ORAL HISTORY OF JUDGE MICHAEL W. FARRELL
THIRD INTERVIEW
AUGUST 11, 2015

The interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is the Honorable Michael W. Farrell, Jr. The interviewer is Lory Barsdate Easton. The interview is taking place at the District of Columbia Court of Appeals on August 11, 2015. This is the third interview.

MRS. EASTON: I just wanted to make sure that was on. Okay. We are now recording and I want that to be unobtrusive and non-distracting.

JUDGE FARRELL: Good.

MRS. EASTON: So, you graduated in 1973 from the American University and went to work for Judge Moore for a year.

JUDGE FARRELL: Correct.

MRS. EASTON: —and through him met Phil Monahan, who had gone into the Appellate Section at DOJ.

JUDGE FARRELL: DOJ.

MRS. EASTON: And you told me the last time we were together that your work consisted of oppositions to cert petitions and some merit briefs for the Supreme Court—

JUDGE FARRELL: —Supreme Court.

MRS. EASTON: —when you could get them past the SG's office. (Both laughing.)

JUDGE FARRELL: That's right. That's right, past Frank Easterbrook and many of the other luminaries.

MRS. EASTON: That's exactly right. And you also were doing appeals for the Strike Force, so that took you all over the country.

JUDGE FARRELL: Most of the Circuits, probably six or seven, but not all of them.

MRS. EASTON: And then also you were doing Indian law, which I think is fascinating.

JUDGE FARRELL: Well, I did about three or four merits briefs and have succeeded in forgetting everything I ever knew about Indian law. But it was important stuff at the time because —I was sort of proud, in a way, of one case I worked on, which established indirectly what people had come to doubt, which was that the Indians are regarded under our constitutional system as separate sovereigns. And that reinforced an idea that had kind of been lost in the past, when everybody over the decades was trying to assimilate the Indians. But this was a case in which, for criminal law purposes, it helped the government to establish that the tribes were sovereigns, the equivalent of a sovereign nation, because it allowed the federal government to prosecute crimes even though the tribes had already prosecuted somebody for the same offense. If they're separate sovereigns there's no double jeopardy problem. It's sort of like comparison of the states and the federal. There's no double jeopardy because they're regarded as separate sovereigns. And so the indirect good in that decision was that it helped—the Supreme Court had occasion to say that the tribes are to be taken seriously because they have their own system of governance. That was one. There are others, but that's the only one I think I remember.

MRS. EASTON: Oh, but that's fascinating.

JUDGE FARRELL: Yeah.

MRS. EASTON: That's really great. Well, I did want to ask you about some of your work on the Strike Force cases too, because that would have been organized crime.

JUDGE FARRELL: Organized crime. None that really stands out as terribly memorable for me. There was one memorable little event, which was I think my first oral argument down in the Fourth Circuit. They rode circuit down there then. In the summer they would go out to Asheville, for example, because one of the judges had a summer place. So my first oral argument was in the courthouse—in the post office building out there, because there was no courthouse. And I stood up to argue on behalf of the government as appellee. And a buzz saw of a judge, who later became chief judge on that court, his name was Harrison Winter [Harrison Lee Winter, Judge of the U.S. Court of Appeals for the Fourth Circuit from 1966 to 1990] from Baltimore. First question out of his mouth was, "Mr. Farrell, is this part of the cover-up?" And I should explain. This was at the time of Watergate and the word "cover-up" was in everybody's mind, covering up things going on. And the case I was arguing had to do with an issue under *Brady v. Maryland* [373 U.S. 83 (1963)] of alleged suppression of evidence by the government which should have been disclosed to the defense. So the words came tripping off Judge Winter's tongue, "[Mr.] Farrell, you being here, is this part of the cover-up, the suppression?" And I was kind of puzzled because I was new. My stomach was churning, and I probably muttered something like, "Could you help me out, I don't quite understand

what you're saying," and so forth. And he immediately shifted in a way and said, "Where's the trial lawyer?" —who was part of the cover-up, in his thinking. And I said, "Well, Your Honor, the appeals from convictions involving the Strike Forces are handled out of the Department of Justice in Washington, a separate section, so the trial lawyer is not here." And he said, "Oh, great," with considerable regret. He said, "Oh, I'm sorry that he isn't because I had some questions for him." Well, things didn't get particularly better in the oral argument. But it's nice to remember that at the end of the argument, after my being eviscerated, they came down and shook my hand and said, "I hope you won't take it personally." (Both laugh.) Because that's what the Fourth Circuit did and I think still does. And of course they affirmed the conviction about five days later in an unpublished opinion. Maybe he had a sense that I was a rookie lawyer and he wanted to take it out on me. (Both laugh.) Not a lot of memorable oral arguments; fairly routine cases, sometimes with four or five defendants in a drug conspiracy or something. I argued a couple of cases out in San Francisco in the Ninth Circuit. They were not friendly to—particularly friendly to prosecutors at the time. And a government attorney arguing a case right before me was asked by one of the judges, "Why are you out here from Washington? Can't you find a lawyer out here in California to argue this case? The taxpayers have to pay for *this*?" And of course the lawyer then had to pick himself up off the ground and make the kind of pitch that I had made in Asheville. So there were some

good times, but not terribly memorable cases—some routine, some more interesting, a few government appeals.

MRS. EASTON: Oh, so you got to be the appellant from time to time?

JUDGE FARRELL: Yes indeed. Not often. Some of the U.S. Attorney's Offices around the country guarded their cases, even the Strike Force appeals they insisted on handling. So, I didn't get any arguments in New York, for example. 'Didn't get any arguments in Chicago, in the Seventh Circuit, because they argued their own cases. But I was happy. I got a chance to see Cincinnati four or five times. Had never been there. Have never been there since. (Interviewer laughs.) But New Orleans, a few other places—it was fun. I only did that for about three years, three and a half years I suppose. And then came over to the U.S. Attorney's Office.

