Pepperdine Law Review

Volume 35
Issue 5 *The Inaugural William French Smith Memorial Lecture & Symposium: An Enigmatic Court? Examining the Roberts Court as it Begins Year Three*

Article 1

3-15-2008

The Inaugural William French Smith Memorial Lecture: A Look at Supreme Court Advocacy with Justice Samuel Alito

Samuel A. Alito Jr

Douglas W. Kmiec

Carter G. Phillips

Kenneth W. Starr

The Inaugural William French Smith Memorial Lecture: A Look at Supreme Court Advocacy with Justice Samuel Alito

Panelists: The Honorable Samuel A. Alito, Jr.,* Douglas W. Kmiec,**
Carter G. Phillips,*** Kenneth W. Starr****

PROFESSOR KMIEC: This is a unique constitutional event this afternoon. The event is dedicated to a very special man: William French Smith, the 74th Attorney General of the United States. Sometimes in life it requires a certain distance and reflection to appreciate the worth of a man. Bill Smith was especially of that nature because he was a good and gentle man, learned in the law, and in his quiet manner, unceasingly helpful to Ronald Reagan both in his personal and public life. All of us on this platform this evening were privileged to work in the administration with Bill Smith and we knew his thinking then and now was incisive and careful and always on point. I happened to find some comments of Attorney General Smith earlier this week in preparation for today that I thought were particularly apt. This was a speech he gave in December of 1981, here in Los Angeles. Bill Smith said:

> "Ours is a nation of laws because we recognize the dangers when even well-intentioned officials exercise power in secret. Even as the preservation of our national security requires effective intelligence gathering, the preservation of our national principals requires accountability and obedience to law in the exercise of governmental authority—especially when secrecy is necessary."[1]

---

* Associate Justice of the United States

** Caruso Family Chair and Professor of Constitutional Law, Pepperdine University School of Law

*** Managing Partner, Washington D.C. Office, Sidley Austin LLP

**** Duane and Kelly Roberts Dean, Pepperdine University School of Law

1. *See* William F. Brown & Amerigo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L.

Bill Smith would have liked this event today because this is an event about mentoring. It is an event about preparation. It is an event about thoughtful instruction by two of the most accomplished members of our legal community.

I will introduce him at greater length in a moment but please welcome the Associate Justice of the United States, Samuel A. Alito, Jr.. Joining him in conversation we are especially pleased to have Carter G. Phillips, the Managing Partner of the Sidley Austin law firm in Washington D.C. and an extraordinarily respected advocate before the Supreme Court of the United States. But the afternoon would be incomplete if we did not have a more full reflection of the life and contribution of William French Smith, and there is no better person in this room than the Dwayne and Kelly Roberts Dean of Pepperdine Law School. Himself a former Solicitor General of the Unites States and a former Judge of the United States Court of Appeals for the District of Columbia Circuit, please welcome Dean Ken Starr.

DEAN STARR: Please join me in saying thanks to Doug, our beloved Caruso Family Chair in Constitutional Law. It was just thirty-nine days ago that a number of us gathered at another special spot for a beautiful evening at the Reagan Library. There in the magnificent Air Force One Pavilion we celebrated the creation of an endowment that bears the name of William French Smith. And it was that endowment that made this lecture series inaugurated today enduringly possible.

At that event on June 29, 2007, with Mrs. Reagan and so many special friends present, including a number of people who, like those on the stage here, served in the Justice Department under the leadership of Bill Smith. We lifted up the memory and the legacy of one of the great lawyers of the last century. He was born in Boston and all his pedigree, remarkable on both sides of the family, dates back to a certain ship that left a certain port in England. He was educated—not at Pepperdine—but at Harvard. But he was a true Californian, Bill Smith. He became very special to Pepperdine, serving for a period on our Board of Visitors. We were Bill Smith's kind of place. He came to love this special place called Pepperdine.

William French Smith was present at the creation of the political career of Ronald Wilson Reagan. He was a charter member of President Reagan's fabled Kitchen Cabinet, and eventually became the 74th Attorney General of the United States. Bill was fully engaged in world politics, but he was first and foremost a person of the law. He rose to great heights, and he enjoyed tremendous success in the practice of law. His law firm, Gibson, Dunn & Crutcher, which has been generously supportive of our effort, was guided by

---

REV. 97, 102-03 (1985) (quoting Address by Attorney General William French Smith, Los Angeles World Affairs Council, Los Angeles Hilton Hotel, Los Angeles, California (Dec. 18, 1981).

Bill's leadership and two of his colleagues. He served on the Executive Committee and the Management Committee as the firm became not only one of the great law firms of Southern California, but also of the nation and indeed of the entire globe. With his first rate mind and his extraordinary judgment for which he was justly renowned, Bill Smith was endlessly interested in the policies that inform and shape the law. On that beautiful evening at the Reagan Library, we remembered the legacy of William French Smith and celebrated it. Bill as lawyer, Bill as friend, Bill as Attorney General. One of the themes that emerged was that Bill was tirelessly focusing on the merits of an issue. He was guided by foundational principles and at bedrock, perhaps given his background in Puritan Massachusetts, was a firm belief in freedom, including religious freedom and freedom of conscience. He believed firmly in limited government, and he believed firmly in the rule of law and a free society founded upon an enduring constitutional order.

We gather today in that spirit and to focus on some of the pivotal parts of a process that was very important to Bill in the administration of justice and the process of judging, including a constitutional interpretation. It includes that moment when judges and lawyers meet— we will be focusing on the Supreme Court—when Justices and advocates meet in public and spirited conversation called oral argument. We will be examining both written and oral advocacy, as well as that mysterious process that is entirely hidden from public view, the internal deliberations within the Court when the Justices come together, the nine of them with no staff present, and decide the important questions of our time.

I would like to start with just a couple of thoughts on oral argument to begin the conversation. Other than the written opinions of the Supreme Court, it is the oral argument where the issues are quickly and succinctly identified and then probed. It is the drama, without cameras, of exchange and interaction, something that every American citizen should watch at some point during his or her lifetime. It is a process more revealing than even sitting in court and listening to a Justice reading his or her strongly-worded dissenting opinion. Indeed many pages of written briefs, both of the parties and the friends of the court, will flow into the Justices' chambers. The Justices go do their preparation and thinking separately and privately. They study the briefs, they examine the authorities that were relied upon by the parties and undoubtedly do independent research, discuss the issues with their respective law clerks, and come, we believe, to pretty strong impressions about the case to be argued, including the resolution of the case to be argued. All of this is done alone, in the individual chambers of the nine Justices.

Since so much time and effort is devoted to the written word—about which we will also be talking—as well as that process of individual preparation in chambers, what is to be said of the role of oral argument? We know from history that the Justices of yester-year relied very heavily on oral argument; they relied upon it to learn about the case at hand. In the tradition of English courts, lawyers were able, with apparently remarkable patience on the part of the Justices, not only to argue extensively, but also to read extensively from case law and from other authorities. The argument in a single case could literally go on for days. The lawyers tend, as was customary, to make what were called speeches. It was as if the Justices of yester-year were to be seen but not heard, at least during argument.

This process is no longer. Now the typical argument in the Supreme Court is one hour long, divided into thirty minutes for each side. The argument moves with extraordinary speed, questions fly from the bench, counsel do not get to ask questions, and sometimes counsel fail to be as responsive as counsel should be. It is better to say, "Yes, Justice Alito," or "No, Justice Alito, but let me add a couple of qualifications." As soon as the first question is asked—which is typically quite promptly in the lawyer's presentation—the race is on, and the questions pour out. Remarkably, fifty to sixty questions can pour out in the course of a thirty minute argument.

