ORAL HISTORY OF ROGER E. ZUCKERMAN
Third Interview
January 23, 2014

This is the third interview of the oral history of Roger Zuckerman as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the office of Mr. Zuckerman at his law firm in Washington, D.C., in the District of Columbia on Thursday, January 23, 2014.

Granof: Last time we got you through law school. You graduated from law school and you were hired by the U.S. Attorney in Washington, D.C. What year was that?

Zuckerman: Hired by The Honorable David Bress in the summer of 1967.

Granof: And you stayed at the U.S. Attorney's Office for how long?

Zuckerman: I was there for five years leaving roughly in the summer of 1972. The first seven or eight months as a kind of Special Attorney who had not yet been admitted. When I got admitted to the bar in early 1968, I got an appointment as an Assistant U.S. Attorney.

Granof: Before that as far as when we talked, the closest you came to trial work was being a process server, am I right?

Zuckerman: Well, I would say the closest I came to – I had no trial – I might have had a trial advocacy class at Harvard my third year. I didn't think much of it. I had spent a fair amount of time on my feet at Wisconsin in various student activities, but I certainly had no experience in a courtroom. However, I had no interest in going to court accompanying other lawyers to just carry their briefcases.

Granof: Had you even taken a deposition?

Zuckerman: No, no. Remember, I wasn't a lawyer yet. I had never attended a deposition and I don't know that I had really ever been in a courtroom and watched a

trial. So this was something that sounded pretty neat, but I was really a fresh-faced, green human being when it came to the endeavor.

Granof: So, all of this was preliminary to the question I really wanted to ask you. You come in with no experience to speak of and five years later you come out as an experienced trial attorney and from an office which has a reputation for excellence. To be sure, they had good material to work with. My question is, "How do they do it? And how did they do it in your case?"

Zuckerman: Yes, that's a great question. It's actually a profound question because in the modern era – certainly from 1985 or 1990 onward – the U.S. Attorney's Office here and in, I think, most other jurisdictions – certainly the large cities – have developed a policy of not taking greenhorns but only taking people out of law firms or young lawyers who have had some level of experience. In the Southern District of New York and here, it is currently the case, and it's been the case for twenty years, that those who went into the U.S. Attorney's Office were much further along in their thinking and their development as lawyers than back in the day I was there. Back in the day, at least speaking from my own experience, it was comparable to what happens when the Marines take a greenhorn and put him through a bunch of Parris Island-like drills; develop him; throw him into battle; and do a number of other things to prepare him for combat. At the end of the military basic training process, somehow there emerges a qualitatively different person, who is a much more skillful human being at the endeavor than he was at the beginning. It works if you've got good material. The way it worked in the U.S. Attorney's Office at the time – which is not the way it worked for me – but the way it worked - is that you spent your first tour of duty in the 60s going to the Court of General Sessions, which was essentially akin to what is called a district court in the various counties in Maryland and, I think, Virginia. It was a court of limited jurisdiction. It essentially could deal only with misdemeanors and with civil offenses to a certain economic level that's relatively low. The judges at the time – trying to be respectful but candid –

were of uneven quality. There were judges who were thoughtful and serious, and there were other judges who would do such things as spraying deodorant on a defendant who was on the witness stand who had some malodorous quality or taking a vote from the spectators in the courtroom as to whether or not a particular defendant ought to be found guilty.

Granof: Did you happen to witness these or just hear about them?

Zuckerman: I'm not a personal witness to either, but I am certain they happened because I trust the observations of others. It was a wild and varied place. And the stories of what went on in, what are still called, Building A and Building B in the courthouse complex, are told with hilarity, love and pleasure to this day. The profile was often young lawyers – essentially males – there was no gender diversity to speak of. There was some racial diversity. Young men, 26 to 30, who were eager to become trial lawyers, who were relatively bright – they had gone, for the most part, to good law schools; some had come out of the JAG program – who were thrown into the hurly-burly of this misdemeanor environment, with judges, some of whom bore resemblance to, or had adopted the style of, a somewhat off-kilter drill instructor at Parris Island. Although not particularly a credit to the administration of justice, this style helped to mold you and give you the feeling that you could deal with a lot of aberrant and unexpected behavior in the courtroom. You had jury trials there; you did all manner of things. You stayed for a year, and if your performance was deemed acceptable, you got moved out of General Sessions as it was called, and you went to the Appellate Section of the U.S. Attorney's Office, which when I was there, was run by Frank Nebeker, who became a distinguished judge on the D.C. Court of Appeals, and then the Court of Veterans Appeals. You honed your craft, writing briefs and arguing both in the D.C. Court of Appeals and in the U.S. Court of Appeals for the D.C. Circuit. If you passed muster there, in roughly the third year of your tenure, you ended up trying serious felony cases in the United States District Court, which had a distinguished bench of about ten judges whom I shall never

forget, and who were, in many respects, God-like figures for us twenty-somethings. The record should reflect their portrait graces a shelf in my office in a photograph that I inherited as the keeper of a lot of the memorabilia from Judge Flannery, who came to be on the court after a period.

