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From the Editor

You're holding a one-of-a-kind volume — transcripts of Bryan Garner's interviews with Supreme Court Justices on legal writing and advocacy.

These pages contain a rich lode of quotable nuggets. While reading, I started to jot down some examples and wound up with three dozen. Here is just a small sampling:

- “I have yet to put down a brief and say, ‘I wish that had been longer’” (p. 35).
- “What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law” (p. 37).
- “I love *But* at the beginning of a sentence . . .” (p. 60).
- “[G]ood counsel welcomes, *welcomes* questions” (p. 70).
- “So the crafting of that issue . . . Man, that's everything. The rest is background music” (p. 75).
- “[T]he genius is having a ten-dollar idea in a five-cent sentence, not having a five-cent idea in a ten-dollar sentence” (p. 100).
- “I can't bear it [legalese]” (p. 141). “Terrible! Terrible!” (p. 156).

It's all here, from thoughtful responses to pointed questions about writing and oral argument, to fascinating facts about the Justices and their interests. (Justice Ginsburg took a class from Vladimir Nabokov. Justice Breyer likes Stendahl.) And while the

Justices naturally disagree on some things, you'll find themes that run through their answers — themes about clarity and simplicity, honesty and accuracy, overlong briefs (and opinions), rewriting and re-rewriting, attending to grammar, anticipating the other side's arguments, the primary importance of briefs in decision-making, and the professional need to cultivate strong writing skills.

Scribes is grateful to Bryan Garner for furnishing these interviews and to the Justices for allowing us to print the transcripts in the *Scribes Journal*.

Scribes is also indebted to the *Journal's* sponsor, Thomas Cooley Law School, for its continuing generosity — and its commitment to better legal writing.

— Joseph Kimble

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Introduction

Bryan A. Garner

In 2004, I began videotaping interviews with American judges and lawyers, partly so that I could develop a body of work that would inspire law students to write better, and partly so that I could use snippets in my CLE seminars. For nearly two decades, I'd been touring the country and abroad, teaching lawyers how to perfect their writing skills. Everywhere I went I spoke with partners, associates, and judges on topics related to what works and what doesn't work in briefs, contracts, and other documents. By the early 21st century, the technology was available to bring into the classroom personal wisdom from the greatest legal minds of our day. By 2006, I had interviewed about 150 judges and lawyers — including judges on all the federal circuits. I now have a huge repository of DVDs from all these judges — an archive that I hope may someday prove helpful to historians and scholars.

At some point I decided to seek Supreme Court interviews. But this, unsurprisingly, proved significantly more difficult than it had been to interview circuit judges. My first serious lead was Justice Scalia, who declined an interview but invited me to breakfast the next time I was to be in Washington — to discuss, he said, some of my views on legal writing. Several weeks later over breakfast, in late June 2006, he again declined the interview . . . at first. We had a wonderful time discussing language and writing, and I persisted in cajoling him to consider an interview. He finally agreed.

That interview took place on October 2, 2006, and it went superbly. It was that interview, in fact, that convinced both of us that we should write a book together — a collaboration that resulted in *Making Your Case: The Art of Persuading Judges* (2008).

Within a month, I had invited the two Justices whom I already knew — Justice Ginsburg and Justice Breyer — for interviews and received their commitments. After that, and perhaps because of the positive reports from my earlier interviewees, I found it increasingly straightforward to arrange the remaining interviews, all of which, in my view, went stunningly well. They took place on these dates:

- Oct. 2, 2006: Justice Scalia
- Nov. 6, 2006: Justice Breyer
- Nov. 13, 2006: Justice Ginsburg
- Feb. 27, 2007: Justice Stevens
- Mar. 2, 2007: Chief Justice Roberts
Justice Alito
- Mar. 21, 2007: Justice Kennedy
- Mar. 28, 2007: Justice Thomas

Throughout this period, I worked with the Public Information Office's Kathy Arberg to ensure that everything about the process was done to the Court's satisfaction.

The only declination I received was from Justice Souter, who wrote to me as follows: "I feel like a rotter in saying that I will have to ask you to excuse me from an interview, but that's how I come out. There is a broad spectrum of legitimate opinion about the prudence of judges' interviews, and I'm among the minimalists Notwithstanding your kindness to me, I've never been satisfied with

my own prose; since I don't think my own work is worth writing home about, I'd feel presumptuous telling other people what they ought to do." I sent a motion for rehearing — to no avail. But I appreciated the thought that went into Justice Souter's letter.

In asking all the Justices for interviews, I assured them that the purpose would not be commercial. In fact, I wanted to ensure that legal educators everywhere would have full access to the interviews at no charge, and so I've kept all the videos posted in their entirety at www.lawprose.org ever since they were made. Many advocacy and legal-writing professors have been able to use the interviews in their teaching at no cost.

I am grateful to the Justices for granting me these historic interviews, and my hope is to make a tradition of it — and to continue interviewing newly appointed Supreme Court Justices not long after they assume their posts.

One editing note: for smoothness, we cut the occasional false start or *you know* or other little distractors in the transcriptions. But the interviews are otherwise unchanged, except for light editing requested by some Justices.

For making the transcripts available once again to the bar as a public service, I am grateful to Scribes — the American Society of Legal Writers. Professor Joe Kimble, editor of *The Scribes Journal of Legal Writing*, has done a tremendous job in ensuring the accuracy and polish of the transcripts. He was aided by four students from Thomas Cooley Law School: Michael Hekman, Cassandra Werner, Bruce Crews, and Thomas Myers. Professors Meredith Aden and Victoria A. Lowery of Mississippi College of Law reviewed the transcripts most helpfully, as did Karen Magnuson of Portland, Oregon. To all these people and organizations, my heartfelt thanks.

Chief Justice John G. Roberts Jr.

BAG: Chief Justice Roberts, thank you very much for taking some time today to talk about legal writing.

JGR: Happy to be here.

BAG: I wanted to ask you, first of all: Why should lawyers be fastidious with their use of language?

JGR: Language is the central tool of our trade. You know, when we're looking at a statute, trying to figure out what it means, we're relying on the language. When we're construing the Constitution, we're looking at words. Those are the building blocks of the law. And so if we're not fastidious, as you put it, with language, it dilutes the effectiveness and clarity of the law. And so I think it's vitally important — whether it's a lawyer arguing a case and trying to explain his position, whether it's a legislator writing a law, whether it's a judge trying to construe it. At every stage, the more careful they are with their language, I think, the better job they're going to do in capturing in those words exactly what they want the law to do; in persuading a judge how to interpret it; and as a judge, in giving a good, clear explanation of what the law is.

BAG: Do you think the profession could do better on that score?

JGR: Yes. I think we all can do better. We read hundreds, thousands, thousands of briefs in the course of a year at the Supreme Court, and some are more effective than others. And it's just a different experience when you pick up a well-written brief: you kind of get a little bit swept along with the argument, and you can deal with it more clearly, rather than trying to hack through . . . it's almost like hacking through a jungle with a machete to try to get to the point.

You expend all your energy trying to figure out what the argument is, as opposed to putting your arms around it and seeing if it works.

BAG: On some of the cases on which you grant cert, are you still, when you read the briefs, having to hack through with a machete?

JGR: Well, sure. The quality of briefs varies greatly. We get some excellent briefs; we get a lot of very, very good briefs. And there are some where the first thing you can tell in many of them is that the lawyer really hasn't spent a lot of time on it, to be honest with you. You can tell that if they'd gone through a couple more drafts, it would be more effective. It would read better. And for whatever reason, they haven't devoted that energy to it. Well, that tells you a lot right there about that lawyer's devotion to his client's cause, and that's very frustrating because we're obviously dealing with very important issues. We depend heavily on the lawyers. Our chances of getting a case right improve to the extent the lawyers do a better job. And when you see something like bad writing, the first thing you think is, "Well, if he didn't have enough time to spend writing it well, how much time did he spend researching it? How much time did he spend thinking out the ramifications of his position?" You don't have a lot of confidence in the substance if the writing is bad.

BAG: Do you find it interesting that here in Washington we have all these different mechanisms for mooted cases, and some people will have five moot courts before getting in to argue before you, and yet they probably don't subject their briefs to the same kind of editorial scrutiny?

JGR: Well, some do and some don't, but it's a very good point. The oral argument is the tip of the iceberg — the most visible part of the process — but the briefs are more important.

I don't think anybody would dispute that. And they should have as much time and energy devoted to them as the oral-argument preparation.

BAG: I've been listening to some of your oral arguments recently, and they're generally breathtakingly good. What's it like being on the other side of the bench?

JGR: It's easier, first of all [laughter], at least at the oral-argument stage. I enjoy the arguments very much. I always did when I was a lawyer. But as a lawyer, you've got to be prepared to answer a thousand questions. You might get eighty, you might get a hundred, but you've got to be prepared to answer more than a thousand. As a Justice, you just have to ask whatever you think might help you decide the case. So it's a lot more relaxed being on the asking side of the bench. I remember saying when I was a lawyer, you hope to engage the Court in some kind of a dialogue and a dialogue among equals. So if it's going to be that, both the judge and the lawyer have to have devoted a sufficient amount of time to preparing for the argument. As a lawyer, you hope to be prepared for questions, to understand where they lead, to have thought several moves ahead, so that you can answer correctly, rather than just sort of on the spur of the moment. And as a judge or a Justice, you should have thought out why you need to know the answer to that question. Sometimes it comes up on the spur of the moment: another Justice asks a question, and another thing occurs to you. It's not like you have to have studied it in advance, but you should know where you're going: Why are you asking that? What are you hoping to find out? And so you do have to prepare as a judge as well. It's a lot less nerve-racking, though, because you can ask stupid questions. It's a lot less harmful than giving stupid answers.

BAG: In society in general, why does it matter how well judges write?

JGR: The opinions are going to be used for lawyers, for other judges — to tell them what the law is. It's an explanation of what the law is. And just like a judge doesn't want to expend all his or her energy trying to figure out what the lawyer is trying to say in a badly written brief, you don't want a trial judge to miss the point of an opinion or to not understand it because it was poorly written. You certainly don't want lawyers, if they're trying to advise clients on how to conform to the law or what the law is . . . you want them to be able to look at an opinion and leave it with some understanding and not just more confusion. And certainly for the future as well. We pick up the books in our chambers, and you get a case from 1872 or whenever it is, and you want to read it and understand what their view of the law was and what the precedent means. And if it is poorly written, sometimes you just kind of throw your hands up and look for something else. That's not good.

BAG: You mentioned the late 19th century. That was kind of the low point of American judicial writing, don't you think?

JGR: Well, you have good writers in every era. And certainly our profession has gone through periods . . . It's the same with contracts. You can look at an old contract, and it's filled with jargon and legalese and *whereas* and *heretofore*, and you just wonder why they didn't just . . . People didn't talk that way, and why they felt compelled to shift into a different language when they were writing a contract . . . And it's the same with opinions: there's a certain style that could be a little confusing, but there were good writers back in that era, just as there are today, and bad ones then, just as there are today as well.

BAG: Who have been your most important teachers of writing?

JGR: It's always the case: the best teachers of writing are good writers who you read, and you kind of absorb it when you read them — someone like a Justice Jackson. You read one of his opinions, and it makes an impression on you — not just the law, but the felicity of expression and the breadth of analogy and reference. And at the same time, it has a very plainspoken approach to it. You don't have to be a lawyer to read one of Justice Jackson's opinions and understand exactly what he's saying. And that's very valuable. Certainly, of the judges I clerked for, Henry Friendly was a brilliant writer and had a way of exposition that just revealed the thought and decision process. If you ever pick up one of his opinions, he walks you exactly through how he reached the result. He says you begin with this, whether it's the language, and it raises this concern, and you pick up this case, and he walks you through, and it's very revealing and very clear. Justice Rehnquist, for whom I clerked — to some extent a very different writing style, but a crisper diction to his language, if that makes sense, and the written word, and yet the same clarity — also taught me a great deal about writing.

BAG: There is kind of beautiful symmetry in Jackson's having had Rehnquist as a clerk and Rehnquist having had Roberts as a clerk. There is this sort of lineage. Did you have the feeling that then-Justice Rehnquist was passing on some things to you that he had learned from Jackson?

JGR: I hope I was attuned enough to pick up what he was trying to pass on, but I think it is the case that law clerks tend to learn a lot about being a lawyer from their judges or Justices. They're young students just right out of law school — impressionable to some extent — and you do

pick up a lot. I certainly picked up a lot from Rehnquist. I hope I did, anyway, and I'm sure he did from Jackson as well.

BAG: What would you identify as the periods in your life when you underwent sort of growth spurts as a writer?

JGR: Oh, gosh, it's kind of hard to say. I think you develop a lot as a writer the more you read. And so whenever I was having a lot of time to read, I think I would have improved a good bit as a writer. I read a lot, as other people do, of course, in high school and college. And the interesting thing is, I think people lose a lot of writing ability when they get to law school because you tend to read a lot of stuff that isn't that well written. And you tend to stop reading other stuff that is well written because you don't have time. You're focused on some badly written cases from whenever or some badly written laws, first of all, and you're not reading anything good. So you tend to start writing not as well as you might have earlier. Maybe law students ought to make sure they have time to read good things apart from the law throughout law school.

BAG: And the casebook method, brilliant as it is, could have some very bad consequences in what it does to people's writing, couldn't it?

JGR: There are in the law some brilliantly written important opinions that people read. And it's an interesting thing. I mean, you can pick up *Marbury v. Madison*¹ — extremely well written. You think, oh, my gosh, it is a 200- or however-many-years-old case. It's going to be tough. It's not; it is good English. And something a hundred years later, you just can't understand what they're trying to say. I'm not a law professor, but those who write the casebooks ought to

¹ 5 U.S. 137 (1803).

spend some time making sure the opinions they put in are well written, too. That will help teach good writing in addition to the substantive law.

BAG: It's probably a little bit of fun to teach Socratically with things like *Pennoyer v. Neff*.² Very opaque and difficult.

JGR: Right. But there again, you expend so much energy trying to figure out what they're trying to say that you can't deal with the legal concepts as much, and I think that's a problem.

BAG: Chief Justice Rehnquist was a stickler about words, wasn't he? He didn't like the word, the nonword, *irregardless*.

JGR: He could be a ruthless editor [laughter] of memos or drafts or briefs, and it's good to know. As a lawyer, you need to know your audience, and if you know there's a word or a phrase or style of grammar that's going to annoy your reader, you want to make sure you don't put it in.

BAG: What are the most annoying things to you when you read a brief?

JGR: I don't have any great fetishes about particular language. It's more lack of clarity that bothers me. If you just sit there and read a sentence and just have to go back and read it again, you do lose . . . I think pacing is so important, whether you're a lawyer writing a brief or a judge reading it. You want to take the judge by the hand and lead them along with some degree of drama to get them to — when you're going to be making the major points — have some degree of anticipation. And if they're slogging through each sentence because it's just not very clear, you're going to lose that, and then it becomes a real chore, as opposed to a pleasure.

² 95 U.S. 714 (1877).

BAG: You mentioned Chief Justice Rehnquist as quite an editor. He was also an occasional editor of oral argument, wasn't he?

JGR: He would stop people if they didn't have quite the right word or were misusing an expression. Yes.

BAG: Is that your style as well?

JGR: No, not really. It kind of depends on, again, the pace of the argument and what's going on. I'm not going to stop in the middle and say someone's used a wrong bit of grammar. No. These analogies are probably not very insightful and maybe a bit trite, but it's like music. If you're listening to music and somebody hits the wrong note, it kind of detracts from it, and you hear it. It's the same way there. If they're making a point, and they just . . . You notice it, and if you notice it, you're not noticing the argument; you're noticing the words. And that's unfortunate.

BAG: What does it tell you when an advocate uses incorrect terminology such as "Justice" Easterbrook or "Judge" Alito?

JGR: I don't put too much weight on that, since a lot of these things are customary, and the customs tend to vary from different parts of the country even. If someone's used to calling Judge Alito "Judge Alito" for 12 years because he's been a judge that long, it's not going to bother me if they say that again. It might bother him more than me. But precision is important. I always . . . when I used to argue cases around the country, would always go out a day early, sit in on a court session, and talk to the bailiff in the courtroom. How do the judges like to be addressed? Do they like to be addressed as "Your Honor"? Do they like to be addressed as "Judge"? And most times the bailiff would say, "Oh, they don't care." Other times, they would say that Judge So-and-So prefers that it's "Your Honor this" or

“Your Honor that.” And when you do it, the judge doesn’t notice anything, and that’s fine. He starts listening to your argument. When you don’t do it, he notices it, for whatever reason, and it’s a distraction. So you want to know that. As a lawyer, you have to be prepared. So to the extent those things — little tiny things — become distractions, that’s not good. And you should try to work them out of the argument.

BAG: Was that part of your regimen as an advocate — to go and listen to some arguments in the court always first?

JGR: Sure. You’d be amazed how much you’d learn. For example, the custom of the court on rebuttal time varies enormously. In our Court, if you don’t save your rebuttal time, you don’t get it. On the D.C. Circuit, when I was there, we’d routinely go over the argument time, and we’d always give counsel a couple of minutes. “You’ve used up all your time, counsel, but we’ll give you a couple of minutes for rebuttal.” Well, that’s a hugely important thing to know because otherwise, if you think they’re not going to give that to you, you would at all costs stop before your time is up. If you know they’re going to give it to you, well, then, you don’t worry about it. It makes a vast difference. So little things like that can be quite important.

BAG: In modern law practice, how does a lawyer balance the time it takes to write really well against the reality of client demands to keep costs down?

JGR: A lawyer doesn’t do it, is my experience. I have never felt comfortable standing up before a court and getting a question and saying, “My client didn’t pay me enough to know the answer to that, Your Honor.” Or writing a brief that some judge is going to put down and say, “Well, that’s not very good,” and having a little thing at the end saying, “This

brief could have been a lot better if the client had only paid a couple of thousand dollars more.” That’s the difference between being a professional and not. You have an obligation as an officer of the court, and regardless of the financial realities, you’re the one standing up there, not your client. And it’s your name on the brief, and you’ve got to be comfortable that that’s a fair reflection of how you want to be regarded as a lawyer. So I think every lawyer does it. If you have an obligation, you put in whatever is necessary to get it done and then hope the client will pay for it.

BAG: But you’re willing to eat some time if it saves your professional reputation.

JGR: I think you have to be. That’s part of what it means to be an officer of the court. You’re not just the client’s representative. You’re there to make sure the court has the information it needs to decide the case as well. And one thing I’ve learned in my short time as a judge is we really do depend on the lawyers — both in giving us straight answers and in presenting straight arguments in the brief. And a slipshod performance because “I only had so much money I could bill or afford to spend on this brief” is a great disservice to the court.

BAG: When you were in practice, how did you go about writing a brief?

JGR: It varied, but in general I would surround myself with all the raw materials — the record in the case, the important precedents, obviously, the statute, the regulations — and put it all there. And I would tend to try to write up a little outline of thoughts. Usually, I tried to do it on a single piece of paper and then just try to move them around a little bit and see what seemed to fit. And at the end of a couple of days, maybe even longer, I’d have this densely packed piece of paper with arrows and X’s out and boxes moved. At one

point, ideally, it kind of crystallizes to — this is the right organization. I guess that's the main point. I would spend a lot of time before I started writing on organization. This is what's going to work. We're going to start with this point, this point, this point, this point, and it folds together this way. And then once I had that all set, I would spend a lot of time writing the facts, certainly before any writing on the law. In other words, I had it organized enough — I knew what facts were going to be important — because I had a sense of the organization, but I needed to get comfortable with the facts before moving on to the law.

BAG: Was that steeping yourself in the raw materials solo work, or would you have associates helping you think through that stuff?

JGR: That also varied. It kind of varied depending upon my own familiarity and comfort level with both the material and with the associate. That first part, I might ask an associate to help with and come to me with his or her idea of what the thing ought to look like in structure. And then I would use that as the launching point to go into that. If it's an area of the law that I was pretty comfortable with and felt I knew it well, then I might ask the associate to do that. If it was one I didn't know very well, I would feel uncomfortable that I wasn't in a position to evaluate what the associate was going to give me. So I felt a greater need to get into the material myself and then get the associate involved at a later stage.

BAG: Was that crystallization moment really the moment you *really* understood what the issues were?

JGR: You know, in some cases, it never happens. Often those are the ones where I didn't win, but there did tend to come a point where it did fit together. Nobody else could look at this piece of paper and have the foggiest idea what it meant.

But for me, it suddenly seemed the pieces clicked in, and that was a structure that made a lot of sense, that had some coherence. It wasn't just point A, B, C, D, and E just strung together, but it had some structure to it the way the argument worked, and it seemed to make sense. I could visualize it with little boxes and arrows. It all was there. And it did seem to click in a way, and provide the bones around which you could do the writing.

BAG: Would you then translate that messy piece of paper into a cleaner outline?

JGR: It's idiosyncratic, but in fact, when I would look at that and it would click, that's the form in which it would click. And I tended to make it, "Oh, this is going to be a smoother outline." I kind of lost the structure. It's almost a three-dimensional kind of thing, and when I could look at that piece and understand where things were going, that was what guided me. And I found that if you tried to make it into something more elaborate or cleaner, as you say, I sometimes lost the structure.

BAG: Then you'd spend a lot of time on the statement of facts in a brief. What are the characteristics of a first-rate statement of facts?

JGR: It's got to be a good story. Every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something, and they're coming together — that's a story. And you've got to tell a good story. Believe it or not, no matter how dry it is, something's going on that got you to this point, and you want it to be a little bit of a page-turner, to have some sense of drama, some building up to the legal arguments. I also think — again, it varies on your forum — but certainly here at the Supreme Court and in the courts of appeals, you're

looking for a couple of hooks in the facts that hopefully are going to be repeated in one form or another later on in the legal argument but also are going to catch somebody's interest. It may not have that much to do with the substantive legal arguments, but you want it to catch their eyes. Certainly here in the Supreme Court, in writing cert petitions, for example, if you're going to be looking at 9,000 of them over the course of a year, you've got to stand out from the crowd a little bit. So you want to put something in there to give them the hooks. And I've seen that with judges when you start talking to them about cases from five or ten years ago. Most of us remember *Marbury v. Madison* and everything else, but otherwise, it's going to be that case about whatever — that case about the coal mine where this happened, or that case about the prescription. But give them some hook, and it kind of helps draw them into the brief and carries them along a little bit.

BAG: Judge Noonan actually has this habit of giving very descriptive and somewhat funny names of the kind you're just talking about to every case on his calendar.

JGR: It's a way to identify it because you're going to have a lot of Title VII cases, so it doesn't do any good to say "that Title VII case." You've got to find some way of trying to bond your reader with the brief. He can pick it up later on and say, "Oh, this is the case about . . ." And it can be something silly. I remember I had a cert petition once with a mine in rural Alaska. It was called the Red Dog Mine. Well, I didn't know why it was called the Red Dog Mine, so you do some research. It's a fascinating story about a guy with his plane and his faithful red dog delivering emergency medicine in a blizzard, and the plane crashes, and the dog dies. You waste a couple of sentences in a brief, but you put

that in there, and it's kind of interesting. Then everybody remembers that. Oh, that's the case about the Red Dog Mine. And they're kind of invested in it, and they want to see how the story ends up, and it gives a little texture to the brief.

BAG: So it's all right to include some facts in a statement of facts even if they don't directly bear on the issue, if it adds a little human interest?

JGR: Oh, I think so. Think of the poor judge who is reading, again, hundreds and hundreds of these briefs. Liven their life up just a little bit in some case [laughter] with something interesting. I'm not saying make something up. But if it's in the course of the narrative and it's not going to be distracting, I think they'll appreciate it.

BAG: You were head of an appellate-practice section of a major D.C. firm. Do you think that appellate specialization is a good thing?

JGR: I do. I know that it's a subject of reasonable debate, but it's the experience I had in the government in the Office of the Solicitor General; that's a group of appellate specialists. It's what I tried to develop at Hogan & Hartson where, building off the work of some great appellate lawyers like Barrett Prettyman, who had established — he wasn't an appellate specialist because he was a specialist at so many other things as well — a focus on Supreme Court and appellate work. I just think it's so totally different from trial work. The skills that are needed to be a good trial lawyer are different from the skills needed to be a good appellate lawyer. Occasionally, you get great people who can do both, and my hat's off to them. I'm just not one of them. And I didn't enjoy the trial stuff as much. I enjoyed the appellate work, and I thought because I enjoyed it, I was better at it than I was at

trial stuff. And people like to do what they enjoy and what they're better at, and so the notion that you shouldn't have an appellate specialization seemed curious to me.

BAG: You once coauthored an article with Barrett Prettyman. That was Judge Prettyman's son?

JGR: Son! Yes, yes.

BAG: What was it like working with him?

JGR: It was a lot of fun, first of all. He had a very infectious enthusiasm about . . . I was about to say about the law, but really about whatever he happened to be doing at the time. He was a rigorous perfectionist. You talk about getting just the right word, just the right punctuation, just the right tone. He taught me a great deal about the importance of practice. One thing I did preparing for oral arguments: I would do countless moot courts early on. For a Supreme Court case, certainly five, maybe as many as ten. I'd do them over and over again, and it paid off enormously in terms of generating familiarity with the types of questions people would ask and also developing a comfort level with answering. You'd give an answer in moot court, and you'd stumbled over a name, a name of one of the parties in the case. Well, then, don't use it. Call him the engineer instead of Mr. Whoever, whose name you can't say. And then you don't have to worry about that. The same thing with any other type of verbal formulation — just get comfortable with it. He taught me the importance of relentless preparation.

BAG: I was listening recently to your argument in *United States v. Kokinda*.³ It was that post-office case.

JGR: Right. Right. Right.

³ 497 U.S. 720 (1990).

BAG: And the first 40 seconds, you nailed it. You seemed to have that first 40 seconds down perfectly. It seemed to have been memorized, but it was delivered very naturally. Do you believe in memorizing just the opening part of the oral argument, the entire oral argument? And then being flexible enough to alter what you're going to say a little bit?

JGR: It kind of follows up on my previous answer. I will tell you I don't believe in memorizing what you're going to say. But when you've practiced it as many times as you need to do, in effect you are memorizing it. You're internalizing it. You're not sitting down and memorizing [as if to say] this is my answer to this question. But if you practice giving the answer to that question 12, 15, 20 times, your mind has got it there, and you may not give it precisely the way you would as if you'd memorized it, as if you'd memorized *The Midnight Ride of Paul Revere* in fourth grade or whatever. But your mind is going to click into that and be able to give it without too much thought about exactly how to formulate it. Now, the opening in the Supreme Court, you're only guaranteed usually about a minute or so, a minute and a half, before a Justice is going to jump in. So I always thought it was very important to work very hard on those first few sentences. You want to convey exactly what you think the case turns on and why you should win — not just the issue in this case is blah, blah, blah. One, they already know that. And two, you're not doing anything; you're not moving the ball if you're just telling them what the issue is. You've got to frame it in a way that makes your main argument, so they understand right from the beginning: the focus is on this particular statutory phrase; the focus is on this particular precedent; the focus is on this particular consequence that'll happen if you don't rule in my favor. And get that

right there at the beginning because it's often a way to guide the questioning. You want to do it in a provocative way, to bring out the question that you want to be asked at that point so that you can respond to it. And then right away you're out of any type of memorized presentation. You're responding to a question, but it's a question that *you* have elicited or planted by the way you opened the case. And it's not the one you're not going to be able to answer, but the one that you are going to be able to answer to get the case off to a good start.

BAG: This may not be perfectly analogous to an oral argument, but I remember watching your opening statement to the United States Senate before the Judiciary Committee. And you never looked at a note — you were looking at the committee members — and I imagine a lot of lawyers consider it to be the most impressive public utterance they've ever heard. Certainly, I think of it that way. And that must have been memorized, but it was delivered very naturally, or did you just rehearse it a lot?

JGR: Obviously, I thought about what I was going to say. But that first day, the senators gave their opening statements first, so you couldn't really memorize it. I didn't know what the first three hours were going to be like — if they were all going to be focusing on one aspect or another aspect or were going to bring up certain things that demanded a response. It would have been very wooden and artificial to give a prerehearsed opening . . . as if you weren't there listening to what they had to say. So I had thought about it. I knew there were some points I wanted to make, but at the same time you wanted to be genuine and respond to what they had had to say and lay out what was your strongest case. A memorized statement that was just given by rote

wouldn't have been very successful. So obviously I knew what I wanted to say and the points that I wanted to make, but it also had to take in what had gone on before.

BAG: So a lot of that was extemporaneous?

JGR: Again, I'd thought about what I wanted to say, but I didn't have a script. I remember them asking me before . . . they said, "For procedures, we need your written statement four days before." And I said, "Well, I don't know what it's going to be because I'm going to be listening to what you say, and I have to react to that." So to that extent, it was extemporaneous.

BAG: Can bad writing lose a strong case?

JGR: It sure can — because they may not see your strong case. It's not like judges know what the answer is. I mean, we've got to find it out. And so when you say can bad writing lose a strong case, if it's bad writing, we may not see that you've got a strong case. It's not that, oh, this is poorly written, so you're going to lose. It's that it's so poorly written that we don't see how strong the precedents in your favor really are, because you haven't conveyed them in a succinct way. Or we don't see exactly how the statutory language works together to support you, because you haven't adequately explained that. Or even simple things: you haven't put it in there. You're telling us about why it should be read this way when we haven't even seen it yet. I've seen briefs like that. You know the statute should be read to this . . . Well, for goodness' sakes, what's it say? Let's start with that. So sure, we're hostage to the language as much as anyone else is, and if Congress doesn't do a good job in its use of language, it makes it hard for us to figure out what they have in mind. If judges who have gone before haven't done a good job in their opinions in explaining

how they're reasoning to reach a particular result, that's going to handicap us. And if the lawyers don't write clearly enough to convey the arguments, it's going to be very difficult for us to get the case right.

