

CONVERSATIONS

WITH BILL KRISTOL

Conversations with Bill Kristol

Guest: Justice Samuel Alito, U.S. Supreme Court

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I: Path to the Supreme Court (00:15 – 34:35)

KRISTOL: Hi, I'm Bill Kristol. Welcome to CONVERSATIONS, and it's a great honor to have here today Justice Samuel Alito. Thank you for joining us, Justice Alito.

ALITO: My pleasure. Thanks for inviting me.

KRISTOL: Good to have you. So how did you learn you were going to become a Supreme Court Justice? That must be a striking moment in one's life.

ALITO: It was. I remember it exactly. I was sitting at my kitchen table at home in New Jersey, drinking a cup of coffee and –

KRISTOL: You were a judge at this point?

ALITO: I was a judge on the Third Circuit, and I had been there for 15 years. And the phone rang, and it was a Deputy Counsel in the White House Counsel's Office, Bill Kelly, who called me to say that the President was seriously thinking about nominating me.

First, he told me that Harriet Miers, who had been nominated for this seat, was going to withdraw, and that was not public information at the time, and then he said the President was seriously thinking about nominating me, and was I still interested? And I said, "Yes, I'm still interested."

So that was really the – that wasn't the formal, the formal offer. And then Andy Card, who was the Chief of Staff at the time, called my house when I was at the office. My daughter answered the phone, and so she took a message, "Andy Card from the White House called." Took a little while for her to realize what this might be about. Then, she consulted with my son, and together they figured out what it was probably about.

So I spoke with him, and then, I think, maybe the next day – this happened over the course of probably three days – Andy Card had arranged for a time for the President to call me. So the President called and he said, "I would like to nominate you for a seat on the Supreme Court." And I said, "Well, thank you very much, Mr. President. I would be very honored." And there was a pause and he said, "Well, do you accept?" He wanted to seal the contract. So I said, "Yes, of course, I accept."

KRISTOL: And you had met the President before that?

ALITO: I had, yes. He interviewed me in July.

KRISTOL: For the opening?

ALITO: Yeah, the sequence was that –

KRISTOL: That was a complicated year for the Supreme Court, comings and goings.

ALITO: It was complicated. I had actually been interviewed the first time in 2001. I think that the Bush Administration, probably like all administrations these days, began to put together a list of potential nominees long before there was a vacancy because the modern process of vetting nominees has become fairly elaborate.

I was interviewed in 2001 by White House Counsel and then in the Spring of 2005 before the end of the Supreme Court's term. I guess the White House began to think that there was a possibility that there would be a vacancy at the end of the term. So then I was interviewed by the Vice President and a number of other people, and then at the end of the term, Justice O'Connor announced that she was going to retire. And it was after that, the President interviewed me, but at that point he nominated John Roberts for Justice O'Connor's seat and then when Chief Justice Rehnquist died later that summer, he nominated John Roberts for the Chief Justice seat and nominated Harriet Miers for the Associate Justice seat but then, as I said, she withdrew.

KRISTOL: What are these interviews like, to the degree you can discuss them? It must be kind of strange, you're a sitting appellate court judge, been there quite a while. Suddenly there for interviews, like back to college or something.

ALITO: It is unusual. Well, the protocol is that those who are doing the interviews can never ask the nominee how the nominee would vote on any particular case or any particular issue. But they ask a lot of probing questions about the potential nominee's general approach to interpreting the Constitution, interpreting the law, the role of the courts. They may ask about, in the case of a sitting judge, decisions that the judge has made in the past. They're pretty extensive.

The interview with the President was particularly unusual for me, having been kind of a cloistered appellate judge for 15 years. I was asked to come down to Washington for an interview, and the interview was on a Saturday so I checked into a hotel downtown, and they said that I was to, I should go to a particular corner at a particular time in the morning and wait for a Chrysler 300 to pull up, flash its headlights a couple of times, and then I was to get in this car.

So I felt like a spy. But they wanted to make sure that media didn't get any word about people who were being interviewed. Then, we went to the White House and, as I said, it was Saturday morning and they brought me up to the President's living quarters. First, when I walked into the room, a friend of one of the President's daughters was there, and then he left and then –

KRISTOL: So there's no, like, pre-brief? You don't meet first with all the staff to tell you what it's going to be like?

ALITO: I had been in interviews before, but not on this particular occasion. So the friend left and a little Scottie came running in, and then the next thing I knew the President came in, wearing kind of casual Saturday clothes. I was wearing a suit. So that was my interview with him.

KRISTOL: Did he ask anything striking, or do you think his mind was already made up? I wonder how much the President could learn in such an interview. You know?

ALITO: I don't. As far as I know, his mind wasn't made up. It was a very pleasant interview. We talked about the same sort of things, about the approach to judging, and then we finished up by talking about baseball.

KRISTOL: I was about to say, he's a baseball owner, you're a great Phillies fan.

ALITO: We spoke a little bit about baseball. We went over to see the TV where he watched baseball games.

KRISTOL: That's good. Now, going backwards, you have long been interested in the judiciary as a possible career. How did that happen? People would be curious, I think. Obviously, you went to law school but even before that I think you had thought a little bit about the law and judging.

ALITO: Yeah, I had. I think maybe I first really became interested in the Constitution when I was in high school and I was a debater. I did a lot of debating, which is kind of, draws a lot of people into becoming lawyers. One year the – there was in those days; I think there may still be – one national debate topic that everybody debated for the course of the whole year, and one year it was about the exclusionary rule, or some constitutional criminal procedure issue. I think it was about the exclusionary rule. So it really made me start to think about the Constitution and what it meant.

If you look in the Constitution, there's nothing in the Constitution about the exclusionary rule. The Fourth Amendment says no unreasonable search and seizures, but that's it – so where did this come from? Is it legitimate? If it is legitimate, what legitimizes something that is not in the Constitution? So I really began thinking about it at that time and then when I went to law school – I'm sorry when I went to college, I took some political science courses about the Constitution. Really some excellent courses. And that sort of is what got me started.

KRISTOL: That was at Princeton?

ALITO: Yeah.

KRISTOL: Who was teaching? Was someone in particular teaching criminal law?

ALITO: Well, it was in kind of a transitional period. The professor – I had two – Charles Miller taught the main course, but he was there for just a short time. Walter Murphy had been teaching, and he was on leave during the year when I took it. Then he became my senior thesis advisor.

He had become very interested in comparative constitutional law. He had done a lot of work with the Irish Supreme Court. I had taken these courses, and I was sort of looking for, I must confess, a summer boondoggle in Europe and there was a scholarship to go to Europe to study something, whatever you wanted, so you had to propose something. I had never met him, I went to see him, and I said I'd like to write my thesis on the Italian Constitutional Court and go to Italy to do some research.

