

**JUSTICE ANTONIN SCALIA**

**June 19, 2009**

**Location: East Conference Room**

**Host: Susan Swain, C-SPAN**

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SUSAN SWAIN, HOST, C-SPAN: Associate Justice Antonin Scalia, in the simplest of terms would you explain what the role and responsibilities of a Supreme Court Associate Justice are?

ANTONIN SCALIA, ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT:  
Oh, to try to come out the right way on cases that the Court has agreed to hear. And also, secondly, and this is the only respect in which the job differs from the job of a Court of Appeals judge, to decide on what cases the Court should agree to hear. So, essentially two functions, but the latter is prior. You know what I mean, first of all decide what to put on our docket and, secondly, what is on our docket to try to get it right.

SWAIN: What role do you see the Supreme Court playing in society today? And the second question is has it changed over your tenure?

SCALIA: Oh, I think the same role it has always played. I don't think it's changed. Its proper role is in the democracy to give a fair and honest interpretation to the meaning of dispositions that the people have adopted either Congress in statutes or the people when they ratify the Constitution. It's simple as that, no more and no less.

I don't think we're a leader of social causes. We're not pushing the society ahead. We are supposed to be interpreting the laws that the people have made.

SWAIN: What do you like best about the job?

SCALIA: What I like best? I like figuring out the right answer to legal questions, believe it or not. I mean – and not everybody does. I think some people who lust to become an appellate judge find the job really quite unsatisfying when they get there. You have to have a rather warped mind to want to spend your life figuring out the answer to legal questions. It's a very isolated job. The only time you see, in connection with your work, people from the outside is when you're listening to argument from counsel.

Other than that, it's very disembodied and intellectual work. Probably most closely resembles the work of a law professor, which is what I was before I was here, so I'm no more unhappy than I was before.

SWAIN: And after two decades of doing it, is there any aspect of the job that if you had the choice you'd prefer to pass on to somebody else to do or avoid?

SCALIA: Oh, I think undoubtedly to my mind the most, what shall I say, onerous and for the most part uninteresting part of the job is ruling on all of the *cert* petitions that come to the court, and they have increased enormously in the time that I've been here. I think when I first arrived, I think if I'm correct, it was something, I think it was about 5,000 a year. Now it's approaching 10,000, and every one of them we have to consider. If not by reading the actual

petitions -- we rarely do that -- by reading summaries of the petitions that law clerks have prepared. So, that's, you know, 10,000 of those a year. That's not a lot of fun.

SWAIN: With the increasing number of petitions, why only 80 to 100 cases a year?

SCALIA: Less than that even, we've been averaging about 75 recently. That number, by the way, is not out of line with what other Supreme Courts in other jurisdictions do. I think we could do more than 75, we can do 100 well. I don't think we can do what we were doing when I first came on the court, 150. I don't think we can do 150 well.

Why? Your guess is as good as mine. I certainly have not changed my standards for deciding what cases we should take and I don't think my colleagues have. If I had to guess I would say that what has happened is in my early years on the court 20 some odd years ago, there was a lot of major new legislation that had recently been enacted -- the new bankruptcy code, ERISA. There's not been that much major new legislation in recent years and new legislation is the principal generator of successful *cert* petitions because it takes 10 years or so to get all of the ambiguities in a statute resolved, and that's our main job, of course.

We don't take cases because we think they were decided wrong. Very rarely would we take a case for that reason, a death case we would. But we usually take cases because the analysis of the courts below reflect a disagreement on the meaning of federal law and you can't have two different federal laws in different parts of the country, so we will take one or both of those cases.

And as I say, those disagreements have been simply on significant questions, have been simply more rare in recent years. I mean it's not as always sit down at the end of the term and say OK guys, you know, let's take – how many cases do you want to take. Let's take 120 – I mean that's not what happens. They trickle in week by week and we vote on those that we think are worthy of our consideration, and the last few years they've been – at the end of the term they've been adding up to about 75 or so.

SWAIN: When you make those decisions, are you aware at the time which ones are going to be the blockbuster cases?

SCALIA: Oh, usually. I think you could usually tell which ones pertain to a major piece of legislation and, you know, a legislation that is a major impact on the society, sure.

SWAIN: Does it affect the decision process?

SCALIA: Not mine. You'd have to talk to other people, but I don't think it does. Look, I put in as much blood, sweat and tears on the little cases as I do on the big ones.

