

CHIEF JUSTICE JOHN ROBERTS

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Host: Susan Swain, C-SPAN

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SUSAN SWAIN, HOST, C-SPAN: Chief Justice Roberts, as we sit in this room today surrounded by some of the famous people who were in this Court before, I'd like to start with some of the history of the Court.

JOHN ROBERTS, CHIEF JUSTICE, UNITED STATES SUPREME COURT: Ok

SWAIN: The Court today is a modern court. How much is it like the Court that the framers envisioned?

ROBERTS: Well, I think it is in many respects, it's still, as they envisioned, one of the three branches of government under Article III, but I think it's fair to say it plays a much more important role in society, in government, than they may have expected.

The easiest way to get a sense of that is they envisioned a White House for the president, a Capitol building for Congress, but didn't give any thought at all to where the Supreme Court should be based. And for the immediate future of the Court, it was based in a boarding house and then in the basement of the Capitol, which doesn't seem suitable for one of the three co-equal branches of government.

But as the Court's responsibility, as their responsibilities have expanded, they eventually got this beautiful building of its own.

SWAIN: And we'll be able to spend some more time with the building and how it operates and its symbolism, but staying with the history of the Court, as you look along the course of your predecessors, who were the most important in shaping the Court over the years to become the Court that we know today?

ROBERTS: Well, of course, there's one that stands out above all the rest. We call him the Great Chief and that's John Marshall. He really was the first person to take the job seriously. Most lawyers, I think, have this image of him as the first chief, but he wasn't. He was the fourth.

The three before him, though, each only served for a couple of years, didn't regard the Court as an important institution, in fact, spent most of their time doing other things. The first chief justice, John Jay, of course, is most famous for a treaty he negotiated with the English.

But John Marshall saw the role of the chief justice and the Court quite differently. He took the job seriously. He served in it for three decades, and he's responsible for establishing the principle that the Court has the authority and the responsibility to review acts of Congress for constitutionality.

So he really established the Court in a prominent position as one of the three co-equal branches of government.

SWAIN: And among modern chief justices who are the most influential?

ROBERTS: Well, my immediate predecessor, Chief Justice Rehnquist, of course, served for – also for – an extended period and I think he had a great influence on how the Court looked at legal questions. Earl Warren, of course, famous for bringing the Court together and deciding one of its most important decisions, *Brown v. Board of Education*, so I think the two of them would have to stand out among the modern chiefs.

SWAIN: How many justices did the earliest courts have?

ROBERTS: I think they started with six, if my memory serves, and it's an interesting thing. It was kind of hard to bring them together early on. The very first session of the Court that John Jay convened – convened had to be adjourned immediately because they didn't have a quorum. And it took a while and I think the second time they convened they did some administrative business then adjourned pretty quickly because they didn't have any cases. So it took a while for the Court to get established.

The current number of nine was established very – I think-- shortly after the Civil War and it's remained intact since then.

SWAIN: Not without some trying, on the part of Franklin Roosevelt, to make it a bit larger. Do you ever reflect on, as you watch the Court and the justices interact, about how it might have functioned if the “court packing,” as it's called, idea worked?

ROBERTS: Well it wouldn't have functioned at all, frankly, as a check on the other branches of government. It's an extraordinary episode.

Franklin Roosevelt, of course, came into office with huge majorities. He had huge majorities in the Senate and in the House, and the Court wasn't in a very popular position then. It was blocking all of his reforms, reforms that most in the country thought were absolutely critical. And he came up with the court packing plan, allowing him to appoint new justices on the Court, a good number immediately and more over time, in order to get a court that would rule in his favor.

And yet, even with his popularity, the country rose up against it and the plan really didn't get off the ground. I think the public recognized the importance of having the Court as an independent check on the other branches of government, even if the Court was very unpopular, as it certainly was at that time.

SWAIN: Today, with all of the visibility of the two other branches of government, the Court, I think it's fair to say, is less known by the public than the other two branches. So I'd like to have you to talk a bit about what people should understand about the role of this Court in modern society.

ROBERTS: I think the most important thing for the public to understand is that we are not a political branch of government. They don't elect us. If they don't like what we're doing, it's more or less just too bad -- other than impeachment, which has never happened, or a conviction on impeachment. It's never happened with the Court.

So they need to understand when we reach a decision, it's based on the law and not a policy preference. For example, if we reach an environmental decision that comes out in favor of environmental groups, you often read in the paper, you know, 'Court rules in favor of environmental group', or 'Court supports environmental protection.' All we're doing is interpreting the law. The decision has been made by Congress and the president and we're just exercising our responsibility to say what the law is, we're not ruling in favor of one side or in favor of another. I think that's very important for the public to appreciate.

SWAIN: And we've talked about your predecessors, what's the role of a modern chief justice?

ROBERTS: Well, in many respects, not terribly different from the role of an associate justice. I just have one vote, just as my colleagues do. The chief's responsibility is to preside at oral arguments and also to preside at the conference where the justices vote on and decide the cases. That means I get to initiate the discussion and have some responsibility to make sure that all the issues are adequately aired at conference.

My most important responsibility is the responsibility for assigning opinions, once the votes are in. If I'm in the majority, I get to determine who will write the opinion in that case. And that's a very important responsibility because you want to make sure that the assignment is given to the justice that commands – whose view commands-- the most support on the Court.

You want to make sure the work gets done on time, so if someone's a little slower than others, make sure that person gets assignments, heavy assignments, earlier on. Some cases

are more interesting than others. You want to make sure those are fairly distributed. Some cases are harder than others. You want to make sure that's fairly distributed.

