Dan Berkovitz Oral History

Interviewed by Dr. Kenneth Durr, April 4, 2025

KD: This is an interview with Dan Berkovitz for the SEC Historical Society's Virtual Museum and Archive on the History of Financial Regulation. Today is April 4th, 2025. And I'm Kenneth Durr. Good to see you, Dan.

DB: Thank you, Kenneth. It's a pleasure to be here and contribute to the oral history on the history of the SEC.

KD: And I'm looking forward to talking about not just one, but two regulatory agencies today. But before we do that, let's go back and get some background. You have an interesting background. You started in physics, is that right?

DB: That's correct. That was my major as an undergraduate.

KD: Okay. And what made you turn the corner and get into law?

DB: Well, at the time when I was an undergraduate, although I majored in physics, I took a lot of history and politics. I actually had a course in English, Constitutional History, and I really had dual interests. I was interested in basic science, and what physics I was interested in was astrophysics, cosmology, history of the universe, where did it all begin? Where's it all going to end? Also, it was a time of great political turmoil here in the US. Watergate, and then the 1970s. So I really had dual interests. After I graduated, I started graduate school in physics. But it looked to me like the job market was a lot better for lawyers than for cosmologists or astrophysicists. And a law degree was three years, and a PhD was eight years. So given the choice of the two, I decided to go into law.

KD: Okay. What did you do when you finished your law degree?

DB: As I said, I was very interested in law and politics and given my science background, my first job was with the Nuclear Regulatory Commission here in Washington DC.

KD: Okay. So you went right into the government. Was it the Office of the General Counsel?

DB: Correct. OGC at NRC.

KD: Okay. Talk about that a little bit. What was that office like? How did you get it?

DB: Well, this was when I graduated from law school in 1982, and they were working on the restart of the Three Mile Island reactor that had been a partial meltdown back in 1979. And at the time, electricity demand in the United States had been growing, at least in the seventies, about seven percent a year, and they really wanted to get the nuclear licensing restarted and get that process going, get new nuclear reactors online. So the NRC was, at the time, busy licensing or trying to license, processing licensing applications, for new nuclear power plants. And at the time, it was really one of the agencies at the forefront of administrative law in terms of

challenges to nuclear power plant licenses and the process the NRC used to license. So when I started, the NRC had a very active Office of General Counsel involved in a lot of litigation over nuclear power plant licensing and nuclear issues.

There were cases in the Supreme Court, there were cases in the District of Columbia Court of Appeals, and the NRC had its own litigating authority. So its attorneys could argue in the federal courts. Well, we worked with the US attorney and the Department of Justice, but we as our own attorneys could go into federal courts and argue. So I was able to do that as a young attorney. There were a lot of great opportunities to get a lot of experience in a lot of cutting-edge administrative law issues at the NRC.

KD: Tell me about those. What were the cutting-edge issues at the time?

DB: Well, in the late seventies, there was the big case, *Vermont Yankee versus Natural Resources Defense Counsel*, which involved the Supreme Court which basically slapped down the District of Columbia Court of Appeals and said, "You can't impose procedures in addition to those of the Administrative Procedure Act. If the agency follows the APA, that's all that's required." So at the time in the seventies, the DC Circuit was what you would call, or what people call a liberal circuit, and the Supreme Court basically told them, "No, you can't make the federal agencies go an extra mile." It was somewhat of a concern that the DC Court of Appeals was imposing its own standards and viewpoints upon the federal government.

There was the Karen Silkwood case. Karen Silkwood was allegedly... I think she actually was injured through contamination at a facility, not a nuclear power plant, but at a Kerr-McGee facility. So there was the case *Silkwood versus Kerr-McGee*. The NRC was not directly involved in, but we submitted an amicus brief to the US Supreme Court. I attended the Supreme Court oral argument as a first-year attorney. It was very exciting. And that involved the question of the extent to which Atomic Energy Act preempted state tort law, Atomic Energy Act preempts the states from regulating nuclear power. So the question is state tort law, particularly in the Silkwood case, is punitive damages a regulation that's preempted by federal law, and the Supreme Court held it was not.

