

Donald Langevoort
Oral History Interview with Donna Nagy
February 11, 2020

Donna Nagy:

This is an interview with Professor Donald Langevoort for the SEC Historical Society. Professor Langevoort is the Thomas Aquinas Reynolds Professor of Law at Georgetown University Law Center. I'm Donna Nagy and we're at Georgetown Law in Washington, D.C., on February 11th, 2020. Thank you so much Don for taking the time to talk with us.

Don Langevoort:

Certainly.

Donna Nagy:

These oral history interviews often start off with a general background question about where you grew up and attended college and law school. So, it would be great if you could share that information with us at the outset.

Don Langevoort:

Sure, I grew up in New Jersey just outside New York City, so I was a New York kind of kid. Went off to college at the University of Virginia and Harvard Law School and came to Washington for the first of two times in my career to work at what was then Wilmer, Cutler and Pickering. I went to the SEC in 1978.

Donna Nagy:

Why did you decide to attend law school? So, you had your four years in Charlottesville, Virginia and attended UVA...

Don Langevoort:

It was well before that.

Donna Nagy:

Okay.

Don Langevoort:

There were no lawyers in my family, so there was nothing in my background to indicate this. But I still have a notebook from my sophomore year in high school, where I listed the law schools, not the colleges, the law schools I was planning on applying to and what I'd most want to get into. So for some reason-

Donna Nagy:

Was Harvard there at the-

Don Langevoort:

Harvard was there, yes.

Donna Nagy:

Excellent. Good, good.

Don Langevoort:

I don't know what provoked me, except, intellectually, I thought law was fascinating and that stuck with me. That's why I'm a law professor.

Donna Nagy:

So without lawyers in your family, law being fascinating, where did that fascination come from? Was it books? Was it television? Was it-

Don Langevoort:

Probably all of the above? I went to a really good high school and there were lots of opportunities to delve into subjects and do debates and things like that. So, I must have stumbled over the law enough times to say, I may be good at this. My mind thinks like a lawyer. And I find it really interesting. So

Donna Nagy:

You mentioned debate, did your high school have a formal team that debated?

Don Langevoort:

It did, but I wasn't on it.

Donna Nagy:

I see. Okay.

Don Langevoort:

I played basketball. So I did not have time to do that.

Donna Nagy:

You have to choose your activities. That's right. Well, that's fascinating. So you've been a law professor yourself now for nearly 40 years-

Don Langevoort:

Correct.

Donna Nagy:

Looking back on your law school days at Harvard, what classes or professors had the most lasting impact?

Don Langevoort:

That's another transition story because I was a religious studies major in college, which you wouldn't think would be a jumping off point to go to law school. But it turned out to be the perfect jumping off

point because I was studying the sociology of religion, the psychology of religion, belief structures and things like that, that all turn out really clearly to how legal regimes develop in a society. So I was not sure at all what I wanted to do with a law degree.

Don Langevoort:

I took corporations from Louie Loss, who was not the greatest teacher in the world, but I found the subject fascinating and didn't expect to make that transition from somebody who would've answered, "Well, constitutional law is going to be my favorite subject," to "Gee, corporations and then I ought to take some upper level courses." So what happened, and I had lots of great professors there, but I decided to take a seminar with Louie Loss because I had liked his class and I had heard he was better in seminars than he was in a lecture class. And at the time, he was in the midst of the Federal Securities Code. A project that we're going to talk about, I'm sure.

Donna Nagy:

We're going to talk more about that too, yes.

Don Langevoort:

The price of getting in the seminar was you had to take a topic in the Federal Securities Code that Loss needed research help on. So this was a way of getting 20 research assistants to be focusing on the Code. I randomly picked the preemption of state tender offer regulation and the structure of the Williams Act. Wrote my paper, after graduation, my paper got published in the Cornell Law Review. So it was Louie Loss guiding me to this subject.

Donna Nagy:

That's wonderful. So, timeframe wise, this would have been probably 1975-ish?

Don Langevoort:

I graduated in '76, so yes, the course was '75.

Donna Nagy:

And the course name again was? Do you remember?

Don Langevoort:

Probably seminar-

Donna Nagy:

Topics in securities regulations?

Don Langevoort:

Exactly. It might even have mentioned the Code.

Donna Nagy:

Okay.

Don Langevoort:

Loss was so immersed in the work on the Code, there wouldn't surprise me that it was that upfront. I certainly understood that this is what I was getting into and this is what I wanted to get into.

Donna Nagy:

I know that at the Securities and Exchange Commission, in 1978, you helped work on the Code project.

Don Langevoort:

Right.

Donna Nagy:

Why don't we talk about the Code right now, through the eyes of a law student who was being involved in this project at its earliest. Well, at not at its earliest stage, this was a very long project, at its middle stage.

Don Langevoort:

Yeah. And it's most important stage because the Code project brought the great eminences of securities regulation circa 1950s, '60s and '70s. Under the guidance of Louie Loss and his advisors, Milton Cohen being the most important of the advisors. To do the rather shocking thing of saying we could sit down and rewrite all the securities laws and get it better. It took a little arrogance and this group that was working on the Code was not lacking in arrogance. And so first to watch it get molded and then the mid '70s where it's polishing stage. Most of the drafting had been done early '70s.

Donna Nagy:

Right. So when we say, or when you say the "shocking thing" of rewriting the federal securities laws, we're basically then talking about taking four separate congressional statutes, and all of their amendments, and combining them.

Don Langevoort:

Right. And I think it was more than four because you had things like-

Donna Nagy:

Six, that's true. The Public Utility Holding Company Act and the Trust Indenture Act...

Don Langevoort:

Right.

Donna Nagy:

Yes, okay.

Don Langevoort:

And the theory was to take New Deal style regulation, which was very much built on the need to give an administrative agency discretion. So general terms, principles rather than bright-line rules. There were plenty of rules, but it was very classic New Deal, and Loss didn't like that. Loss and his advisors had said,

you need more formalization to the lawmaking process. So, as a classical response to the romanticism of the New Deal era, that's what was driving it.

Donna Nagy:

I would imagine significant repetition in the Exchange Act of 1934, the Securities Act of 1933, the Investment Company Act of 1940, as well as the Advisers Act, each has a jurisdictional provision, each has SEC powers, each has an anti-fraud provision, and the idea of the Code is to consolidate? In part?

Don Langevoort:

Consolidate, but as with all work of the American Law Institute and the Code was an ALI project to make it better when it needs to be made better. Loss resisted the idea that this was simply a codification, that you were taking what was already known and putting it in statutory language. The Code was very innovative, substantively, and that's what they were most proud of. That's the arrogance I was talking about before, "We can do it better. We don't just need to put this in statutory form."

Donna Nagy:

What an incredibly fascinating and unique opportunity for you and the other 19 law students in the seminar -- to choose a topic that then possibly finds its way into law. And in 1975 to 76, the hope is that Congress is going to pick up the Code and enact it into positive law.

Don Langevoort:

Yes and surprisingly, in hindsight, simply assume that Congress would do this.

Donna Nagy:

So you really are writing law at that point. As a second or third year student at Harvard Law school? You and the 19 other people, under Loss's direction... obviously.

Don Langevoort:

By 1975 there were drafts of everything.

Donna Nagy:

Right.

Don Langevoort:

So this was, do we have to change it? I was asked to write on the preemption of state tender offer regulation, which was a hot, hot topic in the mid late '70s.

Donna Nagy:

Yes, it was.

Don Langevoort:

My job was to make sure that all of these rapidly happening developments were adequately dealt with in the Code. Hopefully by comments rather than changing statutory language, because that's... Loss had

gotten agreement on the statutory language stuff. But if the comments needed to be rewritten, that was sort of what we were providing the information for.