MRS. EASTON: Right. Right. So Andy Frey calls you or comes to see you and says, "I want you in the Solicitor General's office."

JUDGE FARRELL: Well, he said—he said, "I want to make you an offer, I think you'd probably do it, would you really want it?" And I said, "Yeah." I wasn't kind of sure, because it's a brutal, brutal job in terms of preparation, and I wouldn't have been one of the younger people. It was a thrill to be offered the job. But I had to think down the road, and I had ambitions to be a judge, and I had this offer from the U.S. Attorney's Office to basically eventually take over their appellate section—not quite yet, but come over as a deputy. And it seemed to me that that was more likely to offer me a path to a judgeship than working, even in the Solicitor General's office,

because at that time there was not much of a history of people in that office being able to get judgeships. The reason is you had no—you had no rabbi, you had no state senator who was particularly interested in you, because you were a Washington lawyer. And at that time I think the only people from that office who had moved into judgeships had moved to what was then the Court of Patent and Customs Appeals, now the Federal Circuit. Dan Friedman [Daniel Mortimer Friedman, former United States Solicitor General (Acting) and judge on the Court of Claims and US. Court of Appeals for the Federal Circuit] and Oscar Davis [Oscar Hirsh Davis, former assistant to the Solicitor General and judge on the Court of Claims and Federal Circuit], people like that. They had gotten those kinds of jobs. It's changed since.

MRS. EASTON: But at the time, in the mid Seventies, it seemed more likely going from the U.S. Attorney's Office?

JUDGE FARRELL: I could get a judgeship on the local court, and that was kind of my interest in going over there.

MRS. EASTON: So you went to work, and who was the chief of the appellate division?

JUDGE FARRELL: John Terry, who is a senior judge on this court. He had been there for a number of years. [Note: Judge John A. Terry was appointed to the District of Columbia Court of Appeals in 1982. Prior to his appointment as a judge he had served as the Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia for thirteen years.

http://www.dccourts.gov/internet/documents/DCCA_Bio_Terry.pdf] It's very incestuous. There's a long tradition of people going from chief of that appellate division onto this court of appeals, or its predecessor back in the Sixties. Judge [Frank] Nebeker is still a senior judge; he had been chief of the appellate division earlier. So Judge Terry was my boss when I went over there, but everybody was nudging him to try to apply for a job on this court. 'Took a while to nudge him, because he seemed comfortable with what he was doing, but about 1982 we succeeded in nudging him hard enough. He put his hat in the ring, and he got picked. And he's had a long career on this court. So, between 19—maybe 78, 79—and 1982 I was deputy chief. And my main job—beside reviewing briefs written by the attorneys in a section that had maybe twenty lawyers, twenty-five lawyers—was to argue the big cases. Judge Terry preferred to give them to me to argue. I think he felt less comfortable arguing in that kind of setting than I did. And so I got a chance to argue quite a few *en banc* cases and some significant cases that came up over that time.

It was a time when there were some interesting cases. One of the first things I had was the constitutionality of what they call preventive detention, pretrial detention. There had been a statute in the District of Columbia allowing that. It was passed during the Nixon administration. But it was never used, because everybody had doubts whether detaining somebody before trial for a period of a couple months or more was constitutional, and so there was reluctance to test it. Finally, we did test it,

and I got a chance to argue that before the court *en banc* and it was upheld. And the Supreme Court later upheld it. And I think the reason why they upheld it, indeed the federal government passed a pre-trial detention statute, was because throughout the land people were in fact being detained before trial, for significant periods of time, under the pretense that they couldn't make money bonds. Judges were imposing high money bonds on defendants, you know, partly as a risk of flight but also as a danger to the community, knowing full well that they couldn't make those money bonds. And so it was a kind of a cynical system in which people were locked up pre-trial because they couldn't write a check or get a bondsman to post a bond for them. Finally, Congress passed a statute, first in the District of Columbia, which is the statute I had to defend, and then later a federal statute, led by Senator Ted Kennedy and others, some very liberal senators, who saw the problem with money bonds and decided better before trial to have an evidentiary hearing and decide whether this defendant is in fact dangerous to the community, in which case you can detain him for a limited period of time. Better that than posting—requiring him to post a one hundred thousand dollars bond, which he could never meet, and locking him up anyway.

MRS. EASTON: Or, in some instances, failing to.

JUDGE FARRELL: Well, in the routine case, nobody could make the bond, so judges were just locking people up before trial and thinking it was not pretrial detention, which it was. That was one of the interesting cases. Then we had a whole

series of cases, some of which I argued. You may have seen the movie recently, I can't remember the name, involving the old Abscam. [Note: The movie *American Hustle* was released 2013.] Did you see that movie?

MRS. EASTON: I didn't see the movie, but I know the sting.