Are the Justices really probing counsel? Or are the Justices actually sending messages to their colleagues, their fellow Justices? Perhaps the questioning Justice may even be arguing with one of his or her colleagues in the form of a question posed to that necessary middle man, the advocate. Or maybe, as some of us have witnessed first hand, and have experienced first hand, the Justice sees the hapless advocate floundering and maybe needing a little boost. "Now counsel, I thought your argument was . . ." and the response is, "Oh, yes. That's exactly right." And then of course the Justice fills in what a more artful counsel should have said.

So what role do these various dimensions of advocacy play, and to what extent do they lead into the internal deliberative process? And for that and for other vital parts of that process that so engaged and arrested the attention of William French Smith, please join me again in thanking Doug Kmiec for bringing this conversation together.

PROFESSOR KMIEC: Thank you Dean Starr. I have asked both Mr. Phillips and Justice Alito to stay seated so that we can make this as much a conversation as possible.

Let me tell you a little bit about Justice Alito. He is the 110th Justice of the United States Supreme Court. He is a dear friend of Pepperdine, indeed for the last several weeks he has been a member of the faculty at Pepperdine, teaching a course on advanced constitutional law. His biography has been provided to you, but let me just mention the highlights. He has been an

Assistant United States Attorney. He was an Assistant to the Solicitor General of the United States. He served as Deputy Assistant Attorney General for the Office of Legal Counsel. He served as the United States Attorney for the District of New Jersey. He was a United States Court of Appeals Judge for the Third Circuit for well over fifteen years. Now, of course, he sits as an Associate Justice of the United States. He is a graduate of Princeton and Yale. I will tell you that his Pepperdine students report that he is ever prepared, thoughtful, and discerning in judgment. Of course this is all before he gives the exam. In the words of the poet Horace, he is a "good and faithful judge" who "ever prefers the honorable to the expedient."[2] To give us an overview of his expectations for written and oral advocacy from his side of the bench, please welcome Justice Alito.

JUSTICE ALITO: I did not realize that was a question. The Dean said that we are not allowed to be asked questions. (Laughter.)

My overview of what I expect from oral argument and brief writing is pretty simple. I was a judge on Court of Appeals for fifteen years, and I have only been on the Supreme Court for a year and a half, so my judicial approach is very heavily colored by my experience on the court of appeals, and the work of the court of appeals is all business. All of the courts of appeals have huge caseloads, so what I am looking for in briefs and what I am looking for in the oral argument is a roadmap for me to follow in deciding the case. I am thinking about how I'm going to decide the case—how I am going to vote. I am thinking about what I would say if I am assigned the opinion—how I am going to deal with all of the issues. I am looking for as much help as I can get from the advocates in the form of the brief, and then to clean up anything else that is not taken care of in the briefs in the oral argument. It is just as simple as that.

PROFESSOR KMIEC: Well that is delightfully simple, but we are going to draw out a bit more than that. And to begin the kind of drawing out, we have with us this afternoon Carter Phillips, the Managing Partner of the Washington, D.C. office of Sidley Austin. Mr. Phillips and Justice Alito and I, when we were just lads out of law school, had lives that kept intersecting— much for the blissful happiness of me and to the perplexing bemusement of them. Mr. Phillips was clerking for the Seventh Circuit Court of Appeals when I was practicing in Chicago. Mr. Phillips and Justice

2. JON R. STONE, THE ROUTLEDGE DICTIONARY OF LATIN QUOTATIONS: THE ILLITERATI'S GUIDE TO LATIN MAXIMS, MOTTOES, PROVERBS, AND SAYINGS 13 (2004).

Alito then competed for apparently the same job at the Solicitor General's Office on the same day, not knowing that they were both competing, but ultimately meeting each other and discovering that they were in fact after the same position. One of the wisest decisions the United States ever made was to hire them both. They may have thought they escaped, but a short time later Carter discovered the Kmiec family living virtually next door to the Phillips family in Arlington, and Justice Alito and I shared adjoining space in the Office of Legal Counsel (OLC).[3] I've learned immensely from them both, and to prove that point let me ask Mr. Phillips to give his overview of his preparation for oral advocacy.

MR. PHILLIPS: Thanks, Doug. Let me start off by giving you a quotation which I think pretty much describes my role this evening. This comes from John W. Davis who was arguably the finest Supreme Court advocate of the twentieth century. He said this in 1940. With apologies to fisherman at the onset—I am not one—I will just make this observation:

> [S]upposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on flycasting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fisherman talk about, if the fish himself could be induced to give his views on the most effective method of approach. For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.[4]

In this process I am obviously the angler, and our fish is the Justice. Hopefully this statement will be applied to more meaningful insights than anything I can offer. That said, I have to always catch five fish on every exercise, so maybe I have at least something to add in terms to how to get more than one at a time. (Laughter.)

I thought I would take a second to talk at least about my own view on written advocacy. To me, the most important thing you can do in writing for the Court is to try to tell a story, something that hopefully has a little bit of emotional power to it. A lot of the legal issues are quite boring, I confess that at the outset. But you can do what you can, or the best that you can, to try to make the story on behalf of your client a reasonably interesting one and hopefully, at the end of the day, a compelling one. I think one of the

3. Justice Alito and Professor Kmiec were co-Deputy Assistant Attorneys General in OLC from 1985-1987. Justice Alito returned to his native New Jersey to serve as United States Attorney until named to the Third Circuit by President George H.W. Bush in 1990. Meanwhile, President Reagan named Professor Kmiec to Head OLC in 1988, which he did until his return to teaching at Notre Dame in late 1989.

4. John W. Davis, *The Argument on Appeal*, 26 A.B.A.J. 895, 895 (1940).

overarching roles that an appellate lawyer has to take on is knowing who your client is and where your client's interests lie. The reality is that there are some cases that sadly just are not going to win in any court. You have to acknowledge that. Now, that does not mean when you are standing at the podium for that thirty minutes, you do not believe to a moral certainty you are going to win that case. Once you walk out the door when your client says, "So, how'd we do?" then you can say, "I didn't count any votes on my side." But at least for thirty minutes, you can delude yourself. Going into the process, it is very important to think about what you need to do in order to win. Obviously if you are representing a criminal defendant, you need to win everything. You cannot simply go back to your client in jail and say, "Good news and bad news. The bad news is you're going to be doing time. The good news is other defendants in future cases will really like the rule that we were able to get for you." But there are a lot of institutional clients, and if you are representing an institutional client, sometimes you can win but really lose, and sometimes you can lose but really win.

It is important when you are structuring your brief to understand exactly what it is you need to win. I will give you a specific example. I had a case this year for Norfolk Southern. The issue was a very narrow, quite pedestrian question—whether or not the standards for causation have to be the same for both the claim of negligence and the claim of contributory negligence.[5] It was a pretty narrow issue. I thought we had by far the better of the issue, and ultimately we won that issue nine to nothing. But there was a broader question embedded in there as to the proper standards for causation under this particular statute. That was a much more important issue to my client, and trying to figure out how to kind of try to nudge the court in the direction of dealing with that broader issue was an important consideration. We had to take that into account when writing the brief and in our efforts there. We ultimately did not succeed with the Court in actually pushing them to the full extent, but we did get a separate concurring opinion which some of the Justices recognized.[6] So we have teed it up for a future day. That, at least in my mind, is part of what goes into the written advocacy part, if you are a Supreme Court lawyer.