Donna Nagy:

Yes. What an ambitious project of Louie Loss and his advisors and how creative to involve law students in that. So, two law professors can talk about law school all day.

Don Langevoort:

That's right.

Donna Nagy:

I better move off the topic of the Code. But I will ask two more questions. Were there any other students in that seminar that went into academic careers? To your knowledge?

Don Langevoort:

Not that I recall. In fact, I couldn't tell you who else was in that seminar.

Donna Nagy:

And then other than Professor Louis Loss, were there other corporate or securities professors at Harvard at the time that had a memorable role in your development?

Don Langevoort:

Professionally, lots of other professors had big impacts on how I teach as a law prof... even though they had nothing to do with corporate securities law. Vic Brudney was on the faculty and he was the one all the people most interested in corporate securities laws wanted to take. Because he was an innovator, he was pro-regulation but steeped in economic theory and doing remarkable work in the first battles over law and economics and their place in securities regulation. So he was wonderful to just sit and listen to.

Donna Nagy:

How incredible. So you leave Harvard Law School then in 1976?

Don Langevoort:

Yep.

Donna Nagy:

And your first job after graduation is a law firm associate at Wilmer, Cutler...

Don Langevoort:

Wilmer, Cutler, and Pickering.

Donna Nagy:

Can you share some specifics about that experience, why there? Why Washington, D.C.? What type of work?

Don Langevoort:

Yeah, all of the above are really interesting. My summer associate job, second year in law school, was at Cravath in New York. And I expected at that time, since I liked corporations and liked this stuff, well what else would you do except go to New York City and become a deal lawyer? And I was all set. Got an offer from Cravath, was about to accept it and then realized I didn't like transactional work very much. I was more interested in the intellectual side of all of this. And it was getting late, everybody had had their job offers and I had my job offers. And somewhat funny story, Cravath had a relationship with Wilmer, Cutler and Pickering for referring work that was more appropriately done in New York as opposed to Washington, Washington as opposed to New York, and everybody from Wilmer would be invited up to the Cravath party each summer. I had now heard of Wilmer, Cutler and Pickering and these people seemed nice and that was very much Washington rather than New York City. And they were talking about doing projects that were not just deal documents. So very lazily I said, "Okay, I'll go to Washington," and I know one firm there. So there it is. That's how I ended up.

Donna Nagy:

For securities litigation, for securities enforcement in the '70s what a wonderful place.

Don Langevoort:

What a wonderful place, but there were only 35 lawyers there at the time and very much an attitude that associates do not specialize. There were no departments. In my first week there, I was told you're going to work on a first amendment brief before the Supreme Court. CBS was one of Wilmer's clients. So you do first amendment. And then discovered a couple of securities people, Art Matthews and Mike Klein, who might need some help. And then there's this international arbitration. And the more partners you worked with, the better. No coherence whatsoever. It was just, you'd be good at this and you'd learn something. But it turned out that I became good friends with Art and Mike and asked for as many securities projects as I could while I was working on arbitrations and first amendment and other things like that.

Donna Nagy:

So Art Matthews would have been developing an SEC enforcement type practice at Wilmer. He had left the Commission at that point and...

Don Langevoort:

He had left-

Donna Nagy:

Years before? The SEC Enforcement Division ...

Don Langevoort:

... a few years earlier. He was building what he wanted to be the elite securities practice in Washington. So Manny Cohen, who had been the chairman of the SEC, came to Wilmer as of counsel Al Sommer, one of the great commissioners of all times was brought in, too. So they were growing the securities practice, but it was mostly Art and Mike, and in the end, those were the survivors who built what we know today as one of the best securities practices anywhere.

Donna Nagy:

Absolutely. Absolutely, with several SEC legends, particularly from enforcement.

Don Langevoort:

Yes.

Donna Nagy:

Then you're there at Wilmer for about two years. What prompts your decision to apply for a position at the Commission?

Don Langevoort:

By that time, just like I learned I didn't want to be a transactional lawyer, at Wilmer I was not sure I wanted to be a practicing lawyer at all. And my academic instincts had gotten me to say-

Donna Nagy:

I see a funneling here, of sorts.

Don Langevoort:

Yes.

Donna Nagy:

Okay.

Don Langevoort:

At that time, I decided I was going to go into the teaching market. I had no idea what that meant, but I was going to go into the teaching market. And I read an advertisement in the Legal Times of Washington, SEC Office of General Counsel looking for staff attorney for the Federal Securities Code project. And I said, "Oh, okay." I want to be an academic. Here's somebody trying to rewrite the entirety of the securities laws. Here's somebody needing help with the Federal Securities Code. I know Louie Loss, we've been in contact ever since my graduation. So this is too coincidental not to pursue. So I told both Mike and Art Matthews, I was going to do this and they were thrilled. Their view is spend time at the SEC sometime in your career, you owe it. So that was fine with them if I wanted to go there, which meant my references were Louie Loss, Art Matthews, Mike Klein. For a staff position in the Office of General Counsel, that's a pretty good.

Donna Nagy:

It sure is.. And you went into the interview knowing what the Federal Securities Code was.

Don Langevoort:

Knowing what it was, in fact, knowing more than some of them.

Donna Nagy:

Correct. Very interesting how that came full circle.

Don Langevoort:

Right. And it turns out, and I didn't know this, that Ralph Ferrara, who was the General Counsel at this time, had taken what I later learned to be the controversial step of building a policy planning unit in the Office of General Counsel. The operating divisions assumed policy planning was their assignment based on specialties. Why was the General Council Office doing this other than to grab a little power and authority? So it turns out Bob Pozen, who later on went on to an extraordinary career at Fidelity and Mass. Mutual, was the deputy heading this up. So he was the one I interviewed with. He had been a law professor at Georgetown and then NYU before going to the SEC for a little while. So we hit it off wonderfully. We were kindred spirits. So yeah, it was very clear the job was mine and I said, what a nice thing to do for a couple of years. In no sense was I cutting back on my desire to be a law professor, but for two years this would be a good project.

Donna Nagy:

Excellent. So I want to hear more about the policy planning unit under Ralph Ferrara at the Commission. Before that though, to sort of contextualize this again: the American Law Institute adopts the Federal Securities Code in May, 1978, and you're coming on then at the SEC to work on the next phase of this project?

Don Langevoort:

Right.

Donna Nagy:

So explain what that work was.

Don Langevoort:

Yes. I later learned the motivation. I don't think we ever discussed this in my interview with Bob. Loss and his advisors had taken the key staff members in Congress and made them consultants or observers to the Code project. All with the view that they would know the Code so well they would just walk to Bill Proxmire on the Senate side, Harrison Williams on the Senate side, John Dingell on the House side and say, "We've been watching this for a decade now. It's brilliant. Adopt it." Of course, Washington doesn't work that way. And basically Dingell and Proxmire, who were the two key members of Congress on Securities related matters circa 1978, said this project isn't going to go forward as a legislative proposal, you can imagine jaws dropping, unless the SEC endorses it formally.

Don Langevoort:

And the SEC, for good reasons, had not been involved in this project. This was purely private. And so Harold Williams, who was the chairman of the SEC at the time, agreed under prodding from Dingell and Proxmire, to take whatever time was necessary for the commission staff to learn the code and decide whether to endorse it. It was estimated that this was going to take a couple of years. Loss was furious. He was not expecting this twist-

Donna Nagy:

He hadn't banked on a holding period of...

Don Langevoort:

But Harold Williams gave the General Counsel's Office the responsibility for coordinating a thorough staff review of the entire Code. So I it turns out was hired to be the staff person-

Donna Nagy:

The quarterback, essentially.

Don Langevoort:

Who would coordinate... Well that's, that's inflating my importance. Waterboy might be the opposite end of it. But I was the one to make sure that there was a person in every division who would spend time learning and I was there to answer questions for them. And then ultimately the staff views would be consolidated under the direction of our group in the General Counsel's Office.

