

**ORAL HISTORY
JUDGE MICHAEL W. FARRELL**

APRIL 26, 2017 Interview

This interview is being conducted on behalf 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 Appeals on April 26, 2017. This is the sixth and final interview.

MRS. EASTON: Well, it is so good to see you again, Judge, and I would like to pick up on our oral history—

JUDGE FARRELL: Right.

MRS. EASTON: —when your first fifteen-year appointment was winding down. I have the documentation that you were highly recommended and automatically renewed.

JUDGE FARRELL: I must have sent you that. I only sent you flattering things. (Both laughing.)

MRS. EASTON: Well, it was definitely flattering. It was definitely flattering. But then in 2004, you re-upped for what would have been a fifteen-year—

JUDGE FARRELL: Another fifteen-year term. But I think around 2008, by then I had been on the court for nineteen years. I thought of holding out for twenty as an active judge. I still had two more years during which I could be an active judge because the deadline when you have to either leave the court or become a senior judge is seventy-four, I believe, now. But I went down to Virginia—William & Mary—to participate in a moot court conference. I ran into a judge from the Virginia Supreme Court [Justice Elizabeth B. Macy]. We talked a little bit, and she said she was retiring, and I said, “Well, how many years have you got in?” She said, “Nineteen years.” I

decided if she can retire after nineteen years, why not myself? So I took senior status in 2008, just to give me a little bit more flexibility in scheduling, a little bit more freedom to do some traveling with my wife and to just pursue some other things—hobbies that interest me. And since 2008—we're now in 2017—I've been a senior judge. In general, the senior judges work about half the schedule that the active judges do. Occasionally, there are months where you work a little bit more. There are some where you work a little less. There's perhaps a little bit more pressure on us at the moment since we only have seven active judges. So, the senior judges are fairly important to the court. The problem has become slightly more acute in the last year or so because we lost one judge—Judge Schwelb died, S-C-H-W-E-L-B [Frank E. Schwelb]. A wonderful judge died, and we've had three retirements. The former Chief Judge Wagner retired [Annice M. Wagner]. Recently a former Chief Judge, Theodore Newman, he retired. He decided he likes his home in Virgin Islands too much to come up here and labor away. And most recently Judge Warren King retired. So, we're down to about maybe five or six senior judges to help out the active judges. And, with an active judge compliment of only seven, the court has kind of shrunk substantially—for the moment, we hope, we hope. And that means that the senior judge is required to pinch hit, do a little extra duty. But it still remains roughly half the workload of the active judges. And that means probably in a given month you have—you're assigned one regular

calendar, the cases that qualify as “regular,” which are argued automatically. And maybe you have two summary calendars, sometimes maybe only one summary calendar, but for each summary calendar you have two cases. So that’s about half of what the active judges do and it’s—frankly for me, it’s quite enough.

MRS. EASTON: And you have no clerks as a senior judge, is that correct?

JUDGE FARRELL: We do have clerks as a senior judge. We have a pool of clerks, of five or six I think we’re up to six now. Although with our recent retirements it’s not clear that we need six. But they are a pool; they work for each of the senior judges under a little system that they follow for parceling out the cases among the judges. And at any given time, they’re doing projects for two or three judges, sort of like a low-rank associate at a law firm who could be working for three or four supervisors or partners.

MRS. EASTON: But at least then you have help with the research.

JUDGE FARRELL: You have help with the research. You don’t have the same personal relationship with your clerks that you had as an active judge. You don’t have as much control over them. You may, for example, have something with a little bit of a timed deadline that you would like the law clerk to research, only to learn that the clerk has one or two projects that are even more urgent than yours, so you have to be patient. But it’s wonderful learning for law clerks, this experience of working for multiple bosses. Because they really have the experience of having to juggle three or four balls in the air at the same time. When I was an active judge, I was

probably a softy because I tried to have my two law clerks each work on only one or maybe two projects at a time. I thought that was the most advantageous way of getting the best work out of them. With a senior judge pool arrangement, it's not possible to do that. The clerks have to really learn to, multitask is the word, I guess, these days. And so they spend a lot of time late at night trying to service multiple judges.

MRS. EASTON: Which is excellent training.

JUDGE FARRELL: (Both laugh.) Yeah.

MRS. EASTON: Are the pool clerks for a one-year period or—

JUDGE FARRELL: Just one-year period, yeah. And I think, in general, my experience has been they're pretty much of the same quality as the clerks who clerk for the active judges. My sense is that the average law clerk coming out of a good law school would probably prefer to clerk for an individual judge. But not all can and not all are hired to do so, so sometimes our senior judge law clerks, this is kind of their second-best, clerking for the senior judges, but it's still a wonderful experience for them.

MRS. EASTON: It's terrific, it's one I'll remember to recommend.

JUDGE FARRELL: Yeah, absolutely if you know one. Yeah.

MRS. EASTON: It would be great training.

JUDGE FARRELL: Yeah.