To recapitulate briefly, the first few years of an Assistant U.S. Attorney's tenure in the late 1960s – before the D.C. Court Reorganization Act was enacted – consisted of a three-part process: (1) Misdemeanor prosecutions in D.C. Court of General Sessions; (2) writing briefs for and giving oral arguments before the Court of Appeals as a member of the Appellate Section; and (3) United States District Court felony trial practice. After a couple of years, you were actually pretty fit and actually pretty adept at the give-and-take of the courtroom. That was the normal progression, at least when I was there.

I will now give you a general sense of this period, including a discussion of the demographics and the history of the U.S. Attorney's Office, because it was a significant time. Leo Rover was the U.S. Attorney for the District of Columbia for a long time in the 40s and I think into the 50s, and had as his chief prosecutors a cadre of extraordinarily tough, able – storied in their own right – men. Victor Caputy and Harold Titus and Joe Lowther. These are men who were extraordinarily gifted and colorful. They were essentially career prosecutors. Tom Flannery, who reappears in my life at various points in important ways, was a younger assistant during the 50s. With the appearance of David Acheson, who was, I think, the son of Dean, as the U.S. Attorney probably in the late 50s or early 60s, and then David Bress in the later 60s, the Office had an influx of much younger talent. Then you saw this interesting demographic mixture of (1) a lot of generally eastern law-schooled youth, including young men who had been clerks on the Supreme Court, and came to the Office for trial experience, in combination with (2) these older, crusty, tough senior prosecutors. This mixture of youth and

energy coupled with the wisdom and experience of the senior prosecutors made the experience of the younger prosecutors who came in particularly valuable. It wasn't simply that you got to try cases; it's that you got to try these cases under the tutelage, direction, criticism and guidance of people who had been doing this for twenty or thirty years, who were, in many respects, wonderful teachers and guides, and who took a terrific interest in what you were doing and didn't hesitate to criticize what you were doing. It was a wonderful, wonderful learning experience during a period in which you were able to bond at the age of 25 or 28 with people who seemed old at the time – they probably were 50 or 55 – but were doing essentially what you were doing. In that sense, I think the experience was particularly valuable. Let me go to my own experience. It'll elucidate somewhat of what I am saying.

Granof: I'm curious about that, particularly because my own experience was that it was many years before I got to a NITA – National Institute of Trial Advocacy – program, and I thought why didn't I have this at the beginning of my career? So my question is in your experience did you have anything like that? You obviously had a mentor.

Zuckerman: Yes, well we did. One of my dear friends for life is an attorney now in the Virgin Islands who was the head of the Misdemeanor Section or the Deputy Chief of the Misdemeanor Section in the late 60s. The Chief was Chuck Work for a time who went on to run McDermott Will's D.C. office and had a very exceptional career. The Deputy Chief was Fred Watts. When you went to the Court of General Sessions in the fashion I have described, most Assistants had never tried a case before – they all went to the Fred Watts' trial school. He had a number of – I have only the vaguest recollection of it – a number of lectures and demonstrations and the like that were designed to give you the basics of what it was like to try a case. But trust me, they were only the basics and the real learning experience came when you dropped into Judge Scalley's courtroom or Judge Alexander's courtroom or some other

judge's courtroom with a stack of files. You did a lot of the arraignments - you were on your feet arguing bond questions. You had never seen these case files before in your life, and periodically you had to take one or another of these cases to trial. The trial might last two hours, it might last two days.

Granof: But, you had to pick a jury.

Zuckerman: You had to pick a jury; you had to learn by the seat of your pants and do it. But truly, truly they were not momentous cases. These were – to the people involved – they were very serious but they were –

Granof: Drunk driving?

