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 legaleses.

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?

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[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.