Oral History of STANLEY HARRIS
May 17, 2002

This is the fifth session in an oral history conducted under the auspices of the oral history project of the Historical Society of the District of Columbia Circuit. The interviewee is Stanley Harris, a lawyer in practice and in the judiciary, and the interviewer is William Ross. The date is May 17, 2002.

Mr. Ross: Judge Harris, you stated that you had some comments that you wanted to make on matters that we covered at the last session. Why don't you go ahead and do that?

Judge Harris: The last time we talked about legislative history and how much it should be relied upon in deciding cases and a couple of thoughts occurred to me. One was that back when you and I were younger lawyers, Congress could and did legislate with a rather high degree of certainty and clarity, and as time went on, in my opinion at least, Congress deliberately began to be considerably more lax in the crafting of statutes leaving too many things to be determined by either administrative agencies or the courts and you also had at the same time a number of members of Congress -- certainly of both parties -- occasionally making comments during debate about a particular bill at the urging of some special interest group or another so that they could say that they had put in a good word for them. So you had what to me were really superfluous comments that didn't really affect what the statute meant and overriding that is the marvelous creation of our government with the tripartite form of government with the legislative, executive, and judicial branches to be co-equal, and it is certainly, in my view, not a function of the courts to take legislation and recraft it into a way that fits the mind of a particular judge. I think the judges are intended to follow legislation as its drafted and if that legislation is inadequate and later needs amendment that's the way it should be done, rather than through

judicial intercession. The second thought has slipped out of my mind.

Mr. Ross: Well, it will come back to you. Maybe I can stimulate it. A number of years ago I attended a fascinating forum. I forget the context of it, whether it was a bar association, I think it was academic. The subject was on judicial interpretation of construction of statutes and by far the two most interesting speakers were Judge Breyer, who was then Chief Judge of the First Circuit and has since been appointed to the Supreme Court, and Justice Scalia was on the Court at that time. So you had a Supreme Court Justice and a federal appellate judge on the panel and they were debating, and I happen to know both of them personally fairly well, having worked with them in various ways, and they are formidable men, both of them. And they are actually at different poles on the question of judicial interpretation. Justice Scalia said you should look at the language of the statute, plain language of the statute. And that he doesn't look at legislative history pretty much at all. Dislikes it. He thinks its flawed for some of the same reasons that you have mentioned, and that you should focus on what Congress has said and in effect don't pay too much attention to people who are telling you well they said that but they really meant something else because of something somebody said in a committee report or whatever. Judge Breyer said, "Well, you're on the Supreme Court and you can change things. I'm a subordinate federal judge and I've got to make sense out of statutes, and very often and much more than comes to you, Justice Scalia. We look at a statute and we don't have a clue as to what Congress meant." And he said, "We could just guess, or we could look at the whole process." And he said, "It's maddening, its burdensome, it's confusing, it's uncertain and treacherous, but often you can discern an intent in the whole process that gives you a clue so that you're deciding what Congress thought the statute means rather than what you, the judge,

thought it might be appropriate to mean." And they went at it hammer and tongs, totally candid, totally gracious and polite to each other and I found it exciting and so did the audience and so on. And if I had to say who won, I would say Judge Breyer won. Maybe that will stimulate something in your mind.

Judge Harris: Well, the other two thoughts have come back. The difficulty that I have with comments or statements made during the creation of legislative history is that Congress, once it has acted, has acted as a body of 535 people and to suggest that because a particular member of the House of Representatives or a particular Senator said that he thought the statute was intended to do a certain thing does not mean that 535 institutional members of that body felt that way.

The second thing, in addition to my feeling about being cautious with legislative history, is that courts are limited properly in my view to cases or controversies and I feel strongly the courts are not to go off on a frolic and go beyond the specific case before them to lay out their vision of what they think should follow from a particular decision. Another device that -- and I've sat on a number of appellate courts and on several of the occasions have suggested to colleagues that wait a minute, you are going beyond this case, and I don't think that's right. Typically then there has been a withdrawal of expansive language. Another thing that has troubled me about some appellate courts is the exercise of what they have referred to as supervisory authority over trial courts. In my opinion, courts of appeals have no supervisory authority over the trial courts and it is improper for an appellate court to go off on a frolic after they've decided the issue before them and say for the guidance of the district court in future cases, in the exercise of our supervisory jurisdiction, say that the court should do (a), (b) and (c)

in future cases. And I do not believe that any such authority exists and should not be exercised.

