The Burger Court Opinion Writing Database

Chiarella v. United States

445 U.S. 222 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 4, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

As you may recall from Conference, I was prepared to affirm the conviction and file a dissent along the lines of Dean Keeton's observation that "any time information is acquired by an illegal act it would seem that there should be a duty to disclose the information." Keeton, Fraud, 15 Tex. L. Rev. 1, 26 (1936). Here, Chiarella, literally in the shadow of the warning signs in the print shop, acquired private information by illegal means -- misappropriating nonpublic information entrusted in him in the utmost confidence by the acquiring company. I strongly believe this illegal conduct imposed upon him a duty to disclose or to abstain from trading on the information; his failure to abide by the disclose-or-abstain rule violated Rule 10-b-5.

Your thoughtful opinion now shifts the emphasis and basis of reversal. Since (1) the mere possession of non-public information is not sufficient to create a duty to disclose, and (2) the "Keeton theory" was not submitted to the jury, you have made a good case for reversal. Nonetheless, I am unable to join your opinion as now drafted. At page 7, the opinion suggests that liability for nondisclosure must be "predicated upon a . . . duty to disclose arising from a relationship of trust and confidence between the parties to a transaction." Similarly, at page 9, the opinion speaks of "a relationship between petitioner and the sellers that could give rise to a duty." My concern obviously is that this language can be read to undermine the notion that an absolute duty to disclose-or-abstain arises from the very act of misappropriating nonpublic information. Your language gives me pause. Possibly we can work out an accommodation.

Your focus on what was not submitted to the jury was not -- at least in my recall -- explored in any depth in Conference. I will try to put together some specific language that would clear this up for me.

I could not accept any idea that "blue collar" fraud is less culpable than a "white collar" variety. I do not read you as suggesting anything like that but it should be affirmatively negated if possible.

More later.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

I will be circulating a dissent in due course.

Regards,

Mr. Justice Powell

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1202

Vincent F. Chiarella, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1980]

MR. CHIEF JUSTICE BURGER, dissenting.

I believe that the jury instructions in this case properly charged a violation of § 10b and Rule 10b–5, and I would affirm the conviction.

I

As a general rule, neither party to an arm's length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation. See Prosser, The Law of Torts § 106. This rule permits a businessman to capitalize on his experience and skill in securing and evaluating relevant information; it provides incentive for hard work, careful analysis, and astute forecasting. But the policies that underlie the rule should also limit its scope. In particular, the rule should give way when an informational advantage is obtained, not by way of superior experience, foresight, or industry, but by unlawful means. One observer has written:

> "[T]he way in which the buyer acquires the information which he conceals from the vendor should be a material circumstance. The information might have been acquired as the result of his bringing to bear a superior knowledge, intelligence, skill or technical judgment; it might have been acquired by chance; or it might be acquired by means of some tortious action on his part. . . . *Any time information is acquired by an illegal act it would*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 31, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

I will add the following at an appropriate place in my dissent.

Chiarella's counsel in closing argument said:

"Let me say right up front, too, Mr. Chiarella got on the stand and he conceded, he said candidly, 'I used clues I got while I was at work. I looked at these various documents and I deciphered them and I decoded them and I used that information as a basis for purchasing stock.' There is no question about that. We don't have to go through a hullabaloo about that. It is something he concedes. There is no mystery about that."

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

In Untitled Feller + C.J.

Supreme Court of the United States 2/3
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 31, 1980

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Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Lewis: I would welcome your joining me!

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 8, 1980
PERSONAL

Re: 78-1202 - Chiarella v. United States

Dear Bill:

I will undertake to separate more clearly, if that is necessary, the parts of my dissenting opinion with which you agree from the part on which you do not agree.

This will enable, if you wish, to avoid writing and cover the matter with a recital that you join in part "X" only.

Regards,

WEB

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 27, 1980

Re: 78-1202 - Chiarella v. United States

MEMORANDUM TO THE CONFERENCE:

Attached is a second draft of my dissent in this case. I have moved a paragraph from the end of Part I to the end of Part II to accommodate Bill Brennan's desire to join Part I. I also have taken the opportunity to "beef up" Part II to make clearer my view that the jury instructions in this case did not impair Chiarella's right to a fair trial.