MRS. EASTON: So you are writing opinions actively now about one a month?

JUDGE FARRELL: Yes. Uh, well yes. Not all of them are for publication. A great many of them are not for publication, but that's been true of my career throughout.

We don't publish everything, by any means. But it's—you're probably writing two to three a month, including a regular calendar case opinion and a couple of summary calendar case opinions. The unpublished opinions, we call them memorandum of judgement, MOJs, and there are quite a few of those. Still, you have to apply yourself to several cases a month. That's in addition to, of course, preparing the other cases where you aren't the assigned judge but on which you're expected to participate with the same degree of diligence and thoroughness. So it's, it's all the—all the work that I feel I need at this stage in my career.

MRS. EASTON: Maybe a bit more. (Both laugh.)

JUDGE FARRELL: Ha, yeah.

MRS. EASTON: Some months.

JUDGE FARRELL: Some months, yeah, it depends entirely how complicated the cases are and since the cases are assigned by luck, by draw, there's nothing preassigned about them, you can, in any given case, in any given month, be assigned some fairly substantial litigation to work on.

MRS. EASTON: And the caseload of this court has not dropped at all even though the number of active judges has dropped.

JUDGE FARRELL: I don't think it's dropped. I don't think it has increased, but I think it's been fairly constant, with the same number or the same percentages as there were before: probably nearly 50 percent criminal and then the rest divided among civil, administrative, disciplinary, and the usual things. I think it's stayed the same. But fortunately the caseload has not increased.

MRS. EASTON: How are you doing with your 90-day rule?

JUDGE FARRELL: Oh, my own? The Farrell Ninety-Day Rule? In general, I've been able to adhere to it. It's easier, I think, as a senior judge with a slightly, or substantially, reduced caseload it makes it easier. It gets harder if you luck on to a very tough case that may take a little longer. But I think I've managed to adhere to my three-month rule.

MRS. EASTON: So, in 2008, you went senior and that was to have more freedom for hobbies and travelling. I want to hear about your top hobbies and travel—

JUDGE FARRELL: Oh, well, it's always been a passion for reading, my rather maybe idiosyncratic reading tastes. Not to mention the arts. I've always been a kind of a devotee of the arts since I majored in English, and humanities, and have been an opera fan for many years, chamber music, and things like that. But, you know, all judges have their own particular things that they like and dislike. These things kind of interest me; as a senior judge, I am able to get out more in the evening to go to things like this without worrying that I have to be in court at 9:30 the next morning to sit. Reading is also—it leaves you more time. And, above all, until recently, it's been travel. During the last seven or eight years my wife and I have travelled quite a bit. I think we're beginning to cool on the idea of long-distance travelling because it—it becomes a burden in many ways nowadays to drag yourself off to Italy or France or Germany or somewhere like that.

MRS. EASTON: Looking for sympathy? (Both laugh.)

JUDGE FARRELL: Somebody has to do it, I know (laughing). But it's—uh, sometimes you reach a certain age where the disadvantages of travelling, the burdens, the annoyances, threaten to outweigh the pleasures. And so I think we may be doing less travelling in the future. Particularly as we develop these physical ailments that we have. But nonetheless, the advantage—an advantage of being a senior judge is that in any given month, you can say, "I'm not available for assignments because I plan to be somewhere, not here."

MRS. EASTON: Now, your wife [Ellen Bass] was a government lawyer—

JUDGE FARRELL: She was a government lawyer for a long time, and then she did five years with a nationwide law firm in their D.C. office, Kutak Rock, she did civil work with them. After that, she then went back into government, so to speak; she became the chief of investigations in the inspector general's office at WMATA and did that for six or seven years. [Ellen Bass served as the Assistant Inspector General for Investigations and Counsel to the Inspector General since August 2007 and retired in November 2011, per <https://www.wmata.com/about/inspector-general/upload/semiannual-report-03-12-12.pdf>.] You know, investigating the usual: fraud, graft, mismanagement and things. WMATA, like any agency, has these kind of problems. She did that and then she just finally got tired of it because she had been doing inspector general work at the Department of Education for ten years earlier, just tired of that. She never really, I think, had a deep passion for litigation, so she didn't want to do that; five or six years at

Kutak Rock doing that was enough for her. And then she just decided to retire and let her husband support her. (Laughs.) No, she, she's not in the situation where she financially had to work so she has spent the last six or seven years doing a lot of things, including a good deal of tutoring in the D.C. public school system. She has tutored French, and English to foreign students, so forth. She keeps busy.

MRS. EASTON: Wow. Have you been doing any tutoring, given your teaching background?

JUDGE FARRELL: I have not been doing any tutoring. I have the feeling that I paid my dues to the teaching profession many years ago. I used to, in my early years as a judge, go to the local law schools on invitation of people I knew, and I'd occasionally talk about various things, little lectures and so forth. But that kind of stopped eventually. I kind of—maybe the people I knew there stopped teaching or whatever then, and I just found less time available to do that kind of thing.