KRISTOL: "I'm interested in the summer boondoggle." He probably knew. He was probably used to students –

ALITO: So that came about.

KRISTOL: So you went to Italy and wrote on? That's great. But your father wasn't a lawyer or there were lawyers –?

ALITO: There were no lawyers in the family. Both my parents originally were teachers, and my mother stayed a teacher for her whole life. I think she only left when the police came to her classroom when she reached the mandatory retirement age and physically removed her. She loved it.

But my father left teaching just shortly after I was born, and he became kind of the one-man New Jersey equivalent of the Congressional Research Service. It's hard to believe, in those days, but – today all the state legislatures, I think, have enormous staffs just like Congress – but in those days the New Jersey legislature had, prior to my father's starting, they had two staff people, period. They didn't have partisan staff, they didn't have nonpartisan staff. They had a bill drafter and an accountant, and then they hired my father as the researcher so he was their researcher so he did a lot of drafting of legislation and researching projects for a nonpartisan position.

So I became somewhat interested – that was one of the other things that got me interested in law because, although he wasn't a lawyer, he was working with legislation.

KRISTOL: And I read somewhere that he sort of personally had to do the redistricting of the legislative district after the Supreme Court insisted on one man, one vote.

ALITO: I remember lying in bed listening to this clanking of a mechanical – it's hard to believe – a mechanical adding machine. He was downstairs, and he was drawing maps to try to produce districts for the Senate and for the Assembly that were as close as possible to equal in population just using a mechanical adding machine.

KRISTOL: It's a little different today. And so then you decided to go to law school and you went to Yale Law School, very prestigious law school, not Harvard, of course. But someone has to go to Yale Law School. Why Yale Law School?

ALITO: It was – it's smaller and I thought that would be better, it would be better for me to have a smaller school. I had some friends from earlier classes who had gone to Harvard, and I went up and visited them and they were pretty miserable.

They were living in – you'll know the name of this building; I don't remember – but there was a dorm, horrible little rooms, everybody packed together that went to the law school.

KRISTOL: I didn't go – I remember visiting friends at the law school. It wasn't the most lavish living quarters.

ALITO: So I thought, well, Yale has to be better, it's smaller and didn't really have the same grading system. Harvard has now thrown in the towel, and Harvard Law School has now essentially grading/non-grading system as Yale, but in those days it wasn't true.

At Yale, our first-term courses were credit/fail and after that it was honors, pass, low pass, fail. I don't what you would have had to do to get either a low pass or fail; it was almost impossible. So basically you could go through with doing minimal work and you would have all passes, and it would look reasonably respectable.

KRISTOL: And I've read that you read some works of the great Yale Law professor, Alexander Bickel, before you went to Yale Law School. Is that – ?

ALITO: I did, yeah. The book that, the first book of his that I read was called *The Supreme Court and the Idea of Progress*, which came out while I was in college. And as I said, I had been thinking about this issue of what would make a constitutional decision legitimate if it wasn't based very clearly on the text of the Constitution, or something else that was fixed. The orthodoxy at that time was that aside from a few questions that were settled by the text, judges and Justices were really not finding the law in any sense, there was not an objective law for them out there to find.

This was – the orthodoxy was still very much under the spell of the legal realists who said what judges are doing is really implementing their own policy preferences although they dress it up in fancy language. If you start with a premise like that, what would make a decision legitimate, and that was what Bickel had begun to address earlier. But so he began as really, as a defender of the Warren Court, which was a very un-theoretical court.

They, I think, they reflected the personality of Chief Justice Warren, who was a practical kind of Republican progressive reformer, so he had a very clear idea of what good policy was and he used the power of the judiciary to implement that policy, but neither he, I think, nor most of the other Justices who were with him in the big Warren Court decisions – with the exception of Frankfurter, who became a dissenter – but for the most part, they did not seem to worry very much about the theoretical justifications for what they were doing.

So Bickel began as a – to provide a theoretical justification for what they were doing, at least in the early years of the Warren Court, but by the time, *The Supreme Court and the Idea of Progress* came out in the late 1960s, Bickel had become more and more doubtful about what the Warren Court was doing, particularly in the later years.

KRISTOL: And you read his book or books as an undergraduate?

ALITO: I read his – yeah, I read his book, I very impressed by it and I was looking forward to taking some courses from him when I went to law school, but unfortunately he became ill almost immediately after I – within the year when I started at Yale. So I never did take a course from him.

My Constitutional Law course was taught by someone you may, whose name you may remember, most people today may not remember, Charles Reich.

KRISTOL: I do remember.

ALITO: *The Greening of America*.

KRISTOL: Huge spokesman for the New Left. Though he hadn't always been, right? He had been much more normal, so to speak, moderate liberal. Constitutional law professor.

ALITO: He was a very influential kind of avant-garde liberal professor through most of the 1960s. He wrote a law review article called "The New Property," which was quite influential and was seen as providing the groundwork for a line of Supreme Court cases that began, but was terminated largely after the end of the Warren Court. His thesis was that property rights, traditional property rights, are benefits that are given to people by the state, by legislation that is enacted by a state or recognized under the common law.

And the modern, a modern equivalent of that was government benefits. So something like Social Security or other government benefits could be seen as a form of new property. So there were cases about due process rights or the termination or denial of welfare that were seen as coming from his scholarship or related to his scholarship.

By the time, he taught me he was experiencing, I think, some personal turmoil and it was a most bizarre course. During the first term at Yale Law School, most of the courses were big traditional law school classes, 50 or so students.

And you would have three of those. The first-year courses were Contracts/Torts, Civil Procedure, and Constitutional Law, so everybody would have a big class for three of those subjects, but for one of them you would have a small class of, maybe, 15 students, and that was supposed to teach you the subject but also teach you legal writing – it was a combination of the two. So I had him for Constitutional Law,

and I kept notes of any Supreme Court or any other case that was even mentioned during the course of the term, and at the end of the term, there was exactly one that had been mentioned.

KRISTOL: Not really a deep dive into the legal reasoning of the Court there.

ALITO: Well, he began by saying that his thesis was there were no livable lives to be lived in the law. That was his phrase. So he went around the room and he'd say, "Why did you come to law school?" And in those days nobody would say, "I came to law school because I want to become a partner at a Wall Street firm and make a million dollars," so everyone would say, "I came to law school because I think it's a way of achieving social reform or helping society" or something like that. And then he would engage in a long debate with each student to try to prove that this was not a good reason for going to law school. Basically, he was telling us you really shouldn't be here. And this went on for weeks. And then he went on to other subjects. That was my ConLaw course.