JUDGE FARRELL: Yeah. It went back to the Eighties, the various congressmen who were lured to what they called the "honey pot," where in return for promises to introduce some legislation to help some Arab sheiks, and things like that, they were offered money and they took the "honey." It was a very colorful scenario that the government adopted because they—these FBI agents would come in dressed as sheiks and things like that. And the lead person in this sting operation was a gentleman by the name of Mel Weinberg who could put on a great appearance of being a New York representative of all the sheiks and so forth, and he'd sit down with a cigar in his mouth and talk to all these congressmen and senators and so forth. And they'd take the bait, some of them. And so it resulted in a handful of convictions in New York and Pennsylvania and in D.C. Two of them involved one congressman John Jenrette from, I think South Carolina, another one, Richard Kelly from Florida, a congressman also. They were convicted and I had to handle their appeals, and they were interesting things. And there were some interesting issues that arose out of them: Entrapment, due process violation, and—so, those cases had some inherent interest but also a lot of publicity surrounding them. Other than that, what I did over the next three years in the way of oral arguments was

what you would do in any U.S. Attorney's Office. There were some serious cases and a lot of routine ones. We argued, of course, and briefed cases in both courts, the D.C. Court of Appeals and the D.C. Circuit—more in the local court system than in federal, but cases in both. And it was an enjoyable part of my experience. And then in 1982, Judge Terry was promoted to the D.C. Court of Appeals, and I took over there for the next seven years.

MRS. EASTON: Did your job change much?

JUDGE FARRELL: Not really, no. In good part it was reviewing drafts of briefs, rewriting in many cases, but in other cases trying not to rewrite so as to discourage the junior attorneys. And occasionally arguing cases. I probably argued fewer over the next five or six years because I had two or three deputies then, but I still managed to argue a few cases of a little bit of visibility, I guess, in the courts. But it was what you would expect for an appellate division which has a lot of work and a lot of good young people who can write but some who don't write so well and so you had to kind of, as best you could, train them in the art of appellate writing.

MRS. EASTON: From your time as the chief, do you remember deputies or junior lawyers that you worked with that are still people that you see in the legal community?

JUDGE FARRELL: Yes, I do see them. One is a good friend of mine by the name of Judith, Judy Hetherton. She worked with a number of government agencies [Note: including as general counsel to the inspector general of the U.S.

Department of Housing and Urban Development] and a couple of law firms and then ended up being I think an assistant bar counsel in the District [Office of Bar Counsel for the D.C. Bar] for a while, I think she's retired now. I had a young friend. I had a friend by the name of Thomas Tourish, T-o-u-r-i-s-h, who died a few years ago. He was a very able lawyer there. [Note: Thomas J. Tourish served as deputy chief of the appellate division for 25 years, according to his 2009 Washington Post obituary. http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071100037.html] And a young lady by the name of Elizabeth Trosman, T-r-o-s-m-a-n, who has made a career over there and is now the chief of the appellate division. The interesting thing is, and I already kind of tipped you off about it earlier, it is kind of incestuous, because the young man who succeeded me, young man then, John Fisher, F-i-s-h-e-r, became and stayed as head of the appellate division after me for about ten years. He's now on our court. (Both laugh.) And the young man who succeeded him, Roy McLeese, M-c-L-e-e-s-e, after about ten years he was put on this court. (Laughter.) So, there are currently five of us, including senior judges on this court, who came from that same job.

MRS. EASTON: That's quite a line of succession.

JUDGE FARRELL: Yes. And there were times when I think it annoyed the heck out of the defense bar, the criminal defense bar, and the public defender service, because they say, "When is our turn gonna come?" Well, a few years ago,

two or three years ago, their turn came. And there are now two young ladies on our court from the public defender service, Judge [Corinne] Beckwith and Judge [Catharine] Easterly, E-a-s-t-e-r-l-y. So, you know, what goes around comes around. But—

MRS. EASTON: But we are waiting for Elizabeth, is that it? (Interviewer laughs). —for Elizabeth Trosman?

JUDGE FARRELL: Oh! (Laughs.) No, no I don't think—I think her time has come and passed. Don't tell her, but I think she recognizes that, probably. I'm not sure she would want the job anyway at this point. So, the Eighties were spent as—mostly as chief of the appellate division, trying to nurture and discipline and educate young attorneys in the craft of saying the right things to the Court of Appeals. In a way it was a lot easier for the young lawyers to be, in most cases, on the side of the appellee. As you know from your experience it's harder being the appellant because then you've got to imagine and devise and figure out the best arguments to make. The appellee, you're kind of responding. Nonetheless, it was—we had our share of wins, our share of losses. But I think we established and maintained a pretty good reputation as an appellate office. Most U.S. Attorney's Offices in the country don't have separate appellate shops. Chicago does, New York does, probably San Francisco, L.A., and the District. But ours was and is an independent office, and that allows lawyers to come in and just concentrate on doing appellate work for a

year. I'm not sure doing appellate work makes them terribly marketable, but it's a good experience.

MRS. EASTON: And your entire career has been appellate.

JUDGE FARRELL: My entire career has been appellate. My only appearances in the trial court have been where over the years in the U.S. Attorney's Offices, on about maybe seven or eight or nine occasions, to go in and argue motions before judges, where the U.S. Attorney would call me up and would say, "I want you to go in and argue that motion on a legal point." One of those was the old problem—which came up in our court and was eventually decided by the Supreme Court—of one-house vetoes, whether one house of Congress could veto legislation that the president had proposed and the other house had passed, and the Supreme Court said, "No. Laws require both houses to act and the president to sign." That was an interesting issue for a time and then it disappeared.

MRS. EASTON: That came up through the U.S. Attorney's Office in D.C.?

JUDGE FARRELL: Yeah, it came up, I can't remember how—I think it was involving a reform of our laws involving sex crimes. They had been passed by Congress under Article I, which is the part of the Constitution they operate under in enacting legislation for the District, but apparently only one house had passed the statute, and the other house had not gotten around to doing it, and the president had signed it, and people thought that was enough, and I think we argued—I can't remember. I'm kind of drawing a blank on exactly how it came up in this court system. But we defended the one-house veto and seemed to prevail for a while until the Supreme

Court got the issue and said, "No." [Note: See *Gary v. United States*, 499 A.2d 815 (D.C. 1985) (Michael W. Farrell, Asst. U.S. Attorney, lead counsel for appellee) and *McClough v. United States*, 520 A.2d 285 (D.C. 1987) (same).]