Mr. Ross: That's a very interesting observation. I'd like to go into it. Does an appellate judge who makes such statement which I, like other lawyers have read from time to time, ever cite the authority that he relies on to support his exercise of that function?

Judge Harris: No, and there is none. A number of years ago the D.C. Circuit took one of my cases and said, in the exercise of their supervisory authority, they were decreeing thus and so. And I had to write a follow-up opinion and so researched intensely the question of whether there was any inherent or specific authority for the exercise of supervisory jurisdiction and firmly concluded there is none and so stated in the opinion which I wrote in response to that.

Mr. Ross: What was the appellate court's reaction, if any, to that risky statement?

Judge Harris: I don't know first hand. I heard second hand that I had a made a few people very unhappy with what was implicitly a -- well, I suppose explicitly -- a rather vigorous criticism of what they had done.

Mr. Ross: I see. But they didn't undertake to wrap your knuckles?

Judge Harris: Not visibly.

Mr. Ross: Right, right. I was going to go into that question later, but why don't we pursue it a little bit now.

Judge Harris: When you asked if they wrapped my knuckles explicitly, well, they did not, and I believe the reason that they did not is because they concluded that I was correct, albeit they may have viewed it as somewhat of insubordination for me to have taken that position.

Mr. Ross: There's no reason for us to go into this in any technical detail here, but

it might be interesting to your reader for you to give some account to your investigation of the possible sources of such authority because it would illuminate the whole question of the relationship between the trial court and an appellate court in the federal system. If I recollect the Constitution, it says that the Congress in Article III shall create a supreme court. A supreme court is mentioned, and am I correct in my memory that the reference to the lower courts is quite general?

Judge Harris: Yes. Such courts as Congress shall ordain --

Mr. Ross: Ordain. In other words, it could be district or circuit courts. We used to have circuit courts which are basically trial courts and appellate courts. And the Constitution does not, does it, specify in any concrete way the relationship between an appellate court and the lower courts except by implication, I suppose, that the Supreme Court being called supreme is supreme, is the last word. Is that correct?

Judge Harris: Yes, and in researching this problem in this one particular case, I came to the conclusion that the Supreme Court does have some limited supervisory jurisdiction in some area -- I can't be more specific -- but that certainly either state supreme courts or the United States courts of appeals do not properly have "supervisory jurisdiction." My analysis is set forth in my opinion in *United States v. Williams*, 816 F.Supp. 1 (1993).

Mr. Ross: So then, in a sense, apart from the fact that the appellate court reviews your decisions and has the power from a statute to overturn them in the particular case in its particular issues, there is no statutory authority for the appellate court to exercise supervisory -- whatever that means -- supervisory surveillance over the district court. Is that correct?

Judge Harris: That's correct and because supervisory authority is essentially what

would amount to the issuance of an advisory opinion to be followed in future cases, which is improper. And I illustrate with two examples. When I was on the District of Columbia Court of Appeals, I felt that the law with respect to the so-called Jencks Act, which is 18 U.S.C. § 3500, dealing with the obligation of the government to produce statements of witnesses to the defense side of the case. I thought that the law was very muddled in that area and I wanted to try to clarify it. Well, it took three opinions in three separate cases for me to tie all of the things together. I could have done it in one by being expansive and writing an advisory opinion, but I did not feel that was proper and so I was fortunate enough to have a trilogy of opinions that could all bring it together. In more recent years, I sat on the Third Circuit and had a very interesting case involving Rule 404(b) of the Federal Rules of Evidence, dealing with prior conduct of a defendant in a criminal case, and found that in my opinion the prior Third Circuit opinions had gone all over the lot in dealing with Rule 404(b), and I spent an inordinate amount of time taking all of the threads of the prior opinions and weaving them together so that there was a coherence in what had been some divergence, not in opposition, but some diverging and fuzzy opinions I thought and managed to pull them all together to have them make sense, but that was not advisory. I was dealing with the case that was at hand.

Mr. Ross: Necessary to actually decide the case?

Judge Harris: Yes, I felt I could simultaneously remove some of the doubt that had been created by differing opinions which were not in conflict, but which in my view were unclear as to what trial judges should be doing with respect to that problem.