The professor who taught the big section that term on Constitutional Law was somebody who wasn't that well-known at the time, Robert Bork. And I went to – as soon as I saw that I had been assigned to Charlie Reich's class – I had read *The Greening of America*, and I really was not interested in being in this class. I went to the Assistant Dean and said, "Can't you possibly switch me so I can be in the regular Constitutional Law class?" Never in the history of Yale Law School has anyone ever switched a class.

KRISTOL: They're supposed to be progressive; they're supposed to change; they're not supposed to be bound by history in that way.

ALITO: I was consigned to this experience. It was bizarre, and he told us that he could never tell when he would have to go to San Francisco, but he always had a ticket to San Francisco in his desk and at some point in his term, it was possible that there would be a note on the bulletin board that he had gone to San Francisco and the course would then be over. And I came back to school after Thanksgiving and I looked at the bulletin board and there was a note that said, "I've gone to San Francisco, that's the end of classes." And that was the end of the classes.

KRISTOL: So the lesson is if you want to become a Supreme Court Justice, take a totally worthless ConLaw course your first term at law school, I guess.

ALITO: So I'm self-taught. A lot of people say, "This explains a lot."

KRISTOL: I'm curious, I hadn't really intended to ask about this, what was it like – I mean, it was funny that you had Bob Bork teaching one section and Charles Reich, another. In terms of diversity of thought, obviously I'm sure the faculty and student body were mostly, maybe overwhelmingly liberal, but did it foster – was it tolerant? Was it friendly to dissenting views? How does that compare to law schools today? I'm just curious.

ALITO: It wasn't bad. I think the students were overwhelmingly liberal. But there were a few of us conservatives, kind of hiding. Clarence Thomas was there at the time. John Bolton was there. It wasn't – the classes in those days – this was true in colleges as well as in law school – were not highly politicized and much less so than today.

KRISTOL: Do you think in law school today even they are? I thought maybe law school had kept up the tradition of sort of arguing both sides of the case or the law a little more than the undergraduate.

ALITO: I think that's most definitely true. It's much better. But there's still – there is a kind of, you know, an orthodoxy that all the students are, I think, I assume, that's what they're supposed to think.

KRISTOL: I took one course of law school when I was in grad school because Constitutional Law was one of the sort of minor fields for the exams, and it was John Hart Ely, who was a very distinguished – I

didn't realize at the time I was taking the course that he was so distinguished, or I guess was about to become so distinguished. Very good course, this was I think '75 maybe, and he volunteers something in this course – I believe something he'd either written at the time or soon after – that *Roe v. Wade* had no basis in the Constitution or some formulation that became fairly well known. And he was liberal, and I think pro-abortion rights.

As far as it went as a legislative matter. It's the only time I remember thinking this – there was a kind of a gasp and a certain amount of "Oh my God, how could a professor say this," but I was sort of struck by his willingness to engage in genuine debate.

ALITO: Yeah, I think there's much more in law school than in the other subjects because the practice of law is adversarial so people are, and lawyers understand – law students understand that as lawyers they will be in the position of having to argue a particular point, and there will be an argument on the other side and they may have to make the argument on the other side at another point. So there is, I think, because of the adversarial system of law, there is more of a preservation of the idea of actually debating issues than is probably true in the humanities and the social sciences today.

KRISTOL: That's good. Bad for the humanities but good for law school, to some degree. Let me ask you one more just a biographical question, as I remember, you served in Washington in the Justice Department in a couple of capacities, for most of the Reagan Administration or almost all?

ALITO: Yeah, for most of it. I started in the Solicitor General's office in 1981, and then I went to the Office of Legal Counsel in 1985. And then in 1987, I went back to New Jersey as U.S. Attorney of New Jersey.

KRISTOL: So I'm curious about that because that seems to me the less common – I think most of your colleagues on the Court served at the Justice Department at one time or another, I suspect, but being a prosecutor, which you were for some stretches of your legal career. What was that like? Do you recommend it to young people for both for the sake of the country and as a learning experience? How did it shape you?

ALITO: I do. It was a wonderful experience. I was an Assistant U.S. Attorney right after I had a clerkship on the Third Circuit, the court that I eventually joined. After that I went across the street to the U.S. Attorney's Office, and I was able to go to court immediately. I argued, I mostly did appellate work, I argued a couple dozen cases in the Third Circuit at that time.

It's very, very hard for young attorneys in private practice to have any experience in court. And the U.S. Attorney's Office is one of the few places anymore where you can actually go to court. Particularly for people who would like to try cases. Really the only way to get a lot of trial experience anymore is either to be a prosecutor at the federal or state level or a public defender.

KRISTOL: Did you enjoy arguing the cases in court as opposed to all the research and other stuff?

ALITO: I did, I liked all of it. I liked arguing cases.

KRISTOL: As a non-lawyer, what is that like? It looks challenging to me and intimidating but – ?

ALITO: It is very, it is very challenging. It's a very unusual format, and when non-lawyers or lawyers from other countries see an appellate argument in the United States, they are somewhat shocked by it. We had a group of judges from the European Court of Human Rights come to have a little conference in Washington a couple of years ago, and before the conference they sat in on one of the morning argument sessions. At lunch, I was sitting next to one of the justices, and she was being very diplomatic and polite, but basically what she was saying was that she was shocked by the way the argument was conducted.

She said the judges are interrupting the lawyers, they're interrupting each other, they're saying things that reveal what they're thinking about the case. Because the standard practice on the continent of Europe is for appellate judges to sit there and listen and that's it. I think in some courts they never ask questions, now they may ask a few questions but it's nothing like arguments here. So if you're arguing, of course, it varies from court to court, but you have to do two things: you have to keep in mind what you want to say so you have to have in mind the basic points you want to get across. You can't show up thinking that you're going to deliver a memorized, beautiful speech because that will not happen and you'll be lost as soon as you get interrupted.

So maybe you'll come in with the idea that you have three points that you want to make and you have to – on some courts you may have a period of time when there aren't any questions, and so you need to be prepared to make the points you want to make, but then really the most important part of the argument is answering the questions that are asked by the bench because those are presumably things that the judges or the Justices are really interested in.

When you're talking and they're not saying anything, you really don't know whether they're interested in what you're saying, but if they ask you a question, presumably they're interested in that subject. So you need to be prepared to answer that question and then work your way back into the major points that you want to make. So if you come in and you think, "I want to make points A, B, and C," and you maybe hit two minutes in the argument a series of questions about point C, you need to answer that and then work your way back.

And the really good advocates will read the Court. They may get a sense of an argument that isn't going to work. They have an idea of exactly where they want to go, and they maybe have a preferred route to get to the endpoint that they desire. But they may see that there's an accident here or there's a traffic jam here so there's another route maybe that you can get to where you want to go or maybe you're not going to get all the way to the destination that you really want but you can get to something that's better than the alternative.