We get all sorts of different issues. You want to make sure each justice has a nice mix. You don't want one justice just doing criminal cases or something like that. So a lot of factors go into that decision and it's a very important part of it.

The chief justice is the head of the Judicial Conference, which sets policy for the federal judiciary throughout the country, and that also is a very important responsibility. And then the chief justice has very odd responsibilities that don't seem to have anything to do with being chief justice. I'm automatically Chancellor of the Smithsonian, for example. So over the past couple of years I've been learning a good bit about museums and research institutions.

SWAIN: Are you also the, more or less, CEO of "Supreme Court, Inc."? I mean are you responsible for this place and its budget and the people who work here?

ROBERTS: Theoretically, yes. The Supreme Court, from one perspective, is like a small government agency. We have a police and security force of almost 100 people, for example. We have visitors and sometimes they slip on the steps and we have to worry about things like that. We have to get a budget to run the Court, but I have very capable people who know a lot more about that kind of thing that help me discharge that responsibility.

SWAIN: When you mentioned the budget, one part that we do see every year is the process by which justices go before the Congress to request the budget. It always is an interesting

example of how the functioning of the branches work. What are your thoughts about that step in the process?

ROBERTS: The Framers appreciated that it's very important that the political branches have control over the purse, how money is spent. In one respect, we're no different than anyone else. We have to go to Congress, hat in hand, and get our budget. As you say, though, it's always a very interesting process. We don't ask for much. We have a very little burden on the federal fisc, but we have to go ask for it and, when we do, probably because we don't ask for much, the members of Congress have very little interest in budget issues. They view it as an opportunity, I think, to get some of the justices before them and we hear a lot about their views on cases that are before us or cases that we've decided.

SWAIN: And this building itself, let's spend a little bit of time on that because you mentioned that prior to, the Court was housed in the Capitol itself, which is just across the street from here. What do you think of this place, just as a building among all the monumental buildings in Washington?

ROBERTS: I may be biased. I think it's the prettiest building in Washington, and it's distinctive. A lot of the buildings in Washington – obviously the Capitol is the grand building and the White House, one that many people – most people-- know about and see on the news. But the Supreme Court building is distinctive. It's a different type of marble, just to start with, much brighter, much lighter than the typical government building, which I think is wonderful because it – immediately, as soon as you see it, you appreciate that this is something different.

It represents that the Court is a different branch of the government, and it really is more monumental. It looks a lot more like the Jefferson Memorial or the Lincoln Memorial in terms of its, you know, visual impact, than it does look like another government building. And if you view it as something of a temple of justice, I think that's entirely appropriate.

SWAIN: When it was built in 1935 it was pretty controversial, I understand. Many people have lots of opinions about this building and how it was – whether it was appropriate for the Court and the like. When you walk around here, do you think it suits the work that's done here?

ROBERTS: Well, I do. It is a part of a controversy, I think because it's a grand-looking building, and I'm not sure at the time in 1935 people thought that type of monumental structure was appropriate. But I do think it's suitable to the notion that here we're not involved in the political process. We are applying the law. The thing that makes our system of government unique is that it's bound by the rule of law, by a written constitution that lawyers, judges have to interpret. So you need to appreciate, one, that something different is going on here than what goes on in the Capitol building or in the White House, and you need to appreciate how important it is to our system of government.

Yes, the political branches, the fact that we're a democracy is vitally important, but we're a democracy under law, and in that respect very different from most countries in the world, even those that properly claim that they're democracies as well.

SWAIN: Is its proximity to the Capitol appropriate?

ROBERTS: Perhaps the fact that it's across the street is appropriate. We often refer to that in oral argument, for example, when someone makes what sounds like a political or policy argument, we'll say, 'That's something that you should bring across the street.'

We are three co-equal branches of government, but obviously there's interaction between us. And, I think it's very appropriate that we can see the Capitol right across the street and I think it's very appropriate that they can see us -- that we understand that they have responsibility for the policy matters, that that's their job. And they need to understand, as well, that our job is to interpret the Constitution and the law.

SWAIN: Is there communication between you and senior leaders of Congress?

ROBERTS: Well, yes, on a casual kind of basis. We obviously see each other in things around Washington and get to know each other on that basis, and of course, as you mentioned earlier, the budget process. We've got to get money from them, but other than that very little, to be honest with you. Our job is not to help them as they develop policy, and they don't have a role in helping us as we try to interpret what the law is, so we have friendships across the street. Sometimes we have interaction about things like the budget, but our jobs are very different.

SWAIN: What about that great plaza in front of the Supreme Court, the site of so many public protests over the years? What are your thoughts about the design of the building that has allowed all of that wide public space in the front?

ROBERTS: Well, I'm not sure Gilbert intended it to be a convenient site for protests, and I'm pretty sure Taft, who was heavily involved in the design and architecture of it didn't intend it for that purpose either. It is a lovely introduction to the Court. People coming by, it doesn't hit you immediately but it's more or less off in the distance.

The protest point you bring up is very interesting. I understand people having strong feelings about some of the things that we do and we're involved in. But it's not a situation where our decisions should be guided by popular pressure. And so the protests, to some extent, are there as a way for people to express their feelings, but not directed – shouldn't be directed -- at us. You would not want us deciding what the Constitution means based on what the popular feeling is.

Quite often, and many of our most famous decisions are ones that the Court took that were quite unpopular, and the idea that we should yield to what the public protest is, is quite foreign to what it means to have a country under the rule of law.