MRS. EASTON: Well, so with the exception of these rare arguments where it was clearly going to become an appellate issue so you were arguing the legal point before the trial court, not only was your entire career appellate, but it was also criminal.

JUDGE FARRELL: It was also criminal. When I began in the U.S. Attorney's Office, the appellate section handled the criminal and the civil appeals.

MRS. EASTON: Oh, it did!

JUDGE FARRELL: It did both. And that became a problem, because you had young men whose experience in U.S. Attorney's Office—and women, more men than women at that time—whose only experience had been handling, trying misdemeanor cases. And then they came to the Appellate Section. And then they were asked to write a brief defending a decision, summary judgment, say, in the trial court in a civil matter that had been handled at trial by the civil division. So civil cases and criminal appeals were funneled up through the appellate division, which handled both. What happened is that, more often than you'd like, the attorneys would write a decent brief in the civil case, they'd go over to the Circuit Court [the United States Court of Appeals for the District of Columbia Circuit], where the civil appeals were handled, and they would be outclassed by

civil lawyers who had a long background, a lot of experience doing civil law. They'd be embarrassed by hostile questions by very, very gifted judges over there, like Judge [Harold] Leventhal and others, who were disappointed to find out that this young assistant U.S. Attorney knew so little about, for example, government contracts, disappointed bidder cases, things like that. And of course they knew very little about it because this case was the only one in which they'd ever heard of the subject! Eventually it was decided soon after John Terry, Judge Terry, joined the D.C. Court of Appeals, I think the U.S. Attorney—maybe then it was Charles Ruff [U.S. Attorney for the District of Columbia 1979-81], 'can't remember—decided that the civil appeals would be done by the civil division. So they established their own civil team. So, I had civil background for about four or five years doing civil appeals, but relatively little. 'Little to no trial experience, little to no civil experience, and still they put me on this court. (Laughter.) And so I spent a couple of years here—my first couple of years on this court, of course, I was recused from a lot of criminal cases. So I got my fill of civil cases.

MRS. EASTON: Those first two years I bet.

JUDGE FARRELL: And probably did no end of mischief. But managed to learn what summary judgment was and things like that. (Both laugh.)

MRS. EASTON: That's very interesting. You know, you talk about the attorneys. It sounded as if there was a rotation through, so every new assistant U.S. Attorney—

JUDGE FARRELL: —would go through a sequence of assignments. You would start at that time, it's been changed I think since, they would start with misdemeanor cases, then they would come to the appellate division and learn a little law. Then they'd go back to the felony trial division.

MRS. EASTON: Oh, interesting. They brought them to you before they went to try felonies.

JUDGE FARRELL: To teach them a little law, the hope was. And then after felony trial they would graduate to Felony 1, so-called, murder cases. Some would go over to federal district court and try the cases over there. And then after four or five years many, most, would move on to private practice because they had become somewhat marketable. That was kind of the tour in the U.S. Attorney's Office. It's a pretty prestigious office. It differs from every other U.S. Attorney's Office in the country in that it handles local matters, local prosecutions. On the civil side, it doesn't. The only civil matters it handles are federal. The city handles civil. Except for juvenile cases, though, and traffic offenses, the U.S. Attorney's Office handles local crime. 'Doesn't anywhere else in the land. Which made it interesting in a way because you got a broad variety of crime, not just federal crime, but you got everything from drugs to larceny and things like that.

MRS. EASTON: Sure.

JUDGE FARRELL: Over the years, it's been a subject of dispute; various mayors have made efforts to, perhaps, transfer prosecutorial authority for local crimes to a

separate city attorney general. We now have a separate attorney general's office. Maybe that will happen one day. It hasn't happened so far, partly because it would be a huge cost for the city to set up another three hundred person shop and so forth. Who knows, though? It became a home rule thing.

MRS. EASTON: Good. So, how big was the U.S. Attorney's Office during this time?

JUDGE FARRELL: Oh, I don't know. When I was there, maybe, it was probably 150 lawyers or so, now it's probably twice that many.

MRS. EASTON: And so you would have, when you were the chief, you had two or three deputies—

JUDGE FARRELL: And twenty lawyers or twenty-five.

MRS. EASTON: But all twenty or twenty-five of the lawyers were on rotation? None of them were career appellate lawyers?

JUDGE FARRELL: Not really, no. A few stayed a little longer. And one of the few things I suppose I should take credit for at the time was, I was a little bit instrumental in allowing people to do job sharing. That was a time when job sharing was starting to be popular, where women, and in a couple cases men, wanted to do the child rearing, or the wife insisted (laughs), where they would work part-time and be able to raise their children. And that meant you had to have kind of two people doing the job of one. And we managed to work that out, because you can work that kind of thing out in appellate work. You can't do it in trial work. So I think probably for the first time in the history of the office, we developed that process where

lawyers could work part-time and have somebody else do the other half of their job and accept part-time pay. And it was always a wonderful thing for the U.S. Attorney's Office because you knew that the lawyers were good, and they never worked only part-time. (Laughs.) You always worked more than part-time, even if you were a part-time employee. And we had some superb women who were doing that for a number of years. A few—Elizabeth Trosman did it for a while, Ann Simon (Ann Simon Hadley) still is with the U.S. Attorney's Office and does part-time work even though her kids, I think, are grown up. But that worked in wonderful ways to the advantage of the appellate division of the U.S. Attorney's Office because it allowed us to keep some very, very gifted women, especially. Men also who were doing part-time, but mostly women and—

MRS. EASTON: Who otherwise would have left, right?

