

Oral History of Mark Tuohey
Third Interview
October 24, 2018

This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit. This is the third session of the oral history of Mark Tuohey. Bill Marmon is the interviewer. The interview is taking place at Baker Hostetler, Mark's law firm.

Mr. Marmon: Mark, how did you get from the US Attorneys Office to the Department of Justice?

Mr. Tuohey: After the Hanafi case and some clean-up details were completed, I was contacted by the Criminal Division of the Department of Justice, where several of my colleagues in the US Attorneys Office had transferred after completing their stint to join the Criminal Division as Special Counsel and try high profile cases. Ben Civiletti was the Assistant Attorney General in charge of the Criminal Division and he asked me to join the Criminal Division as Special Counsel to handle major organized crime and political corruption cases. I had met Ben in 1975 when I was Co-Chair of the Criminal Law Institute, an annual high-profile CLE program sponsored by the US Attorneys Office and the Public Defenders Service. In 1977, I served as Chair of the Young Lawyers Section of the Bar and I invited Ben to speak at my farewell dinner. Over the years, we developed a nice relationship. Ben asked me to join his team in the Criminal Division in September, 1977, and I enthusiastically agreed to continue my work as a federal prosecutor rather than pursue several private law firms that had approached me after the Hanafi trial. I spent 18-20 months at the Department of Justice as Special Counsel working for both the Assistant Attorney General Criminal Division and the Chief of the

Organized Crime and Racketeering Section, Kurt Muellenberg, and his deputy Dave Margolis, both career prosecutors. During that 18 months, I was involved in a variety of very interesting matters. The first assignment was to lead the trial team in the prosecution of the Columbus Day bombing case in Rochester, New York. The Columbus Day 1970 bombing incident, involving the attempted bombing of the Federal Building, an African American church and an attempted bombing of a Rochester labor leader's home. This case was unsolved for a number of years, although law enforcement believed that the local mafia crime syndicate was responsible. In 1977, the FBI turned one of the syndicate's capos who fingered six key members of the Buffalo / Rochester crime family under Frank Valenti. As a result of the witnesses' testimony, a multi-count indictment was returned charging the six defendants with attempted murder of Federal officers, bombing, arson and conspiracy. In fact, these defendants were already in state prison after convictions in a murder case involving an informant. As a matter of irony, during his earlier service as an FBI Special Agent in Rochester in the early 1960's, my father investigated and arrested several of these defendants.

I agreed to lead the prosecution and work with the Buffalo Strike Force attorney in Rochester. The defendants' names were familiar as organized crime figures. I knew several of the lawyers on the defense team, and the two deputy sheriffs involved in the investigation were high school friends. It was like old home week for me. The senior federal judge in Rochester, Harold Burke, an old friend of my grandfather, was in his late 80s, and we felt he could not handle a high profile mob case. We decided that I would go to see Chief Judge Curtin in Buffalo to

request a judge from the federal court in New York to try the case. I had met Judge Curtin, a former US Attorney in Buffalo when my father was an FBI agent in Rochester during the 1960's. The judge agreed and arranged for Judge George Pratt from the US District Court in Brooklyn to try the case. The trial began in January, 1978. I had the assistance of several experienced FBI agents from the Rochester office, worked with an immunized witness, who, while credible, would be attacked as a rat on cross examinations. The trial lasted several weeks. At the end, the jury convicted several and acquitted several defendants, but it ended a long period of uncertainty in Rochester. The trial was a unique experience – my parents were in the courtroom much of the time, and these were criminals my father had investigated. Judge Pratt, who later went on the Second Circuit, presided in a very professional manner, and handled the defense histrionics with a deft, but firm hand. He set the sentencing for St. Patrick's Day, March 17, an irony which did not go unnoticed by this Irish prosecutor! In a related manner, I also represented the Strike Force Chief in Buffalo, who had been accused of violating the canons of ethics by the leader of organized crime in Buffalo and a member of the Bonanno crime family. I argued before the New York State Bar Grievance Committee in Buffalo and the complaint was found to be non-meritorious. I enjoyed spending this time in western New York, my home.