You also have to recognize that there is a big difference on the written side between being a petitioner's lawyer and being a respondent's lawyer. The disadvantage of being a respondent's lawyer is the court reversing three

5. Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799, 802 (2007).

6. *Id.* at 809-12 (Souter, J., concurring, joined by Scalia & Alito, JJ.) (examining the degree of causation necessary for a claim under the Federal Employer's Liability Act (FELA)).

out of four cases. So statistically when you are respondent's counsel, it is not good news from your side's perspective. The one thing that works in your favor, though, is that you are not necessarily bound by the decision as it was rendered by the court of appeals. You can defend on alternative grounds. Many times that is some of the most creative work that a Supreme Court lawyer can do—finding different ways to get to the same result, even if you think the Court maybe took the case for the purpose of reversing what the court of appeals had said.

Then the last part with respect to this written advocacy that I will spend a minute on is the reply brief. I will be interested to see the Justice's reaction to this. To me, the reply brief is the most important brief that we file. The reason is that at that stage, the petitioner has laid out his or her case, the respondent has done the same, the issues are joined, and everything is then focused very focused into the twenty pages. That is the good news, and I think if you write a really effective reply brief, if you are the petitioner, you can either resurrect a case that may be damaged or put the nail in the coffin that seals the case on your side. The problem, of course, is that it is only twenty pages, and it is often responding to at least a fifty page brief on the other side. Many times these days there are multiple amicus briefs—another area in which I would be interested in the Justice's reaction. But, when you have ten or fifteen amicus briefs, each of which is thirty pages long, and you are writing a twenty page reply brief, that is a lot to try to figure out and sort out in a relatively short time.

Another one of the disadvantages of the shrinking docket which I will spend some time talking about today is that often times those reply briefs are written in a remarkably compressed period of time. The term before last, when I worked on the *eBay* case,[7] because of the way the scheduling played out, we ended up having to respond to twenty-something briefs in less than a week in order to get it filed in time for the oral argument. Also, in a fairly significant Securities Act case this term, *Tellabs*,[8] we had ten days from the time we received the seventeen amicus briefs and the respondent's brief in order to file a reply brief. So it is an extraordinarily important brief to the process, but it's also one that you do not have the luxury of a lot of time to massage. In a lot of ways you have to somewhat accept the notion that it is better to get it done and make the points as best you can, rather than to necessarily get it one hundred percent right. Realizing, of course, that when

7. eBay v. MercExchange, L.L.C., 547 U.S. 388 (2006). In *eBay*, the Court affirmed that the traditional four-factor test applied by courts of equity in determining whether to award permanent injunctive relief applies to disputes that arise under the Patent Act. *Id.* at 1138-39.

8. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007). In *Tellabs*, the Court held that when determining whether a private plaintiff in a securities fraud action has adequately pled the "scienter" requirement mandated by the Private Securities Litigation Reform Act (PSLRA), courts must consider the inference urged by the plaintiff against any competing, plausible inferences. *See id.* at 2504-05.

you stand at the podium you are going to have to defend whatever you happen to have written at that point.

With respect to oral argument, I think the most important aspect of oral argument is to recognize the advocate's role. Obviously, you are representing a client and you are trying to advocate on behalf of the client. But the reality is you really are there for the benefit of the Court. The Justices have specific questions, and this is your one and only opportunity to really look into the minds of the people who are going to decide your client's fate. You should recognize that as a huge opportunity and not as an intrusion or as an interruption to a magnificent speech that you had spent many months preparing to deliver. It still strikes me. It does not happen as often now as it used to, but it still happens. Lawyers will walk out of that courtroom and say, "I can't believe how they just didn't let me say what I wanted to say. They kept interrupting me. I had a great speech prepared." Well, the reality is, you ought to have a great speech prepared in your mind, but you should be able to deliver it as you answer the questions that are asked.

This actually is not as difficult as it sounds, because at least in this day and age, the vast majority of the questions are directly germane to the case. If you really understand the problems you are going to deal with, those questions are going to be questions that help you move your case in the right direction. Now they may be hostile, you may have to deal with the fact that it is a hostile question, but often times they are not hostile. A lot are very positive questions. The Dean identified, "Well, don't you think your argument would be better if . . . ," which is one of my favorite questions. Now it is always better if I actually got that myself, but I am more than willing to take a lifeline in any circumstance in which anybody wants to offer one. When he said that, I thought of so many instances in which the lawyer at the podium responded, "No, that's not the best way to think about that." That is when you see the Justices reeling around saying, "Arrrrgh!"

But if you are there to serve the Justices, then to me the really important point is to listen carefully to the questions, and I find that that is usually where lawyers get into the biggest problems. This may be the one situation where over-preparation may be a problem, because if you go through a lot of moot courts and a lot of questions, somebody will tell you, "Now you're going to for sure get this question, so you've got to be absolutely ready for the answer to the question." So you have it in mind and you spent days getting ready to give the perfect answer to that question. The Justice's first six words sound exactly like that question you have been ready for, but then it moves to a different question—it is not that question you thought, and unfortunately you stopped listening. Then your answer is to a

question that was never asked, and you have the Justice looking at you quite perplexedly, and you cannot understand why that was not just a homerun answer. But, you did not know what the question was. Then you have this awful situation of miscommunication between the two, which is usually when a Justice will come to your aid and say, "Well don't you think it would have been a better answer to that question if it had come out in this particular way?"

As a last point, the most important thing you do is prepare. You have to understand your case. My own metaphor for this is that you have to figure out what is the smallest, impenetrable shell under which you can hide. No matter what happens, if you are under that shell no Justice can hurt you. Now if you wish, on occasion, you can feel good about yourself and poke your head out, just like a turtle, and see if there might be some kind of way to move forward. But as soon as somebody comes at your head, you get back under your shell. The absolute key to advocacy is knowing where that shell is. Because if you leave your head out and you were wrong, that is a bad place to be—as any turtle that has been run over on the road will tell you. So that is essentially the way I look at it.

If you see novice lawyers, or lawyers who are not that well prepared, they get a hypothetical and their jaw drops. I know what is going through their mind, "Does the trap door open if I say 'Yes' or 'No?'" They have no idea which is right, so they do the best they can. Usually not answering "Yes" or "No," figuring the better way is to try to dodge and weave on that particular issue. The best thing that an advocate can do is know exactly how much you can give, and be willing to give that up. But you also need to know how much you cannot give up, no matter how unpleasant it can be. And I can guarantee you there will be times when it will be extraordinarily unpleasant. Anyway, those are my overall observations about advocacy.

JUSTICE ALITO: Can I use some of my reserved rebuttal time? (Laughter.)

PROFESSOR KMIEC: I had forgotten that you had reserved time. Go right ahead.

JUSTICE ALITO: To address Carter's metaphors, I liked the last one where he is a turtle and we were whacking the turtles. But, I was disturbed by the first fishing metaphor. I never realized when he stands up there to argue cases in front of us he has a filet knife in his hand and he is thinking about preparing some sushi; so I will never look at him the same way again when he argues a case.

MR. PHILLIPS: I have no answers.