JUDGE FARRELL: —otherwise would have left. And I think it continues, because you can do it in appellate work in a way you can't do it in trial work.

MRS. EASTON: Well that was extremely progressive for the early Eighties.

JUDGE FARRELL: Oh, yeah. There was a lot of resistance to it early, in part because the sense was we are a prosecutor's office, you know? And prosecutor's office in the first instance means, trying cases and getting convictions, right? The appellate work—it's not that the appellate work was secondary, it's just that people's mindset was in terms of, "We want people who will work sixty hours a week here or not at all," because that's what the job requires. Well, then finally people discovered that, (a) you

had more and more gifted young women coming out of law school. You didn't have that before the Sixties in those numbers, you know better than I. And [(b)] you would lose people if you didn't offer that kind of opportunity to them, because for some reason the women had the brains to realize that working seventy hours a week isn't all that life is. You know? (Laughs.) And so I would get calls periodically as deputy chief, and then chief, from women saying, "Hey, Mike, have you got any openings in the appellate division because things are happening in my life and I'm looking for kind of a part-time thing." We managed to work it out and it worked out very well and it's continued ever since.

MRS. EASTON: That's fantastic.

JUDGE FARRELL: Yeah, I mean I can't take all the credit for it. I think the U.S. Attorneys evolved into recognizing this was an effective way of keeping some of their best lawyers.

MRS. EASTON: But you had to have the foresight—and show that to them.

JUDGE FARRELL: Yeah.

MRS. EASTON: Overcoming prosecutorial machismo by demonstrating productivity. (Laughs.)

JUDGE FARRELL: Yeah, yeah, yeah, yeah, yeah.

MRS. EASTON: Well that's fascinating. So the U.S. Attorney, the first U.S. Attorney you had worked with was Earl—

JUDGE FARRELL: Silbert, S-i-l-b-e-r-t. Still is practicing and—

MRS. EASTON: Do you know where?

JUDGE FARRELL: Yes, I believe—I don't know whether he's wound down his practice, but I think he's still there [at DLA Piper]. In fact, I have a friend, a relative by marriage, who was a prosecutor here for quite a while who joined Piper about two or three years ago, and he says, "You know, that Earl Silbert, I don't know what kind of case load he carries at his age," he said, "but every morning there are four or five lawyers lined up outside his office for counsel." (Laughs.)

MRS. EASTON: Wow.

JUDGE FARRELL: Because, you know, people like that have an institutional knowledge that can't be replicated.

MRS. EASTON: Right, exactly. Now, was he—he was one of the Watergate prosecutors?

JUDGE FARRELL: Exactly.

MRS. EASTON: Did that start—

JUDGE FARRELL: Exactly.

MRS. EASTON: —while you were there? Tell me about the—some of those things that came through the office.

JUDGE FARRELL: Uh, that was before my time there. That was well before my time. I mean, I can only have vague memories of Judge Sirica and people like that, but Earl was very much involved in that at the time.

MRS. EASTON: You were just catching the fallout with the Fourth Circuit. (Laughs.)

JUDGE FARRELL: Yeah, that's right, that's right, yeah. I mean, at that time my connection with the D.C. U.S. Attorney's Office was nonexistent. I was at the DOJ.

MRS. EASTON: Right, right. And then, after Earl—

JUDGE FARRELL: Earl, then Chuck Ruff, Charles Ruff, bless his soul, he died some years ago, came over before going to a distinguished career at Covington, I think. And, I think Jimmy Carter may have appointed him, if I'm not mistaken. Chuck was a wonderful man to work for. After him—Stan [Stanley S.] Harris [1982-83], and then Joe diGenova, Joseph diGenova, was the U.S. Attorney in the Nineties for a while [Note: 1983-88], from Republican administrations. And then a succession of people after that whom I really haven't gotten to know very well. But I think I worked under probably four or five U.S. Attorneys, all with different notions of how you operate. But in general, they were clever enough to leave the appellate division alone, either on the theory that it wasn't all that important or that they knew their job. So, I had an enjoyable ten years over there, and I learned an enormous lot, which enabled me, when I did get this job, to fit in fairly easily without too much trauma of learning it, because I had been doing that kind of work for all those years.

MRS. EASTON: So you had a tremendous advantage—

JUDGE FARRELL: Yeah.

MRS. EASTON: —from that wealth of experience. You came to law essentially as a second career.

JUDGE FARRELL: Oh yes, indeed. Yeah.

MRS. EASTON: Do you think the—tell me about how you think your maturity, and the wandering—your "wandering years"—

JUDGE FARRELL: Oh, well, I think it helped. All the years that I spent, wasted time, studying the various things that we probably went through in the last interview, and all the reading I had to do, and the writing and thinking, probably gave me a certain maturity—I won't say sophistication of thought, I would say maturity of thinking—that helped me when I started law. I think the writing I had done in graduate work and in clerking for a judge over in Maryland and so forth, and the writing that I did at the Department of Justice, made me a fairly good mentor for young lawyers when I started in the late Eighties, as deputy chief and then chief, reviewing the work of other attorneys. I think I had—by that time I had developed a certain style of writing, and a certain sense of what good writing is, and a certain economy of writing. And, to a limited extent, I could kind of pass that on to our young lawyers, who would often grumble, I'm sure, when they gave me a fifty-page draft and I gave it back to them in thirty pages, or something like that, telling them, "You've gotta learn to think and write shorter," you know, and compress and compress and compress. And I think I had a certain amount of success in being able to pass that on to younger lawyers. It is a sad thing that I've learned in my—a lot of years now on this court—that I, as a judge on a very, very busy court, you kind of lose that ability to sit down with your law clerks and get drafts from them, and kind of take them through draft after draft after draft and to work the best product and develop the best product you can. You really don't have the time for that. Judge Abner Mikva, who

