

## Justice John Paul Stevens

BAG: I am here with Justice John Paul Stevens of the United States Supreme Court, and we're going to talk a little bit about legal writing today. I wanted to ask you, first of all: How did you learn to write?

JPS: Well [laughter], you mean at the very beginning in second grade or . . . ?

BAG: What are your earliest memories of writing?

JPS: Well, I guess my earliest memories are when I was in school. I went to a very fine school that was associated with the University of Chicago. I went to their laboratory school and high school, so I got a very good education. My mother was an English teacher when she was young in Michigan City, Indiana, and my father liked to write. He wrote some poetry, and he loved to read, so I absorbed an awful lot from my family. I had three older brothers who are all probably smarter than I am [laughter]. I learned a lot from them.

BAG: Did you do a lot of writing through high school and college?

JPS: Well, I don't really remember much in high school. I did write for the school paper when I was in college and started out as a sportswriter and eventually became editor of the paper and did a fair amount of writing there. And, of course, did a lot of writing in class.

BAG: Do you see yourself today as a professional writer?

JPS: Well, I never thought of it that way, but I guess writing is a major part of our work, and I do write all the first drafts of my opinions. Of course, I get an awful lot of help from my clerks after I prepare a draft, and they make it into a much more readable product when they get through with it. But

I enjoy writing, and that's one reason I stay around this particular job.

BAG: Why is it that you continue to write first drafts of your own opinions?

JPS: Well, that's kind of a long story, but I think a judge learns more about a case if he has to put his thoughts down on paper. It helps you think through a case, and when you write it out yourself, you often learn things about the case that you hadn't realized. It's part of the learning process and decisional process that I think is really quite important.

BAG: Has clerking changed much from the days when you clerked for Justice Wiley Rutledge?

JPS: Yes [laughter], it has. The clerks have a much larger role in all of the work that goes on. I did very little work on Justice Rutledge's opinions. He wrote them all out in longhand ahead of time and did very little work on comments on other Justices' opinions. We only got one copy of a draft in the chambers, and he would read it, and somebody would send it back and join it — whereas now we all will send at least two copies of a draft opinion around to everyone else because every Justice likes to have his law clerk study the case too before he joins the opinion and see if there are any suggestions that might be helpful to the case. And the clerks now play a much larger role in the entire decisional process than they did when I was a clerk.

BAG: Are they perhaps the main contributing factor to the fact that judicial opinions have gotten longer and longer?

JPS: I think so. I think they really are. When a judge writes out an opinion, he can explain what his thinking is and do it in so many words, and that's the end of it, whereas the capable, scholarly law clerks tend to feel they really have to prove everything. And so they will often be much more

thorough in their research and their consideration of all the arguments than the judge who just sort of thinks he maybe has to tell the world what motivated his particular actions, so I really think that's part of it.

BAG: You wrote what must be the shortest majority opinion in recent decades. It's a little five-paragraph opinion on whether an unloaded gun is a deadly weapon.<sup>1</sup> And I think that was in the early '90s. Why don't we have more opinions like that?

JPS: Well, I guess I haven't written very many more [laughter]. Well, the cases, in all fairness . . . most of the cases that we get do involve some complex issues and require fairly careful study, and there are not very many that you can simply say it's either red or green. There are complicated problems.

BAG: Five years before you clerked for Justice Rutledge, he wrote this article on appellate brief-writing — which I've always thought was excellent — in which he argued that it's important for briefs to be interesting. Do you remember that article?

JPS: No, I don't.

BAG: And did he have his clerks read that?

JPS: No, he didn't. I don't remember it at all. I know he felt it very important to answer every argument that had been made, to let the lawyers know that their points had been fairly considered and that we had thought everything through. And one of the consequences of that was his opinions were very long. He wrote opinions which many people thought were longer than necessary, but it was part of his

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<sup>1</sup> *McLaughlin v. United States*, 476 U.S. 16 (1986).

feeling about the job — that you had to be fair to the lawyers and explain everything. And he was a very, very thorough workman.

BAG: Why isn't Justice Rutledge remembered any better than he is? Because if you talk to modern lawyers, he seems to be sort of an obscure figure.

JPS: That's true, and of course there's a very interesting biography of Justice Rutledge that came out within the last two or three years by Judge Ferren of the District of Columbia Court of Appeals, which is an excellent, fascinating book. I would commend it to anybody interested in the law. But it is interesting. Of course, he was on the bench for a short time. You know he died when he was in his fifties. He was very young when he died, and it's a tragedy that he did. And that's part of it. He only served a few years.