MRS. EASTON: Well, I know you did CLE courses for the D.C. Bar.

JUDGE FARRELL: I did them for a number of years.

MRS. EASTON: When I was first being admitted here in D.C., you were the instructor in one of my required courses. (Laughs.)

JUDGE FARRELL: Oh, really. Although, we require much less CLE than any other jurisdictions really. It's uh—yeah, so I haven't done any teaching in years.

MRS. EASTON: And what are your tastes in opera? Do you go off to Ring cycles?

JUDGE FARRELL: My tastes are pretty comprehensive. Ever since I studied German, way, way back in the dim, distant past, I've had a passion for Wagner. I don't tell that to everybody because occasionally the conversation stops when you say something like that. So, German opera, of course, I've liked. But in the last thirty years I've acquired a passion for Italian opera as well—Verdi, Puccini, and all the greats. So, I like most of it!

MRS. EASTON: Do you find the offerings of the Kennedy Center—

JUDGE FARRELL: Yeah, I find them very interesting. Occasionally, they have new stuff, some of which I missed this year, but they experiment. They're desperately trying to attract new audiences because the demographic for opera—for concert going—is getting older and older. I always joke with people and say, if you want to see the audience for opera these days, go to the telecasts from the Metropolitan Opera that you can find in movie theaters around the area. And when they pan the camera around the audience, you'll see that what you have is a combination, at least among the men, of either no hair or gray hair. So, concert going, opera going is a serious problem in this age—attracting young people. And nobody quite knows the answer to it. One is to do newer things or interesting things, cross-genre kind of things, combining classical with popular and so forth. And I enjoy a lot of that, although I'm old enough that my tastes are still—are probably fairly set in traditional classical music and opera.

MRS. EASTON: I have to ask if you've seen *Hamilton*.

JUDGE FARRELL: I have not seen *Hamilton*. I don't know whether I ever could have gotten a ticket if I wanted. (Both laugh.) I always had doubts that even if I got a ticket whether I'd understand very much without first reading the text.

MRS. EASTON: Yeah, well, you have to read the libretto. (Laughs.)

JUDGE FARRELL: You have to read the libretto on events. I have not seen it. We do get to New York, my wife and I, for three or four times a year to see a show or two and musicals if we can find a good one. But *Hamilton*, I just haven't maybe pursued it enough; it will eventually come here, and I'll see it.

MRS. EASTON: Exactly.

JUDGE FARRELL: And then I mentioned travelling. It's of no interest of anyone where we like to travel but we tend to prefer either the United States or Europe. Only because I refuse to travel to Asia, where my wife would love to go to again, because she spent—before I married her, she spent a lot of time in various countries in Asia and loved them. And in the Middle East. But those distances for me and my long legs and my bad back are a little bit hard to cover without being very uncomfortable.

MRS. EASTON: At one time, you were an avid hiker.

JUDGE FARRELL: I was an avid hiker but since I had cancer in 2014, prostate cancer and rather rigorous treatment for it, the hiking days are essentially over. I am sorry about that but it's just a fact. I'm happy to be alive. (Laughs.) So, when we do take hikes, I find myself looking for the park bench fairly quickly. So there's not much hiking left. And my wife was never an avid hiker either, so (laughs) she's quite satisfied with not hiking.

MRS. EASTON: Did you go up into the Shenandoah or—?

JUDGE FARRELL: Not often, a few times. What I used to do, I was kind of a passionate supporter of the national parks and probably over twelve, fifteen years, I probably had visited two-thirds of them and did some hiking in all of them.

MRS. EASTON: Oh, wow.

JUDGE FARRELL: Yeah. Nothing very rigorous, no overnight hiking. I was always sure—made sure there was a hotel there somewhere to camp in at night. But I just like the outdoors and enjoyed that. I feel I've done much of it, most of it, so I don't really miss it that much now.

MRS. EASTON: And how is your health now?

JUDGE FARRELL: My health, I think, is excellent. I have relatively little stamina, that's the result of the kind of treatment of radiation and other things. But I'm able to exercise. I go to the gym a couple, three or four times a week, and I do light exercise. And I'm able to come to work and work, and I eat a healthy diet and I take care of myself. So, on the whole, I can't complain. The doctor seems to shake his head and think that I've fooled him or something because I am still reasonably healthy.

MRS. EASTON: I'm delighted to see that.

JUDGE FARRELL: I mean, at my age, you know, you don't know whether it's your medical condition or just advancing age that tells you, you can't do the things you used to do.

MRS. EASTON: Well, from the time that you've been a senior judge, are there any cases or experiences on the court that stand out?

