers provided similar information. [612]

Despite the fact that Barrow identified "management" as LEAD's primary function, LEAD subcontracted out much of that work to independent contractors as well. The role of LEAD project manager was filled by Michael Florence and then Tim White, whom LEAD identified as "1099 independent contractors." [613] White was not a licensed professional engineer, and Barrow was not certain whether Florence obtained his license during his time with LEAD or not.[614] The two informed subcontractors of meeting dates, scheduled access to the project sites, and generally transmitted information to coordinate the projects, but neither performed any technical work.

Reviews of LEAD's performance – even in its limited role – were mixed.[615] The e-mail traffic reveals that the Regan project managers experienced a number of problems with the

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612 Interview with Steven Goley and Carlos Ostria; Interview with Anthony Currie (describing Skinner as having minimal involvement in the DPR capital projects); Interview with Mounir Abouzakhm (reporting that he never worked with Skinner); Glover Dep. 153:1-2 ("I never had any contact with Mr. Skinner during the projects."). The documentary evidence revealed that Skinner served as little more than an administrative assistant who answered phones and relayed messages. *See e.g.*, Ex. 170, E-mail from Sinclair Skinner to Abdullahi Barrow and Timothy White (Oct. 14, 2009 12:58 PM); Ex. 171, E-mail exchange between Sinclair Skinner and Timothy White (Nov. 18, 2009, 18:13:08 and 6:21 PM).

613 *See* Ex. 172, "1099 Employees & Subcontractors"; *see also* Joint Roundtable (Apr. 28, 2010) 16:17-21 (Apr. 28, 2010) (describing White as a 1099 contractor).

614 Barrow Dep. (May 20, 2010) 59:1-4 ("Based on the information he provided, he was EIT [Engineer in Training] and prior to his leaving the company I think he become licensed . . . based on his information that he told us.").

615 For example, one project manager from Regan Associates described LEAD as being competent in some areas but struggling in others, and that they "bit off more than they could chew" in trying to handle their workload. Interview with Bonnie Vancheri, Regan and Associates, LLC (Nov. 12, 2010).

materials Barrow was passing along, and that they complained about LEAD's timeliness and responsiveness. [616] Indeed, LEAD's efforts to facilitate the projects often had the opposite effect.[617] Barrow insisted that all communications flow through LEAD, even though the engineers needed to be able to communicate with the architects directly.[618] That request only slowed communications.[619] Ultimately the process of working through LEAD proved "so painful

[616] *See, e.g.*, Interview with Bonnie Vancheri (describing several problems with the work LEAD provided); Interview with Ray Nix, Regan and Associates, LLC (Nov. 12, 2010) (describing missing information and delays from LEAD after having asked repeatedly for additional information); Ex. 173, E-mail from Kris Benson, Core Architects, to Shamika Godley, Banneker Ventures (Jun. 8, 2009, 18:39 EST) (describing various information missing from the Rosedale survey); Ex. 174, E-mail from Kris Benson, Core Architects, to RPeterson@amtengineering.com and bjob@amtengineering.com (Jun. 26, 2009, 11:28 AM EST) (noting that the revised survey "added very little to quell" their initial concerns); Ex. 175, E-mail from Bonnie Vancheri, Regan Associates, to Michael Florence and Abdullahi Barrow, Liberty Engineering & Design (Aug. 21, 12:29 PM EST) (requesting long-overdue information and complaining that the "schedules are being compromised because we are unable to complete schematic design without this information."); Ex. 176, E-mail from Bonnie Vancheri, Regan Associates, to Abdullahi Barrow, Liberty Engineering & Design (Nov. 11, 2009, 16:00 EST) ("It is now 4pm on Wed of the final day you were to have the long awaited for soils report to us. We are now way behind schedule. What is the holdup? I have asked repeatedly for a verbal and have not received any usable information [sic]."). The Regan project management team indicated that these emails accurately reflected their experience with LEAD. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

[617] Interview with Dale Stewart.

[618] *See, e.g.*, Ex. 177, E-mail from Abdullahi Barrow, Liberty Engineering & Design, to Steven Goley, Loiederman Soltesz Associates (Oct. 22, 2009, 11:49 AM EST).

[619] Interview with Dale Stewart.

and the response time was so slow" that at least one set of architects brought their complaints to Banneker.[620]

These are the facts and circumstances that form the backdrop for the analysis of LEAD's invoices and of Banneker's management of its consultants. The record shows that Banneker did not hire an engineering firm with the experience and capacity to do the work and that it failed to implement its own stated objective of directing work to local firms. Instead, the private contractor that was paid a substantial fee to retain and manage qualified engineers and consultants simply hired another middle man that charged its own fee to retain and manage qualified engineers and consultants. And Banneker applied its 9% fee to that middle man's invoices. The review of LEAD's invoices and profit margins reveals that the unnecessary layer of bureaucracy turned out to be particularly wasteful for the D.C. taxpayers in this case.

2. LEAD's invoices

LEAD reaped significant profits from organizing and transmitting the work of others. While witnesses with construction expertise acknowledged that it is generally appropriate for contractors to apply some mark-up to amounts due from subcontractors working under their auspices – even in a pure pass-through situation – they indicated that an industry-standard fee for

620 *Id.* Karim deflected all criticism of LEAD by claiming that it was the critics – who were Regan project managers – and not Barrow, who lacked the experience to understand the issues with the projects. *See* Karim Dep. (Sep. 21, 2010) 95:15-115:3. For instance, he argued that one Regan Associates project manager, Bonnie Vancheri, questioned LEAD because she was inexperienced and "didn't have a clear understanding of what some of the things were." Karim Dep. (Sept. 21, 2010) 107:1-2. He also posited that Vancheri was not an engineer. In fact, Vancheri is a licensed civil engineer. Interview with Bonnie Vancheri.

managing subcontractors would be in the range of 10, or 10 to 15 percent.[621] In this case, though, LEAD charged a markup in excess of 125 percent. The records made available to the Special Counsel show that LEAD paid approximately $422,600 to its subcontractors,[622] but it billed Banneker approximately $969,000.00.[623] Even if one assumes that the firm was entitled to some fee for its management and direction of others, and that Barrow performed some substantive engineering work in certain of the areas, LEAD's fees – which Banneker never questioned – were not justified. [624]

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621 Sean Regan, from Regan Associates, described ten percent as a typical markup for management of subcontractors, and doubted that anyone would opine that the industry standard could exceed 20 percent. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010). Jacqui Glover and the LSA engineers said that the mark-up would typically range from 10 to 15 percent. Glover Dep. 163:15; Interview with Carlos Ostria and Steven Goley.

622 LEAD claims to have paid its subcontractors and "1099" independent contractors a total of $422,603.11 for work on the DPR capital projects. *See* Ex.172. Since the records provided to the Special Counsel were incomplete, it was not possible to definitively account for the exact amount LEAD was charged by subcontractors, or what it ultimately paid its subcontractors for their work on the DPR capital projects. For example, LEAD claims to have paid $11,799.16 to Tim White, an independent contractor who served as a project manager. But LEAD did not produce documentary evidence to support that claim, such as invoices or payroll receipts. LEAD's bank records verify that LEAD in fact paid White, but those checks do not match the amount LEAD claims it paid him for the DPR capital projects in particular. For purposes of calculating LEAD's markup and profits, however, we found that LEAD's claimed payouts to be an adequate approximation of what it paid subcontractors for the DPR capital projects.

623 *See* Ex. 2, showing invoices Nos. #1-9 submitted by Banneker to DCHE.

624 Barrow claimed that LEAD's profit margin percentage was only "between 6 to 15, some of them 20, a few of them 20." Barrow Dep. (May 20, 2010) 97:21-98:2. This claim is simply not credible in light of the documentary record, which reflects that LEAD had limited overhead and expenses. Since LEAD's project managers were independent contractors, their salaries are already accounted for in the $422,000 total for payouts to subcontractors. Few supplies were needed since others were doing the testing and engineering drawings. There are no grounds to believe that LEAD's expenses were high enough to decrease its profit margin from 129 to 20 percent. It is notable that as soon as OPEFM got involved in the projects, it immediately sought to reduce the high fees going to the civil engineers. *See* Ex.178, E-mail from Sean Lewis to Timothy White (Feb. 18, 2010 11:11 AM).

a. Consulting and surveying services

After LEAD was engaged to conduct the surveys, it promptly solicited a proposal from Currie. Skinner pressed him to lower his prices, and LEAD hired him on May 15 to complete five surveys at $8,000 each.[625] Within weeks, LEAD began invoicing Banneker for the surveys Currie produced, but at vastly higher prices than Currie charged. For example, Currie charged LEAD $8,000 for the boundary and topographical survey for the Rosedale site on June 9, 2009.[626] LEAD also hired a contractor, Insight LLC, to locate underground utilities at the site, and it paid $3,800 for that component of the survey.[627] Although LEAD thus paid a total of $11,800 to its subcontractors, and it added little or nothing to the process itself, it charged Banneker $48,500 for the Rosedale site survey: a 411% markup.[628]

LEAD's invoice to Banneker included no back-up substantiating its costs. But Banneker transmitted the LEAD invoice to DMPED as part of its May invoice on June 10, applying its 9% markup to LEAD's fee. Banneker accepted the price for the Rosedale survey even though it had access to information that could have provided another measure of how the work should be priced: the architects for the project – CORE – had proposed to use a different engineering firm

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625 Interview with Anthony Currie; *See* Ex.160, (Fort Stanton); Ex. 157, (Guy Mason); Ex. 179, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (May 15, 2009) (Kenilworth); Ex. 159, (Parkview); Ex. 158 (Rosedale). *See also* Ex. 155.

626 Ex. 180, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Jun. 9, 2009) (charging $8,000 for Rosedale survey).

627 Ex. 181, Insight LLC invoice # 2009250 (Jul. 5, 2009).

628 Ex. 182, LEAD invoice # S529-2009 (May 29, 2009). Interestingly, LEAD's invoice to Banneker is dated weeks before the dates of the invoices from its subcontractors. Thus, it appears as if LEAD may have charged Banneker the full cost of the surveying services before they were completed, or at least, before LEAD was out of pocket for them.

that proposed to complete the boundary and topographic survey for only $19,000.[629] Banneker's May invoice also included LEAD's bills for the Guy Mason and Parkview surveys. Currie had completed them for $8,000 each, and LEAD charged $49,200 and $46,800.[630]

Similarly, on the Kenilworth project, Currie charged $8,000 for survey drawings on June 24, 2009,[631] and LEAD paid Insight LLC $2,800 to designate utilities on the site.[632] These two charges, worth $10,800, were LEAD's only third-party costs for surveying the Kenilworth project. Yet on June 26, 2009, LEAD charged Banneker $47,000 for the Kenilworth site survey – a $36,200, or 335%, surcharge over what LEAD had paid its subcontractors.[633] Banneker included LEAD's invoices in its June bill to DMPED.[634]

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629 Ex. 183, Letter from Michael Wiercinski, A. Morton Thomas and Associates, Inc., to Dale Stewart, Core Architects (May 13, 2009).

630 The invoices thus establish that as of early June, DMPED was on notice that LEAD had been hired to provide the surveys before Banneker's contract was executed, and that it was charging fees that should have caught the project manager's attention. The record also reflects that DCHE was provided with copies of the invoices by June 24, 2009 at the latest. *See* Ex. 184, E-mail from Omar A. Karim to Asmara Habte (Jun. 24, 2009 3:21 PM).

631 Ex. 185, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Jun. 24, 2009) (charging $8,000 for Kenilworth survey).

632 Ex. 186, Insight LLC invoice # 2009251 (Jul. 5, 2009).

633 Ex. 187, LEAD invoice # S62-2009 (Jun. 26, 2009). The Fort Stanton project is yet another example of LEAD's billing practices. LEAD paid Currie $8,000 for the survey and A/I/Data $8,466 for utility designation. LEAD then charged Banneker $49,600 for the survey. Ex. 188, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow, Liberty Engineering & Design (Jun. 24, 2009); Ex. 189, Accurate Infrastructure Data, Inc. invoice #1085 (Sep. 2, 2009); Ex. 190, LEAD invoice #S63-2009. Once again, it appears as though LEAD charged Banneker its lump sum fee for the survey in advance of receiving its subcontractors' invoices.

634 Ex. 191, Letter from Omar A. Karim to Jacquelyn Glover (Jun. 26, 2009).

Banneker's acceptance of the May and June LEAD invoices is even more troubling because at the time LEAD submitted them, and Banneker passed them on to DMPED, Banneker and LEAD had not yet executed a contract establishing a price for the surveys. The original May 4 arrangement with LEAD capped the fees for consulting services at $2,500 per park, but it did not specify prices for the surveys.[635] And there is no evidence that Banneker negotiated with LEAD over the prices for the surveys at any time before LEAD submitted its invoices. The parties did not agree to prices for the surveys in writing until July 22, 2009, and by that point, LEAD had already billed for five surveys, and Banneker had already applied its 9% markup and passed the invoices along. [636]

The formal consulting contract for surveying between Banneker and LEAD covered surveys on ten projects,[637] several of which LEAD had already hired Currie to produce. But LEAD decided to enlist more help in completing the surveys because it did not think Currie's small operation could handle all of its needs.[638]

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635 *See* 76, May 4, 2009 letter of intent to contract with LEAD.

636 Karim claimed to have had a large team of lawyers and staff negotiating the contracts, but could not specifically say whether Banneker negotiated with LEAD over the prices for the surveys or not. Karim Dep. (Sep. 21, 2010) 67:18-68:3 ("I didn't negotiate all of these projects. We had a ton of different lawyers involved negotiating a lot of the terms of different contracts. So we probably had, you know, over a dozen different people working on to make sure that the District got the fairest services and fees for the work that it did that are – that vendors who performed for the contract."). But neither LEAD nor Banneker produced a single document reflecting communication concerning the prices for surveys prior to the execution of the July 22, 2010 contract. And we have seen no documentation of negotiations over the terms of that contract.

637 *See* Ex. 151, Consulting Agreement (surveys).

638 Barrow Dep. (May 20, 2010) 90:2-8.

LEAD contacted LSA and solicited a proposal for its surveying services.[639] On July 21, 2009, LSA submitted a proposal to LEAD for six of the ten DPR projects. LSA did not submit proposals for the remaining projects because it was told that other surveying firms had already been selected on those projects.[640] LSA's proposal included a chart, titled "Table A," in which LSA set out how it calculated the pricing for each site. [641] The next day, LEAD submitted its own proposal to Banneker for the surveys. LEAD's proposal also included a "Table A" of prices, which appeared to copy the Table A template from LSA's proposal. Both tables included the exact same seven categories of services that LSA proposed to provide within the field of "Boundary and Topographical Surveying Services."[642] But the two tables differed in one critical respect: LEAD significantly increased the prices on every line item.[643]

For example, LSA proposed to perform surveying services for LEAD at Chevy Chase for a total of $17,780. This included:

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639 Interview with Carlos Ostria and Steven Goley.

640 Interview with Carlos Ostria and Steven Goley.

641 Ex. 192, Letter from Loiederman Soltesz Associates, Inc. (LSA) to Abdullahi Barrow, LEAD (Jul. 21, 2009) submitting LSA proposal, including Table A.

642 Those categories were: "Boundary Survey, Including computations"; "ALTA Survey, Including Description"; "Legal Description"; "Field Run Topography of Site"; "Record Plat"; "Monument Property Corners (Survey to Mark by Subconsultant)"; and "Subdivision Plan."

643 Aside from the price, virtually everything about the table, including its formatting and punctuation, demonstrates that it was a wholesale copy of LSA's proposal. When confronted with the fact that LEAD's proposal to Banneker used the identical table as the one produced by LSA, albeit with higher prices, Barrow claimed that it was a standard table used in the industry. Barrow Dep. (May 20, 2010) 167:9-168:1; 180:19-181:3. Like other aspects of Barrow's testimony, this simply was not credible. The LSA engineers explained that the table was not standard in the industry, and that it took between a few days and one week to create it. Interview with Carlos Ostria and Steven Goley. Barrow's inability to clearly explain the components of the chart also supported our conclusion that he did not develop it.

$5,940 for "Boundary Survey, Including computations,"
$1,500 for "Legal Description," and
$10,340 for "Field Run Topography of Site."[644]

LSA did not include prices for any of the remaining four categories. LEAD's proposal to Banneker the following day offered to perform the same services at Chevy Chase, but for a total $43,000. LEAD's Table A included:

$16,600 for "Boundary Survey, Including computations,"
$6,300 for "Legal Description," and
$15,400 for the "Field Run Topography of Site."

LEAD also proposed to charge $4,500 for a "Subdivision Plan."[645] In short, LEAD simply copied LSA's proposal for surveying services but marked up the prices drastically.[646]

Despite LEAD's inflated prices and the availability of other firms to produce the surveys at much lower rates, Banneker agreed to LEAD's July 22 proposal and signed a contract incorporating it on the very same day. The total price for surveying services on the ten parks was to be $451,900.[647]

Even if one accepts LEAD's contention that since Currie was a surveyor, but not a civil engineer, Barrow needed to add something before Currie's work could be transmitted to Banneker (a contention that could not be substantiated), we find that LSA's proposals provide

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644 Ex. 192.

645 Ex. 151, Table A.

646 And in the end, LEAD retained Currie, not LSA, to do the survey at Chevy Chase for a mere $5500. *See* Ex. 193, Invoice from Currie and Associates, L.L.C., to LEAD (Aug. 10, 2009) (Chevy Chase Park).

647 Ex. 151, Table A. A project manager from Regan Associates recalls thinking that the proposed survey prices were high when she finally saw Table A, but Banneker had assumed responsibility for procuring those services so Regan did not have an opportunity to raise objections to the contract before it was signed. Interview with Bonnie Vancheri.

one potential gauge of what Banneker should have been paying for the civil engineering and the surveying on the projects. LSA is a full service, fully credentialed engineering firm, it provided both surveying and civil engineering expertise, and its prices incorporated its costs, its overhead, and an appropriate profit. Yet for the six parks that LSA proposed to survey for $150,210,[648] LEAD told Banneker that it would charge $235,400[649] – a difference of over $14,000 per survey – for work that LSA was going to perform, and Banneker accepted the proposal with no negotiation.