KRISTOL: So in the Third Circuit – we've all by now, you can listen to the Supreme Court arguments, we all have a sense, if you care about – or one has a sense of how that works at the appellate circuit level there, a typical case would be a three-judge panel, I suppose?

ALITO: Yes.

KRISTOL: And how long are these oral arguments. Is it like the Supreme Court? Or more time?

ALITO: They're much more informal. And I think most of the Courts of Appeals are that way. We, our standard length was 15 minutes, but as opposed to – 15 minutes as opposed to 30 on the Supreme Court, but it wasn't rigid at all.

KRISTOL: So it could go over a few questions?

ALITO: Yeah, when I was presiding, which was generally toward the end of my time on the Third Circuit, when we came to the end of the 15 minutes, I would always say, "Do you have any more questions? Do you have any more questions?" And we could go on as long as necessary.

I had a colleague on the Third Circuit who just loved oral argument, wonderful judge named Eddie Becker and when the red light would go on and the lawyers would get ready to sit down and he would say, "Ignore the red light, you're on our time now." And he could go on for another hour or two hours if there were questions that he wanted asked.

So it was very informal. There's not a big audience of observers. The start of a typical argument morning in the Third Circuit, the courtroom might be fairly full of people, but by the last case there were generally

two people there. So everybody there was a lawyer or maybe occasionally a client with a lawyer involved in one of the two cases but there was not an audience of people there just because they were interested.

KRISTOL: And either at the appellate level or the Supreme Court level did the oral arguments make much difference?

ALITO: They can make a difference. They probably –

KRISTOL: You've gotten these massive briefs that are thoroughly researched and presumably reflect the work of dozens of lawyers and prestigious law firms so from the outside, one wonders how, you know, could being adept in an hour-and-half argument, could that really change a Justice's mind or a judge's mind compared to the written material?

ALITO: Well, that's exactly right. We do a lot of reading and a lot of thinking about the cases before we take the bench. So necessarily I think most of the time we have a pretty strong idea about how the case should be decided. But sometimes things will be said during the argument that will cause you to rethink your position. It's more unlikely that you will go from thinking the case should be affirmed, to reversed, to making some other sort of lesser modification in the position that you were contemplating.

The oral argument on the Supreme Court is usually the first time when any of us gets much of an idea about what the other Justices are thinking. So you can tell from their questions what they're thinking and you may want to modify your position in light of what some of your colleagues have said.

On the Court of Appeals, the argument probably changes the outcome, causes a dramatic change in the outcome, more frequently as a result of bad lawyering. On the Supreme Court, the average level is very high. On the Courts of Appeals, it varies a lot. The best is as good as we get on the Supreme Court, but the worst is sometimes really bad. So now I remember an argument where a lawyer showed up and said, "Well, I have to inform you that my client has died." That kind of makes a difference.

But, he hadn't brought that to our attention, or "my client is in bankruptcy" so if a party who is sued is in bankruptcy then all the litigation has to stop. Or that lawyer will tell you something that makes you realize that you really don't have jurisdiction over the case.

KRISTOL: Doesn't happen at the Supreme Court level?

ALITO: It doesn't.

II: From Oral Arguments to Decisions (34:35 – 55:50)

KRISTOL: I'm struck that you say that when you hear the oral arguments that's sometimes the first indication you have of your colleagues' views on the case in question. Talk about that. How does it work? How much do you talk to your colleagues? Informally, formally? How does it work as an institution?

ALITO: In the typical case, I will not talk to any of my colleagues about the case before we hear the argument. There's no rule against doing it, but it's just generally not done as matter of tradition or practice or efficiency. But usually I will prepare for the argument, I'll read the briefs and everything else that's relevant and I'll talk about the case sometimes pretty extensively with my law clerks and then we'll go into the oral argument and I'll get a sense of where my colleagues are on the case.

On the Supreme Court, the law clerks are very free to talk to each other so my law clerks usually have a sense of what the law clerks in the other chambers are thinking about the case but that's not necessarily the same thing that the Justices are thinking about the case.

KRISTOL: So a higher percentage of one's time on the Supreme Court is spent studying, reading, asking your law clerks to research some further things or doing it yourself?

ALITO: Exactly. Usually when there are editorials or articles or speeches in Congress about televising Supreme Court arguments, what is said is the people have the right to see the Court at work and really if the people, if the public saw us at work, what they would see, for the most part, is a Justice sitting at a desk or in a chair reading a brief or typing on a word processor. That's most of the work. The oral argument is really a small part of it.

KRISTOL: In terms of the decisions, you do vote so how does that work? So there's the oral argument on Tuesday or something like that.

ALITO: Let's say that the argument is on Tuesday. Then after the argument, I will talk to my law clerks, and we'll go through the things that were said during the argument. Think about any adjustments in what we had discussed earlier that might be appropriate in light of what was said either by lawyers or comments that were made by the other Justices. Then, on Friday we will have our weekly conference, and we'll talk about and vote on the cases that we heard that week.

The procedure at the conference is pretty formal. The Chief Justice will start and he'll say, "Okay, the first case is *Jones v. Smith*, and this is what it's about and this is what I think we should do. I think we should affirm; I think we should reverse."

KRISTOL: The Chief will usually volunteer his opinion first?

ALITO: Yes, we go in descending order of seniority. He won't speak for a long time usually. You know three minutes.

KRISTOL: But he's senior even though he's not been there the longest?

ALITO: He is considered to have the greatest seniority, and then the most senior Associate Justice, Justice Scalia, would speak and then Justice Kennedy, and we will go around the table doing the same thing. We have a rule that nobody can speak a second time until everybody has spoken once. So we make the complete circuit.

KRISTOL: Do you sit in a certain order?

ALITO: We have assigned seats.

KRISTOL: So it is kind of formal. As it should be.

ALITO: Everything based on seniority. Seats are based on seniority. So once we've gone around like that --

KRISTOL: And that's just the nine of you? There's no clerks sitting around?

ALITO: Just the nine of us. No clerks. So we have to take -- we all take notes. And it's pretty important to take good notes, particularly if you're going to be assigned the opinion because you need to try to remember exactly what at least four of your colleagues think about the case and if you draft an opinion and you circulate it, you want at least four justices to agree with you or else it's not going to be the opinion of the Court. It's important to either have a good memory of what was said or take good notes.

But in any event we go around the table and once we've made the complete circuit, usually we'll know how the case is going to be decided and the basic rationale of the case. Sometimes after we've gone around, well, the worst case in terms of efficiency is where there isn't a majority for any judgment. There

might be three votes to affirm, three votes to vacate, three votes to reverse. So then we have to try to see if there is some position, there's some judgment that at least five could agree on. That's pretty infrequent, that happens pretty infrequently.