BAG: And presumably good writing can win not a complete loser but a questionable case?

JGR: I have been very fortunate as a lawyer to work with some great associates and fellow partners. And I have found that I really have to be on guard when I'm dealing with a good writer because you pick up the draft of a brief, say, or a draft of a memo, and you read it through, and if the writing is good, you put it down, and it sounds right. And sometimes when you go back, it's not right. So it's certainly the case that good writing can cover up some weaknesses. That's for sure.

BAG: How does an advocate at oral argument learn to turn a judge's question into a transition to the advocate's next point? Isn't that a great challenge?

JGR: It is. I have a particular practice approach that is addressed to just that point. I don't care how complicated your case is; it usually reduces to at most four or five major points: here's the key precedent, here's the key language, here's the key regulation, here are the key consequences. You have four or five points. It's called A, B, C, D, and E. And when I'm practicing giving the argument, I'll go through it, and then I'll just shuffle those cards — A, B, C, D, and E — without knowing what they are. Then I'll start again and I'll look down. Okay, my first point is going to be C; and then from point C, I'm going to move to point E; and then from point E to point A. You develop practice on those transitions . . . because that's how it always works, at any appellate court. You can't guarantee the first question you're

going to get is going to be on your first point. It may be on your third point. And everyone has seen this, and it's very awkward for somebody to say after they answer that third point, "And now I'd like to go back to the point I was making." Well, okay, it's not very smooth, and you kind of lose a little bit of traction. If you've practiced giving that argument [on your] third point and then to the first point and then to whatever, you can make those transitions, and it's much smoother. And again, one, it conveys a greater degree of confidence on your part in your presentation — that you're not pausing and saying, "Now I'll go back to something else." It prevents the argument from seeming disrupted, and it makes the argument look fluid no matter what questions you get or in what order the points come out.

BAG: I must have read hundreds of articles on oral advocacy. I've never seen that tip before. I think it's brilliant.

JGR: It's a great way to practice because everybody will practice, okay, points 1, 2, 3, and 4; 1, 2, 3, and 4 — and you get so set in that mode. And the first thing that happens, of course, is some judge like myself asks you about point 4 when you get up there, and you think . . . The worst thing sometimes people [say is], "Well, I'll get to that later," which you never want to say. Or in effect you kind of disaggregate the arguments: Okay, I'm going to answer your question on point 4, and then I'm going to go back to point 1, and we're going to go through it all again. And you develop a much more comfortable facility with the whole argument if you've practiced it: point 4, then point 2, then point 3, and then point 1 — because those may be the order in which you get the questions.

BAG: Do you have any other favorite practice tips in preparing for oral argument?

JGR: I don't know if it counts as a tip or not, but it's something that I do both with respect to oral argument and with respect to the brief. And that is before the brief is due or filed, in a little bit of time and comfortably before the argument, sit down with either a layperson or a colleague in your firm or office that has had nothing to do with the case. A non-litigator is what I would look for. And just drop the brief on them and say, "Look, can you spend a half hour — and read this brief and tell me what you think?" And he'll look at it and say, "This is an ERISA preemption case. I don't know anything about that." And you say, "Just read." And if that person can't come back to you after reading through it once and answer two questions — what is this case about, and why should I win? — you need to go back and start over because, yes, your audience is going to be a judge or whatever and someone who knows more about it. But at the same time, they're going to be dealing with a lot of different stuff, and if an intelligent layperson or an intelligent lawyer who is not a litigator and not in that area sits down and says, "It's about ERISA; I don't understand what's going on here," you haven't made it clear enough. It's not clear enough. And the same with an argument. Now, don't give the argument to a layperson. But take five minutes and say, look, in five minutes if you can't explain what's this case about and why should you win, you've got to go back and practice it again. You're too immersed in it, you're too much at the level of jargon, or you don't understand it. So you talk to your parents or your sister or your brother who is not a lawyer. So many times, they'll say, "You've got a case. What's it about?" And you think, "Oh, it's antitrust state

action. It's too complicated. I can't explain it." Then you're not ready to give the argument. Instead, you ought to be able to tell them in simple English — that they don't have to be an expert — exactly what it's about and why you should win. And if they don't leave that case and say, "Oh, I see why you . . ." or "that's not fair, that doesn't make sense," or whatever, you've got to do some more work.

BAG: But a lot of people insulate themselves from that sort of criticism, don't they?

JGR: Well, they do, and you see it in moot courts. You mentioned earlier, it's a great thing: now there are a lot of groups giving moot courts. You're pushing a case for an environmental group, and you look at the moot court, and it's all the people from the environmental groups and they're all . . . No, you want [laughter] . . . you want the people from the other side, the ones who are going to ask the hostile questions, because the judge is certainly going to do that. The judge isn't interested in singing to the choir or being a cheerleader. They're going to probe your position. So if you're going to do a moot court, get people who are not going to be naturally inclined toward your interests. Same thing if you're representing business interests: don't get all the folks from the business groups there; get people from the other side.

BAG: Consumer advocates.

JGR: Yeah, or you can do it at a big law firm because here's somebody who's not going to agree with our position here. Let's put her or him on the case in moot court and we'll get some good questions, and you'll be prepared. And the same with my point earlier about just getting someone who's not involved in the area. Oh, this person's worked in this area for years. He'll know all the tough questions. Well, fine — the

judge hasn't worked in it in years. And what I've seen many, many times are expert lawyers befuddled by the simple question. You're at this abstract level of preparation, and the question is kind of down here. You haven't thought about it. It's not a hard question, but it's one you haven't prepared, because you haven't thought about what somebody just getting into this area might think and how they'd have a problem. So you tend to give a bad answer. Or you tend to give an answer that doesn't help move your case along. You need it, and you see it on our Court with nine judges. We have nine different levels of sophistication in any particular case. One of the Justices may have written 20 opinions in this area over the last 20 years and know it from top to bottom. Another, maybe the first case of its type that the judge or Justice has heard. And you have to be prepared to answer at both of those levels.

BAG: It's a fairly endemic problem, isn't it, in the profession of specialists' not really having enough empathy with non-specialists to be able to communicate as clearly as they might?

JGR: Well, and most judges . . . with rare exceptions, most judges are generalists. And as I said, you may be the world's leading expert in a particular question in patent law, and more power to you; I'm not. And so if you can't translate that expertise down to my level, you're not going to reach me, and it's not going to help you at the end of the day.

BAG: One of my good friends is a writing professor named John Trimble, an English professor, and he came up with a formulation that readers are impatient to get the goods, and they're going to resent having to work any harder than necessary to get them. Do you think that's true of judges?

JGR: I do. That's a more elegant way of putting it than my machete hacking through the overgrowth, but it's the same point. I, as a judge, have a responsibility to try to get the right answer on the law. This brief is going to help me one way or another, and I want to get that help out of it. And if you can't express clearly what your position is, that's not helping me. And if I have to work hard just, say, to understand the facts in a case, again, that's going to impede my efforts and not help them along.

BAG: In practice, did you do much contractual drafting?

JGR: No, I didn't. I did some, but I was usually involved in litigation of one form or another.

BAG: You probably still have a useful opinion on how contractual drafting could be improved.

JGR: I guess it gets back to a point I made earlier. One thing that I think is devastating to effective drafting is the word processor. I've seen so many lawyers that, with the next deal they get, they go back and get copies of the contracts for the last deal, and they press a button, and it prints out, and then they try to modify it. That's not my area of the law, so I don't know it that well — but I'm not saying you should reinvent the wheel every time. But it's good to think about what it is you're trying to accomplish and use the normal words that will get you to that objective. That'll improve drafting, rather than simply building layer upon layer of past transactions.

BAG: How could legislative drafting be improved?

JGR: I think one way would be to stop using it as a veil for disagreement. The reason you have bad language sometimes is because they're trying to find a way for people who have two different objectives to agree on the same language, and that's not a good thing. That just transfers the problem from

the legislature to the court. If you really have agreed on a law and what it should accomplish . . . again, try to use as clear and simple and direct language as possible to achieve that result.

BAG: Do you think contracts and statutes can both be worded in good, idiomatic English?

JGR: I do. And I think people tend to get a little obsessed with structure to the detriment of language. You see that in statutes: well, we're in clause (a)(5)(3)(ii), and so they've got to do it all still building off of this. Well, at some point, you can end the sentence, and you can start another one. Courts will be able to figure that out just as much as something going down there [pointing downward]. And of course, the process is a handicap. You don't get somebody sitting there saying, "I'm going to write this law. I'm going to add subdivision (x)(3)(14) to the law." And so it just squeezes it in there. That can be an impediment to good writing, and I think complex contract negotiation may be the same as well. I guess it's you don't have a pride of authorship in the whole structure, so no one's really invested in that, and it can lead to great confusion.

BAG: Do you think that it would be wise for more law firms to hire professional editors and proofreaders?

JGR: Well, I'd worry a little bit about a disconnect between substance and the writing. I think it's hard to have somebody come in and say, "I'm good at writing; let me see what you've got, and I'll change it," because writing is a reflection of the underlying substance. You can't have somebody come in and just sort of gloss over it and make it better, because they're going to give it back to somebody who's going to say, "Well, that might read better, but that's not what I meant, or you don't quite have the right point there." So

that disconnect between the writing and the thought I think is a problem.

BAG: As a practitioner, did you ever encounter court rules that made it hard to write a compelling brief?

JGR: I'm trying to think. I always had problems with some court rule or another. Sometimes they impose a structure that doesn't really make a lot of sense in a particular case. You begin with a statement of the case, then a statement of the facts, and you couldn't really quite tell what it was, and it didn't always make sense to me to follow the format.

BAG: Would you ever just add an introduction before that stuff just to make it clear?

JGR: Almost always, to be honest with you. Sometimes had to check and make sure it was all right with them as far as the rules go. There's no petty tyrant with such power than the person in the clerk's office who's going to bounce your brief because it begins with an introduction rather than the required statement of authorities in the case, or whatever. But yes.

BAG: But you never actually had one bounced, did you?

JGR: Oh, sure, sure.

BAG: For putting in an introduction?

JGR: For stylistic liberties of that sort, yes, from time to time. Well, they'd let you refile it after you call it something else or whatever. But yes. Particularly in a brief, I think an introduction is different than a summary. It's almost never, you know, "In part one I'm going to say this, and in part two I'm going to say this, and in part three I'm going to say this." It's more, "This is a story about what happened when this, this, and this, and the court below said this, and that's wrong because of this and this." And then go into it. But give them an idea of, not a road map, not a summary, but

your main argument. Again, it's sort of the written equivalent of those first couple of sentences of oral argument.

BAG: This is the toughest question that I get from junior lawyers: What's your advice for a forlorn junior lawyer who's trying to hone writing skills but works for a senior lawyer who's mired in jargon?

JGR: The first thing to realize is that lawyers are professionals, and something that comes from being a professional that I have always found about our profession is that your value is not judged on how senior or junior you are. You're both equal. You're both lawyers. And so don't worry about that. Even a lawyer who's mired in jargon, I've found, if you put good writing in front of them, they'll understand that and see it. And I think that's just the thing to do because, from my experience, judges aren't mired in jargon. We don't really like it when we get a brief filled with jargon when clear writing would have done a better job.

BAG: When you approach an oral argument as a judge, to what extent do you have a tentative vote in mind? Is there a kind of rebuttable presumption?

JGR: It really varies on the case. Some cases seem clear. You look at the briefs, and you're just not persuaded by one side, and you are by another, so you do go in with kind of . . . I'm kind of leaning this way. Usually, you've got concerns. I'm leaning this way, but I need a better answer to this problem. Or I'm leaning this way, but I'm worried about this case. Does it really seem to cut the other way? I'm leaning this way, but is it really going to cause this issue? So even when you're tentatively leaning, you have issues that you want to raise that give the other side a chance to sway you. Some cases, you go in and you don't have a clue. And you're really looking forward to the argument because you want a

little greater degree of certainty than, you know . . . hard to tell. Other cases, you go in and there are competing certainties. The language sure seems pretty clear this way. It really leads to some bad results. What are you going to do? Or, yes, this precedent does seem to control, but I think this consequence is too troubling, or the Congress seemed to have a different idea in mind here, and then you've got to work that out. That's a much more typical situation going into argument.

BAG: What is your own tendency as a judge when you have clear language — it's very clear to you that it couldn't have been what Congress contemplated, and an unjust result — but the language is clear?

JGR: Our precedents make it clear we're supposed to go with the language in almost every case because, again, those are the building blocks of our profession and the law. Also, issues of institutional competence enter into it. The language binds me. An assessment of how significant the consequences are is a little more subjective, and you assume that the people who wrote the language were familiar with that as well. So you can't give a categorical answer, but when you get those conflicts, I think it's the time when you do need to pause and consider the institutional issues. What does it mean for you as a judge to say, "The language is clear, but I'm not going to follow it because I don't like where it leads."

BAG: Some years ago, Justice Stevens wrote a crisp, five-paragraph majority opinion that occupied less than one printed page.⁴ What would happen if the Court started doing more of those?

⁴ *McLaughlin v. United States*, 476 U.S. 16 (1986).

JGR: We could all leave earlier in the spring, I guess, than the summer — which is not true. I'm sure that it's harder to write shorter and crisper than it is to write long and dull. I think that would be good. I'm not one that thinks there's a great value in long expositions. Chief Justice Rehnquist certainly was known for his briefer and crisper opinions. You can't always do it. Sometimes you need a little more room to explain things. And you have to remember this is a collegial enterprise, and when you're judging authorship, you have to appreciate that compromises are made to get a court. Somebody says, "Put in this language" to get a vote. It may not be the language I would have chosen, but I'll do it if I need the vote. So it'd be good in some cases. We still do that and Justice Stevens still does it, and I hope more people do. If we can do things succinctly, the more succinctly the better.

BAG: What would happen if a Justice were to tell a law clerk having finished the opinion . . . it's one of these average-length opinions, which seem to have gotten longer over the last 50 years, although I guess they've gotten shorter over the last 20, haven't they?

JGR: I've seen different studies on it, yeah.

BAG: And then to say, "Good job. Now let's cut it in half. Summarize this, and keep the reasoning in."

JGR: Well, I've told the story about one of the drafts I did for Justice Rehnquist. I did my job on it, and he came in and circled a lot of things and said, "Let's put all these things in footnotes." It was sort of like everything other than the topic sentence of each paragraph, and he said, "We can put this all in footnotes." And I said, "Well, all right." So I went back and gave him a draft with all that stuff in footnotes, and he looked at it and said, "Fine," and said, "Now cut

out all the footnotes” [laughter] — which was his way of communicating that we could do it a little leaner, a leaner way, which has very clear benefits. When we look at older precedents or even precedents from more recent times, a lot of the excess verbiage leads to difficulty and confusion, and the leaner you can keep an opinion, the better it is as a guide to the future.

BAG: When you were a circuit judge, did you have the opinion that Supreme Court opinions are overwritten?

JGR: Yes. When I was a lawyer, I had that. If you look at it and you’re trying to tell a client if they can do something, you’ve got a lot more to deal with on a particular issue that often seems to add confusion rather than clarity. I try to guard against that in writing opinions, but I’m not always successful.

BAG: What could appellate courts do to improve their output? For example, do you think it would be wise if more appellate courts had a counterpart to Frank Wagner, your Reporter of Decisions?

JGR: Well, the reporter really imposes guidelines of uniformity to make sure we’re all doing things as consistently as possible, as opposed to actual substantive clarity. One thing that’s struck me as a judge — I don’t know to what extent it has changed or whatever — we tend to have a fair degree of autonomy as authors. Maybe judges ought to be spending a little bit more time making suggestions on each other’s work. We don’t like to do it because we’re afraid others will make suggestions on our work. But we need to maybe carry the collegial effort a little bit more into the drafting as well, because it is an opinion for the Court authored by one Justice, but it’s the Court’s opinion, and we all have a great interest in the clarity of the language.

BAG: When I interviewed your erstwhile colleague Judge Harry Edwards, he suggested that that actually went on quite a bit at the D.C. Circuit.

JGR: It does in the D.C. Circuit. You know, it's a little easier when you're dealing with three people rather than nine, because the first thing that happens when you make a change that somebody suggests is that three people say they don't like it. With three people, it's a little easier to agree on the language, but that may be something we could spend a little bit more time with.

BAG: Do you enjoy reading briefs?

JGR: If they're good. You know, it's an exciting . . . it's a big part of our job. When the case is new, you want to learn what it's about, and there's nothing better than a well-written brief, and it kind of carries you on. You want to learn more. You want to see what the other side has to say. But it can also be quite a downer to pick up a bad brief in a case, and you know you're not getting the right story, you know you're not getting the full story, you know there's more to it than that, and it's a struggle to get to the result. I enjoy it. I have yet to pick up the brief . . . I have yet to put down a brief and say, "I wish that had been longer." So while I enjoy it, there isn't a judge alive who won't say the same thing. Almost every brief I've read could be shorter.

BAG: Why do so many lawyers want to run from their weaknesses and not somehow address them head-on?

JGR: You know, it is exactly as you say. That is what tends to happen. I don't know why. I've often thought that the more effective oral argument, the more effective brief, is one that is more candid about it. I've seen arguments that can be very effective. Somebody gets up and says, "I think the weakest part of my case is this." Or, "If you read this case

this way, as the opponents, my colleagues, my brother says you should, you're going to rule against me. Here's why you shouldn't." Or get it right out on the table. What I don't like, and you see it at oral argument a lot, is — you've seen it in the briefs — they've got Point A, and the other side has got, well, here's a counterpoint, and you've got a reply, and then they've got a counterpoint. Then the person stands up at oral argument and begins, "All right, here's point A." As a judge, you think, you're saying, "We've been through that already. We know that there's a counterpoint, and we know you've got a response to that. Let's get to the cutting edge much more quickly." It does convey the notion that you're afraid of that. You don't want to get to that point, because you may not be as comfortable with your answer there.

BAG: You seem to be moving the Court toward less fragmentation, toward more moving to the point where the Court can speak with, maybe not a single voice, but fewer voices. And the whole Roman-numeral system of nonheadings that were just I.A, II.A, but no informative headings at all, really seemed to take off when the Court was getting especially fragmented in the early 1970s. Do you think it's time to evolve beyond just the Roman numerals and the A's and to put real headings, but not just the facts and then legal discussion, but maybe the kinds of headings that you would find in good journalism that actually say something about this section of the writing?

JGR: Well, it's an interesting idea. I hadn't heard it before. My first reaction is it's going to be hard, because what you're talking about is somehow summarizing what's about to take place, and it's hard enough to get people to agree on those last [laughter] . . . on those four or five paragraphs. To get

them to agree on something as an accurate summary of the nuances might be awfully hard. Maybe that's why it never really caught on, but I understand the benefit of it, sure. It may take a lot of doing to get there.

BAG: Should legal scholars concern themselves with whether lawyers and judges find their writing useful?

JGR: Well, it kind of depends on what they want to do. It's like philosophers who can write abstract dissertations that are going to be understood and read only by other academic philosophers, and if that's what they want to do, fine. If they want to have an impact in the real world, they need to appreciate that that's a different audience. I think it's extraordinary these days — the tremendous disconnect between the legal academy and the legal profession. They occupy two different universes. What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law. Whether it's analytic, whether it's at whatever level they're operating, it doesn't help the practitioners or help the judges. The academics are perfectly free to say, "Well, I'm not interested in helping the judges or the practitioners." But if they are, they're not going to do it with the type of focus they have these days. You can decide whether you want to be an engineer or a theoretical mathematician or a theoretical physicist, and those are two different lines of work. But don't expect, if you're going to be a theoretical mathematician, to have an impact on how people build bridges. And if you want to have an impact on how they build bridges, you need to become more of an engineer.

BAG: Should law schools stop preparing so many theoretical physicists and do more engineers, if the analogy can be carried forward?

- JGR: Well, most people go to law school to become lawyers. I suppose the really smart ones end up being academics and professors, and that's fine. But if the idea is to prepare lawyers and help lawyers, I think they could use a fair amount of teaching along those lines, rather than just abstract theory.
- BAG: Let's go to a very specific question. You're known as a stickler about the distinction between *that* and *which*. Why does it matter?
- JGR: I think it makes for dramatically different reading. I don't know why. I couldn't tell you. But when I see sentences with *which* in them, it slows you down; it's a little more . . . what? It starts to sound like one of those old 19th-century contracts — *which* and *wherefore*. *That* just seems to have a better pace to it. I actually find you can usually get rid of both of them and go with the gerund *that*, again, is better for pacing. But *which* is . . . I usually strike 'em out.
- BAG: And there does seem to be a bigotry throughout the legal profession against the word *that* — even cutting *thats* that are sort of necessary to understanding the sentence. Have you encountered it?
- JGR: I haven't noticed that as much. But I'm not an aficionado of the rules of grammar. Some things strike my ear differently, and that's very important. And I'll spend a lot of time trying to get a sentence to read in a way that seems comfortable and well paced and conveys the meaning and isn't choppy.
- BAG: Is there any good reason, in modern opinions and briefs, that we continue to interlard paragraphs with lots of meaningless volume numbers and page numbers?
- JGR: I'm familiar with your crusade in this area [laughter]. I have to tell you, I'm not on board. It's partly a question of comfort; it's what lawyers are comfortable with. When I see a

reference to a case, I expect to see a citation. It doesn't break up the sentence for me. It would, of course, for a lay reader. I understand that perfectly. It's confusing; they wonder what it is. But for lawyers, I think it's kind of the custom, and it just doesn't break it up for me. Now, maybe that just means I've already bought into a species of jargon that's become comfortable and familiar. I find it more distracting to be looking up and down to the footnotes for the cite and a reference, as opposed to just reading along.

BAG: Well, I do, in fairness, not believe that anybody should be looking at footnotes, so I want to say what the authority is up in the text. But some people will inevitably look down if they see a superscript, I suppose.

JGR: Yeah.

BAG: There's no perfect system, one way or the other. But citations have gotten longer and longer, haven't they? I mean, it used to be that a citation, in the 19th century, would be 12 characters. Now they're 250 characters.

JGR: Yeah, that is distracting to me. And I don't like the stuff where it's got four different systems in which you can look up this case. That is distracting. And I find the Internet-type cites obscene. You just look at all those letters strung together, and it's just a distraction. But yes, the more succinct the better.

BAG: Are you still, yourself, learning about writing?

JGR: Oh, sure. And again, the only good way to learn about writing is to read good writing. So you have to keep up with that. And I'll see it in the briefs. I'll read good briefs, and I'll understand, that's a good brief. And you'll try to think back at exactly what it was that made it a good brief, and the sentence structure, and how it flowed together. And to a certain extent, your mind internalizes that. That's why I've

always said the only way to be a good writer is to be a good reader. You can't do it consciously. You can't say, "This is how you need to structure a sentence." But your mind structures the words and it sees them, and when you try to write them again, they tend to come out better because your mind is thinking of what was a pleasing sentence to read and remembers that when you try to write. So yes, you hope to get better, and you can get worse. I mean, you read a lot of bad stuff [laughter], and your sentences and your paragraphs are going to get worse. So it's important.

BAG: What nonlegal material do you read?

JGR: It varies. I like to read historical biographies, just because I find those interesting. I've been reading a lot of biographies of Chief Justices and learning a lot about them. I like crime fiction — things like that. And again, whatever type of thing you're reading, you can tell good writing. It's a word I've used a lot because I think it's important: good pacing. You can see that, whether it's a thick biography of one of the founding fathers or the latest by Elmore Leonard or something. The pacing — bringing the reader along at the particular speed you want, for the effect you want — is, I think, very important.

BAG: So when you're reading something as a professional rhetorician, you kind of step back and analyze even something like the pacing, or at least you're aware of it?

JGR: You're certainly aware of it. I don't think you step back and analyze it, because they're not doing a very good job of drawing you in if you can do that. But you're certainly aware of it — whether it's the shorter sentences that give you a quicker pace as you're reading through it to get to a particular point as the drama's building up, or a sentence that's going to cause you to pause a little bit more, to slow down. I am conscious of that.

BAG: Chief Justice Roberts, thank you very much for your time.

JGR: Thank you.

Justice John Paul Stevens

BAG: I am here with Justice John Paul Stevens of the United States Supreme Court, and we're going to talk a little bit about legal writing today. I wanted to ask you, first of all: How did you learn to write?

JPS: Well [laughter], you mean at the very beginning in second grade or . . . ?

BAG: What are your earliest memories of writing?

JPS: Well, I guess my earliest memories are when I was in school. I went to a very fine school that was associated with the University of Chicago. I went to their laboratory school and high school, so I got a very good education. My mother was an English teacher when she was young in Michigan City, Indiana, and my father liked to write. He wrote some poetry, and he loved to read, so I absorbed an awful lot from my family. I had three older brothers who are all probably smarter than I am [laughter]. I learned a lot from them.

BAG: Did you do a lot of writing through high school and college?

JPS: Well, I don't really remember much in high school. I did write for the school paper when I was in college and started out as a sportswriter and eventually became editor of the paper and did a fair amount of writing there. And, of course, did a lot of writing in class.

BAG: Do you see yourself today as a professional writer?

JPS: Well, I never thought of it that way, but I guess writing is a major part of our work, and I do write all the first drafts of my opinions. Of course, I get an awful lot of help from my clerks after I prepare a draft, and they make it into a much more readable product when they get through with it. But

I enjoy writing, and that's one reason I stay around this particular job.

BAG: Why is it that you continue to write first drafts of your own opinions?

JPS: Well, that's kind of a long story, but I think a judge learns more about a case if he has to put his thoughts down on paper. It helps you think through a case, and when you write it out yourself, you often learn things about the case that you hadn't realized. It's part of the learning process and decisional process that I think is really quite important.

BAG: Has clerking changed much from the days when you clerked for Justice Wiley Rutledge?

JPS: Yes [laughter], it has. The clerks have a much larger role in all of the work that goes on. I did very little work on Justice Rutledge's opinions. He wrote them all out in longhand ahead of time and did very little work on comments on other Justices' opinions. We only got one copy of a draft in the chambers, and he would read it, and somebody would send it back and join it — whereas now we all will send at least two copies of a draft opinion around to everyone else because every Justice likes to have his law clerk study the case too before he joins the opinion and see if there are any suggestions that might be helpful to the case. And the clerks now play a much larger role in the entire decisional process than they did when I was a clerk.

BAG: Are they perhaps the main contributing factor to the fact that judicial opinions have gotten longer and longer?

JPS: I think so. I think they really are. When a judge writes out an opinion, he can explain what his thinking is and do it in so many words, and that's the end of it, whereas the capable, scholarly law clerks tend to feel they really have to prove everything. And so they will often be much more

thorough in their research and their consideration of all the arguments than the judge who just sort of thinks he maybe has to tell the world what motivated his particular actions, so I really think that's part of it.

BAG: You wrote what must be the shortest majority opinion in recent decades. It's a little five-paragraph opinion on whether an unloaded gun is a deadly weapon.¹ And I think that was in the early '90s. Why don't we have more opinions like that?

JPS: Well, I guess I haven't written very many more [laughter]. Well, the cases, in all fairness . . . most of the cases that we get do involve some complex issues and require fairly careful study, and there are not very many that you can simply say it's either red or green. There are complicated problems.

BAG: Five years before you clerked for Justice Rutledge, he wrote this article on appellate brief-writing — which I've always thought was excellent — in which he argued that it's important for briefs to be interesting. Do you remember that article?

JPS: No, I don't.

BAG: And did he have his clerks read that?

JPS: No, he didn't. I don't remember it at all. I know he felt it very important to answer every argument that had been made, to let the lawyers know that their points had been fairly considered and that we had thought everything through. And one of the consequences of that was his opinions were very long. He wrote opinions which many people thought were longer than necessary, but it was part of his

¹ *McLaughlin v. United States*, 476 U.S. 16 (1986).

feeling about the job — that you had to be fair to the lawyers and explain everything. And he was a very, very thorough workman.

BAG: Why isn't Justice Rutledge remembered any better than he is? Because if you talk to modern lawyers, he seems to be sort of an obscure figure.

JPS: That's true, and of course there's a very interesting biography of Justice Rutledge that came out within the last two or three years by Judge Ferren of the District of Columbia Court of Appeals, which is an excellent, fascinating book. I would commend it to anybody interested in the law. But it is interesting. Of course, he was on the bench for a short time. You know he died when he was in his fifties. He was very young when he died, and it's a tragedy that he did. And that's part of it. He only served a few years.

BAG: If we exclude present Justices, who are your favorite writers ever to have served on the Court?

JPS: Well, I've always admired Justice Cardozo, to tell you the truth. He just had a style that you enjoy reading, as well as being very, very clear. And, of course, the three great Justices when I went through law school and all were Cardozo, Holmes, and Brandeis, and each was quite different from the other. I admire all of them immensely. Holmes's opinions, of course, are sometimes very, very difficult to understand, even though they're carefully thought through and all. But I think if I had to pick a favorite, it would be Benjamin Cardozo.

BAG: Do you have any memories of Justice Jackson?

JPS: Yes, but I didn't know him well. I met him, of course, and I knew his law clerk Jim Marsh very, very well. He was a very good friend of mine. He was a baseball fan too, which made him, for many reasons, very good friends. And Justice Jackson was a very, very charming man.