BAG: If we exclude present Justices, who are your favorite writers ever to have served on the Court?

JPS: Well, I've always admired Justice Cardozo, to tell you the truth. He just had a style that you enjoy reading, as well as being very, very clear. And, of course, the three great Justices when I went through law school and all were Cardozo, Holmes, and Brandeis, and each was quite different from the other. I admire all of them immensely. Holmes's opinions, of course, are sometimes very, very difficult to understand, even though they're carefully thought through and all. But I think if I had to pick a favorite, it would be Benjamin Cardozo.

BAG: Do you have any memories of Justice Jackson?

JPS: Yes, but I didn't know him well. I met him, of course, and I knew his law clerk Jim Marsh very, very well. He was a very good friend of mine. He was a baseball fan too, which made him, for many reasons, very good friends. And Justice Jackson was a very, very charming man.

BAG: Did you admire his writing?

JPS: Yes. He was one of the best writers on the Court. I think most of us agree he was an excellent writer.

BAG: Let's talk about briefing. First of all, in a general way, what would you say is the quality of advocacy today?

JPS: I think it's high. The advocacy is really excellent, for the most part. You know, you have ups and downs, exceptional cases. But I think it's good.

BAG: Do you think it's gotten better since you joined the Court?

JPS: Perhaps, but it's certainly better than it was when I was a law clerk. Well, yes, it has improved because I think particularly the states are much better represented now than they were when I first came on the Court. I think that during my early years there were a number of states who let people argue cases maybe for political reasons, rather than because they were the best qualified lawyer. So on the whole, I guess the average is better now.

BAG: Do the best-written cert petitions . . . and a lot of it has to do with content, of course, and what the Court's interested in, but do the best-written cert petitions tend to be the ones that get granted?

JPS: I'm not sure about that, because it's really the issues that are involved, and sometimes we grant even though the petition is poorly drafted. And if you see an important issue in the case, it is a plus if it's well done because you think the case will be well argued when it gets here. But it's not an absolute necessity at the cert stage. And, of course, we have to be honest that a lot of the cert petitions we do not actually read. I think we all use clerks to give us an awful lot of help in processing cert petitions. I tend to read the cert petition before I vote to grant, but unless one of my clerks has identified it as a potential grant, I usually will not read the original papers myself.

BAG: If we take the run of the briefs that you generally see, what one prescription could they follow, in general, to be improved?

JPS: To be improved? Well, for the most part they're doing pretty well right now. The most important thing is to be accurate and intellectually honest in your arguments and state them clearly, but most of the briefs really are of high quality — the ones in the cases that we hear on the merits.

BAG: Why is it important to identify the weak points in your own argument and grapple with those weaknesses?

JPS: Well, you want to get the right answer. And you also don't want to give invalid reasons for a conclusion. That's quite important. And there are times when you work on an opinion, you come out differently than where you started at. You recognize weaknesses that you didn't see before.

BAG: How often does it happen that you'll start on an opinion and realize this just won't write?

JPS: Not very often, but once in a while it does happen. Once every couple of years at the most.

BAG: Do you think that there is an appreciable difference in what brief-writers need to be doing at the Supreme Court, as opposed to the circuit level?

JPS: No, I think it's essentially the same task. No, it's basically the same job.

BAG: What is the best and most important thing to do in a reply brief?

JPS: Well, address arguments that you may not have covered in your original brief and respond to arguments that you haven't met the first time around.

BAG: When you begin considering a case, can you describe your own reading? Do you read a bench memo and then the lower court's opinion? Is it a predictable thing that you go through?

JPS: Most often, I start by reading the lower-court opinion, and then I take the briefs. I read the blue brief, the red brief, and the yellow brief. It's amazing how often that I'd be totally convinced when I read the blue brief, and I read the red brief [laughter], I think, "Golly, I sure had that one wrong." Then I read the yellow brief, and I go back to where I was. And then often you're not sure until after argument. We get a lot of cases in which reasonable people can differ, and there are good arguments on both sides, and I find the briefs are very, very helpful. Of course, then I look at some of the cases that are cited. It's interesting, though, in our cases most often there's only one or two or three of our prior precedents that really affect your decision. It usually turns pretty much on one or two cases. In such a case, of course, I go back and reread the case unless I remember it. Sometimes I don't remember it even though I wrote it [laughter]. It happens that way. And then, of course, I always talk to my law clerks. I don't have them write bench memos, but I always review the cases and my thinking about the case both before argument and after argument. I ask them to come in, and we sit down and talk about what happened at the argument. Then I'll talk to them again before and after a conference. I have a lot of conversation with my clerks to get their reaction to a case. But I like to hear what the lawyers have to say as my first introduction to the case.