PROFESSOR KMIEC: Let's get down to business. This year the Court decided sixty-eight cases after argument. Some people have noted—no one in this room, of course—that this is a smaller number than at any time in recent history. Which prompts these questions: Is this a conscious effort to lower the Court's profile, or is the Court looking for, but not receiving, the kinds of petitions and briefs necessary to fill the docket? Tell us a little bit about why you think the Court's docket is at somewhat of a low ebb, and how it relates, if at all, to the preparation of an excellent brief for certiorari.

JUSTICE ALITO: Well, why did we end up with the number of cases that we did? That's a very good question. I don't know the answer. I can tell you that it is not a conscience decision on our part. We did not start out the term and say, "We want to shoot for seventy-eight cases, that seems like the right number," or any other particular number. And I can tell you, I think, without revealing any confidences that should not be disclosed, that we looked very hard during the course of the term for additional cases to take. The criteria that are used in deciding whether certiorari should be granted have not changed over the years. They are set out very clearly in Rule 10 of the Supreme Court Rules. To simplify matters, we are looking for cases where there is an important conflict in the law, a conflict between circuits, a conflict between a court of appeals and a state supreme court, or a question of considerable importance that should be decided by us at this time without awaiting a conflict in the decisions of the lower courts.[9] Those are

9. Rule 10 of the Rules of the Supreme Court of the United States specifically provides as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

U.S. Supreme Court Rule 10, http://www.supremecourtus.gov/ctrules/ rulesofthecourt.pdf

the criteria, and those have been the criteria for as long as I can remember. Those are the criteria that we applied, and the number of cases that we heard were the number of cases that we felt met the criteria.

To go back to the beginning of your question, I am going to quarrel with your premise that the reduced number of cases is a reflection of the quality of the certiorari petitions that we are receiving. I do not know that there is any particular number of cases that we should be deciding. We should be doing the job that is assigned to us, and I think that is reflected in the criteria that are in the Supreme Court Rules. And if we are doing that—if we are providing clarification on issues where the lower courts are in conflict, and if we are deciding important issues that should be decided immediately, without awaiting a conflict—then we are doing our job. And whether we decide 78 cases or 178 cases is really not the question. It is a question of the nature of what we are doing and the quality of what we are doing, rather than the quantity.

PROFESSOR KMIEC: You reflected on Rule 10 and the significance under that Rule of a conflict in the circuits or conflict with the state courts. Often times one hears from some judges that those conflicts are seemingly manufactured, or that there is some structuring going on in the preparation of a petition for certiorari. Is there any suspicion on your part that this takes place?

JUSTICE ALITO: Well, any lawyer knows that there are many different ways to read a case and many different ways to characterize a case. The number of certiorari petitions that allege a conflict in the circuits, or between a court of appeals and a state supreme court, and the number of cases in which there *actually is* a conflict are actually quite different. There are a lot more alleged conflicts, as you might expect, than real conflicts. The question is whether the case at hand would be decided differently in different courts—that is the test. And when you apply that test, you will see many more cases where there is language that seems to be in some tension but there is no conflict in the decisions. The number of cases that meet the criteria that we have is not just a reflection of what we are doing or what the advocates are doing. In fact, I would say it may be more a reflection of the work of the lower courts. How many conflicts are they generating? It is a reflection of the work of Congress. Is Congress enacting the sort of legislation that produces unsettled legal issues that require resolution by us? If Congress passes wide-ranging legislation that leaves a lot of loose ends, or a lot of important questions undecided, that will generate a half-dozen cases for us within a relatively short period of time, depending on the nature of the legislation. So, none of those factors is, of course, within our control.

PROFESSOR KMIEC: Of course the Court is still getting thousands of petitions each year, somewhere in the range of 8,000 or 9,000 petitions, even though the number of decided cases is under 100. Mr. Phillips have you changed your strategy as to what you advise your clients in terms of petitions for certiorari, or how you structure your argument in terms of the petition?

MR. PHILLIPS: Well, one thing that you cannot control is a client that is absolutely convinced that the decision below is wrong, and therefore they want to take it to the Supreme Court. You hear that expression, "We'll take it all the way to the Supreme Court." Sometimes I can say to them, "I mean, literally, you have zero chance of having the Court grant certiorari in this case." And more often than not, they will go find another lawyer to write the certiorari petition. I obviously do not have the enthusiasm for it that they probably want, and that is probably just as well. But I do not think it deters many clients from then filing a petition in those cases where they think that the issue is really an important one.

I know one of the things that has changed over the last few years—and I would be interested in the Justice's reaction—is that the Court is granting certiorari in a significantly increased number of cases from the Federal Circuit.[10] Those are not cases where there is a conflict in the circuits. Instead, those cases recognize that there are some issues that are of overarching importance—presumably either to the business community or to the patent holders or to whomever—that has attracted the Court's attention. I know that empirically part of that is driven by amicus submissions. If you look at the cases the Court has granted, they are usually tied to a half-dozen or more amicus briefs that are filed at the certiorari stage. It does suggest

10. For the October 2007 Term, the Supreme Court granted certiorari in four cases on appeal from the Court of Appeals for the Federal Circuit. Of these, one case was decided by the Court on January 8, 2008. *See* John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008) (affirming the Federal Circuit decision). As of the time of publication, decisions are pending in the other three cases. Quanta Computer, Inc. v. LG Elecs., Inc., 435 F.3d 1364 (Fed. Cir. 2006), *cert. granted*, 128 S. Ct. 28 (Sept. 25, 2007) (No. 06-937); Richlin Sec. Serv. Co. v. Chertoff, 472 F.3d 1370 (Fed. Cir. 2006), *cert. granted*, 128 S. Ct. 613 (Nov. 13, 2007) (No. 06-1717); United States v. Clintwood Elkhood Mining, 473 F.3d 1373 (Fed. Cir. 2003), *cert. granted*, 128 S. Ct. 710 (Dec. 3, 2007) (No. 07-308). The prior Term saw the Court granting certiorari in three cases from the Federal Circuit. KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2006); Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746 (2006); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2006). These cases represent a marked increase from the prior three years, 2003-2005, where the Court only heard one case each Term from the Federal Circuit. Illinois Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2005); Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2004); Scarborough v. Principi, 541 U.S. 401 (2003).

that (1) using conflicts among lower courts as the *sine qua non* of cases to be decided is not always the best approach, and (2) maybe the Court ought to think some about deviating slightly from that approach in cases that are in regional circuits that will decide some issues of overarching significance.

I have always felt this way, particularly in criminal cases. Because I do think that if you wait for a conflict in the circuits, there are criminals in theory—or people who are convicted as criminals—whose convictions might be overturned if the Court were to decide a particular issue, and that is obviously a serious problem. I can remember a case I had in the 1980s where the Court completely rejected a particular criminal law theory, and 250 public officials all had their convictions overturned in one fell swoop. In that context, even they did not wait for a conflict. They just happened to, almost accidentally, end up with that issue before the Court because the lower courts were unanimous in their interpretation at that stage. That is obviously a situation that is in some ways at least uncomfortable.

Now, I will really answer your question, which is, have I changed my approach? The Justice is right. Everybody is looking for a conflict in the circuits. You tend to try and figure out some way to get at it, although I will confess at some stage, I simply throw up my hands and say, "I'm not going to allege that there's a conflict here because there's just not a conflict." Sometimes it is too remote and anyone who reads the opinion is going to recognize that. So I will just make my pitch and hope that the Court is willing to grant on the basis of not having a conflict. Candidly, there are cases where the Court has in fact granted certiorari under those circumstances. But I have to admit there are a few cases last term where there were conflicts in the circuits written by very good lawyers which were not taken by the Court. I do not know how that happened, but I am sure they fell through the cracks somehow.