JUDGE FARRELL: I don't think anything more really unusual than when I was an active judge. Indeed, what you generally don't have as a senior judge is the experience of participating in the *en banc* decisions of the court where all nine judges, or now seven, convene to decide cases of special importance. You don't sit on that; you can't even vote whether to go *en banc* or not as a senior judge, unless you were on the panel whose decision is being then reviewed *en banc*. In that case, you can participate *en banc*, and some of our judges do. That's an experience that I miss in a way. Although we don't go *en banc* very much because we can't really afford the time to go too often given how busy we are as an ordinary intermediate kind of appellate court. You also miss, perhaps, the experience of the administrative policymaking that the court undertakes and has to pursue every month with their monthly meetings to decide administrative questions and so forth. But I'm happy to be free of that. I was on the Joint Committee on Administration for seventeen, sixteen, well from 1992 to 2008, that's sixteen years. That was enough of worrying about the budget and things like that. I'm happy to have turned that over to other judges. I've had some significant cases since 2008, but I don't think they're really markedly different than the cases I had earlier. I would think, on the average maybe once a year, or maybe a little bit more than once a year, you have to write an opinion in a case where you really think

it's worth talking about or that somebody might be interested. All of them are interesting to the litigants, the winner and the loser. But beyond that, much of what we decide doesn't have any kind of resonance with the legal community at large.

MRS. EASTON: Have you ever been involved in the associations of state court judges?

JUDGE FARRELL: No, I really never was that much. Um, our chief judges get very involved in the Council of Chief Justices. Beyond that, what there has been over the years is the ABA's appellate judges kind of conference and appellate judges' annual meetings and so forth. I've gone to a couple of those, but I never became active in that. I never really felt I had the time or wanted to devote the time to that kind of extracurricular activity. It's immensely valuable; you learn from judges in other courts better ways to kind of handle difficulties, like how to get judges to produce their opinions. But in the kind of balancing that I really undertook as to how I was going to spend my time, I felt that it was more valuably spent just trying to do my own job as best I could. And so I really didn't participate a lot in the kind of bar activities of the appellate judges' bar. And not many of my colleagues did either. I think when you're on a court that has a heavy caseload like ours, I mean, traditionally we have had probably the heaviest caseload of courts around the nation in states that have only one court of appeals. There isn't a lot of time to, um, to do that kind of fraternizing in the judges' bar, the judges' community. Maybe it's something if I were to do it again, I would have participated in more. But my experience, my

limited experience, in doing it is that it has been a lot of socializing. Not a huge amount of judicial education that I couldn't pick up otherwise. What I have done over the years, although not in recent years, was take part in moot courts at the universities around the country, law schools and so forth. I always found that interesting. I went down to William & Mary periodically over the years, they have a very good moot court, and the local law schools also have moot court panels. Those are interesting; you meet judges from other jurisdictions and you get to see the—you'd like to think the best and the brightest in the coming lawyer community. But sometimes all you get to see is the glibbest among the new lawyer crop, not necessarily the best.

MRS. EASTON: Have you observed changes in the qualifications or personalities of the young lawyers?

JUDGE FARRELL: Young lawyers—that's a difficult question. I don't know whether my exposure to law practice is wide enough that I can really make a judgement on that. I think the quality of the advocacy that we see has remained pretty constant. The kinds of people who get attracted to appellate work remains pretty much constant. A lot of lawyers, if they don't think they have that really analytical quality and writing ability for appellate work, shy away from it. So we tend to get the self-selecting lawyers who like to do appellate work. And we get a lot of appellate cases from institutions like the U.S. Attorney's Office, Public Defender Service, the Attorney General for the District of Columbia. These are pretty

selective organizations. They don't send lawyers in to do appellate work unless they've given them some reason to believe that they're going to do good appellate work. And so we tend to get often the best of our lawyering from those institutions, and they remain good.

Now everybody, I'm sure, particularly people in law practice, have their own views as to whether the young lawyers are as good as they used to be. Everybody kind of recites the cliché that lawyers now, young lawyers, are a thousand miles wide and an inch and a half deep, when in the past they used to be narrower in their ability to gather information but they could analyze it more deeply and more probingly. I don't know whether that's true or not. You do get a sense that there has been some effect due to the fact that everything is done by young lawyers on a computer now—all of their research, all of their composing, the word “writing” doesn't even exist in their vocabulary. I don't know how that influences behavior, really, except to recite kind of the cliché or the truism that young lawyers, young people, spend so much time on the internet, surfing it, are exposed to such an extraordinary amount of information, that there really isn't the time or the interest in concentrating on specific little topics and subjects. I do know that when I give my senior law clerks an assignment to do some research they do it thoroughly and they seem to have the skills and the ability to do it. They do tend, it seems to me, to give you longer memoranda than they did when they had to write them out in hand. (Laughs.) Because it's easier to write twenty, thirty, forty pages if you're

composing rather than having to write it in longhand. I think there is a periodic complaint from judges who have law clerks draft opinions for them that they're too darn long and the judge has to spend all his or her time in cutting it down by two-thirds. I think maybe that's always been a problem. But I have no reason to think that the lawyers, the young lawyers, at least the young lawyers we see, aren't just as good as they ever were and maybe, in fact, because they've grown up in the information age, grasp matters, grasp issues quicker than their predecessors, I don't know. I will say that they're very smart. And, again and again, going into oral argument and watching young lawyers and seeing the poise they have and the self-possession and the self-confidence makes me envious, because I wish I would have had that when I began doing that kind of stuff. And I don't know where they get it, but they seem to have it. Hard to say; I think it's partly because, particularly in a city like Washington, which attracts very good, young lawyers—they seem to like to come to the big cities—we may not get a fully fair sampling of what the younger generation of lawyers is like. But what we see is awfully good.

