

**ORAL HISTORY OF JUDGE MICHAEL W. FARRELL  
FOURTH INTERVIEW  
AUGUST 27, 2015**

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Judge Michael W. Farrell. The interviewer is Lory Barsdate Easton. The interview is taking place at the District of Columbia Court of Appeals on August 27, 2015. This is the fourth interview.

[Recording started midway in discussion of a production of the musical *The Fix* staged at the Signature Theater in Shirlington (Arlington, VA).]

JUDGE FARRELL: In Shirlington, down there.

MRS. EASTON: Right. And how did you—

JUDGE FARRELL: Oh, it's alright except I have become increasingly annoyed with—I was never a great fan of musicals, ever since Rogers and Hammerstein passed from the scene. But nowadays, everybody's miked. Have you experienced that?

MRS. EASTON: Even in the small theaters.

JUDGE FARRELL: Even in the small theaters. And the result is you don't have any sense of whether the person can carry—the voice is big or small because they all come out monochromatic and all the same. And if somebody's standing in the back of the stage singing, it's as though they are up front. It's just kind of disconcerting. Anyhow, enough of that.

MRS. EASTON: How did you find the drama?

JUDGE FARRELL: I didn't care much for it. I thought it couldn't make up its mind whether it wanted to be just what we used to call "Capital Steps," that was the local satirical political group, or something deeper and more serious about—

MRS. EASTON: Yeah, and they can't go both ways on something like that.

JUDGE FARRELL: No, no, no.

MRS. EASTON: No. Well, let's go ahead and start our fourth session together.

JUDGE FARRELL: Sure.

MRS. EASTON: What is today, the twenty-seventh of August?

JUDGE FARRELL: Fifth, six, seventh, yeah.

MRS. EASTON: Oh, excellent. Well, I'm delighted to be here. If I may go back to ask you about immediately after law school, I assume at some point between law school, clerking, and starting at the U.S. Attorney's office in the appellate section, you took a bar exam?

JUDGE FARRELL: I took a bar exam. I was clerking in 1973 for a judge then on the Circuit Court for Montgomery County, Maryland, a trial judge. In the course of the summer, two months after I began, he got appointed to fill an opening on the Maryland Court of Special Appeals. I'll tell you, just anecdotally, the judge he succeeded had been appointed by Governor Marvin Mandel of Maryland. His predecessor, the attorney [judge], was a fairly well-known appellate lawyer in Maryland and Washington, D.C., but also a trial lawyer, and who really liked the action. Well, it turned out, after a year on the court of appeals, he didn't like the "action" so much and his secretary told me he was taking longer and longer naps in the afternoon. He finally retired. My judge got promoted to replace him on the intermediate court of appeals. During my first couple of months working for him, I took the bar exam in some cavernous convention hall in Baltimore. And lo and behold two or three months later I passed. I don't know whether I passed with flying colors. It didn't matter.

MRS. EASTON: Right.

JUDGE FARRELL: I always had the sense that—and there was some rumor to support it—that Maryland graded the exams depending on how many new lawyers they thought they needed in the bar that year. And perhaps they needed a lot that year, and so I passed with sufficient colors. (Both laugh.)

MRS. EASTON: Oh, excellent. So you took the Maryland bar. And what was the process at that time for practicing in D.C.?

JUDGE FARRELL: Well, it didn't really matter for me, although I joined the D.C. bar—I waived into the D.C. bar within the next year because everyone did. I was working my first job as I think I've mentioned, with the Department of Justice. So, you didn't have to be a member of the D.C. bar, a membership of any state's bar would suffice. But since I always, I think at the time, had ambitions of doing work in the district, particularly as a judge, I knew I had to join the bar, and so I waived in based on my Maryland bar passage. I don't know when that was but at some point.

MRS. EASTON: I'm curious, why did you end up interested in D.C. rather than the Maryland system?

JUDGE FARRELL: Well, I was living in D.C. or right around there at the time. I guess it's that I spent three or four years with the Department of Justice in D.C. And then you recall, I was invited to come over to the U.S. Attorney's Office in D.C., and that solidified my connection with the District. Now, had I gotten an offer from somewhere in Maryland, I think during my DOJ experience, maybe I would have moved over to Baltimore somewhere and

become attached to Maryland. But, no, I think I became pretty early—my wife and I decided we wanted to live in and around the District Columbia area. Her children were here and so that started the connection. Basically though, when I went to the U.S. Attorney's Office, it made the decision for me to practice in and around this area.

MRS. EASTON: And while you were in DOJ or when you moved into the U.S. Attorney's Office, were you involved in the D.C. Bar or any bar organizations?

JUDGE FARRELL: Not a lot. Not while I was at the Department of Justice, no. I had my hands full with my job. Once I came over to the U.S. Attorney's office, in the course of time, I became a member of various committees, most of which I have forgotten. But one: We had a rules committee—a District of Columbia rules committee, mostly on civil but also occasionally on criminal [rules], which would take uniform laws recommended around the country by the uniform commissioners of laws, and decide whether the District should enact similar legislation. We would make recommendations to the Council of the District of Columbia, and occasionally they would adopt something that we proposed. I had that [committee] for three or four years.