Mr. Ross: Let's go into your approximately ten years as a federal trial judge in a court which, in some respects, is a conventional federal district court covering a certain territory

and also has certain special responsibilities because it is located in the District of Columbia. I want to ask you to compare -- because it would be vivid for you, I think -- the Superior Court system with that of the federal district court in the District of Columbia. I think that might illuminate some of the areas in which are of perennial interest to lawyers and court reformers and so on and I want to go further into that. You had an extended experience of being a judge conducting trials in both systems. How would you compare them and their strengths and weaknesses?

Judge Harris: You said ten years. I was on Superior Court about 20 months.

Mr. Ross: That's right. I'm sorry. Hold on just a minute. Yes.

Judge Harris: Then went to the D.C. Court of Appeals --

Mr. Ross: Court of Appeals for ten years. Yes, well, you would have been familiar from your D.C. Court of Appeals experience with the Superior Court, and you certainly were familiar with a federal trial court from your being a federal trial judge, and so I think you can make the same comparison.

Judge Harris: The Superior Court went through a transition as every court does, but in my roughly a year and a half on it from January of '71 to September of '72 and then following it so closely from being on the District of Columbia Court of Appeals from September of '72 to December -- let's see, until 1982. Superior Court is a very tough court to serve on. It had no individual calendaring as the District of Columbia District Court does.

Mr. Ross: Why was that, if I can interrupt you?

Judge Harris: Well, it started, of course, as the Court of General Sessions and was dealing only with misdemeanors and with civil cases involving less than $10,000 so that there

wasn't the preparation or complexity involved that can occur in the classic federal cases that come into the Article III system, and you would have the Superior Court or the Court of General Sessions before the Superior Court was created, might have 30 misdemeanor cases set for trial with no idea of how many of them would plead out or had to go to trial, so everything was pooled. The cases and the judges who were assigned to handle them. When Superior Court was created, the same policies were followed. That is, the general calendaring and if you had a criminal assignment and a case came to you and a guilty plea was received, the expectation was that you would call the clerk and say hey, my case pled out and send me another. And then would come another case for you to try. I often felt on Superior Court as though I was in the Canyon and the dam had broken upstream and down came this flood of water, so it was a tough court to serve on. As it evolved, there was one interesting development that -- all courts I suppose go through phases and I really only know our District of Columbia system, having served on several other circuit courts on an inter-circuit assignment basis, but you don't learn a court system by sitting with an appellate court for a few days. But there was a period of time, for example, when the United States Attorney's Office in the late 1980s was bringing to the United States District Court cases involving the possession with intent to distribute volumes of crack that were in the seven, eight, nine and ten grams range. That type of case historically and typically, and properly in my view, should have been handled in the Superior Court. But we had the United States Attorney, Jay Stephens, who concluded that he wanted to make use of the sentencing guidelines and the mandatory minimum sentences for people who were dealing in more than five grams of crack, and so the district court was practically paralyzed by an unending series of small volume of crack cases. Up until then, people would do whatever they could to get

civil cases out of Superior Court and into the district court and would strive mightily to find a diversity jurisdictional basis for doing so because civil cases to that point could not be tried in Superior Court. Superior Court had such a heavy criminal case load. Then when a lot of those crack cases came to the United States District Court, the district court couldn't reach civil cases, so then people concluded that to get their civil cases tried they would have to shift and try to get into Superior Court. So courts go through that kind of a mating dance occasionally as one gets overloaded for various reasons and they try to get it into a court where they can have their cases tried. And I think most courts are overloaded, but we've had that sort of a cycle in the District of Columbia.

Mr. Ross: In terms of the differences between the two court systems, you are saying that there were differences that they would shift over time. How was the question of the drug prosecutions finally resolved in the district court? I've heard over the years district judges complain about them, not only in the District of Columbia, but elsewhere.

Judge Harris: Well, some of the judges on the district court and at this point, by that time, I had shifted to the district court and was part of processing this overload of crack cases and crack is a dreadful drug, very rapidly addictive to those who experiment with it. And some of our judges were rather vocal in expressing their views to the U.S. Attorney. On the other hand, consistent with my belief in the separation of powers, my feeling was that it wasn't up to judges to decide how cases should be prosecuted. That was the function of the U.S. Attorney's Office, the executive branch. Some of my brothers and sisters were more vocal, but in any event, I thought the system did not make sense and I don't fault Jay Stephens. He was doing what he thought was correct and it was his job to decide how to prosecute. But a man named Ramsey

Johnson who had been running the Superior Court operation for the United States Attorney's Office became the interim United States Attorney after Jay Stephens and made a policy decision that only crack cases with 50 grams or more would be brought to the district court unless there was a gun involved. Smaller quantities, if the defendant had a gun, would still be brought to district court, but the smaller quantities in purely crack cases went back to Superior Court, which made our calendar on the district court quite a bit more manageable. We could get to more civil cases. Not many, however. I think I was lucky if I could try three civil cases in a year for a significant period of time.