Regards,

WEB

STYLISTIC CHANGES THROUGHOUT
and
CHANGES AS MARKED: 5, 6

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

2nd DRAFT Recirculated: FEB 27 1980

SUPREME COURT OF THE UNITED STATES

No. 78–1202

Vincent F. Chiarella, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1980]

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> "[T]he way in which the buyer acquires the information which he conceals from the vendor should be a material circumstance. The information might have been acquired as the result of his bringing to bear a superior knowledge, intelligence, skill or technical judgment; it might have been acquired by chance; or it might be acquired by means of some tortious action on his part. . . . *Any time information is acquired by an illegal act it would*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 5, 1980

Memorandum to: The Chief Justice

Mr. Justice Powell

RE: No. 78-1202 Chiarella v. United States

At conference I indicated that I would be with the dissent in the above, but I now find myself halfway between the positions set forth in your two opinions. On the securities law issue, while I agree with Lewis that the mere use in connection with the purchase or sale of securities of material nonpublic information does not violate Section 10(b) or Rule 10(b)(5), I am unable to subscribe to those portions of his opinion which suggest that no violation of these provisions may be made out absent a breach of a fiduciary relationship between the defendant and the seller. Nor do I agree that a duty to disclose or abstain from trading may stem only from some sort of relationship. Rather, it seems to me that the Chief is correct to suggest that whenever someone improperly obtains information, or converts to his own use information to which he has access under limited conditions which do not permit such conversion, use of that information in connection with the purchase or sale of securities violates Section 10(b). In consequence, I am of the view that on the facts of this case Chiarella probably could have been convicted of violating the securities laws.

The problem, as Lewis suggests, is that the theory under which Chiarella was convicted is not the one sketched out above and in the Chief's opinion. Nowhere in the instructions was the jury told it would have to find that

Chiarella had misappropriated information or wrongfully converted it to his own use. And suggestions (often ambiguous ones at that) in the indictment and the prosecutor's remarks are not, for me, an adequate substitute. Like all of us, I am privately confident that a jury that was properly instructed would not have dallied on the wrongfulness point. But that confidence does not permit us in effect to direct a verdict of guilty on one element of a criminal offense. And neither reference to the harmless error doctrine nor some theory of constructive stipulation cures the defect. Accordingly, I can only vote to reverse the conviction.

Were Lewis' opinion more narrowly cast, I might be able to agree in substance as well as result. But I believe the present draft will be widely read as rejecting the theory of liability set forth by the Chief (I refer particularly to language on page 6, the second sentence of the full paragraph on page 7 and much of page 9). Therefore, unless the present opinions change, I intend to circulate a brief statement concurring in the Court's result on jury-instruction grounds but expressing my disagreement with all language in the opinion that appears inconsistent with the Chief's statement of the law.

Sincerely,

Bill

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 11, 1980

RE: No. 78-1202 - Chiarella v. United States

Dear Chief:

Thank you for your note. I think the parts of your dissent are already separated quite clearly. Still, it would probably simplify things if you could move the final pragraph of your Part I into Part II. With that shift, I would have no difficulty stating my agreement with Part I.

I fear, however, that this will not eliminate the need for a brief statement explaining my position. The problem, of course, is that we part ways on Part II, and that leads us to different results. Accordingly, while I could join Part I with the change referred to above, I am unable to join in your conclusion since I concur in the result reached by the major

Sincerely,

Bill

The Chief Justice

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: FEB 2 8 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1202

Vincent F. Chiarella, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1980]

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court holds, correctly in my view, that "a duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information." *Ante,* at 12. Prior to so holding, however, it suggests that no violation of § 10 (b) could be made out absent a breach of some duty arising out of a fiduciary relationship between buyer and seller. I cannot subscribe to that suggestion. On the contrary, it seems to me that Part I of THE CHIEF JUSTICE's dissent, *post,* at — – —, correctly states the applicable substantive law—a person violates § 10 (b) whenever he improperly obtains or converts to his own benefit nonpublic information which he then uses in connection with the purchase or sale of securities.