The next case was an unusual one. In 1978, Ben Civiletti was named Deputy Attorney General, and he and Kurt Muellenberg, the Chief of the Organized Crime Section, sent me to Florida to investigate a bizarre situation. The Organized Crime Strike Force in Miami had indicted the leader of the South

Florida mob, Anthony Accetturo and several cohorts, for extortion (and related offences) of the owner of the famous Fontainebleau Hotel in Miami Beach. I was sent to Miami because the assigned Strike Force lawyer, an experienced trial lawyer and former AUSA in New Jersey, had mismanaged the key immunized witness, who was supposed to be in the witness protection program – but had disappeared. William Stone was missing, and as it turned out, he was not under the supervision of the U.S. Marshal's Service, but allowed by the Strike Force lawyer to be freelance. The Strike Force Attorney had persuaded the FBI to allow the Strike Force lawyer to handle the witness. The FBI thought Stone was living in San Diego, but the 65 year-old witness, who had been involved in criminal activity most of his life, was living in Hollywood, Florida with an 18 year-old woman. Suddenly, Stone went off the grid. I worked with an experienced FBI agent, Ben Grogan, to track down Stone. Grogan was later murdered in a parking lot in Miami by two armed robbers attempting to escape, who pinned the FBI agents in their car and shot them. Ben was a superior agent who found out from a source that Stone and his young girlfriend had fled to Hawaii where we found him.

At this point, I had been directed to remove the Strike Force attorney from the case and assume responsibility for the case. One of the key members of the Miami Strike Force, John Evans, who had been my boss in the felony trial unit in Washington, joined me as co-counsel. We prepared the case for trial. In the meantime, Ben Grogan and I had to go find our witness in Hawaii. We flew to Hawaii, and with the aid of the Honolulu FBI field office, we were able to track

down Stone in Honolulu. We debriefed him for a day or so, and then brought him back to Miami.

Mr. Marmon: How did you find him?

Mr. Tuohey: The FBI traced his movements to several of the islands and we followed his tracks when we learned that Stone returned to Honolulu, and was staying a particular hotel. We set up surveillance and when we saw him leaving the hotel, we confronted him. The FBI took him into custody. My recollection is the Bureau arranged for his girlfriend to return to Florida. We debriefed him and brought him back to Miami, where he was placed in the custody of the FBI. He was kept in a home confinement with the Bureau sitting on him until trial. We prepared to go to trial with Stone as our key witness against the defendants, who on the third day of the trial, the defendants elected to plead guilty and were sentenced to federal prison attempting to extort the owner of the Fontainebleau Hotel for a substantial sum of money, and when he refused to pay, the defendants assaulted his son, a medical student in Miami, and broke several fingers on both hands, and threatening more violence if his father refused to pay. The FBI conducted the investigation and contacted the Strike Force. The Strike Force Attorney who was responsible for failure to properly handle the immunized witness received departmental discipline.

The next assignment was to assist Chicago Strike Force Chief, Peter Vaira, in a major corruption investigation in Indianapolis. Vaira, who later became the US Attorney in Philadelphia, is an excellent lawyer and a great friend. (When he

became US Attorney, he asked me to be his first assistant, but I decided against a move to Philadelphia). The Chicago Strike Force had under investigation several state officials in Indiana and local officials in Indianapolis. I was assigned to assist in that matter and if need be, help try the case. I spent several days in Chicago, meeting with the Strike Force lawyers, and interviewing potential witnesses. In the mist of that, I got a call from Deputy Attorney General Civiletti's deputy, Tim Baker, who asked me to return to D.C. to meet with him and Ben Civiletti to discuss joining the trial team for the prosecution of three senior FBI officials, Patrick Gray, Mark Felt and Edmund Miller. The case involved illegal FBI surveillance activities, and they were later convicted and pardoned. In that phone call with Baker, I said I would do whatever the Department directed, but they needed to be aware (because it would come out) that several of those officials worked closely with my father when he was with the FBI. The assignment did not trouble me, but they needed to know the background. It was decided that it could be a complicating factor, so I was not involved in that case. Ironically, after I talked to the Department of Justice, I called my father to alert him. He said, "Of course you are going to do your job. I am actually going to Buffalo tonight to give a speech about the investigation you are talking about. I will not mention that you may be the prosecutor." It turned out that was the right decision.