Mr. Ross: Really? I suppose the life of a U.S. trial judge can be very different depending on whether you are in a very large city court system like Washington is, or whether or not you are out in Utah or Arizona. I remember when I was trying cases in the district court in various parts of the country, the court atmosphere in a less densely populated rural jurisdiction could be so startlingly different. And I sometimes thought the life of a federal judge in those jurisdictions would be more pleasant in some ways than the life of a federal judge in the Southern District of New York or in Los Angeles or in Washington. Do you have a thought about that? You must have talked to a lot of district judges at meetings and bar association court conferences.

Judge Harris: I had gone to meetings. I served twelve years on two committees of the Judicial Conference of the United States -- six years on the Committee on Criminal Law and six years as Chairman of the Committee on Intercircuit Assignments -- and would run into a lot of judges that way and go to other jurisdictions from time to time. And one very marked difference in the smaller communities was that judges were held in great deference in the smaller communities and here in Washington where you have so many courts and so many members of

Congress and so many high-ranking government officials, we're just another one of the gang. On the other hand, I think that we have one advantage that some of the other smaller jurisdictions do not have. I think we have considerably greater social freedom in that I think now the District of Columbia Bar has 75,000 members. I think years ago in my early days as a judge it was in the neighborhood of 40-some thousand, but that means that inevitably there are so many lawyers and so many judges that you do not feel the inhibitions on having social interaction with members of the bar that I'm sure must vex a lot of judges in the smaller communities. They must be concerned all the time, I suppose, about does it appear that their relationship with a particular lawyer is such a close personal relationship that it could be perceived as affecting how they might conduct a case. Here, where we know so many lawyers, the interaction is pretty heavy and assumed to be proper; rarely do we run into the kind of problems that I think those in the smaller communities do.

Mr. Ross: That's an interesting observation. Can you talk about your relationship with your colleagues on the federal bench, trial bench here?

Judge Harris: Well, the district court has the individual calendaring system, so that you've got your own calendar and a United States District Judge, like anywhere, but certainly in the District of Columbia, operates as a bit of an island. You have your secretary and you have your law clerks. You get support to a very limited degree from the Clerk's Office. You're handling your own calendar in your own way. On the other hand, I have always felt that no one really can practice law alone and nobody can be a judge alone. There are times when you just need to kick a problem around with somebody whose views you respect to see if the tentative conclusion that you've come to is a sensible one or has a flaw that somebody else might rather

readily perceive. So when I went on the district court, I had a pretty unusual background in that I had been a trial judge for a year and a half. I had been an appellate judge for about nine years and I had been the United States Attorney for nearly two years. So I had quite a background that enabled me to function pretty well. With the island that the district court judge finds himself serving on, I wonder how somebody without that kind of a background would come into the court and start functioning immediately in an effective way, but I still felt that it was important to bounce ideas off of my colleagues occasionally in cases and I was always very careful to make certain that I had analyzed a particular problem and had come to a tentative conclusion before talking with someone more senior on that court than I. I never felt that it would be appropriate to go to another judge and say, "I have this problem. What do you think I ought to do with it?" I would go to a judge and say, "I have this problem, and here's how it looks to me," and, "This is what I think I should do. Do you see a flaw in it or do you think I'm off the wall?" It's not something that one would do often, but one would not want to become a burden, so that what I did is I picked three men whom I respected with a lot greater experience than I on the district court and I would alternate between the three of them if I had a problem that I wanted to get some guidance on and those were Aubrey Robinson, Gary Gesell and John Pratt, all of whom in my view were superb judges, very experienced and most accommodating and being willing to share their time and let problems be bounced off of them.

Mr. Ross: I take it that you were probably willing to do the same thing with your colleagues when they came to you on problems?