And then the other Supreme Court case at the time was the one that I actually wrote as a law student. I wrote a law review article on, the case of *Pacific Legal Foundation*, which involved whether state—again, it was a preemption question of the Atomic Energy Act. State law said that you can't license a nuclear power plant until there's a permanent radioactive waste disposal site. And the question is whether that was a regulation of radiological safety? Under the Atomic Energy Act, what's preempted is regulation of radiological hazards, but states can regulate nuclear power economically. So when California said you can't license any more nuclear power plants unless there's a permanent waste disposal availability, the question is, was that an economic regulation or a nuclear safety regulation? The court held it was not preempted.
And I had done my law review article in law school on that case when it had come out of the district court. I attended the Ninth Circuit oral argument in California as a law student, and then a few years later, I think it was 1983, it's before the Supreme Court. So there was an active Supreme Court docket on these nuclear cases at the time. I argued a case in the US Court of Appeals a year and a half out of law school again on licensing procedures. So there was all that litigation in the background we had in the appellate division at the NRC. And the Office of General Counsel, I think there were six attorneys or so. And so you got a lot of responsibility as a young attorney pretty quickly.

KD: Sort of trial by fire, I guess.

DB: Exactly.

KD: You said you were out at the forefront of administrative law. Was there ever any question at this point between Article II and Article III courts, push back against the whole idea of administrative law?

DB: I think it was in the background, it always has been in the background of administrative law. There was concern, I recall, that the nuclear licensing process was over-judicialized. That it had just gotten somewhat out of control in terms of, it was now this whole additional legal jurisprudence about conducting hearings on nuclear power plants that was viewed as an obstacle to the development of the nuclear industry, that there was the interminable hearings and they allowed people to delay and block nuclear power plants through legal tactics. I don't recall that it was the frontal assault on the administrative law or the administrative state or the NRC's ability to conduct those licensing hearings, but it certainly was a lot of concern that the process was out of control. And I think the *Vermont Yankee* case in the Supreme Court was a manifestation of that, but not to the extent that we are here today.

KD: Yes. So you went over to the DOE after that.

DB: I just should mention, it wasn't a nuclear case at the time, but the Chevron case was 1984. *Chevron versus NRDC*. I mean, that's the fundamental case on statutory interpretation. And that was a reflection of exactly what I was talking about. At the time, Chevron was viewed as a restraint on the courts and the courts imposing their view of the statute on the administrative agencies, as opposed to letting the agencies interpret the statute and the agencies. So you had Chevron come along, which gave back to the federal agencies the primary authority to interpret statute when there's an ambiguity. And that was again, seen as reining the court. So at the time, it was the courts that needed reining in, not so much the administrative agencies, particularly during the eighties.

By the 1980s, when Ronald Reagan was elected president, he was going to take control of that whole process, and they wanted the agencies to be in control under the Reagan administration rather than the liberal DC circuit. So the backlash really was at the time as much against the DC circuit and the courts as against the federal agencies. And we've seen the pendulum... I don't want to mix my metaphors, but the pendulum going 180 degrees. Whatever it is, it's different now depending on whose running whichever branch, somebody else wants another branch to be in charge.

KD: Right. Let's get you over to the DOE and the Environmental Management program. You ran that for quite a few years, right?

DB: I was a deputy assistant secretary on that for about five years. Correct.

KD: Okay. Were you still using your legal experience in that position?

DB: It wasn't a law position. I was the Deputy Assistant Secretary for Policy Planning and Budget. The DOE's environmental management program, which not too many people actually know about, was actually the largest program in the Department of Energy. DOE was the agency

that builds nuclear weapons and hands it over to the military. So we've separated the building of the weapons from the agency that uses them. And then we have now the National Nuclear Safety Agency, which also manages the stockpile.

After nuclear weapons production ceased and we went to maintenance of the stockpile, the budget that had been devoted to building the weapons, which was billions a year, was turned into a cleanup program to clean up all the waste from the weapons production. The weapons program had its own reactors to produce plutonium, to produce highly enriched uranium, and there was also sorts of spent fuel. There were waste tanks that were leaking. So it was a program with about a $6 billion annual budget, which is the largest program in DOE, larger than any of the energy research programs or gas or whatever.

I was Deputy Assistant Secretary for Planning Policy and Budget. We developed the budget, went to Congress, advocated for the program, did public outreach. So it wasn't a legal position, but it was a management position there. And so I'm not arguing cases, but in terms of federal experience and managing a federal program, it was a new challenge and an exciting challenge for me.