MRS. EASTON: I'm interested, did you ever make the switch to composing on the computer?

JUDGE FARRELL: You would ask that question, wouldn't you?

MRS. EASTON: I'm just curious because uh, it is—you're probably right on the cusp where—

JUDGE FARRELL: I'm going to give you anecdote which or—a little story which will tell you the answer to that. Not long ago, one of our senior judges, who has kind of made the switch, was unhappy because he came back from oral argument and found that on the bench for oral argument were long legal pads. He sent around an email to the clerk of the courts, saying "I would think we ought to substitute letter size pads; legal size pads have gone out of fashion. You can't put them in your case file as easily as letter size because everything else is letter-sized nowadays. Can't we get rid of the long yellow pads?" I immediately sent out an email, tongue-in-cheek, and said I want to go *en banc* on that issue, because although I may be the last judge on the court to do it I'm still a fan of long yellow pads. I have only partially made the switch to the information age. I'm perfectly adept at doing email, but I don't compose opinions on the computer generally. Sometimes I do, but more often I stick to my old habit of just writing them out. And I'm probably one of about a dozen judges in the country who still do that. It's a remarkable thing; it's the kind of thing that sometimes tells you maybe your judicial career oughtn't last all that much longer when you see the younger judges, and we have a number of them, who march onto the bench with their laptop computer. No such thing like just a fountain pen, or a ballpoint pen. Everything is done on their little computer there and they work, I'm sure, far more efficiently with that than does Judge Farrell who brings out a sheaf of handwritten notes from his research and thinking about the cases. It's simply part of a general

mutation in our culture toward the electronic age. I've made the transition much more slowly, if at all, than some of my colleagues. But I think it's a problem in general for older judges—older appellate judges and trial judges. We have gone more and more towards strict electronic filing. We're going to be within, I think, fairly short order strictly electronic filing. Judges will no longer get copies of the parties' briefs in their chambers; parties will not be required to file paper briefs. What it currently means, to the extent we have already gone over to that practice, is that the older judges tend to overwork the printing machines. You get it online and you print it out because you like to read the briefs on Metro or something like that, or you don't feel as comfortable as the younger judges do reading forty, fifty, sixty pages on that little screen. I find it personally very difficult to read at length, whether it's transcripts or briefs, online. Maybe it's just my posture, for a lot of reasons I'm just used to—and, of course, I haven't even begun to master the idea of how to electronically make notes online, reading things and bookmarking and things like that. My wife says I'm just lazy in that respect, that I refuse to change my habits. And I plead guilty.

MRS. EASTON: (Both laughing.) I might counsel you to not leap into that plea. I still—I mean, I've been doing things, composing electronically since law school, but I strongly prefer to read long things on paper. And I—so I'm a dinosaur right there with you. Do you use a Kindle or any other device?

JUDGE FARRELL: I use a Kindle. My wife has a Kindle. I found it very valuable, although selectively. I tend to still prefer to get my books from Amazon or somewhere else or a bookstore—they still have a few—and read them between covers. But I confess, I've read, in the last three or four years, quite a few things on Kindle. You get used to it. There's something sentimental, something nostalgic, about closing the covers of a book that you've just finished of three or four hundred pages and putting in on the shelf somewhere knowing you can go back to it and you can look at it and remembering where you made a note in it and so forth. When you finish your book on Kindle, it's as though it disappears into the ether. 'Not necessarily true, you can call it up again and reread it if you want. But I think I use my Kindle reading for things that I really don't feel I'm going to ever look at a second time.

MRS. EASTON: Aside from that nostalgia, I'd be curious if you think that browsing for books has become more difficult in the electronic age. It's delightful, of course, to search on Amazon or elsewhere, but I miss the stacks.

JUDGE FARRELL: Ah, yeah. In the bookstores, just coming across things that you didn't even know were out there. If you're any good at computer research, at Googling things, you can no doubt find a dozen ways of looking for books in any area you're interested in. But still, it's nice to go to a bookstore and look at the heading for history books and just start with A and go through Z and find something interesting. But how long the bookstores are going to survive is anyone's guess.

MRS. EASTON: Sad but true. Well, up until fairly recently, there were more senior judges than active judges on the court here.