SWAIN: But are you cognizant of them, when the big ones occur?

ROBERTS: Well, sure. I mean you're coming in to work in the morning. You can see that there are a lot of people gathered outside the Court, and you suspect they're not just there to hear a case that happens to be on the docket, but justices appreciate that it's not part of their job to be swayed by popular sentiment.

SWAIN: Interaction with the public as whole: Justice Breyer told us in our discussion with him, that in the years he's been here the number of tourists has declined from about a million

a year to somewhere possibly even half that; some of it the construction, some of it the downward size of tourism after September 11th. What do you think about people – you mentioned at the beginning that people should make it a stop. Do you think the Court is visited as much as it should be by the American public? And does the Court actively work to get people here?

ROBERTS: Well, I think everybody who has the opportunity to do so here in Washington should come by and visit the Court. It is an important part of how our Constitution functions and how the government operates, just as important as the White House and the Capitol. We're kind of tucked away behind the Capitol, but our role in the Constitution is just as vital and just as important, so I think people who do come here should visit it. I suspect that the decline is, as you suggested, due more to things like a decline in tourism after 9/11. We are going through a renovation project. It's the first one in 70 years.

SWAIN: It's a big one, too.

ROBERTS: It's a big one. It's ...

SWAIN: What's happening with the renovation?

ROBERTS: Well, it's basically updating. We haven't done anything since 1935. At the time it was a very big deal that there were going to be telephones in the building, and of course so much more in terms of electronic and the modern technology. You have to have the infrastructure behind the walls for that sort of thing. Some of it's security-related, I'm sorry to have to say, making sure that things are safer against any type of intrusion in that regard.

And general updating, I mean you know the usual HVAC stuff. If you've had a building for 70 years you've got to update that as well.

SWAIN: Do you ever run into tourists as you're walking around the building?

ROBERTS: Sure, all the time.

SWAIN: Do they recognize you?

ROBERTS: Sometimes they do and sometimes they don't, and sometimes they'll stop you, and I'm always interested to find out where they're from. There are a couple of things, you know, routes around the building when I need to get from my chambers to some other place that that's the quickest way. And that's where I go, and it's – I'm always happy to see that people are here taking a good look at what we do.

SWAIN: How often are you recognized as you travel?

ROBERTS: Oh, it varies, kind of varies with where I am. I mean if I'm going to visit a law school, for example, I'll be recognized a little bit more than if I'm on family vacation.

SWAIN: And let's move into the process of how the Court functions throughout the year. You gave us a brief synopsis of it, but I'd like to spend more time going into detail from when the Court opens and how all of it functions. Basically, if you don't mind, give us a bit of a civics lesson on the operation of the Court throughout the year. The Court is about to

close, so I'm going to fast forward to the opening of the new session. Start us on the process of cases coming before the Court and how it all works.

ROBERTS: Well we get a lot of cases that people want us to hear. Everybody remembers somebody saying, you know, 'I'm going to take it all the way to the Supreme Court.' I think about 9,000 of those cases in the year that we're just concluding. We only hear about 100 of them, so a big part of our job is going through those 9,000 and trying to figure out what the important cases are. And before we start our term, traditionally as common law courts around the world do on the first Monday in October, we have a long session where we go through those petitions and try to figure out which ones we want to hear.

It's an interesting process. We don't try to just, you know, look at the cases that we think are wrong. We don't look at the cases that we think have a lot at stake. Our main job is to try to make sure federal law is uniform across the country. So if you have a lower federal court in California that decides a question one way and the lower federal court in New York decides the same question the other way, that's a kind of case that we'll pick out of that pile and say we ought to decide that.

The first Monday in October we start hearing arguments.

SWAIN: May I stop you ...

ROBERTS: Sure.

SWAIN: ... because there's a lot more detail in that process which is called granting *cert*? Is that right?

ROBERTS: *Certiorari*, yes. It's an old Roman law term that people call it *cert*, and nobody's quite sure what it means, but that's what has come down from history.

SWAIN: Do you even know the history of the first Monday in October? You mentioned it has a long tradition.

ROBERTS: I don't really know. They used to – the courts used to have several terms. We now have one term we call the October term, but I know it used to have the February term and they would kind of take breaks, I suspect when they had to go travel on circuit as the early justices did. But now we've all condensed it into one. It's called the October term.

SWAIN: The number of cases that you cited, the ones that are petitioned and the ones that are granted, the proportion of that seems to have changed over the past 20 years. There are more requests, fewer granted. Why is that?

ROBERTS: Well the more requests, I think, just comes from the increase in judicial business throughout the country. The fewer granted reflects the growing importance of the Court in the constitutional system. It may seem counterintuitive, the more important, the fewer cases, but in fact early in its history the Court kind of viewed itself as responsible for deciding every case that came up.

In the 19th century, for example, most of the cases were admiralty cases, so you pick up the reports and you see hundreds and hundreds of admiralty cases. But as the Court started to have a more important role, they tended to focus on the more important cases for the constitutional system and leave it up to the lower federal courts basically to try to get each individual case right. We had a different responsibility.

There are countries around the world where the chief justices have come and visited here and they've said, you know, we can't do important work the way you do because we have to decide 3,000 cases a year. So they spend a lot of time pushing paper and making sure individual cases that don't have a lot of impact are correctly decided. We don't. We try to focus on the ones that are going to be important for how our system of government functions.

SWAIN: And what is the actual role of each individual justice in making the decision about the 80 or up to 100 that might be heard?

