Justice Samuel A. Alito Jr.

BAG: I am here at the Supreme Court building in the Solicitor General's Office with Justice Samuel Anthony Alito Jr. Do you use the full name usually?

SAA: Not most of the time, no — just Samuel or Sam Alito is fine.

BAG: We're going to talk a little bit about legal writing and writing in general. I wanted to ask you, first of all: At what point in your schooling did you make the greatest strides as a writer?

SAA: It was before I got to college, probably in junior high school and high school — maybe even to some degree in elementary school. My father had been a high-school English teacher, among other things, and he was really the person who did the most to teach me how to write. Whenever I had a composition for school, we would go over it, and he would pick apart every sentence and every choice of words. And whatever I've learned, most of it I think was the result of that sometimes pretty painful experience.

BAG: Did you grow up, as I did, in a household in which, over the dinner table, grammar would be corrected, and there was this fastidiousness about language?

SAA: Oh, absolutely. Yes. I still remember some of the things that my father would say. If we ever misused the word *healthy* as opposed to *healthful*, we would be corrected for that. There was a whole list of them.

BAG: Is that something you still observe?

SAA: Yes [laughter]. It's ingrained in me.

BAG: Was your mother also interested in language?

SAA: She was. She was an elementary-school teacher. And so I think she spent a lot of time with me on schoolwork and on writing when I was in elementary grades. And then when I moved on to the upper grades, she sort of handed off that responsibility to my father.

BAG: After high school, were there other sorts of growth spurts that you went through as a writer?

SAA: I think really most of what I learned, I learned prior to college. Of course, I hope I've improved a bit over the years. And I did a lot of writing in college and some writing in law school, and that was a good experience. But my experience was that in college, and certainly in law school, much less attention was paid by the professors, or whoever was reading whatever I wrote, to the quality of the writing per se, as opposed to the substance of what I was saying.

BAG: How important do you think it is that lawyers write well?

SAA: I think it's extremely important. Certainly, I appreciate good writing. It makes my job so much easier. I've seen briefs that are extremely well written and some that are abysmally written. The first quality, of course, that's necessary in writing is clarity, so that you can understand what the lawyer is trying to say. If it's elegant, that's a plus. But if I can simply get clarity so that I can understand what the attorney is trying to say without a great strain, that's a help. And I remember something my father would often say about writing. He said, "Sometimes when you're having difficulty expressing something, it's because you really don't know exactly what you're trying to say." I think there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other.

BAG: A lot of people seem to start writing before they quite know what they want to say, don't they?

SAA: They do. And I think that's a mistake. I have sometimes seen briefs that I think were written that way. I think you should have a good idea of what you're going to say, and the order in which you're going to say it, before you actually start writing.

BAG: Some people say, "Well, how do I know what I think until I see what I ended up saying?" Is that kind of writing — to discover what you think — something that can be useful, but you need to junk all that stuff and just start anew?

SAA: I think so. I think no matter how carefully you plan what you're going to write, some of what you've just described will often occur during the writing process. And it goes back to my point about the relationship between language and thought. Judges often say, "It just wouldn't write," and what they mean is that when you have to go through the discipline of actually putting your argument in written form, you see problems with what you had thought out. When you are just thinking about a legal problem, your mind can easily skip over problems. When you have to write it, and if you aim for a tightly reasoned, well-expressed argument, very often that will expose the problems in the kind of argument that you had anticipated you were going to make.

BAG: When you were on the Third Circuit, how often would you discover that the opinion "just won't write," and it's going to have to turn out differently?

SAA: It happened occasionally. Not most of the time, but occasionally it did. There were instances where I was assigned to write an opinion going one way, affirming or reversing, and when I worked on it, I found that I changed my mind, and I actually wrote an opinion coming out the other way. Usually, in those instances I was able to persuade the court to go along with what I had decided during the writing process.

BAG: I would imagine that that would happen much less frequently on the Supreme Court, as well vetted as all the cases are. Has it happened at all since you've been here?

SAA: It has not, no. But I think it can; it certainly can happen.

BAG: What did you learn from your clerkship with Judge Leonard Garth on the Third Circuit?

SAA: I learned many things. He was a wonderful mentor in many respects. If I had to pick just one lesson, I guess it was to pay very close attention to the specifics of the case that was at hand. He was an old trial judge, a trial lawyer. He cared a lot about the specifics of the case, paying very close attention to the record in the case, and I've certainly taken that from the experience.

BAG: Was a clerkship in those days pretty much what you think of a federal appellate clerkship as being today?