DEAN STARR: Rule 10 actually lifts up the value of importance and it then gives guidance as to importance. Where there is no conflict, part of the lawyering skill is to say it to the Court, "We recognize that there's not a conflict, but this is very important for the following reasons." Of course, they need to be very good reasons. But one specific example from past years is in the copyright era. The *New York Times* successfully petitioned, although eventually losing the case, for hearing on a copyright issue—whether the *New York Times* was violating the copyright rights of individual freelance contributors when it, along with other publications, was sending those articles to *LEXIS/NEXIS* and other databanks.[11] There was no conflict

11. *See* N.Y. Times Co, Inc. v. Tasini, 533 U.S. 483 (2001). In *Tasini*, the Court ultimately held that the publishers, in granting licenses to electronic databases to reproduce and distribute articles previously contributed to their publications, infringed upon the authors' exclusive rights under the Copyright Act. *Id.* at 506. The decision turned on the Court's interpretation of § 201(c) of the Act,

whatsoever, but very able counsel for the *New York Times*, Professor Laurence Tribe from the Harvard Law School, urged the Court to take the case because the United States Court of Appeals for the Second Circuit had so ruled in the area, and this ruling would essentially set the standard for the entire nation.[12]

PROFESSOR KMIEC: Several of you, Carter in particular, mentioned amicus participation at the certiorari stage and that such participation is apparently increasing. How important is that, in terms of your own assessment or in terms of the assessment of the Court, when considering whether to take a case?

JUSTICE ALITO: I think amicus briefs are helpful. They are helpful at the certiorari stage in some instances. I find them quite helpful at the merit stage. I do not think you need an amicus brief to show that there is a conflict if you have a conflict, but if the issue is whether the case is of sufficient importance to be taken without a conflict, or to show the importance of the issue in an instance where there is something close to a conflict, then amicus briefs providing different perspectives on the issue can be helpful.

PROFESSOR KMIEC: Now the academic literature overwhelmingly says the participation of the Solicitor General urging the Court to take a case is vitally important. Let me ask Carter Phillips how you engage the Solicitor General to be interested in your case. I will follow that question by asking when the Court itself finds it necessary to seek the Solicitor General's views and what kinds of consideration go into making that decision to ask the Solicitor General. Since we have a former Solicitor General here in Dean Starr, please add anything you'd like.[13]

---

specifically whether these grants constituted a "revision" of a collective work as contemplated by the statute. *See id.* at 499-501; *see also* 17 U.S.C. § 201(c).

12. *See* Petition for a Writ of Certiorari, N.Y. Times Co., Inc. v. Tasini, 2000 WL 34016538 (Aug. 4, 2000). Notably, the Petition asserts no conflict among the circuit courts, instead invoking the Court's attention by articulating the importance of the question at issue: "[T]he court of appeals' holding merits this Court's immediate review because it will require publishers and electronic database companies, nationwide, irreversibly to delete tens of thousands of freelance contributions currently stored in electronic archives." *Id.*

13. Kenneth W. Starr served as the 39th Solicitor General of the United States, from May 1989 until June 1993. *See* Solicitors General of the United States, United States Department of Justice, http://www.usdoj.gov/osg/aboutosg/sglist.html.

MR. PHILLIPS: Well, one of the frustrating changes over the course of my own career has been the stinginess, frankly, with which the Solicitor General actually will come to the aid and comfort of private litigants at the certiorari stage. Granted, it was never one of those practices that was routine. I can remember when I was an assistant in the Solicitor General's Office, only five or six times a year at most would we come in on the side of a private litigant. In those cases it was because there was an agency of the federal government that felt very strongly about this issue and urged the Solicitor General to put the weight of the government behind it. And virtually every one of those petitions was granted. I think that is what this literature is based on. Unfortunately over the years—and I do not know if this is Dean Starr's responsibility or not, and if it is I suppose I have to curse him slightly—the Solicitor General has adopted almost an absolutist rule that they will not file in support of a petition offered by a private litigant, or even by a state, unless solicited by the Court. The usual position is that if the issue is important or if the federal interest is obvious enough, the Court will in fact ask for the views of the Solicitor General. So it is very, very difficult to obtain that kind of assistance.

That said, there is some advantage to running through the process even though you know that the government may not come in on your side, because you can at least get some feedback. So if it is the case that there is real sympathy for your client's perspective within the federal government, but they are simply going to invoke the unspoken rule that they do not file uninvited, then you can write a petition that is aimed at trying to persuade the Court to make that invitation available. Whereas if you know the federal government is not going to necessarily support you, it is kind of a hopeless exercise to get the Court to ask for the views of the Solicitor General, knowing that at the end of that process the Solicitor General will advise against hearing the case. So, even as a private litigant, it is still part of your responsibility to feel out how the federal government will come out. These days it is a very frustrating process, because it is very hard to get them to weigh in unsolicited.

PROFESSOR KMIEC: Justice Alito, when do you ask for the Solicitor General's views?

JUSTICE ALITO: Primarily we seek the Solicitor General's opinion when there is a question in our minds about how important the case is with respect to a program that is of concern to the federal government. For example, there may be a regulatory issue where we want the views of whatever agency is issuing the regulations or has the responsibility in the area about just how important the question is. That would be an example. It is usually to assess the importance of the issue. Sometimes there are deficiencies in the briefing—deficiencies in the certiorari petition—that give

us some concern, and it is helpful for us to get the views of the Solicitor General on the case, so that is an additional consideration.

PROFESSOR KMIEC: All three of you have been in the Solicitor General's Office. Dean Starr, you have held the office itself. If in fact the Solicitor General were to be more generous in his participation, coming forward without waiting to be asked, how would that affect the briefing and advocacy before the Court?

DEAN STARR: I think the lack of generosity on the part of the Solicitor General is shaped in no small part by what is perceived to be a decision by the Supreme Court to hear fewer cases. Now, the Justice said that is not the case, but lawyers have a different view, and lawyers in the Solicitor General's Office have a very different view—that the Court is quite parsimonious in what it will hear. If that is so, then one is always worried that there are only so many slots. So to encourage the Court to take Carter's case may have the undesired effect of filling up the docket. If that is not truly the reality, then presumably the marketplace will respond to that, and the Solicitor General will probably feel less institutional reluctance to say, "This case really does need to be heard." Carter put his finger on a very vital point—the Solicitor General will rarely monitor the docket looking for important cases. There really will need to be a client agency coming to the Solicitor General with private antitrust litigation or securities litigation or environmental litigation, as the case may be, and say, "This is important and we really want you to go in *sua sponte*, on your own and without the invitation of the Court, to urge the Court to grant certiorari." There is still a great deal of resistance to doing that for a number of reasons, including the perception that if the Court wants to hear from the Solicitor General, they know where the address is.

Let me be a little provocative here, because this is sounding as if this is all very mechanical on the Solicitor General's part. If there is an issue that is of grave importance to the President, the Solicitor General has a duty to get in there and carefully look at it, and perhaps to weigh in on his own. These cases are typically with the invitation of one of the parties, but not of the Supreme Court. I am talking about certain areas, usually involving social issues. Even though the government has not been involved, certain issues are so important to the President—one side or the other, regardless of what party is in power—that the Solicitor General may find himself or herself saying, "Court, it is really important for you to provide guidance in this very sensitive area." School prayer is one such area, and abortion is

another, where the Solicitor General has in fact weighed in to say, "Please take the case."