LEAD hired LSA to perform surveying services for two of the projects, Bald Eagle and Barry Farms. For Bald Eagle, LSA charged LEAD $8,250 for the "field run topography" of the site on September 4, 2009.[650] No other subcontractors performed surveying services for the project, nor is there any evidence that anyone from LEAD contributed to the survey. But on September 27, 2009, LEAD charged Banneker $43,250 – more than 5 times its cost – for surveying services on Bald Eagle.[651]

Similarly, LSA charged LEAD $12,540 for the "field run topography" of the Barry Farms site on September 4, 2009.[652] LEAD also hired A/I/Data for utility designating, surveying, and mapping, and A/I/Data charged $11,000 for those services.[653] Those two charges, worth

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[648] *See* Ex. 192.

[649] *See* Ex. 151, Table A.

[650] Ex. 194, LSA invoice # 0077276.

[651] Ex. 195, LEAD invoice # S922-2009.

[652] Ex. 196, LSA invoice # 0077277.

[653] Ex. 197, A/I/Data invoice #1114.

$23,540, were the only third-party invoices for surveying services on the Barry Farms project. Yet LEAD billed Banneker $47,000 – double its costs – for the same services.[654]

For the remaining projects, LEAD relied on Currie. In addition to the five original surveys, LEAD used Currie to produce surveys on five other sites at prices ranging from $3,000 to $8,000.[655] LEAD also hired third-parties to locate utilities on the properties.[656] As with the other projects, LEAD then drastically marked up its prices in its invoices to Banneker.[657] Neither

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654 Ex. 198, LEAD invoice # S923-2009.

655 Those projects were Chevy Chase, Justice Park, 7th & N Park, 10th Street Park, and Raymond. *See* Ex. 193, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow, Aug. 10, 2009 (Chevy Chase surveying for $5,500); Ex. 199, Invoice from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Aug. 10, 2009) (Justice Park surveying for $4,500); Ex. 200, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (July 24, 2009) (7th and N Park surveying for $4,500); Ex. 201, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (May 15, 2009) (10th Street Park surveying for $3,500); Ex. 202, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Sep. 29, 2009) (Raymond surveying for $6,000). As previously described, LEAD provided Currie with incorrect information for the Justice Park project, so that Currie had to produce a new survey. Currie charged $4,500 for the initial survey, but only charged $3,000 for that second survey. Ex. 203, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Aug. 27, 2009) (Justice Park surveying for $3,000).

656 *See, e.g.*, Ex. 204, A/I/Data invoice # 1084 (Sep. 2, 2009) ($3,864 for 10th Street Park); Ex. 205, A/I/Data invoice # 1074 ($3,720 for 7th and N Park).

657 *See, e.g.*, Ex. 206, LEAD invoice # S/C722L-2009-1 (Oct. 15, 2009) ($39,000 for Raymond survey); Ex. 207, LEAD invoice # S732-2009 (Jul. 31, 2009) ($29,100 for Justice Park survey); Ex. 208, LEAD invoice # C927D-20009-1 (Sep. 27, 2009) ($16,600 for "additional" Justice Park survey).

Barrow, Skinner, nor Karim could provide a credible justification for LEAD's profit margin on the surveys.[658]

LEAD even charged Banneker and the government for its own mistakes. On one occasion, Barrow gave Currie incorrect information about the location of a project, so Currie surveyed the wrong property.[659] LEAD nevertheless invoiced Banneker $29,100 for that survey, for which it paid $4500. Currie was directed to complete a second survey for the proper site for a $3000 fee, but LEAD charged Banneker another $16,600. While Karim was informed of LEAD's mistake and the need to order a second survey on August 20,[660] Banneker included second Justice Park bill in its September invoice and applied the 9% mark-up as it had in July,

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658 Karim adamantly denied that LEAD profited as much on the projects as the record suggests, arguing that there are "all types of services" that are included in LEAD's costs. Karim Dep. (Sept. 21, 2010) 89:6-17. But when asked for specifics, Karim could only speculate: "I know that my staff met with them on a regular basis throughout the project and spent significant hours with…a significant number of their staff to handle the surveys. So if they had three people over there who spent just five hours a week meeting at, let's say, at $200 rate, 200 times three is ... $600 time five hours. That's 3,000. If they did that for ten weeks, that's $30,000 right then, and I know they were doing something." Karim Dep. (Sept. 21, 2010) 90:11-22.

Nothing in the record supports Karim's arithmetic. LEAD never had more than Barrow and one or two project managers working on the projects at any given time, and it was billing for the surveys on a flat fee, and not an hourly basis. Even if it had charged by the hour, the hourly rates set out in LEAD's own proposal were well less than $200 per hour – a LEAD project manager attending meetings would have been billing at $130 an hour. *See* Ex. 82. Karim's argument also fails to take account of the fact that it didn't take three people five hours a week for 10 weeks to meet concerning any one particular survey – LEAD billed well over $30,000 for three surveys in May alone and for two in June.

659 Interview with Anthony Currie. Barrow had shown Banneker an aerial photograph of the site, based on its understanding of its location. After Banneker did not comment, LEAD had Currie produce the survey, but it ultimately proved to be the wrong location. Ex. 206A, E-mail from Abdullahi Barrow, Liberty Engineering & Design to Shamika Godley, Banneker Ventures (Aug. 20, 2009, 15:49 EST).

660 *Id.* Karim has described this as a reasonable mistake, since the property across the street from the site to be surveyed was also called Justice Park, which required no credit to the District.

without explaining the duplication or offering the city any sort of credit for LEAD's error. We received no documents reflecting that DMPED asked any questions.[661]

LEAD's fees included components that were never adequately explained. For several projects, LEAD offered to provide a "record plat" or "subdivision plan" for thousands of dollars each. Barrow defined a record plat as a "plat of a survey that might exist in the surveyor's office that will show the land area. . . ."[662] A subdivision plan is a similar document and is related to a record plat.[663] Record plats and subdivision plans are kept on file with the Office of the Surveyor and can be purchased for a modest fee.[664] Even though it is not clear whether any of these

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661 Interview with Anthony Currie; Ex. 207, LEAD invoice # S732-2009 (charging Banneker $29,100 for a site survey); Ex. 208, LEAD invoice # C927D-20009-1 (charging Banneker $16,600 for an "additional survey"). By contrast, Currie only charged $4,500 for the initial survey, and $3,000 for the second survey. Ex. 199, (Aug. 10, 2009) (Justice Park survey); Ex. 203, (second Justice Park survey).

662 Barrow Dep. (May 20, 2010) 152:15-17. Skinner described a record plat as "just the thing you go down the surveyor's office. They give you a plat. It just lays out your land, you're lots, each square." Joint Roundtable (Apr. 28, 2010) 104:9-11.

663 Interview with Carlos Ostria and Steven Goley.

664 Interview with Anthony Currie; Interview with Carlos Ostria and Steven Goley; Karim Dep. (Sept. 21, 2010) 100:4-5 ("Sometimes you can go down to the D.C. Surveyor's Office and request it.")

Karim did not know whether or not a record plat can be obtained from anywhere else besides the surveyor's office. Karim Dep. (Sept. 21, 2010) 100:6-9. We were told that in certain instances a record plat can be created from scratch. Interview with Sean Regan and Thomas Regan; Interview with Bonnie Vancheri; Interview with Ray Nix. If that is true, we recognize that a record plat would cost significantly more than the administrative fee paid to the Office of the Surveyor. Here, however, the record indicates that the documents were simply purchased from the Office of the Surveyor and nothing suggests they were created anew. In its own proposal to LEAD, LSA offered to provide a record plat for Bald Eagle for $2,500 and for Fort Stanton for $3,500. In its proposal to Banneker, LEAD offered to provide the same services for $3,500 each. The record is not clear as to whether LSA's proposal contemplated a new record plat or simply purchasing the document from the Office of the Surveyor.

documents were necessary for the DPR capital projects,[665] and although they can typically be purchased for a small fee,[666] LEAD proposed to provide those records for several thousand dollars each.

For example, on the Justice Park project, LEAD proposed in its Table A to provide a "subdivision plan" for $3,000 and a "record plat" for $2,500.[667] But according to the Office of the Surveyor, on July 28, 2009 a "subdivision plat" was purchased for just $196.[668] Similarly, LEAD offered to provide a "record plat" of Guy Mason for $5,900,[669] but on August 6, 2009, LEAD's project manager purchased a record plat for only $30, and a subdivision plat for Guy Mason was purchased from the Office of the Surveyor for $196 on July 28, 2009.[670] LEAD also included "record plat" in its price for Parkview at a cost of $6,100.[671] But on August 6, 2009, LEAD's project manager paid $30 for a "building plat" from the Office of the Surveyor.[672]

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665 Regan Associates questioned why those fees were necessary but never received a satisfactory response. Interview with Bonnie Vancheri.

666 The District of Columbia Office of the Surveyor lists its prices at the following website: http://dcra.dc.gov/DC/DCRA/Permits/Surveyor+Services/Surveyor+Fees.

667 *See* Ex. 151, Table A.

668 Interview with Mr. Reed, District of Columbia Office of the Surveyor, by telephone (Apr. 27, 2010).

669 *See* Ex. 151, Table A.

670 Interview with D.C. Office of the Surveyor.

671 Ex. 151, Table A.

672 Interview with D.C. Office of the Surveyor.

For Fort Stanton, LEAD offered to provide a "record plat" for $3,500 and a "subdivision plan" for $3,500. But he Office of the Surveyor could not find any transactions related to that property. For Bald Eagle, LEAD offered to provide a "record plat" for $3,500 and a "subdivision plan" for $4,500. The Office of the Surveyor was unable to locate information related to that project without further information about the site.

Barrow claimed that LEAD had to "take that information and also go to the site and verify that record plat reflects what's on site at the present time that we're doing the survey."[673] Barrow's claim of performing any additional work related to the record plat was not convincing, but even if he devoted some time to verification, the record does not demonstrate that he added sufficient value to justify the thousands of dollars charged.

LEAD's May 4 agreement with Banneker also provided that LEAD would perform "consulting services" for ten parks. LEAD was to be paid a maximum of $2,500 per park for those services, which the contract did not define.[674] LEAD ultimately billed Banneker for that work, describing it in its invoices only as "study and consulting phase."[675] When asked what services LEAD provided, Barrow said that they were "going to do a site visit, do an analysis and develop and inform [Banneker] what kind of specific services is needed for each park because each park was different."[676] He also said that the contract was to "develop specific scope of engineering service that needed for each project."[677] Yet LEAD provided no evidence of any work product that it created as part of its $25,000 fees for consulting. Barrow claims there was no written product, but that he communicated verbally "almost daily" with Banneker to tell them

673 Barrow Dep. (May 20, 2010) 152:19-22. When confronted with the fact that LEAD charged far more for the record plat than it paid, Skinner did not know what justified the significant disparity in prices. Joint Roundtable (Apr. 28, 2010) 110:5-11.

674 *See* Ex. 76.

675 *See, e.g.*, Ex. 187, LEAD invoice # S62-2009 (Kenilworth); LEAD invoice # S63-2009 (Fort Stanton).

676 Barrow Dep. (May 20, 2010) 79:20-80:1.

677 *Id.* at 80:12-14.

what work was needed on each project.[678] While we cannot conclude that LEAD performed no consulting work, there was little evidence that substantiated or explained the consulting fees.

b. Civil engineering services

To fulfill its civil engineering contract, LEAD followed the same pattern of subcontracting the work to LSA and charging an inflated fee. As it had done for surveying services, in July 2009, LEAD a solicited proposal from LSA.[679] In its July 21 proposal, LSA provided a table of prices for each category of civil engineering services, which it labeled "Table A."[680] And just as it had done with the surveying proposal, LEAD turned around and used LSA's template for the "Table A" in its proposal, listing all 27 categories just as LSA had proposed. But once again, LEAD proposed prices for the work that far exceeded the standard mark-up for managing a subcontractor. Banneker accepted LEAD's inflated proposal on July 22.[681]

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678 Barrow Dep. (May 20, 2010) 85:3-14. With respect to the initial consulting and surveying services contract, Karim describes hiring LEAD to "do some limited consulting services and some survey services, because we needed somebody to come on board once we found out the depth of – well, it took awhile to find out really all of the scopes but once we found out how much was involved and the time tables behind it, you can't just go get an architect, find him and have him build a rec center on a 20 acre site without knowing where the site [was] going to be, who got soil issues and that type of things. So we brought them on in the early limited engagement for that, I think, no more than $2,500 a site for the consulting services and then to do limited survey services on an as need[ed] basis for some of the projects that were . . . done early on." Karim Dep. (Aug. 5, 2010) 148:22-149:14.

679 Interview with Carlos Ostria and Steven Goley.

680 Ex. 192, LSA proposal. LSA's proposed "Table A" included both surveying services and civil engineering services. LEAD simply copied the formatting and categories of that table but split it into two separate tables, one for surveying and one for civil engineering.

681 Ex. 209, Consulting Services Agreement between Banneker and LEAD (Jul. 22, 2009) (civil engineering).

For instance, on the Fort Stanton project, LSA submitted an invoice to LEAD for civil engineering services on November 25, 2009 for a total of $11,364.91.[682] Five days later, LEAD submitted an invoice for the exact same services, but charged Banneker $17,905.00.[683] LSA's charges included $4,020 for construction drawings services and $6,130 for design drawings. For those same services, LEAD billed Banneker $6,450 and $9,195, respectively. LEAD also marked up reimbursable costs, such as mileage and parking, by far more than 10 to 15 percent.[684]

LEAD's handling of one of LSA's civil engineering functions, the "due diligence investigations," was a stark example of how it marked up its subcontractors' invoices without adding any value. LSA engineers described "due diligence investigations" as written reports designed to answer the questions of whether what the owner was requesting could be built on the site.[685] As LSA's work progressed, it would charge LEAD a percentage of the total fee for that service, representing the latest portion of the investigation it had performed to date. But the LSA engineers explained that they would not provide a written report to LEAD until it was complete. According to LSA, until the written report had been transmitted, there was nothing for LEAD to

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682 Ex. 210, LSA invoice # 0078249 (Nov. 25, 2009).

683 Ex. 211, LEAD invoice # C1130G-2009 (Nov. 30, 2009). While it is possible that LEAD added charges for its own attendance at the listed meetings, nothing in the record suggests that these were anything more than markups on others' costs. For further examples of LEAD's invoicing practices, *compare* Ex. 212, LSA invoice # 0077980 (Oct. 30, 2009) (charging $5,810 for Chevy Chase Park), *with* Ex. 213, LEAD invoice # C1125B-2009 (Nov. 25, 2009) (charging $12,750 for Chevy Chase Park).

684 *Compare* Ex. 214, LSA invoice # 0077658 (Oct. 1, 2009) (charging $23.65 for "mileage/parking"), *with* Ex. 215, LEAD invoice # C1033B-2009-2 (Oct. 23, 2009) (charging $60 for "delivery/Mileage," a markup of 253%). Although it is possible that LEAD was including its own reimbursable costs in this line item, the record as a whole suggests that this was nothing more than a markup of its subcontractor's costs.

685 Interview with Carlos Ostria and Steven Goley.

revise, or to which it could add value. [686] Nevertheless, LEAD repeatedly marked up LSA's fees for partially completed due diligence investigations.

For example, in its September 4, 2009 invoice to LEAD, LSA charged $1,000 for its work to that point on the Bald Eagle due diligence investigation. The invoice noted that the total fee would be $4,000, but the investigation was only 25 percent complete – thus the charge of $1,000.[687] According to the LSA engineers, they had not produced any work product to LEAD at this point because they had not completed their report.[688] But on September 27, 2009, LEAD invoiced Banneker $2,050 for "due diligence investigation."[689]

For the Raymond Recreation Center, LSA invoiced LEAD $2,437.50 on November 25, 2009 for a due diligence investigation that was 75 percent complete.[690] Five days later, LEAD submitted an invoice to Banneker that charged $4,875 for due diligence on that project.[691] LEAD simply doubled LSA's fees – from $2,437.50 to $4,875 – without having received a completed

686 Interview with Carlos Ostria and Steven Goley.

687 Ex. 194.

688 Interview with Carlos Ostria and Steven Goley.

689 Ex. 216, LEAD invoice # C927A-20-009-01.

690 Ex. 217, LSA invoice # 0078252 (Nov. 25, 2009).

691 Ex. 218, LEAD invoice # C1130L-2009 (Nov. 30, 2009).

report and without having added any value. The witnesses could provide no explanation for this practice.[692]

c. Geotechnical engineering

As noted above, LEAD's response to the RFQ for the DPR capital projects identified Geotechnical Consulting & Testing ("GC&T) as its partner on the projects. Yet when it was time to perform the work, LEAD did not use GC&T's services. Instead, Barrow hired one of GC&T's employees, Ernest Njaba, who was also his friend, on an individual basis.[693] Barrow paid Njaba $500 to $1,000 to review each of Barrow's geotechnical engineering reports on his "private time," and did not involve GC&T in the work.[694]

Njaba's testimony provided evidence that Barrow played a role in the geotechnical engineering, but LEAD's profits were notable nonetheless. On the Kenilworth project, for example, LEAD hired Geomatrix Drilling, Inc. for $1,600 and paid Hillis-Carnes Engineering

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692 When asked explicitly about this discrepancy, Barrow gave vague answers that did not persuade us that LEAD performed additional work. "Due diligence investigation is just looking into the – what needs – what's happening on – on the site, especially what kind of utility information, how we're going to bring in to the waterline, how we're going to bring it to the sewer line. All this stuff I'm responsible." Barrow Dep. (May 20, 2010) 205:5-10. It is unclear how this work was any different from the "consulting" for which LEAD charged $2500 per park.

When asked why LEAD billed $3,000 to Banneker for due diligence when LSA was only 20 percent complete, Barrow replied that LSA "is not the only company who was working on this project, we were doing a part of the due diligence and we also provided some information, sent them information so they might, their part, they're 20 percent of this thing, but we probably went farther than that, so that's what that reflects."). Barrow Dep. (Sep. 30, 2010) 65:20-66:3.

693 Njaba Dep. 69:13-22.

694 Njaba Dep. 72:2-10; *see* Ex. 219, check from Liberty Engineering & Design to Ernest Njaba, Sept. 18, 2009 ($2,000 payment for Rosedale and Kenilworth), check from Liberty Engineering & Design to Ernest Njaba, Sept. 18, 2009 ($500 payment for Parkview). With respect to a payment for $2,500 from LEAD to Njaba, Njaba could not recall which projects were related to the payment, but believed it was payment for two projects. Njaba Dep. 73:16-74:9.