And if somebody asked me, you know, what's the hardest case you ever decided while you've been on the bench, you wouldn't want to know because it is a relatively insignificant case, but it was very hard to figure out. There's no relationship whatever between how important it is and how hard it is.

SWAIN: So, can you tell me now that you've described it?

SCALIA: You don't want to know.

SWAIN: Ok, we've heard so much in talking to the justices about clerks, but I'd like to ask you about their role in what you do and you've had many of them over the years. Do you stay in touch with them after they work for you?

SCALIA: Oh, I do indeed. We have an annual clerks' reunion every year and it's good to see them. It's actually one of the most enjoyable parts of the job. You work very closely with four young people every year. There are new ones every year. They are full of vim and vigor. They are not jaded, you know, it's all new to them and their enthusiasm rubs off on you and you work closely with them during the year. You really become very close and then they go off. It's like acquiring four new nieces and nephews every year, none of whom will be a failure. They all go off to do very significant things and it's fun to follow their later careers.

SWAIN: And you do that in fact other than the reunion?

SCALIA: Oh, sure. Sure.

SWAIN: And what job – how do you use them in your job?

SCALIA: Well, I mean I can just say how I do it, what I do is not necessarily what others do. I let them pick the cases that they want to work on. It's sort of like a, you know, NFL draft.

They have first pick, second pick, third pick. I figure they're likely to do the best work on the cases they're most interested in, so they divvy up the cases. And then I usually discuss the case very briefly with the law clerk who has chosen it before oral argument.

And then after oral argument I sit down with that clerk and with the other three who know something about the case, although not as much as the clerk who really is responsible for it, and we kick it around for as long as it takes. You know, it could be an hour, it could be two hours. And then if I happen to be assigned the opinion or the dissent, that clerk will normally do a first draft of it. I'll tell them, you know, what's supposed to be in it, but he'll write it out and then I'll put it up on my screen and take it apart and put it back together.

So, I kid you not and I tell them at the reunions, I am indebted to my law clerks for a lot of the quality of the work that comes out of my chambers. I couldn't do as well without the assistance of really brilliant young people.

SWAIN: In a week when the court is in session, how many hours do you spend in this building in a typical week?

SCALIA: Oh, I have no idea.

SWAIN: Is it a 40-hour a week job, a 60-hour a week job?

SCALIA: Well, how much you spend here, I mean, one of the nice things about the job or one of the not nice things about the job is you don't have to be here to be working. I could, and I think some judges on the Courts of Appeals do, only come into court when there's oral

argument. I could do this job from home. The main thing it would deprive me of, is consultation with my law clerks and would deprive them of my company, too. So I do like to come in, but that has no relationship to how many hours I'm putting in. I've never counted the hours in the week but I almost always work weekends, you know, not all weekend, every weekend, but some of the weekend every weekend.

SWAIN: And is there ever really a break in the summertime for example?

SCALIA: Oh, yes, the summertime's a break. You know, we clean our plate before we leave at the end of June, so it is really a summer without guilt. The only work we have to do over the summer is stay on top of *cert* petitions because there's a monster conference at the end of the summer to vote on all of the *cert* petitions that have accumulated over the summer. So you have to stay on top of them, but that's a manageable job. But for the rest of it, you know, we have continued to function the way all three branches of the federal government used to function. This town used to be deserted in July and August, there was nobody here. And now we are generally not around in July and August and come back in September to get ready for the arguments in October. During the summer you have time to do some of the reading that you didn't have time to do during the court term and to sort of regenerate your batteries.

SWAIN: You mentioned that the Court has retained some of the tradition that the other branches used to have in the summer here, but the Court's also quite well known for many of its other traditions. And I was just writing down a few that came to mind, including in the courtroom itself, the quill pens, the solicitors in formal dress, institutions in the courtroom that I wonder why they matter to the process and why they're retained in 2009?

SCALIA: Oh, I think traditions, in a way, define an institution. An institution is respected when it is venerable with tradition. And certainly one of the remarkable things about the court is that it's been here doing this job for what, 220 years. I think traditions remind people of that fact. You know, I guess we could sit in a bus station and not wear robes but just business suits or even tank tops, but I don't think that creates the kind of image that you want for the Supreme Court of your country.