BAG: When I was watching arguments in the Court recently, I remember thinking, "Boy, that is a good argument on this side, and it's a good argument on the other side. If I were having to decide, I could go either way and be quite happy with it." Do you often leave the bench after oral argument with that feeling?

JPS: Sometimes. Most of the time, I'm fairly confident in which way I'll go. But you're right: there are a lot of cases in which you recognize there are reasonable arguments on both sides, and particularly statutory cases. But most of the time, by the time the argument's over I'm fairly well persuaded one way or the other. But as I said, I've changed my mind not only after argument but after conference and after starting to write an opinion. So there's a lot of flexibility and variation from case to case.

BAG: There seem to be two views on how a judge should write an opinion when the case is very close. One view is that you should write it up as if the opinion that you ultimately come out with, the decision, was inevitable, and it's almost a slam dunk that way. The other view is more in the line of Learned Hand and Henry Friendly.

JPS: Henry Friendly is the best example: there's this argument, that argument. Dick Posner does that too. He does that in a number of his opinions. I think that's a fine way to write opinions.

BAG: It almost oversimplifies the decision-making just to write it up as if it were all a slam dunk.

JPS: Yeah. For some of them you can write it. When you get through with it, there's a choice, and you explain which way you think it should be said, and it can be done rather concisely. But it's appropriate to spell it out, I think.

BAG: What are your most important tips on oral argument?

JPS: Be well prepared, of course. Be intellectually honest; don't try and conceal problems that the judges are going to find anyway. And do the best you can to explain why your side should win.

BAG: How often do you witness intellectual dishonesty?

JPS: Very rarely, but every now and then you do. A lawyer will either make a statement which, arguably, is designed to create an incorrect impression of the record or of the law. It happens rarely, I'm glad to say, because we do have professionals arguing before us. But on occasion you're a little unhappy with what a lawyer does.

BAG: Does it ever happen that an intellectually dishonest lawyer will win?

JPS: If he's right, he may win despite himself. I can remember a case when I was a law clerk that I think was argued by an attorney general of one of the states. It was a tax case in which I remember all the law clerks in advance of the argument thought there's no way in the world that this guy could win — and particularly when he made his argument, that there's nothing to it. And he was so bad that the clerks decided they'd better try and research the problem and figure out what arguments might be made on that side of the case, and they came up with arguments he totally omitted, and he won the case. But that doesn't happen very often.

BAG: What is the most overlooked little point on oral argument — a nicety that more advocates ought to pick up?

JPS: I haven't really thought about that. Of course, we're always glad if they can bring a little bit of levity into a serious problem. I really don't know what the answer to that question is.

BAG: How much does grammar matter to you?

JPS: Well, it does matter. It really does. And it's perhaps unfair, but if someone uses improper grammar, you begin to think, well, maybe the person isn't as careful about his work, or his or her work, as he or she should be if he doesn't speak carefully. Grammar is really quite important. And we don't encounter grammatical errors too often.

BAG: How often do you see typographical errors?

JPS: Typographical errors? I think there's almost never a brief that I don't find a typographical error in. It's amazing. Even though they're proofread over and over again, there are . . . errors are very common. I mean, especially with the word processor now, the word *it* will not, you know, get the spell-check, even though it should have been *if* or *in* or *is*. And there are a fair number of errors that just creep in and people miss. It's surprising.

BAG: Does it bother you at all?

JPS: No. I always correct them when I read the briefs [laughter].

BAG: Are those little briefs with your marks on them . . . are they kept anywhere?

JPS: Probably in the wastebasket. I certainly don't file them away.

BAG: Do you enjoy reading briefs?

JPS: Well, yes, I do, although sometimes I have to confess that they seem somewhat longer than necessary on occasion. But I do, yes.

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

JPS: Yes, I do. I learn from my clerks, to tell you the truth. I'll write something; they'll sometimes rewrite a paragraph, and gee, that sounds a lot better. And I learn a great deal. It's a constant learning process, yes.

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

JPS: I would think so, yes. They do, and I think they probably perform that responsibility quite well — at least those that appear before us.

BAG: Well, I know you have an appointment to get to, and I want to thank you very much for your time today.

JPS: I've enjoyed it. Thank you.