January 4, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
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,

[Signature]

Mr. Justice Powell

Copies to the Conference
January 7, 1980

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

Dear Lewis,

I agree.

Sincerely yours,

[Signature]

Mr. Justice Powell
Copies to the Conference
cmc
January 7, 1980

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

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
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,

[Signature]

Mr. Justice Powell

Enclosure
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
January 9, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

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

Respectfully,

[Signature]

Mr. Justice Powell

Copies to the Conference
MR. JUSTICE STEVENS, concurring.

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.

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
theory are those to whom he owed the duty of silence, namely, the target companies who entrusted confidential information to his employers. Nevertheless—and contrary to views I expressed as a circuit judge—those persons would not be able to recover damages from petitioner for violating Rule 10(b)(5) because they were neither purchasers nor sellers of target company securities. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723. However, neither that case nor this definitively answers the question whether this petitioner's breach of his duty of silence in connection with his purchases of securities constituted a violation of Rule 10(b)(5). I think the Court wisely leaves that question for another day. I write merely to emphasize the fact that we have not necessarily placed any stamp of approval on what this petitioner did; we have merely held that his criminal conviction cannot rest on the theory that he breached a duty he did not owe.


2/ The limitation on the right to recover pecuniary damages in a private action identified in Blue Chip, supra, is not necessarily coextensive with the limits of the rule itself. See, e.g., Piper v. Chris-Craft Industries, 430 U.S. 1, 42 n. 28, 43 n. 30, 47, n. 33.
Mr. Justice: I have reviewed Mr. Justice Stevens' concurrence in light of the Chief Justice's dissent, and I do not believe it is troublesome because Justice Stevens explicitly does not decide what the Chief adamantly urges - that breach of a duty of silence constitutes a violation of 106-5.

The concurrence does suggest that a theory could be advanced that pets defied the target companies who entrusted confidential information to their employees. "I think this must be a typographical error because it was the acquiring companies who entrusted information to handlike." I do not agree.
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,

[Signature]

Mr. Justice Powell

Copies to the Conference

Lewis: I would welcome you joining me!
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
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
Mr Justice—

This seems to be a hopeful sign, but I think you are absolutely correct not to respond until we hear from Justice White, Relinquent and Stevens. If all climb aboard, then it might be possible to explore ways to get the Chief aboard also.

If, on the other hand, one of the others, three Justices changes his mind or agrees with the Chief's position, then I think it would be possible to make minor changes in the opinion that do not detract from the holding that mere possession of material, nonpublic information fails to give rise to a duty.
MEMORANDUM

To: Mr. Justice Powell

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

I discussed this case with Jeff Rosen, one of the Brennan clerks, on Friday. The Brennan position is likely to be that we are correct in our reading of the jury instructions and the result, and we are correct that mere possession of material non-public information does not make out a 10(b) violation, but that our emphasis on the existence of a relationship between buyer and seller goes farther than we need to go in this case. Thus, Justice Brennan is likely to state that he agree with the Chief's formulation of the scope of 10(b). I believe that Justice Brennan will circulate a memorandum to the Conference
expressing these views. Justice Brennan may believe that there
is enough distance between our position and Justice Stevens'
that we can be persuaded to adopt some language changes.

I explained to Jeff that you were reluctant to make
changes because we already had a Court. I did not suggest that
we had already seen the Stevens concurrence.

I think the best course at this point is to consult the
Stevens chambers about changes that should be made to respond to
the Chief's dissent, and, once those are made, then sit still to
await the effect of the Brennan memo. Unless Justice Stevens is
moved, I suspect that the result will be that Justice Brennan
will write a short opinion concurring in the result.

Justice Blackmun apparently is writing a dissent which
will argue that 10(b) incorporates a parity-of-information rule
with limited exceptions for bona fide business activities. I
believe that we will be able to fend off such an attack simply
by noting that there is no evidence that Congress intended such
a result in 1934.
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,

[Signature]

cc: The Conference
February 5, 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 liability 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,

Mr. Justice Brennan
cc: The Conference
lfp/ss