BAG: Did you admire his writing?

JPS: Yes. He was one of the best writers on the Court. I think most of us agree he was an excellent writer.

BAG: Let's talk about briefing. First of all, in a general way, what would you say is the quality of advocacy today?

JPS: I think it's high. The advocacy is really excellent, for the most part. You know, you have ups and downs, exceptional cases. But I think it's good.

BAG: Do you think it's gotten better since you joined the Court?

JPS: Perhaps, but it's certainly better than it was when I was a law clerk. Well, yes, it has improved because I think particularly the states are much better represented now than they were when I first came on the Court. I think that during my early years there were a number of states who let people argue cases maybe for political reasons, rather than because they were the best qualified lawyer. So on the whole, I guess the average is better now.

BAG: Do the best-written cert petitions . . . and a lot of it has to do with content, of course, and what the Court's interested in, but do the best-written cert petitions tend to be the ones that get granted?

JPS: I'm not sure about that, because it's really the issues that are involved, and sometimes we grant even though the petition is poorly drafted. And if you see an important issue in the case, it is a plus if it's well done because you think the case will be well argued when it gets here. But it's not an absolute necessity at the cert stage. And, of course, we have to be honest that a lot of the cert petitions we do not actually read. I think we all use clerks to give us an awful lot of help in processing cert petitions. I tend to read the cert petition before I vote to grant, but unless one of my clerks has identified it as a potential grant, I usually will not read the original papers myself.

- BAG: If we take the run of the briefs that you generally see, what one prescription could they follow, in general, to be improved?
- JPS: To be improved? Well, for the most part they're doing pretty well right now. The most important thing is to be accurate and intellectually honest in your arguments and state them clearly, but most of the briefs really are of high quality — the ones in the cases that we hear on the merits.
- BAG: Why is it important to identify the weak points in your own argument and grapple with those weaknesses?
- JPS: Well, you want to get the right answer. And you also don't want to give invalid reasons for a conclusion. That's quite important. And there are times when you work on an opinion, you come out differently than where you started at. You recognize weaknesses that you didn't see before.
- BAG: How often does it happen that you'll start on an opinion and realize this just won't write?
- JPS: Not very often, but once in a while it does happen. Once every couple of years at the most.
- BAG: Do you think that there is an appreciable difference in what brief-writers need to be doing at the Supreme Court, as opposed to the circuit level?
- JPS: No, I think it's essentially the same task. No, it's basically the same job.
- BAG: What is the best and most important thing to do in a reply brief?
- JPS: Well, address arguments that you may not have covered in your original brief and respond to arguments that you haven't met the first time around.
- BAG: When you begin considering a case, can you describe your own reading? Do you read a bench memo and then the lower court's opinion? Is it a predictable thing that you go through?

JPS: Most often, I start by reading the lower-court opinion, and then I take the briefs. I read the blue brief, the red brief, and the yellow brief. It's amazing how often that I'd be totally convinced when I read the blue brief, and I read the red brief [laughter], I think, "Golly, I sure had that one wrong." Then I read the yellow brief, and I go back to where I was. And then often you're not sure until after argument. We get a lot of cases in which reasonable people can differ, and there are good arguments on both sides, and I find the briefs are very, very helpful. Of course, then I look at some of the cases that are cited. It's interesting, though, in our cases most often there's only one or two or three of our prior precedents that really affect your decision. It usually turns pretty much on one or two cases. In such a case, of course, I go back and reread the case unless I remember it. Sometimes I don't remember it even though I wrote it [laughter]. It happens that way. And then, of course, I always talk to my law clerks. I don't have them write bench memos, but I always review the cases and my thinking about the case both before argument and after argument. I ask them to come in, and we sit down and talk about what happened at the argument. Then I'll talk to them again before and after a conference. I have a lot of conversation with my clerks to get their reaction to a case. But I like to hear what the lawyers have to say as my first introduction to the case.

BAG: When I was watching arguments in the Court recently, I remember thinking, "Boy, that is a good argument on this side, and it's a good argument on the other side. If I were having to decide, I could go either way and be quite happy with it." Do you often leave the bench after oral argument with that feeling?

- JPS: Sometimes. Most of the time, I'm fairly confident in which way I'll go. But you're right: there are a lot of cases in which you recognize there are reasonable arguments on both sides, and particularly statutory cases. But most of the time, by the time the argument's over I'm fairly well persuaded one way or the other. But as I said, I've changed my mind not only after argument but after conference and after starting to write an opinion. So there's a lot of flexibility and variation from case to case.
- BAG: There seem to be two views on how a judge should write an opinion when the case is very close. One view is that you should write it up as if the opinion that you ultimately come out with, the decision, was inevitable, and it's almost a slam dunk that way. The other view is more in the line of Learned Hand and Henry Friendly.
- JPS: Henry Friendly is the best example: there's this argument, that argument. Dick Posner does that too. He does that in a number of his opinions. I think that's a fine way to write opinions.
- BAG: It almost oversimplifies the decision-making just to write it up as if it were all a slam dunk.
- JPS: Yeah. For some of them you can write it. When you get through with it, there's a choice, and you explain which way you think it should be said, and it can be done rather concisely. But it's appropriate to spell it out, I think.
- BAG: What are your most important tips on oral argument?
- JPS: Be well prepared, of course. Be intellectually honest; don't try and conceal problems that the judges are going to find anyway. And do the best you can to explain why your side should win.
- BAG: How often do you witness intellectual dishonesty?

- JPS: Very rarely, but every now and then you do. A lawyer will either make a statement which, arguably, is designed to create an incorrect impression of the record or of the law. It happens rarely, I'm glad to say, because we do have professionals arguing before us. But on occasion you're a little unhappy with what a lawyer does.
- BAG: Does it ever happen that an intellectually dishonest lawyer will win?
- JPS: If he's right, he may win despite himself. I can remember a case when I was a law clerk that I think was argued by an attorney general of one of the states. It was a tax case in which I remember all the law clerks in advance of the argument thought there's no way in the world that this guy could win — and particularly when he made his argument, that there's nothing to it. And he was so bad that the clerks decided they'd better try and research the problem and figure out what arguments might be made on that side of the case, and they came up with arguments he totally omitted, and he won the case. But that doesn't happen very often.
- BAG: What is the most overlooked little point on oral argument — a nicety that more advocates ought to pick up?
- JPS: I haven't really thought about that. Of course, we're always glad if they can bring a little bit of levity into a serious problem. I really don't know what the answer to that question is.
- BAG: How much does grammar matter to you?
- JPS: Well, it does matter. It really does. And it's perhaps unfair, but if someone uses improper grammar, you begin to think, well, maybe the person isn't as careful about his work, or his or her work, as he or she should be if he doesn't speak carefully. Grammar is really quite important. And we don't encounter grammatical errors too often.

BAG: How often do you see typographical errors?

JPS: Typographical errors? I think there's almost never a brief that I don't find a typographical error in. It's amazing. Even though they're proofread over and over again, there are . . . errors are very common. I mean, especially with the word processor now, the word *it* will not, you know, get the spell-check, even though it should have been *if* or *in* or *is*. And there are a fair number of errors that just creep in and people miss. It's surprising.

BAG: Does it bother you at all?

JPS: No. I always correct them when I read the briefs [laughter].

BAG: Are those little briefs with your marks on them . . . are they kept anywhere?

JPS: Probably in the wastebasket. I certainly don't file them away.

BAG: Do you enjoy reading briefs?

JPS: Well, yes, I do, although sometimes I have to confess that they seem somewhat longer than necessary on occasion. But I do, yes.

BAG: Do you continue to learn new things about writing?

JPS: Yes, I do. I learn from my clerks, to tell you the truth. I'll write something; they'll sometimes rewrite a paragraph, and gee, that sounds a lot better. And I learn a great deal. It's a constant learning process, yes.

BAG: Do lawyers have a professional responsibility to cultivate their writing skills?

JPS: I would think so, yes. They do, and I think they probably perform that responsibility quite well — at least those that appear before us.

BAG: Well, I know you have an appointment to get to, and I want to thank you very much for your time today.

JPS: I've enjoyed it. Thank you.

Justice Antonin Scalia

BAG: Justice Scalia, thank you for agreeing to talk with me today about legal writing.

AS: Glad to do it.

BAG: I wanted to ask you, first of all: Why does it matter how well lawyers write?

AS: Well, much, indeed most, of the communication that lawyers engage in is written. To write well is to communicate well. To write poorly is to communicate poorly. It also matters because to the extent that lawyers don't write well, to the extent they abuse words, to the extent they use them incorrectly, they are making dull the tools of their trade, which is a terrible thing. There are some things that can't be said as cogently, as concisely, and as precisely as used to be possible. For example, you know the word *alibi*, which once had a very precise meaning that lawyers understood, perhaps because lawyers understood Latin in earlier days. But you know its derivation is from the Latin "from there," and it was a very precise kind of an excuse, not a general word for *excuse*, which is what it's used as now, and that's a shame. You used to be able to say "alibi," which meant a whole phrase — "he was somewhere else." One of my pet peeves, what is happening recently, is another word is becoming less useful than it used to be, and that is the word *cite*, *to cite*. In more and more briefs, I find, "He cited to *Marbury v. Madison*." You don't "cite to" a case; you "cite" a case. And when you put in the unnecessary *to*, you make it impossible to use the indirect-object construction, which was possible when you used the direct object; that is to say, you used to be able to say, "He cited *Marbury* to the court."

You can't possibly say, "He cited to *Marbury* to the court." But it's basically illiterate to put in the *to*, and it's a shame. It's dulling one of the tools of our language.

BAG: I take it you don't like extra words in sentences that don't do something.

AS: No. When I edit drafts of my law clerks, most of my work consists not of additions, but of deletions. And when I re-edit my own work, which I do — I go over and over again — I'm usually cutting out words that on reflection seem to me unnecessary.

BAG: How many edits would an opinion typically go through in your chambers?

AS: Oh, my. It depends on how much time I have. They're grabbing it out of my hand, and if I went through it another time, I'd probably make further changes. But, oh, I must go through it at least five times.

BAG: What about lawyers' briefs? How could they be improved?

AS: Well, let me say, first of all, how important lawyers' briefs are. One of the happiest events of my life was when I was sitting on the Court of Appeals for the D.C. Circuit. We had a lot of administrative-law cases, which tended to be long cases with many briefs. And I remember one case we had involving standards for automobiles, and there were a lot of intervenors and amici and whatnot. And I read brief after brief, and I was really getting pretty punchy. And I picked up this one brief, and all of a sudden it really captured my attention. Everything was so felicitously put. It was elegant. It was crisp. You could see where the writer was going, and I said, "Who wrote this brief?" And I turned over the front, and it made me so happy to see that it was one of the best lawyers in Washington, and it made me very happy to know that you could tell the difference. You could

really tell the difference. I am not a facile writer myself at all, and writing is very painful for me. And it's nice to know that it's worth the trouble. When you write well, you capture the attention of your audience much better than when you write poorly.

BAG: Do you think it's often true that the less facile writers, the ones who really struggle with it the most and put the most effort into it, are the best writers?

AS: I think it's probably almost always true.

BAG: It just looks easy.

AS: It just looks easy. Yeah. Yes, I don't believe in the facile writer. Maybe there's one or two out there, but . . .

BAG: What are the main shortcomings of the briefs that you typically see?

AS: Prolixity, probably. There was one lawyer who used to file briefs before our Court for a public-interest law firm. And I would always read his brief because it would end when he had nothing more to say. And if that was halfway the number of pages he was allowed, he would still stop halfway. And that's what a good brief should be like. You don't have to use the 40 pages if that's what you're allotted. Use as much as is necessary to make your point. And the same is true for oral argument, of course. Sit down when you have nothing more to say.

BAG: Do you have the feeling that the best lawyers come in well under the page limits?

AS: Hmm. No, I don't. I think that good lawyers usually have enough to say that it takes up the time limit. I guess especially when you're representing an amicus where you have just one particular issue that you're concerned about, you can afford a shorter brief. But somebody who's arguing for one of the parties wants to make every respectable point.

And no nonrespectable point. Just drop the stuff that isn't strong enough.

BAG: Do you think that Supreme Court briefs are appreciably better than D.C. Circuit briefs?

AS: Hmm. No, I would not say that. And at least when I first came on this Court, I thought just the opposite — perhaps because the circuit bar in D.C. was a more specialized bar. There were experts in various fields of administrative law, transportation, communications, telecommunications, and so forth, whereas the Supreme Court bar is, of course, very unspecialized. And ordinarily it's the lawyer who argued the case below and was lucky enough to get cert granted. It's not usual that a new lawyer is hired to argue before us.

BAG: Why does it matter how well judges write?

AS: Well, just as the lawyer wants to make his point clear, the judge wants to make his opinion clear. And imprecision takes a terrible toll — especially if you're talking about appellate opinions — because the only important part about an appellate case is not who wins or loses; it's not, you know, affirmed or reversed. The important part is the opinion. And if you affirm or reverse for the wrong reason, you've done everything wrong. Especially at the Supreme Court, where we basically only take cases where there are disagreements on the law below, if you haven't made clear what your holding is, instead of reducing litigation, instead of making life simpler for courts and lawyers below you, you've complicated it. So it's very important that judges' opinions be clear. And also important that they be short — as short as the nature of the case allows — because the time gets billed to somebody.

BAG: Haven't Supreme Court opinions gotten progressively longer?

- AS: No, I don't think so. I think if you go back and look at the opinions of the '80s, I think they tended to be longer. That's my impression. Of course, a whole lot of it was legislative history, which I wouldn't do at all. I think they've gotten shorter.
- BAG: But probably much longer than, say, beginning of the 20th century?
- AS: Oh, shorter than Holmes. Sure, sure. But he wasn't always that clear either.
- BAG: Do you think a lot of current opinions could be cut in half with a benefit?
- AS: Some, some. You don't want me to name names, do you [laughter]?
- BAG: No, no [laughter]. I don't think so. In your book *A Matter of Interpretation*, you talk about the difference between a strict constructionist and a textualist. What is the difference?
- AS: The example I always give is, if you were a strict constructionist, you would have to say that the First Amendment does not prohibit government censorship of handwritten mail, because all it on its face protects is the freedom of speech and of the press. A handwritten letter is neither speech nor press, and therefore . . . you know . . . but that's ridiculous. That's not what was intended. What was intended: those two principal manners of communication were stand-ins for the totality of expression, of communication. So anything that is inherently and principally communicative is surely covered by the First Amendment, whether it's Morse code or, hell, burning a flag.
- BAG: So you're not a strict constructionist?
- AS: I am not a strict constructionist, and I think they give a bad name to all of us textualists. You shouldn't interpret it strictly; you should interpret it reasonably.

BAG: Is the term *textualist* the same as an originalist? Or is it possible to be a textualist but not an originalist?

AS: Nonoriginalists claim that they are textualists. They start with the text and, you know, ride off into the sunset. No, an originalist gives the text the meaning that it had when it was adopted — which is what we usually do with statutes, but for some reason some people think we should not do that with a constitutional text. I find that undemocratic. The people never decided anything except what they decided when the text was adopted. And if you want to use that text to impose something else, you should go back to the people first and not have the Court decide that we're now going to give it a meaning that it never bore.

BAG: Let's move from interpretation to the actual drafting of statutes. How could legislative drafting be improved?

AS: Oh, you'd probably have to ask brother Breyer about that. He's more familiar with what happens on the Hill. Some countries, I believe, have a more ordered process of drafting legislation and have a very professional drafting crew that goes over everything very carefully before it's ultimately adopted. I know we have some experts in our Congress, but I don't think they're let into the game early enough or late enough or whatever. Sometimes it's in the interest of Congress to draft poorly. You can pick out cases where it's clear that an imprecise word was used precisely so that both sides could claim victory. But we should do a better job in drafting. Of course, to the degree that the court does not give effect to precise language, but rather, you say, "Well, it's close enough," and they make it mean something that isn't really quite accurate, but they want to expand the effect of the statute . . . to the extent that courts play games like that, they eliminate any incentive for the Congress to

be precise. If the courts are going to do with the language whatever they like, who cares?

BAG: If you were a legislator, would you want to be reading every act itself before you voted?

AS: I would want to. Whether that would be possible in the hectic pace of current legislation, I don't know. May I remind you of when President Carter instructed all of his cabinet secretaries to read all regulations before they were issued. One knew that that was not going to happen. And sometimes the last-minute work done in the Congress is done in conference committee. I would want to read it all, but I don't know how practical a prescription that is.

BAG: How did you learn to be such a bold stylist?

AS: I don't know. I don't know that I learned to be a bold stylist. I just don't think the law has to be dull. I think writing should be interesting to the extent that it can be. And I think legal writing did not follow that prescription. In my earlier days as a lawyer before the regression analysis took over the economic science, economic writing was so much more interesting than legal writing. There was not extensive footnoting; there were just references at the end of the piece. And it was written in a conversational, interesting style. I don't know how we got off that track, but it's a scary thought to think that economists were more interesting than lawyers [laughter]. It doesn't have to be dull. To the extent that the writer can do so, I think he has an obligation to make what he writes interesting, if possible. And that can be done even with some relatively dry subjects. It especially can be done in our legal system. One of the wonderful things about American legal opinions is that they are the opinions of a single identified author, so that he can put some of himself or herself into it. He can generate interest in that fashion.

If you ever read any of the opinions of foreign courts that are drafted by committee, or that are very formulary *whereas, whereas, whereas*, it's terrible, dull, dry stuff. Ours does not have to be that.

BAG: You think conversational is good?

AS: Well, no, there has to be a certain dignity and weight to the opinion, but that doesn't rule out an occasional witticism or a pun or something of that sort.

BAG: What are the characteristics of a good legal style?

AS: Well, number one, be literate. That's pretty basic — such as not saying *cite to* and such as using an apostrophe before a participle that's used as a noun. There is a difference between “I saw him coming” and “I saw his coming.” And increasingly I read briefs where they never put an apostrophe before the noun form of the verb. And that's terrible. Again, it makes it impossible to convey that difference between “I saw him coming” and “I saw his coming.” Beyond pure literacy, avoid legalese. There are all sorts of . . . *the instant case*. I said in one of my speeches or I wrote somewhere: a good test is, if you used the word at a cocktail party, would people look at you funny? You talk about *the instant case* or *the instant problem*. That's ridiculous. It's legalese. *This case* would do very well. Another one of my *bêtes noires* of legalisms is *nexus*. Yeah, *nexus*. What is it? It's Latin for “connection.” You don't make it more scientific at all by calling it a *nexus*. What else, besides being grammatical, avoiding legalese? Oh, avoid trendiness. That's probably the other extreme of legalese. I never use, ever use, nor let my law clerks use such trendy expressions as “the First Amendment informs our consideration of this.” The first time that was used, that was very nice. It was a nice metaphor. But it has lost all of its vividness, and it's just

cant. Another example of the same is “*Marbury v. Madison* and its progeny.” That was wonderful the first time it was used. It is trite now. Terribly trite. Get some other expression.

BAG: What do you think about the law-review author who wrote about “*Roe v. Wade* and its progeny”?

AS: [Laughter.]

BAG: What do you think of footnotes?

AS: I know that you and I differ on this, and you will probably have the last word with your charges, but I think footnotes are useful. For one thing, when you draft a majority opinion for a court, whether it’s a court of appeals or the Supreme Court, the majority circulates, and sometimes there is a dissent. I think a dissent should be answered. Now, not every judge thinks that. There is the magisterial approach. You just move on. Do not even dignify the dissent with a response. I don’t think that’s right, and I think you should answer the dissent. It can ruin the flow of your argument if you have to include . . . Some of the points are quite intricate. If you have to include a lengthy discussion of this or that right in the middle of the progression of your argument, it’s awfully nice to put as much of that as you can in a footnote. The dissent says that this point is incorrect because . . . and then you respond to the dissent in the footnote. That is probably the most useful function of a footnote. And the only other things I put down there are things that are worth saying but, again, would interrupt the flow of your argument. The flow of the argument is very [inaudible]. But a good stylist . . . I use a lot of words that tell the reader where you’re going. You should always signal the reader. You know, two sentences, let’s see: “He was a good writer. He was not always accurate.” You could say

those two sentences, but the reader wouldn't know where you were going. Say, "He was a good writer, but he was not always accurate." And those little words — *but* and *and*, *however* — they send a signal: this is where I'm going now. I'm not hitting this . . . I'm giving the other side. I think good writers use those signals.

BAG: Why do you begin so many sentences with *And* and *But*?

AS: I think partly for that reason: signaling the reader. *And* is just: I'm coming up with another reason for the same point. *But* is: now I'm showing the other side.

BAG: And you like *But* at the beginning of the sentence better than . . .

AS: I love *But* at the beginning of a sentence, and I never put *However* at the beginning — almost never put *However*. I think *However* belongs after the word that it is intended to set apart: "That is not true, however, for such and such," rather than "However, that is not true." "It is not true, however." I would much rather say it that way. Maybe that's a peculiar part of my own style, but I don't think you'll often find sentences of mine that begin with *However*.

BAG: And a lot of lawyers prefer *In addition* to *And*, *Consequently* to *So*, and *Notwithstanding* to *But*. Always the heavy words. It's part of legalese, isn't it?

AS: It is part of legalese. Of course it is. Of course it is. *Beyond the peradventure of a doubt*. That's one of my favorite legalesees.

BAG: You don't say that.

AS: I'd never say *beyond the peradventure of a doubt*. *Peradventure* is one of those words you wouldn't use at a cocktail party. Get rid of it.

BAG: Or if you do, people would drift away from you?

AS: They would look at you funny.

BAG: What do you think of the writing in law reviews?

AS: It has most of the defects that we've been discussing — perhaps in an even higher degree because the lawyers-to-be are showing off their legalese, their legal talents. And of course the writing is much too heavily footnoted — much too heavily footnoted.

BAG: When we first sat down to talk about doing this interview, you mentioned that there's a word to describe people like you who care a lot about words. I think the word is *snoot*.

AS: Yes, and you knew the acronym for that better than I did, and the author who developed the term, neither of which I recall.

BAG: David Foster Wallace.

AS: There you are. David Foster Wallace. But there are people who care a lot about words, about precise use of words, and there are people who don't. And snoots are those who are nitpickers for the *mot juste*, for using a word precisely the way it should be used. Not dulling it by misuse. I'm a snoot. I confess. I guess a more old-fashioned word for *snoot* is *pedant*. I hope I'm not a pedant. I will end a sentence with a preposition. I don't believe in those hobgoblins, but I do believe in not misusing words, in using apostrophes where good English calls for it, things of that sort. I acquired it in part from my father. Can I tell a story?

BAG: Absolutely.

AS: My father was a linguist. He taught romance languages at Brooklyn College. He used to read my opinions when I was on the court of appeals and correct my grammar, and he [laughter] . . . The D.C. Circuit used to conclude all of its opinions with a formula: "For the foregoing reasons it is hereby ORDERED" — solid caps — "that the judgment of the District Court is affirmed" or "is reversed." This used

to drive my father up the wall. He would write me: “Son, you cannot order that ‘it is affirmed.’ You have to use the subjunctive: ‘It is hereby ordered that it be affirmed.’” So I ended up being the only judge on the D.C. Circuit who wrote: “It is hereby ORDERED that the judgment of the District Court be affirmed.” But I don’t think that’s pedantry; I think that is “snoot.” But it is preserving the purity of the language.

BAG: Are there any other snoots on the Court?

AS: I think the biggest snoot on the Court used to be Harry Blackmun, and Harry and I joined forces to try to police the Court’s opinions [laughter]. On the current Court, I think probably David Souter is a snoot. Ruth is too polite to be a snoot, but she cares a lot about proper use of the mother tongue.

BAG: Do you think it’d be a good thing if more lawyers became snoots?

AS: Oh, absolutely. I cannot imagine why any lawyer would not be a snoot. It’s the tools of your trade, man! It’s what you work with. Why do you want to abuse them?

BAG: Why would it be good if more lawyers were familiar with the work of H.W. Fowler?

AS: Oh, well, he is so good at conveying very subtle differences in words, and there are subtle differences. Some people don’t appreciate them. Fowler will almost always tell you just what they are. There’s one word that I’m thinking of . . .

BAG: How about *masterly* versus *masterful*? Is that one you care about?

AS: No . . . *Masterly* versus *masterful*?

BAG: *Masterful* being domineering and a little bit bullying; *masterly* being the master.

AS: That's one that went right by me. Now that you've told me, I will use them properly because it's useful to have that distinction, isn't it? It's useful to have that. Oh, I know what I was groping for: *susceptible*. There's a difference between "susceptible to" and "susceptible of," and someone who's sensitive to English understands that difference. You're "susceptible to" something if you're vulnerable to it: "he's susceptible to colds," or something like that. You're "susceptible of" something if you have the capacity to enjoy it, or it is "susceptible of further discussion." "Susceptible of more precise expression" or something like that. It's quite different from being vulnerable. And the proper use of English conveys those differences.

BAG: You are very persnickety in the . . .

AS: But when you're talking about people who write constantly — and I read these briefs all the time — "cite to," we're light-years away from those subtleties [laughter].

BAG: Right, right. You're very persnickety in your opinions about hyphenating phrasal adjectives. Why is that an important thing to do?

AS: Oh, well, I was on the *Harvard Law Review* in the days when we had a *Bluebook* that was taken very seriously. And we had things called the "unit-modifier rule." It is a rule that really does make a lot of sense, and the example that we always used to use was the "purple people eater." If it's a purple eater of people, you would write it "purple people, hyphen, eater," right? And you would understand that: a purple people-eater. On the other hand, if it was an eater of purple people, the hyphen would be moved over: "purple-people eater." It helps comprehension, and anything that helps comprehension should be embraced.

BAG: Do you agree that our literary heritage in law has, with just a few notable exceptions, been pretty shabby?

AS: Maybe, yes. I think that's probably right. There are not many great stylists.

BAG: Isn't that odd, though, that lawyers are the highest-paid professional writers in the world, as a class?

AS: What can I tell you? Maybe judges aren't [laughter]. Well, Marshall certainly wrote beautifully. And most of his generation did. I think it's in later years that we've adopted cant and legalese. I really think that's come in more recently.

BAG: If you exclude the present Justices, who are the best writers ever to serve on the Supreme Court?

AS: The only one that I really admire enormously is Robert Jackson. He was a wonderful writer, had flow, vividness; he could make a point with such force. A wonderful writer.

BAG: Jackson was considered — I know there was an ABA piece from the late 1940s, early '50s — he was considered to be way too aggressive toward his colleagues in his dissents.

AS: Oh, imagine that [laughter].

BAG: Have you ever noted those criticisms of Jackson?

AS: I didn't realize that. No, I did not realize that. He had hard-hitting dissents, and where hard-hitting is called for, maybe that's why I like him. I don't know.

BAG: Why are good dissents so much more interesting than the majority opinion?

AS: Partly because they can be more the expression of the man or woman who writes them. You don't have to get permission from somebody else to put in a vivid metaphor or something like that. It's up to you, whereas in a majority opinion, you have to often take out portions or phrases that other people don't want to include. A good opinion has personality. And it's easier to have personality when

you're writing for yourself. Somebody can join your dissent if they want to, but you're not obliged as you are when you're writing the majority opinion to come up with something that everybody can go along with.

BAG: Is the Court trying to become less splintered in its opinions?

AS: [Sigh.] No, it's not trying any harder than it ever did. We've always tried to avoid splintered opinions, at least to this extent: that there is always one opinion for the Court. Five Justices signing on to one opinion so that the bar knows what the lesson of the case is. After that, I can't really say that the Court has tried in the past or even tries today to suppress . . . Once you have the five on one opinion, if other people want to write separate concurrences or dissents, who cares? You know which opinion is the opinion for the Court, and you just don't have to read the concurrences or dissents. I happen to be of the old-fashioned view that a judge should not join any opinion that he does not believe is correct on not just the principal point but on all the points of law that are set forth. And I have never joined an opinion that I did not think was entirely correct. And you can criticize me, therefore, not just for the opinions that I've written, but for the opinions that I've joined. I happen to think that that approach not only conforms with our history — after all, we came out of a system in which each judge wrote his own separate opinion, so you knew what each judge thought — but I think it is also necessary in order to hold judges to account. You shouldn't be able to join an opinion that you don't really believe in and then later write an opinion that contradicts that. You shouldn't be accusable of being inconsistent. Not every judge feels that way. Some feel, "Well, if it's close enough for government work, just sign on to it."

BAG: Do you think you can say that dissenting opinions are any more valuable than concurrences?

AS: I think they're more valuable in this respect: the concurring opinion somehow could preserve the integrity of the Court. It's wonderful to go back to *Korematsu*¹ and read Jackson, read his dissent, and you can say, well, at least somebody saw what was wrong here. Somebody saw it. A dissent has that value. I don't really like writing a separate concurrence, and I only write them to maintain my integrity. If I don't agree with the analysis in the majority, I should say so. I don't enjoy writing the concurrences. I don't look forward to it.

BAG: Karl Llewellyn believed that for every canon of construction there's an equal but opposite exception. You don't agree with that, do you?

AS: No. I thought that was really sort of a smart-alecky article Karl Llewellyn wrote. Nobody ever pretended that each one of the canons of construction is fully operative and gives you the answer. I wouldn't say that they contradict each other, but some of them point in different directions, but all of them are true. Sometimes one of them cuts this way with regard to a particular statute, and another one may cut the other way, and it's part of the job of a good judge and a good lawyer to know which should prevail in these circumstances. But that doesn't mean that they're worthless just because they do not always point in the same direction. Gee, if you did that with predictions of weather, where you have different things pointing in different . . . of course! You still have to make the judgment as to what predominates.