Judge Harris: Yes. Once I got a much better feeling for the district court and its problems, whenever a new judge would come on the court, I typically would at an early date take

that judge to lunch and talk about the court generally and say, "Particularly during the early days you're going to run into problems that are going to be novel and that you may want to kick around. Please don't hesitate to come see me." Some of those people I knew well. For example, Royce Lamberth, when he came on the district court, had been the Chief of the Civil Division when I was the United States Attorney, and there were other people whom I knew who came on the court and they frequently would come to me to kick around problems in their early days on the court.

Mr. Ross: What was the role of the Chief Judge on that court during your time? Did it change with the personality who held that position or the circumstances?

Judge Harris: I don't think very much because -- and I don't know exactly how other district courts function compared to the District Court for the District of Columbia, and part of that is because the way in which a court functions is in part determined by the size of the court. The district court here has 15 judges, and a decision was made some years ago that the Chief Judge would not be on the draw. In a lot of courts, the Chief Judge is on the draw and gets cases just as the other active judges do. Here -- and I was not a part of these decisions, they were made before I got there -- the Chief Judge's role is more administrative and dealing also with 100 percent of the Grand Jury matters. All Grand Jury matters are handled by the Chief Judge of the District Court here. That is not true in other district courts. They rotate it and share that responsibility. But we had chief judges who were very conscientious, hard-working people. Aubrey Robinson, who was the Chief Judge for the longest period of time while I served on the district court, would frequently keep cases for himself and often took very unappealing ones. For example, there were all sorts of Filipinos who had helped the Americans during World War II

and claimed that they were entitled to veteran's benefits by virtue of having served alongside American Army forces in the Philippines during World War II. And there had to be some guru in the Philippines with a typewriter who would go around into the mountains and the villages and type up a complaint for someone who had served with the American Forces and come in and make a claim for benefits. Well, Aubrey Robinson kept all those cases for himself and I think at one point -- a rotating series of hundreds of them pending -- all from the same typewriter, all saying the same thing. But Aubrey was very conscientious about keeping a share of things that he did not think should be farmed out.

Our Chief Judge, of course, would have very significant administrative responsibilities dealing with the Clerk's Office and different personnel matters and the probation office. Just an awful lot of responsibilities for the Chief Judge of the District Court, including some ceremonial responsibilities, which makes me think how burdened the Chief Justice of the United States has to be with all of the responsibilities that our Chief Justice has including, for example, serving on the Board of the Smithsonian Institution and the multiplicity of tasks that Congress ordained for the Chief Justice in addition to the heavy caseload that the Chief Justice has that he, of course, cannot avoid.

Mr. Ross: Where did your law clerks come from? How did you select a clerk? Please talk about your experiences with your clerks.

Judge Harris: Well, to each his own, and everybody follows somewhat different procedures. I went to the University of Virginia Law School, which without denigrating any other law school I consider to be a fine law school. It turns out very well rounded graduates and in my Superior Court time of service I only had one law clerk, and with the lesser status of that

court, I did not have as many applicants to deal with as I later came to. I hired I think more Virginia graduates because as time went on and as clerkships became more and more appealing to law students, and I would interject here that I did not apply to become a law clerk myself when I graduated from law school and I regret that. There were two basic reasons for it. There were no lawyers in my family so I had nobody directing or suggesting to me that that would be a good course to follow, and the placement office at the University of Virginia was not really thinking much about law clerks. It would be outside forces that would lead someone to seek a clerkship.

Mr. Ross: That's interesting.

Judge Harris: And I was the Articles Editor of the Virginia Law Review, among other things, and I think I would have been an appealing candidate for someone to serve as a law clerk, but didn't apply for it. When I was on the District of Columbia Court of Appeals I had one-year clerkships and typically found that it was a nice mix if I had one male and one female law clerk. When I went on the district court, after two years of having one-year clerkships and after two years of watching those two clerks, talented though they be, come in with looks of confusion on their face and saying, "Judge, we don't know what to do with this," I decided that one-year clerkships were not good for the district court because law school does not prepare one to clerk on a trial court. It's an easy transition from law review to being a clerk for an appellate court. It is not an easy transition to go to a trial judge. So I shifted to alternating two-year clerkships so that each clerk could go through a learning period and then become very productive during the latter part of the clerkship. And the holdover clerk could train the incoming clerk so that I was not burdened with that. And then I made a shift that became rather pronounced in the courthouse and that was once I went to the two-year clerkships, I hired almost exclusively female

