

Oral History of Mark Tuohey
Second Interview
October 17, 2018

This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit. This is the second session of the oral history of Mark Tuohey. Bill Marmon is the interviewer.

Mr. Marmon: We are going to be talking about his time with the US Attorneys Office and some of the key trials that he participate and was involved in during that period. How did you get associated with the US Attorneys Office after law school?

Mr. Tuohey: In September, 1972 at the commencement of my final year of law school, I, like my classmates, interviewed for permanent positions after graduation. I interviewed with several law firms and the office of the Manhattan District Attorney, Frank Hogan. I was particularly interested in starting my career as a prosecutor, an experience that would provide me the opportunity to try criminal cases. After my interview with Mr. Hogan's deputy, John Keenan, a now senior federal trial judge in New York, I was informed that I would be recommended for appointment as an Assistant District Attorney in Manhattan, which I intended to accept. Shortly thereafter, I received a telephone call from an old high school friend, Dave Larimer, who was an Assistant US Attorney in Washington. Dave informed me that the Office had decided to experiment in the hiring process for the following year and to interview a select group of graduating law students to join the Office right out of school, waiving the standard requirement of a clerkship or private practice experience. I immediately expressed interest, sent my resume and other materials that the Office required, and then received an invitation to come to Washington for the first round of interviews with the United States Attorney's Office for late September, 1972. I interviewed with six

Assistant US Attorneys and enjoyed the exchange. I was invited back for a second round of interviews, after which I met Harold Titus, the United States Attorney, who informed me that, subject to an in-depth FBI background check, I was selected to join the Office after graduation and passing the bar. I returned to New York, thrilled with the opportunity, and finished my last at Fordham. That year was busy, between my course load, a trial advocacy clinic and my responsibilities as writing and research editor of the *Urban Law Journal*. I very much looked forward to starting my legal career as a federal prosecutor in the nation's capital. The only other decision was whether I take the New York Bar exam or the DC Bar exam, but in view of the policy that incoming AUSAs must first be admitted to the D.C. Bar, I decided to take the DC Bar exam and its preparatory course at Georgetown Law Center. We were advised that during the period between the bar exam and admission in the following December, the Office would assist in placing us on an interim basis with a DC law firm. After graduation, while Marty stayed in New York to finish her work before we moved, I came down to Washington for the June-July course. I stayed with my college roommate and a group of his colleagues in their Georgetown townhouse and spent my days (and many nights) at Georgetown Law Center. During that course, I met a few of my soon to be classmates in the US Attorneys Office and they became great friends: Henry Kennedy, who just retired as a US District Judge, Judy Heatherton, now retired after a great career with the US Attorneys Office and the office of the DC Bar Counsel, Bernie Panetta, now a criminal defense attorney in El Paso, among others. After the bar exam, I returned to New York, where Marty

and I packed up and moved to Washington in August 1973 to begin the next phase of our lives. The office placed me with the firm of Kellogg, Williams, Lyons and Zuckerman - a very successful boutique of four former assistant US Attorneys who were highly regarded lawyers and even better mentors. I enjoyed a memorable three months with Roger Zuckerman, Phil Kellogg, Jim Lyons and Ed Williams. In November, I received notice that I passed the Bar, and the Office scheduled me to be sworn in on the same day I would be admitted to the DC Bar – December 7, 1973 – together with Henry Kennedy, Bernie Panetta and Dave Addis.

On December 7, 1973, I was sworn in by Harold Titus as an Assistant United States Attorney at the United States Courthouse. My parents attended from Rochester. My father, who had served twenty years with the FBI, followed by five years as the Public Safety Commissioner in Rochester, New York, was very proud. This was the beginning of a great journey for the next four and a half years through October, 1977, when I joined the Assistant Attorney General (Criminal Division), Ben Civiletti at Main Justice. I spent 18 months at Justice as a Special Trial Counsel prosecuting several major organized crime cases in New York and Florida, and the bribery case against a member of Congress.