BAG: What is the best use of law clerks of the Supreme Court?

¹ 323 U.S. 214 (1944).

- AS: I think it depends on the judge. I think all judges probably use them in different fashions. I think they're essential for getting us through our cert-petition work here. We're doing twice as many cert petitions a year as we were doing when I first came on the Court, and without the summaries of those that are prepared by law clerks, I couldn't get through 8,000 or 9,000 of them a year. In my chambers, at least, my law clerks are the principal people with whom I discuss a case. I don't discuss the case that much with my colleagues. We have one conference after the oral argument; that conference is not lengthy. Where I really hone my view of the case is in discussions with my law clerks, each of whom should know the case four times better than I do because each one of them is assigned just one-quarter of the cases. They know a little bit about the other ones. And I use my law clerks. Most of my opinions, my law clerk will write the first draft. I like to think that the last draft bears my stamp on it, and they write the first draft as they are instructed to write it — do this, this, and this. But I find that it is simply more efficient to have the first draft drafted by a clerk. Not always. Sometimes I do it myself.
- BAG: Do you? How do you get the Scalia imprint on a clerk-drafted opinion?
- AS: Well, I told you: I go through it five times. I go through at least five times, and each time I put things in a slightly different way that seems to me a better way to make the point. I'll alter the order of presentation very often, shorten sections, lengthen sections.
- BAG: Is there a significant downside to clerk-drafted opinions? Not in your chambers, but generally?
- AS: There's a significant downside if you don't work on them. I mean, if you just say, "Ah, yeah," and let it go. "It comes

out the way I want; it says basically what I want it to say.” I think that is a downside, unless you go through it painstakingly and make sure that every sentence, every point, says exactly what you think has to be said — no more, no less. Yeah, I guess it invites laziness, you could say. The law lords in England still don’t have law clerks. You know that every word that appears in one of their opinions was drafted by that justice, by that law lord. That’s enormously inefficient, but it does ensure that kind of hands-on judging.

BAG: I think they also have two secretaries among the ten law lords.

AS: Is that right?

BAG: It’s extraordinary, isn’t it?

AS: Ooph. I didn’t realize that they had so few secretaries. No, it is. And as I say, I think it’s inefficient; I think you can do a better job with assistance, if you use it properly.

BAG: What are your main tips on oral advocacy?

AS: It has nothing to do with brief-writing, tip one. It’s really a quite, quite different skill. Some people are good at both; some aren’t. To begin with, you should know that oral advocacy is important, that judges don’t often have their minds changed by oral advocacy, but very often have their minds made up. I often go into a case right on the knife’s edge, and persuasive counsel can persuade me that I ought to flip to this side rather than the other side. You should not approach it the way you approach a brief. In a brief, you have five good points; they’re all solid points; you present each of them. Point three is not your most important point, but it may be your most complicated point, and you may spend half your brief on point three. In oral argument — that’s one of the benefits of oral argument — you can put things in perspective the way a brief can’t. Say, “Your Honor, we

have five points in the brief, but you know, what we think is the most important, what this case really comes down to . . .” and then boom! Hit your big point. And I’ll think, “Oh, yeah, I read your brief last week, and all I remember from it is that lengthy point three, but that’s not the one that you want to talk about.” You should also cast to the wind any concern about logical order. In a written brief you have to follow the logical order: point one leads to two, to three. Not in oral argument. You want to get up and hit your strongest point first because you may never get off that point. Right? And you don’t want to be spending your whole time on your opponent’s best territory. You want to be talking about your best territory. So it’s a different skill in that regard. The last thing I’ll say is . . . I’ve told a lot of classes this: our courtroom is very, very high. It’s like five times the height of this ceiling, which is already very high. Behind the bench there is a clock, way up at the ceiling. And very often you’ll see counsel standing there at the podium when he’s addressing the Court, and he’ll get a question from one of the Justices, and you see his head going up to look at the clock, and you see going through his mind, “Oh, you know, this fool is wasting my time. If he hadn’t asked this question, I could continue regurgitating my brief.” Very, very foolish. The only time you know for sure that you’re not wasting your time in oral argument is when you’re responding to a question. You know you’re addressing a concern of at least one of the three, or of the nine. Otherwise . . . I argued one case before the Court when I was in the Justice Department, and I had two questions my whole time. It was awful. Face-to-face, you know, I’m just saying what I’ve already said. I’m like, “C’mon, you guys. Give me a hand here [laughter]! How can I help

you? What are you concerned about?” No, I think good counsel welcomes, *welcomes* questions.

BAG: When you go about writing an article or a book . . . I'll let you take a sip first.

AS: I can sip water and listen at the same time, contrary to what Lyndon Johnson thought.

BAG: [Laughter.] How would you describe your writing process? How do you go about writing an article or a book? You get a germ of an idea . . . ?

AS: You've got to outline it first.

BAG: Do you?

AS: Yeah, I always do.

BAG: Does anything happen before you outline?

AS: Well, I think about it a lot. There has to be a lengthy germination process. You just don't sit down cold and say, "I'm going to do this." You think about it. You think about it when you're driving home, when you're exercising at the gym; ideas go through your head. Then, when you think you have all of the ideas, all of the points you want to make, then you sit down and organize them. You say, what's the proper approach, what order to put them in, and so forth. And then just sit down and write it. That's the hardest part. Sit down and write.

BAG: How detailed do you like your outline to be?

AS: Not very detailed.

BAG: No?

AS: No.

BAG: Just the main propositions?

AS: The main propositions.

BAG: And then when you actually sit down to write a draft, do you try to write briskly?

- AS: Mmm . . . I don't write briskly; I write painfully. And I do each paragraph one at a time and try to make the point clearly there and then go through it again and again when I'm done.
- BAG: And leave plenty of time for editing?
- AS: Oh, yeah. To the extent you have it. Sometimes if it's the end of the term — it's in June — and you're writing a dissent, you very often don't have much time. It has to go to the printer.
- BAG: You haven't written briefs in a long time, but is your sense that the best brief-writers have a good polished draft well before the brief is due and then refine it?
- AS: I think the best briefs are written that way.
- BAG: And you must see a lot that look as if they were hastily put together?
- AS: I see a lot, and it is about the brief-writer, about using ungrammatical words, about sloppy citation, all of this stuff. There's a maxim in evidence law or criminal law or whatever: *falsus in uno, falsus in omnibus*. If you show that a witness lied about one thing, the jury can assume that he lied about everything. False in one, false in all. It's the same thing about sloppiness. If you see somebody who has written a sloppy brief, I'm inclined to think this person is a sloppy thinker. It is rare that a person thinks clearly, precisely, carefully and does not write that way. And contrariwise, it's rare that someone who is careful and precise in his thought is sloppy in his writing. So it hurts you. It really hurts you to have ungrammatical, sloppy briefs.
- BAG: Even typographical errors undermine credibility?
- AS: Even typographical errors. It just shows you're not careful. And you're citing cases to me, you want me to believe that these cases are the ones that are really relevant. Well, my

goodness, if you can't even proofread your brief, how careful can I assume you are?

BAG: What are the qualities of a first-rate statement of facts?

AS: Well, you have to get across all the elements of the case that would make a judge sympathetic to your cause, without being obvious about it. But there are ways of getting it in there, and that's certainly one thing that's important. Most important is citations to the portions of the record that support what you've said, and be rigorously accurate about what you say. A mistake in that portion is readily identifiable and will really undermine your credibility.

BAG: Do you have any particular tips on reply briefs? What is the office of a good reply brief?

AS: It's to reply. Don't rehash your main brief. And some people do: "I have 40 pages to play with; I may as well go on again." Don't go on again. Just hit the points that were made by your opponent. And you can summarize in a paragraph what your principal points in the main brief were, but the purpose is just to reply — because I've read your main brief. I don't want to hear the same thing again. You're wasting my time. When you waste my time, I begin turning the pages faster, and I may miss something that you would have wanted me to see. If there are fewer pages, I will pay attention.

BAG: Is there a good reason for having the brief . . . inside front cover . . . having the statement of the issues right there? Is that the most important part of a brief?

AS: Oh, I don't think it's the most important. It's a handy way to remind yourself what the case is about when you're walking into the courtroom and you've read the brief two weeks ago or something. The *framing* of the question is crucial, of course, and sometimes you lose a case because you have

not sought certiorari on the precise point that would have been the point that won for you. I have seen that happen: not included within the question presented. So you make that argument and, you know, too bad.

BAG: Any question about legal writing I should have asked you but didn't?

AS: I have a few things written down here that I thought I would want to say [looking at sheet of paper], and let's see if I've said them all. I've said them all. That means you must have asked all the right questions. But really, the two most important points are what I started with. It makes a difference. It really does make a difference, and as I say, that was my happiest day. "Oh, God, all this blood, sweat, and tears that I devote to writing." You can tell; you can tell. I say how painful writing is. It is painful. But it's a wonderful feeling afterwards. I don't enjoy writing, but I enjoy having written. When you take those pains and you see what you've crafted and you're satisfied that all of it is the best it could be, it's a good feeling.

BAG: Why should individual lawyers or law students who are watching this interview feel as if there really is a strong incentive to work really hard on their writing? Because it does involve a lot of hard work, doesn't it?

AS: It does involve a lot of hard work.

BAG: Is there a payoff?

AS: Yeah, I mean, that's what I said. My attention was fixed on that brief. I'd been reading a lot of other briefs, and they did not grab me the way this one did. That's the payoff. That's the payoff. It is clear. Your paragraphs indicate where they're going. I can follow you: *on the other hand, however, in addition*. It's a road map right through your reasoning, and the person that does not take the pains to

make that clear is losing the attention of his reader. Look, judges have to read an awful lot, an *awful* lot. And you cannot expect them to pay a lot of attention to what you're writing unless you've taken the pains to make it as easy for them as possible.

BAG: Would you say it's pretty well universal that judicial readers are impatient to get the goods?

AS: Oh, absolutely. Judicial readers . . . you know . . . I want to move on to the next brief and the next case, and I just want the kernel of the argument. I want it there in front of me, I want it clear, and I want it fast. And if possible, I want it elegant. But prolixity is probably the worst offense that most unskilled brief-writers are guilty of.

BAG: Do you share with me the view that lawyers seem to fear summarizing their points right up front?

AS: Well, I can't say that, but you see our form of brief always has a summary section. The first section of the brief is a summary of argument. I usually don't read it because I'm going to read the brief.

BAG: Really?

AS: Really. Why would I read the summary if I'm going to read the brief? Can you tell me why I should read it? Should I feel guilty about not reading it [laughter]?

BAG: No, but I always find it easier having read the summary than to start getting into the more embellished version.

AS: I don't know why it's there. Maybe it's there for those judges who don't intend to read the brief [laughter].

BAG: Well, Justice Scalia, I want to thank you . . .

AS: No, you know what it's there for. It's there to refresh your recollection. When you've read it two weeks ago, you can pick it up without going through the whole thing. "Oh,

yes, I remember those points.” As far as I can see, that’s the only justification.

BAG: But is there a part of a brief that you consider most important?

AS: Frankly, I do not put as much weight on the statement of facts as I suppose a lot of people would. It’s the legal-argument section that makes the most sense to me. That has the most weight in deciding the case.

BAG: Herbert Wechsler is reputed to have said that he would spend half his time writing a brief just on crafting the issues. Does that make sense to you?

AS: That makes total sense. That makes *total* sense.

BAG: Why?

AS: That’s what the case is about, especially at the Supreme Court level. We don’t care who wins or loses. We care about what the legal issue is that is going to decide not just this case but hundreds of other cases. So the crafting of that issue, “Look, this is the point of controversy. This is the core of it.” Man, that’s everything. The rest is background music. Sure, point number one is to be very clear about what the issue that you’re urging upon the Court is. And in oral argument, unless you are clear about that, you will not know how to answer hypothetical questions, which some lawyers seem to have an aversion to. They say, “Oh, that is not this case.” I know it’s not this case. Do you think I’m a dummy? I’m asking you this hypothetical question because I don’t care about your case; I want to know how this principle, this issue that you’ve brought before us, is going to play out in hundreds of other cases. I am not about to do justice to your client at the expense of creating injustice in hundreds of other cases that will never come before me, that I will never see. So what the precise issue is and knowing in oral

argument how your resolution of that issue plays out in other circumstances, which is what the appellate judge is always concerned about.

BAG: And an oral advocate ought to be willing to do that in any court, the highest court in the jurisdiction, state supreme court.

AS: Any appellate judge. I think the trial judge cares about who wins or loses this case, and there are probably a hundred ways that the trial judge can affect that in a way that is not reviewable. Once you come to the appellate level, the judge is much less concerned about who wins or loses *this* case than he is about what is the rule of law that I'm going to be laying down in this opinion — at least if it's a significant case. I guess there are a lot of cases that are disposed of sometimes without argument in intermediate appellate courts, where there's really no big issue. But if it's a substantial issue before an appellate court, that court is going to be concerned . . . It's almost like writing a statute when you write that opinion. And you know that lower courts will be hanging on every word in your opinion as though it was a statute, which they probably shouldn't do. But you know it's going to happen — which, by the way, is why you must be very precise and also very brief, because the more you say, the more easy it is to make a mistake.

BAG: But it's never acceptable for an advocate to answer a hypothetical question from a judge by saying, "That's not my case."

AS: Oh, boy, no. I mark them down. Absolutely. Absolutely. I would rule against them if I could, just on that alone [laughter]. No, if I had to grade advocates in addition to deciding the case, what you would really get a "Z" for is saying "that is not this case." You know a hypothetical question when

you hear it. And it's not just having fun; it's central to the work of the appellate court. I want to know the principle of law, which is what I'm about — what I'm doing here is setting forth principles of law — I want to know how this principle of law works out in other situations. You tell me it produces a happy result here. Well, that's fine and good, but what about all of these other situations?

BAG: I take it you really enjoy what you do.

AS: Ahh. Love it. I can't imagine anything I would enjoy more.

BAG: Thank you for your time today.

AS: I enjoyed being here, and I thank you for your . . . I think you're something of a snoot yourself, and that makes me happy.

BAG: Thank you.

Justice Anthony M. Kennedy

BAG: Thank you, Justice Kennedy, for agreeing to talk a little bit today about legal writing. I wanted to ask you, first of all: What are the qualities of a good prose style, a prose style that you admire?

AMK: I think they're probably ones you've heard mentioned often: it must be lucid, cogent, succinct, interesting, informative, convincing.

BAG: Why should it be interesting?

AMK: Because otherwise the reader's mind will wander. One of the great pieces of prose in certainly our legal heritage and really in literary history is the Constitution of the United States. I can read the Constitution of the United States cover to cover. Very few other people can. The Declaration of Independence you can read cover to cover, and it was designed to be read to the troops. Washington wanted it — ordered it — read to the troops in order to get them mad. He wanted them to be mad at George III. It was like an indictment of George III. And it has a dramatic progression to it. The more you read it, the madder you get at George III. The Constitution is a little bit different. The Constitution, I think, was not meant to be read in a single sitting. I've done it just for discipline to see if I could do it, although my mind wanders. And it should be interesting. *Hamlet* I was rereading not long ago, and in one of the early scenes in the first act, the ghost is talking to Hamlet, and the ghost is describing his own murder. And the ghost says something to the effect, "And know, thy noble youth, that the serpent that did sting thy father now wears his crown"; i.e., his uncle was the murderer. And I was think-

ing: a serpent? In the garden? Does this sound biblical? This is right out of the story of Adam and Eve. And was Eve, i.e., Gertrude, really behind this? So here I'm on one of the very early scenes, and my mind wanders; I have to stop. A half hour later, I begin reading the rest. That's really interesting prose. And the Constitution is like that: if I read it, I'll get through the first couple of pages, and then I'll say, "Well, now, I've never seen that before. Now, this is really interesting." So that's good writing.

BAG: Now, you've read *Hamlet* many times, and this was the first time you'd noticed it. Actually, I know the line, but I've never noticed that similarity to the Adam and Eve story.

AMK: It's fascinating. And good writing — great writing — is one which captures the imagination and allows you, the reader, to become part of the text. Now, I think it would be presumptuous and arrogant to say that this is what we can do or should do with judicial opinions.

BAG: How did you come out, by the way, in adjudicating the murder of Polonius last week?

AMK: There was a trial where we had two of the world's finest forensic psychiatrists testifying in a trial in which Hamlet is on trial for his criminal responsibility. Not first-degree, second-degree murder, but just for his mental competence to be tried for the murder of Polonius. And the jury divided six to six, which was wonderful. It was so wonderful, everybody thought it was a fix, but it was not.

BAG: Outside law, what writers do you most admire?

AMK: Shakespeare, Dickens because I read Dickens with my father. My father loved Dickens, and I would go with him when he tried cases, and I would read to him in the car when we went to try cases, when I was a little boy. He would take me out of school, and I would sit at the counsel table.

So we would read Dickens. Trollope is wonderful because Trollope has all of the wit of Dickens, but he's much shorter. The problem with Dickens is that he's too long for the modern audience. Dickens was designed to be read in chapters each night by the fire over a long winter.

BAG: Because they came out in serial magazines.

AMK: Right. And so Dickens was designed to be long. Trollope is much more concise. Hemingway. Faulkner. It just sounds like a Literature Greats course. Solzhenitsyn — I think required reading for law students is *One Day in the Life of Ivan Denisovich*. It just takes one day in the life of a prisoner. One day. And it's absolutely gripping. Writers talk about a sense of time, a sense of place, a sense of voice. This was a sense of place. You're in the gulag for one day, and it's absolutely fascinating. We think that voice is important in the law. What's an example? We had a case — I wrote it — *Edmonson v. Leesville Concrete*.¹ The issue was whether or not in a civil case two private parties — the government's not a party — whether it is lawful and constitutional to excuse a juror on account of the juror's race. It was a black juror who was excused. We'd had earlier cases where the Court made the rule clear for criminal cases. *Batson*² is the leading case. But the question was whether or not this also applied in a civil case, where there are just two private parties. And at the end of the case — there was only a minute or so left — the lawyers made what basically was a standing argument: What about the right of the jurors? And it was a very beautiful statement to the effect that: May it please the Court, this case is not just about my

¹ 500 U.S. 614 (1991).

² 476 U.S. 79 (1986).

client, Mr. Edmonson, or my opposing counsel's client, Leesville Concrete Company. It's about two jurors who are not in this courtroom and who are not parties to the suit. Their names were Willis Simpson and Wilton Coombs (I'll make up those names or something like it). They were excused from the jury without being asked any questions. We did not know if they could be fair. We could not know if they could be impartial, because they were not asked any questions. We did not know their occupation. We did not know their education because they were being excused without being asked any questions. But those jurors, when they went into a United States district courthouse that day, knew or thought that the right of service on a jury was as important as the right to vote. And for them, service on a jury was especially important because their fathers and their grandfathers and their mothers and grandmothers could not have served. And we ask that this Court keep the promise that was made in this courtroom in *Brown v. Board of Education*,³ that people are judged not by the color of their skin but by the content of their character. And it was a very moving presentation, oral presentation. And I convinced my colleagues that this should be the voice for the case. It was the jurors' voice that was the case. So voice was important. So: time, place, voice.

BAG: Would lawyers do well to read more literature?

AMK: Yes. I tell my law clerks, sometimes you can't write anything good because you've never read anything good, and that gets them interested [laughter]. And some of the writers I've mentioned . . . Hemingway is one of my favorites because he's concise. There's a wonderful book about a

³ 347 U.S. 483 (1954).

woman who teaches writing and English to students in Kosovo. She goes with her husband, who's in the Peace Corps, to Kosovo. And she forgets to bring the book. So she's over there to teach English without a book, so she buys Hemingway, *The Old Man and the Sea*. A good choice because it's concise, short, a good way to teach English. But also, the kids related to the old man because the old man was like the country — down on its luck — and the young students related to the old man because they associated him with all the misfortune that had befallen the country. And so the book is about teaching Hemingway. And she, of course, later gets the Spencer Tracy movie. The kids all would come over to see her every night, and it's a beautiful book about teaching writing. It's called *The Hemingway Book Club of Kosovo*.

BAG: I don't know it, but I'll look it up. What is your earliest memory of writing?

AMK: Oddly enough, you'll think that it's rather sad [laughing]. It was when I was 10 or 12 years old, and I marked up statutes because I was a page in the legislature. I wasn't happy in school, so they found me a job as a pageboy, the only pageboy in the California State Senate. And I had nothing to do, so I read bills — and I thought some of them were poorly written. It sounds a little nerdy, doesn't it? And then I worked in my father's law office, and I typed documents for him and copied. So when I was 12, 14 years old, I worked in my dad's law office; he was a solo practitioner. And my father taught me how to write. He was a very good writer.

BAG: Was he maybe your main influence in developing as a writer?

AMK: Yes. I had a wonderful English teacher and history teacher in high school. And when I went to Stanford, I handed in a

short story to Wallace Stegner, who's a great writer. When I handed Professor Stegner my story, I think my hands were shaking, just like when I handed in my first opinion around here to my colleagues. And I remember that event.

BAG: What about law school? Do you think law school tends to help people become better writers or maybe sets them back a little bit?

AMK: I don't think it sets them back at all; I think it helps them because you think about the purpose of writing, and there's always a purpose in writing. Most young lawyers will have their first experience in sending a memo to another lawyer in the firm or to draft a memo to the client, and you have to remember who your audience is. And the audience, if it's the lawyer in your firm, doesn't have a lot of time and is not interested in your displaying everything that you know. That lawyer has to have a quick answer and a clear answer. He wants to be convinced in a short period of time that you know what you're talking about because you have some authority — or that you don't, and then it's an unclear question depending on how you come out. So you look at the audience. Now, in a legal opinion we have different audiences. I write a case much differently if it's a railroad-reorganization case than I do if it's a First Amendment case that the public is generally interested in. And you have various purposes in writing opinions, again varying slightly because of the audience. You must convince the parties that you've understood their arguments. You must convince the attorneys that you've understood the law. And if it's a case of public importance, you have a different and much more difficult objective. You must command allegiance to your opinion. You must command allegiance to the judgment of the Court. This is the common-law tradition. It is quite

different in this respect than the Continental tradition. If you read a judgment of a European court in the civil-law tradition in a civil-law jurisdiction, it would strike you as being rather uninteresting. It is digested. It is almost like a headnote in the West Digest, whereas if you look at an opinion of the Supreme Court, say in a case of public importance, it has a rhetorical, almost an emotive, quality about it designed to instill this allegiance of which I speak. In the last two decades in Europe, we now have the European Court of Justice, the European Court of Human Rights, and other transnational courts. They are beginning to follow the caselaw system, the caselaw method, that we're familiar with in the Anglo-American legal tradition. The only judges that knew that method were the Irish and the English and the Scottish judges on those courts. And I've had the great pleasure of meeting with those judges and talking about writing and talking about writing style in their opinions. And I've told them what I've just told you — that you have to look at the purpose for the opinion. The purpose for the opinion is to convince, ultimately. The only authority our Court has is the respect that's accorded its judgments, and that respect is based on what we write. So writing is of immense importance.

BAG: You like to begin your opinions by going straight to the issue: what is the issue before the Court? Why are issues so important to you?

AMK: I wasn't aware that that's what I did. I'm interested that that's how you look at my cases. In part, I think it's a discipline on your own thinking. I think that an opinion is not an autobiographical or an egocentric exercise. I think the personality of the judge should be submerged. And I think that framing the issue in the legal terms is a way to do that.

It's, again, a discipline on the writer. Much of what we do is a discipline on the writer, I think.

BAG: What about a statement of facts in a brief? What are the characteristics of a really good statement of facts?

AMK: It's a little hard for me to tell brief-writers and lawyers how to argue or write their cases because in part — and this may sound like it's immediately contradicting what I've just said — the personality of the lawyer and of the advocate have a role. You can't wholly suppress your own personality. I don't think you should. I think you should as a judge; I don't think you should as an advocate. So what might be my style might not be yours. But the most important thing in a brief when you state the facts is you must be fair. Now, we know that the plaintiff's brief is going to be slanted for what the plaintiff wants to emphasize, and the defendant's too. We expect that. But I think the reader has to have confidence you're being fair. And one way to do this is to say, "The appellant (if that's who you're representing) is convinced that the district court erred because it did not give sufficient weight to some of the very important facts in the plaintiff's case, and they are these." Now, that's immediately fair because you are acknowledging that what you're doing is you're talking about the plaintiff's side. And of course that should be up in front, and that's very important to get the judge interested in your case. But you can't conclude by allowing a loophole or an opening for your learned friend on the other side to say that you have been selective with the facts. And you say, "These facts are so important that in our respectful submission they wholly overcome what the appellee is going to tell you, which is that . . ." And then you state the appellee's and try to take the wind out of his or her sails in that respect.

BAG: It's a very important thing to do, isn't it, to take the wind out of the sails from the other side — whatever they're going to say?

AMK: Yes, that's a good tactic. And if you're on the other side, then you've got to put the wind back in. That's the fun. Now, I have to be honest. I have read briefs now for 33-plus years, and I can't remember one I couldn't put down in the middle [laughing]. I have to tell you that. On the other hand, I do admire well-written briefs.

BAG: Last week, I was in London interviewing a British judge, who told me that he thought, first and foremost, that for an advocate to be persuasive, the advocate had to be likable. Does that make sense to you?

AMK: Again, it's style. I suppose there are advocates that distinguish themselves by being mean and egocentric, but they're so good that you secretly admire them [chuckling]. Sort of a Richard III advocate: "Was ever woman in this humor wooed? Was ever woman in this humor won?" I mean, he's so absolutely outrageous, you kind of enjoy it. I guess you can get away with that. I couldn't do that.

BAG: So it's a good idea, probably, to be likable.

AMK: Yes, but there is a difference between being likable and being patronizing; being fair and being a sycophant; being balanced and being namby-pamby. There's a difference.

BAG: What is the patronizing advocate like? What are examples of patronizing from the bar?

AMK: There's a line between being respectful and deferential, and being so patronizing that you're ineffective. [In a sarcastic tone] "Well, now, Judge, I'm *not* the one to decide, but let me say that I think what you ought to do is . . ." That's not good advocacy. That's not good advocacy. In fact, sometimes if a counsel tries to be the law professor and give me a

little of this and a little of that, I miss the advocate. Of course, I loved to try cases. Frankly, I miss the courtroom. I loved trying cases. And I loved arguing cases. One time, we had a moot-court competition, and this counsel wasn't doing very well, I didn't think . . . the student. And so I asked him a few questions designed to help his case. What do you call it . . . softball questions. Questions he should have hit out of the park. And he was so suspicious of me that he said, "Oh, no, that's not right." He should have said, "That's right." It helped his case. So finally I couldn't stand it anymore, and I said, "What size suit coat do you wear?" And he looked at me with this frown, and he said, "41 long." I said, "Take it off." And I went off the bench, and I put his coat on, and I put my robe on him, and I put him up on the bench. And I said, "Now, here's how you should answer that question." I just couldn't stand it any longer. Now, many judges who have been trial lawyers feel that way: we wish we were down there. And this was a moot court, so I could do it. And I think it helped get the message across about what advocacy should be. I was never invited back to that school, I don't think [laughing].

BAG: Have you learned things since becoming a judge that you wish you'd known when you were an advocate?

AMK: Oh, yes. And I suppose it's most of the things that I'm telling you about. I've learned that the judges really want your help — especially in this Court. We have very difficult cases. The amount of time we give is so short that it is cruel. My colleague Justice Breyer and I wish we had more than 30 minutes per side. The English judge you mentioned would be horrified that we would have only 30 minutes. For the English, their language, their diction, their orality, their writing style is their great national resource. And to them it is

something close to treason [chuckling] to limit oral argument to 30 minutes. But we have only 30 minutes. We need that help, and I didn't realize before I went on the bench how much the judges really want help from the advocate. It's not pretend. They're not there pretending. They want the advocate's help. And sometimes we are harder on the side which we think is right than the one we think is wrong, because if we think it's right, I might have to write the opinion, and I want help. Now, we're talking, I guess, more about advocacy style than writing, but I think the same applies to briefs.

BAG: Let's talk about oral argument a little bit. What could advocates do to help the Court more than they typically do?

AMK: We sometimes criticize the arguments before our Court. I must say that in the run of cases we have very fine advocates. I think they could understand the dynamic a little bit better. They could understand that when I'm asking a question, I'm sometimes trying to convince my own colleagues, and so they could answer not just me but answer based on what they think the whole Court needs to know to decide the case. And the other mistake they make is they don't realize, on our Court especially, that we've taken the case — because we are a Court of discretionary jurisdiction — we have taken the case in order to give guidance in other cases. And so it's not just if they win or if they lose. What's at stake is what the rule ought to be. And the other mistake is lawyers sometimes speak for their clients and they want to tell — this is especially in the courts of appeals and sometimes trial courts — they want to tell the client what the client wants to hear. I'm not interested in that. Another mistake they make, and it's the same way in writing, is they want to tell us about the easy parts of the case. I'm not

interested in the easy parts of the case. The good lawyer is one who says, “The proposition that we wish this Court to adopt is X. We think that that is the correct rule for this case because justice will be served, and for other cases. We recognize that there are authorities against us on this point. We recognize, in fact, Your Honor, that this is an uphill battle, but we are here to tell you why we think this rule should be adopted.” Now, that’s an honest statement. And then the judge knows where you are going.

BAG: Why should lawyers be willing to answer hypothetical questions?

