

# Justice Ruth Bader Ginsburg

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

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

BAG: What explains that common failing?

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

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

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

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

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

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

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

RBG: Yes.

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

RBG: Yes. Yes.

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

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

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

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

RBG: Yes.

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

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

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

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

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

RBG: No.

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

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

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

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

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

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

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

RBG: First, be scrupulously honest because if a brief-writer is going to slant something or miscite an authority, if the judge spots that one time, the brief will be distrusted — the rest of it. And lawyers should remember that most of us do not turn to their briefs as the first thing we read. The first thing we read is the decision we're reviewing. If you read a decision and then find that the lawyer is characterizing it in an unfair way, we will tend to be impatient with that advocate. My other tip is that it isn't necessary to fill all the space allotted. We allow 50 pages for opening briefs. In some cases, complex cases particularly, it may be hard to fit what you have to say into 50 pages. But in single-issue cases, most arguments could be made in 20 to 30 pages. Lawyers somehow can't give up the extra space, so they fill the brief unnecessarily, not realizing that eye-fatigue and even annoyance will be the response they get for writing an overlong brief.

BAG: How common is the first problem that you mention, of not being scrupulously honest in the characterization of what the lower court has done?

RBG: It's never a problem with the SG. Even if I disagree with the argument, I know that the brief will give an honest account of the authorities. That's very important; I know I can trust the SG's brief. Especially in a Court like this, or any federal appellate bench, a lawyer who slants an authority is going to be found out. I mean, there are all those law clerks here to ferret out exaggerations or misrepresentations. So be honest, I think, is the number-one rule.

BAG: In a speech you gave recently, you disdained three-prong and four-prong tests. What's wrong with them?

RBG: Well, three- and four-prong tests are, I think, a clue that a law clerk's work lurks beneath: *three-prong*, *four-prong*, that's law-review language, and sometimes it doesn't make a whole lot of sense. It gives a false sense of security that you have to go down a certain litany in one, two, three, four rank order. But often the decision is made on other grounds and then fitted into the prongs.

BAG: In a piece you wrote about a decade ago in the *Georgetown Law Journal*, you said that law-review writing is often in a language that ordinary judges and lawyers don't understand. Why is that a bad thing for legal scholarship?

RBG: If you want to write a piece on philosophy, that's fine. But if you're trying to write for a lawyer or a judge as your consumer, if you're commenting on a body of precedent or a statute you're trying to parse, you really do want to be clear. You don't want to be operating on a high philosophical plane. Judges are not going to read those articles, because they haven't got the time to try to penetrate them.

BAG: Has the balance swung too far in favor of that kind of philosophical, difficult-to-understand discussion?

RBG: There's still much good writing. For example, in my own field (I taught civil procedure), if I have an article by, say, David Shapiro, it's just a godsend because he's so bright and so clear and just enormously helpful.

BAG: You admired Charles Alan Wright's style a lot.

RBG: Yes, yes.

BAG: What did you like so much about Charlie's writing style?

RBG: For one thing, he was clear. He was assertive. He didn't fear saying something straight out. He didn't feel any need to qualify things, because "Well, maybe I'm wrong." And he had a wonderfully sly sense of humor.

BAG: Does that show through even in his treatise and his horn-book?

RBG: Yes. Yes, I think so.

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

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

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

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

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

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

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

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

BAG: What about Tolstoy?

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

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

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

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

RBG: Yes.

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

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

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

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



BAG: Do you admire Jackson?

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

BAG: What is your view of legalese?

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

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

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

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

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

BAG: How would that affect the legal profession?

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

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

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

- BAG: But there must be a way of satisfying the experts — satisfying lawyers and judges and law professors — and at the same time making it accessible to the general public.
- RBG: Yes, but in some parts of opinions, you really can't. If you're trying to explain the fine points of, say, a provision in ERISA, there's no way you are going to be able to do that, to make it clear to the nonlawyer.
- BAG: What kinds of things in briefs that we haven't spoken about commonly annoy you?
- RBG: First, excessive length. Second, well, I've already spoken about honesty in brief-writing . . . Oh, something else: it isn't necessary to get your point across to put down the judge who wrote the decision you are attempting to get overturned. It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief. Those are just distractions. You should aim to persuade the judge by the power of *your* reasoning and not by denigrating the opposing side.
- BAG: Do you have a sense that lawyers everywhere have heard that ad hominem attacks don't work, and yet they always tend to think, Well, but this case is the exception: I've got to let the judges know just how bad the other side is?
- RBG: If the other side is truly bad, the judges are smart enough to understand that themselves; they don't need the lawyer's aid.
- BAG: So better to be dispassionate about that.
- RBG: Yes.
- BAG: What's the most important part of a brief, in your view?
- RBG: If you're on the petitioner's side, to anticipate what is likely to come from the respondent and account for it in your brief. Make it part of your main argument. You know the vulnerable points, so deal with them. Don't wait for the

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

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

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

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

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

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

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

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

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

RBG: It was a pleasure.