In the US Attorneys Office experience, one began either in misdemeanor trial or appellate. There were a series of rotations that were anticipated and required during the required four-year term. My first assignment was in misdemeanor trial, and several of my classmates joined me in misdemeanor, including Henry Kennedy, Bernie Panetta, Judy Heatherton, John Kern, Peter George, Jonathon

Marks, Andrea Harnett, Jeff Demerath and Steve Spivack. As people were sworn in over the next three to four months, they began their tenure in misdemeanor or appellate. Misdemeanor trial was consequential for a couple of reasons: first and foremost, we learned how to try a case, how to talk to a jury and how to present evidence. I had had an excellent advocacy course at Fordham, so I had the experience of standing on my feet and asking questions of the witness, and arguing a case to a mock jury...but this was the real thing. During the roughly 10-12 months spent in misdemeanor trial, I tried 50-60 jury trials. I was in court every day.

Mr. Marmon Do you remember your first case?

Mr. Tuohey: I know my first assignment was to the “witness room” where misdemeanor cases up for a trial that day were assigned to courtrooms and judges, and pleas were negotiated as well. I spent time in both the witness room and the arraignment court for the first couple of weeks, in order to get my feet wet. I remember the first judge I appeared before Harry Alexander, a judge who was notorious for intimidating young AUSAs. A former Assistant US Attorney and Principal Assistant at one point, Judge Alexander made clear his view about courtroom decorum, how a defendant should be addressed, and how a prosecutor should act. He was defense-oriented and he insisted that prosecutors conduct themselves with the dignity required of the courtroom. He was tough on prosecutors, but once you understood his persona, you could try your case without hassle. I was anxious to get into trial, and in my third week I started a rotation. We had a rotation system for a week at a time in front of judges assigned to misdemeanors. I believe my

first assignment in misdemeanor trial was before Judge John Doyle, now deceased, an experienced judge, former prosecutor, as many Superior Court judges were in those days. I rotated week after week in front of different judges. It was an important experience, learning by your mistakes. I was confident on my feet, but an experienced lawyer on the other side challenged you and taught you how to react. In those days, most of the misdemeanors were handled by court appointed lawyers, known in a colloquial sense as “Fifth Street lawyers”, whose offices were near the courthouses. Most were very good and some were over the hill, but the judges kept everyone in line.

Mr. Marmon: What was the next rotation?

Mr. Tuohey: The next rotation was appellate. The legendary John Terry, now a senior judge on the DC Court of Appeals, highly regarded as was his predecessor, Frank Nebeker, also a senior judge on the Court of Appeals, headed the Appellate Section, and was revered for his encyclopedic memory of appellate cases. More than anyone in my legal career, John Terry taught me the fundamentals of legal analysis and brief writing. John made you work at it until you got it right. The Appellate section handled appeals to the DC Court of Appeals from Superior Court and to the US Court of Appeals from the District Court. John gave new AUSAs easier cases at first, and as you progressed, more difficult cases. I handled about 20 appeals during my 10-12 months in the Appellate section. John Terry was a lawyer’s lawyer in every aspect. He would meet with you to discuss the case assigned and suggest an approach. We would then meet after the draft brief was submitted for review and John would personally edit the draft with his red pen.

He was an excellent teacher and he demanded the best from us. He or his deputy, Jim McMullen, would accompany you to oral argument, whether in the DC Court of Appeals or the US Court of Appeals. Several cases were memorable, including an appeal before a panel in the US Court of Appeals with retired Supreme Court Justice Tom Clark and an en banc case before the entire U.S. Court of Appeals. In the 1970s the D.C. Circuit had an extraordinary group of judges including Chief Judge David Bazelon, Judges J. Skelly Wright, Carl McGowan, Harold Leventhal, Edward Tamm, Roger Robb, Spottswood Robinson, and George McKinnon. The court was roughly split, with a blend of conservative, liberal and moderate thinkers a distinguished court. It was a great honor for me to be able to argue cases in DC Circuit.

Mr. Marmon: Do you remember what the en banc case was?

Mr. Tuohey: The en banc case, *United States v. Coefield*, dealt with the retroactivity of the Federal Youth Corrections Act, a statute with lenient provisions for youthful offenders. Our position was that the FYCA was not retroactive. It was a great honor to have that opportunity because there are only a few en banc cases in a given year. On the other hand, I remember the other en banc case before the court that day, *United States v. Crowder*, a Fourth Amendment case, involving the removal of a bullet from a defendant, was very contentious at oral argument.