was on the D.C. Circuit for a number of years, used to say that he liked to work that way. He had a round table in his office and he'd sit down with the clerk, take the clerk's draft of an opinion, take out a red pen or something like that, and go through it line by line, paragraph by paragraph, kind of teaching him what's right, what's wrong about it, and send the clerk back to do another draft and give it to him. It's a wonderful way, if you can do it. It's a huge learning experience for the young lawyer that way. The sad thing is that in most appellate courts—particularly ours, kind of an intermediate appellate court for many purposes—you can't do that. The time is not there. You're almost like a four- or five-person little law shop. Everybody's working on something at the same time. So I used to end up over many years telling my law clerks when they began, or when I was interviewing them, look, you work for Judge Farrell, you're gonna learn by example. Less than by—you're going to learn by doing and by example. That is, you're going to give me some kind of input into the case early on, maybe a memorandum, maybe a drafted opinion, although that not so often. And you're going to end up at the end of the process seeing what comes out. And you can compare the way you analyzed, the way you thought about the case upfront, and how the judge ended up issuing the opinion. And at least you'll have a sense of what one judge considers to be good analysis and good writing. What you won't get from me, because I don't have the time, is that kind of pedagogy that Judge Mikva liked, where you sit down, and you kind of mentor the clerk

through successive drafts. Federal judges have fewer cases, so, here there wasn't that time. But, I think that I was—because of my teaching background, and my educational background, I had a kind of a pedagogical instinct. I had a kind of an ability, I think, to—if not by actual teaching, at least by an example, to give a sense to young people of what I think good writing is. I remember when I first applied for this job, in 1987 or '88, it was pretty clear I wasn't going to get it because there was another lawyer by the name of Fred Abramson [Frederick B. Abramson], and we thought the fix was in for him. He subsequently died—nice, very nice guy, and was highly qualified. And so, at the meeting of the Judicial Nomination Commission, one of the members of the Commission asked me, "Well Judge Farrell, wouldn't you like to be a trial judge?" In other words, "You're not going to get it. The appellate judge job is taken care of, you're not going to get it. Wouldn't you like to be a trial judge?" And I had to tell him, I said (a) I really am not interested in being a trial judge, and (b) I'd be terribly unqualified for it, because my whole background has been in writing and— (laughs)

MRS. EASTON: I'd have to go learn the rules of evidence (interviewer laughs)—

JUDGE FARRELL: I'd have to go learn the rules of evidence. (Both laugh.) And I don't think I have a quick mind, which you need at the trial court. I think I need time, and given time, I think I can think with a little bit of sophistication about things. But I probably wouldn't be a—and she, the member of the

Commission, smiled and said, "I understand." (Laughs.) So I had to come back a second time.

MRS. EASTON: (Laughs.) When you were in the U.S. Attorney's Office, did you have that kind of more pedagogical time? I mean, it's a busy office.

JUDGE FARRELL: Yes, in two respects. I had a good deal more. It is a busy office, but bear in mind, you had a couple of deputies, and they were also very good at working with the lawyers. And you managed to make the time, because you really felt that was your job there. Your primary job was to file the best product you could in the Court of Appeals, but it was also to educate the young lawyers in what good appellate work was. And you had more time available for that. It was sad when I came on the court and realized you don't. Because in a way it's an assembly line: The things keep coming, you don't want to really get behind, and so you have to do an enormous amount of work yourself, and that means there's less time for the law clerks. But, as chief of the appellate division, U.S. Attorney's Office, and as deputy chief, that was a primary obligation I had, which was to teach young people, as best I could, to do the kind of writing that judges expect on courts of appeals.

MRS. EASTON: Well, I'm going to ask you a philosophical question, but is it possible to teach writing?

JUDGE FARRELL: Well, yes and no. I think it is possible to take somebody who is fluent, and who can put sentences together, and is not just stuck at their word processor not being able to put things down—it's possible to teach them

after the fact on how you can compress and do it much more concisely and much more economically. That you can do. If people simply have no gift of writing, if they can't simply put paragraphs together, they're not likely to—my experience was they weren't likely to have been hired by the U.S. Attorney's Office, because there was a pretty good recognition in the hiring process that these people had to come from pretty good undergraduate careers and law schools and must have learned the basics of pretty good writing. I can probably remember four or five instances of people in my years there who really couldn't write well and clearly and logically. But that was almost a sense of their being unable to think clearly, and you wondered why they had been hired, and I'm not sure their careers lasted very long there. Most young people came with that kind of skill at least from three years of law school and four years of college, where they could basically write. I think, within limits, you can teach writing. You can teach people, as I said, to say things in many fewer words. What you can't—what you can't really teach them, except by an example, is, "What are the three things I need to say," in other words, to really come up with the insights and the ideas. That they only pick up, in a sense, by experience. And some are just highly gifted. I've had a few clerks over the years who were of that nature. I was astonished in the way, at such an early age and just out of law school, they had an ability to get their teeth into legal issues and give you the four reasons why you should reach this decision—or not. That's a rarity, that's a very gifted

person. Those kids tend to end up on the federal courts and in the Supreme Court clerking, and in the law school professions. But if a kid had the basics, the basic analytical skills, and had basic writing ability, you can teach some things. Or at least you can teach them a little bit of the craft of appellate writing, which is not the craft of writing law review articles. It's not the craft of writing legislation, things like that. It's different. But it's an art, and you can teach it.