But more frequently, once you've gone around it's not clear that there is a rationale that five will agree on. There may be, let's say, six-one to affirm but three-one to do it on one ground and three-one to do it on another ground. So again you have to try and find sort of the least-common denominator, something that five would agree on. And then sometimes if particularly, if it's a more controversial case, someone may want to answer something that was said by someone who spoke later so there may be a little bit of back-and-forth debate but it's not an open-ended discussion, and it doesn't go on for a very extended amount of time.

KRISTOL: Not an hour of back-and-forth between you and some other Justice arguing about –

ALITO: For better or for worse, that's how it's done. It changes, it's changed over time. My understanding is that when William Rehnquist was the Chief Justice even less was said. He was a very efficient person, apparently from all accounts. I didn't serve when he was Chief but apparently there was not very much discussion as they went around the table.

And at times in the past, I think there was an extended discussion. I read a book that said when Felix Frankfurter was on the court, he would, when it came his time to speak, he would get up and he would take books down from the shelf and he would start reading passages and he would go on and – because he had been a former professor at Harvard Law School.

William O. Douglas who was on the Court at the time, who had been a professor at Yale Law School, did not like Frankfurter, they just clashed even though they were both FDR appointees. And Douglas, he would sometimes, he would threaten to leave the room because he didn't want to listen to this. And Douglas said that Frankfurter always speaks for 50 minutes because that was the length of the time of a class at law school. So it's change but we're in the kind of intermediate position right now.

KRISTOL: So you cast these votes and they're not binding. You can change your mind as you continue to research and think and read opinions, but based on these votes, the Chief Justice assigns the opinions. Is that how it works?

ALITO: The senior Justice in the majority will assign the opinion, so if the Chief is in the majority he will assign the opinions. So he will do that – or the opinions will be assigned at the end of each two-week argument session.

KRISTOL: So that doesn't happen right away on Friday, that's later?

ALITO: Not unless that's the Friday at the end of the two-week session. So at the end of two weeks, usually we will have heard 12 cases, and Friday afternoon, an opinion assignment list will come around. So of the 12, we will almost always get at least one, and then three Justices will get two. So at the end of the year, basically, we've all received about the same number of opinions.

KRISTOL: The court watchers are always reading the entrails to see if Alito still have two opinions, likely outstanding, or whatever. But so the majority opinion is assigned by either the Chief or by the ranking, most senior person likely to be in the majority. And on the dissenting side, is the any assignment or do people just decide to dissent?

ALITO: Both things are true. Let's say it's five to four, then the senior Justice in the minority may assign a dissent for the majority. Or ask if – so the senior Justice might ask me, "Would you like to write the dissent, or would you write the dissent in this case?" And then I'd write the dissent. But we can always write a concurring opinion or dissenting opinion if we want to.

KRISTOL: But only the majority opinion is really assigned in that sort of formal way?

ALITO: Exactly.

KRISTOL: That's interesting. And then people get to work writing?

ALITO: Yeah, so then if it's assigned to me, I will begin writing and working with my law clerk, and I'll do a lot of work on this before I circulate it to the Court. Once I've drafted something – again keeping in mind both what I would like to say and what I think I can get a majority for. And sometimes you need to think about whether you want to aim just for five, or do you want to write something that will get six or seven or eight or nine – there's a little bit of flexibility there. But once I've drafted something that I'm satisfied with, then I will circulate it. This is what everyone does, we'll circulate it to all the Justices, and what I hope for –

KRISTOL: Including those who have said they would be, likely be in the minority.

ALITO: Exactly. All the communications about cases, almost all of them is done in writing and everything is circulated to the full conference, to all the Justices, no matter which side they're all on. It's not 100% rule, but that's the general rule.

And what I hope is that I will very quickly receive eight memos saying, "This is perfect, you know, don't change a word." And it doesn't always work out that way.

KRISTOL: Do they let you know necessarily if they're going to still concur in the judgment, "but I'm going to write a concurring opinion in which I explain that I don't agree with part three of your opinion," or – So that's all explained?

ALITO: Usually. What I will receive is a memo indicating whether that Justice is going to join the opinion, and I may get a memo that says, "I will join if you make this change and this change and this change." Or "I join your opinion but I suggest that you make certain changes." That would be leaving it to the discretion of the author. Or I may get a memo saying, "In accordance with my vote at conference, I'm going to dissent."

On the Friday conference, one of the things we do is to do an inventory of the cases where the opinions are circulating. So if I would have circulated an opinion, we'll go through the list and sometimes at that point someone will say, "I was in the majority at conference, but on the vote, but I'm going to wait and see what the dissent says." So sometimes that will happen.

And occasionally a decision will flip, you know, maybe once a term or so. Something that was five to four one way ends up being five to four the other way. Someone who was in the majority reconsiders after reading the dissent, thinking about the case, and so it's not the most efficient thing, but it can happen.

KRISTOL: And the votes aren't final, so to speak, until the actual opinion is –

ALITO: The votes are not final until we go out on the bench to announce the decision. So in theory, on a, let's say, on a Monday morning when a certain case is ready to be announced someone in the majority could say, "Something came to me over the weekend and I realized my position is wrong and I'm switching my position," and that's going to switch the decision. It hasn't happened that way, during my time but it could.

KRISTOL: But it could happen the week before. People could be writing until the last minute? It's an interesting combination, I suppose, just thinking about it. I definitely hadn't thought about it this way

before. Stepping back, I've sort of, on the one hand, reasoning, these are supposed to be reasoned opinions so that's why all the work and the legal reasoning and research.

But it is also, in a sense, a democratic procedure. Getting a majority of nines, I suppose, is an interesting way to think about – it's a process that mixes both pure reasoning, you might say, and legal reasoning and a certain amount of democracy.

ALITO: Justice Brennan is supposed to have said to his law clerks when they began, "What's the most important thing for a Supreme Court Justice to know?" And there would be a pause and he would say, "This is the most important thing for a Supreme Court Justice to know: five. You need to get to five to do anything."

KRISTOL: And to get to five or six or seven, if you want to get more, I assume people don't, they're not going to make an argument that they don't think is a correct argument. I suppose it's a matter of not pushing as far as you might want to push in terms of overturning something or elaborating on the implications of a certain argument. Is that right?

ALITO: Yes, exactly. It's different from what I imagine takes place and is considered to be proper in a legislative body where someone could vote for something that a person doesn't really believe in in exchange for getting a vote on something else. I don't know that that's considered to be unethical behavior by a legislator.

KRISTOL: If the other thing is more important –

ALITO: But on a court, you can't. You know that's improper, and I don't know of any instance where it's been done. So you can't trade your vote.

And I don't think any of us would actually sign onto something that we don't believe in. But we are often required to sign on to something that is not exactly what we would prefer. It becomes a hard – one of the hardest things for an appellate judge. It was hard when I started, and it's still hard sometimes to figure out how far you should bend before you say, "I can't go any further." So if someone circulates a majority opinion, and it's not what you would have written, and you don't like certain aspects of it, maybe you don't like the language, how far can you go?

