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 mooting 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

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[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.

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[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.

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[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 nonspecialists 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?

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[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 *that*s 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.