statements that the record discloses material factual disputes that need to be resolved in order to properly apply the law – which, as the Court also stated on June 22, is less than clear. Such a ruling, we respectfully suggest, would be directly contrary to *Fed. R. Civ. P*. 56. Moreover, such a ruling, we respectfully suggest, would face a high probability of reversal, in addition to the expenditure of substantial resources and time.

B. The Court was correct in its decision to deny summary judgment to Plaintiff because there are material factual disputes.

The history of the interpretation and application of § 209 by the Office of Government Ethics ("OGE") and the DOJ Office of Legal Counsel ("OLC") demonstrates that the Court was absolutely correct on June 22 when it stated that a legal determination requires the decision-maker to make "subtle distinctions" among the underlying facts. For example, in an advisory letter to an agency counsel, the OGE stated:

> *It is always an issue under the facts of the particular case whether a transfer of an item of value to a Government employee is a permitted gift or a disguised prohibited supplementation of the employee's salary as consideration for his services*. But to make out an offense under section 209, it is essential to *establish the linkage between the transfer of the thing of value and the services rendered. OGE Letter, 81x31 (Oct 2, 1981).* (emphasis supplied)

In permitting the distribution of a bequest to agency staff, the OGE found it significant that,

> There is nothing in such activities which would indicate an expectation on the part of the[agency] employees beyond fulfilling their official responsibilities in a salutatory manner. *The apparent lack of the requisite intent on the part of either the bequestor* or the recipient [agency] employees to influence services rendered distinguishes this case…. *Id. at 2.* (emphasis supplied).

In the instant case, documents generated by government officials create a disputed issue of fact central to the resolution of the case. For example, affidavits from two of Mr. Berman's supervisors, submitted by Plaintiff, attribute to Mr. Berman a significant role within the Office of

Policy Analysis with respect to oil royalties. Plaintiff argues from these that oil valuation was one of his core functions. Yet a letter from Deputy Secretary of Interior Sylvia Baca to the Congress (included in both POGO's and Mr. Berman's exhibits) states that Mr. Berman had no role in formulation of the oil valuation rule. Furthermore, the notices of meetings and workshops held throughout the country and in Washington by the Minerals Management Service ("MMS") to discuss its proposed new regulations reflect that Mr. Berman was not invited to be a panelist on any of them. *See Berman Exhibit 11, Meeting and Workshop Notices for New Oil Valuation Rule, December 1995-December 1999 from DOI Website).*

More specifically, on December 20, 1995, MMS posted its initial Federal Register notice that it was considering moving away from "posted prices" as a valuation mechanism for oil sold through non-arm's length transactions. Instead, prices obtained for oil at one or more of several marketplaces, *e.g.*, NYMEX or the "spot" market, would be used to establish the benchmark price for sales between related entities. *From the initial notice of the proposed rule (December 1995) through December 1998, when DOI and DOJ officials learned of POGO's awards to Messrs. Berman and Speir, MMS personnel held at least 12 meetings with the interested public, industry leaders, and Members of Congress, at locations across the country*. These meetings had a threefold purpose: to explain MMS's rationale for the new rule; to answer questions; and to receive feedback and gauge public reactions.

Despite Mr. Berman's having advanced nine years earlier in (1986) in one of his first analytical memoranda, the use of market prices to measure the value of oil sold in non-market circumstances, MMS records taken from the DOOI website, show that Mr. Berman never appeared on any panel or as a speaker at any of the MMS-sponsored gatherings. *Id.* His only participation in the mammoth effort by DOI to formulate and seek public comment on a significant new rule was his appearance at a Congressional hearing in 1996 at the insistence of

Rep. Carolyn Maloney. DOI tried to stop even this minimal involvement, but ultimately relented in the face of Ms. Maloney's insistence.

This contemporaneous documentary evidence on the DOI website belies the assertions of Messrs. Bettenberg and Heintz, who endeavor to depict Mr. Berman as a central figure in the consideration of the new rule. *Simply put, during the period of time that MMS focused most intently on developing a replacement for "posted prices" as a valuation technique, Mr. Berman was intentionally excluded from the extensive public debate with respect to the problem and its potential remedy, even though he was the first person identify both the problem and a theoretical solution.* This surely raises a genuine dispute as to exactly what Mr. Berman's role was with respect to oil valuation.

The significance to the resolution of this case of Mr. Berman's exclusion from the critical meetings (and of this dispute, generally) is demonstrated by other opinions of the OLC and the OGE. In one of the OLC's advisory opinions (discussed at greater length in Part II of this memorandum) the OLC set out a six-factor analysis to determine whether the government had proven the requisite "direct link" between the payment and the employee's government service. Among these factors is *whether the employee is in a position to influence the government on behalf of the payor*. The documented record of Mr. Berman's exclusion from critical activities that were central to MMS's consideration of the valuation rule, surely raises an issue as to the "directness" of the "link" between Mr. Berman's government service and the award he received from POGO. Only through discovery can the Court and parties know what the actual state of affairs was with respect to Mr. Berman's actual participation I the effort to change DOJ's oil valuation policies.