I was on various other committees related to court work. We had a committee at one point, interestingly enough, on whether the District Columbia courts should adopt the Federal Rules of Evidence, because we have never adopted them except piecemeal, individually. And we thought it would be a good idea, at least some of us on the committee, for the sake

of uniformity in the District that lawyers and judges should adhere to the same playbook, follow the same rules of evidence. That never reached the stage of a recommendation to do it, partly because there was a lot of uncertainty as to whether the court could do it without input from the D.C. Council or without some fairly dramatic changes in statutes in the District of Columbia. Some of the evidentiary rules in the District have been created by the legislature over the years, and some of them differ rather significantly from Federal Rules of Evidence, for example, impeachment with prior convictions and things like that. So, a lot of changes by the D.C. Council would have been necessary to effect this kind of wholesale reform. And there may have also been some political uncertainty as to whether the Council thought the judges really had the business of doing this or whether the Council should do it. That kind of issue comes up from time to time over the decades. That was another committee I was on, then a handful of others.

We had a committee once—I think I was vice-chair, I'm not sure—on whether the District should create an intermediate court of appeals like most states have, not all. We are the busiest court of appeals, and have been for a long time, among those states or quasi-states that have only one court of appeals. There are probably five or six smaller states that have only the one. Most other states have the two. So periodically there would be a committee set up to consider whether we should adopt an intermediate court of appeals. Some thought that it was a good idea.

Some thought that a city of, then, fewer than five hundred thousand residents really didn't need a second-tier court of appeals and probably couldn't afford it anyway, and Congress might not be willing to provide the money in any event. It never really went anywhere. Various people proposed it, others opposed it. And that was an interesting experience. But it never led to anything much.

MRS. EASTON: Did you have a strong view on the issue?

JUDGE FARRELL: No, I didn't have a strong view. I think, at that time, I was a deputy chief of the appeals section, probably leaned toward the view that there wasn't really enough business to occupy what would be a *certiorari* court, the highest court of the jurisdiction. Maybe—this is a little bit of telling tales out of school, but maybe I was influenced a bit by my experience clerking on the intermediate court of appeals in Maryland, the Maryland Court of Special Appeals, where some judges, I can't name names, were unhappy over the years over the fact that the high court of the state, the Maryland Court of Appeals, wasn't busy enough, they thought. So, what they would do, under their statutory authority in Maryland, would be to reach down and cherry pick, pluck away interesting cases from the intermediate court of appeals, take them as a matter of initial decision-making in the high court, and leave the intermediate court with all the—

MRS. EASTON: The other ninety percent—

JUDGE FARRELL: —the other ninety-five percent of the cases. So, as a prosecutor in the appellate division, naturally your instincts said to you that most of this

stuff is not worth *en banc* or plenary consideration by a high court. There's a lot of junk. You don't need it. It creates just another review tier. You need more lawyers to do the work. And there's very little certainty that you have enough issues to justify a high court. I probably leaned in that direction, although I could see arguments on the other side, particularly as I've worked as a judge over the years. Every appellate judge just wishes she/he had more time, fewer cases, and therefore more time to sit and look out the window and ponder and think deep thoughts and create better opinions that don't simply correct errors in the process but enunciate new law. Everybody would like to have more time to do that kind of thing, but it's not practical in many cases.

And on the whole, my sense is probably that, in a city of our size, we've done pretty well with a single court of appeals. It has helped in the criminal law area that we don't have the death penalty, because what occupies in the South state supreme courts an awful lot—Florida comes to mind as an example, in the past—is death penalty cases. Over the years I've talked to judges on high courts in the South who say, "All this death penalty stuff comes to us, if not originally, it eventually comes to us, and we spend an enormous amount of time agonizing over it." We don't have that in the District, so that's one less big project that the court of appeals here has to deal with. On the other hand, we are a court that is kind of unique in that there's really no federal *habeas corpus* in the District of Columbia—someday we can talk about that—unlike in the fifty states, so

that people who have their criminal convictions affirmed here by our court, basically have only one remedy and that's to go to the United States Supreme Court. They can't go over to the U.S. District Court, file a federal *habeas* like in the states and get another chance.

MRS. EASTON: I didn't realize that.

JUDGE FARRELL: It's true. Of course, Congress has made federal *habeas corpus* a lot more difficult in the last few decades anyhow. But that is a sense in which the District of Columbia is unique. It was actually challenged in the Supreme Court some years ago, and they basically said that as long as the District of Columbia has its own collateral attack avenue to give you a second chance, which we do, then you don't have to have federal *habeas*. But I've gotten you sidetracked there.

MRS. EASTON: It's an interesting aspect of the work of the D.C. Court of Appeals.

JUDGE FARRELL: We have a lot of responsibility, because we are the last resort in these criminal cases especially, as a practical matter. On the other hand, we don't have quite the burden that some state courts have that have to decide these death penalty issues.

MRS. EASTON: So, were there other civic activities or charitable activities that I should also note?

JUDGE FARRELL: I don't think so, because I think I was basically—I was a worker-bee, and a workaholic, and a nose-to-the-grindstone kind of individual. And I thought I served the city best by doing the best possible job I could as a deputy chief of the appeals section and producing the best product we can

for the courts. I'm sure those who are on the commission that picked the judges back in the late Eighties when I finally applied, some of them perhaps wished I had been more active in civic activities than I was. But I had to confess that I basically did my job as well as I could and they'd have to take me as I was.

MRS. EASTON: (Laughs.) So I take it that meant you weren't politically active particularly—

JUDGE FARRELL: No, I was an Independent then, I'm an Independent now, and my politics largely consists of voting when I'm called to vote and reading the papers and keeping well informed and arguing with my wife about politics, which can be a full time occupation.