After I returned to Washington, OCR Deputy Chief Dave Margolis asked me to go to Newark and conduct an investigation into the allegation that individuals in the United States Marshal's Office in Newark had leaked information about

witnesses in the Witnesses Protection Program, particularly in connection with several pending organized crime cases in Brooklyn and Manhattan. I worked with an FBI agent and a New Jersey State Police Organized Crime Investigator, both of whom were top-notch. We spent the next month interviewing people in the US Marshal's office and members of organized crime families, some of whom were in the witness protection program, including Sammy (the Bull) Gravano and Ralph (Baby Face) Pickering. In the end, we concluded that there was not credible evidence that the Marshal Service was leaking information. I had to present the findings to US District Judge, Herb Stern, the former US Attorney in Newark, presiding over the federal grand jury in Newark. It was a fascinating experience dealing with those personalities.

In those days at the Department, there were a number of excellent lawyers who were highly regarded in the Department and have been highly regarded in private practice over the years. Reid Weingarten, for example, one of the best trial lawyers in the country (Public Integrity); Phil Fox, who had been on the Watergate prosecution team and a former AUSA (Organized Crime), John Kotelly, who had been in the US Attorneys Office (Fraud), Bob Richter, who later became a Superior Court Judge (Public Integrity); and Eric Holder, who later became US Attorney General (Public Integrity). I add these names to the many excellent lawyers with whom I had the good fortune to work with in the US Attorneys Office. The experience was unmatched and sent me on a course to a wonderfully rewarding career.

The final case that I tried was Congressman, Daniel J. Flood (D. Pa).

Congressman Flood had been under investigation by the Department for bribery / gratuities violation. This was in the same era as the Abscam investigations.

Flood's Administrative Assistant, Stephen Elko, was convicted in 1977 in federal court in Los Angeles for soliciting bribes from west coast vendors who approached Flood's office for federal grants. He then agreed to cooperate with the DOJ against Flood, who was indicted in the spring of 1978. Dan Flood, the senior House Democrat from Pennsylvania, was also a member of the "College of Cardinals", a euphemistic term for the Chairs of all the Appropriations Committees in the House - the most powerful group of congressmen in the House of Representatives. Flood hailed from Wilkes-Barre, Pennsylvania, and served as Chairman of the Appropriations Committee for HEW / Labor. This position, together with his senior position on the Appropriations Committee for Defense and Armed Forces made him a very powerful man. Stephen Elko, on Flood's behalf, solicited bribes from a number of persons and entities who sought the Congressman's assistance in one matter or another. The primary incident that drew attention was the devastating floods from Hurricane Agnes in 1972 that destroyed a lot of the Pennsylvania communities along the Susquehanna River.

Dan Flood did a fine job of assisting people with needed funds and aid, but there was a cost, and the cost involved was cash payments to Flood and Elko. One of my colleagues at the Department, John Dowd, who was the Chief of Strike Force 18 in Washington, had worked the case and presented the evidence to the grand jury. Prior to the conclusion of the presentation, John had decided to accept an

offer to go into private practice, and he recommended to the Attorney General that I be assigned to try the case. My recollection is that he and I finished the presentation and presented the matter for a final vote on a multi-count indictment. Elko, after his 1977 conviction in federal court in Los Angeles, spent two years at Lompoc, a minimum-security prison near Los Angeles. When I took over and prepared to prosecute Congressman Flood in what would be a high-profile trial, I recruited Los Angeles AUSA David Hinden, who had prosecuted Elko, to work with me and to try the case together, to which he agreed. He was a very valuable part of the team. In addition, I asked a new attorney in the Criminal Division, Karen Tandy (who later served as the Director of DEA) to join the team and she served an important role.