Moreover, the documents cited raise critical unresolved questions whether Mr. Berman was in a position to influence his agency in ways that would benefit POGO. At the July 9, 2004,

hearing, plaintiff's counsel argued that Mr. Berman had been involved in "oil litigation, oil valuation throughout his career." Whether that is so, and the degree of involvement (if any), are questions of fact that must be resolved in order to determine whether § 209 has been violated. There can be no denial of the substantiality, as well as the materiality, of this dispute: One set of government-generated documents can be read to suggest an answer favorable to Plaintiff's theory. The other documents suggest that Mr. Berman was intentionally excluded from DOI's extensive and lengthy efforts to reach a resolution with respect to the new oil valuation rule that it was going to adopt. This is the position the DOI took before Congress, as reflected in Deputy Secretary Baca's letter. This dispute can be resolved only through discovery.

The Court's question to Mr. Berman's counsel at the July 9 hearing -- asking what POGO's payment was for if not for Mr. Berman's government service -- points up the significance of the factual dispute engendered by the government's inconsistent positions regarding Mr. Berman.. The implication of the question is that anytime an outside entity rewards a government employee it must be "as compensation for" his government service. Yet, every year an organization, *Government Executive,* distributes multiple "Service to America Medals," each carrying a stipend of between $3,000 and $10,000, to government employees that they and their co-sponsors select. *See Berman Exhibit 10.* In addition, documents downloaded from the *Government Executive* website disclose that the co-sponsors of these awards are companies such as Siemens, Tyco, and Hewlett-Packard, among others. *Id.* Furthermore, *Government Executive* advertises among private companies with substantial government contract interests to induce them to participate as sponsors by suggesting that doing so is a good business decision: the website touts the number of significant federal decision-makers that attend the awards dinner and read the magazine, and urges private businesses to support this effort because of the contacts they can make. *Id.* These awards have been made for years; the selection committee includes

senior industry executives. Apparently DOJ is not concerned about the influence these industrial award-givers might have on the federal employee recipients.

The point is, not all awards to federal employees are prohibited. Indeed, in its "guidance" to agency ethics officers, OGE advises that there are such things as "bona fide public service awards" and advises these ethics officers that *"an intent to compensate for Government services cannot be inferred from a "bona fide award for public service or other meritorious achievement." OGE Memorandum on 18 U.S.C. Guidance at 12. (emphasis added)* The question, of course, is what distinguishes these permissible awards, of which the government must be aware in that they are distributed at a gala dinner, from the one given by POGO to Mr. Berman.

The distinction is the "direct linkage" between the service provided and the award. In the instant case, POGO says that Mr. Berman was given an award because he had been an example of the best in federal employees, leading the fight to protect taxpayers. Plaintiff implies (without evidence) that Berman was paid off for helping POGO with the *qui tam* litigation. This can only be resolved through further factual inquiry. It is precisely the kind of dispute that precludes granting summary judgment.

There are a number of other factual issues that are in dispute. Although Plaintiff argues that §209 is, in effect, a strict liability statute, both the OGE and the OLC disagree: "The express intent of the payor, if any, is a factor that must be considered." *Id. at 8 (citation omitted).* Danielle Brian has testified in depositions that there was no intent to reward Mr. Berman as compensation for his government services. The government argues to the contrary, though it has provided no evidence to support its assertion. Only through discovery can the facts be fleshed out on this issue.

As is clear from the above, it is surely premature, at best, to grant summary judgment without the defendants even having had an opportunity to conduct any discovery whatsoever. Counsel for POGO has submitted a declaration pursuant to *Fed. R. Civ. P. 56*, and Mr. Berman adopts that position with respect to §§ 2-9 and §11 of that declaration.

In conclusion, the Court's initial view, stated three times on June 22, 2004, that this case cannot be resolved on summary judgment motions was surely correct. Nothing has been added to this record that provides any basis whatsoever to change that decision. We urge the Court to review the transcript of the June 22 hearing. Such a review will, we submit, convince the Court that, in the present state of the record, including the Court's repeated observations about the need for further factual development in order to properly apply the law, granting summary judgment will merely postpone the day when discovery can begin.

THIS CONCLUDES PART I OF THIS MEMORANDUM. THE REMAINDER IS THE PORTION THAT COUNSEL REFERRED TO AT THE JUNE 22, 2004 HEARING PRIOR TO THE COURT'S ANNOUNCING THAT THE MOTIONS WERE DENIED AND THAT THE PARTIES SHOULD MAKE PREPARATION FOR DISCOVERY AND TRIAL. HAD THE COURT DIRECTED THE FILING OF PLEADINGS ON JUNE 22, 2004, IT IS THE DOCUMENT THAT COUNSEL WOULD HAVE FILED AT THAT TIME.