ROBERTS: Well, each one gets a vote, just like anything else, on what cases we should hear, but it only takes four votes to grant *cert* and decide that we're going to hear a case. The Court used to have a lot more mandatory jurisdiction, cases they had to hear. And when they got Congress to pass a law saying that we didn't have to hear all the cases and it wasn't mandatory jurisdiction, I think the deal we made with the Hill was that you didn't need five votes to hear a case. Four would be enough.

That's very informal but the idea is that if four people think we ought to hear a case we'll hear it, even if it comes out that only four think it should come out the same way.

SWAIN: How much reading do you do on each one of those cases before you vote?

ROBERTS: Well, as you might imagine, not a lot. Nine thousand cases, if we did a lot of reading on each one, we wouldn't have time to do anything else. Our law clerks help us. They write memos on each of those petitions. We look at it. You develop a pretty good eye for what kind of case is one that you ought to look at more carefully, so that's what I do. I look at the memos and the ones that I say 'Well, this one we ought to look at more carefully,' and do that before deciding how to vote on them.

SWAIN: How many clerks do you have?

ROBERTS: Four. I think all the justices have four now.

SWAIN: No extra as chief?

ROBERTS: No. I actually think I'm entitled to an extra one, but four seems to be about the right number.

SWAIN: And when you are making those decisions do you have instinctively – and the associate justices as well – instinctively know which ones are going to be the blockbusters of the Court session?

ROBERTS: Well, sure. You can tell if there's a case that's on a particular hot button issue that people are going to give it a lot of attention, but I have to say that doesn't enter into our process of deciding. A lot of our docket is very mundane. You go through the year and say

we're deciding 90 cases; probably a half dozen are ones that are going to make it to the front page of the newspaper. All of the others are, you know, a bankruptcy tax case, Federal Arbitration Act case, a pension plan case. Those are actually a big part of our docket, all vitally important, but not anything that's going to attract any interest.

SWAIN: With the scope of work before you, the number of cases that you have to make the go, no go decision about, does – do you ever pause to think about how many lives are being changed by that 'no' decision – no, we're not going to hear that?

ROBERTS: Sure. Those are the people who said at some point, this is so important to me I'm going to take it all the way to the Supreme Court, and you realize it's the end of the road.

When I practiced law that was a big part of my job, trying to get the Supreme Court to take my clients' cases, and it's a very sad thing to have to call somebody and say look, they're not even going to hear your arguments. It's not going to get in through the door. But by the time a case reaches the Supreme Court, the litigants have had at least two chances to persuade a court that they're right, in the federal system, sometimes more in the state systems.

So, as we put it in legal terms, we are not a court of error. It's not our job to correct every one of those 9,000 cases. We couldn't do it and maintain our position as one of the three branches of government.

SWAIN: In those cases when there are human beings' lives involved, do you ever get letters from people after the fact, when you've made the decision come to your office?

ROBERTS: I don't get many. Maybe they don't send them in to me, but I haven't seen many. We get correspondence, and I like to look at it, not all of it. Again, most of it is screened, but when you get a nice letter from somebody who's visited the Court from grade school or something like that and they have something to say, you like to respond when you can, even though you can't do it very often.

SWAIN: Now, once the decision is made that X number of cases will be heard in a term, then the calendar, the schedule of when they will be heard, how does that – how are the – how is it allocated across the calendar, the timetable for the oral arguments?

ROBERTS: It's a rolling admissions process. When something comes in that we grant, it sort of fills up the next open slot on the calendar, so cases we decide to grant right before October aren't going to be heard in October. They're going to be heard later in the term.

The cases we're going to hear at the beginning were granted the previous spring, so that's how they get assigned to the calendar. The clerk is responsible for that, and he'll allocate them and come in and ask if this is all right, and it usually almost always is.

SWAIN: OK, to oral argument, the part that people most associate with the Court; how does it work?

ROBERTS: Well first of all we'll talk later I assume about briefing, which is important, but once all the briefing is done a case is scheduled for oral argument; most cases have an hour per case, a half hour per side. When you tell that to people they say, 'Is that all?' And when you look at some of the other common law jurisdictions, they have a lot more, but a lot of the

argument's been laid out in writing. Lawyers are not expected, and even if they expect to, are not going to have the chance to get up and give a speech.

A lot of the argument, most of the argument, is devoted to justices' questions. We've read the arguments. We've read the opinions. 'You've said this, but what about this? You haven't talked about this case. What about that? You say this is what the record shows about the facts. Well, what about this?'

And it's a very, very intense period of questioning. Each of the justices has their own unique style about questioning. We have some people who like, you know, the rapid-fire style, others who like to spin out long hypotheticals. It's a real challenge for the lawyers, not only just to answer the questions but to try to do their job of moving the ball in the right direction and defending their clients' interests. It's a part of the process I thoroughly enjoy, because it does give you a lot of interaction with the bar, and through the lawyers, interaction with each other.

It's the first time we learn what our colleagues think about a case. We don't sit down before argument and say, 'This is what we think' or, 'This is how I view the case.' We come to it cold as far as knowing what everybody thinks, and so through the questioning we're learning for the first time what the other justices view – how they view-- the case. And that can alter how you view it right on the spot. And if they're raising questions about an issue that you hadn't thought was important, you can start looking into that issue during the questioning a little bit. So it's a very dynamic and very exciting part of the job.

SWAIN: So you need to listen very intently.

ROBERTS: Very carefully, not only to the questions but what the lawyers are saying, and understanding how their answer might cause you to focus on another issue, appreciating that there's going to be another side of the case as soon as that person's half hour is over. There's a lot going on.