Donna Nagy:

So you were special counsel?

Don Langevoort:

Ultimately promoted special counsel, but as the person to do this. And it turns out, and this was nice happenstance, Louie Loss very much wanted, and his key advisors very much wanted to be, involved in the Commission learning process. So there was a working group set up of Code advisors, and I was the coordinating person between the Code advisors and the staff. So that was really fun to watch-

Donna Nagy:

And you were then able to now work with your mentor-

Don Langevoort:

Milton Cohen, yes.

Donna Nagy:

... and Professor Loss again.

Donna Nagy:

So, how wonderful for that to come full circle.

Don Langevoort:

Yeah.

Donna Nagy:

So, the SEC eventually does endorse the Federal Securities Code in that way. And then, it is now destined to the Hill.

Don Langevoort:

Well, yes and no.

Donna Nagy:

Yes and no. Okay.

Don Langevoort:

In the sense that, as the two years transpired, not surprisingly, people at the SEC found lots not to like in the Code. And our job at General Counsel's Office was to see if the advisors would rewrite the Code to address these concerns. And the answer was sometimes yes, most of the time, yes.

Donna Nagy:

Okay.

Don Langevoort:

Especially if it were technical kinds of things. The staff really knows its stuff and made some good catches. But, on big issues, occasionally the code drafters would come back and say, wait a minute, this is the heart of the code. We can't change this. And the SEC said, but if you want our support, you got to change it. And what happened in the end was the commission voted unanimously to adopt the code with a schedule of disagreements that each side agreed Congress would have to resolve.

Donna Nagy:

Okay.

Don Langevoort:

Because there was no way of coming to a consensus. So, I think there were 30 or 40 scheduled items. Yeah.

Donna Nagy:

So, someone could have gone over to the Hill and continued the work on the resolution of the disagreement.

Don Langevoort:

Absolutely.

Donna Nagy:

Okay.

Don Langevoort:

And, it turns out, I think this would have been okay with the members of Congress who, in the '70s, were in charge of securities legislation. In the end, what did in the Code, because it never did get started,

.

Donna Nagy:

Right.

Don Langevoort:

Was a political shift. And by this time, the gray eminences of securities laws were graying considerably. And they had made sure they controlled this process. So, now younger people were coming up in the world of securities and weren't just going to say, well, because Milt Cohen, Milton Kroll, and Louis Loss said that, then that's the way the law ought to be. There was also now a more conservative movement in the Supreme Court.

Donna Nagy:

Right. Right.

Don Langevoort:

And, whereas it's probably true that in 1973. '74, '75 when the code was being drafted, it was delivering some good things to the business community.

Donna Nagy:

Yes. Don Langevoort:

Now, the Supreme Court, in Hochfelder, in Santa Fe, was delivering some goodies as well. And they weren't reflected in the Code.

Donna Nagy:

Right.

Don Langevoort:

In fact, in many ways, the code went back to security's law as it was in the Second Circuit, 1960s.

Donna Nagy:

Yes.

Don Langevoort:

A very romantic process of reading purpose into text.

Donna Nagy:

The Code did not reflect the series of retrenchment measures that the Supreme Court began to implement.

Don Langevoort:

Right.

Donna Nagy:

That makes sense.

Don Langevoort:

So, now we have the Reagan election in 1980.

Donna Nagy:

Yes..

Don Langevoort:

That didn't happen until after everything I'm describing.

Donna Nagy:

Right.

Don Langevoort:

Had occurred. But politics are changing. The view of what regulation is had moved on from the '60s early '70s sense of if it's securities regulation, it must be good.

Donna Nagy:

Right.

Don Langevoort:

And, if it's on the hands of Louis Loss and Milton Cohen, it must be better. Yeah.

Donna Nagy:

And now, we have skeptics on the Hill.

Don Langevoort:

Skeptics, turnover, Harrison Williams is indicted. You lose some of the people who were involved as observers. So, there are new people. And, to them, the idea of sitting down and rewriting all of the federal securities laws wasn't appetizing.

Donna Nagy:

I see. Don Langevoort:

And, in the end, the code goes nowhere on the Hill. Now, Louie Loss, to his dying day, wants everybody to point out the many ways in which the code did have an impact. And it's true, in the '80s in particular, on many rulemaking projects.

Donna Nagy:

So, if you can provide on example.

Don Langevoort:

Yeah. So, integrated disclosure and shelf registration were taken from the Code. Insider trading law came to reflect some of the ideas that were in the Code. Many, many places the code got cited. But now, we sort of have lost that history. So, the influence was there, but it was never what Louie Loss dreamed of.

Donna Nagy:

Yes. .

Don Langevoort:

Which is the true codification.

Donna Nagy:

We have lost much of the history, which is why opportunities like this to rewind and memorialize is so important.

Don Langevoort:

Mm-hmm (affirmative).

Donna Nagy:

So then, time-wise here, we're in 1979, 1980 where the realization that this was not going as planned on the Hill.

Don Langevoort:

Yeah.

Donna Nagy:

So, you have a portfolio now that needs other things at the Securities and Exchange Commission.

Don Langevoort:

So, at that point, it was why am I here?

Donna Nagy:

I see.

Don Langevoort:

But this had been happening slowly enough that Ralph Ferrara and Bob Pozen knew that my work had been finished on the Code.

Donna Nagy:

Okay.

Don Langevoort:

So, put me to work elsewhere.

Donna Nagy:

Okay. So, let's talk. Was some of that on this policy planning unit?

Don Langevoort:

Yeah.

Donna Nagy:

Okay. .

Don Langevoort:

I was a dedicated person in policy planning, which was distinct from the litigation side.

Donna Nagy:

Okay.

Don Langevoort:

The larger portion of general counsel was still the appellate team that handled the litigation on behalf of the commission, sue or be sued, the many things that a general counsel of an agency have to do. That was all elsewhere. Policy planning was this controversial rump group that would watch everything else that's going on and write memos to the commission if we didn't like or had something to disagree with. So, naturally enough, what I had been spending most of my time on the code, I was becoming quite familiar with the thinking inside the agency such as insider trading, which was one of the hot button scheduled issues on which there could not be agreement. In order to get as close, we had been spending lots of time talking to all the divisions about what would an insider trading statute look like.

Donna Nagy:

I see.

Don Langevoort:

So, and I was the one with the file on that.

Donna Nagy:

Okay.

Don Langevoort:

Meanwhile, and this is nicely archived in the Historical Society materials, Dick Rowe, who had been the head of Corporation Finance, decided to move forward with a tender offer insider trading rule because the SEC has rulemaking authority under the Williams Act that it didn't have on other subjects. And let me go back a little bit. In the code, Loss didn't want and was unable to get support for going any further than what today we regard as a classical theory of insider trading, which is if you're a true insider.

Donna Nagy:

An officer, a director.

Don Langevoort:

An officer, director, or somebody with connections to officers and directors.

Donna Nagy:

Right.

Don Langevoort:

You were not able to trade. So, Texas Gulf Sulphur was good with them. But what was called market information trading at the time, and there were famous Law Review articles on the subject, they just drew the line and said, we're not going to codify that. There was a catchall provision at the very beginning of the anti-fraud section of the code that gave courts power to call things fraudulent. And Loss pointed out, if someday somebody wants to make market-based insider trading illegal, use that. But that defied the idea of the code. Why have a Code if you're then going to say, all that's interesting is left to the generic discretion of the court. So, it was generally known that, in market information overwhelmingly, tender offer related market information was the most valuable, was the most sensitive.

Donna Nagy:

And that's because the price of shares goes up dramatically.

Don Langevoort:

Goes up dramatically.

Donna Nagy:

So, a little bit of money can make a lot of money.