In preparation for the trial, I spent several hours with Stephen Elko at Lompoc Federal Correctional Facility in California. Elko was very helpful in his testimony at the trial. He admitted that he was the facilitator for Congressman Flood in the scheme and both benefited. The cast of witnesses in the trial was a very interesting group of folks, including a well-known Jewish Rabbi in Brooklyn, Leib Pinter, who ran the summer milk program with funds supplied by Congressman Flood's committee. Pinter paid bribes, plead guilty and did time. After Pinter testified at the trial on a Friday, the following day's *Washington Post* had an op-ed piece by Mary McGrory that headlined "Friday, the Rabbi testified", as a throw-back to Harry Kemelman novels. Pinter came across as a persuasive witness. After several weeks of trial, Congressman Flood's lawyer Axel Keibomar, requested a brief continuance due to Flood's ill health. The defense

raised an issue of his competence to continue the trial. Judge Oliver Gasch, a former US Attorney and highly respected judge, granted the continuance, and directed counsel to promptly advise the court of the Georgetown University Hospital medical team's evaluation of Flood's competency. As a precaution, we assembled a medical team from George Washington University Hospital to prepare our own evaluation during the two week break. There was a good deal of discussion back and forth between the medical teams. The judge then held a competency hearing based on the Georgetown's team finding that he was no longer competent. Our team opined that Flood, despite his age and infirmities, was fully competent.

His lawyer, in an interesting and creative approach, put him on the stand after the Georgetown doctors testified. Flood's lawyer intentionally asked him a series of convoluted and complicated questions which he struggled to answer. I decided to take a different approach since I was not sure I could have answered those questions. I asked the Congressman if he remembered my name. He looked at me and said, "Yes. Your first name is Mark. Your last name is T-O.." then turned to the judge and said, "I can't pronounce or spell his last name, but I do know that he is Lacey Irish," tongue-in-cheek, I turned to Judge Gasch and said, "With that, I have no further questions." I actually asked him a few other questions, and it was clear he could respond in a coherent way. I then put my medical team on from GW. The court concluded that Congressman Flood was competent to continue the trial.

In a bizarre turn of events, after final argument, the jury was 11-1 for conviction, but there was a hold-out juror who refused to even discuss with other jurors. He had at one time worked as a cook at Airlie House in Virginia, a facility supported by funds provided from Flood's HEW Appropriations Committee. In addition, the Director of Airlie House was under investigation for paying gratuities to Flood and was later convicted. We suspected jury-tampering. While the FBI could never prove it, we believed this juror had been influenced. In any event, we were prepared to retry the case and Congressman Flood decided to plead guilty a couple of months later. I believe that was the last case I tried during those 18-20 months at Justice, but it was a full docket of interesting and high-profile cases and people.

I want to talk about my experience as the Principal Deputy Independent Counsel, in the Whitewater investigation. When Attorney General, Janet Reno, appointed Bob Fiske to become the Special Prosecutor, under her authority as Attorney General in late 1993 / early 1994, the Fiske team focused on four investigative areas in Washington: the death of Vince Foster, the White House Treasury contacts, the travel office issue, and the conduct of the Department of Justice during these matters; the Little Rock office focused on financial transactions in Arkansas. Fiske was in the process of a thorough and credible investigation when Congress finally decided to renew the Independent Counsel Statute that had expired. The renewal gave appointing and jurisdiction authority to a three-judge court comprised of a Chief Judge from the District of Columbia Circuit, then Judge David Sentelle, and two other Circuit judges, Judge Sneed (9th Circuit) and