MRS. EASTON: I see, actually a really lovely full circle from your first wife telling you that you were a frustrated college teacher—

JUDGE FARRELL: Yeah, yeah.

MRS. EASTON: —you needed to be with the right students.

JUDGE FARRELL: Right.

MRS. EASTON: (laughs) —and actually, it sounds like at the U.S. Attorney's Office you found the right students.

JUDGE FARRELL: I think I did, yeah. You know, I compare my experience with the experience of a friend of mine, James Klein, who is the head of the Public Defender Service [appellate division chief] in D.C., and has been for thirty years now practically. [Note: James W. Klein joined the D.C. Public Defender Service in 1978 and became head of the appellate division in 1983, *see* https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/june-2007-legal-beat.cfm. As of 2015 he was serving as an Appellate Training Director for the CJA appellate panel. *See* http://www.pdsdc.org/about-us/historical-timeline.] A marvelous lawyer,

appellate lawyer he's been for all these years. We were competitors back in the U.S. Attorney's Office. I was chief of mine, he was chief of his, and so forth, or deputy chief, I can't remember. And in a sense, it's a similar situation: He has some of the most gifted young lawyers in the country, coming out of some of the best law schools, who want to work for his office, who come through his appellate division. And he gets a chance to learn from them, to teach them. And, in a way, what better job could you have? Because you have a lot to teach them. And they revere him over there, because he has such a gift of helping them craft and polish their briefs. But he learns from them, too, because you have kids who come up with insights day in and day out that you don't think of, particularly as you get older, you know. But it's a wonderful kind of mix, if you're anybody with my kind of background, who likes writing and has done it over the years and wants to help mold a good product. And it's wonderful when you're working with young people who can give you the raw materials of that in such a good way, without requiring you to take the brief and rewrite it from the beginning. I had many times over the years, in the U.S. Attorney's Office, I would have to basically rewrite the brief. That was just unfortunate, that the things didn't work out. But in the vast majority of cases you were able to work from a good draft by good young lawyers, and you got pleasure in working together with them to produce a good product. I've said to Jimmy Klein over the years, "Why don't you go up and teach at Harvard?" He said, "Why the hell should I go up and

teach at Harvard? I've got the best people down here. I've got the best students here to work with, you know, the cream of the crop."

MRS. EASTON: Who'd already been trained?!

JUDGE FARRELL: Who had already been trained and—(laughter)

MRS. EASTON: (laughter) —you make the point of meeting the right student. Once they've made it to the Office of the Federal Public Defender or the U.S. Attorney's Office, they've been vetted. My philosophical question actually arises, thinking about someone coming into law school.

JUDGE FARRELL: Yeah.

MRS. EASTON: Because now, in most law schools, legal writing is a mandatory course in the first year, and I—I look at that somewhat askance, I'm not sure what it is you can teach at that point.

JUDGE FARRELL: Yeah. It is true. I think the kids nowadays, the young people who come to work as law clerks for judges and so forth, and the young people who come out of law school, have gifts that we never had. I think they have—number one, they've mastered the basics of electronic research. Therefore, they can produce a ton of research in a short time, which would have taken us a week to come up with. And they have the fluency that comes with having grown up now in composing rather than writing. You know, composing on a computer. And it's almost as though the words and the sentences trip off their tongues, because it's such an easy process. I'm putting aside the problem of cell phones and tweeter and things like that, but assuming that they've done writing in college, it seems to come easily

to them. The problem becomes the discipline that we all recognize that the young people need now, of—call it of "overfluency," in a way, overwriting. And so that's the problem of getting fifty pages on a subject in a draft opinion, and when you know that eighteen pages might be enough, or twenty-five might be more persuasive, and you've got to try to persuade them to be their own best critic and cut it down.

MRS. EASTON: And not demonstrate all that they've learned.

JUDGE FARRELL: Yeah, yeah. That's the thing. I must say, in my first two years on the court, probably, I was guilty of overwriting. We all are. Because you do research, particularly for me it was in civil matters, and you almost feel that part of your education is to put it all down on paper in a coherent order. And only later do you recognize that most of the world to which that opinion would be directed—your audience—didn't need all that because they knew the stuff; they just want the right result. And you learn to become more concise. I think all of the judges over the years learn to trim their work down.

MRS. EASTON: The instances in which they don't are rather sad.

JUDGE FARRELL: Yeah, yeah, yeah, yeah. (Laughs.)

MRS. EASTON: Well, I'm going to ask a little bit about some of the changes. You mentioned the technology and the fluency of young lawyers. In the Seventies and Eighties you were—all of this was being done, what, by hand?

JUDGE FARRELL: By hand, with carbon copies and, you know, it was—there was no email.

MRS. EASTON: When did you make the transition to having lawyers writing for you who were using either the [IBM] Mag Card or some of the earliest word processing? It would have happened during your time as chief.

JUDGE FARRELL: Yes, maybe not even then very much. We still—when—up to ’89, when I became a judge, we still had a large platoon of secretaries, they called them then, who would receive drafts from the lawyers in appellate cases, sometimes typed up on the early versions of computers, but more likely on typewriters, and would get them and then would convert them into some kind of electronic format, or would simply type them up from stuff being written out on yellow pads, and would actually do the composing of the opinion and give the draft back to them. So I think until the end, we still had a big cadre of people who were doing the actual preparation of the opinions. Nowadays, as you know, I mean, that’s basically gone. When I started with the court in ’89 and ’90, I think that was still the early days, the early kind of primitive computers. And what we call now a judicial administrative assistant, my secretary then, had come over with me from the U.S. Attorney’s Office. She was one of the very first people to really learn computers and became kind of an educating force here for other secretaries in the court. And it evolved then over the years for most judges; not for me, I regret to say. I’ve never become terribly fluent with computer technology, because it hasn’t really been necessary for me to do it. But most of the judges, particularly the younger judges now, it’s embarrassing to me how sophisticated they are in that, to the point where

they don't even have secretaries in the office. They hire a paralegal instead of the secretarial position, who can, in effect, give them another half of a law clerk, and also a kind of administrator, and the two or three law clerks, plus this legal assistant they have, end up managing the office themselves. And everybody just does their own work on their computer and you don't have the need for giving it to somebody else to work on. It's become a very, very complicated world for old people like me, but for them it's the most natural thing in the world.