While I agree with Part I of THE CHIEF JUSTICE's dissent, I am unable to agree with Part II. Rather, I concur in the judgment of the majority because I think it clear that the legal theory sketched by THE CHIEF JUSTICE is not the one presented to the jury. As I read them, the instructions in effect permitted the jurors to return a verdict of guilty merely upon a finding of failure to disclose material nonpublic information in connection with the purchase of stock. I can find no instruction suggesting that one element of the offense was the improper conversion or misappropriation of that nonpublic information. Ambiguous suggestions in the indictment and the prosecutor's opening and closing remarks are no substitute for the proper instructions. And neither reference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 29, 1979

Re: 78-1202 - Chiarella

Dear Lewis:

In view of your letter and its enclosure, I fully agree with your proposal to write an opinion along the lines you suggest.

Sincerely yours,

P.S.
1.S.

Mr. Justice Powell

cc - Mr. Justice White
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 4, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 7, 1980

Re: No. 78-1202 - Chiarella v. U. S.

Dear Lewis,

I agree.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 10, 1980

Re: No. 78-1202 - Chiarella v. United States

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 11, 1980

Re: No. 78-1202 - Chiarella v. United States

Dear Lewis:

I am trying my hand at a brief dissent which is not entirely in line with the material the Chief has circulated. I shall get this to you as soon as possible, but it is fairly apparent that it will not reach you before Friday's conference.

Sincerely,

HAB.

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAR 7 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1202

Vincent F. Chiarella, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1980]

MR. JUSTICE BLACKMUN, dissenting.

Although I agree with much of what is said in Part I of the dissenting opinion of THE CHIEF JUSTICE, *ante,* I write separately because, in my view, it is unnecessary to rest petitioner's conviction on a "misappropriation" theory. The fact that petitioner Chiarella purloined, or, to use THE CHIEF JUSTICE's word, *ante,* p. 7, "stole," information concerning pending tender offers certainly is the most dramatic evidence that he was guilty of fraud. Petitioner has conceded that he knew it was wrong, and he and his co-workers in the print shop were specifically warned by their employer that actions of this kind were improper and forbidden. But I also would find petitioner's conduct fraudulent within the meaning of § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and the Securities and Exchange Commission's Rule 10b–5, 17 CFR § 240.10b–5 (1979), even if he had obtained the blessing of his employer's principals before embarking on his profiteering scheme. Indeed, I think petitioner's brand of manipulative trading, with or without such approval, lies close to the heart of what the securities laws are intended to prohibit.

The Court continues to pursue a course, charted in certain recent decisions, designed to transform § 10 (b) from an intentionally elastic "catchall" provision to one that catches relatively little of the misbehavior that all too often makes investment in securities a needlessly risky business for the

November 28, 1979

78-1202 Chiarella

Dear John:

As you know, the above case has been assigned to me to write.

I am inclined to accommodate my views to yours, as I understand them. Indeed, I now agree with you as to the limited character of the instructions.

I enclose a draft of a proposed letter to the Brothers who also voted to reverse. I would appreciate knowing whether I have correctly stated your position, and whether you would consider favorably an opinion written along these lines.

Sincerely,

Mr. Justice Stevens

lfp/ss

November 29, 1979

78-1202 Chiarella

Dear Potter, Byron and Bill:

At Conference, the three of you and I voted to reverse broadly on the ground that the Federal Securities Acts are not applicable to this type of fraud. The Chief, Bill Brennan, Thurgood and Harry voted to affirm CA2's sweeping opinion 100%.

John took an intermediate position. Prior to Conference John did what I had not done: he checked the record and concluded that the jury was instructed only that Chiarella breached a duty to the persons from whom he purchased shares at the time he possessed material, non-public information. John thinks, as we do, that the Securities Acts imposed no duty on Chiarella with respect to the sellers - persons with whom he had no relationship whatever. Thus, John has told me that he could join an opinion reversing the conviction on the only theory submitted to the jury.

He would not reach what may be called the second theory: whether petitioner also breached a duty to the acquiring corporation that is actionable under §10(b) and Rule 10b-5. Although John is not at rest on this second theory, he considers it to be different because there is an identifiable agency relationship between petitioner (through his employer Pandick) and the acquiring corporation.

I have concluded that John is quite right that the jury was instructed only on the first theory, namely, that the charge was a criminal fraud upon the seller of the shares. I therefore think that the proper way to write the opinion is in accord with John's views. We would reverse on the first theory. There hardly could be a duty imposed by the

Securities Acts upon Chiarella to disclose information to persons with whom he had no relationship - direct or indirect. Whether he committed a common law fraud actionable under state law is an issue not before us.