AMK: Because we ask hypothetical questions in order to test the dimensions, the meaning, the significance of the general rule. And a common mistake is for the lawyer to hear the hypothetical and say, “Well, now, that’s not this case.” Well, I know that’s not this case; that’s why I asked the question. So you have to accept the argument dynamic that the Court sets for you.

BAG: Can you think of any adjustments you’d like to make to Supreme Court practice?

AMK: Yes, I would like longer time for oral arguments because I love oral arguments. And I think it’s cruelly short.

BAG: It is interesting. What explains the reason that American advocates rely almost totally on the briefs with very fore-shortened oral argument, but the British have almost no briefs — at least just kind of a summary of points relied on — and it’s all oral arguments?

AMK: It’s just the opposite. And as you indicate — and I’ve sat on the House of Lords, as a visitor, not voting — the cases will go on for three and four days. Part of the reason is the English judges use the barristers as we use our law clerks. The English judges are learning about the case in part for the

first time, and they will actually say, “Well, let’s read this case.” And they will bring the case down to the bench and read it. And this is a wonderful system, but it’s inefficient. We could not, with our caseload, have that system. We have to be prepared in advance.

BAG: What makes a cert petition really stand out?

AMK: The cert petition, again, has to tell us that there is a systemic significance to this case that’s much greater than most other cases — that our guidance is needed, that our guidance will be helpful.

BAG: Linda Greenhouse and some other commentators who read a lot of cert petitions have suggested to me that it’s actually fairly easy to look at one and tell whether it has much of a chance pretty readily. Is that so?

AMK: It is so in part for this reason: we’ve read a lot of other cert petitions, and we know about this issue. And we’re walking through familiar terrain. And if there isn’t something urgent about the case that is expressed to us at the outset, we know that we’re not going to do it. The discipline with a brief, the discipline with a cert petition, the discipline with a bluebook — and I’ve read thousands of bluebooks — is to continue reading it [laughing] when you know from the first page what you’re going to do. But incidentally, we tell the lawyers that we have read their briefs, and we are honest about that. We have read the briefs, just like with the bluebook. I will read the bluebook from beginning to end, painful though it may be. Although, I might say, some bluebooks are fascinating because the student, if it’s a very good student, is going to get to the issue you want, and you see him getting there, or her, and then when they do, it’s a triumph.

BAG: How could judicial opinions be improved?

AMK: I think it's perhaps presumptuous for me to say that. I suppose by giving the judges more time. When I write an opinion, it's difficult for me to go back and read it before about a year or two. And when I do, I say, "Oh, if I only had inverted that paragraph. Why did I use this phrase at the beginning instead of the end?" I'm very hard on myself — and in part, that's because I go through many drafts before I submit something to my colleagues. I wished I had more time.

BAG: How many drafts do you go through?

AMK: Well, it's a little hard because I do it in snippets. Right when I hear the opinion's assigned, I'll write out what I think should be the key portions, but then I obviously have to discuss the cases and so forth. I tell my clerk what I want written, but I can't read what the clerk writes until I've read my own. Because the clerk spends a long time on it, and if you're on a scale of 1 to 10, he'll be at level 8. And if I haven't written anything, I'm still at level 1. And I won't know the false starts that the clerk made, or the blind alley, whatever the metaphor is, until I've gone down the blind alley or made the false start myself. There are certain things that you think immediately will be the way to decide the case, but that doesn't work. But you have to almost try them yourself before you understand that. So it's very hard to read someone else's writing unless you've written something on it before. Then you know why this suggestion is being made.

BAG: You have some pet peeves as a writer — among which, you don't like adverbs, do you?

AMK: I do not like adverbs. In part, it's because it's a rule that I want to have for myself. A lot of my writing rules are just discipline for myself. I noticed once that Hemingway had no adverbs, or very few, very few. And I think adverbs are

a cop-out. They're a way for you to qualify, and if you don't use them, it forces you to think through the conclusion of your sentence. And it forces you to confront the significance of your word choice, the importance of your diction. And it seems to me by not using the *-l* word . . . or, pardon me, the *-ly* word, you just discipline yourself to choose your words more carefully.

BAG: Probably . . .

AMK: Or "with more care" [chuckling].

BAG: You get better verbs.

AMK: Yes. Or better adjectives, or stronger adjectives: *with more care* is much stronger than *more carefully*. Number one, it's shorter; number two, it's more direct.

BAG: You seem to have an aversion to the word *that*. Is there anything to this? Now, that's just something I've picked up from reading your . . .

AMK: That's interesting. I do. I think it's overused.

BAG: So do you cut some *thats*, but you also use some *thats*. Do you just make a judgment: Can I cut this?

AMK: Yes. I think it makes for a more concise style. It flows more easily if you don't have too many *thats*.

BAG: Something about the sound of that word seems to bug people. It's unfortunate that it's such a common little kernel word in the language, but its sound or whatever it is that . . .

AMK: Yes. I don't like the word *that*. It's unavoidable, and sometimes helpful for a long sentence. I'd have to plead guilty perhaps to being overly cautious about *that*, and it makes the writing too dense. You need to give the reader a break once in a while.

BAG: Do you think there's anything to the view that Supreme Court prose is too congested with citations, given that it's a court of last resort?

AMK: I'm not sure. I don't think we should have unnecessary citations. And maybe it's like word choice: if you're really sure of a proposition and you have a case, cite it. But on the other hand, remember that one of the things we're doing is to try to make the law cohesive, and if there are cases out there that bear on the point, I think it's only fair to cite them. Now, I'm concerned about the number of cases — I look in our libraries where we're having to add walls and shelves for these books — and I once said on the Ninth Circuit that we should have an en banc case and say, "Here are the following cases that you never need to cite to us again." And then cite a hundred of them and say, "Don't cite these to us anymore." But then I wondered if that might be self-defeating, and I'm sure we'd get a petition for rehearing saying, "Well, please at least cite this case." But I have other pet peeves about writing. One is I'm a traditionalist. This is something that I will admit. And I do not like nouns that are turned into verbs: *I task you* or *I was tasked with this assignment* or *I was tasked with this opinion*. A "task" is a noun; it's not a verb. *Impact*. *This impacts our decision*; *impact* is a noun, and it seems to me trendy. I don't like trendy words. Now, the language obviously grows; it can't be static. The beauty of the language is its dynamism and its growth, so I accept that. I don't like the word *grow*: *We're going to grow the economy*. It seems to me that you *grow* a carrot; you don't *grow* the economy. But after a while I have to succumb to some of these things [laughing].

BAG: What do you think about *incentivize*?

AMK: I think *incentivize* is highly objectionable for two reasons: Number one, it uses *-ize*. I do not like *-ize* words, which are also made-up words. And that's also . . . it's a word that reminds me of someone wearing a very ugly cravat.

BAG: [Laughter.]

AMK: And I don't like to use too many commas. I don't think commas should be used after prepositional phrases. I was taught that. *In this case we are deciding . . .* I don't think you need a comma. Now, some teachers — writing teachers — will say that you use a comma where there should be a pause; you hear what you write. And I think good writers hear what they write. Good writers hear what they write. And that's helpful as a signal that maybe you should think about whether a comma should be used. I do not think, though, that this is anything more than a warning; it's not a rule. It's not a rule that you use a comma where there should be a pause; it's a warning that a comma might be used there. *Four score and seven years ago our fathers brought forth upon this continent* There is no comma after *Four score and seven years ago* because it stops the reader. One of the things . . . some of us are speed-readers. I used to do speed-reading contests, and it's the only way I can survive in my profession: I have to read very quickly. If you have strange rules for the use of commas, it makes it much slower reading. And generally I do not think you should use commas after prepositional phrases. I do not think you should begin sentences with *Moreover* or *However* or *But*. I just don't like it. I don't like the word *focus* because it's overused. I just don't like the word, so I don't use it [laughter].

BAG: In an earlier interview, you said that the Supreme Court — and you said something just a few minutes ago similar — we are judged by what we write. Don't you think it would make sense to consider writing ability in the appointment of federal judges?

AMK: I've never had that question. That's very interesting. I don't mean to turn the question around, but let me just test it for

myself. If a lawyer does not enjoy writing, he would not enjoy this Court. We are legal writers, for better or worse. And why would you punish yourself by electing a career where you're required to do something you don't like or you're not good at? So my guess is — I've never thought about the question — my guess is that when the Justice Department is looking at candidates for the appellate bench, they inquire about the candidate's writing style, or the prospective nominee's writing style.

BAG: And if they don't, they probably ought to?

AMK: If they don't, they probably ought to. Now, the reason I guess I was a little hesitant was to say that attorneys who are in practice often don't have time to really work on their writing skills — they have more time on the bench — so it might be a little bit unfair to require it, but you ought to at least warn the candidate. I was taught in my law school in civil procedure that my pleading must be very concise. So one of the first complaints I filed, I'd worked so hard on, it was beautifully concise, and then I was with another plaintiff — there were multiple parties to the action — and the other complaint was just like the kitchen soup: he threw in everything. And I said, "Why did you do that?" He said, "Because I might have missed something." He said that's the judge's job — he can weed all that out. So maybe I shouldn't be saying this to our law students [laughter]. But practitioners will sometimes say they're concerned with the sin of omission. And so they have the kitchen-sink approach, and then they let the judge figure it out. I think that's sad, but I have to recognize that this is one of the things some practitioners do.

BAG: That's a sin in itself, isn't it? That's a sin of commission.

AMK: Yes [laughter].

BAG: Do you think it's fair to say that Supreme Court Justices are among the most influential writers in the world?

AMK: I think that may be true not because they're good writers, but just because they're making decisions that are important. And perhaps that's a good warning to us that we should be good writers for that reason.

BAG: And you as a Supreme Court Justice . . . all the Justices have something that most writers yearn for, which is a built-in readership.

AMK: We have a captive audience. That is true.

BAG: There aren't very many writers who can assume that they're going to get headlines throughout the world many times during the year.

AMK: I sometimes go to authors' conventions, and I know some authors, and I tell them, "You know, I read what you write. Why don't you read what I write?" And they laugh. They are too polite to say, "I'm not interested in what you write."

BAG: Do you think more lawyers ought to see themselves as professional writers?

AMK: I wish they would. I think the profession would be well served. I think they would be well served.

BAG: Well, Justice Kennedy, I'd love to continue this sometime when we have more time because I have a feeling you and I could go on for many hours, but I want to thank you for your time today.

AMK: Well, you're most gracious, and I think this is important because the law lives through language, and we must be very careful about the language that we use.

BAG: Let me ask you one last question. Legalese . . . and when I ask you about legalese, I don't mean terms of art like *habeas corpus* and *collateral estoppel*. I mean *pursuant to*, *in the instant case*, and that sort of thing. Do you have a view on legalese?

AMK: I think we have to be careful not to overuse it. In part, again, it's discipline. We might think we're saying something important when we're really not. It can be pretentious.

BAG: Thanks again for your time.

AMK: Thank you.

Justice Clarence Thomas

BAG: Justice Thomas, thank you very much for agreeing to this interview.

CT: Thank you.

BAG: I wanted to ask you, first of all: What do you admire in a prose style?

CT: Simplicity and clarity.

BAG: Why is it so hard to achieve?

CT: I think it requires a lot of rounds of editing. And in our chambers, for opinions we have fairly intense rounds of edits, and I think you've got to have the discipline to go through a number of intense rounds. And the humility.

BAG: Why humility?

CT: Because if you have a favorite sentence or a favorite paragraph, the tendency is to develop a proprietary interest in it, and you'd like to keep it — “Boy, didn't I say that really well!” And you start admiring your handiwork. And I think sometimes you've got to learn how to cut that stuff out.

BAG: Are you familiar with the phrase, “Murder your darlings,” the things you're really fond of in your prose?

CT: Well, I'm not familiar with that phrase, but I know the concept that if you really like it, then you X that one out first and move on because sometimes you keep those just because they're there.

BAG: In the last term, your opinions were markedly shorter than anybody else's on the Court. Is that something you work to do in these revisions, to cut unnecessary passages?

CT: I didn't know they were shorter, because I've written some long ones too (particularly early on), and a lot of that was, as you come on you think things through, and so you have

to cover a lot of ground. I think they're somewhat shorter now because I've already covered that ground. But a part of it also is that I tell my clerks here, "Look, the genius is having a ten-dollar idea in a five-cent sentence, not having a five-cent idea in a ten-dollar sentence." So we've got to work to sort of flip it because the model that we have used, the effort that we try to make here, is to be able to explain it to a parent who's not a member of the Court, or to be able to explain it to the person at the gas station, say. Or let's say that person ran across an opinion. Could they read that opinion? Not read it in a way a lawyer or judge would read it, but understand it? And I'd love one day for someone at a gas station who is not a lawyer to come up to me and say to me, "You know, I read your opinion, and I don't agree with you." Wouldn't that be wonderful? "I'm not a lawyer, I read your opinion, I understood it, I don't agree with you, but thanks for making it accessible." So we talk of it in terms of accessibility.

BAG: Why is it so important to you that nonlawyers should be able to understand judicial opinions?

CT: Because I don't think that the Constitution is a legal document. I think it's a document for the country. It transcends the legal, and sometimes we can reduce it to legal arguments, but it's far more important than that. Just a couple of quick examples. I was at Gettysburg — I love to go to Gettysburg for a lot of reasons — and there was a park ranger in a huff, sweating, ran up the hill. We were at Little Round Top. And he said, "I need you to sign this opinion" — it's the *FMC*¹ opinion. I said, "Why are you reading this?" And he said, "That's what this is all about." You know? Here's a

¹ *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

guy who wasn't a lawyer — he was clearly a Civil War history buff — and he'd bothered to read it, and it was accessible to him. Similarly, I was in Florida, I was in Jacksonville, just going through the airport, and a deputy sheriff . . . he looked like a deputy sheriff; he had a little midriff going . . . mid-40s, probably . . . He lived out in rural Georgia, northern Georgia. He said that he read all my opinions. And I said, "Wow, that's amazing." Here's a guy who looked like he clearly didn't go to college, who said that "I've read all your opinions." Well, that's accessibility. What if I'd written it in a way that made it inaccessible to him? I'm talking about levels of generalities and negative pregnant and all these sorts of things. And I'm sure there are some opinions he can't fathom, but I think something like a Fourth Amendment or First Amendment opinion should be accessible to him.

BAG: Do you think a lot of lawyers are writing in this specialist jargon and actually believe that their writing is much clearer than it actually is — that it's not accessible, but they actually sort of are deluded into thinking it is accessible?

CT: Oh, I think that we do it up here too. I think that sometimes you can begin to put trappings, and you can begin to dress up opinions in legal jargon or something that we think is erudite. And I think it makes it inaccessible. So when you start trying to get some of that clutter away, I think it sort of opens it up; it's plain. If you look at some of the briefs that are written by people like Bob Bork or our current Chief Justice, they're music to your ears. I mean, you read something that's hard to get through because there's all this legalese and jargon and not well organized or edited, and then you read something by someone who does his job. When I used to write briefs, I always assumed that the judge

had other things to read than what I wrote. And so I wrote it understanding that mine was not the most important thing he would read that day. Now, if you assume that, how would you write it? Would you use all 50 pages? Would you reduce the font so you could hide the fact that you didn't edit it? Would you keep repeating an argument you've made five times? String-cite something that's obvious? You see what I'm saying? It should be obvious to you that people are really busy, and I want to make sure you see this one. So I think, for example, if you have a clear argument that's 20 pages rather than the full 50, that's an easy brief to read: "Boy, I'm going to pick this one up because it's only 20 pages" [laughter], as opposed to, "Look, this person has crammed every square centimeter or millimeter he could find on this page." That's when you say, "My goodness" [laughter].

BAG: My favorite writing teacher, John Trimble, says that he thinks it's virtually universal that readers are impatient to get the goods, and they are going to resent having to work any harder than necessary to get them. I take it you agree with that.

CT: Oh, absolutely. It's not a novel. It's not a mystery novel. People can't think, "I'm Agatha Christie" or something like that. I mean, just say what you've got to say; get it up front. I listen to poor lawyers during oral argument sometimes, and they don't quite get it. Someone asks them a question; they don't answer the question and then explain. I think you sort of front-load the answer; then you give the explanation. I think a brief should be the same way. You know, What do you think? And then explain.

BAG: What's going through your mind when a question is asked at oral argument, and then you start getting words and words and words that you don't know yes or no?

- CT: You mean from my colleagues or from the . . . ?
- BAG: The question from the bench. I'm not saying from you [laughter].
- CT: No, I meant "words and words and words" [laughter].
- BAG: Words and words and words in response to a yes-or-no question.
- CT: Oh, you know what? I feel my sympathies are with the poor advocates. Let me just tell you, I'm very sympathetic with the advocates. I think we ask too many questions, and I think that we have a chance to have back-and-forth about these things, and I think they have 30 minutes. But to answer your question, I think you plead with them. I'm rooting for them to just say, "Yes. May I explain?" I'm just pleading with them not to lead up to it. Just say "yes," or say "no, but I'd like to qualify that," or "I'd like to explain if you'd bear with me." Now, in our Court I think it's unnecessarily hard to get an explanation in, but I think that the oral arguments would be better if people could actually say their piece. I think the wonderful thing about oral argument is that people get to come to the final institution in our system and say their piece. That's the beauty of it all, that we don't settle disputes by beating up each other or fighting. You get to say your piece. And I would love to have them leave this building saying, "I said my piece," because for all practical matter the argument's settled in the briefs. It's a rare case that's left for the oral argument. It's not the crowning moment in our system. It's an important moment, but the real work is in that brief. So I think that this moment could have that wonderful symbolism to it — that I got to say my piece. It bothers me if someone has to leave this building thinking, "I couldn't get my point over," or "I didn't get to say my piece."

BAG: But that must be happening with some frequency given the oral arguments that I've watched lately; the questioning was intense from the beginning.

CT: Well, I think it's unnecessarily intense, and I've said so. This is no secret up here. It was not this way when I got to the Court. I think that it's much more preferable to me that people say that they said their piece than we say we said our piece. We get to say our piece. We're the judges, after all. And I don't see oral arguments as a debate any more than I see your brief, or the brief of the case, as a debate with me. It may be a debate with the other parties or the parties on the other side, but it's not with me. I'm ultimately the person who has to say yea or nay. So I don't see myself as a debate partner or opponent.

BAG: So why is it that you don't ask questions at oral argument?

CT: Too many.

BAG: If it were much lighter and you didn't feel as if you were adding to the cacophony of voices, you might?

CT: Oh, yeah.

BAG: You might ask more questions?

CT: Oh, absolutely. I mean, it wouldn't be rude. I think it's just too much. And I don't normally ask a lot of questions, but it's much easier to move into traffic when people aren't bumper-to-bumper at 60 miles an hour. And I think that that's where we are now, and I much preferred it the way it was when I got here. I think that oral argument should be a conversation. There are nine members of the Court, and they should talk to the person out there. That person isn't your enemy, that person is not a combatant, that person is not a bad person. The person is participating in an important decision-making process. I think they should be treated that way, with respect and the dignity that we expect. I don't

like the back-and-forth, and I've been very clear about that, and I won't participate. I had about 40 arguments when I started out as a young lawyer, and I was never treated this way. If I had, I would've probably had a stroke. I mean, I was so petrified.

BAG: How often does your mind change during an oral argument?

CT: Almost never. You can go whole terms without it ever changing. That's my point. And I'm almost certain that my colleagues' minds don't change in maybe max 10 percent, 5 percent of the cases. Or it does change in 5 or 10 percent of the cases, maybe, and I'm being generous there. And if that's the case, then why are the arguments so intense? And there's got to be some arguments where the questioning is not intense. I think it would make for a better argument. I think it would be better for the people who come up here to be able to say they got their points. I think that's very important. There have been any number of 9-0, 7-2, 8-1 — when you have votes like that, doesn't it suggest to you that that wasn't a very hard case? And on the courts of appeals, there are many cases where there is no oral argument. So if you go with me for a minute, let's just say half the cases are fairly easy, let's say a third; then that would suggest that a third of the arguments should not be intense questioning — there shouldn't be intense questioning — that it should not be an ordeal but rather an experience for the lawyer that it's a participation in a very, very important process. And I would like it to go back to that. And why you see me not participate is, again, normally I don't ask questions. I didn't ask any questions in high school, college, or law school. But even with that, the opportunity to do so without trampling on someone, whether it's your colleagues or the lawyer,

would be there — to not trample on them in the process of participating.

BAG: Did you ever give an argument as an advocate where there were no questions at all from the bench?

CT: Most of them.

BAG: Really?

CT: Yeah. Most of them there were no questions. And I sat here in any number of the arguments early on where we had four cases a day, and there were no questions.

BAG: And was that other extreme more difficult for you, or was it satisfying?

CT: It was more difficult in the sense that you felt like you were carrying the ball. It was satisfying in the sense that you got your point said. And of course you'd like to be saved from yourself sometime, or you'd like to see what they think of your argument. Well, that's just a human need. You can do that without beating up on someone or without badgering them or asking a thousand questions or a hundred questions. You could do that with asking two or three questions. And I loved it. That's the way it was when I got here. Someone will be merciful and ask somebody a question, but it's usually a softball question, and you could see what they were doing. If somebody was nervous, they would calm them down with a fairly routine question because it's not an ordeal. Why should it be an ordeal? Why should you leave here thinking, "I was beaten up"? Why? It's not that kind of process. I wouldn't do it to anybody.

BAG: What is the difference between a good advocate and a superlative one?

CT: I think it goes back to your question about the written product. I think clarity, simplicity, honesty. I've been up here 15½ years; you've seen just about everything. You've seen

just about every kind of case: First Amendment, Fourth Amendment, substantive due process, procedural due process, procedural cases. You've seen it all, and you're now beginning to have so many of your precedents cited back to you. So when someone comes up and they try to give a cute argument, you're talking to the wrong people because the arguments that you're being cute with have their basis in things that we've written — or at least we've thought about it, probably a lot longer and in more depth than most of the advocates. So I would say honesty, and then some flexibility. Some people come up and they have it either on a piece of paper or notes that are rigid, or they have it in their mind. If you look at the really good advocates, they know what their two or three major points are, their central arguments are, and maybe something that they need to tease out a little bit from the briefs, and they stick to it. And they could take you right back to it with all the cacophony. The Chief was like that as an advocate. He was the best. He was very smooth, unflappable, always prepared to the nth degree. Bob Bork was like that, just unbelievably good. Rex Lee, another one. Of course, I didn't see Rex Lee that much. And there are others that are good examples. But again, I go back to what I said: honesty, simplicity, clarity, flexibility.

BAG: How does a lack of integrity manifest itself in an advocate's argument?

CT: Oh, let's take a simple example. Case A almost gets you through your argument. But it doesn't quite get you there. Well, we know that; that's why we granted cert. If you say to me, "This covers it like a blanket," or "This covers it," we know that's not true. That's not advocacy; that's just being dishonest. Now let me give you a way to say it: "The

logic of that covers this, and let me show you how.” In other words, now you’re telling me, here’s a way to write this opinion, just extending this a little bit. Or we ask you, “Do we have to extend this precedent to cover your case?” You say “no.” Well, we didn’t grant cert for you to say no. You say, “Yes, but it’s an easy extension, and it’s a logical, rational extension, and it’s pragmatic for these reasons.” You see what I’m saying? There’s a difference. The first answer, no, you don’t need to extend it, is clearly wrong, and a tinge of dishonesty. And so you lose credibility. And you don’t want to lose credibility. That is the one thing you bring with you. And if you lose it, it’s hard to get it back. I remember when I was arguing cases, I was standing before the court, and we couldn’t confess error, and there was this young man, this prisoner, filed a motion for a writ of habeas corpus ad testificandum to get out and testify to something that was important. And it was important. And the judge asked me, “Now, do you think it’s right that this writ was denied by the court below?” And I said that we cannot confess error. And then I began to give my explanation . . . said, “However, if it were up to me, the writ makes sense, but it is not up to me.” And you could see him almost, again, relieved, wink and sit back. And of course the writ issued; it was nonsensical for it not to issue. But I had a duty not to confess error, but I was not going to come up there advocating with everything in me that it should not issue, because I was going to appear before that judge again. I was a repeat advocate up there. So I mean, you need your credibility.

BAG: Are there ways in which you’ve seen oral advocates actually enhance their credibility?

CT: Oh, yes, simply by admitting that there’s a flaw someplace. However, I think when you give ground, you gain cred-

ibility. When you hold ground that you don't deserve, you do not gain credibility; you lose credibility.

BAG: But a lot of advocates haven't learned to figure out what they can concede, have they?

CT: No, but that comes with experience. I mean, how do I figure out how to concede that, and a way to concede on that habeas corpus writ? I think that the really good advocates, the people who've been up here many times and before the courts of appeal — which I think is a great training ground because there's only three on the panel — I think it's a much better forum to really practice your art or your craft. I think you learn over time. You gain kind of a comfort with it. It's like a jazz musician or something. You get a feel for it. You don't just know the law, but you have a feel for it. You have a feel for what the judges are trying to do. And then you know where you can give a little ground without giving up your case.

BAG: And it's probably like public speaking: there's no substitute for doing it to learn.

CT: That's right. Well, you know, when I — at the risk of boring everyone — I was sworn in as a member of the Missouri Bar on September 14, 1974, and I argued my first case before the Supreme Court of Missouri on September 17, 1974. I have no idea what I said, but it was a wonderful experience because I panicked, I was sick, I went through all the emotions, and I learned how to control it and do my job. And then probably around the thirtieth argument . . . of course I always was nervous, I always stayed up late to prepare, and I had a system for preparing, but what I learned as an antidote for nervousness was preparation and confidence that I am prepared — that I know the facts, that I know the law, and that I have some notes that are not rigid;

they're flexible. The other thing, as I said — I go back to your question — remember, honesty and credibility go hand in hand. I had appeared before the court so often that they knew me, and they had confidence that I would not say anything that I didn't truly think was accurate.

BAG: Did you have any particular mentors in Missouri when you were at the AG's office there?

CT: Not really. We were understaffed and overworked, and we were running all over the place. Probably the greatest mentor . . . and I'm just thinking the reason I know this is because I spent way too much time on this memoir stuff. I'm not doing this again. This is why you should only have one life to live — so you only have to write one memoir. I think of Senator Danforth. The longer I think about it and the more time passes, the better he looks. I mean, he has aged well. Or he has done better in time for me. It's just like a fine wine. He is, the more I think about him . . . and when I met him, he was in his 30s, I was in my 20s, I was cynical — but he never asked us to do anything that wasn't honest. He never asked us to do anything that was not on the up-and-up. And he never was overbearing. Politics never came before the law. I had one incident: I had a case that I had tried and was arguing on appeal involving the low-numbered license plates in the state of Missouri. That's before they became these vanity plates that you paid for. Very prominent people had them in the state of Missouri. And they were arguing, of course, that they had a property right in these plates because they'd been handed down in the family. You'd think that they were Cornhusker season tickets or something. But they brought a lawsuit, and they were very serious about it. And Senator Danforth came to my office, and he said, "What's the story on this?" The

director of revenue had complained that this was going to be a problem if we lost it. And I explained to him what the legal implications were. And he said, "Clarence, this may be good law, but it's bad politics." Well, he took the files overnight, brought them back, and never said another word. That's as close to any involvement on his part. And I thought that was just a wonderful moment. So if you want to talk about a mentor who sort of teaches you how to do the right thing, even when it would be attractive to kind of move things in a different direction, there he is.

BAG: It sounds as if it was more learned by the seat of your pants. You're handling lots and lots of cases; you're out there just arguing three days after being admitted to the bar. What is your advice to a new member of the profession who believes that he or she is not getting the kind of guidance from a senior lawyer that he or she might have?

CT: I think you can find people, even people not in the profession, who can talk to you about honesty and about things of character. The irony is, years later when I was on the Hill, I used to talk to a janitor frequently and all sorts of people. Of course, it's totally fortuitous that I got to work for Senator Danforth. Someone said, "Well, why'd you go to Missouri?" I said, "Well, that was the only job I had" [laughter]. So that made the choice easy. And it's just fortuitous, if not providential, that I had a chance to work with him. But I think that if you have choices, work for the person, not the job. That would be my recommendation. Work for good people. Work for honest people. And I remember years later I did something: I sat down and I looked five and ten years out, you know, people who were five or ten years ahead of me, and said, did I want to be like that person? Not much older, not somebody who's 70 or 80, but

five or ten years out. And that would be the person that I would seek advice from.

BAG: But you've seen a lot of these lawyers. Presumably, you've even seen former clerks of Supreme Court Justices get into this stream-of-litigation practice, and they're on the treadmill that they're expected to be on. No getting off it.

CT: Well, you can always get off. You don't have to stay on. We all had to make those choices. And some of us chose to get off for a variety of reasons. I'm not going to get into all the details, but there were things that were more important than, say, some of the financial rewards. And certainly, in my opinion, I vowed years ago I would never make a Faustian bargain and never trade character for a few dollars.

BAG: You mentioned writing your memoirs. What's it been like working on your memoirs?

CT: Oh, gosh, it's like a death wish. It's a different kind of writing, and it's really hard, and it's dealing with things that you've long forgotten and rightfully so. There's a reason why we forget things. And to have to relive them is not all that easy. And then write about it and then edit it and edit and edit and edit and edit and edit. So I can't tell you how many rounds of editing I've gone through, self-imposed and otherwise.

BAG: Forgive me for even asking: They have not yet been published, is that right?

CT: No.

BAG: You're still working on them?

CT: Mm-hmm.

BAG: So what is the state that they're in as of March 2007?