For the purpose of making a majority or for the purpose of just not writing another meaningless separate opinion, how far can you go before you say, "No, I can't go any further?"

KRISTOL: I suppose, on the other side, as a matter of sort of comity, it's not good form to sort of just write separate or concurring or partially agreeing in the judgment but disagreeing with certain aspects, to do that in some sort of pedantic way, where, you know, "I don't like the following two paragraphs in this section or the following part of this section." That's important, I suppose.

It's not like it's law school or something where a professor could say, "I agree with arguments one, three, four, six and eight and part of nine and I'm going to explain now why the others are wrong." I don't think, the Court doesn't want each Justice to be that.

ALITO: It's a hard line. As a former consumer of Supreme Court opinions when I was on the Court of Appeals what I wanted and what I think all the lower court judges, what all the parties want, the lawyers want, is a pretty clear rule so it's nice to have a majority opinion. It's difficult when you have to put together opinions and try to figure out what the holding is.

But on the other hand, sometimes I may get the draft of a majority opinion and I agree with the bottom-line, or it could be a dissent, I agree with the bottom-line and the basic argument, but there may be paragraphs that are based on past decisions from which I've dissented. And so it's kind of hard to, you

know, I accept the fact that this case was decided and it's binding on me, but I still think I was right on that case and it's hard to sign on to something that is enthusiastic about a position that I thought was incorrect. There are a lot of very hard lines to draw.

KRISTOL: Do you – I wanted to ask you about your colleagues, you've obviously have studied them. You've probably read a huge percentage of the opinions of almost all of your predecessors on the Court, I would guess.

Who do you admire the most and who – who should we go back to read if we really want to see what being a Supreme Court Justice should be? How it could be done well?

ALITO: There are a lot that I admire for different things. There's no one single Justice that I would say that I'm going to model myself on. John Marshall would be presumptuous to do it with some. The issues are different, the way the Court operates over time has changed, the style of writing opinions has changed a lot.

I admired Chief Justice Rehnquist very much. I thought that he was – he achieved a lot during his time in the Court. He started out dissenting, often by himself on certain issues, often about federalism issues, and by the time he became Chief Justice, he had assembled a majority in favor of some of his positions. So I admired him.

The second Justice Harlan was a very scholarly person; I admire his work. Justice Jackson was a good writer, a very memorable writer. The last Justice who didn't graduate from law school.

KRISTOL: I guess, what is it called? He studied, apprenticed sort of for the bar. Yeah, that is interesting. And if someone probably – just thinking about this now – but some publisher came to you now and said, "You could edit some selected opinions of one of your predecessors that people should read." As you say, it's hard probably to work all the way back because the issues are so different, maybe, but in terms of 20th-century, let's say, Justices.

ALITO: That's hard. That is really hard. Well, maybe the ones that I mentioned. Those would be some that I mentioned.

The first Justice Harlan is a very interesting figure, an admirable figure in a lot of ways. He was the only dissenter in *Plessy v. Ferguson*. Very old-fashioned man, in some good ways. One of his, he was kind of derided by his more sophisticated colleagues. Holmes said he was the last of the tobacco-chewing justices, which I think was true. He used to chew tobacco on the bench, believe it or not.

Justice Brewer said that Harlan goes to sleep each night with one hand on the Constitution and one hand on the Bible, and he sleeps the sweet sleep of the just. He said that, as you know, kind of a critical comment, but maybe that's not such a bad thing.

KRISTOL: I mean, I remember this from years ago. I haven't looked at this stuff, unfortunately, in a lot of time, but when I took a couple political science courses on ConLaw, the dissent in *Plessy* is really a powerful and moving, I would say, document.

ALITO: He was, and he came from a slave-owning family, from a Southern background. The majority opinion in the case was written by Henry Brown who was not very well-remembered, but I believe that he had the distinction of being the only Supreme Court Justice who attended both Harvard and Yale Law Schools.

KRISTOL: And he was the opinion upholding Jim Crow?

ALITO: Maybe that says something.

KRISTOL: That does say a lot, I think.

III: What Is Free Speech? (55:50 – 1:08:37)

KRISTOL: There's so many things that one could ask about your work on the Court, so much of it is so interesting. But let me ask about the rather unusually, I think – I think it was 2010 term or 2011 – you dissented in two free speech cases. Adam White wrote about it in *The Weekly Standard*.

I think people noticed it because there's always been this sort of, you know, simple-minded political divisions on the Court and that's true some of the time, the divisions of six-three or five-four, you can sort of guess some of the time who's going to be with who.

And suddenly you were dissenting in two different, I think, eight to one decisions in which the opinions were written by Justice Scalia in one case, and the Chief Justice in the other, people with whom you're often allied. So talk about those two cases, and what your thoughts on free speech – because I think there you have a distinctive, I think, view and a very interesting one, I think – free speech, political speech, so forth.

ALITO: The first one was a case called *United States v. Stevens*, and it was, it involved the constitutionality of the statute that prohibited the creation or circulation of depictions of animal cruelty. It was enacted by Congress to stamp out something called “crush” videos, which are horrible things. They are videos of a person, presumably a woman, wearing high-heeled shoes stamping a little animal to death, a hamster or sometimes a kitten or something like that. There's apparently, there was and maybe there still is, a market for this sort of thing. So all you would see on the video was the foot and the animal being, the animal being crushed to death.

And it's virtually impossible to find out who was doing this. The physical activity could be made illegal, no one questions that, that you could have a law against animal cruelty. But can you have a law that prohibits the creation of these videos without which the animal cruelty would not take place? That was the theory of it.

And the Court said no –

KRISTOL: This was a federal statute?

ALITO: Federal statute. The statute was overbroad. There was some, you could think of examples of things that would fall within the literal terms of this statute that were quite removed from these crush videos. The Chief Justice wrote the opinion in the case, and he had the example of someone shooting a deer out of season in a particular state. That would be an illegal activity so if you had a video, a hunter, shooting this deer out of season or cock-fighting in Puerto Rico where it's legal.

In any event, I dissented.

KRISTOL: Because that was not the instance? The actual case was a real crush video.

ALITO: The case itself was actually – they were videos of dogfights. You know, dogs tearing each other apart. So the Court held that that was unconstitutional, and I dissented.

And the other one was *Snyder v. Phelps*, which had to do with protests at the funerals of soldiers who were killed, mostly killed in Iraq or Afghanistan. There was a group that, a small group that felt very strongly about two things. They were against homosexuality and they were against the Catholic Church, and someone made the connection between homosexuality and the U.S. military so they would look in

the papers, presumably for the funeral of a soldier, and they would show up and they would protest outside of the church or wherever the funeral was being held.