Judge Butzner (4th Circuit). In June/July, Ken Starr was contacted by Judge Sentelle about his interest in becoming the Independent Counsel replacing Bob Fiske. I never agreed with the notion that Bob Fiske should be replaced. He was a magnificent United States Attorney in New York in the 1970's (when I served under Earl Silbert in DC). Together with Tom Sullivan in Chicago, Fiske and Silbert were three of the great US Attorneys in the 1970s. It was announced early August, 1994 that Ken Starr would succeed Bob Fiske to investigate the Whitewater issues under the direction of the three-judge court. The 1994 ABA Annual Meeting during this time in New Orleans. As usual, because of the number of relationships and positions I had in ABA that year, I attended the meeting that weekend.

At the ABA Annual Meeting in New Orleans, I ran into Ken Starr and my old friend from DOJ days, Terry Adamson, who was advising Ken on the formation of his team, at the Hilton Hotel just as I arrived. Terry and I worked together during my time at DOJ, and we have been friends over the years. When I met with Ken and Terry at lunchtime on that Friday on the first weekend of August, I told Ken that I had some thoughts about lawyers he should consider. Ken and Terry said they wanted to discuss it further. I invited Ken to sit at the DC Bar table at the "Women of Distinction" lunch on that Sunday, and we could talk some more then. That Sunday morning, I was on a panel with Terry Adamson and others on the issue of Congressional Investigations. Terry suggested that I come up to his suite that night to discuss personnel. At lunch, Ken and I sat together at my table, but he had to leave early for a speech to the Federalist

Society. Since there were reporters waiting outside the main ballroom, I took Ken through the kitchen to get to a back elevator, and we talked on the way. I gave him some names to consider for his principal deputy to oversee the investigative efforts, since Ken did not have that experience. That night, I stopped by Terry Adamson's suite and over drinks Terry informed me that the "committee" advisors who had flown into New Orleans on Saturday to discuss these matters with Ken decided to recommend me for the job. That was an interesting discussion with Terry that Sunday evening! I said I needed to talk about it with Ken (as well as my wife and my firm).

I left New Orleans the next day to join my family and a dear friend, Judge Matt Byrne, a former US Attorney and then Chief Judge of the District Court in Los Angeles (as was his father). Matt was widely admired for his work over many years and he had great practical and political judgement. We spent a week at his fishing camp in Jackson Hole, Wyoming. That first night, after everyone went to bed, Matt and I discussed the Starr offer for several hours. His advice and my thinking were on the same page. It was important for me to take the position – to assure the investigation was handled thoroughly with care.

When I returned to Washington, I met with Ken. We discussed the nature of my responsibilities and the investigation in general, and after further deliberation, I decided to accept, in view of my background and ability to help him work through this investigation. I stayed for the period of time I felt was necessary to complete the bulk of the investigation, and by the following August, 1995, I felt the fact finding was essentially completed. It was a very interesting year.

We first hired the Washington staff, and then additional staff in Little Rock to work with the Fiske staff that thankfully stayed on for a period of time. We had a civil and positive working experience working with White House Counsel during that year - Lloyd Cutler, followed by Judge Abner Mikva. We had similar working relationships with the Department of Justice under Janet Reno - Deputy AG Jamie Gorelick and Criminal Division AAG, Joanne Harris. Jamie, whom I had succeeded as D.C. Bar Presidents and have been close friends for many years. We had a strong working relationship throughout my time with the FBI under the Director Louis Freeh.

An immediate focus for me was the Vince Foster death. We examined the evidence Bob Fiske had collected and I felt Fiske had the right approach. As a former homicide prosecutor who examined cause of death issues, I tentatively agreed with the Fiske team findings, but I wanted our team to conduct additional witness interviews and forensic examinations to make the conclusion fool-proof – particularly with the growing number of loose-cannon conspiracy theorists.

Mr. Marmon: What was the issue?