Associates, Inc. $556 for laboratory tests.[695] Barrow also paid Njaba $1,000 to review his report.[696] Although LEAD's third-party costs thus totaled $3,156, it charged Banneker $22,500 for geotechnical engineering on Kenilworth alone.[697] Even Barrow's friend Njaba, who specializes in geotechnical work, observed during his deposition that if those were LEAD's costs, its price for the Kenilworth geotechnical engineering was "really inflated."[698] Even if Barrow wrote the report himself, there is little in the record to justify this 713 percent increase.[699]

The Rosedale project is another example. LEAD paid Geomatrix Drilling, Inc. $2,806 to drill soil samples, which Njaba described as "the most expensive items in geotechnical investigation."[700] It paid Hillis-Carnes Engineering Associates, Inc., $568 for laboratory testing of those samples.[701] And it paid Njaba $1,000 to review the report.[702] Those costs totaled $4,374, but LEAD charged Banneker $14,640 for the geotechnical work on Rosedale.[703] Even if Barrow

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695 *See* Ex. 168, Hillis-Carnes invoice # 83407.

696 *See* Ex. 219, check from Liberty Engineering & Design to Ernest Njaba (Sep. 18, 2009) ($2,000 payment for Rosedale and Kenilworth).

697 Ex. 220, LEAD invoice # S735-2009 (Jul.31, 2009); Ex. 221, LEAD invoice # G920-2009 (Sep. 27, 2009).

698 Njaba Dep. 89:21.

699 Njaba estimated that it would have taken Barrow approximately 12 hours to complete the geotechnical reports that he reviewed. Njaba Dep. 86:6-12. So even if Barrow drafted it himself and charged by the hour at the $180 rate specified in LEAD's July 25, 2009 geotechnical engineering proposal, the fee for drafting the report would have been in the range of $2160.00.

700 Ex. 222, Geomatrix Drilling, Inc. invoice # 148-09 (Aug. 19, 2009); Njaba Dep. 78:14-15.

701 Ex. 223, Hillis-Carnes Engineering Associates, Inc. invoice #83874 (Aug. 31, 2009).

702 *See* Ex. 219, check from Liberty Engineering & Design to Ernest Njaba (Sep. 18, 2009) ($2,000 payment for Rosedale and Kenilworth).

703 Ex. 224, LEAD invoice # G921-2009 (Sep. 27, 2009).

prepared the first draft of the geotechnical reports, the evidence suggests that the prices LEAD charged and Banneker accepted were excessive.[704]

d. Environmental Site Assessments

Barrow hired his friend Mounir Abouzakhm, owner of Geotechnical Engineering & Testing Consultants, Inc. ("GE&T"), to work with him to produce the ESA reports.[705] LEAD paid GE&T between $500 and $1,000 per project for its Phase I ESA work on Barry Farms, Justice Park, Fort Stanton, and 10th Street Park.[706] LEAD paid GE&T another $1,000 for the Justice Park Phase II ESA.[707]

Even if one gives Barrow credit for his collaboration with Abouzakhm in walking the sites and forming conclusions, his mark-ups of the GE&T invoices were remarkable. On Justice Park, for instance, LEAD paid out a total of $2,825 to its subcontractors to perform

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704 Karim approved LEAD's substantial fees for geotechnical engineering without consulting his teaming partner, even though the parks fell within the scope of Regan's responsibilities. On October 27, 2009, after she had received an executive summary of the Fort Stanton geotechnical report, Bonnie Vancheri emailed Skinner, Barrow, Karim and others at LEAD and Banneker to express frustration about the failure to keep her apprised. "[A]s project manager, one of my roles is to keep control of the budget. As requested several times, please send me the proposal to do the geotechnical for Ft. Stanton, Barry Farms, and Parkview. With the tight budgets, it is imperative that we keep track of all costs. And that we get all due diligence work completely in a timely manner so that the pricing is as accurate as can be." Ex. 225, E-mail from Bonnie Vancheri to Timothy White, Cc to Sean Regan, Tom Maslin, Duane W. Oates, Omar A. Karim, Sinclair Skinner, Abdullahi Barrow (Oct. 27, 2009 7:33 PM).

705 Interview with Mounir Abouzakhm.

706 Ex. 226, GE&T Consultants Inc. invoice Nos. 463-467. Abouzakhm noted that his prices can be cheaper than other companies because he has no overhead costs. Interview with Mounir Abouzakhm.

707 Ex. 227, GE&T invoice # 462 ($1,000).

environmental work.[708] Yet LEAD invoiced Banneker $15,300 for the same work – a 542 percent markup.[709]

F. Management and Oversight of LEAD

The Special Counsel's review of LEAD's invoices to Banneker and Banneker's invoices to DMPED uncovered, at the very least, poor management on the part of Banneker as well as the several District agencies responsible for the projects.

As the project manager that hired LEAD, Banneker was primarily responsible for ensuring that the District obtained the best price and value for LEAD's services.[710] Indeed, it was Banneker's job to provide "the most efficient allocation of available funds to achieve the desired improvements" of all the projects.[711] But Banneker apparently accepted LEAD's inflated prices without questioning how much it would actually cost LEAD to provide those services. Karim claimed that Banneker did not ask LEAD for supporting documents from its subcontractors because such a request is not within the industry standard.[712] That explanation is unconvincing in

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708 Ex. 228, Environmental Data Resources, Inc. invoice # 2582880 ($425); Ex. 229, Anabell Environmental Inc. invoice # 6356 ($3,600); *see* Ex. 226, invoice #463 ($500); Ex. 227.

709 Ex. 230, LEAD invoice # C1022D-2009-3 (Oct. 23, 2009).

710 Although Regan Associates handled the program management duties for half of the projects, Banneker handled all of the invoicing. Interview with Bonnie Vancheri; Glover Dep. 153:2-3 ("I think the only difference was Banneker handled the issuing of invoices and any contractual documents.").

711 *See* Ex. 80, July 14, 2009 Contract: Scopes of Work, General Notes.

712 Karim Dep. 84:12-15 (Sep. 21, 2010) ("That's not an industry standard. It doesn't happen like that. We worked – we worked on a lot of projects in my time doing this type of work, and that just doesn't happen."). Interview with Asmara Habte (confirming that LEAD's invoices did not have supporting documents for subcontractors).

light of other witnesses' testimony, including other project managers involved in the DPR capital projects.[713]

Banneker's contractual right to mark up LEAD's costs gave it an incentive to turn a blind eye to LEAD's billing practices. Whether Banneker accepted LEAD's invoices because it wanted to maximize its own markup or simply failed to notice that the invoices were inflated, the evidence reflects a failure of management.

Although Banneker was responsible as the project manager for overseeing LEAD, several District government agencies were also accountable for overseeing the projects, and they share responsibility for the deficiencies in the management of the engineers. DMPED took over management control of the projects from DPR, and retained that control when it contracted with DCHE.[714] DMPED's own project manager for the DPR capital project, Jacqueline Glover, was the primary point of contact between Banneker and the District. She did not participate in the

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[713] Glover Dep. 159:6-13; Interview with Asmara Habte. Thomas Regan, a principal of Regan Associates with several decades of experience in program management, said that he would expect the subcontractor to be identified to the client. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010). Dale Stewart said he generally expects to show his client his subcontractors' bills, although there are some clients that do not want to see them. Interview with Dale Stewart.

[714] Ex. 231, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Feb. 27, 2009); Ex. 232, Memorandum of Understanding Between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority (Jul. 31, 2009).

initial negotiation of LEAD's prices,[715] and had "limited" direct contact with LEAD.[716] She instead communicated any instructions for the engineers through the project managers.[717]

One key aspect of Glover's job was to approve the monthly invoices submitted by Banneker. Glover stated that she would check to be sure the project manager had provided the "appropriate backup," which she described as the invoices from Banneker's contractors.[718] She would then talk with the Banneker project manager to verify that the contractors' work was actually performed.[719] Once satisfied by Banneker, Glover would relay her approval to DCHE, which served as the pay agent for the projects and would pay Banneker for its invoices.[720] She approved and passed along all of Banneker's invoices even though she concluded after the first two that the invoices were "very very high."[721]

Glover testified that when a contractor uses a subcontractor to perform some of the work, the contractor typically includes the subcontractors' bills when it submits its own invoices.[722] For the DPR capital projects specifically, Glover said she was aware that LEAD had subcontracted out some of its work, but she could not recall which engineering services in particular were

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715 Glover Dep. 208:2.

716 *Id.* at 153:17-19.

717 *Id.* at 153:17-19.

718 *Id.* at 157:13-19.

719 *Id.* at 158:12-14.

720 Interview with Asmara Habte.

721 *See* Ex. 105; Glover Dep. 161:9-20.

722 Glover Dep. 159:6-13.

involved.[723] She noted that it would have been helpful in her review of LEAD's invoices if she had received the subcontractors' invoices as well.[724] Yet she did not ask for backup substantiating LEAD's costs at the time, and she approved the invoices for payment by DCHE.[725]

Because Glover did not request that information – even though she was on notice from the first kick-off meeting that LEAD would be relying heavily on subcontractors – she was unaware of the prices LEAD had paid its subcontractors.[726] Glover acknowledged in her deposition that had she been aware of LEAD's actual costs, she would have been concerned

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723 Glover Dep. 159:19-160:1.

724 Glover Dep. 163:16-164:1.

725 Glover Dep. 159:21-160:1. Glover's own description of her level of oversight was unspecific and underwhelming.

> Q: …Did you ever have a conversation with anyone from Banneker Ventures about the amount of Liberty Engineering's fee that it was charging for its surveying services?
> A: I believe I questioned them about it and asked them to provide more information about what they were doing.
> * * *
> Q: And when you asked for more information, what did they give you?
> A: They provided something, I'm not sure exactly and we also met with them, met with LEAD.

Glover Dep. 144:22-145:6, 145:11-14. Glover met with Skinner and Barrow to become comfortable but she had no recollection of what they said to ease her concerns. *See* Glover Dep. 147:18-148:16. She testified that she found the $48,500 price for a survey of Rosedale Park to be high, but she couldn't quite recall what led her to accept it. "I talked with Banneker about the price and what it was for. … I can't recall exactly what was discussed, but obviously they provided enough justification for me to go ahead and approve the invoice." Glover Dep. 161:19-162:3. When asked whether she was concerned that the architects' invoices included a percentage of completion but LEAD's did not, she responded, "I'm sure I probably asked Banneker about that and whatever answer they provided I'm assuming was satisfactory." Glover Dep. 240:11-13.

726 Glover Dep. 162:15-163:4.

about LEAD's prices.[727] She explained, though, that she viewed it as Banneker's responsibility to ensure that LEAD's invoices were sufficient because it was Banneker that had hired LEAD.[728]

DCHE also had a role in administering the contracts and serving as the pay agent and budget administrators for the DPR capital projects.[729] DCHE's project manager for the DPR capital projects, Asmara Habte, was responsible for reviewing the invoices submitted by Banneker.[730] Habte and other DCHE staff reviewed the invoices to make sure they were complete, mathematically correct, and accompanied by any required documentation.[731] They were charged with comparing the invoices to the budgets that DMPED and Banneker had provided. But DCHE did not question whether the District was paying too much for particular services, or whether any contractors had actually subcontracted any work to others. Instead,

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727 Glover Dep. 162:15-163:4.

728 *Id.* at 239:8-19.

729 *See* Ex. 232, MOU between DMPED and DCHA (Jul. 31, 2009).

730 Habte explained that DCHE was not responsible for deciding whether reprogrammings were necessary, which would involve reviewing whether appropriated funds were spent in the proper year and for the proper project. Instead, as budget administrators, DCHE would monitor the budget prepared by DMPED and Banneker and, if funding was nearly depleted for a project, DCHE would inform DMPED and ask DMPED what they wanted to do about it. Interview with Asmara Habte.

731 Interview with Asmara Habte. During the investigation, some Council members asked about notations – "SS" – that were handwritten across several invoices submitted to DCHE from Banneker. They asked if Sinclair Skinner – "SS" – had a role in approving Banneker's invoices, even though he did not work for Banneker or DCHE. When Skinner testified on April 15, he was firm that the initials were not in his handwriting and that he had not signed off on the invoices. Joint Roundtable (Apr. 15, 2010) 223:18-225:20. Asmara Habte later cleared up the mystery when she identified "SS" as a notation used by DCHE staff to signify that an invoice was "superseded" by a subsequent, updated invoice. Interview with Asmara Habte.

DCHE viewed that as DMPED's responsibility, and relied on DMPED's approval of the invoices to indicate that it was satisfied that the work was completed and billed at an appropriate price.[732]

Like Glover, Habte said that she would have expected to see LEAD's subcontractors' invoices as part of Banneker's submission if LEAD did not perform the work itself. She expected such information because DCHE's other contractors provide such supporting documentation when they hire subcontractors. Habte explained that those records would enable her to judge whether LEAD's mark-up was reasonable.[733] But DCHE never received – and it did not ask for – that backup, and it did not object to LEAD's inflated prices.

In sum, the many layers of project management – provided by DMPED, DCHE, and Banneker – confused and obscured responsibilities for the DPR capital projects. DCHE relied on DMPED to ensure that the contractors were actually providing the services for which they submitted invoices to DCHE. When DCHE raised questions about Banneker's invoices, Banneker would say that they had been approved by DMPED and that Banneker's bills were appropriate.[734] DMPED, in turn, relied on Banneker to verify that its contractors were providing value for their services. What no one did, unfortunately, was call upon Banneker to justify LEAD's role in the DPR capital projects or to substantiate its costs. Had anyone done so, they

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732 Interview with Asmara Habte; Dwyer Dep.123:12-126:12.

733 Interview with Asmara Habte.

734 *See e.g.* Ex. 233, E-mail from Asmara Habte to Omar Karim and Carol Rajaram (Jul. 15, 2009 12:13:27 PM EST) and reply E-mail from Omar Karim to Asmara Habte and Carol Rajaram (Jul. 15, 2009 12:28 PM EST) Habte requests supporting documentation for the $100,000 requested for "advance payments and related costs" in invoice #1. *Id.* Karim replies that the advance is for permits and related fees to agencies and states, "DMPED agreed with this approach and amount." *Id.* DCHE paid the invoice.

would have quickly found that LEAD added virtually no value to the projects and wasted tens of thousands of dollars of taxpayer funds.

VIII. AWARD OF THE CONSTRUCTION CONTRACTS

After the architects and engineers had been hired, another of the program manager's key functions was to procure the general contractors who would be responsible for the actual construction. Banneker took the lead role in this process, notwithstanding the fact that the Regans were supposed to share the project management function, and they were assigned responsibility for half of the parks. The selection process overseen by Banneker resulted in the recommendation of several firms with financial ties to Omar Karim and/or Sinclair Skinner: Blue Skye Construction, AF Development, Capital Construction, and District Development Group. Since those ties have not yet been adequately explained, this is another aspect of the inquiry that should be referred to the United States Attorney for further investigation.[735]

The July 20, 2009 Regan Associates consulting contract with Banneker provided that Regan would "play the lead role for half of the projects," and it was contemplated that those parks would include Parkview, Guy Mason, Chevy Chase, Fort Stanton, and Barry Farms.[736] The contract also indicates that Regan's services shall include: "working with Banneker to prepare

[735] There were questions raised in the fall of 2009 about the selection of RBK Construction, a company owned by Keith Lomax, to perform the work at two playgrounds, one as a joint venture partner with Forrester Construction and one alone. The investigation has not uncovered ties between RBK and any member of the selection panel that lead us to recommend a referral of that decision, but the award of the smaller solo job – Chevy Chase – raises questions about the decision to award the contract to RBK when another small contractor received a higher overall score. *See* Ex. 234, Request for Proposals, Construction Services, DPR Capital Projects – DMPED Project Management Services, Interview/RFP Proposal Comparison Sheet.

[736] Ex. 97, Regan/Banneker Letter Agreement.

and issued an RFQ for construction services" and "working with Banneker to evaluate bids and proposals."[737]

Banneker issued its request for qualifications for general contractors for the parks on July 20, 2009.[738] The Regan team had provided some comments on a draft, some of which were incorporated into what went out and some of which were not. The solicitation indicated that based upon the responses, the project manager would develop a short list of contractors to be interviewed. Responses were originally due on July 31, but the date was extended until August 5.[739] In the meantime, Sean Regan informed Duane Oates that the Regan team would be doing its own solicitations for the parks under its management at a later date.[740]

So according to Sean Regan, he was surprised when he was informed that the responses were arriving and were available to be reviewed. He reminded Karim that he had requested that the Regan project managers conduct their own solicitations for the parks under their management. On August 4, Regan sent Jannarone and Karim an e-mail reiterating that his team planned to manage the procurement of the general contractors for Parkview, Guy Mason, Chevy

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737 *Id.*

738 Ex. 235, Request for Qualifications – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Jul. 20, 2009).

739 Ex. 236, RFQ/RFP for Construction Services, DPR Capital Projects, Qualifications/Proposals Received Log.

740 Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

Chase, and Fort Stanton separately.[741] Regan proposed to select a contractor through the Banneker process for Barry Farms only.[742]

Banneker went on to evaluate and score the 58 RFQ responses on its own anyway,[743] and it made the determination of which contractors would be invited to submit proposals for all of the parks without reviewing its decisions with the Regan project managers.[744]

On August 12, the contractors deemed most qualified by Banneker were invited to submit proposals for large projects (construction of approximately 20,000 GSF new recreation center),[745] for medium projects (renovation of 10,000 GSF recreation center),[746] or for small

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741 Ex. 237, E-mail from Sean Regan to David Jannarone, Cc to Duane Oates, Omar Karim, Thomas M. Maslin (Aug. 4, 2009 12:45 PM).

742 One of the Regan Project Managers, Bonnie Vancheri, did look over the responses, and she created a spreadsheet organizing data about the respondents' level of experience, etc., which she transmitted to Banneker. Vancheri did not use any sort of numerical rating system. The Regans do not know whether or how the observations she submitted were incorporated into Banneker's scoring, if at all.

743 Ex. 238, Request for Qualifications for Construction Services, DPR Capital Projects, Initial Response Evaluation and Scoring Sheet (Aug. 5, 2009).

744 The companies with ties to Karim – Blue Skye Construction and AF Development – came out on top. Within the large projects, the Coakley/Blue Skye joint venture topped the list, receiving 94 out of a maximum 100 points, tied with Sigal/AF Development/F&L. Forrester Construction came in 4th with 87 points. In the medium category, Blue Skye was again tied for first, this time with Hamel Builders/District Development Group, both with a score of 88. RBK ranked third in the medium category with a score of 84. *Id.*

745 Ex. 239, Request for Proposals – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 12, 2009) ("approx. 20,000 GSF").

