Justice Stephen G. Breyer

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

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

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

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

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

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

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

SGB: Yes.

BAG: Why is outlining important?

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

BAG: Are you a natural outliner?

SGB: Yes. Do you think I just normally do that? Yes, I normally do that. Always, always. I always have an idea of just where I'm going.

BAG: Do you think it's universally true that writers of nonfiction would benefit from doing outlines first? You must see what happens when people don't have outlines to begin with.

SGB: When you don't have outlines, you don't know where they're going. Now, if you're a genius, I suppose, then it wouldn't matter that much. You really look at Montesquieu, or you really look at Wittgenstein. He's thinking of something up here and something over there — it's what was called a *pensée*. It's like Walt Whitman's "Leaves of Grass." I mean, you have leaves of grass and they grow, and as long as you're a genius, I'm sure it works fine. But for most of us who are not geniuses and cannot expect a reader to be absolutely fascinated by every idea that comes into our heads, I think for such a person you have to have a definite outline of where you're going. It needn't be long. It has to be enough to keep you on track. Sometimes I could have an outline of something I wanted to say, the thing is quite long, but it's like eight words. But these eight words are going to keep me on the track.

BAG: When you had all of these outside readers, friends of yours, critiquing the manuscript, what kinds of things would they contribute?

SGB: One might say, "This doesn't make any sense. Why are you saying this?" And "This is an interesting thought, but what does it have to do with active liberty?" Or "Why do you put this argument about the historical approach versus the more consequential purposive approach in this book? What has it to do with active liberty?" I did think about that quite hard, and it wasn't so easy to figure out how to fit this whole

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

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

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

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

SGB: The beginning and the end.

BAG: I'm sorry, the beginning and the end.

SGB: Yes, yes, I do — to say what you want to say, to summarize it as well as you can.

BAG: And you seem to like, as I've observed in your writing . . . to the extent there's a refutation, it comes in the middle.

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

BAG: In *Active Liberty* you were writing, I take it, for a general, informed citizen?

SGB: Pretty much. But the difficulty of that book is while I'm writing for the informed citizen — ideally a high-school

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

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

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

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

SGB: Yes.

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

SGB: Uh-huh.

BAG: Why did you do it that way?

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

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

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

SGB: With this, I think it worked perfectly.

BAG: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[1] 347 U.S. 483 (1954).

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

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

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

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

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

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

SGB: No. No. I can think of some great writers who couldn't. I've seen the manuscripts that Proust wrote, and they're filled with changes [laughter]. It's nice to be able to do it if you could, but I can't.

BAG: Do you think it matters whether ordinary people can understand judicial opinions?

SGB: Yes.

BAG: Why?

SGB: Well, particularly in this Court, because if an ordinary person who is not a lawyer can understand it, I think that gives weight to what the Court does, and law is supposed to be intelligible. They should be able to follow it with — the lawyer or the judge should be able to — without having to take special vocabulary courses. And the purpose of an opinion is to give your reasons, and you give your reasons both for guidance, but also it should be possible for readers to criticize the writer. Now, people can't criticize what I say, they can't explain why they think it's wrong, unless they can understand. Brandeis said that once. He said first we have to understand what an opinion means before we can say whether it was right or wrong.

BAG: Do you have an opinion on legalese?

SGB: I'm against it. Legalese — you mean jargon? Legal jargon? Terrible! Terrible! I would try to avoid it as much as possible. No point. Adds nothing. I'm sure there are some instances where there is a necessity for it, but I have not found one, or I can't find many.

BAG: What does it say to you about a lawyer who uses a lot of that jargon?

SGB: It would be helpful to me if he didn't. And if he's trying to disguise the fact that he has no argument, he's not going to get away with that [laughter].

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

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

BAG: And Lon Fuller?

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

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

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

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

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

BAG: Why do you like his style so much?

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

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

BAG: Almost laconic.

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

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[2] 323 U.S. 214 (1944).

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

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

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

BAG: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SGB: You mean the language that's used?

BAG: The language, yeah.

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

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

SGB: Practice. The same as anything. There are very few people who can't explain things. You can do it. Read it and get your long-suffering spouse to listen [laughter]. Your children. A few minutes a day, listen to theirs. The way that I think it works best: you think of the rough kind of thing you want to say by jotting on a piece of paper every idea you have, and it's a jumble. And then you try to create an outline. And having created that outline, you just start to fill it in. And then you read through it and say, "I wonder if this is understandable." And when it isn't understandable — as it never is — you rewrite it. And then you rewrite it again. I think it's practice that makes the difference. I don't believe there's anyone who can't do it.

BAG: But there are a lot of lawyers around who have written a whole heck of a lot and probably don't write all that well, wouldn't you agree?

SGB: They may not practice what they're trying. But what you're urging them, and I agree with it, is to try to write clearly and practice that.

BAG: And talking it through with others is helpful?

SGB: Yes. I think so. I think so. That's why I like the law clerks. I've got to be sure I go out of that room with a clear idea in my mind.

BAG: Do you continue to learn things about writing?

SGB: Yes, I do. Probably even more now. I mean, there are a number of little gimmicks, like I'll often start a sentence with an *And* or a *But*. And the reason I'm doing that is because it's one thought. And this thought in law, particularly, can be complex. And the reason that it can be complex is law is filled with qualifications. So you start saying, "Well, the point here is that if it's A, and it's A, and it isn't A, and besides . . ." All right, now we've got a thread, and we're

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

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

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

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

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

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

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

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

BAG: What about the questions presented?

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

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

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

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

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

BAG: Thank you, Justice Breyer, for your time.
SGB: Good. Hope it was helpful.