Zuckerman: No, those were Corporation Counsel cases. You might get low-grade drug offenses, you might get low-grade weapons offenses, you might get assaults; things that were relatively minor in the scheme of things. One of the things you did in General Sessions is you charged the cases. It was a wonderful experience. You had a cubicle; police officers would come in in the morning; they would bring you their "PD-251s," which would include their description of what had occurred generally the day before or the night before. The defendant was oftentimes in jail and was appearing for arraignment or presentment if it were a felony as the case might be, and you made your charging decision. The process was called "papering." You, the young prosecutor, saw to it that "the charging papers" were created and then these "papers" were sent up to the courtroom where the Duty Judge was calling cases of individuals who were in the lock-up and each one would be brought in. "Mr. Wilson, you've been charged with X, Y, Z." "How do you plead?" "What does the government have to say about bond?" "What does the defense have to say about bond?" Either the individual was granted bond or remanded.

Granof: Was he represented by a lawyer at that point?

Zuckerman: There were court-appointed lawyers who would sit in the jury box and they would be assigned to these individuals and consult with them in the lock-up before the case was called. It was a real police court and you were learning the business of the administration of justice from the ground up - really from the ground up. It was done - to answer your first question which is a good one - it was done with enough ease that if you were bright and worldly and committed, you could pick it up pretty quickly. You had the camaraderie of your colleagues and you would not only laugh and exchange stories, but also learn bits of wisdom from them. After a few months, you actually felt as if you understood the system and could do basic surgery as it were.

My experience was different and in some respects better and in some respects not as good. David Bress had a soft spot in his heart for Harvard graduates and figured that they operated at a speed which was equal to, if not greater, than the graduates of other illustrious institutions. Oftentimes if you went to Harvard or some comparable school – even Yale, if I may say – he would not send you as your first order of business to boot camp in General Sessions. He would say, you can pick this stuff up quickly. I'm going to start you in the Appellate Section. You in effect are going to skip first grade. And that's what happened to me. I started in the Appellate Section and it created an extraordinary anomaly. I wrote briefs, then I argued briefs, and I developed a good working relationship with Frank Nebeker, who was at that time running the Appellate Section. I would say after being there about a year and one-half, which was relatively little time, I had been an Assistant maybe for six months, I had been on this sort of pre-Assistant status for six or eight months. He called me and asked me if I would take over a position that was being vacated called the Deputy Chief. So I became the Deputy Chief of the Appellate Section - I assigned briefs, I edited briefs, I supervised people. I was a pretty good writer and good enough thinker and could pick this stuff up.

Granof: You were a young guy.

Zuckerman: I was 25 years old and I had never seen the inside of a trial courtroom, remember. I had been there for maybe a year and one-half. I was the Deputy Chief. I was doing what I thought was competent work. I was arguing in the Court of Appeals. I was defending decisions that judges had made, defending actions of prosecutors. A little bit anomalous because I had never seen the inside of a courtroom. But people can argue appeals and not have tried cases. It's not a critical necessity. In 1969, while I was the Deputy Chief – I had not been the Deputy Chief for more than six or eight months, I believe, maybe a year – Frank received an appointment to be an Associate Judge on the D.C. Court of Appeals. Probably in early 1969, he left the Appellate Section. I am sitting there - I had just turned 26 - I had been in the Office probably less than two years, and by default I am the Acting-Chief of the Appellate Section of the U.S. Attorney's Office in Washington, D.C. Keeping the seat warm, to be sure, for its next occupant who turns out to be John Terry, an incredibly eminent jurist on the D.C. Court of Appeals in later years and a wonderful leader of the Office. But I kept the seat warm as the Acting Chief of the Appellate Section probably for about three months.

Granof: I remember John Terry.

Zuckerman: Well, you don't remember me. Trust me. I enjoyed it. I think probably I did not fumble the ball, but I was manifestly underage and manifestly too inexperienced for that position. It was good experience. I did a good job. It's like a lieutenant or major getting thrust into battle at an age and level of experience which is a little beyond his years. I enjoyed it. It was challenging and I ran the place. That's about the time David Bress left, I think, as I put it in my mind. He left and Tom Flannery came in as the U.S. Attorney. John Terry was his appointee to run the Appellate Section. I left the Appellate Section and my exalted position as Acting-Chief. I was offered the opportunity to go right to District Court to try felony cases. Bear

in mind, I had never so much as set foot in a trial courtroom. I argued a lot of cases in the U.S. Court of Appeals and enjoyed that, but I had never been in a courtroom. I declined to go to the District Court. I said, "Why don't you give me a few months at least in General Sessions to see how the vegetables grow in the garden from the roots up."

Granof: That was a very astute decision.

Zuckerman: I thought it was a good decision. So, I went to General Sessions. I went to Fred Watts' trial school. I had all of the experiences in front of the cantankerous and eccentric bench that existed there. I was put through – here's another metaphor I will give you – it's a kind of pledgeship and these judges thought they were your pledge masters in a fraternity, and their job was to hassle you and rile you up and say outrageous things and do outrageous things, partly for their own amusement, but being generous about it, to make you a little bit tougher, a little bit more adept at handling the array human foibles that arise in a courtroom.