MRS. EASTON: (Both laugh.) Well, having grown up in such a political atmosphere in your childhood home—

JUDGE FARRELL: That is true. It is interesting that I really didn't kind of ingest or internalize my father's newspaper man kind of political obsessions. I think it was just a part of the business he was in. I went off to college and school and became more interested in other things than in politics. I went to college in the Fifties when General Eisenhower, later President Eisenhower, was presiding, and it was kind of a quiet, dull time. Things got more interesting with JFK. Your juices started to flow a little bit more about the political arena with a New Frontier and things like that. [Note: See [https://en.wikipedia.org/wiki/New\\_Frontier](https://en.wikipedia.org/wiki/New_Frontier) for discussion of the John F. Kenney acceptance speech and New Frontier policies.] And then we

had the Sixties, with everything that happened then, the assassinations and all the rest. I have never though really been an acutely political person. I've often thought too that it befits the role of a judge, including a judge on a court of appeals, to keep his politics to himself and not get too active in that kind of area. I don't think any of our judges feel that it's really consistent with their role as a judge to be out there in the community doing too much politicking. Hand shaking, yes, chief judge has to shake a lot of hands, but politicking—no.

MRS. EASTON: When you accepted to chief the appellate section did you find yourself shaking more hands?

JUDGE FARRELL: Not really. Number one, nobody was interested in the appellate section. Appeals—nobody quite knows what appellate sections do or what appellate lawyers do. Many don't know what courts of appeals do. You know, it's not quite the same as Judge Jones, the trial judge, who you think can fix your traffic ticket or something. So not really, no.

MRS. EASTON: So you had had ambitions to be a judge even when you went to the U.S. Attorney's office. How did you decide that it was time to put yourself up for appointment? Or did you get invited?

JUDGE FARRELL: Well, no. I had ambitions? That's a rather dramatic word, but I certainly had an interest in doing it because I had done a lot of writing in graduate school. I'd done a lot of writing in the appellate division, of course. And I thought I'd probably be a pretty good court of appeals judge, not a good trial judge. So, from the beginning, it was within my sights, I think. But I

recognized that I had to pay my dues and I had to work over there for quite a while, and there was no guarantee that you would do it. And indeed, the first time I applied [to the Nominating Commission], they said, thank you very much but come back next time. I was very fortunate that the stars aligned and at a particular point when they were looking for somebody, I qualified, and they hired me. As I said, perhaps earlier, there has been a tradition of taking people who are chief of the appeals section in the U.S. Attorney's office and moving them to the Court of Appeals. Not everybody has always been happy about that in the bar, but that's the way it's been, and I happened to be one of them. And as I mentioned to you, since I came on the court, two more of my predecessors [successors] have joined the court and are now on the court.

MRS. EASTON: Well, at the time, let's see—this must have been '88, '89?

JUDGE FARRELL: Yeah.

MRS. EASTON: What was the process for—

JUDGE FARRELL: It was a situation where you had a commission. It's the modified Missouri Plan, I think, where an independent commission consisting of people appointed by the Council, by the mayor, by Congress, one federal judge—don't ask me why they insisted that he or she be put on there, harkening back to when the District was just a kind of an extension of the federal government. And members of the bar would be appointed, and that commission would pick three names, send them to the White House, and the White House had to pick one. So, it's kind of a home-rule

compromise. And I think it's an excellent system because it takes a lot of the—not entirely—but it takes a lot of the politics out of the situation. You get a lot of voices who get to be heard. I don't think the president in my memory has ever resisted in some way picking one of three. Nobody's ever tested the matter. I'm not sure that any president has ever had any particular person that he keenly wanted to put on our local court bench. They seemed to be more interested in federal judgeships. I'm not sure why, but it does seem to be the case. So it's a system that worked. From time to time, there are people who are seen as kind of a natural for the job and the first time, because they've been important people, say, in the bar. The first time I applied, there was a gentleman who had earned his right to be considered for a judgeship, trial or appellate, and he was being, I think, groomed for the job in the eyes of many people. And they basically told me I'd have to wait because it was really his chance. Well, it turned out he didn't pursue it or wasn't ultimately picked, somebody else was picked. And in a couple years later my turn came. And my wife always reminds me of how fortunate I was to pull the wool over their eyes, but it worked.

MRS. EASTON: (Laughter.) Was there a vetting process with questions?

JUDGE FARRELL: Yes, you have to—you have to do an awful lot. You fill out an intensive questionnaire for the Judicial Nomination Commission. And you're interviewed by them. If the White House picks you, or if the White House indicates to you that it intends to pick you or would like to pick you, you

fill out a questionnaire for them. If you're nominated, you fill out a questionnaire for the Senate. And as I used to say, the White House's questionnaire wants to know what you do on Monday, Wednesday and Friday. The Senate says, "What do you do on Tuesday, Thursday and Saturday?" So, you have to give a good accounting of your life to get through that kind of screening and hope that you get confirmed. And I was eventually confirmed in 1989. But before that there was an interesting little hitch in the process. After my name got sent up to the White House, President Reagan, in his last year in the office, nominated me in maybe October or so. Well, nothing happened. Congress went out of session in 1989 when Reagan's term expired. The election took place; Bush won. George Bush was elected. The process had to start all over again. He re-nominated me. But interestingly enough, sometime around in February of 1989, I received a call from the Deputy White House Counsel who told me that, "Unfortunately Mr. Farrell, all of your papers have disappeared. It would appear that President Reagan took all of his papers west to what was going to be the new presidential library" in California—somewhere out there where the Reagans lived, Santa Barbara, in that area. And I had this image of President Ronald Reagan, as his last act, going through Mr. Farrell's resume and deciding this is very important and it should go to Santa Barbara. (Laughter.) In any event they said, "Please send us another copy of your resume and your application," which I had to do, and then things went from there. [Note: Records on