SAA: It was. There were some differences in the way we worked. We didn't have word processing, for example, but the substance of it was pretty much the same as it is now.

BAG: What is the best use of law clerks?

SAA: I use them for the two main categories of work that I do: deciding the case — deciding how I am going to vote — and then working on the opinions. I think you have to use them in both of those ways.

BAG: What did you learn about advocacy from working with Rex Lee at the SG's office?

SAA: Rex was a tremendous oral advocate. We didn't do a lot of work together on written submissions, but I heard him argue, and he had a very matter-of-fact, down-to-earth, plainspoken manner. But he was extremely persuasive in making his arguments that way; I think that's very helpful.

BAG: What are the most overlooked tips on oral argument?

SAA: Simplify; summarize; synthesize; and understand exactly the point that you want to make, the exact contours of the argument that you are making, the borders of your argument — that's what's most important. You don't have very much time, and the way oral argument is presented today, the answering of questions is really the most important part. There's not a lot of making pretty speeches any longer in oral argument, so you have to be prepared to answer all the tough questions. And then, the really great advocates that I see, including a lot of people who appear before our Court, have a tremendous ability to stand up, let's say in a rebuttal where they may have two minutes, and summarize all the important points they want to make at the very end of the case in a coherent form. I don't know whether people who see that performance understand how difficult it is, but it's very hard and, I think, very helpful in leaving the Court with the impression that you want.

BAG: Isn't that one of the key skills that lawyers need, and probably a great rarity, is a really good ability to summarize?

SAA: It is, it is. And to simplify — to leave out the things that are just not important. Of course, you don't want to leave out anything that is important or distort the facts of the case or the law or the argument that you're making. But it takes a real discipline to say, "This really isn't important, and that really isn't important." So often a mediocre brief will have all sorts of extraneous things in it, and it just makes it more complicated for the reader to understand. And I think it can lead to sloppy thinking also on the part of the lawyer. If you really identify what is important and start pushing away all the things that aren't important, what you're left with is what you want to present to the court, and I think it helps you in making your argument if you do that.

BAG: It probably requires lawyerly judgment. And it's a hard thing, isn't it, to simplify as far as possible but never go so far as to oversimplify?

SAA: It is, it absolutely is. But I will give you just a simple example, a mundane example, that comes up all the time. I used to get, on the court of appeals (a little bit less here), lots of briefs and draft opinions all full of dates. The dates were totally irrelevant. Why did you need to know that something happened on March 2, 2007? Now, of course, if there is a statute-of-limitations issue or something like that, then you have to put the date in, and the one date that you put in will stand out. But on such and such a date, such and such a motion was filed. Generally, it's of no importance whatsoever, and yet it complicates what you've written.

BAG: Why is that, in particular, such an endemic problem among legal writers?

SAA: I don't know [laughter]. I think it's just easy to do that — just to put in a lot of unnecessary details, to give the facts of the case and put in a lot of unnecessary facts, to recount the procedural history and recount all sorts of things that have dropped out of the case and are not any longer important on appeal. It's just easier to write all that. The brief should have gone through two or three more drafts, and each time, things that were not important should have been excised. But it's the old adage, "If I'd had more time, I would have written less." A lot of times, people just don't have the time, or they will not devote the time to the project that it really should require.

BAG: When you write a judicial opinion, what readers do you have in mind?

SAA: That's changed a little bit here. I think we have a much broader readership here. Certainly, on the court of appeals I had in mind principally the lower courts and lawyers in future cases who would read the opinion. We would write the opinion, if it's what we used to call a "published opinion," as precedent, so I wanted to try to speak clearly to them so that they would understand what we were holding, and they could apply that and be guided by that in future cases. I had in mind, certainly, the parties in the case. I wanted to respond to their arguments and show that their arguments had been given careful consideration. And if we disagreed with them, I wanted them to understand why we disagreed. Here we have a somewhat broader audience — which makes it, I think, more difficult to write because we are writing most of the time on very technical subjects. And if you are just writing for lawyers who are knowledgeable in the field, you leave out a lot of things that are understood. Ordinary people reading won't understand if you leave out too much. And they may also get a mistaken impression about your attitude toward the case because things are understood among lawyers that are not understood by laypeople — intelligent, articulate laypeople reading a judicial opinion.

BAG: Do you think opinions tend to be too long?

SAA: They do. I think in general they could be shortened. I'm sure mine could be shortened. Again, I think it's mostly a matter of time and energy. It is the process of shortening — it's work, it's time-consuming, and it requires mental energy to do it.