PROFESSOR KMIEC: Dean, you had a case before the Justices this year about a speech issue. You, as I recall, were successful in getting the Solicitor General's participation.

DEAN STARR: We were successful, not at the certiorari stage, but at the merit stage, when the Court had decided to take the case.

PROFESSOR KMIEC: And that involvement posed its own problem?

DEAN STARR: Well it did, because this was the so-called "bong hit" case.[14] The Solicitor General's Office had a very robust view of the discretion the school board should enjoy in controlling undesirable student speech. We, on behalf of the school board were a little bit more concerned. Juno, Alaska, has a very robust pro-free-speech policy and that is the way the policy began. That policy encourages speech and deliberation and participation of the democratic conversation as a very sort of libertarian statement, and the school board was not interested in providing wide running room to school officials that might take a more restrictive view. The result was that the position of the Solicitor General was not embraced warmly by a concurring opinion authored by one Justice Samuel Alito.[15] Happily, the Justice and his concurring opinion rejected less of my brief than the Solicitor General's brief, but we still felt somewhat rejected. But lawyers get accustomed to being rejected, sort of like actors.

MR. PHILLIPS: Before we switch topics, I just wondered if I could ask the Justice to comment on the patent cases. Maybe you cannot say anything about it, but it does seem to me there has been a pretty fundamental shift there. I am just curious if there is any publicly available explanation for taking more cases from the Federal Circuit?.

JUSTICE ALITO: Well I was not on the Court during this long period of time between the creation of the Federal Circuit and the last year and a half, which happened to be the time when the Court took more cases from the Federal Circuit. It has been pointed out, and it is very apt, that with the patent cases—since all patent appeals go to the Federal Circuit—there are not going to be conflicts in the circuits. So that would certainly be an area where we would not look for that in deciding which cases to take. What

14. Morse v. Frederick, 127 S. Ct. 2618 (2007).
15. *Id.* at 2636-38 (Alito, J., concurring).

would seem unnatural to me would be a situation in which we take cases from all the twelve regional circuits and don't take cases from the Federal Circuit. I would think taking into account the fact that we are not going to see the conflicts on patent issues, we would treat the Federal Circuit the same way we treat all the other circuits.

PROFESSOR KMIEC: Have the circuits ever become a suspect class?

JUSTICE ALITO: Any particular ones in mind?

PROFESSOR KMIEC: Some do seem to occupy more of your time than others. (Laughter.) But maybe this is just by nature of the population.

JUSTICE ALITO: I would not speculate as to the reason, but I will say this, and I probably should not reveal this, but it is public record so anybody would know it anyway. The last decision of mine from the Third Circuit that went up to the Supreme Court was an opinion I wrote for the en banc Third Circuit, and it was reversed nine-to-zero by the Supreme Court.[16] They were wrong, I was right. (Laughter.)

PROFESSOR KMIEC: So there is hope for the locals.

JUSTICE ALITO: I did not find that a reflection on the quality of my work. It is a reflection on the quality of *their* work. Seriously, it is not the job of the courts of appeals to decide cases the way they think we would decide them, anymore than it is the job of the district judge to decide an issue the way the district judge thinks the court of appeals should decide the case. They have their own responsibilities, and they should follow precedent. All of us should follow precedent in the appropriate way, but I do not read any more than that into reversal rates on particular circuits.

PROFESSOR KMIEC: We are going to turn the page now to focus more on oral advocacy. I am going to take advantage this moment to borrow a wonderful story that Carter Phillips tells about an oral argument that he

16. The case to which the Justice is referring was decided by the en banc Third Circuit Court of Appeals in 2002. Thomas v. Comm'r of Social Sec., 294 F.3d 568 (3d Cir. 2002) (en banc), *rev'd*, Barnhart v. Thomas, 540 U.S. 20 (2003). In fairness, however, Justice Alito did subsequently pen another opinion for the en banc Third Circuit that was not reversed, where instead the Court denied certiorari. Southco, Inc. v. Kanebridge Corp., 390 F.3d 276 (3d Cir. 2004) (en banc), *cert. denied*, 126 S. Ct. 336 (2005).

witnessed, where an advocate was being quizzed about whether or not a particular entity was a state actor. As is so often the case when you are under the glare of intense questioning from highly intelligent people, the reaction was . . . [JAW DROPS]. The advocate was so clearly missing an answer that one of the Justices did what Carter Phillips suggested before, and threw a lifeline and said, "Counsel, the answer you're seeking is, 'No.'" At this point, Justice Stevens who had asked the previous question, apparently leaned over and asked, "Why?" Having received a lifeline from Justice Scalia with the previous answer, the counsel then looked at Justice Scalia again for help. To which Justice Scalia said, "You're on your own now buddy." So it would seem, Justice Alito, that in that circumstance there is a kind of conversation going on, whereby the advocate is an instrument through which you may talk to another member of the bench. We say this all the time when preparing students for oral advocacy moot court exercises, but is that the sum and substance of oral advocacy—you are really just talking to one another through a third party?

JUSTICE ALITO: No. I almost never do that. I cannot say that I have never done that in more than sixteen years on the bench. But I almost never do that. If you are one of my colleagues on the Court and I have something to say to you, why don't I just say it to you? Why do I have to say something to you through a question that I ask somebody else? It seems to me extraordinarily inefficient and awkward to do that. So I rarely do that. I cannot say that it never happens—it does happen at times. But it seems to me to be a very awkward and inefficient procedure.

PROFESSOR KMIEC: As you are going into an oral argument what types of materials are you bringing with you in terms of identifying the concerns that you want the advocate to address.

JUSTICE ALITO: This is going to sound very revolutionary, but I am looking for the advocate to answer the questions that are unanswered in my mind.

PROFESSOR KMIEC: So you have gone through the brief and you have identified questions, or your clerk has helped you identify questions. Do you wait for the advocate to wander toward this territory or do you bring him there immediately?

JUSTICE ALITO: Well, it depends. In my current situation, it is extremely difficult to get a question in, because this is a very, very talkative court. I attribute it to the fact that we have the highest quota of former law professors in the history of the Court. (Laughter.) This is a Court that asks a lot of questions, certainly more than it did back in the 1980s when I was

arguing. So, it is better and more polite and makes for a more coherent presentation if you can let the lawyer get to the point in the lawyer's argument where your question would logically come up. But, if you really want to get it answered, you have to look for the strategic opportunity to get a word in edgewise.

PROFESSOR KMIEC: Now, many of us who write essays and comment on the Court's work are asked for those comments immediately following an oral argument, and one of the things usually said is, "Well you really can't tell what is on the Justices' minds based on the questions being asked, because they may be hypothetical. They may be a form of devil's advocacy." Is that your experience?

JUSTICE ALITO: Sometimes it is. Speaking both as a former advocate, as well as a judge and Justice, sometimes you cannot tell based on what the Justice says, and that may be for several different reasons. It may be because the Justice really has not made up his or her mind and is grappling with some questions; so the questions may give you an idea about an area of concern without revealing very clearly how that particular individual ultimately is going to resolve the concern. That may be one explanation. There may be other instances in which the Justice does not want to publicly reveal at that point in the process what he or she is thinking.