I enclose a copy of a memorandum prepared by my clerk, Jon Sallet, based on his examination of the jury instructions.

Absent dissent, I will undertake to write an opinion along the foregoing lines. Unless it can be written this way, I see little chance of a Court opinion.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist

lfp/ss
Enc.

JS 11/25/79

MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-1202, United States v. Chiarella

I believe that a review of the jury instructions supports the conclusion of Mr. Justice Stevens that the jury was never presented with the theory that now forms the basis of the SG's argument-that petitioner breached a duty to the acquiring corporation that is actionable under section 10(b) and Rule 10b-5.

After some general instructions on a jury's duty in a criminal trial, the judge explained the purposes of the Securities Acts of 1933 and 1934. He emphasized that the "philosophy...at the heart of the securities laws is one of full

and fair disclosure of material facts to prospective purchasers of securities. R. at 676. In this vein, the judge stated that:

> The charges in this case involve allegations that Vincent Chiarella traded on the basis of material non-public information without disclosing this confidential information. In simple terms, the charge is that Chiarella wrongfully took advantage of information he acquired in the course of his confidential position at Pandick Press and secretly used that information when he knew other people trading in the securities market did not have access to the same information that he had at a time when he knew that information was material to the value of the stock.

R. at 677.

After the judge read the indictment, which restates the language of Rule 10b-5 and details the financial transactions at issue here, he read the langauge of 10(b) and Rule 10b-5 to the jury. The jury was told that in order to find the defendant guilty it must find that Chiarella either (1) employed any device, scheme or artifice to defraud or (2) engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person. R. at 681.

The judge stated that a "scheme to defraud" is a plan to obtain money by trick or deceit, and that "a failure by Chiarella to disclose material, non-public information in connection with his purchase of stock would constitute deceit." R. at 683. Accordingly, the jury was instructed that Chiarella employed a scheme to defraud if he "did not disclose...material non-public information in connection with the purchases of the stock." R. at 685-86.

Alternatively, the jury was instructed that Chiarella's conduct would operate as a fraud or deceit upon any person if "Chiarella's alleged conduct of having purchased securities without disclosing material, non-public information would have or did have the effect of operating as a fraud upon a seller." R. at 686. The judge had earlier stated that fraud "embraces all the means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false misrepresentation, suggestions or by suppression of truth." R. at 683.

The judge then instructed the jury that an element of the offense was that the acts be committed knowingly and willingly. In the course of these instructions, the judge suggested the "central issue...is what was Mr. Chiarella's state of mind when he was engaged in the transactions involved...knowing that this violated company policy? Did he have any realization that he was doing a wrongful act or not?...Had Mr. Chiarella not seen the notices posted next to his time clock and elsewhere for many months, as he testified?" R. at 682.

In sum, the jury instructions were premised upon the theory that Chiarella violated 10(b) merely by his failure to disclose material, non-public information to sellers when he bought the stock of target corporations. Although the instructions briefly mention the company policy against use of

confidential information, that discussion is part of the instruction on the requisite state of mind for the offense. The jury was never instructed that violation of a duty to the printer's customers could constitute actionable fraud.

The question of Chiarella's duty to the customers of his employer was mentioned at other stages of the trial. In its opinion denying a motion to dismiss the indictment, the trial judge compared Chiarella's conduct in using information to embezzelment committed by a bank employee. And the prosecution apparently relied upon a similar theme in its closing argument. The prosecution's argument lead Chiarella's attorney to make an unsuccesful request that the trial judge explictly instruct the jury that the tender offeror was not a victim of fraudulent activity. R. at 701. Nevertheless, the jury was not instructed that violation of a duty to the acquiring corporation would be a fraud reached by section 10(b).