JUDGE FARRELL: There were, but I think it's almost fifty-fifty now, because we're down to about seven seniors and have seven actives currently.

MRS. EASTON: So tell me about your observations on the collegiality of this court.

JUDGE FARRELL: Well, I think, like most courts that—a lot of whose work is, call it, error correcting, intermediate appellate court kind of work, it's fairly easy and fairly important to maintain a very high level of collegiality, because a lot of the issues that are presented aren't the kinds that tend to deeply divide people. You don't have the kinds of social issues that come to the Supreme Court of the United States. That's not our bread and butter work; it can't be for any intermediate appellate court. The number of cases where there are potential divides because of the backgrounds of people or because of their personal kind of beliefs and thinking, on our court—the number of cases that present that kind of issue is fairly small. We have disagreements. We have dissents, fairly often. But they're often just judgmental questions about, you know, whether the trial court really got it correctly here, or whether the police did what they're supposed to do before they entered the home and searched the refrigerator, things like that. And there can be deep divisions, but I think they're not the kinds of things that make people not want to talk to one another anymore. We all get along quite well. We disagree. We come from different backgrounds. In recent years we've had two people come from—very gifted young—

younger than myself, “youngish” lawyers, come from the Public Defender Service. One come from the U.S. Attorney’s Office. They come from different backgrounds where it’s been almost internalized into their system to think a certain way. But they swear an oath to do it objectively and call the cases as accurately and honestly as they can. They all do their best. Inevitably certain predilections, certain inclinations, certain attitudes come into play in the way they look at cases. Some judges, perhaps if they have come from the trial court bench and then moved up to the court of appeals, have a slightly different sensitivity toward deferring to honest exercises of discretion by a trial judge. Others may be less moved to give them that kind of deference. And they stress more—a little bit more—the kind of function of this court to announce general rules. But collegiality has not been a significant problem here. I don’t think it’s a problem in most courts nationwide. For years, people used to point out that a few of the federal circuit courts tended to, where the appointees reflect the particular president who is in the White House, have been marked by fairly sharp divisions. But, as many have pointed out over the years, those kind of divisions emerge in a tiny, tiny class of cases, even on courts like the District of Columbia Circuit Court, the Ninth Circuit Court of Appeals. Most of the work, the judges have very little difficulty in sitting down and in a very collegial fashion arguing over and either agreeing on or politely disagreeing on. The bigger problem that I have is that the younger judges on our court are just too smart.

MRS. EASTON: (Laughs.) How does that cause you a problem?

JUDGE FARRELL: (Both laughing.) I mean, not only do they come into oral argument with their desktop, but they come in there loaded with information and loaded with analysis and quick thinking. And you have some trouble as your mind gets a little bit more, uh—it starts to slow down a little bit, you have some trouble keeping up with them. But you try. You do your best. And you at least delude yourself into thinking that what you lack in terms of quickness of mind, which they possess, you have—you have in the way of judgement, experience, and, dare we say, wisdom. And you can bring that to bear in judging these cases.

MRS. EASTON: All of great value.

JUDGE FARRELL: But it's nice to have the younger judges who have not only the enthusiasm but the skills and the analytical smarts to tell you where you're wrong.

MRS. EASTON: What is it going to take to get a full complement on this court? Because it's been years—

JUDGE FARRELL: Anyone's guess. Anyone's guess. We have some hopes that within the next six months, maybe we'll get at least one. But, you know, the first hundred days of the present administration have been busy, at least some say. And I don't think they've been spending much time thinking about filling openings on our court. There are a very sizable number of openings on federal district courts including in the District of Columbia. Those jobs have yet to be filled. They will be filled, I think, fairly soon. My guess is the administration will probably give priority to the federal judgeship

openings. On the other hand, in a way, their task should be easier, in the case of our court and our superior court, our trial court, which also has openings, because the President for each judgeship is given a list of three, under our system, and just has to pick one, and is probably required to pick one by statute. So it should not be that difficult. I think the opening that we had for a year and a half or two depended on a particular situation involving a lawyer who was nominated by the—by President Obama to fill the position. There was some opposition to him on the Senate side, where the confirmations take place, because of positions that he had taken as an advocate working for the Attorney General of the District of Columbia. My own view is it's kind of unfair in the way that they have kind of—some may have held against him taking those positions. He was an advocate. He was doing his job. But there's very little you can do about it, because Congress is under no time restraint in confirming judges and apparently they've decided to take their time.

MRS. EASTON: Have—now you were caught with a presidential change reappointment situation back in '88 and '89.

JUDGE FARRELL: That's true.

MRS. EASTON: Do you know if there have been even new issues —

JUDGE FARRELL: Well, yes. This one nominee who I talked about, when we were down by one, was appointed by President Obama; that lapsed after the first term of Obama. President Obama then reappointed him, and that has lapsed, of course. His name is still before the White House, because the same list is

there from our nominating commission. And it's up to the new administration. They don't have to pick him, they can pick somebody else.