MR. PHILLIPS: Well, I would think you can pretty well predict in about eighty percent of the cases which way the Court is likely to go. Obviously the difficult ones are the five-to-four decisions, where if it is going to turn on Justice Kennedy as the likely swing vote and his questions are ambiguous, you walk out and really do not have any idea. But usually if the case is going to go six-to-three, seven-to-two, or eight-to-one, and certainly if it is unanimous, it is pretty easy to tell. I have walked out of cases saying there were no votes on one side or the other. When it is your side getting no votes, those are very depressing conversations to have with clients.

But I agree with Justice Alito. I do not think he does this as much as other Justices do, but there are several who really do not ask questions. They make statements. In those situations, the advocate is sort of there as the ping-pong table. Somebody else makes a statement, and then somebody else makes a statement. One of the interesting phenomena of being an oral advocate in front of the Supreme Court is that if you are going to get through more than seventy questions in thirty minutes, you have to keep at it all the time. This does not leave a lot of room for the poor advocate to actually

give an answer. So a lot of times it is just better for the Justices to keep asking questions back and forth and not bother to wait for the advocate to leap in the middle. They are just a useless appendage at some point. (Laughter.)

I said that this is an interesting phenomenon, and I doubt that the Justice can comment on it, but I do perceive that there has been a change in the last two years on that score. I do not know whether it is because the Chief Justice has been on that side of the podium and experienced that same feeling as often as I have, and maybe said to the Justices, "You know there is an element of, if nothing else, politeness to allow the advocate to actually finish a question and answer it before three or four more questions are larded up on the poor person who is standing at the podium." So I have had more instances in the last year two years where a Justice said, "Well but Mr. Phillips . . . ," and then say, "Oh, I'm sorry. I don't know if you completed your answer." They actually gave me an opportunity to finish. Now at that point, then I immediately jumped in and said, "I don't know what you're talking about." (Laughter.) That's fine, but at least I got out what I wanted to say. But if they are asking questions where they are really just making statements, it is usually not because of the view of a devil's advocate. Typically, that is their view, and it is usually reflected in the votes at the end. They tend to match up pretty clearly, at least in my mind, with the expressions that have come out during argument.

PROFESSOR KMIEC: Do you have occasion to discuss cases with your colleagues in advance of oral argument, or do you primarily prepare individually in your chambers? In other words, are you ever aware of a colleague's concerns in a given case that would focus your own concerns? Is that the kind of discussion that happens in advance, or is it independent work?

JUSTICE ALITO: In my experience on the Court—less than two Terms— it is independent. It is almost entirely independent going into oral argument.

PROFESSOR KMIEC: Let's look at the other side of the lectern now. Carter, how do you prepare for an oral argument? And what is your most memorable oral argument?

MR. PHILLIPS: Well, I can tell you my most unpleasant memory of an oral argument—when I had the poor judgment to refer to Justice Ginsburg as Justice O'Connor. That went over well. (Laughter.) Hopefully it will never happen again. But as was often the case with Justice O'Connor, she had asked a question very early on in the oral argument which I had actually been able to answer with I think a "Yes" or "No" answer. As I was

beginning to explain slightly what was going on, Justice Ginsburg then asked me another question. So I was looking at the Joint Appendix to quote the specific language that was responsive to Justice Ginsburg's question, but unfortunately my mind had not switched from one Justice to the other. So I responded with, "Well, but Justice O'Connor, on Joint Appendix page fourteen it says . . . ." I looked up and for the first time in my time arguing before the Court, Justice Ginsburg was smiling at me. So I knew I had made a terrible mistake of some sort. There is not much you can do in that situation, because you cannot really apologize. That would be somewhat offensive to Justice O'Connor—"Oh Lord, I didn't mean to call you *that*!!" (Laughter.) So the best you can do in that situation is to just go forward as if never happened, and the next time she asks a question be very specific—"You know, *Justice Ginsburg* . . . ."

The best response to one of those I ever saw was in an argument where Justice Rehnquist asked a question, and the lawyer called him "Senator Rehnquist." And the Justice said, "No, it's Justice." The lawyer—he was easier with it than I was—responded, "I'd apologize, but I don't know that there isn't a senator in the courtroom right now." (Laughter.) So that was smooth. I, on the other hand, just stood there looking stupid. The best part was walking out of the courtroom and seeing Tony Mauro from the *Legal Times* standing there He said, "Have you ever made that mistake before?" Of course that was the front page of the *Legal Times* that week.[17] So that is my most memorable for all the wrong reasons.

PROFESSOR KMIEC: Justice, do any stand out for you? Has anyone fainted at the podium?

JUSTICE ALITO: No, nobody fainted. When I was on the court of appeals, I did have an argument Philadelphia where the first lawyer of the day stood up to argue wearing shorts and a T-shirt. We were a pretty informal court, but not quite that informal. He had apparently flown in that night before, and the airline had lost his luggage, so the only thing he had to wear was what he was wearing. And at nine o'clock in the morning in Philadelphia he could not buy himself a new suit. So there is one lesson for the traveling advocate—the virtues of carry-on luggage.

17. Tony Mauro, *Stable Court Starts 10th Year Together*, LEGAL TIMES, Oct. 13, 2003. Notably, Mr. Phillips was not the first such advocate to make this mistake. With this blunder, he joined the ranks of such renowned advocates as Laurence Tribe, Walter Dellinger, and Bruce Ennis. *Id.*

PROFESSOR KMIEC: Well, I am glad you are such a generous soul. I had an occasion to be a presenter at a seminar in which your colleague, Chief Justice Roberts, and two other Associate Justices were present in Europe. I had worked diligently to prepare my notes, all of which were in my briefcase, which was stolen in the Brussels Rail Station hours before the presentation. When I told my tale of woe to the Chief Justice he said, "Boy these dog-ate-my-homework stories are getting more unbelievable all the time." To which I responded, "Imagine how disappointed the thief was." (Laughter.)

Speaking of wit and patience, here are a couple of related questions. For one, did you ever have any doubts about accepting the nomination of the President? And do you have any thoughts on the confirmation process?

JUSTICE ALITO: I did not have any doubts before I accepted. There was a three month period there were I had some cause for reflection. My thoughts on the confirmation process—I'm glad I don't have to do it again. Those are my thoughts. (Laughter.)

PROFESSOR KMIEC: Well said. Turning to the internal deliberations of the Court, this is one of the least visible sides of the Court, and yet it is the most important. We are told from the essays written by the Justices themselves that there is normally a progression in the discussion, starting with the Chief Justice and going down in order of seniority—both in terms of discussing the case as well as voting on the case. The new Chief Justice began his service by publicly aspiring to greater consensus and unanimity on the Court. This year the number of five-to-four opinions has grown to about one-third of the cases. Is the internal deliberation process effectively working to produce consensus and clarity in the law as far as you can tell from your experience thus far?

JUSTICE ALITO: I think that it is working effectively. I think the internal deliberation process is good. Whether one likes the outcome or not is a different question, but I do not attribute the voting results to procedural issues. What we do at the conference is very straight-forward. The Chief Justice speaks first, and he gives a short explanation of the issue or issues in the case, how he would analyze each one, and what his vote is on the merits of the case. Then the next most senior Justice, currently Justice Stevens, gives a short presentation. Then we go all around the bench that way until they get to me—I am the most junior. By the time they get to me I am either irrelevant or I am very important.

PROFESSOR KMIEC: And how has that been working out?

JUSTICE ALITO: Well in five-to-four cases I am sometimes very important, but it depends. We have a rule that we go around the table once completely before anybody speaks the second time. Then, depending on the case, sometimes there will be considerable additional discussion, but sometimes there will be less.