Granof: It seems to me that law school, at least when we were there, didn't prepare you at all for trial work but it did prepare you for writing briefs. Even though you didn't do a lot of it, there was some experience in the first year of moot court, you argued a case and, of course, most of the decisions that you studied were appellate decisions. Still having said that, my own experience at the National Labor Relations Board, where I first argued appellate cases, was that nobody does a good job on their first brief. I mean it takes a break-in period. You must have been a very quick learner. I just wondered what your thought is on that.

Zuckerman: In terms of brief writing, how can I put it? In terms of brief writing, I have the following reactions. Ninety percent of the issues were routine and repetitive: the judge had abused his or her discretion in allowing in this piece of evidence; the judge had abused his or her discretion in allowing a

defendant to be impeached by certain prior convictions; the judge had abused his or her discretion or committed error by allowing in a line-up identification or photographic identification; or a judge had abused his or discretion in allowing an inflammatory argument by the prosecutor. You can probably list a dozen or two dozen of these. There was a library of briefs that existed in which the legal standard for these had been chewed over a thousand times and it was pretty easy to pick up. These tended to be in the main not overly complicated legal issues, they were very much fact and record specific: "What exactly was the record?" - "What was the evidence that supported the prosecutor arguing X, Y or Z?" - "Tell me the circumstances surrounding the photographic line-up or the like."

Once in a while you had appellate issues that were extraordinarily rare. In my experience, the rarest and the one I lost that occasioned – believe it or not – an editorial in the *Washington Post* involved Mr. Tatum and Mr. Gaither. They were two defendants and their appeal was handled, I think, by Bob Weinberg, who was a wonderful lawyer at Williams & Connolly. He came up with the following argument: "When they were indicted, the grand jury had received a bill of indictment and charged Tatum and Gaither jointly with robbery or some offense. Although the grand jury voted to indict the defendants for robbery, there was no written bill of indictment before the grand jury at the time it voted. After the vote, the prosecutor went and typed up the indictment in the format that he believed the grand jury had voted, and he then got the foreman to authorize or approve the formatted writing by signing his name to the indictment, which was then filed. Once indicted, these defendants were prosecuted. Weinberg argued that there was only one problem with this procedure, and that is while the grand jury may have voted conceptually to indict, it had never seen or voted on the actual verbiage in the indictment, it had only been ratified by the foreman after the fact. Yours truly had to argue the propriety of that in the Court of Appeals.

Granof: U.S. Court of Appeals?

Zuckerman: In the U.S. Court of Appeals. When I initially saw the argument, I thought it was silly. I wrote my brief, Bob Weinberg was there, we argued and it was obviously very troublesome – it's a Fifth Amendment issue – it's a due process issue. You have a right to be indicted and the process of indictment seemingly includes the vote by the grand jurors on the bill of indictment. I actually did a lot of John Dawson – remember John Dawson – who taught history, legal history, English legal history?

Granof: At Harvard?

Zuckerman: Yes. I had a lot of John Dawson research on how bills of indictment were voted and whether they were extant when they were voted back in the common law era. I ended up making what I thought was a credible argument, but I got crushed. And the United States Court of Appeals invalidated the process by which thousands of indictments had been voted as being a violation of the Fifth Amendment, calling into question the legitimacy of God knows how many convictions. This is one of young Zuckerman's cases.

Granof: In the 1960s the U.S. Court of Appeals for the District of Columbia was a powerhouse and they certainly had no compunction –

Zuckerman: I will get to them in a second. I can't remember the panel.

Granof: I was going to ask you who the panel was.

Zuckerman: I can't remember the panel, but I then went back and, with the guidance of others older and wiser than myself, sought to have the ruling made prospective only, so that at least as to future indictments the indictment in its written form would be returned to the grand jury before it voted. The term "gaitherized" came into vogue for a time. Such a "prospective" ruling would not invalidate a thousand or ten thousand prior convictions. And the *Post*

weighed in on it in an editorial – I will always remember – in favor of that result. This is an example of a case that was not quite a run-of-the-mill case, where one is dealing with fact. The Court of Appeals –

Granof: But don't leave me hanging. Tell me what happened.