746 Ex. 240, Request for Proposals – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 12, 2009) ("10,000 GSF recreational center").

projects (hardscape and field renovation).[747] Some contractors were considered for more than one category. The requests for proposals indicated that interviews with the selection committee would follow the review of the fee proposals, and the interviews were conducted on August 24, 2009. Seven companies or joint venture teams were rated for large projects, three for medium projects, and two for small projects.[748]

While DMPED was paying DCHE for its assistance with the DPR capital projects, and while DCHE would ultimately be the party that entered into the contracts with the general contractors, the interview sheets indicate that no one from DCHA or DCHE participated in the selection process. The panel included Jacqui Glover, Latrena Owens, and Bernard Guzman from DMPED; David Janifer from DPR; Omar Karim, Duane Oates, and Shayla Taylor from Banneker; and Bonnie Vancheri and occasionally Sean Regan from Regan Associates. Based on the written score sheets, it appears that not everyone in the group was present for every interview.[749] Banneker collected the score sheets, but there was no discussion among the group as to which contractor should be awarded which park. Banneker made that decision on its own or in consultation with DMPED after the interviews, and the Regans were not provided with an opportunity to weigh in on that.[750]

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747 Ex. 241, Request for Proposals – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 12, 2009) ("Hardscape and Field Renovation").

748 *See* Ex. 234.

749 Ex. 242, General Contractor Interview Evaluations, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 24, 2009).

750 Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

On August 31, Banneker informed the bidders of its intent to award the following contracts: [751]

- Rosedale Recreation Center -- $12,091,000: Blue Skye/Coakley Williams joint venture[752]
- Barry Farms -- $10,360,000: Forrester Construction Company/RBK Construction joint venture
- Fort Stanton Community Center -- $7,775,000: Winmar Construction/Dustin Construction joint venture
- Justice Park -- $7,775,000: Winmar Construction/Capitol Construction
- Kenilworth Recreation Center – $7,651,250: Forney Enterprises, Inc.
- Raymond Recreation Center -- $7,598,750: AF Development/Sigal Construction Corp. joint venture
- Bald Eagle Recreation Center -- $3,341,250: Blue Skye Construction
- Chevy Chase Playground -- $1,879,250: RBK Construction
- Parkview Recreational Field -- $660,000: Forney Enterprises Inc.
- Guy Mason Recreational Center – (amount unknown) District Development Group, LLC/Hamel Builders, Inc. joint venture.[753]

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[751] Banneker notified Regan Associates of its choices by email, and Sean Regan recalls being relieved that the large projects under his management had been awarded to teams including well-established construction firms. Banneker mailed out letters notifying the contractors of its intent to award them contracts on August 31, and it submitted a memorandum to DCHE informing it of those "recommendations" on September 7, 2009. Ex. 243, Memorandum from Duane W. Oates, Banneker Ventures, to Lawrence Dwyer, DC Housing Enterprises (Sep. 7, 2009). The investigation did not reach the question of whether or not these companies ultimately received contracts once the projects were moved to OPEFM.

[752] On October 20, 2009, Banneker also issued a notice to proceed to Blue Skye Construction LLC for the construction of Rosedale.

[753] Ex. 244, Letters from Duane W. Oates to contractors regarding "Notification of Award"/Construction Services (Aug. 31, 2009); *see* Ex. 245, "Pending DPR General Contracting Services Contracts," for contract amounts. RBK was evaluated as part of a team with Forrester for large projects and alone for small projects. All of the ratings for the Forrester/RBP team were generally high, although Vancheri rated RBK and Forrester separately, and it was Forrester that

(footnote continued on next page)

Separate from this process, Banneker also awarded a $146,000 contract to Capital Construction to renovate Gibbs elementary school, which was going to house the Rosedale Recreation Center activities while the Center was being demolished and rebuilt.[754]

The investigation has revealed certain financial ties between Omar Karim, whose company was managing the competitive procurement, and some of the successful bidders, and it has also revealed ties between some bidders and Sinclair Skinner:

- In 2008 and 2009, Blue Skye paid Karim's sole proprietorship, Liberty Law Group, over $50,000. Blue Skye made a payment of over $10,000 just eight days before it submitted its August 19, 2009 response to Banneker's RFP.[755]

- AF Development, which was selected as part of the team to build the $7.6 million Raymond Recreation Center, was also one of Karim's clients, and it paid $53,500 to Liberty Law Group between October of 2008 and November of 2009, including $10,500 on March 12, 2009 (memo says "Jan Feb Mar); $3500 on April 3, 2009;

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got the high score. RBK alone was evaluated by Guzman, Owens, Oates, Taylor, Karim, Glover, Vancheri, and Sean Regan. The Regan and Vancheri ratings were considerably lower than the others. In the end, four of the seven contractors scored higher than Forrester/RBK – which received a score of 78.1 out of 100 points. *See* Ex. 234. The large contractors who scored higher – Blue Skye/Coakley (92 points), Dustin/Winmar (87.7 points), FEI Construction (85.2 points), and Signal/AF/F&L (78.3 points) all received notices of intended awards as well, but it is unclear why Forrester/RBK was selected for the second largest project instead of other contracting teams that scored higher.

For the medium projects, RBK received a score of 75.8, with its proposal and interview receiving only 8 out of 20 possible points. All of the other medium and small contractors scored higher -- Blue Skye, Hamel/DDG, FEI, and HRGM. All but HRGM, which also scored higher than Hamel/DDG, received notices. There is nothing in the record that would explain Banneker's selection of RBK over HRGM; while some of the interviewers raised questions about HRGM's community involvement, those assessments were reflected in the scoring and HRGM received a higher overall score than RBK.

[754] Ex. 246, Proposal from Capital Construction, Inc., to Banneker Ventures, LLC (Jul. 29, 2009).

[755] Ex. 247, Check # 1196 from Blue Skye Development LLC account to Liberty Law Group (Aug. 11, 2009) ($10,500).

and $7500 on July 1, 2009 ("May, June, Aug"). Monthly payments of $2500 payments were made from August through November of 2009.[756]

- Capital Construction, which was awarded Justice Park in a team with Winmar Construction, and was also selected to handle the renovation of Gibbs Elementary School, paid Skinner's Liberty Industries $54,500 between August of 2008 and March of 2010, including $10,000 on September 10 of 2009. The memo lines on the checks describe them as loan reimbursements.[757]

- District Development Group, a successful bidder teamed with Hamel Brothers on Guy Mason, made payments totaling $9000 to Liberty Industries between July and December of 2008.[758] While several of the interview sheets from their August 24, 2009 presentation commented on the fact that the companies had worked together only once before,[759] Karim wrote on his evaluation: "Experienced working together for 20 years!"[760]

Karim did not disclose his financial ties to the general contractors to either his joint venture partner or to city officials. Thomas Regan observed during his interview, "it would give me heartburn," if one of the bidders had been paying Karim a consulting fee to improve its responses to solicitations.[761] Even Duane Oates, one of the Banneker project managers, observed

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[756] Ex. 248, Check #'s 3079, 3099, 3217, 3259, 3274, 3302, 3323, from AF Development, LLC, payable to the Liberty Law Group.

[757] Ex. 249, Check #'s 1210, 1239, 1286, 160, 5107 from Capital Construction Enterprises Inc. payable to the Liberty Industries, LLC ("reimbursement of loan").

[758] Ex. 250. District Development lists 3215 Martin Luther King Avenue, S.E. as its address on its proposal; this is one of the addresses also used by Skinner in LEAD's October 2008 and September 2009 applications with the D.C. Small Business Administration for upgraded certification as a CBE.

[759] *See, e.g.*, Ex. 251, General Contractor Interview Evaluation of Hamel/DDG by Jacqui Glover ("Old Congress Heights school only project worked on together") and Ex. 252 General Contractor Interview Evaluation of Hamel/DDG by B. Guzman ("as a JV [illegible], not very experienced…").

[760] Ex. 253, General Contractor Interview Evaluation of Hamel/DDG by Omar Karim.

[761] Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

that in his eyes, such financial relationships would have constituted a conflict of interest, and that the information would have made a difference to him in making his recommendations.[762]

As noted previously, during his deposition in August of 2010, Karim took the position that payments made to Liberty Law Group fell outside the scope of the Special Counsel's investigation and he declined to answer any questions about the firm.[763] The Superior Court rejected his contention and on September 17, 2010, ordered Karim to answer questions about these matters. But his testimony was unhelpful, to say the least.

> Q: Well, but Liberty Law Group was providing community consulting services. What did it do in the nature of community consulting services?
> A: Whatever was asked of us.
> Q: Well, did you meet with anybody as part of community consulting services.
> A: You have to be more specific about that.
> Q: Did you ever meet with any – … Do you recall ever meeting with anyone as part of providing community consulting services?
> A: Like whom are you referring to?
> Q: Anybody.
> A: I'm sure I met with people over the last three years.[764]

Karim professed to be unable to recall who he met with or whether he prepared invoices, and he did not recall that he generated any written work product.[765] While he firmly maintained that that the payments he received from his consulting clients had nothing to do with their obtaining government contracts or contracts related to the DPR projects, he could provide no information about what the money *was* for and offered nothing that would explain why Liberty

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762 Interview with Duane Oates (Nov. 9, 2010).

763 Karim Dep. (Aug. 5, 2010) 47:20-48:18.

764 Karim Dep. (Sep. 21, 2010) 38:1-38:15.

765 Karim Dep. (Sep. 21, 2010) 174:20-177:16.

Law Group was receiving payments from Blue Skye at the very time that Banneker Ventures was considering Blue Skye's proposal and recommending that it receive two contracts.

> Q: What did the Liberty Law Group do for Blue Skye Construction?
> MR. BOLDEN [Counsel for Karim]: I'll allow him to answer subject to the attorney client privilege. …
> A: I believe they're consulting work.
> Q: What sort of consulting work?
> A: Whatever consulting they asked us to do, but I do know it had nothing to do with DPR capital projects nor any city contracts or public contracts or any of those types of things. And we have been doing consulting for them for two years, you know, prior to, you know, us even getting involved with any DPR Capital projects, and it wasn't for anything related to the DPR capital projects at or any other government project. That's not – we don't do government consulting.
> Q: Who did you speak with at Blue Skye Construction about performing consulting services for Blue Skye?
> A: I don't recall.
> Q: Well, how many individuals do you know at Blue Skye Construction?
> A: They've got a lot of people over there.
> Q: I understand they may have a lot of people over there. My question is who do you know.
> A: I know a number of the people over there.
> Q: Well, do you – you indicated that you know Scottie Irving.
> A: Yeah, I know –
> Q: He's the president, correct?
> A: Yeah, to my knowledge.
> Q: Did you speak with Mr. Irving about consulting services that you were – that Liberty Law Group was performing for Blue Skye Construction?
> A: Yep.
> Q. Did you speak with anyone else besides Mr. Irving?
> A: I don't recall.
>
> * * *
>
> Q: … [T]ell me about your conversation with Mr. Irving and the specifics of how it is that Liberty Law Group came to provide consulting services for Blue Skye Construction?
> A: Oh, we provide consulting services for, you know, a number of different clients and on a, you know – there are a range of different type of companies and I don't recall our, you know, first conversation or you're talking about over, you know, numerous years of having that firm.
>
> * * *
>
> Q: … [M]y question is describe the conversation that you had with Mr. Irving about what Liberty Law Group could do for Blue Skye Construction, the sort of work they could do for them.

A: I don't recall the initial conversations …
Q: Well, what would be – what would be the typical way you would have – you would solicit business or go about getting business? And describe how you would market Liberty Law Group's consulting services.
A: I don't market Liberty Law Group services. The firm is no longer in existence.

* * *

Q: Can you provide … any specifics of any conversation with anyone at Blue Skye about what it is that Liberty Law Group or you individually were going to do in the nature of consulting services for Blue Skye Construction?
A: There wasn't me individually. So my law firm, and I do know that none of it had to do with Blue Skye Construction paying us to get any work. They absolutely – and when they paid us in 2009, it was way prior to us selecting them. It was months that they – they – they paid us the last payment. It was for work that they – that we had done for the firm several months before even the RFQ or RFP was even put on the street. So we didn't—so just to be clear, they weren't paying to get any contracts with us. They do a lot of other stuff in the District, both public and private, and they select who – I mean they – they were selected with a dozen other general contractors who we do no business with, my law firm, and who didn't pay us a nickel over any type of time period, and the work that we did for Blue Skye Construction had nothing to do with their being selected for the DPR contract or any other contract to do with the District.
Q: … What did Liberty Law Group do for Blue Skye Construction?
A: Oh, consulting, consulting, community consulting. They do a lot of work in the community, right? They hire brothers and sisters who just got out of the pen, you know. They, you know, give people jobs and that type of thing.
Q: So did you do any – did you do any of the work, the consulting work for Blue Skye Construction?
A: My firm did.
Q: My question is did you.
A: I'm the only person – the only person that's part of the firm. So?
Q: So the answer is, yes, you, as part of Liberty Law Group actually did the consulting.
A: Well, you have to be specific. I mean this was, you know – we haven't done any work with the firm in over a year. So I have a dozen different clients, and I quite frankly don't recall it being a year ago.[766]

Brian Scott Irving, of Blue Skye Construction, did remember how it was that he came to work with Omar Karim, and his testimony contradicted Karim's assertion that it had nothing to do with obtaining government business. At his deposition on November 12, 2010, Irving

[766] Karim Dep. (Sep. 21, 2010) 173:21-175:19, 176:5-177:9, 177:17-179:20.

explained that his firm hired Liberty Law Group for the specific purpose of enhancing its ability to compete for government contracts: "it provides us with labor and an understanding of government contracts."[767] He explained that Karim approached him shortly after Blue Skye submitted a proposal with Coakley Williams to serve as the general contractor for the Walker Jones project, for which Banneker was serving as the project manager along with Regan. Karim advised Irving that Blue Skye was not well represented in its proposal. According to Irving, Karim then offered, for a fee, to help Blue Skye understand the technical aspects of construction, build capacity, and make a stronger appearance in response to future solicitations. Irving began meeting with him regularly for that purpose, and Karim provided him with proposals that other contractors had submitted which they would review and discuss.[768]

> So he would have like manuals or other bid sheets that people had turned in, and we would review them, and some of them dealt with technical questions that I had no understanding of. So we would review them and every time I would go after a job, I would apply these technical questions or these QC questions dealing with – or safe developer, safety manual. So that's what he would help me with.[769]

As part of Liberty Law Group's consulting services, Irving also met with Skinner, who as Irving recalls, handed him a Liberty Law Group business card bearing his name at a party. Skinner's assistance related to how to operate within the community – how to understand the Advisory Neighborhood Commissions, and how to hire from the community, including ex-offenders returning home.[770]

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[767] Deposition of Brian Scottie Irving, Blue Skye Construction (Nov. 12, 2010) 11:15-16.

[768] The investigation did not reveal whether Karim showed Irving proposals he had received in his capacity as the city's program manager or whether these were samples he obtained from other sources such as his previous work experience.

[769] Irving Dep. 23:19-24:4.

[770] *Id.* at 28:15-30:2.

> My conversation with Skinner was – was kind of like he used the term which I was comfortable with, "black." "I need to talk to you about how you incorporate our people into what you're doing and how you uplift our community."[771]

Skinner and Karim referred Blue Skye to African-American architects, attorneys, and other consultants:

> Q: Is it correct that basically what … Liberty Law Group did for you was just give you the names of these individuals to contact?
> A: A little bit more than that, but yeah.
> Q: All right. What more did they do for you?
> A: Make sure that African Americans share our money together, and that's why these African Americans was used, that we developed these shops in DC.
>
> * * *
>
> Q: Did you expect to pay a monthly fee just to get the name of someone who might be able to help you?
> A: Yes.
> Q: Did you expect that in, you know, trying to develop business for the African American community some of your – some of your friends, whoever they were, or acquaintances would help you do that without a fee, in other words, would give you names? "You ought to talk to this person" –
> A: I have never met that person.
> Q: – or they referred you to that person?
> A: I have never met that person.
> Q: What? You've never met the –
> A: I have never met a person that never gave a name without a fee… In construction.[772]

When it came to answering questions about the solicitation for the DPR projects in particular, Irving could not recall whether he had any conversations with Karim or Skinner related to either Blue Skye's proposal or his interview.[773] He testified that he stopped utilizing

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771 *Id.* at 29:16-21.

772 *Id.* at 73:20-74:6; 76:12-77:6.

773 *Id.* at 56:20-57:8

Karim and Skinner's services when "all hell broke loose" concerning the Banneker and Liberty recreation center contracts.[774]

Despite his personal involvement in the Blue Skye relationship, Sinclair Skinner did not advance the inquiry.

> Q: Did you provide any consulting services, either yourself individually or through your company, Liberty Industries, to Blue Skye Construction, LLC or to Blue Skye Development?
> A: At this moment I don't – I can't recall specifically. I know I didn't do anything related to transfer of funds…[775]

After initially refusing to answer questions about Liberty Industries, he later agreed to do so. But his "answers" were not really answers at all.

> Q: … What is general consulting?
> A: It's consulting.
> Q: Can you be more – any more specific than that?
> A: No.
> Q: Based on the work you did for any client, and without necessarily at this point getting into the identity of any client, what sort – can you give me some examples of the sort of work that you have done for clients beyond describing it as consulting? Can you be more specific?
> A: Yes. I don't recall any details but I'm clear that it had nothing to do with determination of policies, consulting in procedures or practices surrounding the transfer of funds or authority via the memorandum of understanding or any other instrumentality for the Department of Parks and Recreation capital projects. I'm positive the consulting had nothing to do with that.
> Q: … [M]y question is really aimed at what it did relate to, what it – what was involved in consulting. So that's the question that I have for you now.
> A: Yeah, I can't recall. But I know for certain it didn't involve the transfer of funds.
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> * * *
>
> Q: Have you done any community consulting?
> A: Oh, I'm sure I have.

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774 *Id*. at 35:7-10. While Karim could not recall whether Liberty Law Group generated any invoices or documents, Blue Skye was able to provide some records memorializing the relationship. Blue Skye's files included not only invoices from Karim, but also an email from Skinner attempting to collect on Liberty Law Group's invoice.

775 Skinner Dep. (Oct. 6, 2010) 16:5-11.

Q: Do you recall ever having done any community consulting?
A: Nothing specific but I have background in community organizing and I'm definitely capable of doing so.