In this particular case, the soldier was being buried in Maryland, and they showed up in this small town in Maryland, and they had placards that said horrible things about him personally and it was very distressing to the family members who were in attendance. So they were sued under a very well-established tort that goes back to the 19th century, the intentional infliction of emotional, of severe emotional distress. And I thought that this tort constituted a reasonable exception to the First Amendment, but my colleagues disagreed about that.

KRISTOL: So explain – and you wrote powerful dissents, in my opinion, in those two cases. What about the obvious sort of simple argument – “Well, look it’s a slippery slope, you can’t curtail speech.” I mean, that’s kind of the argument that the majority made one way or the other, I would say.

ALITO: Well, I think some members in the majority – this is not based on inside information, this is what I get from reading the opinion. I think that there are those who would support the majority decisions in both those cases for exactly that reason.

So if we say even in these outrageous situations, we will not tolerate any abridgment of freedom of speech then when something comes along that I would regard, and I think our cases would regard as really being at the core of the free-speech protection, that these decisions provide a guarantee or they provide a wall of protection against a bad decision in those areas.

If I really believed that to be the case, I might think that it was an appropriate trade-off. I don’t think that’s the case. I think that judges who are inclined to make a bad decision, anti-free speech decision in a case involving core political speech will find a way of getting around these little, these little cases.

So what I think has been going on in those two cases and another one where I was in dissent, this time not by myself, in *United States v. Alvarez*, which had to do with the constitutional statute passed by Congress called The Stolen Valor Act. What I think had been going – and The Stolen Valor Act prohibited a false claim of having received a military medal.

KRISTOL: Which was happening a lot at the time.

ALITO: It was happening a lot. People were making up, you know, claiming to have won the Congressional Medal of Honor, that’s what this Mr. Alvarez did, said, “Well, I won the Congressional Medal of Honor.” Well, he had done no such thing.

And the Court struck down that statute six to three. But I think what – those cases involve a diversion, I think, of attention from the core, from what is most important about the guarantee of freedom of speech.

I think freedom of speech protects and serves many purposes, but I believe and I think the Court has said that at the core, whatever other purposes it may serve, it is vitally important for democratic self-government. If people cannot debate public issues, if they cannot debate the relative merits of political candidates, then democracy is basically impossible. So I think that is the core of the protection. These cases involving depictions of animal videos, depictions of animal cruelty, the protest at military funerals, flashy claiming to have won the Congressional Medal of Honor don’t involve anything like that.

And if we lose focus on what is at the core of the free-speech protection by concentrating on these peripheral issues, I think, there’s a real danger that our free-speech cases will go off in a bad direction. In the cases that we’ve had that I think involve core free speech, the example, the chief example that I would give from my time on the court is the *Citizens United* case. The Court has – now that came out five to four, protecting the right to freedom of speech, but it was five to four. And it remains very controversial.

My former colleague John Paul Stevens has written a book recommending a number of constitutional amendments to correct the decisions he really disagreed with during his time on the Court and that's one of them. He wants an amendment to the First Amendment, which is pretty remarkable, to overrule the decision in *Citizens United*. *Citizens United*, I think, is core political speech. It is a video about a candidate for the Presidency of the United States. If that's not protected by First Amendment free speech, by the First Amendment free speech guarantee, I don't know what is.

So on things that are at the core, the Court has been shakier than it has been on these things that are at the periphery.

KRISTOL: So the argument that protecting the periphery helps protect the core doesn't seem to hold in this case.

ALITO: I don't think it works.

KRISTOL: You also make the argument, as I recall, in at least one or two of those three dissents, you make more of a positive argument for the virtues, for the right, for or the ability of the community to draw certain boundaries around civility or civilized behavior, mostly in the case of the soldiers' funerals or all of them really, the animal cruelty, all three of them, lying. Those are all things a community would have a reasonable interest in discouraging, to say the least.

ALITO: I think that's true. And I think that's appropriate in cases that don't involve political speech. I would not make the same argument in a case involving, in the case involving political speech. I thought all of them were cabined by specific rules, very reasonable rules. So in the animal cruelty case, I thought that was very similar to the rationale – I thought the rationale there should be very similar to the rationale against child pornography.

Which is that you can't produce child pornography without abusing a child and by stamping out child pornography, or trying to stamp out child pornography, you are attacking the underlying abuse – same things with these crush videos. You couldn't stamp them out without preventing the creation and the circulation of the videos.

But I wouldn't make that kind of an argument, I think that kind of an argument is a dangerous argument when you're talking about political speech. And if you compare our law, for example, to the law in democratic countries that believe in human rights, in Europe, they go much further. They are much more restrictive of speech, including political speech. There are laws against hate speech. There are laws on defamation of a public figure. Make it much easier for people to sue, for a public figure to sue someone who a public figure, the public official, thinks has said something false.

KRISTOL: We had an article about this in *The Weekly Standard*. The laws against hate speech seem – just to step back and look at the actual speech that's going on in these countries – that have these laws not to have been very effective, and if anything, to perhaps add a slightly contrarian effect somehow, romanticizing the daring anti-Semitic speech or whatever –

ALITO: I think that's probably true. Certainly, they have laws against hate speech, including Holocaust denial speech, and yet you see what's happening with anti-Semitism in Europe so it doesn't seem to be very effective.

IV: *Obergefell v. Hodges* (1:08:37 – 1:15:44)

KRISTOL: We're speaking shortly after the end of the 2014-15 term, and it closed with the dramatic *Obergefell* case on same-sex marriage and marriage equality, and you dissented along with three other Justices. I think you each wrote your own dissent. Yours is a powerful dissent, which I recommend to everyone to read in full, but it does close with a strong – I could say Bickelian, it reminded me of

Alexander Bickel, he wrote these “dangerous branch” concerns that you express about, almost, the legitimacy of the Court in light of this decision.

You say these people are sincere in wishing, the vision of liberty; the majority was sincere in the vision of liberty it held and expressed in this case, “but this sincerity is a cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.”

That’s a strong statement, and you obviously thought a lot before writing it, and just explain the corruption and explain what we citizens should think about that.

ALITO: Well, the decision was based on, really, one word in the 14th Amendment. The Due Process Clause of the 14th Amendment prohibits the deprivation of life, liberty, or property without due process of law. So this was all based on liberty and on a substantive protection of liberty, not a procedural protection, which is what you might think the Due Process Clause was about, but substantively the Constitution protects certain liberties, the Court held. And the right to same-sex marriage is one of those liberties.

The idea of substantive due process has been very controversial throughout the Court’s history. It was a prominent feature in a number of pre-New Deal Supreme Court decisions where it was used to protect property rights. And the New Deal Constitutional Revolution tried to either kill off substantive due process completely or relegate it to very, very minor role.