CT: They're getting there. I'm in the process of cutting them way down, and they're getting there. Oh, it's written. It's just a matter of editing. It's like I said, I'm not saying

anything about editing briefs that I don't practice myself. I'm just editing, and it's a lot of work. I've been up now since 2:30.

BAG: Really?

CT: Yeah. So you just keep cranking away. I don't like it. I can't tell you I like it. But it's just got to be done.

BAG: You say never again on these memoirs. On the other hand, you've got 30 or 40 great years ahead of you.

CT: Yeah, but I'm not writing about them. I don't care what anybody says [laughter]. I'm not writing about it. To be honest with you, I don't really want to write about it anymore. I don't want to write about me anymore. I don't want to talk about me anymore.

BAG: One last question about that. What is the great challenge of composing your own life into a narrative?

CT: The narrative. The remembering. All of it's hard. There's no easy part of it. The remembering, the recording, and the putting it down in some form, and then putting it down in a way that makes it readable. In other words, accessible again. And for an audience that you're totally unfamiliar, at least in the last almost two decades, of dealing with directly, in that way. So it's different, and it's a lot of work.

BAG: Mm-hmm. What do you think is the most important part of a brief?

CT: Oh, I like the summary of the argument. I think that it gives you a preview. It's like giving you, you know, what's going to be on TV next week. If you watch the television program 24, you know what's going to happen next week. Or it says, "Here's what I'm going to tell you." I remember I got that from Justice Black — he would be very upset when someone left the summary of the argument out. Each of us reads a brief differently. I never read the jurisdiction state-

ment or anything like that. I don't read the facts. I go right to what you have to say. And then there are some of the points, to me, I don't care, because you've thought about those. We granted cert for you to answer a particular question. And some people think they need to write these Brandeis briefs. I'm not into Brandeis briefs. We ask a legal question; I want a legal answer. And I would say the summary of the argument.

BAG: Do you think statements of fact tend to be too long?

CT: I don't read them.

BAG: Ever?

CT: I may have. I can't say ever, but I don't as a matter of course read them. I read the court-of-appeals opinion, and that has a statement of facts.

BAG: Before we sat down to this interview, you said that you thought that was the best brief of all.

CT: Oh, I do. I think it is because judges are engaged in the exact same job I'm engaged in. They're not advocating a position. They're not trying to push the law in a particular direction. They're judges. They had some parties before them, they had briefs, and they had to decide, and they had to explain their decision. Same thing I have to do. And so I go to them as coparticipants in this process. And that's not to denigrate the lawyers. But if the court-of-appeals judge has already stated the facts, then I take that and I go on. There was a wonderful brief some years ago. It was an electric-utility case involving these grids. We had an amicus brief by engineers supporting neither side, neither party, explaining the nature of a grid. It was well written. It was a wonderful explanation. It wasn't there to say this or to say that about the legal argument, but "we wanted you to fully understand what a grid was." What a great brief. And I think

of judges as sort of that way. You know, we might not agree, but we have the same job.

BAG: Did the engineers who wrote that just have a feeling that the advocates, the adversaries, weren't necessarily explaining for the Court what the problem was?

CT: That's probably true — that they were so involved in the back-and-forth and using whatever page limitations they had to make their arguments that they were shortchanging the explanation about grids. One says, "I didn't unfairly keep you off the grid." The other says, "Yes, you did." But the engineers said, "Look, here's what a grid is. Electricity doesn't move around. This is how you do it." It was fascinating. It was a wonderful brief.

BAG: And helpful to the Court.

CT: Oh, it was helpful to me. It's the same thing when you get involved in some of these technology cases, whether it's software or hardware, that's fairly complicated — a case involving a patent or something — and you get an explanation. And now, of course they're getting to the point where they even put the explanations or an example of a patent at a website, or they put it on a CD, and you can just observe it on your computer to see how it works. It's really interesting. But again, there is someone who doesn't have an interest or a stake in the outcome, who's just simply saying, "I want you to know; this is how it works." And there's no debate about that. It's a wonderful thing. And that's the way I see judges — just, here's what we think, here's the case, here are the facts, we're not upset, we're not trying to skew the facts in any way. So they're the honest broker in the process.

BAG: What is the difference between a really good court-of-appeals opinion and a not-so-good one?

CT: Oh, my goodness. I think, again, it's clarity. I think it's the ones who set out the facts in a way that are relevant. I think most of them are pretty good. You get some that could be a little better, but I think I'd have to say, in my time up here, most of the court-of-appeals opinions I've seen are just . . . I think there's a lot to be proud of in this system. I think they do a wonderful job. I think these busy district judges who sit down, with all the things they have going on, and they write these opinions . . . you say, When do they get the time? Or these magistrate judges who write, bankruptcy judges . . . I think we may have flaws in the system, but I think it's a wonderful system. And I think the judges a lot of time come in for too much abuse. I try to be respectful to them when I write because I know that it is a lot of work. You just read some of the things that these magistrate judges and these district judges are doing on a daily basis, managing their dockets and things. And you look at some of these courts of appeals and these complicated cases that they're dealing with, and what they do for us is — and this is why we hate it when you skip the court of appeals and you expedite something beyond the court of appeals — they are the winnowing process for us. When we get it, it's refined. They've gotten a lot of the chaff out and the big chunks out of the system, and what we get is a case that's ready to be decided. Sometimes when we don't grant cert on a case, the reason is . . . we say it needs to percolate a little more. We should say it needs to be refined a little more. It needs to go in the mill just a little, and then it comes to us. But we can reach into that process sometimes and take cases prematurely, and they're not ready. But I think the judges do a great job. So I would say cases, most of the court-of-appeals cases, are just fine.

- BAG: Do you find it difficult to take complex problems that come before you, some of the most complex problems in the world, and reduce them to a yes or a no?
- CT: Not really. Because we ask specific questions. We don't ask for all that complexity. We answer a specific question. Some years ago when it was clear that we were going to begin to get cases involving the Internet, I remember spending a summer learning what the heck the Internet was. This was early on. And I had an old computer, and I pulled it apart so I could find out what a BIOS was and what the memory was and a processor and things like that. It's 10, 12 years ago now. Well, actually, it's more — 12, 13 years ago. But the point is simply this: we knew it was coming, so it's time to get ready for it and to begin to understand it. So I think that the cases might be complicated, but you have smart people up here, and we ask not very precise questions, but discrete questions that we would like answered.
- BAG: The first thing that one sees in opening a U.S. Supreme Court brief, just inside the front cover, are the questions presented. How important are they to you?
- CT: I think they're very important. That's the question we ask. I have a little fear sometimes when we change the question presented. But that's what we granted the case on. That's what we vote on. That's what we'll do on Friday. You brought the case here and you said, we petition for certiorari. You said, this is the question I'd like the Court to answer. And as I noted in an earlier conversation, before we went on tape, that I think it's problematic when people have one question presented in the cert petition and then change it in their opening briefs. And some people go so far in the respondent's brief to write another question presented. And I don't know what gives them license to do

that [laughter]. We asked you what we wanted to. This is what you asked, and this is what we granted on, and that's the one you should answer.

BAG: In his final argument before the U.S. Supreme Court, Charles Alan Wright wrote an amicus brief in which I thought the question presented was no good. Before he filed the brief, he showed it to me, and I rewrote the question presented for him. I said, "That's the one you need to ask. That's a much clearer question." And he refused to change it because that was not the one on which cert was granted. And he did the right thing.

CT: That's right. He did the right thing. The time to rewrite that question presented is at the cert-petition stage. We didn't ask the new question you asked. And that's not the one on which we granted cert. And some people try to do that in different ways. They don't change the question presented itself, but they change everything else. They change the question they answer. And that sleight of hand is not well received up here.

BAG: Do you have a view on these very long, convoluted sentences beginning with *Whether* and trying to stuff it all into one sentence in the question presented, as opposed to a couple of short sentences and then asking a shorter, more punchy question?

CT: It doesn't have to be punchy. You can break it up. I've gone through tons of these things, and I don't think it should be some great big, long, indecipherable paragraph. Write two or three things. There's a question, and there are these subquestions. Or there might be three questions, and they're related. And I tend to not like to separate out questions. For example, we grant cert on question two. Well, sometimes one and three were also necessary; it's a part of the

whole. And then we live to regret it. There are some cases, if you go back and you look at . . . just before I got here, you look at the busing cases out of Kansas City. Well, cert should have been granted on everything, probably. But if I were here, that's the way I would have voted. And then, you don't have to answer everything in the Court. You can choose not to answer this question because the case can be decided on the first two questions. But sometimes you run the risk of eliminating a question that you would have answered had it been presented. And I think that risk is too great to do that. But I think I would break them up a little bit and not have real long questions that run a whole page or half a page.

BAG: What's the purpose of the conclusion in a brief?

CT: I think that ultimately you want to tell the Court what you want it to do.

BAG: I've interviewed a couple of former Solicitors General, Ted Olson and Charles Fried. Fried strongly believes that you should say nothing more than *For the foregoing reasons*. Olson believes that that's an opportunity for you to hammer home, briefly, some of the public-policy reasons and to make your pitch one last time.

CT: I would probably be more in favor of Charles Fried. I've already read your arguments. And again, I'm not big on the Brandeis-brief type thing, where you're arguing public policy. If you put the argument section and the summary section . . . if you want to do a little something, fine. If you want to sprinkle a little something in the body of the brief, fine. But I look at the conclusion. If you need to do that, to add a little sprinkling at the conclusion, then you have not done a good job in the body of the brief.

BAG: Should briefs be shorter?

- CT: I think they should be as short as necessary. I think you should pare them down to what you need, not expand them to the page limit.
- BAG: But most people are approaching the page limits, aren't they?
- CT: I would pare them down. A Bob Bork brief — look at some of his. I remember he came up here once on a case, and I think he had 20 pages, beautifully written pages, said what he had to say, and he sat down. Or he stopped writing. Or he may have had more and edited it down to what was necessary. And those tend to be beautifully written briefs.
- BAG: Do you have a preference for printed, single-spaced briefs over the double-spaced type that came off typewriters?
- CT: I don't care.
- BAG: Doesn't matter?
- CT: Not everybody is in a position to afford the finest type. With computers, you can do almost anything now, though.
- BAG: Do you often see what you consider to be an excessive citation of authorities?
- CT: Some people can beat a dead horse until it turns to glue. And I just think that at some point . . . come on, you don't have to give me 20 authorities for an obvious point. You can cite one case to say that statutory construction begins with the words of the statute. One case. Move on.
- BAG: Don't you think judges themselves, and I'm not necessarily talking about your colleagues, but judges generally tend to overcite in their opinions?
- CT: Oh, I don't know. Really, how many times have you read an opinion and gotten beyond the first cite? The main cites. You just don't get into the body of it, and sometimes they cite a lot because a lot of the cases aren't right on point, and you're just riveting it down with all these cites. I understand that, but I'm not going to criticize the judges. But I

think that I don't read all the cites, so it doesn't really matter. It seems like it's unnecessary. It seems to clutter up the text of your brief.

BAG: What do you think of parentheticals with citations?

CT: Hmm . . . that's an interesting one. I'm not real fond of parentheticals. I find them distracting, but some people like them. But with citations, that would be interesting.

BAG: What is your view of footnotes?

CT: I don't care. I don't read them that closely. I think that if it's important, you put it in the text.

BAG: What would you think, Justice Thomas, of a style of subordinating citations — putting citations in footnotes — but never talking in footnotes at all, and saying in the text what the authority is? But making it a more narrative style, but none of the numbers, volume numbers and page numbers and all that gunk out?

CT: Oh, I'm not bothered by the cites in the text.

BAG: You're not?

CT: No, I'm not bothered by that. It's really interesting: every change up here, you develop a rhythm and a way to read something that's already there, and it doesn't bother you; you become accustomed to it. I'm sure there's nothing wrong with driving on the other side, on the right side, of the car, if you get used to it. And you say, well, it might be safer to be on the right-hand side, etc., etc., etc., but to change that, to sort of disrupt patterns . . . but the briefs are fine the way they are. I think there are ways to take the very same format and just sort of clean it up. You can clean up the prose, you can make it a little shorter, you can make it a little tighter. But the format itself really doesn't bother me.

BAG: You have tremendously intelligent law clerks who've already had some clerking experience. In general, what do they most need to learn when they arrive at the Supreme Court?

- CT: I think they just need to go through the repetition of doing the job. They're wonderful. But see, I have a system. This is not learning how to work one-on-one. I have a structured system: you fit in and you get the rhythm during the summer, and I have continuity in the way I do things. And the only thing we have any discussion about is, I make it clear how I want things done, and I do that during the summer. So that way we have a clarity and a sense of how things will be done. And if people don't want to do it, they don't have to stay. And then we never have that discussion again; we can then work as a team. I don't have to go around parading that I'm in charge. So I think with my clerks, they need to just go through the reps, and in my system the editing's built in. The sense that you don't own this product is built in — the sense that we work, we talk, we discuss, that there's no backbiting, that we all keep each other informed. And it's just a wonderful endeavor. They're my little family. They're my kids, and I just really like having them around.
- BAG: What would you hope that they learn about writing over the year with you?
- CT: Oh, I know what they learn. They learn the value of collaborating and editing and being edited — both in a constructive way, recognizing that we all are trying to accomplish the same thing. And by the time they're done, I haven't had a single clerk who leaves and says that being edited didn't help. It's just the opposite: I've learned a lesson that editing is the key to it all, and that other people look at something that you think is clear and they don't see it, and that you can always learn something from the other person. It's wonderful. It's just a human experience, and it requires you to grow up. When you think of the kids, your

kid's number one in everything. Nobody has ever sort of said, you've got to work with other people; this isn't yours. And suddenly you've got to back off. You've got to learn how to work with other people and not have a proprietary interest — it's not yours; it's mine. And it works. They're wonderful; it's just absolutely wonderful.

BAG: Are there some quintessential Justice Thomas edits?

CT: Oh, probably early on. But as time goes on, because of clerk manuals and just so many opinions and working with them, they know. We have simple sentences. You're not fighting anybody. I'm not fighting you. A clerk doesn't hand me something that that clerk did. Nothing comes to me that hasn't been through aggressive editing.

BAG: Already.

CT: Oh, yes. There are three aggressive rounds of editing before it ever gets to me. But see, we start our decision-making process at the cert-petition stage. Everybody knows. All the clerks are involved in the preparation. All four clerks are involved. Before I go on the bench, we have an outline form of the disposition of the case that we've discussed. So when we go on the bench, we already have an outline, if we get the opinion, of how we would do it. That's when we go on the bench for oral argument. Then after, when we go in conference, we have the final-disposition memorandum. We have further discussions about the case. So when we get a draft, when we get an opinion draft, we're already three-quarters down the road — which is just a matter of putting it on paper.

BAG: Is it good for a conservative Justice to have some liberal clerks? Is it good for a liberal Justice to have some conservative clerks to play off ideas against an opposing view?

CT: I don't know. I don't think "liberal" or "conservative" works up here real well. I think that may work across the street a little better. I think there are different approaches to the law. There are people who like these broad, expansive approaches and are a little more loose around the edges than I like to be. And there are people, like me, who like to tack pretty close to what the law says and that document says. I don't think that is liberal or conservative. I don't think when I wrote separately in the medical-marijuana case² that people would say, well, if you're for people having a right to smoke dope, that must be a liberal position. It's neither; it's a Commerce Clause position. And it's just a matter of who makes the decision. I think you are tempting fate if you have someone in your chambers, working this closely with you, who is fundamentally at odds with your approach to the document and to your work. Not disagreeing; we get plenty of disagreement. But the one thing that I won't give ground on is the view that we have to adhere to this document or to this statute. It's not our decision to make. Some people don't think that. They think it's a point of departure, and I don't abide that here. So, no, you have kids with all different views on different things, then that's fine. That's like saying should you have a Catholic priest who is a non-Catholic, just to have some disagreement. You know, you can only be ecumenical up to a point [laughter]!

BAG: Let's go back to your beginnings as a writer. What's your earliest memory of writing?

CT: Sister Mary Dolorosa in second grade. I got three Ds in that class. That's probably my earliest. But my most painful would have to be essays in eighth, ninth grade, where you

² *Gonzales v. Raich*, 545 U.S. 1 (2005).

had the weekly essays. I remember in high school, every — I forget when it was now — every Monday you had to have a one-page essay.

BAG: Were you in Catholic school all those years?

CT: Oh, yeah, I was in the seminary through high school, and I was in Catholic school from the second grade through Holy Cross.

BAG: And what was so difficult about those essays?

CT: You had to do them every week. I mean, what were you doing on Sunday night? You don't want to sit down and do an essay. It wouldn't occur to me to do them on Saturday night. But it was one page, and you had to come up with something every week. And book reports and things like that. And I remember writing them out and learning how to type and typing them, etc. It's just to do it; that's all it was — just to do it.

BAG: In retrospect, was that good training for you?

CT: Oh, it's fabulous training. It was fabulous training. Probably that and Latin translations. Fabulous training, absolutely fabulous. You just got to do it, and I couldn't use the English language very well; I had great difficulty using the English language. So it was very, very painful for me. It was looking up every word and looking up the spelling of every word. It was really not easy. Every word was painful. So I had my little Funk & Wagnalls, the little hard-back cover that eventually just fell off. And I had a thesaurus.

BAG: Can it really be that you had difficulty using the English language?

CT: Oh, yeah. I grew up speaking Geechee. That's that language in the southeast part of the country in the islands, sort of like if you've been to the Caribbean. It's that sort of patois.

BAG: About what age were you speaking standard English?

CT: Oh, standard with ease? Twenty-two, maybe.

BAG: Really?

CT: Twenty-one; I don't know. Probably early twenties. Late teens, early twenties.

BAG: Was that Catholic school that did that for you? Or was there a lot of self-study involved?

CT: Oh, there was a lot of self-study. There was a lot.

BAG: And what do you think led you to do that?

CT: Probably a lot of things. I mean, what are your choices? Everything is done in standard English. You know, I had two clerks one year. One came to this country from Russia, from the Ukraine, and didn't know a word of English, and learned English as a second language in the tenth grade out in California, and never missed a beat at high school, and went on to Harvard and Harvard Law School. I had another clerk who came to this country from Albania, and went to Palm Beach Atlantic University, and then went to the University of North Carolina and graduated number one in his class, and learned English on the fly, and wrote and spoke beautiful English. So they had a tough time.

BAG: Would you describe yourself as a word lover?

CT: Not particularly.

BAG: No?

CT: No. I like buses and football and cars . . . well, I said cars. I don't even care about cars much anymore. No, I wouldn't say that. I think that I had to do what I had to do: I had to learn English. I mean, what are my choices? I never liked reading. I enjoy it now, but I never liked it. I never liked school, but what are your choices again?

BAG: Was the Latin translation a chore for you?

CT: I didn't have any problems with Latin. I was very disciplined with Latin. It's like with everything else; it's like the work up here: you get it processed, and you get it done.

And Latin was something you had to just work with every day — conjugations, declensions, vocabulary, translations — and it was very, very aggressive, and you got it done.

BAG: How could legislative drafting be improved?

CT: Oh, I don't know. That's a different process. In a perfect world, we'll sit down and parse it and do all these sorts of things. But these people have different interests. These are politicians. They're balancing a lot of things. They have legislative counsel to do a lot of this stuff. But I don't know how you do it in a democracy, where people have all these different interests and they're busy, etc. You'd hope it'd be clearer, but it's messy to live in a free country.

BAG: Did you do much contractual drafting in practice?

CT: Oh, yeah, I did when I was at Monsanto.

BAG: How could contracts be improved?

CT: I don't know. They could be shorter [laughter]. I've tried to make them short, and in English that people can understand. Or not English — let's just say that some people don't write them in English — but in language that's accessible. A lot of the *wherefores* and *whereases* and all that sort of thing. Just put it in English: "If you don't deliver the product by 4 o'clock, we will cut the price in half [laughter]." Now you know. Get my product delivered.

BAG: What's your favorite story about something that happened in the Supreme Court courtroom?

CT: I would have to say I don't have a favorite story. My favorite time is when I got here. I loved the idea that I sat with Byron White and Sandra Day O'Connor and Chief Justice Rehnquist. I love that fact. I just love that period. I just think the Court was . . . I was so much younger than everybody. I was 40 years younger than Justice Blackmun, or

almost 40 years younger. And I was a little kid over in the corner. I just loved that group. I never thought I would. I liked it. I loved going up to the oral arguments and being a part of it and seeing these wise giants of the law. Justice White would just sit back, and he'd have a question: "Yes or no?" "Yes or no?" "You would have to say that, wouldn't you?" Or you'd see him walking down the hall: "Clarence!" — throws his hands out. And I just thought it was a great . . . For me, I have just fond memories of that Court. And one of the hardest things is to see people leave, to see Justice O'Connor leave, to see the Chief get sick and pass away, and see Justice White. But I'd say . . . it's not a favorite moment in the courtroom, but it's just a favorite time on the Court.

BAG: Excluding present Justices, what opinion-writers have you most admired ever on the Supreme Court?

CT: Harlan, first Harlan and the second Harlan. I just liked him. I didn't come here with any extensive knowledge about him, but when I've run across opinions that I've liked, I've said, "Oh, there's Harlan again." I just happen to like them, and I of course liked the first Harlan because of *Plessy*.³ And it's just a wonderful dissent. There are times I just read it. I like teaching Con Law just to be able to read those again — just to go through it again.

BAG: That was really a prophetic dissent.

CT: Oh, just wonderful. It just shows you that sometimes you write beyond the present. *U.S. Reports* and principles in that report have a long shelf life, so what you put in it, you put in it with care. Not with erudition, but with care, so that people in the future can access some interpretation of their Constitution.

³ 163 U.S. 537 (1896).

BAG: I've talked with various law professors over the last year about Justices' writing. Many, *many* said you are the clearest writer on the Court, that there is never any doubt about what Justice Thomas thinks, and there are no sentences in his opinions that you have to wonder, "What did that mean?" At the same time, last term you were by far the briefest writer. Your average opinion was about 2,700 words. You were the only one under 3,000.

CT: Is that right?

BAG: And that surprises me.

CT: Well, I'll add some this year.

BAG: Will you?

CT: No, I mean, it goes up and down. We edit. I really, truly try to be accessible. I come from a family of people who could barely read and some who couldn't read. The world was inaccessible to them because they couldn't read. There are some average readers and barely above average out here. There are people who are busy — busy sole practitioners out here, busy judges who are doing all sorts of things, part-time judges. We've got to write for them. Shouldn't they have access to the Constitution? I have a wonderful buddy who's a quadriplegic. Do you realize that a curb that high [showing a two- or three-inch space] is like the Great Wall of China to him in that wheelchair? Well, maybe a sentence that long is the Great Wall of China to the people who want to read about their Constitution. So we try. And I can't say that we always succeed, but our goal is to make this document accessible to the parents of these law clerks. Certainly my family can't read it all, but others can. I'm glad to hear that they're getting shorter and that people find them easy to read.

BAG: What do you think would happen if one or more of the Justices decided to take one of the opinions, a 4,000-word-long opinion, and try to write a précis and try to condense it to a thousand words?

CT: Good luck!

BAG: Do you think much would be lost?

CT: Yeah, like collegiality. Good luck [laughter]! The people here are independent. They have different approaches, and I respect that. If you notice, my dissents say, “I respectfully dissent.” I respect their right to disagree and have their own approaches, so I wouldn’t force that on them because some people aren’t comfortable. They don’t think they can reduce things that much and say what they think needs to be said. So I wouldn’t do that to them, but I think we can all edit a few more rounds. But I wouldn’t do that to them. These are good people.

BAG: I mean if a Justice decided to do it to his or her own opinion.

CT: I know, but you’ve got to have people join. You could do it with your dissents, but you’ve got to get people to join. There are some times you add stuff that you look at and you say, “Why do you want that?” The person wants it. So you have to add it because they think it’s important for their join, and you don’t see it doing any harm. But you say, “Look, I don’t need that extra thing to dangle from my mirror in my car.” “Well, I’m not riding unless you do.” So the thing dangles from your mirror in your car. It’s not going to do any harm. That’s just the way it works [laughter]. What do you say when somebody says, “Look, I want this footnote,” and the footnote won’t do any harm; it’s an explanatory footnote. And you say, no, because I don’t use footnotes.

BAG: Do you really believe that things dangling from a rearview mirror don't do any harm?

CT: Well, I don't have any dangling from mine, so I can't really tell you [laughter]. But look, I'll learn how to get along with it if I need them to go along on a matter of principle.

BAG: Do lawyers have a professional obligation to cultivate their writing skills?

CT: I think lawyers have a professional obligation, like we all do, to get better and better at our craft, and I think writing better is a part of that.

BAG: Well, Justice Thomas, you've been up since 2:30 this morning. You've been very generous with your time.

CT: Oh, I'm not going back to bed.

BAG: Well, it's midnight now, so . . .

CT: Oh, "it's midnight now" — you're a funny guy.

BAG: Thank you very much.

CT: Thank you.

Justice Ruth Bader Ginsburg

BAG: I wanted to ask you, first of all: Do you think that law is essentially a literary profession?

RBG: I think that law should be a literary profession, and the best legal practitioners do regard law as an art as well as a craft. Unfortunately, many lawyers don't appreciate the importance of how one expresses oneself both in the courtroom at oral argument, and most importantly in brief-writing.

BAG: What explains that common failing?

RBG: The education system. By the time young people get to law school, if they haven't learned good writing skills until that time, they are not likely to learn it later. Most law schools have a course in legal writing, but they don't give it high priority. Students overwhelmed with more demanding courses tend to pay little attention to the legal-writing course. That's a problem. Law schools, at least the larger ones, have huge lecture classes and no accountability before the end-of-course examination. Students lack constant opportunities to write, as ideally they should have.

BAG: It's hard to reform some failing like that in academia, though, isn't it?

RBG: Yes, it is. It is. I'll give you an example: when I was teaching law, as I did for 17 years, I put a legend on my exams — something to the effect that good, concise writing counts.

BAG: Because in filling out bluebooks, there is often the notion that the more you write, the better off you might be.

RBG: Yes. That is the notion. If I produce many pages, I've got to get something right. And in truth, issue-spotters do well in law school — students who have minds like sparklers. They see all kinds of issues, relevant or irrelevant.

In that mixed bag there will be some bright ideas. But a skilled lawyer does not dump the kitchen sink before a judge. She refines her arguments to the ones a judge can accept.

BAG: Isn't it strange that law school rewards this profusion of ideas and just spilling everything out in the bluebooks, but then as you say, the law profession is so different because you're distilling down to a few points.

RBG: Yes.

BAG: But that's not rewarded in law school unless it happens to be the very right points.

RBG: Yes. Yes.

BAG: Many observers, such as Linda Greenhouse of *The New York Times*, consider you the best writer on the Court today. Do you work hard at it?

RBG: Very hard. I go through innumerable drafts. I try hard, first of all, to write an opinion so that no one will have to read a sentence twice to get what it means. I generally open an opinion with a kind of a press-release account of what the case is about, what legal issue the case presents, how the Court decides it, and the main reason why. So if you don't want to read on, you — particularly the press — have got it there in a nutshell. I try to do that — to start each opinion that way. My eye is on the reader, and that's predominantly judges or other courts who must apply our decisions as precedent and lawyers who must account for them in their briefs. So I try to be clear and as concise as I can be. If my opinion runs more than 20 slip-opinion pages, I regret that I couldn't make it shorter.

BAG: I really like your opening paragraphs. You often take a few sentences — short sentences — and lay it out, sort of crystallizing what the problem is. And it seems to me so much

clearer than the type that tries to stuff everything into one sentence in the opening paragraph.

RBG: Yes.

BAG: How did you arrive at this style, with just having it crystallize in a few short sentences?

RBG: As a consumer of what judges write: in all my years as an advocate for the ACLU, when I constantly read judicial decisions relevant to the case I was briefing; as a law teacher writing an article that requires reading a massive decision. I try to write an opinion so it will be what I would have liked an opinion to be when I was a law teacher or an advocate.

BAG: How did you originally cultivate your skills as a writer?

RBG: I attribute my caring about writing to two teachers I had, not in law school but as an undergraduate at Cornell. One was a teacher of European literature. His name was Vladimir Nabokov. He was a man in love with the sound of words. He taught me the importance of choosing the right word and presenting it in the right word order. He changed the way I read, the way I write. He was an enormous influence. And I had a kind and caring professor, Robert E. Cushman, for constitutional law. I worked for him as a research assistant. In his gentle way, he suggested that my writing was a bit elaborate. I learned to cut out unnecessary adjectives and to make my compositions as spare as I could. To this day, I can hear some of the things Nabokov said. *Bleak House* was one of the books we read in his course. He read aloud the opening pages at our first lecture on the book — describing the location of the chancery court surrounded by persuasive fog. Those pages paint a picture in words.

BAG: Did Nabokov live to see you become a judge?

RBG: No.

BAG: Did you stay in touch with him after you left Cornell?

RBG: Not after he wrote *Lolita*, a huge success, and went off to Switzerland to catch butterflies.

BAG: Justice Douglas and Justice Powell, as well as Chief Justice Burger, lamented the low quality of advocacy in the Supreme Court. Do you share that sentiment?

RBG: For the most part, no, I don't. In this Court, we have one repeat player or a team of repeat players — that's the Solicitor General. The SG's arguments are always at least good, sometimes very good, sometimes excellent. The SG, representing the government before the Court, is here very often. I think that the representation of cities and states has gotten much better as a result of the organizations formed to help them with their brief-writing. There's a national association of state attorneys general, and a comparable organization for municipal and county attorneys. So the quality of those briefs I think today is better than it was before those organizations started up and began assisting the state attorneys general and the corporation counsel of the cities.