Don Langevoort:

A lot of money, exactly. So, it was hyper-material. And Dick Rowe, and he tells this in his oral history, decided to move forward with a tender offer insider trading rule. That immediately sets off battles. And, obviously, the general counsel's team thought this was really interesting and, frankly, thought general counsel's office ought to have a big say in what insider trading ought to look like. Enforcement wanted no part of any rule, any statute, or anything like that.

Donna Nagy:

Right. So, this project eventually becomes Rule 14e-3.

Don Langevoort:

Eventually does. And battles are going on on issues like what we then called Chinese walls. What happens if one person in a financial services firm knows the information, another person in that firm executes a trade that turns out to be profitable? They don't necessarily know what each other knew, but the firm itself is both the trader and the knowledgeable person.

Donna Nagy:

Right.

Don Langevoort:

So, that was a big issue that the Commission was worrying about generally. It turned out that this was a project going nowhere as long as the divisions were at each other's throats.

Donna Nagy:

Yes.

Don Langevoort:

And that's what essentially was happening. So, I got thrown into this because they were at each other's throats for exactly the same reason that precluded agreement on the Code's insider trading definition.

Donna Nagy:

So, typically one would imagine the Division of Enforcement at the Securities and Exchange Commission was looking for a very broad anti-fraud provision that would capture much insider trading, in the context of tender offers. Because, as you said, that's the authority that gave the Commission the power to adopt the rule.

Don Langevoort:

Right. Yes.

Donna Nagy:

It had to relate to a tender offer. It was under the Williams Act.

Don Langevoort:

right. And Stanley Sporkin, who was director of the Division of Enforcement at the time, was very much committed to "let me have 10b-5 and I can deliver good results." Put it up for political haggling, as the code was going to do, or writing a rule as the Division of Corporation Finance wanted to do, was necessarily going to tie his hands. And he was strongly opposed to anything that might tie his hands. Now in retrospect, we now know the Supreme Court made such a right turn.

Donna Nagy:

Right. And we'll talk about the right turn in-

Don Langevoort:

That...

Donna Nagy:

Yeah.

Don Langevoort:

But Stanley should have seen that coming and didn't.

Donna Nagy:

Yes.

Don Langevoort:

He was wedded in the the cases of the '60s and early '70s like Capital Gains. And that's what gave him such confidence that you didn't want anything more than the generic statements you find in section 10(b) and rule 10b-5.

Donna Nagy:

So, you mentioned the Texas Gulf Sulfur Second Circuit decision, which was 1968. The Second Circuit resoundingly not only sustains the liability of the officers and directors, but also an employee is one of the defendants in that case. They're all traditional insiders as you point out, but there is certainly language in the Second Circuit opinion that talks broadly about equal access to information and the justifiable expectation of the investing public.

Don Langevoort:

Mm-hmm (affirmative).

Donna Nagy:

And that, no doubt, was some of what prompted Stanley Sporkin into believing that the language that the Second Circuit puts forth in the opinion is broad enough to cover, not only the tender offer outsider situation, but the proverbial two people in an elevator who overhear type situation where just any lucrative information is being discussed. The overhearer would be prohibited from trading under the broadest view of unequal access.

Don Langevoort:

And here you can see the dots starting to connect.

Donna Nagy:

Yes.

Don Langevoort:

Because 1968 was the beginning of the Code project. And David Ruder, who then was a relatively young law professor, but very much up and coming and fairly conservative, wrote a Law Review article when Texas Gulf Sulphur came out saying all that stuff about equal access is dicta that the court didn't really mean it. And, when you read the case as a whole, rather than just those sentences, you see a very different, more conservative posture.

Donna Nagy:

Yes.

Don Langevoort:

Ruder becomes the point person for insider trading on the code project. So, when I said before that the code circumscribes insider trading to the classical fiduciary type approach, that was a very deliberate decision. And Loss was committed to it. That's why we never got anything further.

Donna Nagy:

I understand.

Don Langevoort:

So, meanwhile, inside the agency, Stan Sporkin, Ted Sonde, Ted Levine, his key lieutenants all are seeing the better opportunity in a broad 10b-5 approach. They are pushing cases forward that tests the limits. And so, you can see why they're looking at the code project as, in a way, an attack on the administrative discretion that they feel was appropriate.

Donna Nagy:

So, that's a great entree into talking about the Supreme Court's decision in 1980 in Chiarella versus United States. So, as you know, this spring is the 40th anniversary of the Supreme Court's landmark decision. The SEC Historical Society, the Indiana University Maurer School of Law where I teach, and the NYU Pollack Center for Law and Business will be co-sponsoring a program that brings together many of the distinguished lawyers who were involved in that case. I am happy to say that you are one of those distinguished lawyers, at least in terms of the aftermath of that case. And we'll talk about this. So, I'm going to use some of our time together to take a deep dive into that Chiarella history.

Don Langevoort:

Okay, sure.

Donna Nagy:

So, I'm guessing that over the course of your career as a law professor, you've taught the Supreme Court's Chiarella decision at least 50 times, maybe double that, depending on whether you teach it in corporations and securities regulation. So, can you please recount its basic facts?

Don Langevoort:

Sure. And the important thing to remember as a preface is this as United States versus Chiarella, this is a criminal prosecution, thus not in the hands of the SEC.

Donna Nagy:

Yes.

Don Langevoort:

So, that's going to make this an interesting story in terms of political and jurisprudential power.

Donna Nagy:

The SEC did have a...

Don Langevoort:

Yes.

Donna Nagy:

So, the SEC brought the civil-

Don Langevoort:

The SEC actually, it cracked the case. So, we have Vincent Chiarella, or Chiarella I believe is the actual pronunciation of the name, but his name has been changed ever since, was a printer, a typesetter essentially at a financial printer in New York City. And, under the Williams Act, anyone launching a tender offer has to on day one have available a disclosure document. Back then they were not electronic, a printed disclosure document to satisfy the bitter disclosure obligations under section 14D. And he was able to see what was being said in type. And there were codes but not very sophisticated ones, for the names. But he was able to decode and made some money. Not all that much money but,

for a printer, I'm sure it was considerable, by buying stock in the companies named as target in the schedule 14d-1's. He was caught. There were actually quite a number of financial printer cases going on at the time.

Donna Nagy:

Yes.

Don Langevoort:

Division of Enforcement brings an action. He quickly settles essentially for disgorgement and I believe an injunction.

Donna Nagy:

An injunction, yes. So, this would have been 1977.

Don Langevoort:

And that's how most insider trading cases were then, and still are, resolved, by settlement, not litigation. And then, because by this time the press, the media were picking up on insider trading is a great storyline and the money to be made in tender offers and takeovers as a great storyline, the U.S. Attorney's Office decides no, justice had not yet been done with respect to Mr. Chiarella. and they indict.

Donna Nagy:

So, the SECs complaint and settlement was filed in the Southern District of New York in May, 1977. And then, the U.S. Attorney's Office begins its own investigation, at some point thereafter. Chiarella was brought to trial in the spring of 1978, which is just around the time you're joining the commission.

Don Langevoort:

Yes. Right.

Donna Nagy:

Do you recall when you first heard about the Chiarella case? Was it at that point during the 1978 trial? Or was it later?

Don Langevoort:

First of all, I was on policy planning at this time.

Donna Nagy:

Right. Right.

Don Langevoort:

This issue, the coordination with the Solicitor General's office, which would be handling this case on behalf of the United States, was on the other side of the wall inside general counsel's office and in the hands of Jack Stillman, Paul Gonson, and his team. So, I am sure I first heard about it when the code project turned to the disagreements about insider trading because so many Supreme Court decisions

were changing the law of rule 10b-5 that that had to be reflected in what the code was doing. And the Chiarella case was clearly going to be a big one in addressing market information and addressing all those issues that the code wanted to stay away from, but now, litigation reality was pushing them in the direction of.