Because a criminal conviction may not be affirmed on the basis of a theory not presented to a jury, see Rewis v. United States, 401 U.S. 808, 814 (1971), the SG's theory need not be reached in this case. Even if it is thought that the SG's theory was presented in addition to the parity-of-information theory, a criminal conviction may not be upheld on the basis of an alternative theory which the jury may not have adopted. See United States v. Gallagher, 576 F.2d 1028, 1046 (2d Cir. 1978); cf. Leary v. New York, 395 U.S. 6, 21-22 (1969);

Stromberg v. United States, 283 U.S. 359 (1931). Thus, this case may properly be disposed of simply by holding that the parity-of-information theory presented to the jury does not properly describe conduct actionable under section 10(b).[5] The opinion need not decide whether the breach of a duty to an acquiring corporation could constitute fraud under section 10(b).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1-3-80

From: Mr. Justice Powell

Circulated: JAN 3 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1202

Vincent F. Chiarella, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a person who learns from the confidential documents of one corporation that it is planning an attempt to secure control of a second corporation violates § 10 (b) of the Securities Exchange Act of 1934 if he fails to disclose the impending takeover before trading in the target company's securities.

I

Petitioner is a printer by trade. In 1975 and 1976, he worked as a "markup man" in the New York composing room of Pandick Press, a financial printer ~~located in New York City.~~ Among documents that petitioner handled were five announcements of corporate takeover bids. When these documents were delivered to the printer, the identities of the acquiring and target corporations were concealed by blank spaces or false names. The true names were sent to the printer on the night of the final printing.

The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents. Without disclosing his knowledge, petitioner purchased stock in the target companies and sold the shares immediately after the takeover

February 4, 1980

No. 78-1202 Chiarella v. United States

Dear Chief:

Thank you for your note of January 31st advising me of the addition you will make to your dissent. Incidentally, I am reminded that I failed - inadvertently - to respond to your letter of January 4.

You may recall that we had a brief discussion of this case in your Chambers, at which time it became clear that we were too far apart to "bridge the gap". If I were in Congress, I probably would support a carefully drawn criminal statute that would make it a crime for one to do what Chiarella did. But it is clear (at least to me) that Congress never had the slightest intention - back in 1933 and 1934 - to extend the Securities Acts to this type of situation.

After all, the government seeks to impose criminal liability under the extraordinarily vague language of one section of a statute that was enacted to protect the public from manipulation of the securities markets by insiders. Before criminal liability is imposed by the courts, I think the Congress should face up to this question, and draft a proper criminal statute that puts people on notice.

I add that I do not admire Mr. Chiarella any more than you do.

Sincerely,

The Chief Justice

LFP/lab

February 4, 1980

No. 78-1202 Chiarella v. United States

Dear John:

Now that we have seen the Chief's dissent, I certainly have no objection to your concurring opinion.

I have a slight preference for not emphasizing that the result may have been different if liability had been premised on a duty to the acquiring company, as I am by no means sure that 10(b) should be extended this far beyond its clear purposes at the time of its enactment in 1934. As we are talking about criminal liability, I am inclined to think we should leave it to Congress to draft a more refined and specific criminal statute. To be sure, you leave the question for another day. But with a five to four vote by the Court, I would prefer - I think - not to invite a judicial rather than a legislative consideration of the question.

Nevertheless, these are rather personal thoughts, and I do not in any sense interpose them as an objection to your concurring opinion.

I repeat my indebtedness to you for making me focus, at an early point in time, on the relatively narrow way in which this case was submitted to the jury.

Sincerely,

Mr. Justice Stevens

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 6, 1980

78-1202 Chiarella v. U.S.

Dear Bill:

Thank you for your memorandum of February 5 addressed to the Chief and me.

Although I welcome your concurrence in my view as to what was submitted to the jury, I am afraid we remain in disagreement - as we were at Conference - as to the necessity for breach of some duty arising from an identifiable relationship. No one has suggested, not even the SEC, that any evidence exists of a congressional intent to extend liabiity under §10(b) of the '34 Act to the universe of people who buy and sell securities. The common understanding, until fairly recent years, was to the contrary.

But before imposing a criminal liability that apparently was never considered by Congress - and particularly before imposing it under language as imprecise as §10(b) - I would think it desirable to have congressional hearings and a carefully drafted statute that would afford reasonable notice to criminal defendants.

I nevertheless am happy to have you aboard concurring in the judgment.

Sincerely,

L. Lewis

Mr. Justice Brennan

cc: The Confernce

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2-7-80

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: FEB 7 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1202

Vincent F. Chiarella, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1980]

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The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents. Without disclosing his knowledge, petitioner purchased stock in the target companies and sold the shares immediately after the takeover

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 11, 1980

78-1202 Chiarella v. U.S.