* * *

Q: Can you be more specific other than simply saying that community consulting is consulting in the community?
A: No.[776]

In light of this record, more investigation is needed concerning the payments made to Liberty Law Group by Blue Skye and other contractors.[777] And while the bank records reveal that District Development and Capital Development made payments to Skinner's Liberty Industries, and not to Karim's Liberty Law Group, given the unexplained and overlapping relationships between Liberty Law Group and Liberty Industries, the payments to Liberty Industries warrant further inquiry as well.

There is insufficient evidence to enable us to conclude whether the payments made to Liberty Law Group and Liberty Industries by contractors bidding for city work were made for independent, legitimate reasons or whether they were part of an improper effort to affect the process. While the expansion of opportunity for minority owned contractors is an important goal – and indeed, preferences for local and disadvantaged businesses are codified in D.C.'s procurement laws – and while it is laudable for businessmen who achieve success to assist up-and-coming companies seeking to enter the market behind them, the evidence raises questions as to whether Karim was taking advantage of his status as the city's project manager to market that

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[776] *Id.* at 46:10-47:14, 48:2-14.

[777] Anthony Floyd, the owner of AF Development was scheduled to be deposed on December 14, 2010, but on December 13, he cancelled the deposition, citing the need to obtain counsel and holiday-related conflicts that would require deferring the deposition until 2011. In light of the recommendation that the matter be referred for further investigation, the decision was made not to prolong the investigation further in order to obtain the testimony of other witnesses, on these issues.

mentorship as a paid service, and whether he was selling the service to would-be city contractors at the same time that he was entrusted with making unbiased decisions about the disposition of city funds. At the very least, the facts that have come to light so far indicate the existence of a significant undisclosed conflict of interest; at worst, they raise the question of whether the payments were part of an improper scheme. Without expressing a view as to the likely outcome, we recommend that the Council refer this matter to the United States Attorney for further investigation.

IX. EVENTS AFTER THE INVESTIGATION BEGAN

A. The Funds Cutoff and the Stop Work Order

After the press began reporting on the Banneker contract and the Committee held its initial Roundtable hearing on October 30, 2009, there was considerable discussion both within the government and between the government and its contractors about how to proceed. On November 2, Sean Regan wrote to Glover and asked: "We've had a couple contractors and consultants ask us if the projects are on hold or if they should keep working on the design and estimating going on right now." Glover sought Jannarone's guidance on how to respond, and he directed her to "keep moving, get the contracts signed and ready to send to council."[778]

On November 3, the Council voted to suspend the flow of funds from DMPED to DCHA for the parks projects.[779] Since DCHA viewed DMPED as its "client" on the parks projects, on

[778] Ex. 254, E-mail from David Jannarone (EOM) to Jacquelyn Glover (EOM) and Sri Sekar (EOM) (Nov. 2, 2009 1:20 PM). *See also* Ex. 255, E-mail from Erika Lehman, Regan Associates, to Craig Atkins, Jeff Lee, Abdullahi Barrow, *et. al*. (Nov. 12 2009 10:34 AM) ("our project managers at DMPED are asking us to keep moving forward with all projects in spite of the uncertainty").

[779] Ex. 256, Department of Parks and Recreation Budget Transparency Emergency Act of 2009.

November 4, the DCHA Executive Director, Adrienne Todman, wrote a letter to the Deputy Mayor seeking direction.[780] The letter to Santos asks: "In light of the Public Roundtable on Friday, October 30, 2009, the MOU and the contract with Banneker Ventures, LLC, please advise how DMPED would like DCHA to proceed with the MOU and the contract with Banneker Ventures, LLC for program management."[781]

At the same time, William Slover, the Chair of the DCHA Board and therefore a member of the DCHE Board, was concerned that DCHE could find itself responsible for charges for work performed on the projects that it could not pay. He came to the view that the agency could best protect itself by transferring responsibility for the park projects back to DMPED. Slover consulted with the DCHA General Counsel, who drafted a proposed resolution to accomplish that end.[782]

Slover discussed his proposal with fellow Board members during the informal brown bag session that preceded the November 11 monthly Board meeting. According to Adrienne Todman, the reaction was "mixed:"

> [T]here were some board members who fully supported what he proposed. Folks were very nervous about the scrutiny. It's the first time the Housing Authority had been under such severe scrutiny. But there were some board members who thought that, you know, we began a partnership with DMPED and we should see it through.[783]

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780 Ex. 257, Letter from Adrienne Todman to Valerie Santos (Nov. 4, 2009).

781 When asked during her deposition, Valerie Santos could not recall whether she responded to Todman's November 4 letter or not. Santos Dep. 89:1-2 Nor did she know whether she had referred it to the OAG for a response, although she recalled consulting with that office. *Id.* at 89:7-10.

782 Ex. 258, Resolution 09-42, DCHA, Notice of Termination of Memorandum of Understanding.

783 Deposition of Adrianne Todman, DCHA (Sep. 24, 2010) 35:8-14.

For her part, Todman "was trying to find a solution that would protect DCHA. I had some concern about an outright termination, if it would look like we were somehow doing something that was inappropriate."[784]

Valerie Santos, the Deputy Mayor, sat on the DCHA Board, and she was strongly opposed to Slover's approach. LaRuby May, another DCHA Board member, remembered little about the Board meeting when she was deposed,[785] but she indicated that she "just really tried to give a good look at how it would affect the residents that we are privileged to serve."[786] Looking at it from the standpoint of the communities' needs, she concluded that it was important to continue work on the recreation centers.[787] The resolution was not put forward for a formal vote at the November meeting.

On November 13, the Attorney General sent a letter to Adrienne Todman and the DCHA Board containing his recommendation on how the agency should proceed. Nickles wrote:

> I believe the solution is for DCHA on its own behalf and on behalf of DCHE to inform the Council of the potentially devastating impact of its emergency and temporary legislation on the DCHE/Banneker contract, specifically, and recreation projects in general and submit the contracts on an emergency basis for approval at the Council's December 1, 2009 legislative session. Such legislation should exempt the contracts from the emergency and temporary legislation prohibiting the transfer of any funds to DCHA relating to DPR projects.[788]

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784 Todman Dep. notes.

785 May Dep. 39:14-40:13.

786 May Dep. 51:1-3.

787 *Id.* at 51:7-8.

788 Ex. 262, Letter from Peter J. Nickles to Adrianne Todman (Nov. 13, 2009).

Nickles sent a copy of his letter to every member of the DCHA Board and to Froelicher, the DCHA General Counsel.

On November 16, Froelicher responded. He outlined the nature of the agency relationship established between DMPED and DCHA under the terms of the MOU and pointed out that DCHA/DCHE now lacked the funds it needed to perform its responsibilities. Froelicher took the position that under the terms of the MOU, it was DMPED's responsibility to seek Council approval for the program management contract.[789] Todman agreed with this position.

> We actually responded to him and suggested that it was actually a project that was owned and sponsored by the city government and that we would not take the lead in terms of providing these matters to the council. In having had reviewed the MOU, it was clear that it was the responsibility of DMPED to engage in certain local government matters.[790]

Meanwhile, according to Larry Dwyer, the Executive Director of DCHE, the agency was becoming increasingly concerned that it could incur additional liability to pay contractors at a time when it was unclear whether the funds to pay those contractors would ever be forthcoming. Therefore, the decision was made to suspend all work on the projects. On November 20, 2009, Dwyer transmitted a letter to Banneker indicating that all work must stop as of November 30.[791] DCHA Board members agreed with this approach.[792]

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789 Ex. 259, Letter from Hans Froelicher to Peter J. Nickles (Nov. 16, 2009).

790 Todman Dep. 32:21-33:5.

791 Ex. 260, Letter from Larry Dwyer to Omar Karim (Nov. 20, 2009) with delivery receipt attached.

792 May Dep. 41:10-21 ("[W]e had an obligation to make sure that we didn't have vendors or contractors working beyond a point that we could pay them…. I think we issued a stop work notice, I don't know, effective in November or at some point. So I know that that was something I was definitely in support of, to make sure that we didn't allow people to work beyond what we could pay them.").

B. The December 2009 Change Order and MOU

After the work stopped, DMPED took steps to resolve the conflict with the Council in the hope of getting the projects moving again. David Jannarone took charge of the effort,[793] and he circulated a checklist of tasks to be completed by DMPED, Banneker, and DCHA.[794] Jannarone testified that "when the Attorney General issued an opinion that the contracts should go to Council, we started this process to send them to Council."[795] He stated that the City Administrator directed him to make sure it happened.[796]

Neil Albert confirmed that as City Administrator, he supported the effort to revise the contracts and obtain Council approval. He testified that at the time, the executive branch was engaged in informal conversations with some members of the Council and that they were optimistic that the effort to package the contracts to be submitted to the Council after the fact would solve the problem.

> … I had a voice in that and my voice was to make sure that the contracts went to the Council. I had conversations with Council members about it, particularly Council member Harry Thomas about sort of what is the best way to move the projects forward, getting City Council approval. I think we both, Harry and I both were of the opinion that we shouldn't penalize the residents of the District of Columbia for some, my words, "mistakes" on behalf of the municipal government.[797]

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793 Glover Dep. 209:8-11.

794 Ex. 261, E-mail from David Jannarone (EOM) to Omar Karim (Dec. 4, 2009 7:41 PM) with DPR Capital Projects checklist.

795 Jannarone Dep. 131:6-9.

796 *Id.* at 131:12-15.

797 Albert Dep. 161:5-14.

Jannarone also testified that he had reason to believe that the Council would be receptive to the effort.

> I was involved in conversations about, "What do we do now to get these projects done?" And I was involved in conversation with every single person including every single Councilmember about that issue.
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> * * *
>
> [I] spoke with many, many Councilmembers about this. Worked with many Councilmembers to figure out how to resolve this issue and move the projects forward.[798]

Jannarone identified Councilmembers Harry Thomas, Marion Barry, Kwame Brown, Tommy Wells, and possibly Yvette Alexander as those with whom he spoke.[799] Glover also believed that the Council was aware of what Jannarone was attempting to accomplish. "I don't really know the specifics, at least I can't remember, but per some conversation that Mr. Jannarone had with some of the Council members, I guess, they came to some type of understanding that if Banneker were to change their contract around then it could be presented to Council for approval and it might be approved."[800]

The change order submitted to DCHA for execution reflected the expanded scope of work, and it also reduced the fees that had been the subject of criticism at the earlier hearings. Jannarone explained:

> It was actually Kwame Brown who was working with all the Councilmembers again individually to try and come up with a package that they felt comfortable with and approve. As part of that, we went back and beat them down on the markup per my conversation with Kwame Brown.[801]

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798 Jannerone Dep. 128:2-6, 132:7-10.

799 *Id*. at 132:13-14.

800 Glover Dep. 214:10-16.

801 Jannarone Dep. 138:17-22.

While the original contract provided for a fixed fee of $4.2 million and a 9% mark-up on payments to consultants,[802] the change order increased the fixed fee commensurate with the expanded scope of work but reduced the percentage of the mark-up on consultants to 5% and capped the amount that could be paid under that provision at $350,000.[803] As was the case with the original contract, it was DMPED and not DCHA that negotiated the terms of the agreement.[804]

While DCHA resisted taking the lead, it worked with DMPED to revise the MOU and the contract so that the work could resume. According to LaRuby May, "I do recall there trying to be something, you know, an amicable like something that we can work this out in order to move forward or between DCHA and DMPED and the Council and all of the parties involved…"[805] She testified that once it was determined that the contract needed to be submitted to the Council, the object of the exercise was to make sure that the Council had a complete package that fully reflected the scope of the work.[806] Todman, the DCHA Executive Director, handled the issue on the DCHA side.[807]

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802 Ex. 80, Contract for Services between DCHE and Banneker Ventures, Contract No. 2009-05 (Jul. 14, 2009), § 9.A. I and II.

803 Ex. 263, DC Housing Enterprises Resolution 09-15, Change Order to Contract for Project Management Services regarding DMPED/DPR Capital Construction Projects (Dec. 9, 2009).

804 *See* Todman Dep. 20:1-7, 44:12-21; Dwyer Dep. (Aug. 6, 2010) 29:2-32:8.

805 May Dep. 44:19-45:1.

806 *Id.* at 42:18-43:9.

807 *Id*. at 45:15-21.

On December 9, the DCHA Board was asked to vote on a resolution to amend and increase the MOU,[808] and the DCHE Board (consisting of 3 DCHA Board members and Todman) was presented with a resolution to execute the change order to its contract with Banneker.[809] Todman explained that there had been discussions between DCHA and DMPED, "its client," about taking the DPR contract to the Council, and that DMPED decided it wanted the contract to reflect the full scope of the work to be performed.[810] When she was asked why it was being done in December, after the Council had cut off the money, Todman's response was:

> DMPED wanted to take the contracts to the Council. We had done the stop work order and no work was happening. DMPED decided it wanted the parks built, so it wanted to get past the issue of Council approval by getting Council approval, hoping the work would be approved and continued.[811]

While city officials may have believed that the effort to have the Council ratify the contract retroactively would succeed, the DCHA Board was placed on notice that at least some members of the Council would take a dim view of any effort to expand the MOU or the Banneker contract at that point in time. Councilmember Barry personally attended the DCHA Board meeting on December 9, 2009 at which the resolution to increase the MOU to $99 million and to execute the change order with Banneker was discussed. Barry informed the Board that he was "shocked" and "outraged" that DMPED and DCHE were even considering taking such action in the middle of a controversy that had tarnished both the city and the Housing Authority, particularly when the Council was poised to take action and the projects were likely to be sent to

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808 Ex. 264, DCHA Resolution 09-49 (Dec. 9, 2009) (approving amendment to MOU with DMPED regarding Capital Construction Projects).

809 Ex. 265, DC Housing Enterprises Resolution 09-15 (Dec. 9, 2009) (change order).

810 Todman Dep. Notes.

811 Todman Dep. Notes.

OPEFM.[812] He warned, "the climate down there on the City Council is very toxic right now."[813] The Board's reaction to the resolutions was "mixed but ultimately successful."[814] It approved the resolution by a vote of 5 to 3.[815]

Thus, although the activity in December was not universally approved, it seems to have been nothing more than an effort to reconcile the governing documents with the evolution of the project, and it did not represent the first attempt to get that done. The record reveals that Banneker prepared change orders along the way when it was asked to manage the renovation of additional parks, although there is no indication that they were ever signed by DCHE.[816] The documents produced by city agencies also include many emails between DPR and DMPED exchanging drafts of MOUs that would have transferred additional funds and more accurately reflected the reality of the work being overseen by DCHA.[817]

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812 Ex. 266, DCHA Board Minutes (Dec. 9, 2009) at 30-56.

813 *Id*. at 55.

814 Todman Dep. Notes.

815 During his interview, Slover characterized the non-unanimous vote as an extraordinary event. When Todman was asked whether it was unusual for the Board to pass a resolution without consensus, she said, "At that point, no, but it was unusual given the history of the board." Todman Dep. Notes.

816 *See* Ex. 267, "Change Order No. 1 to Contract for Services," signed by Karim on Aug. 1, 2009; Ex. 268, "Change Order No. 2 to Contract for Services," signed by Karim on Sep. 1, 2009; and, Ex. 269, E-mail from Carol Rajaram, Banneker Ventures to Asmara Habte, DCHA (Oct. 28, 2009), transmitting change orders 1-3.

817 *See e.g.*, Ex. 270, E-mail from Jacquelyn Glover (EOM) to Bianca Fagin (DPR) and David Janifer (DPR) (Mar. 16, 2009), transmitting MOU for Raymond Recreation Center ("We are adding this project to our list."); Ex. 271, E-mail from Bianca Fagin (DPR) to Bridget Stesney (DPR) (Jun. 15, 2009) attaching draft MOU for Bald Eagle; and Ex. 272, E-mail from Jacquelyn Glover (EOM) to Bianca Fagin (DPR) (Jul. 17, 2009) regarding amending the MOU.

Experienced construction managers who were interviewed, such as Larry Dwyer from DCHE and Will Mangrum of Brailsford and Dunlavey, indicated that it is not unusual for the scope of ongoing projects to expand before the paperwork catches up. While the most prudent practice would involve executing a change order before new work begins, they were not particularly troubled by the fact that Banneker began work on additional parks based upon DMPED's oral directions. They noted that in the absence of a revised contract, the contractor was proceeding at its own risk.[818]

The driving consideration in this effort was speed, and it was symptomatic of that approach that DMPED expanded the contractor's scope of work without negotiating appropriate change orders, and that DCHA approved invoices for work on parks not included in the MOU. In this push to complete things quickly, what suffered was the quality of DMPED's project management and the administrative services performed by DCHA. But the evidence did not reveal anything underhanded. As Larry Dwyer pointed out, it was never anticipated that the work would stop abruptly in November, and it is likely that the paperwork would have caught up if the projects had run their course.[819]

The expansion of the MOU and the Banneker contract in December were intended to align the contract and the funding documents with the actual scope of the project, so that the contract being presented for approval – which had also been revised to be more palatable to the Council – would be complete. While we conclude that William Slover's proposed resolution to

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[818] Dwyer Dep. (Aug. 6, 2010) 77:8-15, 82:7-22, 133:19-134:11; Interview with Mangrum and Miranda.

[819] Dwyer Dep. (Aug. 10, 2010) 24:17-25:2.

terminate the MOU was an equally acceptable approach,[820] the fact that DCHA and DMPED revised both the contract and the MOU on the eve of the December Council hearings is not itself something that gives rise to concerns about wrongdoing.

C. Removal of the DCHA Board Chairman

On November 20, the Chairman of the DCHA Board of Commissioners, William Slover, was removed from his position as Chair. Slover remained on the DCHA Board as a member, but the loss of his Chair's position had the effect of removing him from the Board of DCHE as well. Slover had been vocal in raising concerns about the Banneker contract. And in November, after the Council cut off further transmittals of funds to DCHA, he advocated terminating DCHA's involvement and transferring the DPR projects back to DMPED, rather than increasing the MOU and modifying the Banneker contract. Slover expressed his opinion to DCHA Board members, including Deputy Mayor Santos. He spoke directly to City Administrator Neil Albert on the afternoon of November 20, and that evening, he learned from Tracy Sandler, the Director of the Office of Boards and Commissions, that he was being removed. Slover's removal as DCHA Board Chair appeared to some at the time to have been related to his opposition to the Banneker contract and the course of action being recommended by the Deputy Mayor. The interview with Peter Nickles revealed, though, that the change in DCHA leadership was prompted by the Attorney General's own dissatisfaction with the DCHA General Counsel's response to his advice. In any event, Slover served as Chair at the pleasure of the Mayor, so the Mayor's action was not illegal, and it does not raise issues for further investigation.