During my time in appellate, Bill Collins, the Chief of the District Court Criminal Section, asked me if I'd were interested in trying a District Court criminal case. John Terry approved it as long as I got my appellate work done. I tried my first

felony case, involving federal postal fraud, before Judge Barrington Parker, and the jury convicted the defendant. Near the end of my time in appellate, I also co-
tried an armed robbery case in Superior Court. After the appellate experience, I
was assigned to the Grand Jury section in Superior Court where, day after day, I
presented witnesses to the grand jury to seek the return of a felony indictment.
This involved weeding out cases that did not have merit. The cases ran the gamut
from routine felonies like burglary, unauthorized use of a motor vehicle and false
statement, to serious sexual offenses, assault with a dangerous weapon, robbery
and murder. One learned the criminal code very thoroughly in the grand jury
experience. I do not remember how many cases I handled but it would have been
several a day, because you had to interview the investigative officers, and in many
cases, the primary witnesses, and if the case did not have merit, you could break it
down to a misdemeanor, or dismiss the case. The experience was valuable in its
own, but I was anxious to move to the felony section – where the action was.

During my time in the Office, the lawyers from the D.C. Public Defenders Service
and AUSAs who tried and defended serious felony cases, had, for the most part, a
strong positive relationship. We fought hard in court. At night, we would go out
for drinks and dinner after a trial, and socialize on weekends. The friendships
remain to this day. Unfortunately, things changed in these relationships in the
80's – after many of us moved on, and the administration of justice suffered in my
opinion.

I tried a number of felony trials during my tenure in the Supreme Court Division.
I was promoted to felony 1 in October, 1976. From October through March 9,

1977, when the Hanafi takeover occurred, I prosecuted the most serious felony cases – murder, rape and armed robbery before the best judges on the Superior Court bench, and against the best criminal defense attorneys in the bar. Our three lawyer team, Mike Scheiniger, Marty Linsky and I were in trial most days – an experience that shaped my entire career at the bar.

Mr. Marmon: Let's take on the Hanafi trial. Maybe you could set the scene of what happened, what the underlining facts were, your role and what happened in the court.

Mr. Tuohey: In 1973, a group of 5-6 men associated with the Nation of Islam traveled from Philadelphia to Washington to murder Hamaas Abdul Khaalis, the leader of the Hanafi sect in Washington, because of his outspoken opposition to the Nation of Islam and its leader, Wallace Muhammed - who he believed were responsible for the murder of Malcolm X in New York City in 1968. Khaalis and his family lived on 16th Street, Northwest in the Shepard Park area (around the corner from my home), in a home donated to Khaalis by Kareem Abdul Jabbar, a Hanafi follower. Khaalis and his wife were not at home when the group arrived at the house, and the group proceeded to brutally murder nine members of his family, including several babies. They escaped just as Khaalis and his wife, Khadija arrived home. The defendants who murdered Khaalis's family were later captured and successfully prosecuted by the US Attorneys Office. They were sentenced to multiple terms of life imprisonment, as there is no death penalty in the District. Khaalis, unbeknownst to the police and the US Attorneys Office, not only grieved, he began to act out his resentment at not having had the death penalty imposed on the murderers of his family. He planned his revenge. The

16th Street home became a gathering point for a number of young men, who joined the Hanafi sect and regularly gathered at his house for meetings and physical fitness training on the front lawn in the evenings. Having lived in the neighborhood since 1974, I remember seeing blue cabs parked outside the Khaalis house on 16th Street at night and on weekends, with a group of men exercising on the front lawn. What no one knew was that Khaalis was planning an attack of his own. The MPD homicide squad, the best in the country in the 1970s – as it is again today – had a working relationship with Khaalis because they investigated and arrested the murderers of his family, but there were no clues about the impending attack. I believe he lost his mind over the tragic deaths of his family. He seethed while he planned.