SWAIN: And also it sounds as if the justices are really communicating with one another through the questions.

ROBERTS: It can be that way sometimes, and this is where you get the justices acting as a devil's advocate. If I think that lawyer has a good answer to a question that appears to be concerning one of my colleagues, I might ask an aggressive question that looks like I'm hostile. But I know he or she is going to come up with a good answer that might help respond to that other justice's concern.

SUSAN SWAIN: You mentioned that each justice approaches oral argument with their own style. What's yours?

ROBERTS: You know, I guess it's more the repeated questions, trying to probe a particular point. I don't usually spin out long hypotheticals, maybe because I didn't like them when I was a lawyer, having to answer them. But it's different some other times. I mean, if I have a particular view of the case that I think the lawyer ought to have an opportunity to respond to - - if my thinking has developed to that level at that point -- I might do more of a spinning out, saying, "Counsel, this is how I see the case: you were relying on this statute -- but there's this precedent that goes the other way and this is how you distinguish the precedent, but this --

what's your answer to that?' And hopefully, that lawyer will have an answer; or if not, I'll appreciate the significance of that.

But I think most of the time, it's more rapid fire. Not as much as some of my other colleagues, but – because I like to try to get the lawyer to deal with the particular issue and not, well, 'here is a general question,' because he or she will have thought, 'Here is a good answer to that.' You try to throw them off balance a little bit.

SWAIN: You have a particular experience of having been on the other side of the bench, and I am wondering what the difference is. What's the experience like arguing cases before the Court versus your role now?

ROBERTS: Well, it's a lot easier to ask questions than answer them. The big difference is we have a – there is a wonderful Supreme Court Bar and you run into your competitors, both on your side and against you, on a regular basis. But it's still a competition. You still win or lose, as a lawyer, and you still either have to call the client and say, "I am sorry" or call a client and say, "Hurray." And that competitive edge enters into how you approach the job.

Nothing like that on the bench. Obviously, we have majorities and we have dissents, but I don't think any of us view that as winning or losing, and there is no competitive edge to it. I am very grateful that I had the opportunity to be on both sides of the bench, because they're very different experiences.

SWAIN: Do you remember your first oral argument?

ROBERTS: Oh, sure, yes, absolutely, a case called *United States against Halper*. I was very nervous. But I was very nervous when I did my last oral argument as well. I think if you are a lawyer appearing before the Supreme Court and you're not very nervous, you don't really understand what's going on.

SWAIN: This is the question for all the members of the bar out there, I guess, and for all those attorneys who eventually find themselves lucky enough to have a case before the Court. What is it that you wish you had known about the process when you were on that side that you now know?

ROBERTS: Everybody tells a lawyer in that position, 'You have to answer the questions. Don't try to avoid the questions or distinguish your case in any way.' And I hope I did that when I was a lawyer. But the importance of that is very accentuated. I appreciate it so much more now that I am on the other side of the bench. You have to appreciate that the justices are engaged in the process of trying to help themselves decide the case correctly. So they are going to ask hard questions. They're going to ask questions that don't put your case in the best possible light, and you need to appreciate that.

It's good to establish – and I think I didn't appreciate this as much I should have -- some dispassion. Yes, you want to have a certain level of zeal and commitment to your clients' cause. The justices know that. But when they ask you a question about a difficult case, it's better to sometimes say, 'I appreciate that that case doesn't support my side. I appreciate that that causes us some difficulty. Here is why I think you shouldn't rely so heavily on that case.' As opposed to, as soon as we ask, say, 'No, that case doesn't hurt us at all and here is why.'

They like you to be part of the process that is helping them come to the right result. They understand you've got a client to represent and they expect you to do that. But if you can convince them that you're on their side and helping them reach the right decision, as opposed to something that they have to push against to get you to give an answer. I think that's very helpful, not only to the Court but also to your client.

SWAIN: Do you ever change your mind? Listening?

ROBERTS: All the time.

SWAIN: Do you?

ROBERTS: Partly because you don't make up your mind before you go into the courtroom. It's a continuous process of narrowing your decision window. When you pick up the first brief, the blue brief -- they are all color coordinated-- you don't have much of an idea how you think it should come out. When you finish it, you say, 'Well, those are good arguments.' You pick up the red brief on the other side and you see that, you know, there's another side to the story. You sit down with law clerks and talk about the case, 'What do you think about this?'

Again, you're moving toward a particular decision. You read the cases that might help; sometimes, it causes you to go the other way. Based on the briefs you're going this way, but you read the cases, you're going this way. Based on your own thoughts, you're going one way; based on discussions, bouncing ideas off law clerks, you move another way.

So you go into argument, sure, not with a totally blank slate, but you've you know moved a little bit back and forth, and you're more leaning one way than another, but you've got all these questions. How are they going to come out? You learned – others of your colleagues viewed this part of the case as more significant than you may have thought. So, you change your mind as 'maybe' – and that happens sometimes too. You go and say, 'I'm pretty sure I am going to do this,' but you end up the other way. But it's more a question of helping you get to the point of decision. And then you go to conference, and you talk about it with your colleagues, and that may cause you to move in an entirely different direction.

SWAIN: When cases are argued by the Solicitor General, representatives of the Justice Department, do you have a different mindset about the government, because of the co-equal branch and your role as the Court versus the Administration?