law clerks. And on the district court, for a variety of reasons, including the desirability of Washington as a city for law students from around the country and the desirability of the district court here because of the nature of the cases that it gets, I was getting close to 400 applications a year for a clerkship and that would be for one vacancy. Some of my colleagues would, I know, take an entire weekend and try to go through all of their applications. I did not do that. I thought that was inefficient, so what I would do would be to take the Virginia applications and look through those, and if I found a couple of people that I thought looked as though they'd be a good match, I'd interview them and most often would hire somebody from Virginia. If I for various reasons did not find somebody from Virginia that I thought would be a good match, I would go to another school, but I typically did not look that much at applicants from other schools, although I've had law clerks from Harvard, from Georgetown, from a variety of other schools, but most of mine came from Virginia simply as a result of having an overwhelming number of applications to look at. In that connection, I might mention that when I took senior status, and I served five years in senior status on the district court, my number of applications dropped from close to 400 to about 240, so there still was no shortage of applicants.

Mr. Ross: I know that some federal judges followed a practice of checking out clerk applicants with particular faculty members at a university that they have some relationship to who may know something about them, and the faculty member may either know the student or if he or she didn't, they could go and talk and find out something about them. Did you follow that practice at all?

Judge Harris: I did not, although you are quite right there are a number of judges who will use a particular law school professor almost as a headhunter and virtually delegate the

selection of the law clerk to them. I did not for a number of reasons, but the principle reason is that I mentioned a few minutes ago that being a district judge you're serving on an island. You're within the confines of your own chambers virtually constantly. In my view, if you take the quality of applicants that we had, they were pretty much fungible as far as their abilities are concerned. And I did not say I must have the editor-in-chief or I must have the number one person in this class. I would interview people and would hire the person that I thought would be the most pleasant and productive to come in and work with every day, that I would enjoy working with them. I could not see hiring somebody that I didn't feel a good personal match with simply because they had terrific talent. And then I might say one of the nicest things of being a judge is the succession of talented, energetic, nice young kids that come in and pass through your life for a couple of years as your law clerk. It's a wonderful experience.

Mr. Ross: They can certainly wake you up and startle you at times. In fact, it seems to me it would be very hard to practice law either as a judge or as a private lawyer without some young minds around because you sure can become trapped in your own experience.

Judge Harris: And the position I took with my law clerks was that look, let's don't -- I'm not exalted here. What we are is a three person law firm. You two are the associates and I'm the partner, and we're working together and we want to do the best job we can in every case we have. I want to know what you think.

Mr. Ross: What procedures did you follow in your write-ups where you'd have an oral argument? You will have read the briefs. I suppose you might have discussed some cases before oral argument selectively with a clerk?

Judge Harris: Now, which court are you talking about now?

Mr. Ross: I'm talking about the -- I should have said trial rather than oral argument. I am talking about the district court.

Judge Harris: On the district court, if in a fair percentage of cases we had dealt with meaningful motions prior to a trial, a motion for summary judgment or a motion to dismiss, motions *in limine* that would give pretty good familiarity with the case, but something happened at least with me, and I don't know about that many other judges, I felt that we had so much work to do on the district court that I could not afford the luxury of having law clerks do meaningful work on a case before it was tried. And you never know, of course, but that a case might settle a day or two prior to trial and any preliminary work that might have been done before that would have been wasted. So, absent a motion for summary judgment or dismissal, typically, I would not have a law clerk do anything on a case and if a case were to be tried, I would take the entire jacket and read it from cover to cover the day/night before a trial, and the law clerk would not be asked to have any particular input on it at all because the law clerks had plenty to do on other dispositive motions and other cases.

Mr. Ross: I suppose that meant that the clerk could not spend much time, if at all, sitting in your courtroom and listening to proceedings? It might have been valuable for the clerk, but it would just simply have taken too much of their time.