MRS. EASTON: From the list of—

JUDGE FARRELL: From the list of three. Or indeed, there will now be two lists up there before long. And they can pick both judges from either list, if they want. We hope that they'll be happy with at least two and pick them and so we can get back to nine. Many of the courts of appeals in the country, or at least the high courts of appeals in the country, state courts', only have seven judges. So it's not unusual to be down to seven. But we are—we have become used to doing our job with nine over the years, and it makes it a lot easier. We're optimistic that now there's some signs that we may be able to pick up one judge before long. But nobody knows for sure.

MRS. EASTON: Well, are there any issues involving the court, or the state of the courts in the nation, or anything else that we should cover?

JUDGE FARRELL: I don't know, I think I should probably guard my speech when it comes to talking about Farrell on the judiciary in general. But these things, of course, go cyclically. Each administration has its preferences. It's entirely conceivable that on the federal side, including our court—we're an Article I Federal Court—you will see appointments that mirror the likes and dislikes of this administration. And courts will become more conservative. But eventually the wheel turns, and the next administration, or whenever the Democrats are in office again, the balance will shift back.

The wonderful thing about the system of—about being an appellate judge is you have very little room, day in and day out, to exercise any biases that you have either consciously or unconsciously. Because you're constrained by an enormous number of, uh, limitations, some of which I've discussed in previous interviews, including, darn it, the need to persuade at least one other judge, and the constraints imposed by the record in the case, and imposed by stare decisis. As I said, we cannot go *en banc* all the time to overturn prior decisions and, therefore, we are kind of bound by the law in general that is developed in our court. And you work within those constraints. On the one hand, they make the job a little bit easier, because they kind of give you the guidelines, at least the guidelines, that you follow in trying to reach the right result. On the other hand, they can be irksome if you don't particularly like those guidelines and if your feeling is that the law of the jurisdiction should be going in another direction. Well, you have only limited capacity to send it in another direction as an individual judge. And I think that's true in the courts around the country. Generally, people tend to exaggerate the sense in which individual judges or courts are perceived as going off the reservation or being too activist and so forth. There isn't really, day in and day out, a lot of ability of judges, individual judges, to kind of send a court in a different direction. Appellate courts, in that sense, are very conservative, in the sense that they're bound by the past in very significant ways. Which is why, like probably I mentioned this once before, the old anecdote of the trial judge

who ran into the appellate judge at a conference, and the appellate judge said to the trial judge, “John, I’m sorry I reversed you recently in that case.” And the trial judge said, “Fred, I reverse you every day in my courtroom.” (Both laugh.) The trial judges, at least, think they have more ability to make decisions day in and day out that are not going to be second-guessed by anybody. So. No, to me it’s been a wonderful experience, an extraordinary learning experience. And part of it is just—part of it which makes you, uh, like it or not try to remain active and interested and on top of things, is that you’re always getting younger judges who come along and who test you. You do your best to keep up with them in terms of their intellect and their skills. And they keep you, uh—they keep you sharp, or at least they keep you as sharp as you were. So there’s very little opportunity to go out to pasture, so to speak, while you’re acting as an older judge, an elder judge, a senior judge. You still have to do the work, and you still have to, in a way, compete in terms of analysis and persuasiveness with a new generation of judges who don’t quite have the respect maybe they should have for their older peers [both laugh] but keep you on your toes. That’s the nicest thing about it.

MRS. EASTON: And were you to be counseling a lawyer who was an appellate advocate, enjoyed appellate work, and had aspirations to being an appellate judge, what would you advise him or her?

JUDGE FARRELL: Well, I’ve traditionally given the advice which is contradicted by my own experience, which is you’re probably going to end up being a better

appellate lawyer if you've gotten a good deal of trial work—trial preparation and trial work under your belt, if you've started, not necessarily in civil practice doing depositions and things like that or reading documents, but at least started with a government agency where you've had to learn the rules of evidence, for example, and rules of procedure, day in and day out by actual hands-on doing and practice. The number of appellate lawyers who are kind of born to the manor and excel at appellate advocacy without ever having done that is fairly limited. Those tend to be the people who were at the top of their law school class in very good law schools, in law review, had just that natural gift for writing and analysis and so forth, have gone to appellate clerkships right out of law school, some have gone on to the Supreme Court, then have gone on to places like the Solicitor General's office in Washington. Those kind of people—you know from your experience—those kind of people find it very comfortable to go right into appellate work and to excel at appellate work. And many of them never leave appellate work. That I think is a very, very small number of people on the whole. There's a grumbling that you get now-a-days that you never got, I think, years ago, for example that all of the Supreme Court arguments these days are done by about a dozen lawyers. In a way, clients have decided they cannot afford to make the mistake of not having the best Washington appellate lawyer from Sidley & Austin or wherever argue their case, even if they got a very creditable performance by a local lawyer out in Des Moines in the,