Zuckerman: Oh, the Court did rule to make the effect of its ruling prospective only so as not to create stupendous havoc. You can look at the issue of when prospectivity as a concept is appropriate. And it's a close question here, because you're arguing, not about issues of Fourth Amendment deterrence and the like, but you are arguing about a command in the Constitution, and it is very hard to argue that if a command in the Constitution has been ignored, that the remedy ought to be prospectively applied only. In any event, the mess was somehow – the consequences were avoided – the bad consequences. I think Bob's approach was okay. His victory was a little bit pyrrhic. I don't think it made a damn bit of difference in terms of how the system operated, but it's just another box you had to check in order to vote the indictment.

Granof: His clients, at least –

Zuckerman: Yes, his clients probably had the benefit. That's right. The clients had the benefit of the ruling. It's an important principle.

The Court of Appeals in D.C. in the late 60s had three very definable wings. It had a liberal wing that consisted of Judge David Bazelon, the Chief Judge, Judge J. Skelly Wright and Judge Charles Fahy, whom I will always remember and revere because when I lived at Van Ness North, I rode the L1 bus to work. It was an express bus. It was terrific. Right down Connecticut and then down Pennsylvania and Judge Fahy also rode the bus most of the time. That was the storied liberal wing, and you knew exactly where you stood if one of these judges were hearing your criminal case. On the conservative side, you had Judge Edward Tamm, Judge John Danaher, and

I'm blocking the third. And you knew exactly where you stood when one of those judges sat. And in the middle, you had three of what I regarded as amongst the best minds and jurists I had ever seen. You had Judge Harold Leventhal, who was just terrific and thoughtful and reminded me actually a lot of David Shapiro at Harvard. You had Judge Carl McGowan, who was just a wonderful human being, and Judge Spottswood Robinson. Basically, you learned that these three judges were where the center of gravity was in any panel that you were arguing to. If you lost one or more of them, you probably were not going to prevail as a prosecutor.

Granof: I would have thought, at least from my experience at the National Labor Relations Board, that McGowan and Leventhal – I didn't know much about Spottswood Robinson, but certainly McGowan and Leventhal who I did argue before – were pretty solid votes for upholding the decisions of the NLRB. We regarded them as liberal. But maybe for criminal purposes they were more middle of the road.

Zuckerman: In today's environment, they would be very liberal.

At the time they were, I would say, thoughtful, moderate jurists. Certainly in comparison to the somewhat wiliness of Judge Wright and Judge Bazelon. I mean they were – Judge Wright and Chief Judge Bazelon – were extraordinarily aggressive, creative, pick what you want – at trying to recraft some of the basic tenets of the law. Chief Judge Bazelon, of course, being famous for trying to get out from under the Durham rule, and recrafting the law of insanity in a way that rested very heavily on the medical model – psychiatric model – and much less on deterrence and the ALI standard, as I remember at the time. Anyway, it was a fascinating period that I had in the Appellate Section. The people who passed through it, whom I was privileged to supervise, turned out to be amongst the best litigators in town. They were just wonderful people and it really was a wonderful time. Marred only by the sense that I had never tried a case in a courtroom and that fact

gave me a feeling, not of inadequacy, but a feeling probably best described as a feeling of incompleteness at not having had quite the array of experience that one would want when one is arguing, "These remarks could not have had an effect on the jury, there wasn't any error, it was harmless error." "Well kid, you've never been in a courtroom, you've never seen a jury deliberate, you've never confronted a prosecutor's closing and so forth, and your remarks in that sense are a little bit empty." That's the kind of feeling that I had. I did manage – I will tell you – since the Appellate Section was on the third floor of the courthouse - I managed to sneak off to other floors of the Courthouse and watch trials. I watched Harold Sullivan, who was a young, but immensely talented prosecutor, and Vic Caputy. I would sit there for a few hours and watch them examine, cross-examine or close, and sometimes talk with them about what they were doing. And in that sense, at least, felt that I was imbibing a little.

Granof: Who were some of the people you supervised who went on to be very distinguished that you recall?

Zuckerman: Jim Sharp, who was a great, great trial lawyer, whom I supervised in a way that, in at least one case, was quite critical, and he to this day tells hilarious stories about how in the wake of my supervision and my criticism, he was convinced that he could not cut it as a lawyer, and had decided that he was going to go back to Oklahoma. Turns out my criticism of his argument and his brief was completely misguided. The case was affirmed. It's an extraordinarily funny story. Jim went on to represent President Bush and a number of other luminaries and really has had a storied career as a D.C. litigator. I don't know that I supervised Bob Bennett. I think I probably supervised John Aldock. There are probably twenty lawyers who came through during that period.

Granof: Just turning to some nuts and bolts. I'm always curious as to what your

workload was. How many cases did you actually, personally argue?

Zuckerman: I'm guessing I argued between fifteen and twenty-five. Fifteen and thirty. A lot of cases were resolved without argument. I probably sat as the second chair in the Court of Appeals for another forty or fifty.