MRS. EASTON: Do you have a recollection of when electronic research became the reality for your work? Was it while you were a chief? I mean, that would have been about the time.

JUDGE FARRELL: About the time, in the Eighties, you think it was that early?

MRS. EASTON: I know I was doing it in the Eighties, so—

JUDGE FARRELL: I guess, but basically, I—to the extent that I had to actually get into writing, I was probably an old barnacle who would go down to the library and look up the digests. Remember the digests they had? I would do that because I didn't have to do too much of it, and I had the time and I could do it. And I knew my own ways of getting cases. I am sure that the young lawyers who were producing drafts for me were doing it far more efficiently electronically, because they had already mastered the earlier versions of West and Lexis and whatever research they had. But not for me. I just never—I wasn't forced into the situation like you would have been, say, in practice, where time is money. You've got to learn the stuff

to do it fast. You didn't have to do it as chief of the appellate division, because you had the people doing it for you. And what you brought to bear on the ultimate product was judgment and some sophistication in shaping the final product. Yeah, but the research changed enormously. And now one of the pleasures about the job—sometimes you think it may be a little bit of a curse, too—is when you tell a law clerk to go out and find me the law on a kind of a thing, a day later, in your case maybe a half a day later, because you tell them, they've—you've got the product, you've got it there. Sometimes I think they work too fast and you're not sure they have it all. But the change began, and I was the beneficiary of it, because I had very good young people, particularly as a judge, young law clerks who could do the stuff so well. And I think they just shook their heads throughout my twenty-x years as an active judge, or my twenty years as an active judge. While they were doing all this, applying all these state-of-the-art tools to producing what they produced for me, there was poor Judge Farrell sitting there down in with his yellow pad, writing out his opinions and so forth. But there are only a couple of us. One of them is my dear colleague Judge Frank Schwelb, who died last year. We were colleagues for fifteen, eighteen years here. He never learned the computer stuff. He was older than I am, but not by much. He could never really learn it. He either would depend on the clerks to do the research for him, or he would go down to the text books in the library—we still do have the

books—and go down to the hornbooks, to the Restatement. We grew up with the Restatement, things like that, you know.

MRS. EASTON: I know. Young lawyers now don't know what the Restatements are, unless I send them to look at them. (Both laugh.)

JUDGE FARRELL: Yeah, so the change has been monumental. Fortunately it's a change that affects appellate judges less than I think trial judges for example. You cannot be a good trial judge now, with a busy docket, without having mastered all this electronic stuff and being able to have it up on the bench with you. And you know, you see it all the time, being able to get to the stuff immediately, and control electronic filing. And all that is something that we are just getting around to in our court of appeals. And my quip to them whenever they threaten with, "The day is here when it's all going to be electronic!"—my quip is, "Well, you better get a lot of printers, because there are a lot of judges on this court who are going to insist that their clerks print out every piece of electronic information that comes before us." (Both laugh.)

MRS. EASTON: It's true, it's true. It's just, it is convenient to be able to take the file from one place to another, but I still prefer to read the hard copy.

JUDGE FARRELL: (Laughs.) Yeah.

MRS. EASTON: And I suspect—

JUDGE FARRELL: (Laughs.) Yeah.

MRS. EASTON: —there are quite a few judges that are the same. (Both laugh.)

JUDGE FARRELL: Right. But I think I was just a little bit too late to really benefit from the education I would have had in electronic research and everything to do with computer technology as it relates to the law. Or maybe, as my wife tells me, I was just, in a way, lazy. I prefer—"You prefer to do it your way, Michael," she says. "And you'll never change." And my response is, "If the chief judge over the years had been willing to send me off to La Jolla for a month of learning Lexis and West and computer analysis and research, I would have done it, but short of that, I'm doing it my way." (Laughter.)

MRS. EASTON: Exactly, in order to get it done. (Laughs.) Well, I want to ask you if you would think about anything else from your U.S. Attorney years that we should be sure to talk about next time. And then when we get together next time, I will want to talk about the application form that—you mentioned that you—you were put up once—

JUDGE FARRELL: Right.

MRS. EASTON: And then decided to do it again—

JUDGE FARRELL: Right.

MRS. EASTON: —before starting on the bench. And then start, at least, talking about your years on the bench.

JUDGE FARRELL: Right, right.

MRS. EASTON: But I'll go back and do this transcribing and we'll see if we can move on into your judicial years.

JUDGE FARRELL: Well, we should—maybe we can finish the whole thing in one more session, although it's twenty years of judicial stuff.

MRS. EASTON: And the more recent things, we can, you know, actually sit and talk about some opinions if you'd like.

JUDGE FARRELL: Yeah, sure.

MRS. EASTON: So, I'll give you a little bit of homework in that, if there are some things from your U.S. Attorney days, or particular opinions you want to discuss, let me know about it so I can get up to speed and ask questions about them.

JUDGE FARRELL: Wonderful. Maybe I'll do—I'll send you a list of a few of them and we can talk about them.

MRS. EASTON: I'd really enjoy that. That would be fantastic. Well, let's go ahead and go off the record.