Donna Nagy:

Right. So, Chiarella is convicted. The Second Circuit affirms on a slight-

Don Langevoort:

In a very interesting opinion.

Donna Nagy:

Okay. Why don't you say a few words about that?

Don Langevoort:

Most people have a recollection that the Second Circuit's Chiarella decision was simply an extension of the market egalitarian story that Texas Gulf Sulfur had a told a decade earlier.

Donna Nagy:

Yes..

Don Langevoort:

In fact, the Second Circuit's Chiarella decision both disclaims that that is true and quotes all that language, making it very confusing what they were saying.

Donna Nagy:

No doubt.

Don Langevoort:

But a fair reading was that their decision was much closer to the SEC's original Cady Robert's decision than it was to Texas Gulf Sulfur. And that idea was actually a very comforting one for the SEC. Cady Roberts was its vision of what insider trading should look like. Texas Gulf Sulfur was the Second Circuit's. And the dicta there wasn't dicta the SEC was really pushing. It was something else. So, I think a fair rating of the Second Circuit's opinion, which was very murky, is, if you have a status that situates you close to sensitive market moving information, that special access creates a duty to abstain or disclose to not trade on the basis of that information, expansive enough to reach Chiarella.

Donna Nagy:

Because he was a financial printer.

Don Langevoort:

And Chiarella was working for the bidder, trading in the target company stock. But he certainly had a special status because law firms, printers, accountants, and others provide the lifeblood of day to day securities activity. and in the eyes of Judge Kaufman, that was enough to create a duty. So it tries to

dance through this question of where do duties come from without giving a big hug to market egalitarianism.

Donna Nagy:

Yes, fascinating. When reading the Second Circuit's decision, and then reading the Solicitor General's brief after the Supreme Court granted cert, so the merit brief...

Don Langevoort:

Right.

Donna Nagy:

It seems there was a substantial change in litigation's strategy.

Don Langevoort:

Yes.

Donna Nagy:

The justification of the finding of fraud was grounded in the notion of property misappropriation.

Don Langevoort:

Right.

Donna Nagy:

Can you tell us what you remember at the time of that?

Don Langevoort:

Sure. This is when I started hearing noises from the litigation side. Paul Gonson, Jake Stillman and others, because they were, as a matter of standard solicitor general policy invited in as the expert agency. So people from the SEC, even though this was a criminal case, were going to have a role. But then they discovered that the team doing this at the Solicitor General's office, it turns out to be a very famous team, Frank Easterbrook was leading it until just before the filing of the briefs. Other really famous people in retrospect were handling this, and they wanted no part of Texas Gulf Sulphur, Cady Roberts or anything else. They wanted to make insider trading about the protection of property rights.

Don Langevoort:

That only when there is a misappropriation of the inside information, something akin, and I never realized this at the time, but today we see echoes of this repeatedly, something akin to embezzlement. Is it appropriate to bring in a prohibition against trading while in possession of that kind of information? That's not where the SEC wanted to go. This was becoming of concern in the building, that this 10b-5 duty and one of the core precepts, the prohibition on insider trading, was going to be taken in a very different direction. But that's the SG's brief.

Donna Nagy:

Right. And so Frank Easterbrook, now Judge Easterbrook.

Don Langevoort:

Right.

Donna Nagy:

Was then deputy solicitor general, and in his waning days when cert was granted. But by the time of oral argument ...

Don Langevoort:

Yes.

Donna Nagy:

He was already gone.

Don Langevoort:

Right? So, so transitions out, and he tells this in his oral history, he was there when the discussion started about the right way to handle this.

Donna Nagy:

Yes, right.

Don Langevoort:

So his legacy is in the brief, even though his name is not on the brief.

Donna Nagy:

Right.

Don Langevoort:

So they pitch insider trading as a totally different story. And famously the Supreme Court doesn't bite, not substantively, but because when you look back at the indictment and the way the criminal trial was handled, it really wasn't based on this theory. And so not properly charged became the Supreme Court's way of avoiding the misappropriation approach. We then know that the Supreme court gives us a fiduciary based approach to insider trading with many cites to Cady Roberts. Chiarella, as the Supreme court gives it to us, led some people at the commission to breathe a sigh of relief. Cady Roberts and commissioner Dick Smith's concurring opinion in the InvestorsManagement case, some classic SEC opinions, get some good press. At the same time, the Supreme Court draws the line at fiduciary duty, thus cutting off arguably, the ability to go after the Vincent Chiarella's and the others in the world of corporate takeovers, other places where it's market information rather than true inside information, it's an issue.

Donna Nagy:

Right. So time-wise it's March 1980 and the Supreme Court issues its decision, reverses Chiarella's conviction, as you said, for the reasons that you said. The majority, Justice Powell writes the opinion, chooses not to address the misappropriation theory but actually leaves it open for cases subsequent to potentially raise those issues.

Don Langevoort:

Right. And as you well know, there is both a concurring opinion by Justice Stevens and a dissenting opinion by Chief Justice Burger. Stevens says, "I agree this wasn't properly charged, but I like that misappropriation theory, if it's about fraud on the source of the information, about fraud in the entrustment of the secrets. " Burger says, "I think this was properly charged and I think there's a duty to disclose that arises from misappropriation. Those ideas survive the opinion because of the majority's saying, "Hey, it just wasn't charged. This is for next time."

Donna Nagy:

So the government's brief and the concurring or dissenting opinion together essentially raised two misappropriation theories. One is a fraud on the source. Chiarella's misappropriation, although it hadn't been charged to the jury, arguably defrauded the printer Pandick Press and the investment banks. But Chiarella also arguably defrauded the individuals on the other side of the transaction, the tender offer targets because his theft of the information triggered a disclosure duty.

Don Langevoort:

Right.

Donna Nagy:

So can you take us through the SEC's response then to the Chiarella decision as you sort of look back in and remember it?

Don Langevoort:

Sure, and that's where I become involved, that day, literally.

Donna Nagy:

Okay.

Don Langevoort:

Because I had had plenty of insider trading responsibility before then because of the Code project, but not major because this was all being litigated and in the very good hands of Paul Gonson, Jake Stillman and a remarkable litigation team. So they were on it, they didn't need me. But now you have the two consequences I just described, some good dicta and good citations on what would turn out to be the classical theory of insider trading when you could find a fiduciary nexus. But then that hard line, seemingly about misappropriation, unless you could take up the invitation of Justice Stevens and Chief Justice Burger to bring misappropriation, to bring property rights into all of this.

Don Langevoort:

Now remember I said before, as the Chiarella case was going on, Dick Rowe in corporation finance was already pushing a rule that enforcement wanted nothing to do with. When Chiarella is decided, all of a sudden enforcement's position, which is 10b-5 is open enough for us to take any form of abuse of insider trading and run with it gets shut down. Ralph Ferrara, I think quite rightly says, "We've got to act fast because now the whole tender offer world of insider trading is in question." So what do we do? And essentially two decisions were made in the general counsel's office and I got both of these

assignments. So I am now over the wall and doing insider trading as a litigation matter, not just policy planning.

Don Langevoort:

One is for the SEC to step in with a rule that would essentially answer all the open questions left in Chiarella. So the rule, which was nicknamed 10b-X, restated the classical theory pretty much as Chiarella had it, and then went on to say, "And there are two more parts of rule 10b-X, fraud on the source and misappropriation as the basis for a duty to disclose." So a three part 10b-X rule that have adopted would now be the SEC's statement, somewhat responding to an offhanded remark in the Chiarella case that Powell says, "It's unfortunate we have to do any of this, agencies should state the law." Well, Ralph said that's what he's asking for.

Donna Nagy:

Okay.