Congress.com reflect that Michael W. Farrell was nominated on January 3, 1989, and confirmed by unanimous consent of the Senate on June 7, 1989. <https://www.congress.gov/nomination/101st-congress/62/actions?q=%7B%22search%22%3A%5B%22farrell%22%5D%7D&r=6&overview> See also Senate Hearing 101-40 (April 21, 1989), Hearing before the Senate Committee on Governmental Affairs, available at <https://babel.hathitrust.org/cgi/pt?id=uc1.b5139429;view=1up;seq=1>.

I was not confirmed for a good five or six months, until almost the summer of 1989, because Senator Sasser from Tennessee was the chair of our committee, and he was not in town all that time because he was running for reelection. [Note: Senator James Ralph “Jim” Sasser of Tennessee chaired the committee hearing for Judge Farrell’s nomination; it appears that Senator John Glenn of Ohio was the chairman of the Senate Committee on Governmental Affairs at the time of Judge Farrell’s confirmation.] So things sometimes can move slowly. ‘Nothing political; unlike the Senate Judiciary Committee, our committee was a different committee that handled the Article I confirmations. But things sometimes worked slowly.

MRS. EASTON: So that’s a fairly extended period during which you just continued to serve as chief?

JUDGE FARRELL: Yeah, much easier for a government lawyer, as you can imagine, than for a lawyer in practice. And it happens again and again. It almost is a disincentive for people to apply for federal judgeships and state judgeships

around the land because you can get tied up so long in the legislature for confirmation and meanwhile your practice is sort of on hold. It's easier with a government employee.

MRS. EASTON: The work kept coming. (Both laugh.)

JUDGE FARRELL: That's right. In fact, our poor ninth judge nominee [Todd Sunhwaee Kim, Solicitor General for the District of Columbia from 2006], the White House has nominated him the second time, has been under consideration by the Senate for the better part of two years now. I won't even go in to the reasons, assuming I even have an idea of what they are. Meanwhile, we're functioning with eight judges when we could dearly use a ninth.

MRS. EASTON: Oh, absolutely. Once you were confirmed, what happened next?

JUDGE FARRELL: Once I was confirmed, I was vacationing in Florida with my wife and her brother from Paris, France. He came over. We had brought him to Miami for an eye operation and we were at Disney World, I think, and I received a call from the White House saying, "You're it!" That was during the winter before the confirmation. And I said, "Thank you." The actual confirmation, I can't even remember, it happened maybe in May or June. And I came over about two or three weeks later, maybe took a little vacation and started right in.

MRS. EASTON: Now, did you have a hearing with that?

JUDGE FARRELL: Oh, yes. Yeah, I had a hearing when Senator Sasser was able to make his way back to Washington, probably in May. And it got to the floor very quickly, because these things were not controversial then for our court.

And there was not much time because I was one of these people who always wanted to be ahead of the project. I didn't want to get behind. I spent the summer working on the cases that I would begin to decide in September. So, I had a good summer to kind of prepare.

MRS. EASTON: So, you had a sitting that fall, your first fall?

JUDGE FARRELL: Not until September of 1990, I guess, was the—

MRS. EASTON: 1989?

JUDGE FARRELL: Well, let's see. It was '89 still. Yes, '89, right.

MRS. EASTON: Was there a judicial college? Training?

JUDGE FARRELL: No. No, you learned by the seat of your pants. You learned by doing. Yes, there is a one-week seminar that we traditionally have sent our judges to up in New York at New York University Law School, which basically invites judges and other speakers from around the world to talk about some subjects. But, it's nothing like what many states use, for example, which is a judicial college, I think it's out in Reno, where judges will go out for three weeks, a month or so and actually get some hands on training on being a trial judge. Appellate judging, you basically learn through the experience of doing it. You can learn it through various seminars that the ABA puts on—you attend those. But no, I think that may be a shortcoming in our whole system: that judges kind of have to learn by doing. And there is no real—that I'm aware of—advanced training that you can do of any length.

MRS. EASTON: So, when you—when you were confirmed, did you go about hiring clerks?

JUDGE FARRELL: Yes, I did. I have a little difficulty remembering how I ended up hiring one. Maybe I just looked at a bunch of applications that were there, people who were interested. Word gets out that a new judge is beginning and you get applications. And then, a professor out at Catholic University Law School, who I knew through an Inn of Court—I had been a little bit active in Inns of Court—called me and said, “I have a young man out here who is exceptionally good. He’s decided at the last minute that he’d like to clerk next year, would you be interested in him?” I hired him and he was my second hire or first hire, I don’t know. And he was actually one of them who was *in pari delicto*, you know that old phrase? He was an accomplice in what you mentioned, that forty-page opinion that you pulled out before—hugely over long. (Both laugh.) But he was a very gifted young man. And he and I worked very hard together in the first year.