Granof: So you were arguing about one a month?

Zuckerman: I would say two a month, maybe, and when I was a Deputy Chief and as Acting-Chief, probably supervised five a month. Maybe more. It was intensive, grounding and, I suppose, gave you a sense that if you could deal with the Court of Appeals, you could certainly deal with whatever it was a trial judge was going to throw at you. Turned out to be untrue.

Granof: I'm not surprised.

Zuckerman: It gave you a false sense of confidence. Trial turned out to be a completely different experience. But I went to General Sessions, did my stint in General Sessions. I kind of flipped the two experiences, and then I was drawn into a case that was not quite a career changer, but really was one of the centerpieces of my career in the U.S. Attorney's Office. That case involved the prosecution of three New York, purported Mafia-connected, drug suppliers and a huge network of drug suppliers and distributors in the District of Columbia. The case arose in the following fashion. In 1968 at the instigation of Professor Robert Blakey, then a professor at Notre Dame, and an acknowledged expert in, and proponent of, wire interception and electronic eavesdropping, the Congress had voted the *Omnibus Crime Control and Safe Streets Act of 1968. Title III* of that Act authorized courts under a very strict regime to approve applications in certain circumstances for wiretapping and electronic eavesdropping. The Act was signed into law during the waning days of the Johnson Administration, but the Johnson Administration, through Ramsey Clark or whoever was the Attorney General, refused to implement the statute. Thus, it was little used in 1968.

When Nixon became President in early ’69, he thought wiretapping and electronic eavesdropping were appropriate tools in the fight against crime. A position which Nixon took – which may be one of the few – but it was a position that he took, which was eminently correct. Slowly, the various U.S. Attorneys’ Offices around the country began to respond by submitting wire interception applications that had to be approved. In the beginning, they had to be approved, I think, at Justice. There had been probably, I’m guessing, five or ten thousand court-ordered wire interception applications in the last forty years since that happened. The seventh was an application to intercept the telephone at a location, I believe, either in Northeast or Southeast, in the District of Columbia filed by Harold Sullivan, an Assistant U.S. Attorney and the head of the newly-created Major Crimes Unit of the U.S. Attorney’s Office here – probably in the spring of 1969. Whereas the first six applications from all over the country yielded very little, this application yielded a trove of communications by drug peddlers. It turned out to hit the telephone of what was essentially a 24-hour drug delivery service that was being supplied by these three New Yorkers. The interception ran for about forty days. It was – I’m sure to this day – one of the greatest mother lodes of criminality – certainly in the drug area.

Granof: It hit the jackpot.

Zuckerman: It really did. A good word for it. It really was a jackpot. It was run under the combined aegis of the U.S. Attorney’s Office, what was then called the Bureau of Narcotics and Dangerous Drugs – BNDD – and the Metropolitan Police Department. In early 1969, I was midway through perhaps four, five or six months in General Sessions. I had left the Appellate Section. Tom Flannery had come in as the U.S. Attorney. David Bress had gone. He had not gotten a judgeship which he wanted and would have gotten, I think, if Johnson had been re-elected, but he was not. The new U.S. Attorney was Tom Flannery. The case was named after the principal defendant, Enrico “Harry” Tantillo, and probably sometime in the spring or summer of ’69

there were fifty indictees in five separate indictments. The first of which had the core ringleaders in an indictment of about seven people. Judge Flannery decided to prosecute the case himself. He needed an experienced prosecutor to help him – and that was Ted Wieseman. But he said, "I not only need an experienced prosecutor, but this wiretap stuff is new. It will face a very significant constitutional challenge. It's very important that it be litigated correctly and well. I need an experienced appellate lawyer to basically defend the wire interception." So, he asked me if I would return from General Sessions and become the third member of the team with responsibility for protecting the wiretap.

Sometime in the first half of 1969, I came back and spent the next year working with Tom Flannery and working with Ted Wieseman with primary responsibility to protect the wiretap. We probably did a four-week suppression hearing. I wrote and argued a variety of lengthy motions. The matter was litigated before Judge Aubrey Robinson, who was a great judge and a great person – really a great person. For a time there were death threats – real or imagined. Harold Sullivan was under police protection. He was the prosecutor who had gotten the warrant, but he was not on the trial team. I, at least, remember it as a time when I got a ride by a U.S. Marshal to work from Van Ness North and a ride home. What good that would do I have no idea, but in a slight nod to the lowest member of the trial team, there was a marshal who was assigned to keep an eye on me during my travel.