Mr. Tuohey: Was it suicide or something else? We brought in additional resources – a number of nationally renowned forensic folks, Brian Blackburn, medical examiner in Massachusetts with whom I worked in Washington in my AUSA cases, Henry Lee from New Haven, a well-known forensic scientist, and a number of technical experts from the FBI to examine the scene at Ft. Marcy Park. I also traveled to Hope, Arkansas with an FBI team to interview Vince Foster’s mother and sisters,

examine his background, and search his belongings. At the time I left in late August, 1995, I was convinced that Vince Foster suffered from severe depression. He was a proud man who could not deal with even minor failures and took his own life. Our team interviewed a number of Treasury and Justice officials, and by late summer, 1995, in my view, concluded the fact-finding in all the D.C. investigations.

I was involved in matters in Little Rock as well. With the able assistance of Professor Sam Dash, who we hired very early on to be our ethics officer, since the Justice Department for a short time was a subject of the investigation. Dash's advice was important to our work and to our reputation.

In terms of hiring in the Washington office, the first two people we brought on board were Brett Kavanaugh, Justice Kennedy's law clerk, and who was about to start at Kirkland & Ellis and Alex Azar, a Scalia clerk. They were both young lawyers, but very bright and capable. They played important roles. We hired Rod Rosenstein, who was working at the Public Integrity section of DOJ, and later served as the US Attorney in Baltimore; Hick Ewing, a former US Attorney in Memphis; Brad Lerman, head of Special Prosecutions in the Chicago US Attorneys Office; Amy St. Eve, an associate at Davis Polk recommended by Bob Fiske, and now a 7th Circuit Judge; Steve Colloton, a former AUSA in Iowa, now an 8th Circuit Judge. Bill Duffy who had worked at King and Spalding (now a Federal District Court Judge in Atlanta) together with Dennis McInerney and Julie O'Sullivan, former AUSAs in New York, gratefully stayed on for a period to assist in important ways.

Mr. Marmon: What was Kavanaugh's role?

Mr. Tuohey: Brett wrote important legal memoranda on critical issues. He was also involved in the Foster investigation where he learned investigative techniques and the skills of interviewing witnesses. He grew in the job in a very substantial way. I brought in a friend and colleague from the US Attorneys Office, John Bates, who ran the Civil Division, as principal deputy. He served as my deputy and succeeded me when I left. He also worked closely with Brett Kavanaugh. Brett and Alex Azar immersed themselves in a number of legal issues and were a very valuable part of the team. We conducted the interviews of Hilary Clinton and President Bill Clinton in April in the White House, but largely on the Foster death. I do not recall the Rose Law Firm issues that came up until the Seconerview in July, which I did not attend because I had announced my impending departure to join Vinson & Elkins, which had represented the Rose Law Firm.

After I left, I would have discussions with Ken or John Bates from time to time, but I had completed my work when I started with Vinson & Elkins in September, 1995.

Mr. Marmon: What was your thought on the Whitewater investigation? Was there anything there?

Mr. Tuohey: Yes. There certainly was. I was involved in the review of the indictment of Jim Guy Tucker, the former governor of Arkansas, and the McDougals in the Madison National Bank transaction and the 855 Loan. We discussed the evidence and

approved the indictment. We discussed what if any role the Clintons played. We had a long discussion in Little Rock, and, with Sam Dash's counsel, we determined that the indictment had merit, and that the evidence did not support naming anyone beyond the three named defendants, who eventually were convicted.

Mr. Marmon: How as Ken Starr to work with?

Mr. Tuohey: Ken is a collaborative colleague, and a gentleman. He has great temperament. He is very smart. He was not experienced in criminal investigations, but he was a good listener and took advice. I value that relationship. The whole Lewinsky issue was a difficult one because it was presented to the Attorney General and the Attorney General concluded that if it was going to proceed, it should proceed with the Starr team, rather than with a new Independent Counsel. I have mixed views about the whole Lewinsky matter, and the decision to testify about the final report, but I am supportive of the results of other parts of the investigation.