At about 10:00 a.m. on March 9, 1977, I was about to begin my closing argument in a murder case involving two parents charged with the murder by starvation of their baby. The case was tried before Judge Nunzio, and my opposing counsel was Frank Carter, a highly respected public defender and good friend. Suddenly the rear courtroom door through which the judge and jurors entered, flew open and several US marshals barged into the courtroom. One of the marshals grabbed the judge, and quickly removed him from the courtroom and escorted him into chambers. The other marshal quickly escorted the jurors to a holding area. Frank Carter and I looked at each other with quizzical expressions, and asked the marshal what occurred. The marshal informed us that a group of armed invaders had taken over the District Building and another armed group had invaded B'nai B'rith headquarters in center city - and that's all they knew. Needless to say, the

atmosphere in the courthouse was panic stricken. By early afternoon, we all realized that a group of heavily armed men had invaded the District Building and taken hostages in the City Council Chair's office on the fifth floor. A larger group, very heavily armed, had entered the B'nai B'rith headquarters, taken almost a hundred hostages, to the eighth floor and barricaded themselves. Finally, two armed men entered the Islamic Center on Massachusetts Ave., NW and held two hostages. We then found out that this appeared to be a concerted effort led by Hamaas Abdul Khaalis to seek revenge for the murder of his family. It became clearer by the hour what was happening because the news reports were constant. MPD Chief Maurice Cullinane and Homicide Chief Joe O'Brien established telephone contact with Khaalis who was situated at B'nai B'rith. Khaalis demanded that the murderers of his family be turned over to him and if his demands were not met, he and his men would kill all the hostages at B'nai B'rith, the District Building and the Islamic Center. A WHUR reporter, Maurice Williams, standing outside the Council Chairman's suite where the four Hanafi members held the twelve hostages during an exchange of gunfire, was killed by the Hanafi captors. Also, a special police officer stationed outside the Chairman's suite suffered a heart attack during the siege and later died. Councilman Marion Barry, as he was been crossing the fifth floor hall from the stairway in the District Building to the council chambers, was shot in his chest, although, it turned out to be a surface wound.

The nation's capital was in lock-down over the next thirty-six hours as negotiations with Khaalis began. That night, a few of us gathered over in the

MPD Chief's conference room to monitor developments. US Attorney Earl Silbert, Superior Court Criminal Chief Bob Shuker and Felony Chief John Evans, who were responsible for the prosecution of the murderers of Khaalis's family, huddled with senior MPD officials. At some point, I accompanied several homicide detectives to B'nai B'rith, where we observed thru high-powered scopes from a hotel roof across the street, the defendants abusing the hostages barricaded on the eighth floor. The stairwells had been jammed with furniture to prevent the police from getting to the eighth floor. The defendants had carried to the eighth floor 15,000 rounds of ammunition and an array of weapons that included automatic weapons, shotguns, pistols, bow and arrows, knives, throwing stars and a host of lesser, but not any less lethal, weapons. There was no way to rescue those folks - or the folks in the District Building - without a loss of life. From there, we went over to the District Building, scurried up the stairs to the fifth floor and quickly entered the Council Chamber located between the Mayor's office at one end and the City Council Chairman's office, at the other end, where the terrorists held the hostages. We entered Council Chambers and moved to a side entrance where we had a close-up view of the hostages tied up and sitting in chairs facing the police barricade squad with guns to their heads. The glass entrance panels had been shot out, and the police on barricade, guns trained on the terrorists, were 20 feet away. It was a very scary situation. For the next 36 hours, negotiations went on with Khaalis, law enforcement officials and the ambassadors from Egypt, Iran and Pakistan.

Mr. Marmon: Were you involved in the negotiations?