ROBERTS: No, not at all. I mean, when I was a private lawyer I argued against the government. They had very good lawyers, but I thought they were wrong a lot of times and this was my opportunity to show that. That's really one of the most remarkable things about the process. The government of the United States – one of the most powerful forces in the world-- and they have a particular view. And all I have to do, representing just say, one little individual, is convince five lawyers that the government is wrong and that little individual will win. The government will have to accede. That's an extraordinary thing. It doesn't happen in very many places around the world. It hasn't happened in very many places throughout our history. That's what people mean when they talk about the rule of law.

So, the idea that I'm going to, as a justice, defer more to what the government lawyer thinks is inconsistent with the whole process.

SWAIN: The days that oral arguments are heard, just walk through a typical day, how it is scheduled and how you go about it?

ROBERTS: Sure.

SWAIN: As you're driving in to work you know it's a day that arguments are being heard, would you just...

ROBERTS: Sure. As I said, the argument process is perhaps more important for me since I had the experience on the other side. It's an exciting part of the process. I'm going to learn what my colleagues think about a case that I've been studying for a long time. From the very first time, I'm going to hear what the lawyers have to say. So it's an exciting day. I tend to get here a little earlier.

SWAIN: About what time?

ROBERTS: 7.30. Gives me a little more time to sort of go over some last minute things. I will call the law clerk who's worked on the case in and just to bounce off some last minute ideas: You know, 'what's the problem with this; what's the problem with that; how do you understand this case?' I'll look over the briefs with my notes one last time. And then shortly before argument, we go to the Robing Room. We put on our robes. We meet in our Conference Room, which is right behind the courtroom. We carry on the tradition established by Chief Justice Melville Fuller, more than a 100 years ago -- shake each others hands before we go into the bench. And we line up outside the bench; we go in. We

announce any opinions that we have to announce. We announce any orders that we have to announce.

If there are members of the bar or hopeful members of the – lawyers who hope to be admitted to the bar -- we go through that process as well. And then we're off and running. And as I said, it's exhilarating for me, as I think it is for the lawyers involved.

SWAIN: When you walk out with your colleagues, do you converse about the argument you just heard?

ROBERTS: No. It's I think informal protocol, but we don't talk about the case. We go to lunch. By then it's lunch time.

SWAIN: Together?

ROBERTS: Yes, usually. I mean if somebody has a commitment outside the Court, they're not there. But usually on an argument day, most of the justices are there in our dining room. And it is the rule there that we don't talk about the cases.

SWAIN: So what do you talk about?

ROBERTS: You know, my colleagues who go to the opera, we'll talk about the opera. Some of us will talk about the baseball game or the golf tournament. Somebody will talk about a good movie they've seen or a good book they've read, something particularly

interesting their family is doing. The kind of the things everybody would talk about at lunch with colleagues.

SWAIN: And then you would hear another case in the afternoon?

ROBERTS: Sometimes, we do now. Sometimes we have three cases scheduled. It's usually two cases in the morning. In the fall, it's often three. In the spring, usually two, because we try to frontload the work, so that we can get started on opinions earlier and then spend more time in the spring getting them out.

SWAIN: Well, we should move on to conference, because our time is going to evaporate quickly. Talk about the process in conference please.

ROBERTS: We sit at the conference table in the same places everyday. I sit at one end. Justice Stevens, who is the most senior of the associate justices at the other end, and then it wraps around the table in order of seniority. We go in. We sit down. If it's a non-argument day, we have conferences on Fridays when we don't hear argument. We'll shake each other's hand again.

SWAIN: What's the importance of the handshake, do you think?

ROBERTS: I think it's to reaffirm that we're a collegial court, that we're involved in the same process. We've all read the same briefs, read the same cases, are going to hear the same arguments. Sometimes we have very sharp disagreements on matters of great importance to

the country we all love, and that's to show that we're all involved in the same process, which I think is vitally important.

I usually – not usually... I initiate the discussion for an argued case. I'll say, 'This case is about this. The arguments are so and so, and I think we should reverse or affirm and here is why.' Sometimes in an easy case, it will take a minute. In a hard case, it can take a lot longer.

Then it goes in seniority. So Justice Stevens would go next. He might say, 'I agree with everything, Chief,' which is nice. Or he might say, 'I disagree. I think it should come out the other way and here is why.' Or he might say, 'I agree with the result, but I think the reasoning should be this.'

And then it goes on all around. Justice Scalia is next, then Justice Kennedy, Justice Souter, then Justice Thomas, Ginsburg, Breyer and Alito. And it goes around in that direction. And there is a tentative vote as we discuss it: 'I think, as I talk about the case, I think it should be reversed;' and so on. And we keep track of that. And if there is more discussion, we have more discussion.

A fundamental rule that helps things work out well is: 'Nobody speaks twice until everyone has spoken once.' And once everyone has spoken, then we decide if there is a need for more discussion. Sometimes there is, sometimes there isn't. Sometimes we have a lot more discussion and don't seem to be getting anywhere. And at that point, I will say, 'You know, we'll work it out in the writing,' which means there'll be memos about the case later on,

about how we should decide it. I try to make sure that the issues are fully discussed and that both sides have an opportunity, if there are two sides, to get their views out.

SWAIN: You had talked earlier about how you allocate, being fair and in giving people different experiences. When do you decide to write it yourself?

ROBERTS: It's a tough part of the job. Obviously, there are good cases and I'd like to take them all; but you have to be fair. And I'm very conscious of the need to take my fair share of the cases that aren't interesting. My fair share of the ones that are hard. Any of them-- my fair share of the ones that are good and interesting, but it's a hard part of the job.