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[820] As Neil Albert testified, "he certainly had the – I think he had the authority as the chair of the Housing Authority Board to make that decision." Albert Dep. 151:10-12.

As noted above, on November 13, 2009, the Attorney General conveyed his recommendation to DCHA that it seek retroactive approval of the Banneker contract from the D.C. Council. And on November 16, the DCHA General Counsel, Hans Froelicher, responded with his opinion that under the terms of the MOU, it was DMPED's responsibility, and not DCHA's, to obtain any such review. During his interview, Nickles explained that he found Froelicher's November 16 letter "very disappointing" and "very frustrating." He was "offended" that DCHA would ask for his advice about these contracts and then reject it, particularly since the OAG had previously taken the position that Council approval for all contracts was necessary. He made it known within the Executive Office of the Mayor that he believed that a change in leadership at DCHA was required.[821]

Slover made it clear during his interview that he had no personal knowledge of why the action was taken – he was not provided with any reasons at the time. What he did know was that he had publicly disagreed with Deputy Mayor Santos about the course of action DCHA should take, and that he had repeated his concerns about the Banneker contract and his recommendation that the parks projects should be transferred back to DMPED to the City Administrator, Neil Albert, on the very day that he was removed.[822] But it appears that neither Albert nor Santos was behind his removal.

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821 Nickles stated during his interview that he had never had any dealings with Slover individually nor any with the DCHA Board as a whole. But he felt that the General Counsel was simply an employee, and that the ultimate responsibility for the agency's actions lay with the Board. He also stated during the interview that he sought a change in leadership across the board and that he did not single Slover out, but the OAG produced a November 20, 2009 memorandum from Nickles to Tracy Sandler calling for the change which was entitled, "DCHA Board--Chairmanship." Ex. 273, Memorandum from Peter Nickles to Tracy Sandler (Nov. 20, 2009).

822 Interview with William Slover.

Albert confirmed Slover's account that the two of them had spoken at some length earlier in the day on which Slover was removed.[823] He recalled that the two had been trying to schedule a meeting for some time and they were finally able to get together on that date. Slover expressed his view that the MOU between DMPED and DCHA should be terminated, and Albert took the opposing side, pointing out that the projects were moving forward and that the MOU had received legal approval within DCHA.[824] The conversation was cordial; as Albert recalled, "I remember having a conversation with him … I had lost my dad at that time and he was particularly sympathetic in that conversation and so the majority of what we talked about was that along with the DC Housing Authority issues."[825] According to Albert, he was unaware that Slover was going to be removed at the time of the conversation;[826] he did not have personal knowledge of how Slover came to be removed;[827] and he did not recommend that anyone remove him.[828]

During her testimony, Valerie Santos, the Deputy Mayor for Planning and Economic Development, who also served on the DCHA Board, was able to detail her clash of perspectives with Slover:

> Well, his view was that he was uncomfortable about the structure. He was uncomfortable. He was one of the people that thought that – he alleged that the fees were excessive, and he made several statements that DCHE should just get

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823 Albert Dep. 152:14-153:12.

824 *Id*. at 153:16-154:6.

825 *Id*. at 157:1-7.

826 *Id.* at 153:9-12.

827 *Id.* at 151:19-152:8.

828 *Id.* at 157:8-12.

> out of the business of doing this work. So he raised a number of questions, not all of which I remember. And he was in favor of basically stopping the work, from our perspective and putting it back on the City to figure out how else to get the work done…. I mean, he said all kind of things and this was a long time ago, but I do remember him saying, these fees are high based on his knowledge.
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> * * *
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> And so I said, Bill, we – it's important to us [that] the projects move. It's important not just to us, but we get complaints all the time from community members and also Council members, why aren't you guys faster, why isn't this done, why isn't this done. So that's where I'm coming from. What concerns do you have? Can we deal with them in a different way as opposed to just stopping work.
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> * * *
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> His response was, these are his concerns, he's worried about the fees, he wants reassurances that nothing inappropriate has happened. And I said, as far as I know, of course nothing inappropriate's happening. I have no desire to be involved in anything like that. It doesn't benefit anybody. I don't know Omar. I can give you my personal assurance. Because those are the things he was worrying about.
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> And then, I remember he needed to think about it…. He was just very nervous, is probably the better way of putting it. Nervous as in, he wanted to really be as conservative as possible.
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> * * *
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> …Bill didn't shift his position, and so he basically wanted to stop all work. I don't remember the sequence of who talked to whom and when, but culminating in … I don't know which came first, but I do know that the decision was made to replace him as Chair of the Board. And after that it was just pretty acrimonious.[829]

But Santos could not remember any specific conversation concerning the actual decision to remove Slover, and she did not recall being provided with the reasons that he was removed.[830]

Tracy Sandler, who communicated the decision to Slover on November 20, testified as well. In November of 2009, Sandler was serving as Director of the Office of Boards and Commissions. She was a Mayoral appointee with responsibility for the recruitment and

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829 Santos Dep. 91:3-19; 95:11-97:8.

830 *Id.* at 99:14-101:22.

recommendation of the more than 2700 other Mayoral appointees serving on over 180 boards.[831] She testified that there was only one occasion during her tenure that she removed an appointee, and that was in the case of William Slover.[832] On November 20, Sandler was called to the "bullpen," an open space within the executive office of the Mayor, to meet with the Mayor. During a brief conversation, he asked if they were able to remove Slover as Chairperson, and she informed him that they were. He then directed her to do so.[833] Sandler returned to her office to handle other matters and telephoned Slover that evening.[834] The Mayor did not provide Sandler with any reasons for his request nor did Sandler request any.[835] She was told to elevate LaRuby May to the position of Board Chair during the same conversation,[836] and she informed May of the decision that evening as well. May was not told why she was replacing Slover.[837] Other than speaking with a staff assistant, Sandler testified that she did not believe that she discussed the matter with anyone else in city government that day.[838]

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831 Sandler Dep. 13:14–18:20.

832 *Id*. at 17:2-7.

833 *Id.* at 46:1-12, 50:17-51:9.

834 *Id.* at 25:2-15, 48:3-6.

835 *Id*. at 26:2-6, 46:13-18, 53:17-21.

836 *Id*. at 47:3-9.

837 May Dep. 12:8-12.

838 Sandler Dep. 27:10-22, 29:11-30:13, 54:19-21. Sandler testified on July 20, 2010 that she did not memorialize her conversation with the Mayor in writing, she did not create any paperwork regarding his removal, and there was no other record or document from the Mayor regarding Slover or his removal. *Id*. at 27:2-9. She had a clear recollection that it was the Mayor who directed her to take the personnel action in a face to face conversation, and she did not recall discussing the matter with any other city official. She also stated multiple times that she was never provided with any reasons for Slover's removal. *See, e.g. id*. at 26:2-6, 46:13-18, 53:17-21.

(footnote continued on next page)

In the written questions submitted to the Mayor, Mayor Fenty was asked why he directed Tracy Sandler to remove Slover as Chair of the DCHA Board. He responded:

> There were a number of reasons why I directed Tracy Sandler to remove William Slover as Chair of the DCHA Board. As I recall, a primary concern that I had was his unwillingness and the unwillingness of the leadership at DCHA to follow the opinion of my Attorney General that these DCHA contracts had to be submitted to the Council for approval.[839]

Given the Executive's prerogative in this area, there is nothing in the events surrounding Slover's November 20, 2009 removal as DCHA Board Chair that warrants further investigation.

After the deposition had been completed, we became aware of a memo dated November 20, 2009 from Peter Nickles to Tracy Sandler with the subject line: "DCHA Board – Chairmanship," which had not previously been produced to us, and was not mentioned by Sandler during her testimony. The memo states, "I have become increasingly concerned about the leadership of DCHA, particularly its failure to abide by the request I made recently that DCHA submit certain contracts to the Council for its retroactive approval. ... Please inform me as to whether the requested change in leadership of the DCHA Board can be effected promptly." Ex. 273. OAG provided the memo to the Special Counsel on September 13, 2010. Given the timing of the memo's production, we had no opportunity to question Sandler about it.

[839] Ex. 24. On September 3, 2010, during a campaign debate, Fenty was asked about Slover, He responded: "the answer is that the person who you named would not, even though the Attorney General asked him, agree to send contracts to the Council. Because he did not, that was one of the reasons the Attorney General made the recommendation to the Director of Boards and Commissions that he step down and someone else would be put in there." http://www.myfoxdc.com/dpp/news/politics/dc-mayoral-debate-adrian-fenty-vincent-gray-candidate-questions-090310. While it is true that Slover did not think that DCHA should pursue the course being proposed by the Deputy Mayor and the Attorney General, the written answer and this statement could be read to imply that what he objected to was the idea of submitting the Banneker contract, or DCHA contracts in general, to the Council for approval at all, and that would be inaccurate. According to Slover, he was unaware of the Council approval issue until the investigation began. Once he learned about it in October, he did not object to seeking Council review, but thought from his review of the documents that it was DMPED's responsibility to do so. But from the start, Slover raised numerous questions about DCHE's participation in the projects and the award of the project management contract, and in November, after funding was cut off by the Council, his objective was extricating DCHA from the projects altogether.

D. The December 24 Payment

On December 15, 2009, the Council formally disapproved Banneker's project management contract in a unanimous vote.[840] At that time, Banneker invoices 1 – 4 had already been paid in full, and invoices 5 through 7, for work performed in September, October, and November, were still outstanding. On December 21, Banneker representatives and their counsel met to discuss payment with Adrianne Todman – the Interim Executive Director of DCHA, who also served as a Board member of DCHE; LaRuby May – the DCHA Board Chair and a DCHE Board member; and, Hans Froelicher – the DCHA General Counsel. DMPED's David Jannarone participated in the meeting by phone as well.[841] Those present agreed that DCHE would work to review and pay the invoices promptly if Banneker provided all of the necessary documentation. On December 22, Banneker submitted a supplemental invoice #8, transmitting additional subcontractor bills for work performed before November 30.[842] Three days after the meeting, on Thursday, December 24, Banneker and DCHE executed a settlement agreement,[843] and DCHA issued checks to Banneker totaling $2,554,071.[844] On that day, DCHA's Chief Financial Officer, Debra Toothman, raised concerns, but Todman directed that the payment be made.

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840 D.C. Act 18-258. The Council passed the resolution on December 15, 2009, and it was signed by the Mayor on January 4, 2010.

841 Ex. 274, Letter from A. Scott Bolden to Peter J. Nickles (Jan. 5, 2010); Todman Dep. Notes; May Dep. 59:18-62:19; Interview with Hans Froelicher.

842 Ex. 275, Letter from Omar A. Karim to Asmara Habte (Dec. 22, 2009) with invoices attached.

843 Ex. 276, Settlement Agreement and Release (Dec. 24, 2009).

844 Ex. 277, Memo from Asmara Habte to Quincy Randolph (Dec. 24, 2009) (requesting payment of Invoice #'s 5, 6, 7, 8 in the amount of $2,554,071 to Banneker Ventures); Ex. 278, E-mail from Debra Kay Toothman to Adrianne Todman (Dec. 24, 2009) (indicating that payment had been made).

The decision to pay the outstanding invoices was made primarily by Todman, under prodding by Jannarone and with May's concurrence, and without the participation or knowledge of the Council,[845] the DCHA Board, or Deputy Mayor Santos.[846] The DCHE Board resolution approving the Settlement Agreement was signed by Board members Todman and May and just one other director, William Knox.[847] (The fourth DCHE director, Fernando Lemos, was out of the country, was not spoken to, and did not vote.) Larry Dwyer, the President of DCHE, was generally aware of the desire to wrap up the contract and terminate DCHE's involvement, but since he was out of the office for most of December tending to a relative who was ill, he was not actively involved in the discussions. He testified that DCHE's Chief Operating Officer, Hugh Triggs, was authorized to sign an agreement in his absence if the Board approved one. The agreement was signed by Triggs and the DCHA Deputy General Counsel.[848] There is no evidence that the Mayor or the Office of the Attorney General played any role in the settlement with Banneker at this juncture.

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845 We were not provided with any documentary evidence or testimony indicating that the Council had been notified.

846 Santos testified that she first learned of the payment when Councilmember Thomas asked her about it at a meeting in January 2010, and that she was caught "like a deer in the headlights." Santos Dep. 134:17-18. As of January 7, 2010, her executive assistant, Liza Collado, was summoning Glover, Jannarone, and others to a morning meeting to discuss how to clear up the Councilmember's "misimpression" that a settlement had been approved in late December. Ex. 279, E-mail from Liza Collado (EOM) to Chip Richardson (EOM), David Jannarone (EOM), Sri Sekar (EOM), Lindsey Parker (EOM), Jacquelyn Glover (EOM) (Jan. 7, 2010 9:28:45 EST). Todman's email to Santos confirming the settlement and outlining the amounts involved was not sent until later that day. Ex. 280, E-mail from Adrianne Todman to Valerie Santos (EOM) (Jan. 7, 2010 12:24 PM EST).

847 Ex. 281, DC Housing Enterprises Resolution "09-" To Authorize Payment of Subcontractor Invoices Pursuant to DCHE Contract with Banneker (Dec. 24, 2009).

848 *See* Ex. 276.

The DCHA witnesses who were deposed explained that they had been receiving repeated inquiries from contractors who had not been paid, as well as from David Jannarone, and that it was their desire at that point to make the contractors whole and bring DCHA's participation in the DPR projects to a conclusion. According to Larry Dwyer, "there was a desire to sort of clean it up on … Housing Authority's part and at this point clearly the majority of it, if not all of both the DCHE board members, the commissioners and staff all wanted to just simply put a tourniquet on the Housing Authority's damage on this thing and part of that was pay off, get out of obligations, get this thing done."[849] Todman, who had just been appointed in October 2009 to serve as DCHA's Interim Executive Director, testified that she had been receiving calls from vendors directly and from the DMPED representatives, who reported on the vendor calls being made to them. She stated:

> There had been a number of concerns raised about vendors not getting paid and the subs who had done work and not paid for months. There were two outstanding invoices received in August or September, and there had been work done up until the stop work order. The vendors were calling me, among others, and I was getting calls from DMPED about vendors calling them. At the point the Council terminated the contract, it was clear the projects were not going to move forward but work had been done. There was a general interest in trying to make the vendors whole who had done that work. So the DCHE board decided to move forward and authorize the payments.
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> Q: When [did the Board authorize the payment]?
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> A: The Board authorized the payment on the same day the payment was made.[850]

Todman agreed, though, that the process was well underway before it was presented to the other members of the DCHE Board for approval. She explained that she received a call from

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849 Dwyer Dep. (Aug. 10, 2010) 34:22-35:6.

850 Todman Dep. Notes (from Special Counsel's notes from the unrecorded portion of the Todman deposition).

May advising her that Banneker and its attorney wanted to meet. Todman attended the meeting along with May and Froelicher, and David Jannarone participated by phone.[851] She confirmed that counsel for Banneker accurately described what took place when he stated in a January 5, 2010 letter:

> During the discussion, the parties agreed to bifurcate and separately resolve issues related to payment of the outstanding Banneker invoices for work performed through November 30, 2009 (the effective date of the Suspension of Work Order) and the negotiation of a final settlement to address contract close-out.[852]

She stated that she committed to cut the check within 48 hours if everything was in order, and testified that such speed was consistent with the practice of her agency. When asked whether she considered consulting the Council, or whether notifying the Council was discussed within DCHA, Todman indicated that it was not part of DCHA standard operating procedure or practice to inform the Council when making payments.[853] While Todman could not identify any other instance in which a check of this magnitude was processed in three days, she testified that she was not troubled by the timeline:

> It's not impossible to suggest it occurred in other settlement or emergency situations.
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> * * *
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> [C]utting a check is cutting a check. And I think that the fact that it was around Christmas is irrelevant for me because it was a work day, on the 24th. As it relates to the frequency or the casual observer how it usually is, settlement negotiations are never usual, it always presumes that something has occurred that's out of the ordinary. So I think that in situations like this it is not unusual that a large organization would take aggressive action to have closure and that's what we did.[854]

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851 Jannarone recalled discussing the settlement with May and Todman but did not recall being part of the meeting with Banneker and its counsel. Jannarone Dep. 149:13-19.

852 *See* Ex. 274.

853 Todman Dep. Notes.

854 Todman Dep. 38:9-18.

Todman stressed this concept of "closure" as her principal motivating factor:

> The closure for me … was we, at HE/HA were the holders of the contract and we were the contract administrator, as evidenced by what we were doing, and we ultimately were going to be the ones responsible for getting the vendors paid. And the closure, for me and for all those who took this action is we wanted the vendors to be paid so that we at HA/HE were not dealing with legal matters and time staff matters and programmatic matters dealing with 15 or 16 or 17 vendors who were asking us on a daily basis to pay them. … I am not funded by my primary funder to do this work. And so every time spent engaging in this is time spent away from our core mission. … And for me closure meant taking something off the table so we could focus on the matters that matter.[855]

LaRuby May also played a key role in approving the Christmas Eve payment. While her recollection was somewhat limited, she testified that she had been receiving calls and emails from both Jannarone and Karim concerning the outstanding invoices and that she also heard from a Ms. Webster, the director of constituent services for Councilmember Thomas, who was advocating on behalf of Ward 5 contractors who had not been paid.[856] May said that it was important to her to make sure that the small contractors got paid. According to May, the decision was DCHE's to make, and she testified that since she and Todman sat on the DCHE Board, they were representing DCHE at the meeting. May recalled that at the meeting, they made a

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[855] Todman Dep. at 39:8-40:5. Todman's complaint that handling vendor invoices diverted attention from DCHA's "core mission" raises the question of why DCHA would agree to an MOU in which its role was to act not as the construction manager, but as the "pay agent" for another agency's project.