PROFESSOR KMIEC: One of the things that academic scholars of the Court have inquired about, in terms of internal deliberations, is how well the Justices have expressed themselves in the conference discussion. When you are given the assignment to write an opinion, how well do you fully comprehend the various nuances of things that need to be said, especially to hold together a five-person majority if it is a narrow majority? I take it from your answer that the conference is sufficient for you to do your work, or would an alternative means be better, like say, circulating a draft or an outline, before a vote is taken? Might that be helpful to bring greater clarity?

JUSTICE ALITO: Well again, on the Supreme Court, I can only speak from the basis of limited experience. I have found that the conference generally provides a pretty accurate picture of the views of the Justices, and particularly what is most important—the views of those who are in the majority. Usually, whoever gets the assignment is able to draft an opinion that the author hopes will keep at least five votes. As far as providing a draft or an outline of what is to be said after the argument, we sometimes did something like that on the court of appeals. I think this is because the cases at that level tended to be much more unruly. They had more issues and a many more things to sort out. I have not found that to be the case on the Supreme Court, and I cannot think of instances where I thought that would be helpful.

Sometimes on any court, when you are given the assignment of writing an opinion, you will find when you actually sit down to write it, things do not always play out the way you thought. When you actually have to write the opinion and deal with the issues, you will see problems that you did not initially anticipate. That does not always happen, but the more deeply you get into the case the more likely you are to see things you would not have seen earlier. Producing an outline or summary shortly after the conference would not address that problem. Sometimes when the opinions come out differently from the way you thought they were going to come out at conference, it is because of things that have happened when the majority opinion writer, dissenter, or someone who's concurring, has gotten much

more deeply into the case and has seen problems that were not as apparent on the surface.

PROFESSOR KMIEC: Again, one of the things that academics speculate about is when an opinion that looks like it was at one time a majority opinion is actually a dissent. In other words, it looks like there was a switch in the considerations of one of the Justices from the initial conference to the time when the opinion is issued. In your experience is that a frequent occasion, and when it happens, what do you do?

JUSTICE ALITO: Well, I will address that based on my whole judicial experience, not just that on the Supreme Court. It does happen. It has not, in my experience, happened frequently. But it does happen, and if it happens to me, and I lose a necessary vote along the way, of course I'm going to be disappointed. I may ask myself whether I could have written the majority draft in a different way to avoid losing the necessary vote. But if I come to the conclusion, "No, I didn't have an alternative," then it is just something that you accept.

PROFESSOR KMIEC: One of the measures of a Court is its collegiality. The supposition in the academic writing is that a Court with some tension in terms of collegiality is more likely to produce fractured opinions with concurrences, separate opinions, and the like. To what degree do you think this is the cause of separate opinions? And are separate opinions concurring in part or concurring in the judgment something that the Court institutionally ought to steer itself away from if it can?

JUSTICE ALITO: I do not think that collegiality, or the lack of collegiality, is an important factor in the number of separate opinions. Look at it this way: if we are on a Court, I am not going to join an opinion that you wrote with which I disagree just because I like you. Conversely, if I do not like you and you write an opinion that I agree with, then I will join that opinion anyway. We both have a public responsibility that we have to fulfill, and it would not be right for us to let personal feelings of collegiality affect the way that we do our work. The proliferation of separate opinions is just the result of the nature of the cases and the issues that have come before the Court.

We could easily have a system in which there were no separate opinions. They have that in most of the European appellate courts, where the court decides the case with a single unsigned, institutional opinion. There are no concurrences, there are no dissents, and the vote of the court is not revealed. You certainly have clarity in those cases, and you do not have any dissenting voices. You do not have to try to figure out what the court has held, other than simply by reading the court opinion. This system does

sacrifice something, though. It sacrifices a number of things, and one of those is a sense of accountability. Under our system, if I join an opinion, then that means that I approve it. I am signing onto the opinion, and I am taking a measure of responsibility for it. It says it is just as much my opinion as it is the opinion of the author. In the European systems this is not the case. So if you are going to hold each Justice accountable for the opinion, then I think you have to allow each Justice to write separately if he or she does not fully agree.

PROFESSOR KMIEC: Carter, any thoughts?

MR. PHILLIPS: Well, because of the globalization of the law, I have actually had an opportunity to read a fair number of opinions from European courts. The problem with them is that they often do not say much. Even though, they do not have the problem of concurring and dissenting clutter, they also do not really say very much about what they are upholding. Those types of opinions do not leave a particularly helpful precedent going forward. As a litigator and as somebody who counsels clients based on what the Supreme Court says, my view is that it can be relatively easy for me to interpret the law, even in a five-to-four decision, if those five Justices come to a decision that is relatively clear. This is true even with more provocative holdings. Unanimous decisions, on the other hand, often wash over the more difficult problems. Many times, I do not think the Justices read those unanimous opinions with the same kind of precision that they might read an opinion in five-to-four decision.

One of things Chief Justice Burger said to me the first time we talked was, "Never assume anything is as it appears." Basically what he meant by that is there are a lot of footnotes and a lot of language in opinions that was pretty loose at the time, and maybe if he had the time and energy, he would have written a separate opinion that identified that as a problem, but it was not worth it. Life is short, especially when you are handling 150 cases, because you do not have time to sit there and pore over every detail and edit everything. So there are advantages and disadvantages. For me the biggest problem, is when you end up with no Court, and are left with a plurality opinion where you cannot figure out what the real holding is. I guess that I should not complain, because that almost guarantees that the case is going back to the Supreme Court, which means more work for me. (Laughter.) Don't misunderstand me on that score. But for purposes of my client, it is extremely painful to go through that because they want to know what the Court is going to do, and I do not have a crystal ball.

DEAN STARR: I have a very brief comment. There is a value in transparency, especially where a Justice may not be expressly willing to go along with the majority opinion, but still he or she has strong feelings about this area of the law. I think that it is helpful for those of us in the profession, and for the American people more generally, to know what those views are.

PROFESSOR KMIEC: On the issue of transparency, what are your thoughts on whether or not the televising of Supreme Court arguments would promote accountability, especially in light of the fact that the internal deliberative process is not seen?

JUSTICE ALITO: I think that we are one of the most transparent government institutions already. All of our decisions are open to the public. We do not just decide cases and say, "This is the decision—affirm it or reverse it," or, "This is the law we are adopting." We provide reasons for our decisions, and we try to explain at great length the basis for the outcome. All of the information that is presented to us is available to the public. I believe that all of the briefs are available online, the certiorari petitions are available online, our opinions are available online, and there is a transcript of the oral argument that is released the day of the argument. You can see all the questions that were asked and all the answers that were given. There is an audio tape of the argument that is released after the argument. So the only thing missing is a picture of the Justices' lips moving and the advocates' lips moving at the podium. I think that those who are arguing in favor of that really have to explain why that little increment of additional information is important.[18]

PROFESSOR KMIEC: Well, I can offer some explanation, because it has been an absolute delight to see your lips moving and Carter Phillips' lips moving this afternoon. Thank you very much, Justice Alito and Carter Phillips.

DEAN STARR: What a marvelous way to enhance and deepen our understanding of one of our nation's least understood institutions, and yet one of our most important institutions, the Supreme Court of the United States. Thank you so much for joining us. We stand adjourned.

---

18. For an in-depth discussion and analysis of the televising of Supreme Court arguments, see generally, Audrey Maness, *Does the First Amendment's "Right of Access" Require Court Proceedings to be Televised? A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123 (2006).