MRS. EASTON: So you had two clerks—

JUDGE FARRELL: I had two clerks. That’s what we have on our court. The trial judges get one, we get two. Two clerks and a—we used to call them “secretary,” now they are judicial administrative assistants. The way things have evolved now, some judges, not only in our court, but elsewhere, don’t even have secretaries or administrative assistants; they have an extra law clerk, who can also be a paralegal to help them to keep tabs on the cases.

MRS. EASTON: I heard that recently. That’s amazing to me.

JUDGE FARRELL: Yeah, it’s wonderful for a federal appellate judge if you could have four clerks instead of three, if they can do the work. And of course, the young

people all do their own composing now, so you don't need anybody to do the typing.

MRS. EASTON: Right. Wow. So, you and your two clerks, there you are with a stack of briefs.

JUDGE FARRELL: There you are, learning. As I said, I had the advantage of having a month and a half, two months in the summer, to kind of figure out some of this stuff with the help of the clerk. So I was able to hit the ground running pretty well come September because I had worked up several of the cases. I had introduced myself to the arcane subject matter of things like worker's compensation. Actually the first opinion I think I wrote, I did a draft—I shouldn't tell this—before the case was argued in September. I had worked my way through it and I had written an overlong draft on worker's compensation, very proud of myself at having discovered I could figure out that law, which is not so easy to figure out sometimes.

MRS. EASTON: There was a total prohibition on criminal—

JUDGE FARRELL: Oh, for at least a year and a half, there was no significant criminal participation. There was a little bit because occasionally you would get misdemeanor cases that went through the system in the U.S. Attorney's Office very quickly and would come up on appeal, cases that had begun after I left. But by and large, at most it took a year and a half for me to get past cases that had been in the system while I was in the U.S. Attorney's Office, and as to which I felt obliged to recuse myself.

MRS. EASTON: How did you keep track of that?

JUDGE FARRELL: Oh, you could tell it by case numbers. Not the appellate number but the actual case jacket number would tell you. And some judges are more rigorous in doing this than others, but I felt that as long as it was in any stage in the U.S. Attorney's Office at the time, I should recuse, and I did, which was also good because it gave me a nonstop diet for a year and a half or two years of civil and administrative law. And helped me to learn my way around a little bit.

MRS. EASTON: It's like a crash course.

JUDGE FARRELL: I'm sure there were plenty of civil practitioners out there who were saying, "Why do we trust these complex civil matters to somebody whose whole experience has been criminal?" But someone has to do it, and you have to learn it. And you do learn it.

MRS. EASTON: So were any of the other judges on the court helpful to you as you were setting up chambers?

JUDGE FARRELL: Absolutely, I mean a lot of them would come around and offer whatever assistance they could. A lot of them offered advice. Much of which I probably ultimately should have followed but didn't. (Laughs.) The result is that, from my vast learning, I try to teach similar advice to each new judge who comes on the court. And by and large, I think they respectfully listen to it and take it to heart and probably don't follow a lot of it. But we all think we can help. And they did help me enormously. I got tremendous support from them. And I think they were happy to have

me on the court, because I had appeared before them so often, and I knew most of them, that they recognized I could probably make a contribution.

MRS. EASTON: Well, that's pleasant and that's right, you have been appearing before them for—

JUDGE FARRELL: This had been my job for many years—not many years but for quite a few years, eight or nine. And so we got to know one another informally. It's, I think, why some people refer to the incestuous relation between the U.S. Attorney's Office and the Court of Appeals, these judges who just change seats and put on different hats. But it is a remarkable transfer—it's a remarkable change from what I had been doing to what I had to learn to do.

MRS. EASTON: And tell me about going from being an advocate to being a judge. That's a big change. But I also want to hear about how the collegiality was different. Did you feel isolated from your colleagues at the U.S. Attorney's Office? Or the bar?

JUDGE FARRELL: Well, I think you inevitably go a couple of years, two or three years, where you almost self-consciously distance yourself from your former colleagues. Just as a part of the problem of trying as best you can to purge yourself of any kind of particular leanings, biases that you might have acquired, perhaps inevitably acquire. So, there's a certain amount of that detachment. You do, nonetheless, continue to see them at events, annual meetings of the former assistant U.S. attorneys association. They know fully well your new position and that your relations with them have to

change and have changed. But, it's not as dramatic a change in a small city like this. As you can imagine, you bump into people all the time.

MRS. EASTON: Well, that's another question I have for you. My own experience from moving to D.C. is that this is a very small town for lawyers. So when you took the bench, did you meet new practitioners that you had not previously known, from the civil side?

JUDGE FARRELL: Yes. Yes, I did. Except that you know, as an appellate judge, you're considerably more cloistered, perhaps is the word, than as a trial judge, generally speaking. You don't have that much contact with lawyers informally. And even formally in the sense that in trial courts [lawyers] come into the chambers to file motions and things and there's inevitably back and forth. There's relatively little socializing on the part of appellate judges—at least my experience has been, on our court—with members of the bar. So, my learning to know new people, civil practitioners and so forth, largely consisted of seeing them in court, hearing them argue, reading their briefs, occasionally seeing them and congratulating them on their work, but not a lot of socializing. A court of appeals judge, my experience has been, is a sort of a monastic kind of existence in many ways. Your job is a limited one and it's not one in which you're really called upon to reach out to the world around you and engage. You're confined to that darn cold record that comes before you.