KD: Okay. Is it your time going to Capitol Hill talk, speaking before Congress or working with Congress, is that what got you in touch with Carl Levin?

DB: So I was at DOE from 1995 to 2000. Between the NRC and DOE, I was the counsel on the Senate Subcommittee on Nuclear Regulation. So I worked on the hill. That was about eight years actually. I worked on the hill on that Nuclear Regulation Subcommittee, and I became familiar with Senate and met a lot of staff people. So when I left DOE at the end of the Clinton administration and I was looking what to do next, Carl Levin was looking for somebody to assist on investigations into the energy markets. Around 2000, it was 2001, energy prices were becoming very volatile. Gasoline prices in his home state of Michigan had just spiked up. It looks a little quaint now, but around Memorial Day of 2001, gasoline prices spiked from that week, Memorial Day week, I remember spiked from a 1.25 to a 1.50.

And that created a huge uproar. And it was not only in Michigan, but it occurred nationwide. And the Federal Trade Commission investigated, and was this collusion between the oil companies. And so Senator Levin, who was chair of the Senate Permanent Subcommittee on Investigation said, "I want to investigate why gasoline prices are all going up together and so quickly in my home state of Michigan and elsewhere." So he was looking to hire somebody with experience in investigations, experience in energy, experience on the hill. And I had done all that in the nuclear area when I was counsel in the Senate Subcommittee on Nuclear regulations. I was specialized in nuclear. When you're on the hill, the issues are in the context of the entire energy mix as one component and how to promote this component versus that component of our energy picture.

So I was familiar with energy issues in general. We had a number of whistleblower issues. Whistleblowers come up to the subcommittee, that I worked on investigations into. So I had investigations background, I had energy background, and I happen to know pretty well one of the staff people already on the subcommittee, a permanent subcommittee. So both my hill background plus my knowledge of people there, it was a great opportunity at the time.

KD: Talk about some of your investigations? What were the ones that you think made the most impact?

DB: Well, interestingly enough, the gasoline investigation turned out not to find anything wrong with the market. And that I spent about a year on it and I told Senator Levin, "The old model that people have of the oil companies controlling gasoline prices is really the old model. That's not the way the gasoline market is structured in the United States anymore." The oil majors are really now our exploration companies, and different companies are refining companies and different companies are marketing companies. You have different segments to get gasoline to the consumer. You have upstream, you have downstream, and you have midstream. And each one of those is its own market. And now since the 1980s at least, gasoline and crude oil are commodities. And the commodities prices are not set by the oil companies. These big oil companies who get together and collude, which was the concern, all gasoline prices go up together. They must be colluding. What's going on when you see all the prices and all your gasoline stations rise together, and then even when oil prices fall, the prices don't fall, they stay up. So what's going on here?

But what I really discovered then was gasoline as a commodity. And it's traded on the New York Mercantile Exchange, the NYMEX or CME now, and people all along, as I was looking into this and interviewing people and interviewing oil executives and people in the industry and economists and people who might know something about it, they said, "You really ought to look into the commodity market because there's a lot of issues in the commodity markets." And one of the issues is in the Brent crude oil market coming out of the North Sea, that there's a potential manipulation of the crude oil market in the North Sea.

So we concluded the gasoline investigation with a report that's said how gasoline prices are set, and it really just explained, in a couple hundred pages, what I'd gone through at a high level here, the structure of the gasoline market and now how different it is from what it used to be. And then we turned to some of these allegations that I received. People told me that there's potential manipulation of the Brent crude oil market, that an oil company was—The Brent Field is a field of oil off the North Sea and the United Kingdom off Scotland, a rich oil field and major oil producing area, and it's a big pricing center for crude oil coming out of Europe. We have West Texas in the United States, we have Brent in Europe, and those are the two big pricing hubs for pricing benchmarks around the world.

And so the Brent benchmark which was traded in the UK on the Intercontinental Exchange in the UK at the time, that's a big pricing center. Well, whether the US imports or exports oil depends on the relationship of the price of Brent to the price of West Texas. Well, the allegation was there's about 20 shiploads of Brent coming out of the North Sea each year and excuse me, each month, and the allegation was is that a particular oil company, BP, was taking all that oil and purposely dumping it into the Strategic Petroleum Reserve off Texas and Louisiana, or in Louisiana, to take it off the market, spike the price. And so it was, you take off the supply of it and the price goes up.