SWAIN: How do you approach the process of writing opinions?

ROBERTS: I, first of all, I do it longhand.

SWAIN: Do you?

ROBERTS: I don't do it on the computer, I'll sit down with the...

SWAIN: Is that the way you always tend to write—longhand, as opposed to on the computer?

ROBERTS: Yes. You know, I think I was just a couple years too late going through college and law school, the technological revolution was slightly behind me, so I never really learned – I mean, I can do it-- but I never learned how to write on the computer. I write out

longhand. I have law clerks' help if there is something I think they could write part of -- you know, 'I feel comfortable with this, so you go ahead and draft something up,' that I will then heavily edit. If it's a new area that I don't feel I know about, I try to do that myself to make sure I'm getting it right. I like to do a lot of the facts myself, because I think they're very important. And certainly by the time the opinion is done, I don't put it to bed until I feel comfortable that it's -- that it's my work.

There is a lot of -- it's an ongoing process. You write a first draft. You figure out, 'Well, I need to know a little bit more about how this case fits in.' You go back and read the case. You're always going back and looking at the briefs, always bringing the law clerks in and bouncing ideas off of them -- 'What's wrong with it?' It's sort of the continuation of the oral argument process -- 'What's wrong with this? What's the answer to that?'

And sometimes, memoranda go around to the other justices before that: "At conference, I said this, I said this is the reason; as I've gotten more deeply into it, I don't think that's the right basis for decision. I'm going to write the opinion this way,' just so they're alerted to that. And you go through, usually in my case, I like to do a lot of different drafts. Twenty drafts, 25 drafts it's not unusual, changing one thing in one draft and changing something else; sometimes changing it back, and then changing it back again, it's -- it's...I like the writing process, so I enjoy that.

And when you're ready to send it out to the toughest critics in the world, your colleagues, that's what you -- that's what you do. It's printed up nicely, which always make it look more authoritative, but it doesn't work with them. They are not restrained on commenting on things that are... they think a particular analysis is different and they want to go that way,

and they'll send detailed memorandum about it. Sometimes, it's fine except they say, 'I don't like this footnote or I don't like this paragraph or don't cite that case, I don't think its right.' And – and you know, you make those accommodations if necessary to get their support.

Obviously, if you are just starting out and someone says, 'I would like you to change this or that,' you're going to be very receptive. When you get eight votes and the ninth one comes in, saying, 'Change this or that,' you often say, 'Well, you know...

SWAIN: 'I'm there already.'

ROBERTS: Not quite, 'Go fly a kite,' but, you know, the fifth vote is a more critical one. You're more susceptible to making changes than the ninth vote.

SWAIN: What about those five-four cases and the process of dissent? Can you talk through – knowing that this is going to be a five-four decision, how much extra time you might spend on writing the opinion, crafting the opinion and then the value of the dissent in that process?

ROBERTS: You know I don't think I spend more time on a case I know is going to be five-four. I mean, in either – where you got nine-nothing, or something that looks like it's going to be five-four, it's an opinion that's going to show up in those bound books on judges' and lawyers' shelves and...

SWAIN: You're cognizant of that, as you're writing?

ROBERTS: I'm very cognizant of that. Now, dissent is a very valuable part of our process. It shows the thinking of different parts of the Court. It shows that arguments have been fully considered, and it's valuable for the writer of the majority, because we have a healthy degree of skepticism about what we're saying up to the very end. So it's good to see those fleshed out.

I mean, obviously, you don't like it when somebody disagrees with you. But in some cases, that can be very important. Now, not in every case. And, you hope to be able to persuade people, and I think it's a good thing if we talk about cases and send memos around and try to come together as much as we can in agreement. But sometimes, we can't do that, and sometimes there is dissent and you need to respond to it.

And there is a lot of back and forth. When the dissent comes around, you try to say, 'You're wrong about this, this and this.' You try to alter your opinion, to say, 'You know, the dissent says this, and here is the answer to that.' And sometimes, it goes back and forth a lot. But it's an important part of the process.

SWAIN: Do you ever, as chief, broker dissents that might get too personal?

ROBERTS: I think all of us do. On the Court of Appeals where I served, a couple of the judges had what I thought was a very good process: When it was all done – and of course, the Court of Appeals is going to be two-to-one --everybody sat down, the two authors, and said, 'What is there about my opinion that you think is too personal or crosses the line or is not quite right?' And they would say, 'You know, mostly it's taking out adjectives and adverbs or if somebody says something like, for example, 'Oh, the majority ignores this and

this.' And they didn't ignore it; it's just that they didn't agree that it was important. So you take that out. And so, the majority, you know, is not persuaded by these cases or something like that.

I thought that was a very good custom. It's not quite so formalized here, but there are times when you sit down with somebody and say, "You know, on reflection, do you really want to be that harsh?" And most of the time, they are surprised, 'Oh, I didn't realize that was going to be viewed that way,' and they are happy to change it. It's not just me. I think it's all of my colleagues.

SWAIN: Your colleagues had been at this for quite a while when you joined them in the role of chief, what was that transition like for you? How did you get up to speed with the many traditions and operating procedures of conference, so that you felt in command the way that your responsibilities give you the role?

ROBERTS: 'In command,' is the wrong word, as I'm sure my colleagues would correct you on that. It helped that I had been a law clerk here 25 years earlier; I had some sense from that how the Court functions.

SWAIN: But you never got to go in that room as a law clerk.