MRS. EASTON: Unless you're just posting on the internet.

JUDGE FARRELL: (Both laugh.) That—well, that’s right. Unless you write books and do everything like that. There are exceptions. (Both laughing.)

MRS. EASTON: Well, then, tell me about the substantive change. You obviously were excited to do it.

JUDGE FARRELL: Oh yeah, I was excited. Actually I was interviewed shortly after I was appointed by a young man who still writes, I think, for the *Washington Post*. And I made the mistake, in a way, of saying it would be nice to take this new job because I’ll get a chance really to call them as I see them. I don’t think the U.S. Attorney at the time, when he read that in the newspaper, warmed to it too much, because that kind of suggested I was a hired gun or a shill or something when I worked in the U.S. Attorney’s Office and wasn’t calling them as I see them. [See B. Gellman, “Three Names Forwarded for D.C. Court of Appeals, But No Action Expected Soon,” *Washington Post*, Nov. 11, 1988, at

[https://www.washingtonpost.com/archive/local/1988/11/11/3-names-forwarded-for-dc-court-of-appeals-but-no-action-expected-soon/ab2c6a82-520c-4e3a-b4c0-ba2115006185/?utm\\_term=.34d62cb3054b](https://www.washingtonpost.com/archive/local/1988/11/11/3-names-forwarded-for-dc-court-of-appeals-but-no-action-expected-soon/ab2c6a82-520c-4e3a-b4c0-ba2115006185/?utm_term=.34d62cb3054b)]

Well, nonetheless, there is a very big difference between being an advocate and having to do the decision-making of a judge once you get on the court. I mean, for so many years as an advocate, particularly an appellate advocate, your job was to burrow yourself into the law and the facts far enough to construct an honest, presentable, reputable argument on

behalf of your client and argue it as best you could to reach the result you wanted, consistent with the record and consistent with the law. But you're an advocate. Everything you did in your written presentation, like in your trial work, is designed to lead the court, if you can, to a certain result, which is the result your client wants. And that's a fascinating career. I mean it's wonderful. At the same time that it calls for a lot of skills, it develops a lot of skills in you—among those being, I guess, using rhetoric well, particularly when you're writing for a court of appeals trying to persuade, or at least trying to make the court uncomfortable with your opponent's argument. These are skills that you learn as an appellate lawyer.

But they are skills that you just kind of—in the main, put behind you when you become a judge. And one of the first things I think I discovered once I started analyzing cases with the view towards deciding them was just what a complicated world it is. How hard legal issues can be. How rarely it is that there is one side—the side that your client represents—that has all the virtue, with all the non-virtue on the other side. And that makes for a difficult job, because there's relatively little perfection in what the law provides to you. So, you've got to make judgments that as a lawyer you really didn't have to make. As a lawyer, once you decide ethically that the law supports a position that you're maintaining, you maintain that position as vigorously as you can. Because it is not your job to decide the case. When you're the decision maker, you suddenly realize that there are few

legal issues where good things can't be said on both sides of the equation. And especially in my situation, starting out in civil law, where I knew relatively little anyway, when you start going into the texts or into the case law, you may find out, at the end of a tedious process of trying to instruct yourself in it, that the case could be decided either way, maybe with a balance one way or another. It becomes a difficult task, and you have to learn it, and you have to learn to do it, and it's not something you learn easily. So, I think that was kind of the hardest thing for me at the beginning. Oh, I anticipated the job exactly required that. But just to recognize how darn complex the law is and how hard it can be to reach the correct result.

This is all in addition to the complications you find as a judge, particularly an appellate judge, that the facts create, and the process of the trial or the proceedings in the trial court create. You find that not only is the law complicated, but it's darn hard to apply to the facts of this case, because the facts turned out to be terribly messy, not fitting the particular legal matrix that you think you've identified. And so you spend hours trying to figure out how do you deal with this, how do you kind of fit a messy set of facts—with objections made, objections not made—to certain legal principles that you have to apply to the facts and reach what you hope is the right decision. That was one of the difficult things for me, quite apart from just learning the subject matter of partnership law or *res judicata* or a hundred other subjects that got put on my plate in the first year in the

court. But, you do, you do your best. You've been trained as a lawyer. You've worked as a lawyer. You ultimately come to recognize that all you can do is create the soundest kind of legal logical chain of reasoning that you can that will lead to what you think is the right result. Hope you'll persuade at least one other judge, since we sit in panels of three. Ideally, hope you'll persuade both. And then, even more, hope that when you send that draft opinion around to the whole court, they're not going to tell you, "Do it over again," or something like that because, "We don't agree with you."

So, the second lesson you learn pretty quickly in becoming a judge, especially an appellate judge, and that differs from being an advocate is that you have a different audience. In the first instance, in a collegial court, you've got to work with other judges. We sit in panels. You're not the lone decision maker. So you've got to write for them. You have to learn fairly quickly, if you're going to be any good at it, how little to say or how much is important to say in order to get that kind of collegial unanimity that you aim for and that the bar really wants. The bar doesn't want a lot of split decisions.

And then there's the audience of the—you got to learn to recognize who you're writing for. You're writing for the public. You're writing for the bench and the bar. And you have to learn, and this sometimes takes time to learn, to be careful not to say things in written opinions that can mislead the bar, can cause them to think that you're writing more than you're

writing, and can create mischief down the road by unnecessary, unnecessarily broad language that they may misinterpret and think, “Gee, the Court of Appeals is telling us we can do this,” when you didn’t really mean that.