But it has experienced a revival in more recent years, not in the area of property rights, but in the area of some non-property individual rights, including same-sex marriage. So the jurisprudential question is what limits the definition – how do we determine what liberty in the 14th Amendment means? Liberty means different things to different people. For libertarians, for classical liberals, it does include the protection of economic rights and property rights. For progressive social democrats, it includes the protection, a right to liberty means freedom from want, etc., etc. Government benefits.

And there are many other conceptions. The Court’s conception, I said in this opinion and I believe to be true, is a very postmodern idea; it’s the freedom to define your understanding of the meaning of life. Your – it’s the right to self-expression. So if all of this is on the table now, where are the legal limits on it?

If a libertarian is appointed to the Supreme Court, is it then proper for the libertarian to say, “Well, I think that there is a right to work less than the minimum wage? I think there is a right to work as many hours as I want without being limited by the government. I think I have the right to build whatever I want on my property irrespective the zoning laws and so forth.”

If a socialist is appointed to the Supreme Court, can the socialist say, “I think that liberty and the 14th Amendment means that everyone should have a guaranteed annual income or that all education through college should be absolutely free,” or whatever. There’s no limit. The Court had tried to limit this in some earlier cases from the Rehnquist era, prominently a case called *Glucksberg* that involved the claim that there was a constitutional right to die, by saying that liberty protects those rights that are deeply rooted in the traditions of the country. So you had to find a strong historical pedigree for this right.

But the *Obergefell* decision threw that out, did not claim that there was a strong tradition of protecting the right to same-sex marriage, this would have been impossible to find. So we are at, we are at sea, I think. I don’t know what the limits of substantive liberty protection under the 14th Amendment are at this point.

KRISTOL: And I suppose that does get to the question of the Court’s credibility and authority? If they’re just at sea, who gave them the right to steer the ship?

ALITO: Exactly. Exactly. What is – where do we get the authority to impose what we think about same-sex marriage, or what we think about minimum-wage laws, or what we think about free college tuition or anything else on the rest of the country?

If it's not in the text of the Constitution or it's not in something that is objectively, objectively ascertainable, if it's just whatever I as an appointee of the Supreme Court happens to think is very important, so I don't know where – it raises questions of legitimacy, it raises practical questions because the more the Court does this sort of thing, the more the process of nomination and confirmation will become like an election. It will become like a political process.

KRISTOL: And I suppose it also doesn't give any guidance to lower court judges about where they should draw the line, so about other people presumably deciding you have a right to use heroine or something. I mean, why –

ALITO: I think that's right.

KRISTOL: So this will be an ongoing debate about the Court?

ALITO: Well it has been. This issue has been a hotly debated issue for a long time, but this is going to, this will fuel that fire.

KRISTOL: Maybe it will be a healthy fire if it leads to a real civic debate and not simply a political or partisan fire.

V: Philadelphia Baseball (1:15:44 – 1:21:04)

KRISTOL: I can't close without asking you about baseball. Someone who visited you in chambers said that there are almost as many baseball uniforms, baseball paraphernalia, historical stuff on your wall as there are law books. That's probably an exaggeration, but I guess you're a big baseball fan?

ALITO: I am. I have a collection of baseball memorabilia, which my wife has encouraged me to remove from the house and take to my chambers. I have one section. I have more books than baseball stuff. But I have a little section of my bookshelf that's full of pictures and things like that that I've collected over the years.

KRISTOL: And you're a Phillies fan? Tough year.

ALITO: Very tough year.

KRISTOL: Any memorable moments in your baseball playing, or did you play baseball as a kid?

ALITO: I did.

KRISTOL: Not recruited for the majors? Not offered a contract?

ALITO: Two things happened at a certain point in my baseball career: one, I needed glasses, and in those days, it was really considered not to be too athletic to wear glasses so that made it hard to hit. And I overcame that, but the other I couldn't overcome, and that is when the pitcher started to throw pitches that moved.

The difference between the fastball and the curve, that eliminates a lot. But anyway I was not a great baseball player, I played until my teenage years. I've been a very devoted fan. I think that if you're a real fan you must stick with your team, it's like treason to leave even when times are not good and they are not. And they certainly are not too good right now.

I grew up, as we were talking earlier, I grew up near Trenton, New Jersey, which is at the mid-point of the New York and Philadelphia zones of sport influence, and when I was forming my baseball affiliation in the 1950s, the Yankees won every year almost every year.

Most of my friends, many of my friends, were Yankees fans. They were very smug. And the Phillies were declining, and for some reason I can't remember, I chose the team that was losing instead of the team that was always winning. I think it's had a big influence on my personality.

KRISTOL: Yeah, I did the same thing as a kid. I was an anti-Yankees fan when most my friends in Manhattan, in New York, were Yankee fans, and this was still the great days of Mantel and Maris and all that.

But I rooted for the Tigers sort of randomly since I had no connection to Detroit except that they were sort of challenging the Yankees so I wasn't quite going to root for the worst team. I was rooting for the team that might have a chance to upset – although they almost never did. Well, I'm glad that, I'm glad that you were rooting for the underdog. Any one particular memorable game you were at or moment at a baseball, at a stadium? Most people who are fans have one or two special –

ALITO: I really recall going to, the first time I went to a night game. My family used to go to double-headers on Sunday. I think the ticket cost a \$1.25, and for \$1.25, we could see two games.

KRISTOL: And this was in the old Philadelphia stadium? I guess I was never there –

ALITO: Connie Mack Stadium. And in those days, Philadelphia had – there was an ordinance that prohibited any inning from beginning after, I think, it was 6 o'clock on Sunday.

KRISTOL: Would now be found unconstitutional undoubtedly.

ALITO: Undoubtedly. For a dollar and a quarter each, and we would bring, in those days, you could bring your own food in, you could bring your own thermos so we would have a picnic and we would sit in the same seats. Sort of a semi-obstructed view along the right-field fence to see the doubleheader.

I remember my father took me to a night game, and I remember I walked into the stadium, and at night it just looks completely different. It's an amazing sight.

I remember a player on the Cincinnati Reds named Ted Kluszewski, who wore short sleeves and had big muscles, and this was in the days before – baseball players at that time thought it was very bad to lift weights, would make you stiff and muscle-bound. So there was none of the weight-training that goes on today, but Ted Kluszewski stood out because he had these, he was a really muscular guy. And he hit a home run over – there was a big fence in right field, like about a 25-foot, 30-foot fence. No stands out there but just this big fence. He hit a home run that went over this fence and just disappeared into the night, and I still remember that.

KRISTOL: A memorable note on which to close. Justice Alito, thanks so much for taking the time to be with me today, and thank you for joining us on CONVERSATIONS.

[END]