We litigated against a storied group of defense attorneys led by Albert Krieger, who came down and represented Tantillo, a wonderful New York lawyer, who did a lot of mob work and is still practicing, I think, to this day; Bob Kasanoff, who in time formed his own small New York firm that we did a lot of work with in later years, and my personal favorite – John Shorter. John Shorter was one of two African-Americans who had graduated from Georgetown in the early 1950s. The other member of his class was Luke Moore, who became the U.S. Marshal in D.C. and a D.C. judge. They were

both whip-smart and Luke took one road – the U.S. Attorney's Office law enforcement road – and John took the "guys and dolls" road – if I can put it that way – and ended up representing any number of notorious hoodlums, such as they were, at the time – gamblers and dope peddlers around town – but he was a wonderful man, a terrific lawyer, very handsome man, had magnetic presence in the courtroom and came to be in time a very, very close friend of mine. He died relatively young of diabetes. He represented the principal D.C. defendant, Lawrence "Slippery" Jackson – "Slip" as he was known to his friends. I had wonderful relations with all of them during the suppression hearing, during the trial. I took some witnesses in the trial, but the trial was principally Tom Flannery and Ted Wieseman. The trial, I think, was probably a two-month trial.

Granof: How many defendants were there?

Zuckerman: Seven. One died actually of an ectopic pregnancy, Slippery's girlfriend, during the trial. There were six defendants. One of the defendants was represented by Tom O'Malley, who was a very nice man, a sole practitioner in Rockville, lovely fellow. I would not say nondescript, but nothing extraordinary about him. He was just a good lawyer. His son has turned out to be the Governor of Maryland, Martin O'Malley. There are a thousand-and-one vignettes. This was a trial – it received extraordinary press. These were major drug figures, they were purported New York mafia people who were down here. The case involved the very early use of wiretaps which were played in the courtroom. It was a very, very large trial in its public image. Judge Aubrey Robinson felt that the attendance at the trial might be a problem for a regular courtroom. So he decided he would try the case in the Ceremonial Courtroom to accommodate the crowds that were likely to come to this extraordinary event, and the trial itself went on for six weeks in the Ceremonial Courtroom. I would say the courtroom never had more than about twenty people in it. It was not the draw the Judge thought it would be, but it was a very significant event in the legal history of the City – the

national history of the country – in terms of utilizing eavesdropping as a wire-interception tool. The issue has morphed eighty different ways since then and we now talk about the NSA. But back in the day, it was a much more basic conversation about what people's expectations of privacy were on their phones or in their homes and what level of intrusion was permissible on a showing and what regime was permissible.

Granof: You have to get a search warrant to do this?

Zuckerman: Yes. But the warrant you had to get was not a "garden-variety" search warrant. It was, as Professor Blakey constructed the regime and as Congress passed, it had purportedly much greater rigor. You had to show, for example, that if I were investigating Gene Granof, that there were no other ordinary investigative techniques that would allow me to get this particular evidence that I needed, apart from the intrusive wire interception. So I had to write a section of the warrant that said ordinary investigative techniques would not suffice, and I had to give a clear and complete statement – not just a summary – but a clear and complete statement as to why that was the case. There are three or four other unique requirements that the statute imposes that in theory create a much more rigorous standard that a prosecutor has to conform to.

Granof: Well, that's interesting. Well, that's the way the law was written, but why should there be a more rigorous exception for phone interceptions than say for a search warrant that basically says we'll, look at the guy's house?

Zuckerman: Yes. It's a fair point. I think you're trying to decide the balance between the needs of law enforcement and the chilling effect, hard to measure empirically, but the chilling effect on the normal communications that citizens have over the phone that permitting some level of wire interception would create, and you make the judgment it's about "here" that we want to strike the balance. We think that if we strike the balance "here" then "You,

law enforcement, will get what you need," and "You, Mr. Citizen, will not feel as if you're likely to be overheard willy-nilly by prosecutors who are taking the easy way out."

Granof: Maybe I misunderstand this, but this was a Congressional judgment, is that right?

Zuckerman: No, it was a regular statute.

Granof: That's what I meant. It was a statute –

Zuckerman: It was a regular statute, but all the legislative history and the analysis and the "to-ing and fro-ing" is done in Congress, and all of the subsequent litigation about suppression and deviations from the statute and what does this mean and what does that mean, it all is decided in terms of what's in "the bible" that one looks at here, the legislative history of this statute.

Granof: Before there was a statute would you have been able to go to court and simply say I want a search warrant?