[856] Todman and May both specifically brought up advocacy on behalf of contractors by Councilmember Thomas's staff as part of the motivation for their decision to pay the Banneker invoices. While there may have been telephone contacts, the only documents that have been produced that reflect communications from Thomas's office to DCHA are emails from January of 2010, after the Christmas eve payment, and they relate to work performed on DPR and DCHA projects that were not among the set of DPR projects managed by Banneker – the 14th and Girard Street Park, and the 10th and French Street Park. Indeed, Todman pointed that out herself in her January 15, 2010 response to Thomas's staff member. Ex. 282, E-mail from Adrianne Todman to James Pittman (Council) (Jan. 15, 2010 5:37 PM EST).

commitment to make the payment once all of the documentation issues were resolved, but she did not believe that they promised to pay by any particular date. She stated that she was out of town when Banneker was actually paid, but she also testified that she personally signed the DCHE Board resolution authorizing the payment, which is dated December 24.[857]

Hans Froelicher, the DCHA General Counsel, also recalled that they reached an oral agreement on December 21 to pay the invoices if Banneker submitted all of the necessary back-up documentation. He recalls that the goal was to get it done as soon as possible so that the contractors who had done the work could get paid. Todman and May indicated that they played no role in the negotiation of the settlement and that they left the terms of the agreement up to Froelicher. He was on leave on December 24, and he testified that he gave his Deputy General Counsel, Lori Parris, authority to consummate the settlement. She contacted Froelicher that day to confirm that it would be acceptable to carve portions of invoice # 7 out of the agreement, and he approved that arrangement.

Asmara Habte, the DCHE contractor whose job it was to review the Banneker invoices, recalled being asked by Todman to review the outstanding bills at some point in December, but she was not told that the work had to be completed by any particular date. She did not feel under pressure to finish by December 24 but indicated that for her own personal reasons, she tried to complete the review that day so that she would not have to think about it over the holiday. While she had never personally been involved in a situation in which a claim was resolved at this speed, she did not have an opinion as to whether the turnaround time in this instance was out of the ordinary. Habte explained that in those instances where she found the back-up for a claimed

[857] The Board meeting was a telephone meeting and Todman, May and Knox were present on the call. Todman Dep. 51:20-52:2.

expense or subcontractor charge to be inadequate, she backed that expense out of the invoice and left it to be resolved in January.[858]

Habte explained that DCHE served as the "administrator" on the projects, managing the finance and budget aspects, but not the construction. DCHE had no responsibility for tracking the expenditures against amounts budgeted or appropriated in any particular fiscal year for the individual parks; it was monitoring the construction budget that had been provided by DMPED and Banneker for each park. Habte's role consisted of reviewing the invoices to ensure the sufficiency of the documentation and comparing the amounts charged for each project against its individual budget. Banneker was supposed to review its subcontractors' invoices in the first instance, and Habte made it clear that it was DMPED that had the responsibility for approving

[858] The documents provided by DCHA include lengthy emails from Habte to Banneker in which she asked detailed questions about the invoices and requested additional documentation and verification. *See e.g,* Ex. 283, E-mail from Asmara Habte to Carol Rajaram and Duane Oates, Banneker Ventures (Dec. 23, 2009 3:00 PM EST), in which for each park, she asked, "please provide supporting documents for Liberty's reimbursement request." While some of the support was provided, *see* Ex. 284, e-mail exchanges between Asmara Habte and Antwoine McCoy regarding "DPR…Questions" (Jul. 20, Jul. 21, Sep. 1, 2009), the documents also include e-mails from Karim pressing for payment and claiming that he had been "promised" a check on December 24, as well as an e-mail refusing to provide Habte with anything more. *See, e.g.* Ex. 285, e-mail exchanges between Banneker and Asmara Habte (Dec. 23, 2009); Ex. 286, e-mail exchanges between Banneker and Adrianne Todman (Dec. 23, 2009). (Karim stated, with respect to reimbursables: "we will not be sending you additional information. Since the work has ended we consider all past invoices old and expect no further delays;" with respect to subcontractor invoices: "By our submission of the sub-invoices to DCHE, we have signed off and approved all of them … we are not going to go thru all of the invoices and physically sign them;" with respect to LEAD's invoices: "We would not have invoiced you if we didn't have LEAD's deliverables. We will not provide you any additional information …." *See* Ex. 285.) When Banneker grew frustrated with Habte, it went over her head and emailed Todman and May directly. "Ms. Todman, Asmara has everything she needs…" *See* Ex. 286. Habte explained that, ultimately, Banneker provided some of the missing supporting documentation in invoice #9. She also indicated that the unused portions of any amounts that had been advanced in the early invoices for permits were deducted from the payment Banneker received in December.

the invoices and confirming that the work billed for was satisfactorily performed.[859] Dwyer confirmed this: "Generally, our review is administrative in nature. In terms of certification of acceptance of the work product … Jacqui [Glover] is the project manager for this project."[860] DCHE did not make any sort of independent analysis of the reasonableness of fees being charged by Banneker's subcontractors, nor did it ascertain whether services or work product referenced in the invoices had actually been provided.[861]

Habte was aware that by invoice #4, when Banneker began breaking its invoices out by park, the total project management fees claimed in the invoices exceeded the $168,000 monthly amount specified in the contract. She questioned Karim about this, and he attributed the higher

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859 Interview with Asmara Habte.

860 Joint Roundtable (Jan. 8, 2010) 38:6-9.

861 Interview with Asmara Habte. The timeline surrounding the December payment raises questions about how thoroughly Glover considered the November invoice. DCHE could not process invoices #5 – #8 in December without DMPED's express approval, and the e-mail traffic indicates that the 278-page invoice #7 for November was transmitted to Jacqueline Glover at 5:48 p.m. on December 22. *See* Ex. 287, E-mail from Asmara Habte to Jacquelyn Glover (EOM) (Dec. 22, 2009 5:48 PM EST) When Glover hadn't responded by midday on the 24th, Habte emailed her and indicated that DCHE was prepared to pay $932,181. Glover was traveling, and she emailed back her approval from her car ten minutes later. Ex. 288, E-mail from Jacquelyn Glover to Asmara Habte (Dec. 24, 2009 12:38 PM EST). She testified that she was sure that she reviewed the material "at some point" in her office previously, but she could not recall when she did so or how long it took. Glover Dep. 239:10-13. Even when Glover was reviewing the earlier invoices on a more leisurely schedule, she relied heavily upon Banneker when looking at charges from the sub-contractors. "I'd look at the invoice, see what they were billing for and confirm with the project manager that this work was in place." Glover Dep. 158:12-14.) When she noticed that LEAD's invoices for the surveying were high, "I talked with Banneker about the price and what it was for. I can't recall exactly what was discussed, but they obviously produced enough justification for me to approve of the invoice." *Id.* at 161:11-162:3. In other words, the investigation revealed that DCHE deferred to DMPED to approve the expenditure of funds, and DMPED deferred to Banneker, so despite the multiple layers of review, in the end, there was little oversight of the project manager.

fees to the fact that the scope of the work had increased.[862] Even though no change orders had been executed, because DMPED approved the invoices, DCHA paid them. The December 24 settlement thus included project management fees of $242,212 for September (invoice #5), $242,712 for October (invoice #6), and $242,212 for November (invoice #7).[863]

Debra Toothman had been recruited by former DCHA Executive Director Michael Kelly to serve as the agency's Chief Financial Officer. After the invoices were reviewed and approved by DCHE, they ultimately landed in her office for payment. She was out of the office on December 24, and was not involved in the efforts being made to process the invoices until she received a telephone call from Quincy Randolph, her payroll manager, who informed her that he was being asked to cut a check for a settlement agreement but that he had not even seen the

862 As early as July, Banneker was billing for work performed on parks that were not part of the DMPED/DCHA MOU or the Banneker contract, and it was submitting those invoices to DCHE. Karim explained to Habte that change orders would be forthcoming, DMPED approved the invoices, and the invoices were paid. Ex. 289 E-mail from Omar A. Karim to Aaron Buchman (Sep. 1, 2009 11:03 AM EST).

863 *See* Ex. 2, DCHE charts showing a breakdown of Banneker paid invoices.

invoices yet.[864] Toothman told him not to do anything until he heard from her further, and she telephoned Todman. Toothman informed Todman that she was out of the office and that there was no one present with the clearance to approve the check. She asked Todman whether anyone on the DCHA Board had been made aware of the payment, and she believes that Todman indicated that the Chairman (May) was informed. When she was asked who had authorized the payment, Todman informed Toothman that the DCHE Board would be meeting later that morning to approve the settlement.[865] Toothman asked Todman if anyone had notified the Council, and according to Toothman, Todman told her that it was not necessary to do so.[866]

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[864] Todman stated that she stepped out of the meeting on December 21 to call Toothman when she was asked how quickly DCHA could pay. According to Todman, she said, "We're talking about settlement," and Toothman agreed that she would just need a call from Todman when it was time to pay. Todman Dep. Notes. Todman also testified that she specifically notified Toothman about the upcoming payment prior to December 24, but the email she sent to Toothman on December 23 was transmitted at 10:52 p.m. Ex. 290, E-mail from Adrianne Todman to Debra Kay Toothman (Dec. 23, 2009 10:52:35 PM EST) ("Tomorrow we will need to process the first of two settlement checks to Banneker…. Hans has drafted a work in place settlement document. Once I approve it in the am, I need the check to be cut by COB… I need to know who to work with in your shop once you have given them direction so this person(s) sticks around until this is done." At 10:15 a.m. on the 24th, Toothman asked via email: "Adrianne on who's authority [*sic*] are you paying these invoices did the board authorize a settlement payment?" Ex. 291, E-mail from Debra Kay Toothman to Adrianne Todman (Dec. 24, 2009 10:15 AM EST). Todman replied: "DCHE Board is meeting later this am to approve this portion of the settlement." *Id.* Thus Todman's instruction to Toothman that an employee needed to be available to process the check preceded any meeting of the DCHE Board.

[865] Interview with Debra Kay Toothman, former Chief Financial Officer, DCHA (July 22, 2010).

[866] Todman acknowledged that Toothman did ask her if they were planning to advise the Council, and that she responded that advising the Council was not part of what they usually did at DCHA. She did not recall whether she specifically stated that it was "not necessary." She also said that when Councilmember Thomas asked her about the payment in January, she "apologized to him that he felt slighted," but it was not done "given our normal course of duty." Todman Dep. 56:17-21.

Toothman informed Todman that it had been her plan to release her employees at noon for the holiday. She also pointed out that the banks were going to close early on Thursday for Christmas Eve and remain closed on Christmas Day, so there was no need to cut the check before Monday.[867] In her interview, Toothman said that she asked Todman to wait and Todman refused. Todman did not offer any reasons why the settlement needed to be completed that day, but she stated that the check had to be issued, and that Toothman's staff could not leave the building until it was done.[868] Since Todman was her immediate supervisor, Toothman

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[867] Ex. 292, E-mail from Debra Kay Toothman to Adrianne Todman (Dec. 24, 2009 12:23 PM EST).

[868] Todman did not recall that Toothman asked her to wait. She disagreed with any suggestion that she directed Toothman to cut the check over her objection, saying [in the unrecorded portion of the interview],"there was no time that Toothman said 'I'm not going to cut the check,' and I said, 'yes, you are going to cut the check.' That dialogue did not occur." While Toothman did not recount an express refusal on her part either, she stated in her interview that she asked Todman to wait, and reported in her testimony to the Council that Todman rejected her suggestion that they notify the Council.

> Q: [C]ould you have said no, you wanted to wait and look at them further?
> A: (Toothman): I express[ed] my concern about the invoices … to Miss Todman. And I ask[ed] if she thought that we should bring – that we should at least notify the Council that we were about to make this payment. [S]he told me we did not need to notify the Council because of the previous Council action, we were going to have to settle the payments so we could return the money.

Joint Roundtable (Jan. 8, 2010) 333:16-334:8.

Toothman testified before the Council that Todman ordered that her employees remain in the building, and that she did not have authority to disobey the Executive Director's instruction. Todman agreed that she was the one who gave the order that the employees could not leave the building until the matter was concluded.

> Q: Why did you cut the payment? …Why did you agree to give the sign off?
> *(footnote continued on next page)*

authorized her employee to sign the checks at around 3:00 that afternoon with the understanding that a complete package of supporting information and a Board resolution would be on her desk on Monday morning, December 28.[869] Toothman was sufficiently concerned by these events that she made an unsuccessful attempt to reach Councilmember Michael Brown's staff that afternoon.[870] She described the speed of the settlement in this case to be "unusual" and the order she received to be "unique" in her entire professional career.

To the Council, which was then engaged in its own investigation of how the DPR projects had been handled, and which had just voted to disapprove the Banneker contract, the Christmas eve checks to Banneker were extremely troubling. The effect was to exacerbate the Council's suspicions that the process was being manipulated to benefit Banneker. From our review of the all of the facts and circumstances, the settlement appears to have been a good faith

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> A (Toothman): Because it was Christmas Eve and my staff couldn't leave the building until [it was done]. [W]e needed to make sure that this was rectified and this check was cut before my staff left the building.
> Q: Who said people can't leave until that's done?
> A (Todman): I did. …

Joint Roundtable (Jan. 8, 2010) 362:17-363:14.

[869] Interview with Toothman; Ex. 278. Toothman was still waiting for the information Monday afternoon. "These invoices were processed in good faith that I would have the documentation on my desk first thing this morning. I have not yet received them. If they were not yet complete, how were you able to establish the proper payment amount?" Ex. 293, E-mail from Debra Kay Toothman to Asmara Habte (Dec. 28, 2009 3:52 PM EST). The e-mail traffic reveals that much was still unsettled when people returned to work after the New Year. Ex. 294, E-mail exchange between Asmara Habte and Duane W. Oates (Jan. 5, 2010). Vendors were still asking DCHE why they had not been paid, *see* Ex. 295, E-mail exchange between Asmara Habte and Lawrence Dwyer (Jan. 4, 2010); Habte was still seeking documentation from Karim, *see* Ex. 296, E-mail from Asmara Habte to Omar Karim (Jan. 6, 2010 4:28 PM EST); and Karim was still seeking clarification about how the payments had been calculated, *see* Ex. 297, e-mail from Omar A. Karim to Asmara Habte (Jan. 7, 2010 11:33 AM EST).

[870] Interview with Amy Bellanca, staff member for Councilmember Michael Brown (Sep. 28, 2010).

effort on the part of DCHA to pay for work that had been performed and to bring the agency's participation in the matter to a conclusion. However ill-advised it may have been from a political perspective to expedite payment without broader consultation, we did not find any wrongdoing that warrants further investigation.

But that conclusion does not express unqualified approval of the way the December settlement was handled. In the absence of any exigent circumstances compelling the three-day turnaround, DCHA should have taken the time to think through the implications of the payment and the settlement agreement, and it should have solicited input from – or at the very least, notified – the many interested parties. Taking more time could have improved both the quality of the process and the result.

The Settlement Agreement between Banneker, Regan, and DCHE provides that Banneker and DCHE are parties to the July 14, 2009 contract and to the change order dated December 9, 2009, [871] and that DCHE entered into the contract "as the agent" for DMPED. It describes the Council's emergency legislation cutting off the flow of funds to DCHA and the stop work order, but it fails to mention the Council's December 15, 2009 action invalidating the contract. The Agreement states that Banneker entered into contracts with vendors and consultants "in performance of the Contract," and it expresses a desire to resolve disputes concerning payment of the invoices without resort to litigation. It specifies that invoices #1 - #4 have been paid in full, and that DCHE will pay $2.5 million for invoices #5 - #8 on December 24, 2009. The agreement contains language in which the parties release each other from all claims arising out

[871] The Agreement states that it is entered into by and between Banneker Ventures, LLC, and Regan Associates, LLC, "a joint venture," which is referred to thereafter in the document as "Banneker" or "Contractor." It then asserts that "Banneker" entered into the contract with DCHE, but neither Regan nor a joint venture including Regan is a signatory to the contract.

of invoices #1 - #8, but it also specifies that invoice #7 has only been paid in part, and that further negotiations over the balance owed under invoice #7 are not precluded.[872] Thus, the rush to complete the deal before the questions concerning invoice #7 had been conclusively resolved resulted in a one-sided contract that purports to be a settlement agreement and complete mutual release, but has a significant gap in it favoring Banneker. If the justification for the settlement was to bring the matter to a conclusion, executing an agreement and issuing a payment before all of the issues were resolved did not accomplish that goal.[873]

The settlement raises other concerns, including the fact that the reasons that were publicly advanced for the settlement payment do not fully square with what took place. The witnesses cited the need to pay the subcontractors who had performed in good faith as their primary motivation: "I was only interested in funding for payment for work that had been done. I was focused on the vendors who hadn't been paid."[874] Similarly, Jannarone asserted:

> … my position, the way I felt about it is if the work was completed and we had the work and they performed, then they should be paid. … And … when I mean "they" I mean all of the consultants. … I understand the position that they wanted to stop Banneker. I understand that. I understand what all this is about. I do, and that's fine. But for a consultant who is a subcontract to Banneker who did their work not to get paid, that's not fine.[875]

But the settlement went well beyond paying the subcontractors. The project management fees billed by Banneker in invoices #5, #6, and #7 – which far exceeded the monthly fee set out in the

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872 Ex. 276.

873 Indeed, by January of 2010, DCHA attorneys were already referring to the December 24 agreement as a "partial" settlement and release. Ex. 298, E-mail from Andrea Powell to Ben Miller, Sharon W. Geno (Jan. 14, 2010 12:57 PM).

874 Todman Dep. Notes.

875 Jannarone Dep. 149:21-150:10.

contract – were paid in full, and DCHE also paid the mark-up on the consultants' invoices, including invoices that themselves had been tabled to await further documentation.[876]

Moreover, no one seems to have seriously thought through whether a settlement was appropriate at all at that juncture and under what terms. Todman justified the payment to the Council by explaining that the payments were made pursuant to the terms of the Banneker contract: "Under the contract between DCHE and Banneker, DCHE was responsible to pay for the costs incurred by Banneker … and the fee for acting as program manager."[877] But by the time the invoices were being processed, the contract had already been rendered void by the Council. At that point, under the analysis applied by the Attorney General, any fee for Banneker should have been calculated on *quantum meruit* principles only.[878] DCHE made no effort to determine the reasonable value of the services actually rendered by Banneker from September through November, and instead, it paid the management fees claimed in the invoices in full, including the mark-up on consultants that was the subject of much consternation at the Council hearings. While the DCHA Interim Executive Director cannot be faulted personally for failing to anticipate this legal analysis, a more broad-based, thorough, unhurried consideration of the unique legal circumstances surrounding the contract was warranted.

The Settlement Agreement recites that Banneker and DCHE were parties not only to the original contract, but also the December 9, 2009 change order. Yet, the payment that went out the door under the auspices of the Settlement Agreement did not incorporate the modifications

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876 Ex. 299, E-mail from Asmara Habte to Omar Karim, Carol Rajaram and Duane Oates (Dec. 24, 2009 10:04 PM EST).