Dear Harry:

Thank you for your note. I am in no hurry.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5,6,12

3-11-80

From: Mr. Justice Powell

Circulated: _____

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1202

Vincent F. Chiarella, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a person who learns from the confidential documents of one corporation that it is planning an attempt to secure control of a second corporation violates § 10 (b) of the Securities Exchange Act of 1934 if he fails to disclose the impending takeover before trading in the target company's securities.

I

Petitioner is a printer by trade. In 1975 and 1976, he worked as a "markup man" in the New York composing room of Pandick Press, a financial printer. Among documents that petitioner handled were five announcements of corporate takeover bids. When these documents were delivered to the printer, the identities of the acquiring and target corporations were concealed by blank spaces or false names. The true names were sent to the printer on the night of the final printing.

The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents. Without disclosing his knowledge, petitioner purchased stock in the target companies and sold the shares immediately after the takeover

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 3, 1979

Re: No. 78-1202 - Chiarella

Dear Lewis:

I can go along with the approach suggested in your letter of November 29th. I would have preferred to see it written more broadly, but under the circumstances it just can't be, and I will be willing to join an opinion that simply expresses no opinion as to whether the breach of a duty to an acquiring corporation could constitute fraud under § 10(b) (which I understand to be the recommendation of your law clerk, Jon Sallet, from the last sentence of page 5 of his memorandum). I would be unwilling to join, at least for the present, any opinion which stated that there was a breach of duty in such circumstances. I agree

Sincerely,

Mr. Justice Powell

Copy to Mr. Justice Stewart
and Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 7, 1980

Re: No. 78-1202 - Chiarella v. United States

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 7, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

You have written what I regard as an unanswerable opinion which I will be happy to join. I am considering filing a separate concurrence along the lines of the enclosed draft but will not make a definite decision until after I see what the dissenters have to say.

Respectfully,

John

Mr. Justice Powell

Enclosure

78-1202 - Chiarella v. United States

MR. JUSTICE STEVENS, concurring.

I agree

Before liability, civil or criminal, is imposed, it is necessary to identify the duty that the defendant has breached. Arguably when this petitioner bought securities in the open market, he violated (a) a duty to disclose and (b) a duty of silence. I agree with the Court's explanation of why this petitioner owed no duty of disclosure to the sellers from whom he purchased target company stock, that his conviction rests on the erroneous premise that he did owe them such a duty, and that the judgment of the Court of Appeals must therefore be reversed. In short, I join the Court's opinion. OK

The Court correctly does not address the question whether the petitioner's breach of his duty of silence--a duty he unquestionably owed to his employer and to his employer's customers--could give rise to liability, either civil or criminal, under Rule 10(b)(5). If we assume he breached that duty when he purchased target company securities, a strong argument can be made that his action constituted "a fraud or a deceit upon any person, in connection with the purchase or sale of any security." Two persons victimized by the fraud on that

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 9, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

Please join me. I may add a brief concurring opinion.

Respectfully,

John

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: FEB 6 '80

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Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78–1202

Vincent F. Chiarella, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1980]

MR. JUSTICE STEVENS, concurring.

Before liability, civil or criminal, may be imposed for a Rule 10b–5 violation, it is necessary to identify the duty that the defendant has breached. Arguably, when petitioner bought securities in the open market, he violated (a) a duty to disclose owed to the sellers from whom he purchased target company stock and (b) a duty of silence owed to the acquiring companies. I agree with the Court's determination that petitioner owed no duty of disclosure to the sellers, that his conviction rested on the erroneous premise that he did owe them such a duty, and that the judgment of the Court of Appeals must therefore be reversed.

The Court correctly does not address the second question: whether the petitioner's breach of his duty of silence—a duty he unquestionably owed to his employer and to his employer's customers—could give rise to criminal liability under Rule 10b–5. Respectable arguments could be made in support of either position. On the one hand, if we assume that petitioner breached a duty to the acquiring companies that had entrusted confidential information to his employers, a legitimate argument could be made that his actions constituted "a fraud or a deceit" upon those companies "in connection with the purchase or sale of any security." * On the other hand, inasmuch

*See *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7