Don Langevoort:

Other people in the agency said you can't overturn a Supreme court decision this quickly, it's not going to look good. Yes, you want this, but let's slow down. And so Corp Fin argues let's just handle the tender offer problem instead of going this far. Enforcement is still not sure what to do, but they see the writing on the wall that some of their discretion has been taken away. In the end, and this is May of 1980, the commission tells the squabbling divisions, "Let's prioritize 14e-3."

Donna Nagy:

Okay.

Don Langevoort:

And prioritizing essentially meant that 10b-X gets put in a file cabinet somewhere never ever to see the light of day.

Donna Nagy:

So rule 10b-X was proposed to the commission as a rule to adopt?

Don Langevoort:

Yes, by the general counsel's office. Immediately Corp Fin proposed a counter rule and got investment management and market reg to join with them. And then enforcement wrote its own rule, which you can imagine was extremely flexible. So this is what was dumped on the commission in that meeting in early May, literally three different rule 10b-X's all put in motion by the general counsel's office. And I remember the day vividly, of watching the commission say, "We're not going to umpire this battle, get your act together, get a tender offer rule out there."

Donna Nagy:

Right.

Don Langevoort:

Because that was the Chiarella case. That was the one place where everybody had been saying section 14(e) of the Securities Exchange Act gives the SEC power with respect to tender offer fraud that it didn't have elsewhere. So that was the path of least resistance, at that point all work now is getting an agreement among everybody on how rule 14e-3 would read.

Donna Nagy:

Right. So I have a bunch of follow-up questions here.

Don Langevoort:

Sure.

Donna Nagy:

So May, 1980 the Commission then has these three competing anti-fraud rules promulgated under the Commission's rule making authority under section 10(b) of the Exchange Act. Does the Commission issue a decision or any written memorialization of its rejection of ...

Don Langevoort:

No.

Donna Nagy:

So it's memories like this that allow us to reconstruct the events?

Don Langevoort:

Right. Yes, and again, you will get this story in the oral histories for both Dick Rowe and John Huber. John Huber was the person in Corp Fin with primary responsibility for putting pen to paper and getting a 14e-3 out there.

Donna Nagy:

And I want to talk more about the rule 14e-3 ending, which does get adopted I believe in September, 1980.

Don Langevoort:

Yes.

Donna Nagy:

By the Commission. Just to pause a little bit on the broader anti-fraud provision.

Don Langevoort:

Yeah.

Donna Nagy:

That would have, you said three subsections of sorts. One would apply to traditional insiders. A second would be fraud on the source of the misappropriated information.

Don Langevoort:

Right.

Donna Nagy:

And then the third was fraud on the contemporaneous traders in situations where information had been misappropriated or wrongfully obtained.

Don Langevoort:

Yes.

Donna Nagy:

And I'm struck, if we fast forward 40 years, the Senate now has before it a bill amending the federal securities laws.

Don Langevoort:

Yes.

Donna Nagy:

That passed the house overwhelmingly in December, I believe.

Don Langevoort:

Fifth.

Donna Nagy:

410 to 13.

Don Langevoort:

Yes.

Donna Nagy:

And so tell us a little bit about that legislation and the symmetry between that bill and the rule that was percolating in 1980 at the Commission?

Don Langevoort:

Right, let me back up and add some texture to the story because I had said before two things happened that involved me. One is I was the one who wrote the original 10b-X that everybody then throws a hatchet at and we have competing proposals. But then Ralph and the team was absolutely convinced, we had to grab hold of the litigation going forward as quickly as possible because there were many cases percolating around, Dirks being one of them, where the Chiarella holding changed everything and it was going to have to be rethought. So I was put on a train up to New York city because there was a case that ultimately becomes United States versus Newman. At the time, Jacques Courtois was the visible defendant and they were about to indict him.

Donna Nagy:

A former Morgan Stanley investment ...

Don Langevoort:

Yes, a former Morgan Stanley investment banker. So raising these same issues about you get a secret from the bank, you work for, you buy stock in some other company. Thus breaking the Chiarella fiduciary nexus. And Ralph and Paul Gonson very much wanted the US Attorney's office to plead as broadly as possible to preserve the alternative misappropriation theories. And I was an abject failure in the sense that the US attorney's office very much was enamored with the fraud on the source theory.

Donna Nagy:

Okay.

Don Langevoort:

And in retrospect I came to realize that's because they were infatuated with mail and wire fraud, which at the time was using an honest services view of when you're entrusted and you deceptively abuse that trust, you commit mail and wire fraud. Well this was just that idea put into 10b-5. They knew it, they knew how to try cases on that. So I went home having reviewed the indictment and yes it got fraud on the source right, but not with what we were hoping was account to that would have put in play Chief Justice Burger's idea of a fraud on the marketplace arising from something akin to an embezzlement.

Donna Nagy:

A duty to disclose to the target shareholders on the other side of the Newman trading?

Don Langevoort:

Right.

Donna Nagy:

So the indictment in that case against Newman was filed, I believe in February 1981?

Don Langevoort:

Right.

Donna Nagy:

And so let's go a little deeper then into your train ride up to New York.

Don Langevoort:

Yes, right.

Donna Nagy:

And your involvement. So at the time, I think Lee Richards was the Assistant US Attorney ...

Don Langevoort:

Yes, he was.

Donna Nagy:

And so did you work with Lee?

Don Langevoort:

Yes.

Donna Nagy:

Okay.

Don Langevoort:

That's who I went up to deal with.

Donna Nagy:

Okay.

Don Langevoort:

He and his team and they were very polite and they understood, but criminal prosecutors always want to sharpen their case rather than let policy drive a wishlist. They know what it means to be in front of a jury, and multiple counts and multiple theories tend to confuse. So I understand why they did what they did.

Donna Nagy:

Right.

Don Langevoort:

But it was the last real opportunity to get formal charges using a Chief Justice Burger approach. Ultimately when subsequent cases like United States versus Carpenter come along, echoes of Chief Justice Burger can be found in them, but it's fading. And as you and I both know, because we've written extensively about this, sadly I think the connection to that duty to disclose based on the wrongful acquisition disappears in time. Later in the eighties the American Bar Association charges Harvey Pitt and again a team of eminences to draft an insider trading statute. They use "wrongful" obtaining, one of those echoes, to craft a definition of insider trading. But ultimately politics intervenes and we don't get legislation beyond remedial legislation, the second sanctions act.

Donna Nagy:

Right, right.

Don Langevoort:

So when we come today to the legislation that passed the house in December 2019, you're seeing a word that you may not trade while in possession of information that has been wrongfully obtained, where wrongfully is then defined to include breaches of fiduciary duty, but also theft, hacking, various ways that somebody through wrongful action. You're seeing that and in many ways it is a direct line from all of those decisions that were made in March, April and May.

Donna Nagy:
Of 1980?

Don Langevoort:
Of 1980.

Donna Nagy:
Yes, I guess a principal difference is that if it's an SEC rule promulgated under rule 10b-5 it needs to be tied to fraud.

Don Langevoort:
Yes. Right.

Donna Nagy:
And is that the case with the new statute?

Don Langevoort:
No, of course not.

Donna Nagy:
Okay.

Don Langevoort:
In the sense that Congress can do what it wants. And many people have said actually insider trading isn't necessarily fraudulent so much as it's a market abuse. It should be illegal, there are very good reasons for it to be illegal, but the deception of contemporaneous traders may not be the best of those reasons.

Donna Nagy:
Yes.

Don Langevoort:
Congress in this case could be stepping in and saying a more coherent basis for insider trading, and frankly one recognized around the world is to simply say it is illegal to exploit this kind of information because it threatens the integrity of our capital markets.

Donna Nagy:
And as you say, as most countries with developed securities markets have done to explicitly define the offense and prohibit it.

Don Langevoort:
Yes. Exactly.