That relates to another of my lessons you learn, I think, which is how to use your law clerks. Law clerks fresh out of law school who are learning the intricacies of a particular subject matter want to give you everything in a draft or in a memorandum. And you have to come to recognize, perhaps only over time, that the more you say about a particular subject in a written opinion, the more you can perhaps create problems down the road, if not landmines, misleading inducements to people to make arguments, and things like that. And a judge with a little bit of experience, I think, acquires the ability to decide better than a young person just out of law school what’s enough to decide a case without leaving too many things open and creating too many promises that you don’t mean to.

So, these are a couple of things you have to learn through just doing. But maybe I had an advantage over some of the other judges who, for example, have come up to the court from the trial bench, because I had been doing appellate work for eight or nine years. So, on the whole I would have to say, and I don’t mean this immodestly, I think it was fairly easy for me to change hats from being an advocate to an independent decision maker. I’m sure many lawyers over the years thought I never took off my prosecutor’s hat. Maybe it’s not possible to completely do it.

I think that I did from years of working as an appellate lawyer acquire a pretty healthy sense of the prerogatives of a trial judge and of the fact that the justice is administered primarily in the trial courts and not in the Court of Appeals. And that trial judges have an enormously difficult job, and that interfering with particularly discretionary calls that they make ought to be something the Court of Appeals shouldn't do lightly. I think I came to that sense of a kind of initial deference to the decision-making by the trial judges. But, nonetheless, you have to learn also that—especially when you're interpreting statutes and things—you're the decision maker, and you're the person that the law entrusts with the job of reading those statutes.

MRS. EASTON: Well, especially on the civil side, if the answer were really clear, it's unlikely it would be making its way up to you.

JUDGE FARRELL: That's right.

MRS. EASTON: Because business does not love litigation.

JUDGE FARRELL: No. No. That's why—I mean I learned fairly quickly that—it was partly because of my background. I was so familiar with the criminal justice process that the civil cases, all of the civil cases, seemed novel and hard. And then gradually I realized that there is a winnowing out process, and that stuff—civil cases in general—doesn't come up to the Court of Appeals unless somebody thinks there's something there, otherwise they're wasting their client's time and money. But the most difficult thing for me was just the number of new issues that you experience for the first

time as a judge. And then you just have to roll up your sleeves, sit down with your law clerks, decide how you're going to research the matter, and send them to the right sources to try to get the answers, and then give it the best judgment you can and hope that you've got it right. When I clerked in Maryland on the intermediate court of appeals, you at least had the sense that, well, we're not the last voice on this matter. If we do get it wrong, somebody else is going to correct it, even if it doesn't happen that much because they [the higher courts] don't take all the cases on review. On our court, you're the last resort, so there's a certain additional incentive to try to take the extra time to get it right.

MRS. EASTON: How did you allocate time? As a very experienced appellate advocate, you would have a sense how long it would take you to prepare a brief.

JUDGE FARRELL: Yeah. I don't know whether I sat down in advance when I started my appellate work and tried to map out a schedule and so forth. I think I basically just plunged into it with a determination to keep ahead of the crunch, the crush, all the time, by just hard work. And I had an advantage that some people don't have. Sometimes, as I said, it's trial judges who have spent a long or short career judging cases, but not doing a lot of analysis and writing, particularly having to substantiate your thinking in a written document. I had had that—at least as an advocate—that writing experience. So I started out, I think, with the determination to do as much of the work as I could myself. That's not all judges, and it doesn't work in all courts. On the Supreme Court of the United States, for example,

constrained as they are to get their opinions out by the end of a term, it's virtually impossible for a justice to write everything himself or herself. It just couldn't work. It can't work on most federal courts of appeals with the voluminous administrative records and things they get.

But to the extent I could, I decided at the outset I was going to try to run a little four-person law shop. Each of us—each of the lawyers, since the clerks were now fresh, baby lawyers, or were going to be—we'd be working on some legal project at the same time. I might be doing the first draft of an opinion on a case we had just heard, whereas each of the law clerks was preparing me a memo, called it a "bench memo" or whatever, on upcoming cases, things like that, or research assignments I had given them. And there were often many of them, particularly in civil matters. But the critical thing I decided, in order for me to be able to stay on top of a busy court operation, would be for all of us to be actually engaged from the beginning in the actual analysis and drafting of opinions. And I think that ultimately worked for me over the years. And that's one of the bits of advice I've tried to give to other judges—often not observed, for their own reasons—and that is to get your hands involved very early in the project of actually putting your own thoughts down on paper as soon as you can after the case is submitted to you, while your memory is still fresh, rather than waiting to get a draft from a law clerk, who might be very gifted, but still thinks differently than you do.

MRS. EASTON: And is junior.

JUDGE FARRELL: And is junior, and doesn't have the experience, and then going to work trying to work from a draft. Other judges who are masterful on the Court of Appeals work very differently. One judge I won't name—I've admired him over the years—number one, had the gift of getting terrific law clerks through his friends who were teaching in good law schools, and he entrusted them with probably a lot more actual drafting of opinions than I ever felt comfortable with doing, particularly after my first year on the court. We'll talk about that in a moment. But nonetheless, he knew—he had almost a preternatural kind of ability to give instructions to them as to exactly how he wanted the thing shaped. I had the feeling that, sort of like a little Mozart, he had the things sketched out in his mind before he actually wrote down the music, and he could give them the marching orders, the instructions, and they would give him something. He would then work on it, and at the end of the day, the end of the process, you knew it was his opinion.