So there were allegations that they were doing this intentionally. And I got this allegation from a well-respected economist and actually a senior oil industry executive. So this wasn't just some somebody mad about oil prices. These were credible sources. So we investigated. And the great thing about the Senate permanent subcommittee is it has subpoena authority. The chair has subpoena authority, doesn't even have to get bipartisan support over anything in interstate commerce. So basically anybody you talk to has to come in and talk. So you get really unparalleled access to anything dealing with US Commerce.

Well, we looked into it and we did the pricing curves and did an economic analysis. And indeed, there was a spike. There was a spike coming at certain times when Brent crude oil was deposited into the SPR. We got from the Department of Energy, all the crude oil deliveries into the SPR, and there seemed to be validity to these allegations. So this took a number of months. We called in BP, I wouldn't say the end of the investigation, but when we had enough information to sort of validate the charge that they had been dumping oil into the SPR, we had all the shipments and we had the price spikes associated with it.

But it ended up, when they dumped all the oil into the SPR, it ended up spiking the price about a dollar a barrel, which is a significant increase. And so we brought in BP and said, "What about it?" Basically. "Here's the evidence." And they say, "Yeah, we knew. We'd actually tried to avoid it. We didn't want to do it. We were concerned, but the DOE made us, the DOE made us deliver into the SPR. We said no, we don't want to do it all at once. We want to defer, have a smoother schedule. We don't want to take so much so quickly. DOE made us." And we got their emails, and their emails were back and forth between BP and DOE. And BP said, "This actually is going to cause price impacts, and we want to smooth it out. If you let us, we'll deliver more later. So we'll pay you in barrels of oil for deliveries." And DOE said, "Nope, put it in."

And so we had been working with DOE on this. We weren't investigating DOE, but we had this from BP that DOE made them do it. So we called in DOE and said, "Hey, BP says you made them do it." And DOE said, "Yeah, we made them do it. We didn't want to do it either, but the White House made us do it." And I said, "Oh, really?" And they said, "Yeah." "So give us your email with the White House." And they did. And they wrote a long memo to the National Economic Council saying that, "This was not the best way to fill the SPR, that there was going to be price impacts associated with it. And the White House made us do it. They didn't want to delay the deliveries."

Well, so of course we called the White House up, National Economic Council and said, "Why did you make DOE make BP put all this oil into the SPR?" And National Economic Council said, "We're not talking to you. We don't have to talk to you." And so what happened was the one big additional fact here is the timing of this. So this price spike and all this activity occurred in very late 2001, starting in November of 2001 into early 2002, where they made them put the oil in the SPR. And so it was after 9/11, and after 9/11, the administration decided it was ramping up its plans to go to war with Iraq. The Iraq war and Afghan war was a direct result of 9/11. So anticipating a potential disruption in Middle Eastern oil associated with the invasion of Iraq, the White House ordered DOE to fill up the SPR as quickly as possible.

Now, the report that we ended up putting out on this ended up—we concluded, and I think it's the right answer, we concluded that even under those circumstances, you don't fill the SPR as quickly as possible, because if you don't fill the SPR, whether you put it in the SPR or not, in the short term does it really make a difference. Because once it's produced, it's in a tank somewhere and it's accessible somewhere. So if Saudis are pumping oil, you don't need to put it in the SPR because it's going to be commercial tanks. The SPR is really a long-term thing. So if you're going to go to war in a month, whether you put it in the SPR in a month or put it in an above-ground tank, doesn't really make a difference. We concluded it didn't really benefit national security to put it in that quickly, even under a short-term need. And you had the price spike. So we did that. We put out the report on it.

Senator Levin, the report came out in spring of 2002 and we're at war, and he didn't really want to attack the administration for filling up the SPR in anticipation of war. So we put out the report which said it wasn't the smartest thing to do, but he didn't want to make it a big political issue because we were at war. Even though there was a lot of controversy about whether we should have gone to war or not, he didn't want to undercut the effort when troops are on the ground and he's chair of the Armed Services Committee. So he was very sensitive in the time of war about raising this issue. But we put out the report, and I thought that was a very good report, and it was not what we anticipated. I mean, we got this market manipulation allegation. It ends up being this thing about filling up the SPR, going to war.