Mr. Tuohey: I was not involved in the negotiations. The senior police officials led the negotiations assisted by US Attorney Earl Silbert and the ambassadors. On the morning of March 10th, the day after the takeover, US Attorney Earl Silbert called Marty Linsky and me, assistant US Attorneys (and both Fordham Law grads I might add), to be prepared to handle the prosecution of the Hanafi terrorists that would follow, depending on the circumstances. Hopefully, no one would be killed. Like all of our colleagues, we were anxiously awaited a successful negotiation, which did occur later that night when Khaalis agreed to surrender. We prepared to assist the police by accompanying the hostages as they were transported from B'nai B'rith and the District Building to GW Hospital for medical checks and released to their families. We were on the bus with the B'nai B'rith hostages. We were greeted by a throng of reporters and cameras at the hospital, but the police cordoned off an area for the hostages to get from the bus into the emergency room. Marty Linsky and I met with the hostages on the buses, assured them that we would be in touch to set up interviews in preparation for the trial, but we stressed the importance of their physical and emotional health. We suggested that it would be best not to say anything to the press at this point, and then reconvened at MPD headquarters for a brief celebration and repast prepared by Iranian Ambassador Zahedi and his staff. Then we had to prepare for an emergency bond hearing before the Superior Court Chief Judge Green at 6:00am the next morning.

Mr. Marmon: What were they demanding?

Mr. Tuohey: The demands included the following: the primary demand was the immediate release from prison of the five convicted murderers of Khaalis's family and delivery to Khaalis so that he and his men could execute them. The secondary demand was for some undefined reparations to Khaalis and his family from the Jewish community. The third demand was the immediate cessation of a movie, *Muhammed, Messenger of God*, playing in Manhattan and Los Angeles. I think it was actually stopped for a few days. The key demand was for the surrender of the murderers to Khaalis. This was not going to happen of course.

The hostages were released and taken for medical assessment before discharge. Leaving GW, the place was jammed with press at you might imagine. The Government had agreed during the negotiations with Khaalis, that he alone would be permitted to be confined in his home pending trial with a twenty-four hour police presence. The other 11 defendants were held in pre-trial confinement. The decision was controversial, but it was part of the agreement for the release of the 100 hostages. It was unclear how long he was going to be able to stay. That all changed the week later after Khaalis made telephone threats and his bond was revoked.

Marty Linsky and I had to get busy preparing for the trial which was set 60 days later in mid-May. We spent the next two months assembling the evidence, marshalling the evidence, interviewing witnesses, and preparing for a lengthy trial in a secure courtroom. We spent 10-11 hours, seven days a week, working with a dedicated and highly professional team of MPD investigators, forensic experts and senior MPD officials, led by Homicide Chief Joe O'Brien.

Mr. Marmon: What were the charges?

Mr. Tuohey: Murder, kidnapping, conspiracy, and some lesser charges. The trial preparations consisted of interviews of several hundred witnesses. The selection of trial witnesses resulted from a thorough examination of the facts and assessment of the physical and emotional well-being of the trial witnesses, who were terrorized, and in some cases, injured. It was a very difficult and emotional situation for the victims. To its credit, B'nai B'rith brought together all the mental health support systems it could for those folks. It was amazing to watch how the B'nai B'rith system really did respond to their employees' emotional trauma. Hostages from the District Building were traumatized as well. One of the witnesses, a law student intern, was shot in the back and paralyzed. Sadly, the same kind of emotional support was not available to those folks. In the end, we had a really courageous group of witnesses who testified in a very compelling manner. The second element of trial preparation involved forensics. We had MPD specialists do forensic tests on the weapons and ammunition, and we had to assemble physical evidence to present to the jury in a way that was secure in the courtroom. The mobile crime team mounted the weapons on secure platforms with bullet proof glass. Three platforms with the weapons mounted were presented to the jury in the well of the court - with marshals surrounding the defendants.

Thirdly, we had to prepare the wiretap evidence. As soon as the takeover occurred, it was clear that Khaalis – barricaded at B'nai B'rith with six of his men – was communicating by telephone with his cohorts at the District Building and at the Islamic Center. An application for a court ordered wiretap was approved, and