BAG: What do advocates need to work more on, brief-writing or oral argument?

RBG: Of the two components of the presentation of a case, the brief is ever so much more important. It's what we start with; it's what we go back to. The oral argument is fleeting and very concentrated, just a half hour per side. It is a conversation between the Court and counsel. It gives counsel an opportunity to face the decision-makers, to try to answer the questions that trouble the judges. So oral argument is important, but far less important than the brief.

BAG: What would your two biggest tips be to brief-writers on how they could improve?

- RBG: First, be scrupulously honest because if a brief-writer is going to slant something or miscite an authority, if the judge spots that one time, the brief will be distrusted — the rest of it. And lawyers should remember that most of us do not turn to their briefs as the first thing we read. The first thing we read is the decision we're reviewing. If you read a decision and then find that the lawyer is characterizing it in an unfair way, we will tend to be impatient with that advocate. My other tip is that it isn't necessary to fill all the space allotted. We allow 50 pages for opening briefs. In some cases, complex cases particularly, it may be hard to fit what you have to say into 50 pages. But in single-issue cases, most arguments could be made in 20 to 30 pages. Lawyers somehow can't give up the extra space, so they fill the brief unnecessarily, not realizing that eye-fatigue and even annoyance will be the response they get for writing an overlong brief.
- BAG: How common is the first problem that you mention, of not being scrupulously honest in the characterization of what the lower court has done?
- RBG: It's never a problem with the SG. Even if I disagree with the argument, I know that the brief will give an honest account of the authorities. That's very important; I know I can trust the SG's brief. Especially in a Court like this, or any federal appellate bench, a lawyer who slants an authority is going to be found out. I mean, there are all those law clerks here to ferret out exaggerations or misrepresentations. So be honest, I think, is the number-one rule.
- BAG: In a speech you gave recently, you disdained three-prong and four-prong tests. What's wrong with them?

- RBG: Well, three- and four-prong tests are, I think, a clue that a law clerk's work lurks beneath: *three-prong*, *four-prong*, that's law-review language, and sometimes it doesn't make a whole lot of sense. It gives a false sense of security that you have to go down a certain litany in one, two, three, four rank order. But often the decision is made on other grounds and then fitted into the prongs.
- BAG: In a piece you wrote about a decade ago in the *Georgetown Law Journal*, you said that law-review writing is often in a language that ordinary judges and lawyers don't understand. Why is that a bad thing for legal scholarship?
- RBG: If you want to write a piece on philosophy, that's fine. But if you're trying to write for a lawyer or a judge as your consumer, if you're commenting on a body of precedent or a statute you're trying to parse, you really do want to be clear. You don't want to be operating on a high philosophical plane. Judges are not going to read those articles, because they haven't got the time to try to penetrate them.
- BAG: Has the balance swung too far in favor of that kind of philosophical, difficult-to-understand discussion?
- RBG: There's still much good writing. For example, in my own field (I taught civil procedure), if I have an article by, say, David Shapiro, it's just a godsend because he's so bright and so clear and just enormously helpful.
- BAG: You admired Charles Alan Wright's style a lot.
- RBG: Yes, yes.
- BAG: What did you like so much about Charlie's writing style?
- RBG: For one thing, he was clear. He was assertive. He didn't fear saying something straight out. He didn't feel any need to qualify things, because "Well, maybe I'm wrong." And he had a wonderfully sly sense of humor.
- BAG: Does that show through even in his treatise and his horn-book?

RBG: Yes. Yes, I think so.

BAG: On occasion, you've referred to "dense" statutes. Is density unavoidable in legislative drafting, or is there a better way?

RBG: Well, it may be that too many cooks spoil the broth because some of the bills that Congress deals with tend to get cluttered with special-interest exceptions here and there. There are legal systems that have expert committees draft the law in keeping with the guidelines set by the parliament. I know Sweden is a country that operates that way, so its legislation is more professional than ours is.

BAG: Do you continue to learn things about writing yourself?

RBG: Oh, yes. I just read a fine article by Judge Leval of the Second Circuit. It was his Madison lecture at NYU. It's about the distinction between "holding" and "dictum" and how dangerous it is to be sloppy when using the word *hold*. It's delightfully written, and I am certainly going to pay attention to what Judge Leval conveyed. I'm always learning about writing. I read and admire someone's writing and say, "That's a good way of putting something. I'll remember and use it."

BAG: Have there been any writers outside law who've been major influences on your style apart from your own teachers, Cushman and Nabokov?

RBG: I can't say that there's a direct relationship between Jane Austen's novels and my writing. Or Tolstoy's.

BAG: Let's talk about Jane Austen for a moment. What do you admire so much in her novels?

RBG: The word pictures she paints. It's not really the plot that counts — there's a certain sameness to them — but she is like a painter with her pen.

BAG: What about Tolstoy?

RBG: He's very strong; he's a strong writer. He's a contrast to Jane Austen in that respect. I remember the first time I read *War and Peace*. I was 16 years old, and I couldn't put it down.

BAG: So is a lot of your extracurricular reading the classics?

RBG: It's eclectic. It's mainly with my husband's advice and counsel. He's a voracious reader, and he knows how little time I have, so he will say, "This one is really good; this one you will enjoy." The problem is, when I read a good book, I want to stay with it. But I know I have to put it down and turn to the not-so-beautiful briefs.

BAG: Is there a problem if that's all a judge is reading . . .

RBG: Yes.

BAG: . . . having that infect your style a little bit? Do you have to inoculate your style against some of these bad habits that you see in briefs?

RBG: Well, you need a respite from the briefs. There's no question about it; you can't have a steady diet of them. So my respite is, for example, the Washington National Opera, whether it's a performance or a dress rehearsal. And we have some time-outs at the Court as well. We have annual musicals. In fact, this year we are having two of them. So, yes, what is it? All work and no play makes the judge a dull person.

BAG: If we exclude present Justices, who, in your opinion, were the best writers ever to sit on the Supreme Court?

RBG: If we could start with John Marshall, then probably the best writer is Holmes. In more recent times, the second Justice Harlan because he laid it all out. You could agree with him or disagree with him, but you know every step in his reasoning. Nothing was hidden. Nothing was shoved under the rug. Brandeis was a very fine thinker and writer.

BAG: Do you admire Jackson?

RBG: Oh, yes, he was a fine writer. Yes.

BAG: What is your view of legalese?

RBG: Any profession has its jargon. The sociologists have lots of fancy words, and some of them think somehow that puts them on a higher plane. I can't bear it. I don't even like legal Latin. If you can say it in plain English, you should.

BAG: Is there any problem with professions' having their own sort of in-speak?

RBG: If you want to communicate with the public, you don't need to do that. There have been movements about using plain English in contracts and wills. Those movements tend to start with great enthusiasm and then sort of fizzle out.

BAG: Do you think it would be a good thing if lawyers everywhere became more dedicated to trying to use plain English?

RBG: I think it would be a very good idea, yes.

BAG: How would that affect the legal profession?

RBG: For one thing, you would have much shorter documents than we now do. For another thing, the public would understand what lawyers do, what judges do, better. They might understand it even from reading an opinion or from reading a brief instead of getting it filtered through the lens of a journalist.

BAG: Should judges at all levels care whether ordinary people can understand their opinions?

RBG: Yes, with this caveat: your first audience, if you're an appellate judge, is other judges and lawyers. And after that, well, what I call my press-release opening, they are addressed to the general public. I hope that, in most cases, what I write is clear enough for a lay audience.

BAG: But there must be a way of satisfying the experts — satisfying lawyers and judges and law professors — and at the same time making it accessible to the general public.

RBG: Yes, but in some parts of opinions, you really can't. If you're trying to explain the fine points of, say, a provision in ERISA, there's no way you are going to be able to do that, to make it clear to the nonlawyer.

BAG: What kinds of things in briefs that we haven't spoken about commonly annoy you?

RBG: First, excessive length. Second, well, I've already spoken about honesty in brief-writing . . . Oh, something else: it isn't necessary to get your point across to put down the judge who wrote the decision you are attempting to get overturned. It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief. Those are just distractions. You should aim to persuade the judge by the power of *your* reasoning and not by denigrating the opposing side.

BAG: Do you have a sense that lawyers everywhere have heard that ad hominem attacks don't work, and yet they always tend to think, Well, but this case is the exception: I've got to let the judges know just how bad the other side is?

RBG: If the other side is truly bad, the judges are smart enough to understand that themselves; they don't need the lawyer's aid.

BAG: So better to be dispassionate about that.

RBG: Yes.

BAG: What's the most important part of a brief, in your view?

RBG: If you're on the petitioner's side, to anticipate what is likely to come from the respondent and account for it in your brief. Make it part of your main argument. You know the vulnerable points, so deal with them. Don't wait for the

reply brief; just incorporate in the main brief as part of your affirmative statement answers to what you think you will most likely find in the responsive brief. And in the responsive brief, I think the principal danger is that it will end up being a series of “not so’s”: “the petitioner says thus and so,” or “the appellant says thus and so.” “That’s not so.” A series of “no’s” doesn’t really work. In the days when I was writing briefs, I tried to draft a brief for the appellee or for the respondent before I ever got the brief for the appellant or the petitioner because I wanted to avoid that trap. So I told my side affirmatively and then used, for the most part, footnotes to answer points made in the petitioner’s brief or the appellant’s brief and had not been part of the body of the brief I tried to write even before I got the brief I’m answering.

BAG: Do you feel strongly enough about that that you could make it a general recommendation that appellees ought to go ahead and make their affirmative cases? Just do a draft before they see what the appellant’s going to say?

RBG: Yes, I think that is a very, very good idea because, as I said, the principal danger when you’re on the downside is to impart a negative cast to your brief by constantly repeating “not so.”

BAG: What would be your two biggest tips for oral argument?

RBG: First, appreciate that oral argument is not an occasion for speech-making — not in a Court like this. It certainly wasn’t so on the D.C. Circuit. These are hot benches, the judges are prepared to the hilt, and you will do best if you concentrate on the questions you’re being asked and not resent them as distracting you from your prepared lecture. In many systems, lawyers do make lectures — they make grand pleadings — and when judges from other countries that follow

that civil-law pattern come here, they're amazed that we interrupt the counsel. They sit there stone-faced, listen to what the counsel says, and then they do what they want. I would much rather have a hot bench so I know what's on the judge's mind.

BAG: Do you think lawyers have a professional obligation to become the best writers they can be?

RBG: Yes, I certainly think so. Both for their clients and to the extent that a lawyer is a skilled professional who has an obligation, I think, to serve the public. The more effective a lawyer can be in speech and writing, the better professional he or she will be.

BAG: Justice Ginsburg, thank you so much for your time today.

RBG: It was a pleasure.

Justice Stephen G. Breyer

BAG: I'm here in Washington in chambers with Justice Stephen Breyer. Thank you, Justice Breyer, for agreeing to talk a little bit today about legal writing. I wanted to ask you, first of all, about your book *Active Liberty*. Presumably, you started with a germ of an idea, but how do you go about writing a book? Could you describe your writing process?

SGB: The idea was trying to explain to people how I go about writing a Supreme Court opinion. And I've drawn a set of examples from use of the democratic theme, which I call "active liberty," and I want those to flow together. I wanted it as a whole to have parts that are interesting, but also that someone who reads it begins to understand how I might think about constitutional law or law in general. Now, that's illustrative; it is not a simple expository argument, and in a sense, it's more creative. But at the same time, it's less convincing. So I start, and I write a draft, and I show it to people and get a lot of criticisms and write more drafts, and write it over and over and over and over until eventually I have something that I'm reasonably satisfied with. I tried it out in different lectures. I saw what the students' reaction was. I had people tell me what did they think wasn't clear, and I wrote and rewrote and rewrote. That's how I did that.

BAG: How many drafts do you suppose you went through?

SGB: Oh, I bet I went through 20? I bet. I mean, maybe 10. Certainly more than 10.

BAG: Did this book get more scrutiny than earlier books that you've written?

SGB: The earlier books that I've written, except for one, were expository books. That is to say, I am trying to explain to people how regulation works, so I wrote a long book about economic regulation. Now, there is creativity in that, I think, the long book about economic regulation. The greatest creativity came in the outline for the book because I'm trying to separate regulation into six parts, and I'm trying to find certain characteristic things to say about each. But there's a great deal of explanation about regulation for the reader. It's a technical subject, and I've got to explain it so that a reader who understands a little bit of the technicality — but not too much — understands what I'm talking about. The book I wrote about “breaking the vicious circle: risk regulation” was a little bit like this because I wanted to explain it to an audience that might not know anything about it. But still, it's a technical subject.

BAG: Did you outline the book before actually writing it?

SGB: Yes.

BAG: Why is outlining important?

SGB: Without outlining, you don't know where you're going. People will read something, they won't understand what the basic point is. You can have purely aesthetic writing — just designed to create an overall emotional impression. But lawyers or judges are rarely involved in that. They're involved in trying to explain something to someone, and people can only grasp a certain number of things. And so the way that I think you get people to understand something is you have a broad outline, and then you fill in the details, like a tree. And they can understand it once they see the tree. But if you don't outline it, they won't ever see it — because you won't see it yourself.

BAG: Are you a natural outliner?

- SGB: Yes. Do you think I just normally do that? Yes, I normally do that. Always, always. I always have an idea of just where I'm going.
- BAG: Do you think it's universally true that writers of nonfiction would benefit from doing outlines first? You must see what happens when people don't have outlines to begin with.
- SGB: When you don't have outlines, you don't know where they're going. Now, if you're a genius, I suppose, then it wouldn't matter that much. You really look at Montesquieu, or you really look at Wittgenstein. He's thinking of something up here and something over there — it's what was called a *pensée*. It's like Walt Whitman's "Leaves of Grass." I mean, you have leaves of grass and they grow, and as long as you're a genius, I'm sure it works fine. But for most of us who are not geniuses and cannot expect a reader to be absolutely fascinated by every idea that comes into our heads, I think for such a person you have to have a definite outline of where you're going. It needn't be long. It has to be enough to keep you on track. Sometimes I could have an outline of something I wanted to say, the thing is quite long, but it's like eight words. But these eight words are going to keep me on the track.
- BAG: When you had all of these outside readers, friends of yours, critiquing the manuscript, what kinds of things would they contribute?
- SGB: One might say, "This doesn't make any sense. Why are you saying this?" And "This is an interesting thought, but what does it have to do with active liberty?" Or "Why do you put this argument about the historical approach versus the more consequential purposive approach in this book? What has it to do with active liberty?" I did think about that quite hard, and it wasn't so easy to figure out how to fit this whole

thing together. I think I did it in a satisfactory way, ultimately — a way that pleased me, anyway.

BAG: How similar is the process of writing a book like that to writing a judicial opinion?

SGB: I don't think it's too similar. A book is a project where it's going to take awhile, and it's not going to be tied down to a form. And you're continuously thinking of how to get this across to your audience, and you have many broader choices. I could have it in the form of chapters. I could have it in the form of subchapters. There are enormous amounts of leeway as to what you put in, what you don't put in, in what depth you go into the argument, and how much refutation you allow yourself to put in and then refute it. All those are open, and you're guided by an overarching idea. And in part I think it's an aesthetic idea. I think when you're writing an opinion, you have a discrete problem, and you want to solve that problem and to explain your reasons for reaching the result that you do. I believe aesthetics has something to do with it because it will make it clearer. It helps to have a beginning, a middle, and an end. It helps to take what we used to call a rhetorical approach, where you begin with a summary and you draw in your audience and then, having done that, you set out your thesis. You elaborate the thesis. You see what the arguments are against it. You explain the main arguments against it. And then at the end you repeat your conclusion to tie it together. And I know in an opinion people are going to read that first bit, and they're going to read the last bit. And how much they read in the middle I'm never certain.

BAG: So you think the beginning and the middle are definitely the most important parts?

SGB: The beginning and the end.

- BAG: I'm sorry, the beginning and the end.
- SGB: Yes, yes, I do — to say what you want to say, to summarize it as well as you can.
- BAG: And you seem to like, as I've observed in your writing . . . to the extent there's a refutation, it comes in the middle.
- SGB: Yes, it comes after you set forth your argument because you explain to people first why is it that I think what I think. You're not trying to prove a point. Law is not mathematics. If I am a mathematician, I am trying to prove why A follows from B. But this is not the nature of this discipline. The best I can do is to explain to a reader what *my* reasons are for adopting this particular conclusion. I can't prove anyone has to, but I've explained why I did. Now, I've explained my reasons, but maybe I should also explain the reasons why I didn't adopt the other approach, because there were good arguments. Now, that's the way it works best: you first explain where you're going and why, and then you explain why you didn't go this other way. If it were a novel, of course, you might want to reverse it because it might be terribly interesting to leave the reader bewildered: what direction shall I go? So you might give all the reasons why you didn't take those directions. And then the reader says, "Oh, dear, what can we do?" And then you pull a rabbit out of a hat and say, "I did it this way." I bet a good novelist could do that. I'm not a good novelist, and I would see no point in doing that. I'm not trying to produce tension or suspense. I am trying to explain what it is I did and why.
- BAG: In *Active Liberty* you were writing, I take it, for a general, informed citizen?
- SGB: Pretty much. But the difficulty of that book is while I'm writing for the informed citizen — ideally a high-school

student and ideally someone who's not a lawyer, so I can explain what I think the Constitution and the Court is about — at the same time, I don't want to say things that will leave those who are very professional, law professors, for example, thinking that what I've said is so obvious that it's uninteresting or wrong. And that's one of the reasons I showed it to so many. But it also means in the first part of the book, say chapter 1, I had to incorporate a number of ideas that probably the average person who's not a lawyer won't understand why I put them there. That makes chapter 1 the most difficult, and I think the most negative comment I've gotten about it is, "Well, I just can't get through chapter 1." So I say, "Well, skip chapter 1; go to chapter 2."

BAG: It *is* the hardest in the book.

SGB: Yeah, yeah, because I wanted to do too many different things there, and I'm trying to tie it in to tradition, I'm trying to bring in some history, I'm trying to forestall . . . You see there my objections would normally come at the end of the beginning. But there the objections come right at the beginning, and I'm actually trying to forestall them.

BAG: Your text isn't burdened with footnotes in *Active Liberty*; instead, you have endnotes.

SGB: Yes.

BAG: But interestingly, endnotes at the ends of the paragraphs; no superscripts within a paragraph.

SGB: Uh-huh.

BAG: Why did you do it that way?

SGB: Because what I'm doing with almost all of those endnotes is I'm referring the reader to other things to look at. And I hope maybe they will. Or occasionally I want to show them where what I say came from. And there's no reason to

burden the text with a lot of numbers, and that's why I put one in each paragraph. And there's no reason to put the title of a book in the note in the text; that would just be distracting. That isn't what I do with an opinion.

BAG: Do you agree with what modern publishers seem to be doing with semischolarly books of using endnotes instead of footnotes, reference footnotes?

SGB: With this, I think it worked perfectly.

BAG: Yes.

SGB: With something like this, it's very good because someone who's interested could go and look at it. For example, where it's a closer question, what I did was I took a lot of language from judges whom I very much agree with. I admire them for various reasons — Brandeis, Stone, Frankfurter, Holmes, Learned Hand — and I strung them together in about four or five pages in this first chapter. And what I was trying to show with their language is what I think is related to what they think. And so I had to use this language and work with it so it actually said the kinds of things I might have said without it. Now, that's complex to do that, and it's perhaps disturbing to some of the readers; they don't understand what I'm doing, and why are all of these quotes put in here, and who said them? Well, that's only three or four pages. Somebody who doesn't get interested can skip it. And somebody who's really interested could go look to the endnotes and see who said what.

BAG: Let's talk a little bit about your judicial work. How do you use law clerks?

SGB: Oh, I use them mostly for research and mostly for discussion. That is, when we have a difficult case, I try to bring all of them into everything. The law clerks are absolutely necessary for handling one of our jobs, which is the job of taking

8,000 cases filed over the year — those are requests for hearing; that's 150 a week, about — and then reducing them to the 80 cases that we actually hear. So each week I'll get 150 cases to read and probably only select one or two to hear. Now, that's a very small number of selections out of a lot of cases, and there are only about 10 or 12 that are even possible, that anyone would think of considering for granting. So what the law clerks do is they take all the papers, and they reduce them to memoranda. So I'll get a stack of memoranda from the law clerks in this building, and I'll read through them pretty quickly, and I'm looking for the nature of the legal question, not whether the judge below is right or wrong. Everybody's had an appeal, they've had a trial, maybe they've had two appeals. It's the nature of the legal question, for what we are trying to do here is, we're trying to decide those legal questions, those federal legal questions where there are differences of opinion typically in the lower courts, and so you need uniformity. That's one of their jobs: to summarize the issue in those cases, summarize those cases, and I'll go back through the papers sometimes if I need to. But the main thing is, when we're writing opinions, the first thing I'll always do is have my law clerk write a very, very long draft or a memo — call it what you want. And I've read the briefs, the law clerk has read the briefs, I've already gotten the memo from the law clerk. Now that law clerk will go back and write something that has about everything in it that I can think of and some analysis and a lot of cases and whatever. Now, I use that as a datum, and I will then read that. I will then read the briefs again, and then I sit at the machine in back of us and write my own draft, which is much shorter and sometimes has things in it that weren't in the memo but more likely uses

this as raw material to construct a set of arguments that I think are the right ones. If they're not there, I'll try to get some more information. Then I write my draft, give it back to the clerk, and the clerk will critique it and edit, usually with me. I then get it back, and I feel I don't like it, and I have to go all over again. So I'll normally write two drafts from scratch. Whether it's one or two — it is normally two — I'll then use the clerk to edit, critique, and discuss. I like to discuss difficult things with all my clerks together, and it works very well. We'll go back and forth, eventually editing something that we started with into shape, where I think I can circulate it.

BAG: Back in 1964–65 you clerked for Justice Arthur Goldberg. How much has clerking changed from how it was in those days?

SGB: I think not too much. We had two clerks instead of four. And I think the reason we have more clerks now is because of the tremendous growth in the number of requests for hearings. They've grown maybe from 2,500 to 8,000, and so there's a need for more of the summarizing to be done. But otherwise the job is pretty similar. With Arthur Goldberg — whom I loved, who was a wonderful man and a great judge — we would discuss everything, and he liked to talk about things, and it was fun and interesting, and we did a lot of research.

BAG: Did that experience give you a greater sense of the history of your current job, and did it help you in some way?

SGB: Yeah, I think so. As a person, I think he was a very practical person. He wanted to achieve concrete objectives, and he would be impatient with some kind of discussion in an opinion that seemed too theoretical that wasn't getting anywhere. He wanted things to make a difference, to be clear, to be

practical. I think the Court at that time had an overwhelming problem, and the overwhelming problem was racial segregation. The Warren Court was trying to deal with a set of legal issues that came down to whether legal segregation would be permitted in the United States or not. *Brown v. Board*¹ had said no, but to make it no, you had to dismantle an entire set of legal rules that had underlay a set of practices that meant racial segregation. So they were very, very busy at that task, and it was a Court in a sense with a mission. The mission was a constitutional mission to see that people were not discriminated against on the basis of race. Today, I think that it's harder to find a single overarching constitutional mission.

BAG: On a personal level, what did you learn from Justice Goldberg?

SGB: On a personal level, I learned he was a marvelous person, and I learned that actions have consequences. I would say that's the most important thing — that what you're going to decide in an opinion is not a theoretical game. What you're going to decide is going to matter in the world, and therefore it's important to pay attention to those consequences because human beings will be affected.

BAG: Is it true that shortly before you became a federal judge, Justice Goldberg, I think then-retired, implored you never to use a footnote?

SGB: Yes, but it's not true before I became a federal judge. I think it was after I had been a federal judge for a year or two, and he said, "There's no point using a footnote. If you want to put something in a footnote, make a decision: Is it relevant and important or not? If it's important to your argument,

¹ 347 U.S. 483 (1954).

put it in the text. And if it's not important, throw it out." You are not there to prove to everybody how clever you are. You're not writing an opinion to show you're well-read. You're writing an opinion as a useful document to lawyers and judges. So the citation either plays a role or it doesn't.

BAG: Is it true that you have never used a footnote as a Supreme Court Justice?

SGB: As a Supreme Court Justice, I think it's true. It's possible sometimes that you have to write a footnote to say something about another judge — in our Court, a Justice — who's joining an opinion in Part A but not Part B, or something. But I can't think of an instance in which I've used a footnote.

BAG: Among scholars, your writing style is known especially for its clarity. How hard is it to achieve clarity when you're writing about legal subjects?

SGB: It's not easy, because the trouble is often you know too much about it by the time you've gotten into the subject, and so you assume a lot of knowledge on the part of the reader, and the reader might not have that knowledge. And if you make an effort and think you're explaining it to your spouse, your wife, your husband, your daughter, your son — you're explaining it to someone. Go through the explanation so they can understand it, and then the reader will understand it. That's why for me it requires a lot of drafts. Now, there are some writers that don't need a lot. P.G. Wodehouse had an exhibit at the Morgan Library, and the extraordinary thing, since he was a great writer, is to look at his drafts. They came out of the typewriter to the publisher without a change. I can't do that.

BAG: And you probably can't think of many other writers who can do that?

- SGB: No. No. I can think of some great writers who couldn't. I've seen the manuscripts that Proust wrote, and they're filled with changes [laughter]. It's nice to be able to do it if you could, but I can't.
- BAG: Do you think it matters whether ordinary people can understand judicial opinions?
- SGB: Yes.
- BAG: Why?
- SGB: Well, particularly in this Court, because if an ordinary person who is not a lawyer can understand it, I think that gives weight to what the Court does, and law is supposed to be intelligible. They should be able to follow it with — the lawyer or the judge should be able to — without having to take special vocabulary courses. And the purpose of an opinion is to give your reasons, and you give your reasons both for guidance, but also it should be possible for readers to criticize the writer. Now, people can't criticize what I say, they can't explain why they think it's wrong, unless they can understand. Brandeis said that once. He said first we have to understand what an opinion means before we can say whether it was right or wrong.
- BAG: Do you have an opinion on legalese?
- SGB: I'm against it. Legalese — you mean jargon? Legal jargon? Terrible! Terrible! I would try to avoid it as much as possible. No point. Adds nothing. I'm sure there are some instances where there is a necessity for it, but I have not found one, or I can't find many.
- BAG: What does it say to you about a lawyer who uses a lot of that jargon?
- SGB: It would be helpful to me if he didn't. And if he's trying to disguise the fact that he has no argument, he's not going to get away with that [laughter].

BAG: You were a professor at Harvard Law School from 1967 to 1981, and the faculty had some really great legal writers at the time. Which ones did you admire for their writing style?

SGB: I thought my colleague John Ely had a very good writing style, wrote very clearly. A lot of them wrote very clearly. The course I liked was the Hart and Sachs course on jurisprudence — it was the legal process — and Al Sachs was very clear in his writing there. Paul Freund was always very clear when he wrote. Most were clear. I don't think there was a clarity problem.

BAG: And Lon Fuller?

SGB: Yes! Lon Fuller, too, a philosopher and always clear. Seems to me you can do that. There's a great saying I like — I think it's Ortega y Gasset — which said something to the effect of "clarity is the courtesy or politeness of the author."

BAG: Have any writers outside law been major influences on you as a writer?

SGB: Outside law? Well, if I read novels, I know what I like. A certain kind of clarity I do admire. Stendhal writes very, very clearly. And I say, "That's marvelous. That's good." I can't do that. I would certainly prefer a great book that is clear. When you're talking about great authors, there are great authors for many different reasons.

BAG: If we exclude present Supreme Court Justices, who do you think were the best writers ever to sit on the Court?

SGB: Jackson is a great writer . . . great.

BAG: Why do you like his style so much?

SGB: Because he's clear, and he's able to use metaphor in a way that makes it work in the legal area. That's hard to do. Now, Cardozo of course could do that: "The cry of distress is the call to rescue" — very clear in a case where the issue is when and under what circumstances there is an obligation on a

person to save another person and in the process not behave negligently. “The cry of distress is the call to rescue” — it helps in that context, and Cardozo was a genius at that. Jackson had a case where he wrote once — it had something to do with natural-gas-pricing regulation, a subject that used to be dear to my heart because I taught administrative law — but he said neither the wit of man, neither the wealth of Midas, nor the wit of Solomon, or something, could ever be able to understand or to do enough to make clear the principles of natural-gas-pricing regulation. That juxtaposition was funny but quite true, and made a dry subject interesting and also was illuminating. In *Korematsu*,² he complained about the Court’s opinion, which I think he was quite right. The Court’s opinion upheld the detention of the Japanese. Most of us would say it was very wrong, and he said, “Well, whatever they thought, they shouldn’t have written an opinion that would create a precedent,” he said, “like a loaded gun pointed at the head of an innocent person.” Quite right. So he was dramatic but very, very good. Holmes is a great writer, but Holmes is so metaphorical and succinct that sometimes it isn’t clear what he’s driving at.

BAG: Almost laconic.

SGB: Yes. Yes. Yes. But he’s certainly a great writer. Brandeis from time to time is. Brandeis, who I rather admire enormously . . . Brandeis is so interested, however, in the depth of the opinion. He wants to get into the details, and of course I think you should do that. I think it’s helpful for a judge to do that. But most of the judges whom I admire write well.

² 323 U.S. 214 (1944).

Learned Hand certainly writes well. All the great judges. Very hard to find a great judge, one who is now admired, who didn't write well.

BAG: In fact, isn't it almost that they wrote so well that makes them so admired? Isn't the writing the most important thing a judge does?