BAG: Do you think that law clerks over the last 50 years have contributed to the length of opinions?

SAA: Yeah, absolutely, absolutely — and I was a law clerk. I remember what I knew and what I didn't know when I started. When you start as a law clerk right out of law school, everything is new to you. And so there is a tendency to go back to the very beginning and recount a lot of stuff that experienced lawyers and judges understand. Law clerks are not in a good position to do the sort of deletion of unnecessary details that I was talking about before, so they do tend to put everything in. And I think they feel that if they produce a lengthier product, it's more impressive — that a certain length and heft to the opinion is necessary to make it authoritative.

BAG: What would happen if a Justice took a finished opinion and said to a clerk, "I now want you to cut this in half and summarize." What would be lost?

SAA: Well, it would be good. But the clerk might not really know what to take out. So probably what you would have to do is sort of what I was talking about with my father going over my old school essays to give the clerk an idea: "Well, let's sit down, and let's go through this line by line and sentence by sentence, and see all the things that we can leave out, all the things that we can simplify." And I wish we had time to do that. We generally don't have the time to do that.

BAG: You often use footnotes in your opinions. What is the best use of footnotes in a judicial opinion?

SAA: I use them. I try not to use them excessively. Maybe I haven't always followed that over the years. I think substantive points generally shouldn't be in a footnote unless it's a point that does not fit in directly with the argument that you are making. It might be something that you want to note that you are not deciding something — that would be something you would put in a footnote. Maybe you're going to

quote a statute or a regulation; you might put that in a footnote. I don't like to take a significant discussion of a point in the case and put it in a footnote.

BAG: If *Carolene Products*[1] could be rewritten, that footnote would be moved up, wouldn't it? Don't you suppose?

SAA: Probably, yeah [laughter].

BAG: Can bad writing lose a strong case?

SAA: It can, it can. It can because you may totally fail to convey the point that you want to make to the court. The court just might miss your point. There have been times when I've read a brief, and reread a brief, and I just didn't see what it was saying. Or I thought the lawyer was saying one thing and then later, sometimes when the lawyer argued the case orally, the lawyer would be more articulate, and I would say, "Oh, that's what you were trying to say." Now, if we hadn't had the argument or if the lawyer hadn't been more articulate in oral argument, the whole point would have been missed.

BAG: Can good writing win a marginal case?

SAA: It can, certainly. A marginal case by definition is one where you are pretty close, and good writing may persuade the judge that an argument should be accepted. Certainly.

BAG: In your opinions, you always seem to have a summary paragraph up front giving the essence of the opinion right there. Why is that important to you?

SAA: I think it makes the opinion easier to read. It makes it clearer. If you tell people where you're going, they can follow along with the steps in the argument. I know some judges have not done this because they thought people would stop reading after the introductory paragraph, but I think a summary

[1] 304 U.S. 144 (1938).

is very useful. An old colleague of mine in the SG's office once said that he spent hours and hours and hours on the summary of the argument in a brief because he thought that was critically important — that would be the first thing he thought that Justices would read, and he wanted to start out with that. I think that's very important in a brief, and a lot of lawyers, particularly in the court of appeals, just sort of blow that off. They've written the whole brief, and now they have to do the summary (it's a requirement of the rules), so they don't devote any attention to it — sometimes it's a few sentences — and I think that's really a missed opportunity.

BAG: Do you think it's the most important part of a brief?

SAA: I do in a way. I do. I think it should be self-contained. I think that somebody reading the summary of the argument should understand what the case is about and the essence of the argument that is being made and should be persuaded to agree with that argument by what's in the summary. And then in the rest of the brief, you develop the points.

BAG: Would you be as surprised as I was — well, you don't know how surprised I was — but I was surprised in interviewing Justice Scalia to learn that he thought the summary of the argument was entirely dispensable.

SAA: Well, I disagree with him on that. I think it's very helpful. It's the first thing I read.

BAG: You use a lot of paragraph transitions in your writing, such as beginning sentences with *But* — which I have long endorsed and encouraged people to do to signal a rebuttal — and starting paragraphs with *First*, *Second*, and *Finally* as guideposts. How important are these transitional devices to readers?

SAA: I think they're important. It's easier for a reader to understand what you're saying if the reader is not on sort of a mystery trip. So if you start out by saying where you are going to go at the end, and then you make it clear as you go along just how you are progressing through the argument, the reader can understand more easily what you're trying to say and how you're getting there and how the points relate to each other.