Donna Nagy:

Interesting. So on the United States v. Newman case, it's Lee Richards as the assistant US attorney who prosecutes, there's a motion to dismiss the indictment and it's granted, but then appealed to the Second Circuit.

Don Langevoort:

Right.

Donna Nagy:

Then Lee Richards tries the case and he obtains the convictions there under a fraud -- under a clear fraud on the source.

Don Langevoort:

Yes, right. Absolutely.

Donna Nagy:

And then we see the fraud on the source theory become the misappropriation theory.

Don Langevoort:

Gradually become the misappropriation theory. Again, when I go back and look at the United States versus Newman, United States versus Carpenter, Musella, there were a number of cases being decided at the time. When they talk about misappropriation, they're remarkably unclear as to exactly what the misappropriation is. It's like somebody is trying to preserve a little bit of connection, but in the end, when you watch insider trading law ripen over the late eighties into the 1990s, the Burger misappropriation theory makes its disappearance.

Donna Nagy:

Other than that attempt to broaden the indictment in US versus Newman, and the strategic decision. . .

Don Langevoort:

Right.

Donna Nagy:

. . .of sticking with mail and wire fraud, but now in a Rule 10b-5 deception of the source context, were you aware of efforts on the part of enforcement at the SEC to bring civil cases. . .

Don Langevoort:

Sure.

Donna Nagy:

. . .that would allow the fraud to not only to be against the investment banks or the printers or their law firms, but the contemporaneous traders?

Don Langevoort:

Yeah, there was a case brought against Crown Zellerbach. I remember because I wrote a memo to the commission,

Donna Nagy:
Crown...?

Don Langevoort:

Zellerbach. That was the commission's first real opportunity to address misappropriation. And if I recall very carefully preserved multiple theories just as Paul Gonson and Ralph Ferrara very much wanted. But United States vs Newman is the first court of appeals decision and in the Second Circuit, so that was a signal that "Okay, use that."

Donna Nagy:
Right.

Don Langevoort:

They're both about misappropriation. It's not like you're giving up immense territory, but in fact some things were given up by going in the direction of fraud on the source that would have been preserved had the alternative theory somehow not drowned.

Donna Nagy:

Well, so many more questions to ask on that, but I won't because I want to move. I want to close out the Rule 14-e3 story because the broader insider trading rule under Rule 10b-X faded away. The Commission in May of 1980 says, "No, work on tender offers. Eradicate that problem." Rule 14e-3 then is what? It had already been proposed, but it had...

Don Langevoort:

But it had gotten so much-

Donna Nagy:
Weathered.

Don Langevoort:

Inside the building as well as outside the building pushback. It took Chiarella to create the momentum and get the-

Donna Nagy:
Get it to the finish line?

Don Langevoort:
Get it to the finish.

Donna Nagy:

And that was September of 1980 then and then we have the insider trading litigation front in '81 in the winter time. But at this point you're looking to move into law school teaching-

Don Langevoort:

[crosstalk 01:14:53] Oh, by this time I had accepted a job. Yes.

Donna Nagy:

Okay. So before I start talking about your incredible career as a law school professor, inspirational career as a law school professor, is there any memorable aspect of your time at the Commission that I've not managed to touch on?

Don Langevoort:

Not really. This was the core part of it. I do, and I've suggested this obliquely, so let me say it directly. The people I worked with at the SEC from 1978 to '81 were intellectually the most fascinating, challenging people imaginable. Bob Pozen, brilliant guy, my immediate boss, Ralph, one of the most creative lawyers who's ever gotten to run the general counsel's office, Paul Gonson a king, Jake Stillman And go on and on. I tried to do a list of who is famous, who was at the general counsel's office at the time, and then who was famous now was at the commission at the time? It's a long list. So that sense of, "Wow, and now I'm going to be a law professor talking about securities regulation." It was the perfect, what now would be fellowship but fellowship on steroids.

Donna Nagy:

Yes. Well, and it replicated you being at Harvard Law School with Professor Louis Loss working on the federal securities code.

Don Langevoort:

Right.

Donna Nagy:

And then-

Don Langevoort:

And he and Bob Pozen are the ones who helped me get my first teaching job. So they happily send me on. I still have the letter Louis Loss wrote me congratulating me on getting my first teaching job.

Donna Nagy:

That must be very touching for sure. You say in one of your many books that one of the SEC commissioners, Irv Pollack, became one of your heroes and still is.

Don Langevoort:

Oh absolutely.

Donna Nagy:

And so before we leave the commission years, I'd like to hear why.

Don Langevoort:

And it's a little bit connected to what I was just saying. I remember my first day at the SEC, which is never a pleasant day because you're filling out paperwork for the most part and you don't know what you're doing and you're finding you're getting lost in the building and all of that. An orientation for all new staff members. It turns out Marc Steinberg started the same day I did at the SEC. He's now a well-known law professor and insider trading expert.

Donna Nagy:

Yes.

Don Langevoort:

And so we went to an orientation, which was pretty much run by the enforcement division. They were the most visible and they brought in commissioner Pollack, Irv Pollack, who had been the first director of the division of enforcement at the SEC, to speak to everybody and he was truly inspirational. He talked not about making securities regulation better, but that public service as an obligation for all of us and learning to allow our conscience and our honor to go to work in doing the tasks of securities regulation was how we should think about it. And so I was impressed that day.

Don Langevoort:

Itso happens that my roommate in Washington was his nephew, so I had separately been able to say "hello" to him and just mention the connection and he knew. So we knew each other. The one thing I remember about Irv, besides that incredible orientation talk was much of the commission's business is very routine and done seriatim where you march from commissioner's office to commissioner's office saying, "We need your signature." And usually it's you go in, somebody senior to you actually says what needs to be said, you just sit there and smile, you get the signature and you leave.

Don Langevoort:

Irv would always find the most junior person on the team and ask, "What do you think?" And the conversation would go on with the junior people because he said later, "That's where the spirit, the heart of the commission is." It's staff. And it's not the big egos running the division. It's the people who show up for work everyday like he did over the course of a career as a securities regulator.

Donna Nagy:

What a lovely story. I can see why it had such an impact. Well, let's talk about law teaching, which is a subject that I know a little bit about too. So you've said that when you went to the Securities and Exchange Commission in 1978 you did that knowing that you wanted to be a law professor and enjoyed the academic side of the practice that you were doing. And so you got your wish.

Don Langevoort:

Yes.

Donna Nagy:

And Vanderbilt Law School is where your first teaching position was. So in your long and distinguished career at Vanderbilt and then at Georgetown, you've participated in the hiring of I would think, dozens

of junior faculty members. How would you compare today's new hires in corporate and securities law to your cohorts 40 years ago?

Don Langevoort:

Oh, major changes. The competitiveness of the market for teaching today is far greater than it was when I went. People of my age always say, "I'm glad I went into teaching when I did because I couldn't get a job in today's environment." The empirical study, the theoretical study of securities law was emerging in the '70s and '80s people like Frank Easterbrook were starting to conceptualize the field, but it still was doctrinal. It still was old fashioned law and I clearly got my job based on what I had written in that Cornell Law Review article, which was very doctrinal. It was very much about what constitutional law should look like in addressing the federalism problems associated with State tender offer regulation. Today, nobody comes into teaching without four or five publications, probably spent two years just preparing that record.

Donna Nagy:

Sure.

Don Langevoort:

And thus the empirical and theoretical sophistication is just far greater than it ever was.

Donna Nagy:

It was in 1978, it would have been pretty extraordinary for a new hire to have published in the Cornell Law Review.

Don Langevoort:

Yes.

Donna Nagy:

So you were-

Don Langevoort:

Yes, I was very lucky. I always thanked Louie Loss for steering me in the direction of writing a paper that was publishable because Vanderbilt was surprised that I already had something in print. And by that time I was already working on my Chiarella article because I had enough time free and a lot of material. So I call it post Chiarella restatement because I was working on the post Chiarella restatement of the law inside of the building.