SWAIN: On the robes, I was looking at a little bit of history before I came in, your earliest chief justices depicted here really didn't wear them.

SCALIA: Didn't wear robes?

SWAIN: That's right, it began around 1800, according to Supreme Court sites.

SCALIA: John Jay over your right shoulder was the first chief justice and that was before 1800, and in that portrait he is wearing a glorious robe not just of black, but of black and red. What you just told me is news to me.

SWAIN: Well, I'll go with John Jay, but let's say that it is now 2009 and tank tops aside, why do the robes – what's the symbolism behind the robe and why is it important for members of the judiciary to continue to wear them in our society?

SCALIA: Well, I think it's a – I'm sure we could do our work without the robes. We could do our work without this glorious building that you're deciding to have this conversation in. What the robes, like the building, impart to the people who come here is the significance the

importance of what goes on here. That's nothing new. Public buildings always don't look like bus stations, and they shouldn't.

SWAIN: This building itself: Justice Breyer yesterday called it the 'symbol of American judicial process, internationally.' When you come to work here are you conscious of that as you drive up here, after doing it for such a long time?

SCALIA: Conscious of?

SWAIN: It being a symbol of the American judicial process.

SCALIA: I can't say it's in the middle of my mind, I'm usually thinking about whatever case I'm going to be working on that day. Oh, you get used to it I mean you get to take stuff for granted that maybe you shouldn't take for granted. But I take for granted working in this glorious building. I take for granted wearing a robe when I go out on the bench.

SWAIN: When you have the opportunity when it's quiet around here, are there special places in this building that you might go to reflect on the history of the court and its predecessors?

SCALIA: Not really, I hang out in my chambers most of the time. I mean, you know, the center of the building what is really the reason the building is here is the audience chamber where we hear oral arguments. As the august nature of that chamber suggests... I mean, it has a ceiling so high you can hardly see it from the ground. That's the center of the Court, of course.

SWAIN: Let's talk about what goes on in that room in the process of oral argument. Can you talk about how you use oral argument and why in fact, when there's so much paper beforehand on making all of the cases, oral argument is even needed?

SCALIA: Yes, a lot of people have the impression that it's just a dog and pony show. That in fact, you know, 'I read a 60-page brief by the petitioner, a 60-page brief by the respondent, a 40-page reply brief, very often an *amicus* brief by the solicitor general. Sometimes dozens of other *amicus* briefs, not all of which I will read. I have underlined significant passages, I have written at best nonsense in the margin. What can somebody tell me in half an hour that's going to make a difference?'

And the answer is that it is probably quite rare, although not unheard of, that oral argument will change my mind. But it is quite common that I go in with my mind not made up. I mean a lot of these cases are very close, and you go in on the knife's edge. Persuasive counsel can make the difference. There are things you can do with oral argument that cannot be done in a brief. You can convey the relative importance of your various points.

Sometimes, you know, say you have four points and one of them is very complicated, it's not your most important one but an 'it takes a third ear' brief. Now if I've read your brief a week ago and I come in, I have a misperception of the nature of your case. You can set that right in oral argument, and very often that third point, the difficult point, maybe the first point you address in your brief because that's the logical order. You don't put it in jurisdiction last, it has to go first.

But in fact that's not your strongest point even though you discuss it first in your brief, and even though it takes more of your brief than anything else simply because it's the most complicated. So you get up in oral argument and say, you know, 'Your Honors, we have five points in the brief. We think they're all worth your attention. But really what this case comes down to is...' Boom! You hit your big point, and that can make a difference.

And the brief cannot answer back when I write nonsense in the margin. And you can ask counsel, you know, "Counsel, is there some reason why this point is not nonsense?" And sometimes they can tell you. So I'm a big proponent of oral argument. I think it's very important and you'd be surprised how much probing can be done within half an hour --an awful lot.

SWAIN: What's the quality of counsel who come before you, generally?

SCALIA: Well, you know, two chiefs ago, Chief Justice Burger, used to complain about the low quality of counsel. I used to have just the opposite reaction. I used to be disappointed that so many of the best minds in the country were being devoted to this enterprise.

I mean there'd be a, you know, a defense or public defender from Podunk, you know, and this woman is really brilliant, you know. Why isn't she out inventing the automobile or, you know, doing something productive for this society?