MPD was able to monitor the conversations between Khaalis and his men throughout the 36 hours. There were calls back and forth between B'nai B'rith and the District Building, and to a lesser extent, the Islamic Center. In order to charge the defendants in the other buildings with the murder at the District Building, we had to show sufficient evidence that Khaalis and his men knowingly participated in a conspiracy and joint conduct that would impute to Khaalis, together with the defendants in the District Building responsibility for the murder of Maurice Williams as well as other crimes committed there. We also included a conspiracy count in order to utilize the co-conspirator exception to the hearsay rule allowing statements of one conspirator to bind others. Wiretap evidence also requires certain legal procedures necessary for the admissibility of the wiretap evidence - foundation testimony, relevance testimony, chain of custody evidence and the like. In fact, when we put that evidence on the stand, it required we put seven or eight witnesses on the stand simultaneously to testify about these requirements. After a lengthy hearing before Judge Nunzio, in which we demonstrated the legal basis and practical efficiency of the simultaneous panel approach, the court permitted it, and it was sustained on appeal by the D.C. Court of Appeals. Eight witnesses on the stand at the same time - very dramatic testimony.

We planned these three elements of trial preparation 10-12 hours/day, seven days a week, for the two months. We got it all organized – with a great team, a tremendous group of police officers and staff, some of the best law enforcement professionals with whom I ever worked. Judge Nunzio, before whom I was trying

the murder case on March 9th, was assigned to be the trial judge. He did a tremendous job. He was tough, but fair. Khaalis's lawyer, former judge Harry Alexander, was provocative and outspoken in the courtroom, asking on several occasions to be referred to as "judge", but Judge Nunzio made it very clear there was one judge in the courtroom and it was him.

Mr. Marmon: What was the defense? Did Khaalis take the stand?

Mr. Tuohey: Yes he did. The defense was revenge, and he blamed the District of Columbia, together with a "Jewish Cabal" for some undefined failure to help his family. Harry Alexander and the other defense attorneys (all of whom were friends/colleagues) did a very professional job defending their clients, especially considering at the time, tense atmosphere due to the alleged threat of Khaalis ordering his men to attack the lawyers, including us. The trial began in May, 1977. I believe it was May 9.

We planned our strategy carefully. Except for some of the histrionics of Harry Alexander, encouraged by his client, Khaalis, the trial was an orderly, day-by-day, presentation of evidence. The defense attorneys were experienced and professional.

Mr. Marmon: All 12 defendants were in the courtroom the whole time?

Mr. Tuohey: Yes, they sure were. I don't remember any real hitches. Again, we had to carefully deal with the wiretap evidence. Most of the witnesses were very good, not intimidated seeing their captors right in front of them. They were courageous

and testified. The trial was long. The days were long. The nights were long. We would enter and leave a highly secure courthouse with several checkpoints.

Mr. Marmon: How many days?

Mr. Tuohey: The trial ended in August.

Mr. Marmon: Was it continuous, daily? There were no breaks?

Mr. Tuohey: Very few. Memorial Day and Fourth of July. The jurors, 12 actual and 12 alternates were sequestered. We heard after the fact of interpersonal situations with jurors during the trial – divorce, marriage proposals, dating and the like. In a bizarre instance, one of the young women on the jury became infatuated with one of the defendants and she refused to deliberate. She was replaced.

Mr. Marmon: Did you make the closing argument?

Mr. Tuohey: I gave the opening statement. Marty Linsky made the closing argument and the rebuttal. We split the witnesses in half. It was a terrific experience working together – Marty Linsky is a very good trial lawyer. The jury, sequestered during the trial, deliberated for about a day and a half, and found all 12 defendants guilty of multiple counts of kidnapping and assault with intent to kill, and Khaalis, the leader and his cohorts at the District Building guilty of murder. The defendants were sentenced to multiple life terms of imprisonment. Several of them, including Khaalis, died in prison.

Mr. Marmon: Was there conviction on all charges?

Mr. Tuohey: Khaalis guilty on all charges; his cohorts in the District Building guilty of murder and multiple charges of kidnapping and felony assault. His cohorts at B'nai B'rith guilty of multiple counts of kidnapping and felony assaults. Noteworthy event: two weeks before the end of the trial, the police arrested a sympathizer of the Hanafi Muslim group, in a bizarre, attempted to buy on Georgia Avenue (several blocks from my house) grenades and silencers to kill our families - Earl Silbert, Marty Linsky and me. US Marshals moved into our homes for the duration of the trial.