877 Ex. 300, Letter from Adrianne Todman to Councilmember Harry Thomas Jr. (Jan. 7, 2010).

878 Ex. 120, Letter from Peter J. Nickles (Oct. 28, 2010) at 2, n.5 and 8.

contained in the change order. DCHE accepted Banneker's application of the 9% markup to its consultants' invoices even though the mark-up had been reduced to 5% in the change order executed by both parties.[879] And the fixed fee paid on invoices #5 - #7 exceeded not only the original $168,000 per month, but also the increased amount for the larger scope agreed to in the change order: $179,000 per month.[880] So even if there was an appropriate legal basis to pay outstanding invoices according to the terms of the contract, or the terms of the contract as modified by the change order, the amount that was approved on December 24 was neither.

E. The July Settlement

On July 1, 2010, the District entered into a second settlement agreement with Banneker, providing for additional payments totaling $550,000. Questions have been raised about whether this settlement was the result of improper favoritism toward Banneker, and whether it prematurely released potential claims against Banneker while the investigation was still ongoing. After the Council learned about the July 1 agreement, it took a number of actions intended to stop or postpone payment of the settlement amount. As a result, the payment has not been made, and Banneker has filed suit against the District seeking to compel payment.[881] This suit is pending, and we do not express an opinion on the issues before the Superior Court or any other legal issues, such as the extent of the releases included in the July settlement agreement. However, to answer the questions posed to us by the Committee, we have reviewed materials relating to the settlement negotiations, including settlement communications between the parties,

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879 Ex. 301, Change Order No. 1 to Contract for Services (Dec. 9, 2009), §9.A.II.

880 *See* Ex. 2.

881 *Banneker Ventures, LLC v. District of Columbia*, Case No. 2010 CA 006067 B, filed Aug. 11, 2010 in the Superior Court of the District of Columbia.

which were provided by Attorney General Peter Nickles with the consent of Banneker, and interviewed key participants.

As noted above, the December 24 settlement agreement addressed Banneker's invoices #5 through #8. Based on discussions at a meeting between the parties on December 21, Banneker understood that claims relating to the close-out of the contract were to be separately negotiated.[882] On December 15, 2009 (the same date as the December settlement agreement), the Council passed an act expressly disapproving the Banneker project management contract.[883] The act went into effect when it was signed by the Mayor on January 4, 2010. Banneker nevertheless continued to pursue a further settlement for contract close-out amounts, and on January 5, 2010, submitted a settlement proposal to Attorney General Nickles.[884] Banneker asserted that its contract, as amended on December 9, 2009, was still in force, and suggested that the correct course was for the District to terminate the contract for convenience and to pay Banneker an additional $2,250,000 in fees under the contract, plus unspecified sums for consultant payments, reimbursable costs, and "Reasonable Fees Related to Shut Down." Banneker indicated that some of the "reasonable fees" would be in return for Banneker's assignment to OPEFM of Banneker's rights under the architects' contracts.

The District, however, took the position that the Council disapproval action rendered the project management contract void *ab initio*, which would make contract-based remedies

882 Ex. 302, Letter from A. Scott Bolden to Peter J. Nickles (Jan. 5, 2010).

883 D.C. Act 18-258.

884 Ex. 302, at 2.

unavailable.[885] Accordingly, on January 26, 2010, Banneker submitted a revised settlement proposal that purported to seek recovery in *quantum meruit*. Banneker's request totaled $2,230,309.00. It included a demand for $975,000 "to facilitate the assignment of the A/E Contracts," on the theory that Banneker – and not the District – owned the rights to the architects' designs for 9 of the parks, plus all designs created by Liberty Engineering & Design.[886] Banneker demanded $809,247 for shut down costs allegedly incurred by Banneker and Regan Associates for office costs, staff payroll, staff severance costs, legal fees and other expenses. And Banneker added a 25% lost profit amount of $446,062. The next day, Banneker submitted invoice # 9, covering additional costs for services performed before work stopped as of November 30, 2010.[887]

The Attorney General responded on February 18, 2010, with a counter-offer of $325,000. Mr. Nickles noted that the District rejected Banneker's claims under invoice #9, as well as Banneker's claims for lost profits and legal fees.[888] While he maintained that the District already owned the intellectual property rights to the architects and engineers' designs, he indicated that "to the extent that your clients may fairly dispute that position, an amount has been factored into the counteroffer to reflect a value of assigning the contracts."[889] The counteroffer also reflected

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885 *See* Ex. 303, Letter from A. Scott Bolden to Peter Nickles (Jan. 26, 2010), at 1; Ex. 120, at 8.

886 Ex. 303, at Attachment A.

887 *See* Ex. 304, Letter from Peter Nickles to A. Scott Bolden (Feb. 18, 2010).

888 *Id.*

889 *Id.* at 2.

reductions to the direct costs claimed by Banneker and Regan "to account for expenses not reasonably recoverable in *quantum meruit*."[890]

One week later, Banneker, through its counsel, sent cease and desist letters to seven of the firms that had provided architectural services on the DPR capital projects. Banneker asserted that under the language of the architects' contracts, Banneker owned the project drawings and other "instruments of service" prepared by the architects.[891] Banneker stated that if the architects did not stop providing the District with access to project drawings, Banneker would file suit against them. In response to Banneker's action, by letter dated February 26, the Attorney General demanded that Banneker withdraw the cease and desist letters, stating that failure to do so would end the settlement discussions.[892] The District also sought to address the concerns of the architects by agreeing to indemnify them against potential claims from Banneker. It entered indemnification agreements covering the work on 6 of the projects. This required the District to book the potential indemnification amounts (approximately $4.15 million) against the project budgets.[893]

Banneker's claim to ownership of the drawings was based on the terms of the contracts it executed with the architects, which provided that the "Owner" of the project would own all of the drawings and other documents prepared by the architect, but defined the term "Owner" to be

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890 *Id*.

891 *See, e.g.*, Ex. 305, Letter from A. Scott Bolden to Ronnie McGhee, R. McGhee and Associates (Feb. 25, 2010).

892 Ex. 306, Letter from Peter Nickles to A. Scott Bolden (Feb. 26, 2010).

893 Interview with Peter J. Nickles; Ex. 120.

Banneker Ventures, and not the city.[894] While it was in the District's interest to provide that the architects did not own the drawings, we do not believe that the District ever intended to make Banneker the owner of its consultants' work product.[895] Without expressing an opinion as to the correct interpretation of the architects' contracts, we believe that if the design procurement process had been better managed by the District, Banneker would not have been permitted to include the language it subsequently relied on as establishing ownership.

Rather than responding to the Attorney General's February 26 letter, Banneker opened another front in its demand for payment. On March 11, 2010, Banneker submitted a "Request for Final Payment and Contracting Officer's Final Decision" to Larry Dwyer of DCHE. Banneker

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894 *See, e.g.*, Ex. 307, Banneker Contract with Bowie Gridley Architects, PLLC, § 1.5 (identifying Banneker as the "Owner") and § 1.3.2.1 ("Drawings, specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service for use solely with respect to this Project. The Owner shall be deemed the owner of the Instruments of Service and shall retain in perpetuity all common law, statutory and other reserved rights, including the copyright."). However, the contract also expressly acknowledged that Banneker was a contractor to DCHE, that Banneker was not the owner of the property or the project to be constructed, and that "DCHE and the District of Columbia are intended third party beneficiaries of this Agreement." § 1.1.4. The contract further expressly acknowledged that the money to be used to pay the architect would be coming from the D.C. government, and that Banneker had no obligation to pay the architect unless and until Banneker received payment from the District. § 1.3.9.5. Banneker's other contracts with architects have similar provisions.

895 There appears to be no valid reason for Banneker to have deemed itself to be the owner of the drawings, and Banneker's assumption of that role is inconsistent with the terms of its project management contract with DCHE. Banneker's contract states, "In the event that this Contract is terminated for any reason, then within ten (10) days after such termination, the Contractor shall make available to Enterprises [DCHE] all Work Product, including as-builts, original tracings, plans, maps, computerized programs, reports data and material which have been prepared as the result of this Contract directly by the Contractor's personnel or as to which the Contractor has the legal right to copy. The Contractor may keep copies for its records." Ex. 80, ¶ 19, at 12.

sought $2,277,748.12,[896] "representing the reasonable costs incurred by Banneker to facilitate contract close-out following the de facto termination for convenience of the Amended Contract by DCHE."[897] Banneker noted that the parties had been engaged in discussions seeking to resolve all issues remaining after the December 24 settlement, but "these discussions did not result in a resolution of this matter. For this reason, Banneker now files this Claim seeking a formal Contracting Officer's Final Decision regarding Banneker's Claim for compensation in accordance with applicable procurement rules, regulations and the Amended Contract."[898] Banneker itemized the amounts allegedly due as follows: (1) $112,765.50 for unpaid portions of its fixed fee; (2) $112,485.62 for additional amounts due for work done before November 30, 2009; (3) $827,497 for reimbursable costs including staff severance, document copying and legal fees, plus $250,000 for "reimbursable opportunity costs;" and (4) $975,000 to compensate Banneker for its ownership rights in project drawings.

We are not aware of any action taken on Banneker's claim by Dwyer or DCHE. Instead, according to the chronology provided by the Attorney General, a settlement meeting was held on the day after the claim was submitted (that is, March 12, 2010). After further negotiations, Banneker accepted the District's offer of $550,000 on March 31**.** But Banneker then claimed it was owed additional amounts over and above the $550,000 sum, and made other demands as

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[896] The amount of the claim is stated differently on different pages of Banneker's submission, but the total of the items included is $2,277,748.12.

[897] Ex. 308, Letter from Omar Karim, Banneker Ventures, to Larry Dwyer, DCHE (Mar. 11, 2010) at 1.

[898] *Id.* at 4.

well.[899] By letter dated April 26, 2010, the Attorney General rescinded the District's settlement offer and advised Banneker to "take whatever steps you deem appropriate to pursue your claims."[900] Banneker responded by requesting that the parties continue to settle for $550,000.[901] After several months of negotiations and exchanges of drafts, the settlement agreement was executed by Banneker and Regan Associates on June 28, by DCHE on June 30, and by DCHA and the Attorney General on July 1, 2010.[902]

The settlement agreement provides for the $550,000 settlement amount to be paid in two payments: the first check, for $264,863.21, was to be issued within 10 business days of execution of the agreement, and the second, for $285,136.79, was to be issued after Banneker had paid and obtained lien releases from certain architects, engineers, consultants and subcontractors identified in Attachment A to the agreement.[903] As part of the agreement, Banneker acknowledged that the District owned the drawings and other documents prepared by the architects and engineers for the projects, and covenanted not to sue the architects and engineers over intellectual property rights.[904]

The release given to Banneker and Regan provides as follows:

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899 Ex. 309, Letter from Peter J. Nickles to Robert P. Trout (Jul. 12, 2010) with a chronology of the "Banneker Settlement" attached. The chronology shows that Banneker claimed additional amounts were owed Banneker on April 14 and April 23.

900 Ex. 310, Letter from Peter J. Nickles to Lawrence S. Sher (Apr. 26, 2010).

901 Ex. 309, showing in the chronology that Banneker's response was on April 28.

902 Ex. 311, Settlement Agreement and Release (Jul. 1, 2010).

903 *Id.* at ¶ 1. Liberty Engineering & Design is listed on Attachment A as being owed $11,862.93.

904 *Id.* at ¶ 3.

> … the District hereby remises, releases and forever discharges Banneker and Regan, each of their successors and assigns, administrators, executors, and any other person claiming by, through, or under Banneker or Regan, of and from all agreements, actions, cases, causes of action, claims, compromises, controversies, costs, damages, debts, demands, disputes, expenses, judgments, liabilities, payments, promises, and suits of any nature whatsoever, including attorneys' fees, whether or not known, relating to, arising under, or in connection with Banneker's or Regan's provision, under the Contract, WITHOUT EXCEPTION, for project management services for capital projects to the District or from the District's administration of the Contract through the Effective Date; the intention hereof being to release Banneker and Regan completely, finally and absolutely from all liabilities, arising wholly or partially from Banneker's or Regan's provision, under the Contract, of project management services for capital projects and other services to the District or from the District's administration of the Contract.[905]

Peter Nickles described this settlement as one that was fair to the District, and that accomplished his objectives of relieving the city of the amounts it had to accrue for the indemnifications of the architects, and encouraging the architects to work with OPEFM to complete the projects.[906] Various councilmembers, however, raised questions about the settlement as soon as it came to their attention, and the Council quickly passed emergency and temporary legislation intended to prevent payment of the settlement amount.

One of the Council's key concerns was whether it was appropriate to release claims against Banneker before this investigation was completed. The Attorney General disagrees that this is the result of the settlement agreement:

> I have emphasized that in the past both in correspondence with the Council and Mr. Trout that the settlement agreement does not release Banneker or its individual officers from potential civil or criminal fraud if the appropriate authorities believe that such action is warranted. Indeed, counsel for Banneker agrees. *See* the attached October 21 letter from Lawrence S. Sher, Esq., in which he states his view "that paragraph 7 of the settlement agreement does not in itself

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905 *Id.* at ¶ 7.

906 Interview with Peter J. Nickles.

> preclude the authorities from seeking to prosecute the settling parties in the future for criminal or civil fraud."[907]

As a result of the Council's actions, however, the District has not yet issued checks for the settlement amounts. In October of 2010, Banneker filed suit to enforce the settlement agreement. As of March 1, 2011, the litigation had yet to be resolved. As noted above, we do not express a view on any of the matters at issue in the litigation or on the scope of the releases in the agreement. We do conclude, however, that the evidence of the conduct of the settlement negotiations does not support a claim that the settlement was improperly engineered in order to benefit Banneker, and that the circumstances surrounding the negotiation of its terms do not warrant further investigation.

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907 Ex. 120, at 5 (footnote omitted).

RECOMMENDATIONS

The resolution appointing the Special Counsel directed him to conduct an investigation in order to 1) "determine if the circumstances surrounding the transfer of capital funds, the subsequent awarding of contracts, or the approval and expenditure of funds warrant further review of the United States Attorney for the District of Columbia or any other investigative or enforcement agency," and 2) "make any recommendations that he may have for any necessary changes to District laws."[908] With respect to making those recommendations, the Special Counsel did not take on the task of drafting specific proposed legislation and regulations, or recommending particular policy choices, but rather, we reviewed what took place with an eye towards identifying systemic issues exposed during the investigation that the Council may wish to address.

A. Legislative Recommendations

1. It became clear during our investigation that the transfer of funds from DPR to other agencies was largely motivated by a broadly shared perception that the District's procurement procedures were not well suited for large public construction projects, particularly when there was a public interest in getting stalled projects moving and completed on an expedited basis. As the administration cast about for the appropriate procurement agency, it looked at one point or another to OPEFM, DMPED, and DCHA/DCHE. What resulted was a multi-agency project involving the successive transfer of funds and the layering of different entities with management authority, blurring the lines of responsibility. In this instance, the

[908] Ex. 5, Special Council Resolution.

dollars moved everywhere but the buck stopped nowhere. The result was substantial waste and the opportunity for improper practices to go unchecked.

DRES has been tasked since 2008 with handling construction procurement and project management for the District and for agencies without their own procurement authority or project management capacity, but DPR and the administration did not choose to use DRES for the DPR capital projects. We therefore recommend that the Council undertake a thorough analysis of construction contracting in the District, to examine issues including the following: (1) whether DRES's policies, procedures, budgets and staffing are appropriate for its role; (2) whether additional agencies should be given independent procurement authority; (3) whether agencies without procurement authority should be permitted to obtain construction services from agencies other than DRES, including independent agencies such as DCHA; (4) if so, whether the PPA should apply to procurements conducted by independent agencies on behalf of executive agencies; and (5) whether there are other changes to the District's construction procurement and project management policies that could increase the speed with which major projects are accomplished while maintaining appropriate budgetary controls and project oversight.

2. The investigation also revealed that while MOUs between agencies were not unusual or unlawful, and there had been prior MOUs transferring responsibility for construction projects to DCHA, the Walker-Jones, Deanwood, and DPR projects were of an entirely different order of magnitude. Much of the consternation that arose in the fall of 2009 was attributable to Council members' surprise and frustration that such large amounts of funds had been transferred from or to agencies under their supervision without their knowledge. To the extent that it is appropriate for one agency to reach out to another agency to obtain services, we recommend that

the Council should consider whether additional reporting or review should be required for MOUs involving more than a certain threshold amount, such as $5 million dollars.

3. The revelations about the DPR capital projects prompted the issuance of a formal Opinion of the Attorney General on October 23, 2009, addressing the question of whether DCHA, an independent agency, was bound by the provision in the Home Rule Act calling for Council approval of contracts over $1 million. DCHA has acknowledged that it is bound by that opinion, which by its terms addresses a situation when the contract involves the use of District funds. DCHA has not acknowledged that it is obliged to satisfy the Council approval requirement when non-District funds are being used. In the future DCHA might therefore enter into a contract involving non-District funds over $1,000,000, yet fail to seek Council approval. Apart from whatever concern this might cause the Council once it learned of DCHA's actions, the contract itself would be at risk of being declared invalid if it were determined that DCHA was obliged to comply with the Council approval requirement even when non-District funds were being used. To avoid this possibility, the Council should clarify the obligation of all independent agencies, including DCHA, to satisfy the Council approval requirement regardless of whether District funds are being used. If the Council determines that a particular independent agency, or all of them, should be exempt from the Council approval requirement when the contract involves expenditure of non-District funds, it should take the necessary steps to establish the appropriate legislative exemption for such contracts or otherwise clarify the scope of the requirement.

4. The investigation also uncovered conduct that frustrated the intent behind the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act. While the act by its terms governs prime contractors engaged directly by the District, and not

subcontractors retained by project managers or general contractors, the Council should consider whether to require city contractors to monitor and verify that subcontractors selected on the basis of their CBE status are in fact directing the appropriate percentage of the work and the dollars to CBE firms.

B. Referral to the United States Attorney

In response to the question posed in the resolution appointing the Special Counsel, it is our conclusion that certain of the circumstances surrounding the DPR capital projects warrant referral for further review by the United States Attorney for the District of Columbia. In particular, we believe that LEAD's response to the engineering RFQ, Banneker's award of the engineering contracts to LEAD, Banneker's selection of general contractors, and the financial relationships between Omar Karim, Sinclair Skinner, and their various business entities should be the subject of further inquiry. We also recommend that the Council refer for further inquiry the question of whether Karim and Skinner provided false testimony in the course of this investigation. The documents and testimony that we were able to obtain raised questions that could not be satisfactorily answered with the tools we had available. We express no opinion as to the likely outcome of any investigation.