Judge Harris: That's correct. And it presents a very difficult problem for a judge because not only do you learn to really care about your law clerks, but you want them to have the best possible experience and get the most possible benefit from their clerkships. But as a practical matter, you couldn't really afford to have them watch much and they would -- I would have a clerk come in once to watch jury selection. And we typically couldn't afford to have them

do that on a regular basis, although in a lot of cases I would have a law clerk -- what happened as we began to run into personnel shortages in the Clerk's Office and then the Marshal's Office, there was a point in time when a deputy marshal was assigned for every case, whether it was civil or criminal, and so jury selection, you could have a marshal hold a microphone back in the courtroom and make sure that the microphone could be used by jurors responding to questions so that everybody could hear them. Then they stopped providing deputy marshals to us for civil cases and I would have a law clerk come in and be sort of an Oprah Winfrey passing the microphone to jurors and kind of making sure that everything flowed smoothly. But I would have the law clerk stay in for opening statements and I would solicit requested jury instructions before the trial and the law clerk, after opening statements, would leave and start working on jury instructions which I always basically had finished to the extent that you can before the evidence was completed. On the other hand, I wanted them to get experience and with each new law clerk, if the first time that a expert witness in drugs would testify, I would have them come in and listen to that. There would be circumstances in which let's say there's a contract case and a particular witness's testimony was going to be critical to the decision in the civil case or a particular eye witness's testimony was going to be critical in a criminal case, and I would say to the law clerk, "Come on in and catch this particular witness's testimony," or occasionally I would say, "This partioular lawyer is a very good cross-examiner, come in and watch his technique." And always, of course, then they would come in and sit in on closing arguments and they would always be with me when we had our jury instructional conference because they would have done the research as to the propriety of a particular requested instruction and could work with me in dealing with the lawyers and finalizing our jury instructions. So I tried to get -- it's a difficult

balance, but I always wanted to get them the greatest exposure to the trial process, but that's a luxury that we could not afford, which I made clear to them at the outset, that they could not expect to watch a whole heck of a lot.

Mr. Ross: When you came to the decisional phase of the case, you were preparing findings and conclusions and an opinion, did you have the clerks review these in draft before you finalized them when time permitted?

Judge Harris: Well, there are two ways you can approach the preparation of what the rules characterize as findings and conclusions. One can either do it by here are my findings and here are my conclusions or it can be done in a narrative type of decisional process, and I preferred the latter. And typically the law clerks would do the first draft where we had to do them. We would get typically in complex cases proposed findings and conclusions from counsel so that we would be sure we wouldn't overlook anything. There are some judges who will have their court reporters provide them with a transcript of everything. I never did that. I didn't think that was fair to the taxpayer and I thought it was unduly burdensome to the court reporters also. So we would get proposed findings and conclusions from the lawyers, and if I needed to get a few pages of transcript to try to resolve a particularly touchy problem, I would get that from the reporter and keep it limited. As an appellate judge I followed the unvarying practice of having Clerk A do an original draft of an opinion and then that draft would come to me and would also go to Clerk B. Clerk B would be assigned the task of going through that opinion, not only with the idea of making editorial suggestions, but more importantly to backup and make sure the accuracy of every quotation, every citation and all of that, while I would be editing it also, and then at the end, I would sit down with these three different edited drafts because Clerk A would

also edit her version of the draft and I would meld them all together into the final product. But as a trial judge we could not afford that luxury. So that if Clerk A did a draft for me and in working on it, and this would happen occasionally, not often, I would read that particular draft and I'd say, "Wait a minute, if that's the law, the law is an ass." Well occasionally the law is an ass, but in that situation I would bring in Clerk B and I'd say, "Do me a favor, would you check out the cases that Clerk A has relied on?" This seems to me like a lousy result, but maybe it is the result we are required to reach, and typically Clerk B would come back and say that's the result we are required to reach. Every now and then Clerk B would say I disagree and then it would be necessary for me to replow the entire field and get into the details of the cases, too.

Mr. Ross: I think before we conclude, and we're almost there, I will ask you a follow-up question. You stated that at one point you went almost entirely to female law clerks. Why did you do that?

Judge Harris: I think there's a slightly better talent pool of applicants who are female, in part because they were not hired as readily by law firms. In part I suppose because they thought well, a clerkship would be wonderful and maybe by then I'll be married and might have a baby and might postpone getting back into a law firm. But also, my wife and I have three sons, never had any daughters. Maybe it was a thirst for a never-had daughter. But I think basically it was because the chemistry worked very nicely. The female law clerks not only were very good, as were the males. I never had a bad law clerk or one that was not fully satisfactory. But nature makes women want to please men just as it works the other way and I found that a pleasant aspect of the relationship.

Mr. Ross: That's a very candid and I think persuasive statement of that. In my

law firm, we had a practice of hiring brilliant female law graduates because they were available and they couldn't get hired as readily in other law firms and we thought they gave us an edge. Of course, that meant that we had to make them partners, too. Well, why don't we conclude today and I'm going to stop until the next time.