Zuckerman: No. *Katz* is the case. I think in the early 60s there were cases out of New York, *Berger v. New York* and *Katz.* They were cases that involved wire interception in New York. I don't know whether the interceptions in both – I can't remember – occurred without warrants. But they went to the Supreme Court – both cases – and in both cases, the Supreme Court tossed the use of the evidence. But with this inviting language: to paraphrase the Court's opinion –*This is not to say that if there were a rigorous statutory scheme that provided appropriate protections that we would necessarily find that as well to be outside the Fourth Amendment.* So there was a cue in either *Berger* or *Katz*, and Blakey took it and ran with it, and the powers that be ran with it in Congress, and the result is this sea change in the way in which electronic data is collected and used for law enforcement purposes that has burgeoned into these extremely difficult issues today. But the seedling for all of this

was planted in the Ceremonial Courtroom of the U.S. District Court in front Aubrey Robinson back in 1970 in this extraordinary case. Remember, the first case involved only seven of the fifty indictees. Judge Flannery, I think, went on about his business. I can't remember when he went on the District Court. Ted Wieseman left the Office and here are forty indictments of major drug figures in the City that needed to be tried. After the first case where I was the wiretap protector, the institutional knowledge about these forty people resided principally in me. Therefore, I was tasked to prosecute the remaining four cases, and they were prosecuted before Judge Robinson. I prosecuted one with my dear friend, Jim Lyons, that went on for about two months and we got convictions.

Granof: How did the original case turn out? Did you get convictions?

Zuckerman: We got convictions. Extraordinary long sentences – 20- to 30-year sentences – for the most part. There was a policeman who was convicted who got about five years, there was a lesser life from New York who got, I think, about five years. They were lengthy sentences. I argued the appeal. I did the remaining cases. We did one jury trial of six weeks, got convictions on all, and then we got pleas basically from everybody else because you can't – they're not reasonably defensible cases, and defendants got a much better deal if they pled. Finally, I got rid of those cases and then handled the appeal. The appeal we did as I was leaving the Office. It was a very important appeal because the legality of the tap was the foundation for fifty convictions roughly. I did a chart in an appendix to the brief to make the point that these fifty convicted individuals –

Granof: Including those who pled guilty?

Zuckerman: Including those who pled guilty. I can't remember whether the defendants that pleaded guilty were given the right to withdraw their pleas; it is conceivable that they were if the tap was found unconstitutional. Sometimes

the government does that, sometimes they don't. To indicate the importance of the investigative technique, I did a chart – there were roughly fifty convictions – and if you can imagine this, eight-hundred years of sentences. My thesis to the Court of Appeals was that there would have been no other way to break this case, certainly to this magnitude – and if ever you were to look at a wire interception and try to measure its value, this is the paradigmatic case. It's the example of what a well-crafted wire interception can do to bring crime to heel. I made one mistake in the brief – a copy of which, believe it or not, I still have. I believe it's the longest brief in a criminal case ever written in the District of Columbia. The brief was bound in book form. It was easily three-quarters of an inch thick, perhaps an inch thick, I think. When it was in typed form, before it was printed, it was probably 250-275 pages, something like that. There were a lot of issues that were raised and I thought the record deserved to be elucidated rather fully. I think at that time Roger Robb, I think it was Roger Robb, who had been appointed to the Court of Appeals, and I think he was on the panel. One of the judges on the Court of Appeals was furious with me and articulated his fury in the oral argument, chastising me for not finding a way to present the issues more concisely than in a book-length brief. I think in retrospect, he was 150% correct. I was imbued with the notion that this was an extraordinarily important case, that there was a great deal riding on it for the community and for lots of people, and that it deserved more than casual or more than regular attention. That was the centerpiece of my work in the U.S. Attorney's Office for some significant period of time.

Granof: Were you doing that full-time during this time?

Zuckerman: Not full but a lot. I regarded it as a useful time investment as a public servant because it was, in effect, the equivalent of 30 or 50 separate cases and they were bad people.

Granof: Were you handling other cases at the same time?

Zuckerman: Yes. Judge Flannery was very kind. I think he recognized that Ted and I had worked very hard and that this was a very significant case nationally. He nominated us for what was then a relatively rare award that was given to maybe a dozen Assistant U.S. Attorneys on a yearly basis for superior performance. Ted and I got such an award and there was a surprise presentation in one of the courtrooms that I will never forget. He invited the wives. Ted's wife, Mary, and Irene came down. We were doing something and we were told to go to this courtroom. There was everybody in the Office and he made a nice little speech and gave us our award, which is to this day somewhere here. This was given to me as a consequence of the work.

Granof: The award reads: "For Superior Performance as an Assistant United States Attorney." And with that we can end this interview.