SGB: There is a theory to that, but I'm not sure I accept it. I don't think someone who isn't a good judge could become a good judge simply by writing well.

BAG: Yes.

SGB: I mean, ultimately the question is one of interpreting the law; the question is applying the law. The people who are affected are the people in front of you or others who have to live under the law. And I think if you don't have a sound view as to how these cases should come out, how the law should fit together, I doubt that you could make up for it by good writing. If you're very clear, you might just be very clearly wrong.

BAG: You sat as a judge on the First Circuit for 14 years, and now you've been on the Supreme Court for 12. What's the difference in judging on those two levels?

SGB: One difference is what I wrote about in the book. One difference is that on the Supreme Court we have constitutional cases as a steady diet. They appear from time to time but usually in one area of Fourth Amendment or Fifth Amendment in the courts of appeals. Here we get them all over the law, and the consequence of that is after a time a judge in our Court begins to develop a coherent view of the Constitution as a whole. And what I wrote about that is I think most of us begin to see the Constitution as a document that has a set of discrete purposes. It creates a set of democratic

institutions. It's designed to create democratic decision-making and a certain kind of democracy to protect basic human rights, to assure a degree of equality, to divide power horizontally (three departments of government), vertically (state, federal), and to assure a rule of law. Now, having said that, you have the basic purposes. And what we do, I think, here after a time is we've explored a lot of the areas of the Constitution and see how they fit together, elaborating on what I've said.

BAG: What do you think about the quality of the briefing that you get at the Supreme Court as opposed to the First Circuit? Is there much of a tangible difference in quality?

SGB: Usually it's somewhat better here. You'll get very good briefs in the circuits on a lesser number of occasions. I think the really good briefs here are more frequently found because people have more time, they get others in. When a case gets here, there are usually a large number of groups and others who are interested in that case, and they'll work out complex briefing systems, and they'll do a pretty good job.

BAG: By the time the Court has granted cert and you get a merits brief, is the briefing pretty uniformly good?

SGB: I think it's pretty uniformly good. Yeah, I do. It's a different job, too, because there's another important difference. When I was a court-of-appeals judge, what we're hearing are appeals from, say, a criminal conviction or, say, a decision in the trial court. And the question is, Why is that lower-court judge, the trial judge, wrong? Wrong about what? Well, often, wrong about anything because often there will be 17 different issues raised, and if the petitioner or the appellant is right about one of them, he has to go back and get a new trial. And so what you're looking at is the whole case, different issues, and ways of disposing of that case.

Here, contrary to popular belief, we've taken the case to decide an issue — one issue usually, maybe two — and we are not looking so much at the whole case. We're looking at the way, right or wrong, of answering the question raised by that single issue. So people who brief it are focusing on that issue.

BAG: At the intermediate level, is that good lawyering, to come forward with 17 issues?

SGB: That depends on what they are. I mean, it might be, because what the lawyer wants is to get a decision for his client. Now, if he throws in four of those issues, or eight, that he knows are no good, well, the judge might read those eight first and draw the conclusion that he's just hot air, and so he might not pay as much attention. So I wouldn't advise it.

BAG: Do you have a sense that the better lawyers, though, win now out those marginal issues and go straight to the good ones?

SGB: Yes. Yes. Yes. They do. But you still can have maybe three, maybe four, in a case that this evidence was incorrectly admitted, anyway there's no jurisdiction, besides that there was a bad instruction. You might have three or four issues like that. And all you've got to do is win on one of them, and the appeals court will be looking . . . In fact, what I do as an appeals judge, if I think he might be right about two or three, but he's certainly right on one, well, I'll go for the one.

BAG: Do you agree with this theory that I sometimes hear — again we're talking about intermediate-court-level cases — that it's more legitimate for criminal lawyers to bring forward a lot of issues than, say, in civil litigation?

SGB: Oh, "legitimate"? I mean, it's not a question of "legitimate." People can bring as many issues as they want, but I as the

judge am looking at the question, “Is this judgment right?” That’s what they’re doing: they’re appealing from a judgment — a judgment of a lower court — and if I see 19 issues there, I’m going to say, “Hmm, maybe he doesn’t have a good case.” I think it’s better to winnow them. That would be my advice, but I can’t guarantee that.

BAG: What would you say are the most important keys to persuasive brief-writing?

SGB: Again, I think in the intermediate court it seemed to me what that attorney was trying to do is to get the judge to see the case in a particular way. Is it a rabbit, or is it a duck? It’s like the famous psychological example. You have a figure: it could be seen as a rabbit, or it could be seen as a duck. You’re going to win if you get him to see it as a duck, but the other side says, “No, no. This is a rabbit.” And the characterization will matter, and that’s why I liked oral argument. I wanted to know how the lawyers see this case. I’m trying to think, How do they really see it? And very often — not always, but very often — that helps a lot. In this Court, we’re not dealing with the case. It’s too late to characterize. We are dealing with a legal issue. And I want to know what the answer to that issue is.

BAG: What are your main tips on effective oral argument?

SGB: Try to get out your main points. In this Court, it’s hard to do; there are nine judges. But you want to get the main one out quickly. And probably the best one you can have is to figure out what’s your opponent’s strongest argument and make sure you get out your answer to that argument. A case is only as strong as its weakest link, and I think that’s sometimes a mistake, but lawyers can make that mistake: they have 15 excellent strong links; ah, but one is weak — well, they’re going to lose. So you better tell the judge —

who is going to find it — what's the best argument against their strongest, not their weakest. Then answer the questions. Listen to the question — it's what you tell a witness: listen to the question, think about it for a second, and answer that question. That judge is worried about something — so answer it.

BAG: I noticed in watching oral argument this morning that almost every judge who spoke would actually signal, about 30 seconds before asking questions, through body language — you would do this — that you were concerned about something, and you were about to speak. Among the myriad things that a lawyer has to keep in mind, how important is it to, sort of, be aware of the body language?

SGB: In this Court, it's difficult because there are nine people, and what I would say is that for a lawyer, if he sees one of the judges seems to want to talk and isn't going to get a chance, he tries to get that judge to say something — because if the judge has a question and he doesn't get to say it, he's going to think about that question anyway. And therefore, it's better to try to get it out. Find out what it is, and then you can answer it.

BAG: How similar do you think legislative drafting is to contractual drafting?

SGB: I worked on the judiciary committee in the Senate for some time, and there were professional drafters who did a pretty good job. The greatest difference, I think, whether the statute turned out well or didn't, was the process of exposing draft language in hearings, in public hearings, to all kinds of people who might have an interest. But by getting people to testify about it and talk about what should be done, you began to see how language would work to solve their problems or not. But where something was put onto a bill on

the floor or without a hearing, a likely mess would ensue. Language wouldn't do what people wanted it to do. And that doesn't mean they were stupid; it means that nobody can foresee all the different ways in which a statute might be used, and if you have public hearings and take your time, it's more likely you'll find out.

BAG: And it's hard for contractual drafters to have that kind of scrutiny even though their language can have these sorts of . . .

SGB: That's true. It can have it, but the universe is more limited. And this may be an advantage of a large firm, or maybe you can go to West. You can get form language. Language has been produced over time, which the people in the firm or maybe at West or other places know will have a certain result.

BAG: What if we talk about the expression of statutes more than, say, coverage. How could it be improved?

SGB: You mean the language that's used?

BAG: The language, yeah.

SGB: I think it would be better if the Department of Justice and the drafters in the Senate and the House were permitted and would look at everything, and take their time, and try to work out form words to express it. And then the committees would use those words. When I was there — it was some time ago; it was in 1979, '80, and 1974, '75, '76 — it was quite a long time ago, but I mean, we used to go to the drafters, who were a professional group of people, who would have certain forms of putting language together, and it worked pretty well, I think. At least the language would express what the senators and their staffs wanted to say.

BAG: Let's say a lawyer decides, "I'm not really a very good legal writer, and I'd like to become much better." What would your prescription be?

- SGB: Practice. The same as anything. There are very few people who can't explain things. You can do it. Read it and get your long-suffering spouse to listen [laughter]. Your children. A few minutes a day, listen to theirs. The way that I think it works best: you think of the rough kind of thing you want to say by jotting on a piece of paper every idea you have, and it's a jumble. And then you try to create an outline. And having created that outline, you just start to fill it in. And then you read through it and say, "I wonder if this is understandable." And when it isn't understandable — as it never is — you rewrite it. And then you rewrite it again. I think it's practice that makes the difference. I don't believe there's anyone who can't do it.
- BAG: But there are a lot of lawyers around who have written a whole heck of a lot and probably don't write all that well, wouldn't you agree?
- SGB: They may not practice what they're trying. But what you're urging them, and I agree with it, is to try to write clearly and practice that.
- BAG: And talking it through with others is helpful?
- SGB: Yes. I think so. I think so. That's why I like the law clerks. I've got to be sure I go out of that room with a clear idea in my mind.
- BAG: Do you continue to learn things about writing?
- SGB: Yes, I do. Probably even more now. I mean, there are a number of little gimmicks, like I'll often start a sentence with an *And* or a *But*. And the reason I'm doing that is because it's one thought. And this thought in law, particularly, can be complex. And the reason that it can be complex is law is filled with qualifications. So you start saying, "Well, the point here is that if it's A, and it's A, and it isn't A, and besides . . ." All right, now we've got a thread, and we're

only half through. But then start again and say, “And more than that, it also has to be a dah, dah-dah, dah-dah, dah-dah.” And then we’re not yet through, so we say, “But still more [laughter] . . .” Then it can be . . . Now you’ve divided maybe 15 necessary qualifications into three sentences. Instead of one long sentence with 15, you have three sentences with five. And the fact that you’ve started them with an *And* or a *But* indicates to the reader that this is one idea. And then when you go to the next idea, you don’t have the *And* or the *But*, and therefore they say, “Ah, now this is another idea.” And that’s useful because we have our ideas lined up in about the same kind of category and we have the qualifications in there, but they’re connected to show it’s one idea with the *Ands* and the *Buts*.

BAG: And you like *But* at the beginning of the sentence better than *However*?

SGB: Well, a *But* is a lesser *However*. A *But* is . . . “it’s really part of this same idea.” And *However* is, “but there’s another equally valid thing that goes the other way.” Now, that’s not always true. But . . .

BAG: Do you think lawyers have a professional obligation to be the best writers they can be?

SGB: Absolutely! Absolutely! They’re great at taking complicated things, and that’s a lawyer’s greatest, greatest virtue, I think to me, is that he is a generalist. And people who are really specialists should be able to explain this patent, or explain this method of setting a price, or explain this steam engine, or explain this computer part to that lawyer, who will then take it in, if he spends enough time, so he really understands it, and then, in English, can explain it to the judge, who doesn’t have that much time, but has to know it in English because if he listens to it in technicalese, he’s going to make

a mistake. That's why lawyers are generalists. That's what they're paid to do. In a very complex, very modern society filled with technology, they enable all that to work.

BAG: Is there a part of the brief that you consider most important?

SGB: I think in the beginning, I want to see what the question is; and the end, I want to know what the summary is. And I think if I have to emphasize one in a brief in this Court, the description of the argument. I'll go right to the table of contents. I want to know what that argument is, and I want to know the points. I want to know the main points. In part, I want to know if I've already read them in another brief.

BAG: What about the questions presented?

SGB: Questions presented should be fairly presented. Here, there isn't usually a question of that because we've granted to consider a particular question presented. Don't try to load the question in your favor; it just won't be read. Say what the question is.

BAG: Do brief-writers have any common failings that you would consider annoying habits in reading their briefs?

SGB: Too long. Don't try to put in everything. Use a little editing, I would say. If I see something 50 pages, it can be 50 pages, but I'm already going to groan. And I'm going to wonder, Did he really have to write that 50 pages? I would have preferred 30. And if I see 30, I think, Well, he thinks he's really got the law on his side because he only took up 30. Now, I'm not saying that you always do that. But trying to be succinct — absolutely clear — is the main thing. It saves me a lot of time.

BAG: Are there any questions about writing that I should have asked you but didn't?

SGB: No. You've gone through a lot.

BAG: Thank you, Justice Breyer, for your time.

SGB: Good. Hope it was helpful.

Justice Samuel A. Alito Jr.

BAG: I am here at the Supreme Court building in the Solicitor General's Office with Justice Samuel Anthony Alito Jr. Do you use the full name usually?

SAA: Not most of the time, no — just Samuel or Sam Alito is fine.

BAG: We're going to talk a little bit about legal writing and writing in general. I wanted to ask you, first of all: At what point in your schooling did you make the greatest strides as a writer?

SAA: It was before I got to college, probably in junior high school and high school — maybe even to some degree in elementary school. My father had been a high-school English teacher, among other things, and he was really the person who did the most to teach me how to write. Whenever I had a composition for school, we would go over it, and he would pick apart every sentence and every choice of words. And whatever I've learned, most of it I think was the result of that sometimes pretty painful experience.

BAG: Did you grow up, as I did, in a household in which, over the dinner table, grammar would be corrected, and there was this fastidiousness about language?

SAA: Oh, absolutely. Yes. I still remember some of the things that my father would say. If we ever misused the word *healthy* as opposed to *healthful*, we would be corrected for that. There was a whole list of them.

BAG: Is that something you still observe?

SAA: Yes [laughter]. It's ingrained in me.

BAG: Was your mother also interested in language?

- SAA: She was. She was an elementary-school teacher. And so I think she spent a lot of time with me on schoolwork and on writing when I was in elementary grades. And then when I moved on to the upper grades, she sort of handed off that responsibility to my father.
- BAG: After high school, were there other sorts of growth spurts that you went through as a writer?
- SAA: I think really most of what I learned, I learned prior to college. Of course, I hope I've improved a bit over the years. And I did a lot of writing in college and some writing in law school, and that was a good experience. But my experience was that in college, and certainly in law school, much less attention was paid by the professors, or whoever was reading whatever I wrote, to the quality of the writing per se, as opposed to the substance of what I was saying.
- BAG: How important do you think it is that lawyers write well?
- SAA: I think it's extremely important. Certainly, I appreciate good writing. It makes my job so much easier. I've seen briefs that are extremely well written and some that are abysmally written. The first quality, of course, that's necessary in writing is clarity, so that you can understand what the lawyer is trying to say. If it's elegant, that's a plus. But if I can simply get clarity so that I can understand what the attorney is trying to say without a great strain, that's a help. And I remember something my father would often say about writing. He said, "Sometimes when you're having difficulty expressing something, it's because you really don't know exactly what you're trying to say." I think there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other.
- BAG: A lot of people seem to start writing before they quite know what they want to say, don't they?

SAA: They do. And I think that's a mistake. I have sometimes seen briefs that I think were written that way. I think you should have a good idea of what you're going to say, and the order in which you're going to say it, before you actually start writing.

BAG: Some people say, "Well, how do I know what I think until I see what I ended up saying?" Is that kind of writing — to discover what you think — something that can be useful, but you need to junk all that stuff and just start anew?

SAA: I think so. I think no matter how carefully you plan what you're going to write, some of what you've just described will often occur during the writing process. And it goes back to my point about the relationship between language and thought. Judges often say, "It just wouldn't write," and what they mean is that when you have to go through the discipline of actually putting your argument in written form, you see problems with what you had thought out. When you are just thinking about a legal problem, your mind can easily skip over problems. When you have to write it, and if you aim for a tightly reasoned, well-expressed argument, very often that will expose the problems in the kind of argument that you had anticipated you were going to make.

BAG: When you were on the Third Circuit, how often would you discover that the opinion "just won't write," and it's going to have to turn out differently?

SAA: It happened occasionally. Not most of the time, but occasionally it did. There were instances where I was assigned to write an opinion going one way, affirming or reversing, and when I worked on it, I found that I changed my mind, and I actually wrote an opinion coming out the other way. Usually, in those instances I was able to persuade the court to go along with what I had decided during the writing process.

BAG: I would imagine that that would happen much less frequently on the Supreme Court, as well vetted as all the cases are. Has it happened at all since you've been here?

SAA: It has not, no. But I think it can; it certainly can happen.

BAG: What did you learn from your clerkship with Judge Leonard Garth on the Third Circuit?

SAA: I learned many things. He was a wonderful mentor in many respects. If I had to pick just one lesson, I guess it was to pay very close attention to the specifics of the case that was at hand. He was an old trial judge, a trial lawyer. He cared a lot about the specifics of the case, paying very close attention to the record in the case, and I've certainly taken that from the experience.

BAG: Was a clerkship in those days pretty much what you think of a federal appellate clerkship as being today?

SAA: It was. There were some differences in the way we worked. We didn't have word processing, for example, but the substance of it was pretty much the same as it is now.

BAG: What is the best use of law clerks?

SAA: I use them for the two main categories of work that I do: deciding the case — deciding how I am going to vote — and then working on the opinions. I think you have to use them in both of those ways.

BAG: What did you learn about advocacy from working with Rex Lee at the SG's office?

SAA: Rex was a tremendous oral advocate. We didn't do a lot of work together on written submissions, but I heard him argue, and he had a very matter-of-fact, down-to-earth, plainspoken manner. But he was extremely persuasive in making his arguments that way; I think that's very helpful.

BAG: What are the most overlooked tips on oral argument?

- SAA: Simplify; summarize; synthesize; and understand exactly the point that you want to make, the exact contours of the argument that you are making, the borders of your argument — that’s what’s most important. You don’t have very much time, and the way oral argument is presented today, the answering of questions is really the most important part. There’s not a lot of making pretty speeches any longer in oral argument, so you have to be prepared to answer all the tough questions. And then, the really great advocates that I see, including a lot of people who appear before our Court, have a tremendous ability to stand up, let’s say in a rebuttal where they may have two minutes, and summarize all the important points they want to make at the very end of the case in a coherent form. I don’t know whether people who see that performance understand how difficult it is, but it’s very hard and, I think, very helpful in leaving the Court with the impression that you want.
- BAG: Isn’t that one of the key skills that lawyers need, and probably a great rarity, is a really good ability to summarize?
- SAA: It is, it is. And to simplify — to leave out the things that are just not important. Of course, you don’t want to leave out anything that is important or distort the facts of the case or the law or the argument that you’re making. But it takes a real discipline to say, “This really isn’t important, and that really isn’t important.” So often a mediocre brief will have all sorts of extraneous things in it, and it just makes it more complicated for the reader to understand. And I think it can lead to sloppy thinking also on the part of the lawyer. If you really identify what is important and start pushing away all the things that aren’t important, what you’re left with is what you want to present to the court, and I think it helps you in making your argument if you do that.

- BAG: It probably requires lawyerly judgment. And it's a hard thing, isn't it, to simplify as far as possible but never go so far as to oversimplify?
- SAA: It is, it absolutely is. But I will give you just a simple example, a mundane example, that comes up all the time. I used to get, on the court of appeals (a little bit less here), lots of briefs and draft opinions all full of dates. The dates were totally irrelevant. Why did you need to know that something happened on March 2, 2007? Now, of course, if there is a statute-of-limitations issue or something like that, then you have to put the date in, and the one date that you put in will stand out. But on such and such a date, such and such a motion was filed. Generally, it's of no importance whatsoever, and yet it complicates what you've written.
- BAG: Why is that, in particular, such an endemic problem among legal writers?
- SAA: I don't know [laughter]. I think it's just easy to do that — just to put in a lot of unnecessary details, to give the facts of the case and put in a lot of unnecessary facts, to recount the procedural history and recount all sorts of things that have dropped out of the case and are not any longer important on appeal. It's just easier to write all that. The brief should have gone through two or three more drafts, and each time, things that were not important should have been excised. But it's the old adage, "If I'd had more time, I would have written less." A lot of times, people just don't have the time, or they will not devote the time to the project that it really should require.
- BAG: When you write a judicial opinion, what readers do you have in mind?

SAA: That's changed a little bit here. I think we have a much broader readership here. Certainly, on the court of appeals I had in mind principally the lower courts and lawyers in future cases who would read the opinion. We would write the opinion, if it's what we used to call a "published opinion," as precedent, so I wanted to try to speak clearly to them so that they would understand what we were holding, and they could apply that and be guided by that in future cases. I had in mind, certainly, the parties in the case. I wanted to respond to their arguments and show that their arguments had been given careful consideration. And if we disagreed with them, I wanted them to understand why we disagreed. Here we have a somewhat broader audience — which makes it, I think, more difficult to write because we are writing most of the time on very technical subjects. And if you are just writing for lawyers who are knowledgeable in the field, you leave out a lot of things that are understood. Ordinary people reading won't understand if you leave out too much. And they may also get a mistaken impression about your attitude toward the case because things are understood among lawyers that are not understood by laypeople — intelligent, articulate laypeople reading a judicial opinion.

BAG: Do you think opinions tend to be too long?

SAA: They do. I think in general they could be shortened. I'm sure mine could be shortened. Again, I think it's mostly a matter of time and energy. It is the process of shortening — it's work, it's time-consuming, and it requires mental energy to do it.

BAG: Do you think that law clerks over the last 50 years have contributed to the length of opinions?

- SAA: Yeah, absolutely, absolutely — and I was a law clerk. I remember what I knew and what I didn't know when I started. When you start as a law clerk right out of law school, everything is new to you. And so there is a tendency to go back to the very beginning and recount a lot of stuff that experienced lawyers and judges understand. Law clerks are not in a good position to do the sort of deletion of unnecessary details that I was talking about before, so they do tend to put everything in. And I think they feel that if they produce a lengthier product, it's more impressive — that a certain length and heft to the opinion is necessary to make it authoritative.
- BAG: What would happen if a Justice took a finished opinion and said to a clerk, "I now want you to cut this in half and summarize." What would be lost?
- SAA: Well, it would be good. But the clerk might not really know what to take out. So probably what you would have to do is sort of what I was talking about with my father going over my old school essays to give the clerk an idea: "Well, let's sit down, and let's go through this line by line and sentence by sentence, and see all the things that we can leave out, all the things that we can simplify." And I wish we had time to do that. We generally don't have the time to do that.
- BAG: You often use footnotes in your opinions. What is the best use of footnotes in a judicial opinion?
- SAA: I use them. I try not to use them excessively. Maybe I haven't always followed that over the years. I think substantive points generally shouldn't be in a footnote unless it's a point that does not fit in directly with the argument that you are making. It might be something that you want to note that you are not deciding something — that would be something you would put in a footnote. Maybe you're going to

quote a statute or a regulation; you might put that in a footnote. I don't like to take a significant discussion of a point in the case and put it in a footnote.

BAG: If *Carolene Products*¹ could be rewritten, that footnote would be moved up, wouldn't it? Don't you suppose?

SAA: Probably, yeah [laughter].

BAG: Can bad writing lose a strong case?

SAA: It can, it can. It can because you may totally fail to convey the point that you want to make to the court. The court just might miss your point. There have been times when I've read a brief, and reread a brief, and I just didn't see what it was saying. Or I thought the lawyer was saying one thing and then later, sometimes when the lawyer argued the case orally, the lawyer would be more articulate, and I would say, "Oh, that's what you were trying to say." Now, if we hadn't had the argument or if the lawyer hadn't been more articulate in oral argument, the whole point would have been missed.

BAG: Can good writing win a marginal case?

SAA: It can, certainly. A marginal case by definition is one where you are pretty close, and good writing may persuade the judge that an argument should be accepted. Certainly.

BAG: In your opinions, you always seem to have a summary paragraph up front giving the essence of the opinion right there. Why is that important to you?

SAA: I think it makes the opinion easier to read. It makes it clearer. If you tell people where you're going, they can follow along with the steps in the argument. I know some judges have not done this because they thought people would stop reading after the introductory paragraph, but I think a summary

¹ 304 U.S. 144 (1938).

is very useful. An old colleague of mine in the SG's office once said that he spent hours and hours and hours on the summary of the argument in a brief because he thought that was critically important — that would be the first thing he thought that Justices would read, and he wanted to start out with that. I think that's very important in a brief, and a lot of lawyers, particularly in the court of appeals, just sort of blow that off. They've written the whole brief, and now they have to do the summary (it's a requirement of the rules), so they don't devote any attention to it — sometimes it's a few sentences — and I think that's really a missed opportunity.

BAG: Do you think it's the most important part of a brief?

SAA: I do in a way. I do. I think it should be self-contained. I think that somebody reading the summary of the argument should understand what the case is about and the essence of the argument that is being made and should be persuaded to agree with that argument by what's in the summary. And then in the rest of the brief, you develop the points.

BAG: Would you be as surprised as I was — well, you don't know how surprised I was — but I was surprised in interviewing Justice Scalia to learn that he thought the summary of the argument was entirely dispensable.

SAA: Well, I disagree with him on that. I think it's very helpful. It's the first thing I read.

BAG: You use a lot of paragraph transitions in your writing, such as beginning sentences with *But* — which I have long endorsed and encouraged people to do to signal a rebuttal — and starting paragraphs with *First*, *Second*, and *Finally* as guideposts. How important are these transitional devices to readers?

- SAA: I think they're important. It's easier for a reader to understand what you're saying if the reader is not on sort of a mystery trip. So if you start out by saying where you are going to go at the end, and then you make it clear as you go along just how you are progressing through the argument, the reader can understand more easily what you're trying to say and how you're getting there and how the points relate to each other.
- BAG: Do you agree with me that a lot of brief-writers seem to have trouble with these transitions sometimes to get to a new paragraph?
- SAA: They do, absolutely. The old rules about writing are sound rules. Start off the paragraph with a topic sentence most of the time. There's a reason for those, I've found.
- BAG: Are you conscious in your own writing of trying to keep the narrative flowing?
- SAA: I am, yes. I think it makes it easier to read. I also think that it makes for a more logical argument. It's a kind of a discipline: if you understand exactly how all of the pieces of the argument you are making fit together, it makes for a more logical argument and a more persuasive argument.
- BAG: If we exclude present Justices on the Court, what Justice's writing do you most admire?
- SAA: Maybe the Justice who's seated behind you, Justice Jackson. I thought he wrote extremely well. Justice Holmes wrote very well. He used language very well. He was so brief, however, at times, and so concise, so pithy, that he probably went further in doing that than I think anybody would want to do in the modern era, where I think we have come to expect more argumentation in our opinions than was customary in his opinions. But he certainly was a good writer in the broad sense of the word. He used the English language beautifully.

BAG: Do you ever look at old Supreme Court opinions and just find it very difficult to figure out what they were driving at?

SAA: Yes, absolutely. If you go back to a certain era, if you go back to the late 19th century, sometimes earlier than that, the writing style was so ornate it is sometimes very hard to follow what's going on.

BAG: The first Justice White was almost impenetrable, wasn't he?

SAA: Yes.

BAG: But if you go back far enough, to Chief Justice Marshall, do you admire those early-19th-century opinions?

SAA: I do. I think that the writing of the colonial era and the period right after that was better. I think that was a time when the leaders in the bench and the bar were probably, as a whole, better educated, or more formally educated, than some of the Justices later on. And it may also have just been a change in style.

BAG: Granted that we work in a system based on precedent, is there any good reason that we have to continue interlard-ing paragraphs with a lot of volume numbers and page numbers?

SAA: Yes and no. Probably we go overboard. Probably some of it is attributable to law clerks because that's how they were taught to write in law school and on law reviews. And there's, I think, a reason for insisting on that in student writing. I think it's a good discipline to a degree in student writing. I think that we certainly could get rid of a lot of it, but there are reasons why judges put in lots of citations. It's felt to strengthen the argument — make it appear that the argument is less than just something that the Justice or the judge invented — and it's simply a continuation, a reiteration, of things that have been held and said before. So you're running into the wind in trying to get rid of that.

- BAG: But it is a curious thing that those law-review editors who are now clerks did not have all those numbers up in the middle of the discussion in law review.
- SAA: You mean putting it into the text as opposed to the footnotes?
- BAG: Yeah. And then they get into working on opinions or working on briefs and suddenly it just loads the paragraphs. It's amazing.
- SAA: It could be . . . The citations certainly could be dropped to footnotes. But I made a decision when I became a judge that I would not write opinions in a form that made them seem like law-review articles. It was just sort of a quirk, but I wanted them to look like older judicial opinions and not like a law-review article that had been printed in the official reporter. So I almost never use topic headings in the opinion. Some judges will say "Facts," "Procedural History," "Discussion," and maybe that makes it clearer where you are in the opinion. But I, certainly for a quirky reason, left that out, and so maybe that's the reason I wouldn't put the citations in the footnotes.
- BAG: Let me ask you a question about legalese — and by that I mean legal jargon, not terms of art, not *habeas corpus* but *the instant case, pursuant to*, and so on. Do you have an opinion on legalese?
- SAA: Phrases like that are totally unnecessary, and they can be eliminated. What makes legal writing more difficult than other types of writing is that very often you have to use a particular form of words because it's the legal term, because it's the language of the statute, because it's what was said in an opinion. And so in order to be precise, in order to avoid any impression that you're changing the law in any way, you are stuck with reiterating these same phrases, which

may be very cumbersome phrases. You can't try to develop a synonym or some alternative language; if you do that, it's going to introduce ambiguity into the opinion. And that makes it harder because in ordinary writing, of course, you wouldn't do that. You would try to boil down those complex phrases or find various ways of saying the same thing. You're limited in your ability to do that when you're writing an opinion or a brief.

BAG: If somebody just entering the profession wants to be a really good writer, what would your advice be?

SAA: I think you just have to go back to the rules of writing that you would use in another context, and try to apply them in legal writing as far as you can without unnecessarily, unjustifiably sacrificing the precision that you need in doing technical writing.

BAG: Thank you very much for your time today.

SAA: You're welcome.

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