I mean lawyers, after all, don't produce anything. They enable other people to produce and to go on with their lives efficiently and in an atmosphere of freedom. That's important, but it

doesn't put food on the table and there have to be other people who are doing that. And I worry that we are devoting to many of our very best minds to this enterprise.

And they appear here in the Court, I mean, even the ones who will only argue here once and will never come again. I'm usually impressed with how good they are. Sometimes you get one who's not so good. But, no, by and large I don't have any complaint about the quality of counsel, except maybe we're wasting some of our best minds.

You shouldn't, how can I put it another way? Law clerks – law firms -- spend enormous amounts of money to get the very, very brightest, you know, that amount of difference between that guy and the next one, but it's worth it because the law is so complicated and so complex. The legal system probably shouldn't put such a premium on brains, but it does and our lawyers are really good. I think lawyers generally are pretty smart people.

SWAIN: Moving on to the next stage – conference. Can you talk about conference and how it works?

SCALIA: Well, I can't talk too much about it, but I can tell you we sit down together and there's nobody else in the room. And I'm not giving away anything because Chief Justice Rehnquist wrote a book about the court in which he acknowledged that conference is probably a misnomer. It is really not an occasion on which we try to persuade one another.

Very few minds are changed at conference. Each justice states his or her view of the case and how he or she votes. And you go right around the table, and if in the middle of somebody's presentation, you disagree with something that that person says... I mean, if

when John Stevens is speaking, you know, I say 'Wait, John, now why do you say that?' That would not happen. Or if it did happen, the chief justice would say, you know, 'Nino, you'll have your turn. John is speaking now. Let him finish.' When we get all a round, yes, at the end, you can speak a second time and, you know, raise some of these questions.

But it is not really an exercise in persuading each other, it's an exercise in stating your views and the rest of us take notes, and that's its function. You take notes so that if you get assigned the opinion, you know how to write it in a way that will get at least four other votes besides your own, and that's its principle function.

SWAIN: With regard to being assigned the writing of opinions, the chief told us in our conversation that he works very hard to be fair about the distribution of the assignments. You said earlier with your clerks that you try to give them cases that they're interested in because they'll do the best job. Are you able to lobby if you particularly interested in a certain case?

SCALIA: I haven't done that. I could if I wanted to. On very, very rare occasion have I said you know, I'd like that case. I bet you not more than three times the whole time I've been on the court. No, I pretty much take what I'm given and both of the chiefs that I've served under have tried to be fair in giving you good ones and dogs.

Of course, sometimes what they think is a good opinion is not what you think is a good opinion. Chief Justice Rehnquist used to love Fourth Amendment cases involving searches and seizures and I just hate Fourth Amendment cases. I think those things-- it's almost a jury question, you know-- whether this variation is an unreasonable search and seizure; variation

3,542. Yes, I'll write the opinion, but I don't consider it a plum. But Bill Rehnquist used to consider it a plum and if he gave you that he thought he was entitled to give you a dog, and I didn't much like that.

SWAIN: You are a writer. You've written three books now, is that correct?

SCALIA: Oh, two.

SWAIN: Two, but writing is something that seems as you...

SCALIA: No, you don't want to be an appellate judge if you're no good at writing.

SWAIN: Well, my question is in this part of the process do you enjoy the writing of opinions and the exchange of the precise words to make your point?

SCALIA: No, as I often put it, I do not enjoy writing. I enjoy having written. I find writing a very difficult process. I sweat over it. I write, I rewrite, I rewrite again. I mean, before the opinion goes out, the law clerk will say, you know, 'It's going out this afternoon. Do you want to read it one last time?' And I'll say, 'Yes, let me read it one last time.'

And I guarantee you; every time I read it I will change something else, so finally it has to be wrested from my grasp and sent down to the printer. No, I am not a facile writer, but I think writing is a job that is worth the time you spend on it.

SWAIN: Has technology, in the course of your time here, made the process easier?

SCALIA: Well, we had word processors when I arrived, so I can't say it's made it easier since I've been here. I had word processors when I was a law professor. That certainly makes the job of writing, especially writing when you're editing somebody else's first draft, enormously more simple than it otherwise would be.

You don't have to write little balloons, you know, and what not. You just highlight the part you want taken out, bang! It's gone. And you put in the new part. Bang! It's in. It makes it a lot easier.

SWAIN: When you strongly disagree with someone's point of view, how do you keep the opinion or descent from being personal?