uh, 8th Circuit or wherever out there. It becomes that way. In a way it's disappointing for the Supreme Court justices. They see the same people before them again and again, the appellate practitioners, the Supreme Court level of appellate practitioners. It is, to begin with, almost a dead-end for the average lawyer to just plan to be an appellate lawyer. It's not going to happen. There isn't enough of the work. Everybody says, it's a cliché now, if you have a decent Supreme Court issue as a citizen you can get somebody to take your case into the Supreme Court without paying them a nickel. Good lawyers and law practices, appellate practices in the big law firms, are falling all over one another to get the cases that are Supreme Court worthy. But the average young man, woman coming out of law school can't count on an appellate law career. The odds are even if they want to they will never end up doing that. But beyond that, at least a number of years of learning in the trenches how to try cases and how to cross-examine witnesses. I was, in a sense, lucky. I didn't do that partly because, as we've talked about before, I started my legal career late. I don't think I probably would have been a terribly good trial lawyer. I don't know whether I would have had the patience for it or whatever—maybe the quickness of mind. But you really have to test yourself, I think, as a trial lawyer, and for a period of time, before you think about pursuing an appellate career. And of course in organizations like the Public Defender Service, for example, there are—they depend on their lawyers having—in the same institution for having tried cases very effectively to

produce a record that can be adequately litigated on appeal. We get quite a few of Criminal Justice Act—quite a few lawyers who try to specialize in appellate work. But by and large, I think the lawyers do the appellate work for a number of reasons: Partly because they're doing it part time, some of them working out of their home, or they're doing it to supplement the trial work [where] there just is not enough trial work for them to make a living, so the appellate work provides an additional source of income, and a certain enrichment for them too as a—professionally. But I don't think appellate lawyering as a career for most is any more productive or prosperous as—than it was in the past. It's a very limited practice. So, here I am and here I will remain. I don't know how long I will remain as a judge. 'Could be one more year. I'll turn 80 next year, that might not be a bad number for— On the other hand we have a couple of senior judges who are over 80 and show no signs of stopping. I could—I don't know, it will depend on my health. It's a terrific job in the sense that you're your own boss. I've been my own boss since 1989. You have nothing comparable to the kind of pressures on higher-level folks like yourself in law firms, who are balancing and juggling the demands of satisfying clients and partners and things like that.

MRS. EASTON: The work does come to you. That's the part of which I'm most jealous.
[Laughing.]

JUDGE FARRELL: The work comes to you. The work comes to you, which makes it astonishing to me, why—not really perhaps astonishing, but a little

puzzling why we don't get more applicants for our court. I'm told that our latest opening has generated only at most a dozen applications and my guess is probably heavily from government organizations. That has always been the case, traditionally, for a lot of reasons. But in a way it is a little disappointing that so many of the super-good lawyers out in law firms find it an unattractive proposition to apply for appellate judgeship on our court. There are a lot of reasons. Most probably don't live in the District of Columbia and they're not really prepared to move in. They couldn't afford to maybe, and you have to have that. For many it's a matter of simply taking the pay cut. I mean being an appellate judge pays fairly well, but it's nothing like being a partner in a good law firm. And also it's the ambition of those who have wanted to do appellate work, historically, is aimed toward the federal courts, where the chances of getting an appellate judgeship are next to nil statistically speaking. But that kind of work, federal and constitutional law and statutory law has been the thing that has attracted people most. There's a certain reluctance on people from at least larger law firms to want to come and do unemployment compensation litigation or workers compensation or local regulatory kind of stuff or burglary appeals and things like that. So it's not so easy to get—to attract, I think, the breadth of applicants that we would like to have for our court. I don't think that's going to change any time soon. But that is the way it is. Nonetheless, we do get good people. How's that?

MRS. EASTON: I think it's excellent Judge, thank you so much.

JUDGE FARRELL: I think we've kind of wrapped it up. When I was reading through the last transcript, I said to myself, "God, I didn't realize you were so stupidly verbose." But, uh—(Laughs.)

MRS. EASTON: It's been a delight for me to get to know you, and I've learned a lot from you. So I thank you very much for this adventure.

MRS. EASTON: I think it's a real treasure that they're collecting this information, and I'm so pleased and honored to be part of it. Well, I—do you have interest in taking a professional portrait? Is that something that would—

JUDGE FARRELL: No. I will.

MRS. EASTON: —maybe you should get one.

JUDGE FARRELL: No, I won't. I don't think I'll get professional one. I'll just get, a—in lay-
persons dress, I'll just get a head photo.

MRS. EASTON: Okay, yeah, that would be a nice addition.

JUDGE FARRELL: And I'll give it to her because she certainly doesn't want to limit herself to me in my basketball togs.

MRS. EASTON: Although, that's really—(Laughs.)

JUDGE FARRELL: That was the highpoint of my non-professional career.

MRS. EASTON: Your pre-law career. (Both laughing.) Oh, Judge, well thank you so much—