Donna Nagy:

Yes. And that was that your first official law professor article.

Don Langevoort:

So that went into print after I got to Vanderbilt when it was actually written before my first day there.

Donna Nagy:

Yes. Well, that's a nice way of tying your practical experience and your academic interests together. And of course that was one of dozens of insider trading related articles that you've written in your career as an academic.

Don Langevoort:

Yep.

Donna Nagy:

And I wanted to explore your just amazing productivity and impact of your scholarship. Before we do that though, I want to talk just a little bit about teaching and your approach to teaching securities regulation because presumably that is one of the courses you taught at Vanderbilt.

Don Langevoort:

Eventually.

Donna Nagy:

Eventually.

Don Langevoort:

But yes, actually it's somewhat of a funny story. When I ended my interview day at Vanderbilt and I presented myself as a securities person, "I'm coming from the SEC, here are my two articles." They mentioned, "But we already have somebody who teaches securities regulation."

Donna Nagy:

And who would that-

Don Langevoort:

Larry Soderquist.

Donna Nagy:

Larry Soderquist, okay.

Don Langevoort:

And I said, "Hmm, that's interesting." "But we really need a contracts professor. So would you be willing to teach contracts?" And I said, "Okay, but I'm going to be writing about securities regulation. It would be nice if I could teach it as well." And so that was left for future agreement because Vanderbilt was a small school and frankly it didn't need two sections. And Larry was a very successful, had a case book. So it's not like I could pitch a fit, I could go elsewhere, but I liked Vanderbilt.

Don Langevoort:

So at that point I said, "How about corporate finance?" Because Vic Brudney had taught me corporate finance and it was a stealth securities regulation course and I figured I could do the same thing. So it turned out that I was teaching contracts and corporate finance at that point. A couple years later, I got a call from Harvard Law School because Louie Loss had finally gone to an emeritus status and he wanted

me to teach securities regulation at Harvard. And I agreed to a visit. It turns out, I never told Harvard this, but I'd never taught securities regulation in my life. And I was being brought in specifically for the purpose of being what turns out to be the third person after Louie Loss to ever teach securities regulation at Harvard Law School.

Donna Nagy:

Okay. That is quite the test.

Don Langevoort:

Right, yes. I just didn't mention that this is the first time for me.

Donna Nagy:

Eventually then you do go on to teaching securities-

Don Langevoort:

Larry and I agreed that it would be right because by this time I have an article in the Harvard Law Review about securities regulation. It might be appropriate for me to teach the class.

Donna Nagy:

Right.

Don Langevoort:

So we took the two basic securities statutes and Larry said "I like 33 Act." And I said, "I like 34 Act. So why don't we just split securities regulation in half into two separate, two credit courses suggest to students that they take both and do that sequence?" And there was my toe hold.

Donna Nagy:

Right.

Don Langevoort:

And eventually I bargained into actually teaching securities regulation.

Donna Nagy:

Well, and then you are the coauthor of one of the leading securities regulation casebooks with James Cox at Duke and Robert Hillman at UC Davis. It's a fabulous casebook for securities regulation.

Don Langevoort:

Thank you.

Donna Nagy:

I say that as a happy consumer. I've taught out of it for 25 years. My students very much like its problem- oriented approach, which at the time was new for securities regulation.

Don Langevoort:

Yes.

Donna Nagy:

Our time is running short. So I've spent an hour and a half on your two years at the Commission and then fast forward through 40 years of an incredibly distinguished teaching career. Can't possibly do it justice, can't possibly discuss the breadth of your scholarship, the impact of your scholarship. So I will zero in to ask about your interest in psychology and behavioral economics. How that developed, where in your teaching career did your scholarship go in that direction?

Don Langevoort:

Yeah, and as in all things in my life, there are connections back to the time at the SEC. By the late 1970s and this is Frank Easterbrook, Ralph Winter and others, the notion of the rational actor model for how financial markets work had taken hold and it was growing fast. And I had studied some of that in law school. Some of the earliest courses built around the economic analysis of law I took, clearly it was affecting corporate legal scholarship by the late '70s so I was steeped in it. And I remember one day sitting in the commission room watching a debate about some issue. I have no idea what the issue was. And I remember saying to myself, "What's driving the outcome of this conversation is not rationality, it's ego." And I ultimately wrote a series of articles about self-deception, about ego and to this day I am convinced that I had it right in that commission room that if you want to predict human behavior you got to go well beyond a utilitarian calculus of expected return.

Don Langevoort:

So that was a note to self that ultimately got me working on this, but much more directly. And some of this came out of the code project. The idea that you should integrate the 33 and 34 Acts because when a company is widely enough traded, it's market is efficient and you need far less mandatory disclosure or at least access to mandatory disclosure in an efficient market than you would with respect to IPOs or some other. It was becoming an article of faith. In fact, there was a Law Review article, I forget who wrote it and probably just as well that I forgot, that said, "We don't even need 10b-5 much because the market is smart enough to see through fraud." And my reaction was, "That's not right."

Don Langevoort:

And I discovered very quickly that there was a literature on contrarian investing that was emerging that was a counter attack on all of this that lawyers and regulators were just paying no attention to. So I decided to write my first big articles once I was in academia, on why we should be a little less quick to embrace market efficiency in all of these settings in which efficient markets are invoked.

Don Langevoort:

So as I read more about the contrarian literature, what I was discovering is that on every other page that would be a reference to the work in social psychology on rational choice and not so rational choice. What we now know is the Kahneman and Tversky paradigms of heuristics and biases, was coming to fascinate game theorists and others. So if that had something to say as powerfully as people are reading this mess must have something to say about securities regulation as well. So I started reading the social psychology, not just the contrarian economics.

Donna Nagy:

Right.

Don Langevoort:

And that produced a very progressive research agenda that lasted for 25 years.

Donna Nagy:

Yes. And one no doubt that caught Georgetown Law School's interest and you moved from Vanderbilt to Georgetown where you are now. I would love to hear more about your scholarship and with more time I could go through each of your Law Review articles asking questions. Your government service ended in 1981 when you began teaching, but you've done much public service throughout your 40 year career in teaching, testifying in Congress, advising the development of legislation, service on the FINRA's National Adjudicatory Council. Can we conclude with reflecting on public service and how being a law professor allows you to continue what was a small, time wise, official full time public service at the Securities and Exchange Commission?

Don Langevoort:

Right. And for this I must go immediately back to Irv Pollack. The words he used at that orientation speech about, "Your career is always about public service no matter where you are," stuck with me. So sometimes you just get invitations to speak and very quickly as I was working on social psychology, I became interested in ethics. And as I became interested in ethics, I became interested in the psychology of ethics. And that has turned out to be a very resonant body of public service work that I do. I talk a lot, I've done this at the SEC, at FINRA, for many organizations about how we deceive ourselves into thinking that what we're doing is good and valuable when it's really just a cover for what we want.

Don Langevoort:

It goes back a little bit to that moment in the commission room when I said, "It's ego going on here, not rational choice." So I have tried to use all of these vehicles on FINRA's National Adjudicatory Council. I have since, actually when I was at Vanderbilt, I would regularly go over to the SEC informally to do brown bag lunches for staff people, just whatever I can do to help make people think better about securities law, which is on multiple levels. It's not just the intellectual, analytical, empirical. It's about making sure what we do really does serve others instead of being a pretext for hypocrisy.

Donna Nagy:

Well, I can't think of a better way to conclude this interview.

Don Langevoort:

Okay.

Donna Nagy:

Thank you so much. It's been a true honor to be here with you this morning-

Don Langevoort:

Thank you.

Donna Nagy:

And thank you.