ROBERTS: Never. And it helped that I had spent 20 years of my private practice life and in government, arguing cases here. So you pick up a little bit of a sense about how the Court functions. And when I got here, my colleagues were very helpful in filling me in on how things worked -- often in contradictory ways. But you do get some sense about what's

expected in the process. And then you go in and do it, and hold your breath and hope they all don't say at once, 'Well, what you're talking about? Why are you doing that?' And the real key is that my eight colleagues were extraordinarily helpful in making me feel very comfortable.

I mean, imagine--it's not just that I was coming in as chief and the youngest among the bunch, and in many respects the least experienced as a judge. But they had been together for eleven years without any change. And you can easily imagine that that would be difficult. But every one of them, I think, went out of their way to make me feel comfortable in the process, for which I've always been very appreciative.

SWAIN: We have five minutes left and, of course, I have 25 minutes worth of questions. So let me move to this building, because it's really why we're here, ultimately. When you're here after work is done and you have the opportunity to walk the Court building, where do you most like to go? Where is your place of reflection? Or, your real sense of history and purpose?

ROBERTS: I like to go sometimes on a quiet night to the conference rooms for – called the East Conference Room and the West Conference Room--we're not very creative in naming things. Because the portraits on the walls, eight in one room and eight in the other, are all my predecessors as chief justice. And, you know, to some extent you look up at them on the walls with a degree of awe, appreciation for what they've been through. They're probably looking down at me with either bemusement or amazement. But – and each of them has a special story to tell, not only personally, but with the institution of the Court.

You look up at Marshall and appreciate the importance, for him, of having the Court function as a court. Moving the Court from a situation where each justice wrote his own opinion and instead saying, 'No, we're going to have an opinion of the Court,' which was vital in establishing the Court in its present form.

When you go right next to him you know Roger Taney, the most unfortunate of my predecessors, the author of the *Dred Scott* decision. And you understand that he saw this great problem in the country of slavery and he was going to solve it. And this is how he was going to solve it. And tremendously misguided -- it injured the Court for generations to come. So that helps to inform how you look at your own job.

You walk down a little further and you see Morrison Waite. If we have 1,000 lawyers and the law professors and said, 'Who is Morrison Waite?' And one of them would -- maybe a couple of them -- would know. And that's a good lesson. You know the job doesn't give you a prominent role or historical significance just because you hold the job.

You look at Melville Fuller, and you understand his role in making sure the Court functioned collegially.

You go into next room and you see Charles Evans Hughes and you recall his vital role in turning the back the "court-packing plan." And you think about the importance of the independence of the judiciary and things like that.

So it's always an interesting way. Perhaps, I don't do it everyday, don't do it every week, but from time to time, I find it a useful reminder of the role of the Court and the role of the chief justice.

SWAIN: And looking at what your predecessors did and how the small things like the handshake, for example, set's the tone. Have you instituted changes in the Roberts' Court that help change the way the place functions?

ROBERTS: I don't think so, at least, none that I am aware of. It's kind of hard to say if things have changed when you are not real sure about how they were before. So I guess the short answer is none that I'm aware of.

SWAIN: And when you put your hand on the Bible and took the oath, what was your sense of... I mean, there have only been 16 people before you to hold this job. What was your sense of the responsibilities that you were taking upon yourself?

ROBERTS: That I had an important job to do. I was very grateful that I had eight colleagues. If I had to make all these decisions on my own, I think it would be paralyzing. But we share the burden. We share the responsibilities, and we help each other out in discharging that process.

But obviously I was very excited. We were hearing cases that day. I was – my investiture was in the morning, I had cases right away, and I was anxious to get to work.

SWAIN: As we close here, the Court is in the process of preparing for a new member. Can you give us a sense of what's that – that's like saying goodbye to an old colleague and not sure of what the process will be like before a new justice is sworn in?

ROBERTS: To some extent, it's unsettling. You quickly get to view the Court as – the Court as composed of these members and it becomes kind of hard to think of it as involving anyone else. I suspect it's like people look at their families. You know, this is the family how could it, you know, be different. But you do get new arrivals in both of those situations. It's a tremendous sense of loss.

Justice Souter is just a wonderful colleague in so many different respects, and we will miss him in our deliberations, and we will miss him around the Court. But that's part of the process of the evolution of the Court. We will welcome the new member with open arms, and the Court will be richer in the course of history because of the gradual turnover.

But you do get used to seeing the same people every day. You used to get – you get used to having lunch with the same people every day, and it will be an interesting part of the changeover.

Justice White always used to say, 'When the Court gets a new member, it changes everything.' Changes everybody, simple changes. We move the seats around in the Court room. The seats are by order of seniority, so there will be a shift there, same in the conference room. But more fundamentally, I think, it can cause you to take a fresh look at how things are decided. The new member is going to have a particular view about how

issues should be addressed that may be very different from what we've been following for sometime. So it's an exciting part of life at the Court.

SWAIN: And since we are speaking in the summer, as we close here, does the chief get vacation in the summer time?

ROBERTS: Vacation is the wrong word. Justice Brandeis once said, 'he could do the 12 months worth of work at the Court in 10 months, but he couldn't do it in 12 months.' It's good that we get something of a break from each other.

We have work that we continue to do. We continue to pour through those 9,000 petitions that come in. You can't put those off till the fall. You have to keep up with those. We get emergency matters from time to time. But we do get out of Washington, the workload is significantly reduced, get to spend a little more time with my family than was the case during – as always the case during the sitting.

SWAIN: Well, thank you for spending almost an hour with us, Chief Justice. We appreciate it.

ROBERTS: Thank you very much.

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