Justice Clarence Thomas

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

CT: Thank you.

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

CT: Simplicity and clarity.

BAG: Why is it so hard to achieve?

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

BAG: Why humility?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CT: You mean from my colleagues or from the . . . ?

BAG: The question from the bench. I'm not saying from you [laughter].

CT: No, I meant "words and words and words" [laughter].

BAG: Words and words and words in response to a yes-or-no question.

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

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

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

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

CT: Too many.

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

CT: Oh, yeah.

BAG: You might ask more questions?

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

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

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

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

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

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

CT: Most of them.

BAG: Really?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CT: No.

BAG: You're still working on them?

CT: Mm-hmm.

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

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

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

BAG: Really?

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

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

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

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

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

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

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

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

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

CT: I don't read them.

BAG: Ever?

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

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

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

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

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

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

BAG: And helpful to the Court.

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

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

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

BAG: Do you find it difficult to take complex problems that come before you, some of the most complex problems in the world, and reduce them to a yes or a no?

CT: Not really. Because we ask specific questions. We don't ask for all that complexity. We answer a specific question. Some years ago when it was clear that we were going to begin to get cases involving the Internet, I remember spending a summer learning what the heck the Internet was. This was early on. And I had an old computer, and I pulled it apart so I could find out what a BIOS was and what the memory was and a processor and things like that. It's 10, 12 years ago now. Well, actually, it's more — 12, 13 years ago. But the point is simply this: we knew it was coming, so it's time to get ready for it and to begin to understand it. So I think that the cases might be complicated, but you have smart people up here, and we ask not very precise questions, but discrete questions that we would like answered.

BAG: The first thing that one sees in opening a U.S. Supreme Court brief, just inside the front cover, are the questions presented. How important are they to you?

CT: I think they're very important. That's the question we ask. I have a little fear sometimes when we change the question presented. But that's what we granted the case on. That's what we vote on. That's what we'll do on Friday. You brought the case here and you said, we petition for certiorari. You said, this is the question I'd like the Court to answer. And as I noted in an earlier conversation, before we went on tape, that I think it's problematic when people have one question presented in the cert petition and then change it in their opening briefs. And some people go so far in the respondent's brief to write another question presented. And I don't know what gives them license to do

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

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

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

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

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

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

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

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

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

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

BAG: Should briefs be shorter?

CT: I think they should be as short as necessary. I think you should pare them down to what you need, not expand them to the page limit.

BAG: But most people are approaching the page limits, aren't they?

CT: I would pare them down. A Bob Bork brief — look at some of his. I remember he came up here once on a case, and I think he had 20 pages, beautifully written pages, said what he had to say, and he sat down. Or he stopped writing. Or he may have had more and edited it down to what was necessary. And those tend to be beautifully written briefs.

BAG: Do you have a preference for printed, single-spaced briefs over the double-spaced type that came off typewriters?

CT: I don't care.

BAG: Doesn't matter?

CT: Not everybody is in a position to afford the finest type. With computers, you can do almost anything now, though.

BAG: Do you often see what you consider to be an excessive citation of authorities?

CT: Some people can beat a dead horse until it turns to glue. And I just think that at some point . . . come on, you don't have to give me 20 authorities for an obvious point. You can cite one case to say that statutory construction begins with the words of the statute. One case. Move on.

BAG: Don't you think judges themselves, and I'm not necessarily talking about your colleagues, but judges generally tend to overcite in their opinions?

CT: Oh, I don't know. Really, how many times have you read an opinion and gotten beyond the first cite? The main cites. You just don't get into the body of it, and sometimes they cite a lot because a lot of the cases aren't right on point, and you're just riveting it down with all these cites. I understand that, but I'm not going to criticize the judges. But I

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

BAG: What do you think of parentheticals with citations?

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

BAG: What is your view of footnotes?

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

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

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

BAG: You're not?

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

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

CT: I think they just need to go through the repetition of doing the job. They're wonderful. But see, I have a system. This is not learning how to work one-on-one. I have a structured system: you fit in and you get the rhythm during the summer, and I have continuity in the way I do things. And the only thing we have any discussion about is, I make it clear how I want things done, and I do that during the summer. So that way we have a clarity and a sense of how things will be done. And if people don't want to do it, they don't have to stay. And then we never have that discussion again; we can then work as a team. I don't have to go around parading that I'm in charge. So I think with my clerks, they need to just go through the reps, and in my system the editing's built in. The sense that you don't own this product is built in — the sense that we work, we talk, we discuss, that there's no backbiting, that we all keep each other informed. And it's just a wonderful endeavor. They're my little family. They're my kids, and I just really like having them around.

BAG: What would you hope that they learn about writing over the year with you?

CT: Oh, I know what they learn. They learn the value of collaborating and editing and being edited — both in a constructive way, recognizing that we all are trying to accomplish the same thing. And by the time they're done, I haven't had a single clerk who leaves and says that being edited didn't help. It's just the opposite: I've learned a lesson that editing is the key to it all, and that other people look at something that you think is clear and they don't see it, and that you can always learn something from the other person. It's wonderful. It's just a human experience, and it requires you to grow up. When you think of the kids, your

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

BAG: Are there some quintessential Justice Thomas edits?

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

BAG: Already.

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

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

CT: I don't know. I don't think "liberal" or "conservative" works up here real well. I think that may work across the street a little better. I think there are different approaches to the law. There are people who like these broad, expansive approaches and are a little more loose around the edges than I like to be. And there are people, like me, who like to tack pretty close to what the law says and that document says. I don't think that is liberal or conservative. I don't think when I wrote separately in the medical-marijuana case[2] that people would say, well, if you're for people having a right to smoke dope, that must be a liberal position. It's neither; it's a Commerce Clause position. And it's just a matter of who makes the decision. I think you are tempting fate if you have someone in your chambers, working this closely with you, who is fundamentally at odds with your approach to the document and to your work. Not disagreeing; we get plenty of disagreement. But the one thing that I won't give ground on is the view that we have to adhere to this document or to this statute. It's not our decision to make. Some people don't think that. They think it's a point of departure, and I don't abide that here. So, no, you have kids with all different views on different things, then that's fine. That's like saying should you have a Catholic priest who is a non-Catholic, just to have some disagreement. You know, you can only be ecumenical up to a point [laughter]!

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

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

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

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

BAG: Were you in Catholic school all those years?

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

BAG: And what was so difficult about those essays?

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

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

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

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

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

BAG: About what age were you speaking standard English?

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

BAG: Really?

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

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

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

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

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

BAG: Would you describe yourself as a word lover?

CT: Not particularly.

BAG: No?

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

BAG: Was the Latin translation a chore for you?

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

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

BAG: How could legislative drafting be improved?

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

BAG: Did you do much contractual drafting in practice?

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

BAG: How could contracts be improved?

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

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

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

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

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

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

BAG: That was really a prophetic dissent.

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

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[3] 163 U.S. 537 (1896).

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

CT: Is that right?

BAG: And that surprises me.

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

BAG: Will you?

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

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

CT: Good luck!

BAG: Do you think much would be lost?

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

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

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

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

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

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

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

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

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

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

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

BAG: Thank you very much.

CT: Thank you.