SCALIA: Well, you just criticize the argument and not the person, that's all. An *ad hominem* argument is one that is addressed at the person rather than the argument. I feel quite justified in whacking the argument as hard as it deserves. That's not impugning the individual that made the argument.

SWAIN: Do you have a preference for writing the majority or the dissent?

SCALIA: Oh, of course, I always want to write a majority, why do you want to write a dissent?

SWAIN: Intellectual challenge?

SCALIA: Well, hey, dissents are more fun to write, I've got to say that, because when you have the dissent, it's yours. You say what you want, and if somebody doesn't want to join it, who cares? If you don't want to join my dissent, fine, it's my dissent. This is what I want to say.

When you're writing a majority, you do not have that luxury. You have to, you know, craft it in a way that at least four other people can jump on. And actually you try to craft it in a way that as many people as possible will jump on, which means accepting some suggestions-- stylistic and otherwise -- that really you don't think is the best or are best, but nonetheless, in order to get everybody on board, you take them.

SWAIN: We have just a few minutes left. You and I are talking at a time when the Court is about to say good-bye to a member and accept a new one. How does this institution change during that process?

SCALIA: Oh, the institution doesn't change at all. I think the relationships change you lose a friend and hopefully acquire another one. I'll miss David Souter, I'll miss him a lot. He has sat next to me for his whole time on this Court. When we go out on the bench he is always, depending on which side of the bench I happen to be sitting on, he's to my left or to my right. So he's been a rather constant companion, and we chat back and forth sometimes during argument or pass a note back and forth, and I'll miss him. He's an intelligent, interesting, good man, and so that changes. And I miss a lot of my former colleagues on the Court from Byron White to Bill Brennan, but that's the process, they go, and new people come on.

SWAIN: In fact, during your tenure I think that there have been, including the chief, seven new arrivals. And I'm wondering when you welcome new justices in the system, when they've come from the appeals court is there an acclimation process even so here?

SCALIA: Not really, it's the same job. It's the same job as being an appellate judge on a lower court. You hear the – you read the briefs, you hear the argument, you write the opinion. We have the added job of deciding what to decide, which a Court of Appeals judge does not have that burden or that luxury. I mean you take whatever they bring you and you have to.

But except for that additional part of the job, it's the same with maybe one other exception: and that is on the lower courts if there is a whole line of Supreme Court authority that you fundamentally disagree with -- doesn't mean it's easy, you just say hey, you know, I think it's stupid, but that's what they say. You follow it. You don't have to worry about whether it ought to be changed; whereas, you know, on the highest court if it is indeed a stupid line of cases, it's your stupid line of case and you have to decide, do you leave it alone? Do you simply refuse to extend it any further? Or, do you indeed try to get rid of the whole thing. In other words, *stare indecisus*. You don't have to worry about that on the Court of Appeals, you do up here.

SWAIN: We are out of time for our 30 minutes. I guess in closing the sort of big picture question again. For people that, for whom the Supreme Court is just an item in the newspaper, I wonder what you would like to say to them about this place. How it functions and what they really ought to know about the Court?

SCALIA: Well, it's really not a point distinctive to this court. It's a more general point that applies to this Court and to all others: You really can't judge judges unless you know the materials that they're working with.

You can't say, "Oh, this is a good decision and this was a good Court," simply because you like the result. It seems to you that the person, who deserved to win, won. That's not the business judges are in.

We don't sit here to make the law, to decide who ought to win. We decide who wins under the law that the people have adopted. And very often, if you're a good judge, you don't really like the result you're reaching. You would rather that the other side had won, and it seems to you a foolish law.

But in this job -- it's garbage in, garbage out. If it's a foolish law, you are bound by oath to produce a foolish result because it's not your job to decide what is foolish and what isn't. It's the job of the people across the street.

So don't judge judges unless you really take the trouble to read the opinion and see what provisions of law were at issue and what they were trying to reconcile and whether they did an honest job of reconciling them, and if interpreting the words of the law in a fair fashion. That's what counts. Unless that's what you want your judges to do, you have a judiciary that's not worth much. You have a judiciary that is just making the law instead of being faithful to what the people have decided. So that's my main advice. Be slow to judge judges unless you know what they're working with.

SWAIN: Justice Antonin Scalia, thank you for spending time with C-SPAN.

SCALIA: My pleasure, thank you.