BAG: Do you agree with me that a lot of brief-writers seem to have trouble with these transitions sometimes to get to a new paragraph?

SAA: They do, absolutely. The old rules about writing are sound rules. Start off the paragraph with a topic sentence most of the time. There's a reason for those, I've found.

BAG: Are you conscious in your own writing of trying to keep the narrative flowing?

SAA: I am, yes. I think it makes it easier to read. I also think that it makes for a more logical argument. It's a kind of a discipline: if you understand exactly how all of the pieces of the argument you are making fit together, it makes for a more logical argument and a more persuasive argument.

BAG: If we exclude present Justices on the Court, what Justice's writing do you most admire?

SAA: Maybe the Justice who's seated behind you, Justice Jackson. I thought he wrote extremely well. Justice Holmes wrote very well. He used language very well. He was so brief, however, at times, and so concise, so pithy, that he probably went further in doing that than I think anybody would want to do in the modern era, where I think we have come to expect more argumentation in our opinions than was customary in his opinions. But he certainly was a good writer in the broad sense of the word. He used the English language beautifully.

BAG: Do you ever look at old Supreme Court opinions and just find it very difficult to figure out what they were driving at?

SAA: Yes, absolutely. If you go back to a certain era, if you go back to the late 19th century, sometimes earlier than that, the writing style was so ornate it is sometimes very hard to follow what's going on.

BAG: The first Justice White was almost impenetrable, wasn't he?

SAA: Yes.

BAG: But if you go back far enough, to Chief Justice Marshall, do you admire those early-19th-century opinions?

SAA: I do. I think that the writing of the colonial era and the period right after that was better. I think that was a time when the leaders in the bench and the bar were probably, as a whole, better educated, or more formally educated, than some of the Justices later on. And it may also have just been a change in style.

BAG: Granted that we work in a system based on precedent, is there any good reason that we have to continue interlarding paragraphs with a lot of volume numbers and page numbers?

SAA: Yes and no. Probably we go overboard. Probably some of it is attributable to law clerks because that's how they were taught to write in law school and on law reviews. And there's, I think, a reason for insisting on that in student writing. I think it's a good discipline to a degree in student writing. I think that we certainly could get rid of a lot of it, but there are reasons why judges put in lots of citations. It's felt to strengthen the argument — make it appear that the argument is less than just something that the Justice or the judge invented — and it's simply a continuation, a reiteration, of things that have been held and said before. So you're running into the wind in trying to get rid of that.

BAG: But it is a curious thing that those law-review editors who are now clerks did not have all those numbers up in the middle of the discussion in law review.

SAA: You mean putting it into the text as opposed to the footnotes?

BAG: Yeah. And then they get into working on opinions or working on briefs and suddenly it just loads the paragraphs. It's amazing.

SAA: It could be . . . The citations certainly could be dropped to footnotes. But I made a decision when I became a judge that I would not write opinions in a form that made them seem like law-review articles. It was just sort of a quirk, but I wanted them to look like older judicial opinions and not like a law-review article that had been printed in the official reporter. So I almost never use topic headings in the opinion. Some judges will say "Facts," "Procedural History," "Discussion," and maybe that makes it clearer where you are in the opinion. But I, certainly for a quirky reason, left that out, and so maybe that's the reason I wouldn't put the citations in the footnotes.

BAG: Let me ask you a question about legalese — and by that I mean legal jargon, not terms of art, not *habeas corpus* but *the instant case*, *pursuant to*, and so on. Do you have an opinion on legalese?

SAA: Phrases like that are totally unnecessary, and they can be eliminated. What makes legal writing more difficult than other types of writing is that very often you have to use a particular form of words because it's the legal term, because it's the language of the statute, because it's what was said in an opinion. And so in order to be precise, in order to avoid any impression that you're changing the law in any way, you are stuck with reiterating these same phrases, which

may be very cumbersome phrases. You can't try to develop a synonym or some alternative language; if you do that, it's going to introduce ambiguity into the opinion. And that makes it harder because in ordinary writing, of course, you wouldn't do that. You would try to boil down those complex phrases or find various ways of saying the same thing. You're limited in your ability to do that when you're writing an opinion or a brief.

BAG: If somebody just entering the profession wants to be a really good writer, what would your advice be?

SAA: I think you just have to go back to the rules of writing that you would use in another context, and try to apply them in legal writing as far as you can without unnecessarily, unjustifiably sacrificing the precision that you need in doing technical writing.

BAG: Thank you very much for your time today.

SAA: You're welcome.