Some work that way. But from the beginning decided I would make most progress if I took on most of the [drafting] responsibility myself. This is partly a result of my appellate experience, that is, I had my own sense of what good writing was. I had a kind of a bias in favor of more compression, more concision than some. Inevitably, in the first year or two, I wrote overlong, because I was learning so much civil law matter. And it's a kind of a human instinct: As you learn something, you put it down, because you think you're educating yourself and others, when

others probably don't need all of that. But I took it as one of my goals to try to—besides being prompt—to try to learn to write short. Shorter, at least, than I did in my first few opinions in my first year. And you can do that better, you can maintain better control over what you ultimately write, I think, when you're the actual drafter as much as you can be.

So I developed the practice early on of requiring from my law clerks basically three things. Number one, most importantly, that they be available when I want them to be available to talk about issues. Often at nauseating length, when they wanted to go out and play tennis or something like that. Into the night. To try to use their bright, young minds to figure out issues. Then, two, to give them particular research assignments and get research products from them in particular areas. And then the third thing: After I took their work product and worked it into a draft opinion, make them my best critic, on the theory that you'd much rather have a law clerk tell you in your chambers that, "This doesn't work, judge," than to have another judge tell you, "This doesn't work, Mike." Every judge wants the thing that comes out of his or her chambers to be the best they can produce—rarely happens, but that's what they aspire to. And you depend on your clerks for that. They may not have the judgment you have, they may not have the writing ability you have—some may, they certainly don't have the experience you have, but they have a pretty keen eye for seeing logical defects in writing. And, after familiarizing themselves with a subject matter, seeing defects in the way you've applied

the law to the facts. So I decided I was going to use them for that function too, to keep my conscience working in a sense, you know. And I think every judge wants to do that. Oftentimes the law clerks and I would disagree ultimately, but I think they always had the feeling that I was treating their perspective seriously and that I learned from it.

MRS. EASTON: Now you mentioned that you had worked up for the first year, worked up at least one of the cases. Did you have your clerks do an outline or a bench memo for you before you—

JUDGE FARRELL: No, because my clerks I think were still coming on during the summer. I was alone for a month or two, so I was just working at my own pace on my own because I didn't have the pressure of a case or even arguing. Once I got the clerks and saw what the array of cases was going to be coming down the pike, with so many new subject matters, all civil and administrative, I had to put them to work pretty quickly on researching subjects, such as dissolution of a partnership in which there is no partnership agreement, and how you settle accounts and wind up and all that stuff—can you imagine a poor criminal appellate lawyer trying to get into that stuff?

And you depended on the clerks, particularly at the beginning, to just find out what the law is for you in that area and to kind of crystallize it for you. So that one of the first opinions, which is the one you mentioned, this partnership dissolution case, forty-some pages, came to me in a form of a memo—could have been a draft, you could've just put a heading on it—

from this very gifted young lawyer I hired from Catholic University. And the draft was about 130 pages. And there were still two or three trial type issues that hadn't been resolved. And I think his thinking was, "I'm smarter than this judge. He's a criminal guy, he doesn't know civil. I'll leave those little trial issues to him. I'll give him the stuff on partnership law." And he did, with a vengeance. Gave me over a hundred pages. That opinion has so much in there on partnership law, this and that. I think one of the most difficult tasks I had in my first year was taking that 140 page analysis and whittling it down to forty. And you think that's too much! (Interviewer laughs.) I thought I did a masterful job of reducing it to forty or so.

MRS. EASTON: (Both laughing.) Somebody cited that case within the last month or two.

JUDGE FARRELL: I cannot believe it! (Both laugh.) There's a venerable lawyer, Jake Stein [Jacob A. Stein], in the District of Columbia—he's getting older now, but he was a wonderful civil lawyer for many years. I think he commented at one point, "This is an encyclopedia on partnership law and dissolution. But like most encyclopedias, people will do nothing but reference it maybe once in a decade." (Judge laughs.) And as I mentioned to you, I think, in my little e-mail to you, my colleague, Judge [John M.] Steadman, who came to the court some years before myself, not too many, but from a professorship at Georgetown University Law School, he read my draft and was convinced that it was ninety percent dictum. And he even concurred, saying, "I would decide this case on A, B, and C, rather than A through Z

like Judge Farrell.” So that was kind of mortifying, to think that he didn’t quite like my analysis.

MRS. EASTON: He didn’t appreciate it, huh?

JUDGE FARRELL: Right. (Both laugh.)

JUDGE FARRELL: But I couldn’t worry about that, those naysayers who thought I was writing too much. Because I was onto to my second, third, fourth, and fifth [opinions]. Some of which were equally long, because I think the other clerk caught the disease. (Interviewer laughs.) And gave me some long drafts. And I had to work on cutting them down. But it just so happened, in that first year I got a succession of, I think, tough civil cases on immunity. And I probably lost fifteen pounds that year and only recovered in time. And thank goodness, two years later, criminal cases started coming along, and I regained my weight and my sanity.

MRS. EASTON: (Laughs) Wow! Well, why don’t we take this as a point for our pause?

JUDGE FARRELL: Yeah. —Absolutely.

MRS. EASTON: Thank you very, very much.