KD: So you learned a lot about a lot of other things in the process.

DB: Yes. But I think the most significant investigation I worked on came a few years later. But I'll tell you one thing about that investigation and the report and what we did, and this is characteristic of all of Carl Levin's investigations, the extent to which it's documented and thorough, these are really significant research reports as much as anything else. And we had all sorts of pricing charts, so it was quantitative as well as qualitative. So we established our credibility as somebody with the ability to do these in-depth, serious investigations in commodity markets. Okay? I was the commodity markets person, and as I said, although we didn't make a big political, didn't attack the administration over it or anything, I think it helped establish the subcommittee's credibility on these types of issues.

So I got a lot of people coming up to me after that with other issues they wanted us to investigate. And we screen, we don't investigate everything somebody comes up with. But we get a lot of allegations about a lot of things, and we have to pick and choose what we look into, the credibility, the significance, what it indicates.

During this whole time, in the 2000s, was great turmoil in the energy markets in the US. When we started the decade around 2001, oil was in the upper 20s per barrel. And I say gasoline, at $1.25 in spring of '01. By 2008, we had the spike of oil prices to 147. There was Enron, there was a Western power crisis, and then the investigation I'm going to mention, the Amaranth investigation. The energy market in the 2000s was really the wild west. And energy trading, to a large extent, had been deregulated, or swaps energy trading had been deregulated by the Commodity Futures Modernization Act of 2000. So you have these derivative markets, swaps markets, in parallel to the futures markets. The swaps market was unregulated, the futures market was regulated, and there was a lot of activity migrating to the swaps market as a result. If you can trade two economically equivalent instruments and one's unregulated and one's regulated, you'll go to the unregulated market.

And that's precisely what happened with the Amaranth natural gas episode. We got allegations about the hedge fund Amaranth manipulating the natural gas market through swaps. Very credible allegations from very credible sources, so we looked into that, and that took a year to do.

The swaps market had begun as these bilateral, bespoke, individualized instruments where two—You'd have a bank and a commercial company do a swap to give the commercial company some price protection or whatever. And CFMA basically said, "These individualized swaps are not futures contracts, and they're not to be regulated. They're between sophisticated market participants. They don't involve retail, they're not traded on exchanges, so they're not regulated." And that's what the CFMA put into law.

Well, it ended up, they turned these individualized instruments into tradable instruments and then swap markets developed where companies were trading the swaps. And they said they weren't standardized because the price terms were all different. And then you had swaps exchanges. You had the Intercontinental Exchange running an exchange of natural gas swaps that settled off the NYMEX price for futures contracts. They're economically indistinguishable, so you had an exchange of swaps that were economically identical to the exchange of futures.

And Amaranth, the hedge fund, was trading in both markets. And CFTC had no visibility into the swaps market that was running parallel to NYMEX. And then the Amaranth hedge fund came around and blew up the whole market. And there were allegations of price manipulation, price distortion, and that's what we investigated with the Amaranth hedge fund. And indeed, we subpoenaed all the trading records. The CFTC did not even have any information on Intercontinental Exchange; it was an unregulated exchange. Well, we got it from ICE, they cooperated. We had subpoena authority, so everybody cooperated.

We got all the trading records, reconstructed Amaranth's trade, and on the exchanges, on the CFTC regulated exchanges, there are limits as to positions, how large you can be. And when NYMEX told Amaranth, "You can't get any bigger, you've hit your position limit," Amaranth shifted its positions over to the ICE. So we showed that when the regulated market said, "You can't get bigger," they went to the unregulated market and just put the positions on there, which renders your whole position limit regime ineffective.

And we showed that in the investigation and came out with a report. And as a result of that investigation and that report, we recommended that that market be regulated, where you have an actual market in these things, that they be regulated. And it was a persuasive investigation and we had a hearing on it.

And at the hearing, Jeff Sprecher, who's the CEO of ICE, developed this whole swaps exchange. That's how Jeff Sprecher, now ICE owns the New York Stock Exchange, but they started out as a natural gas exchange in swaps. That's where they started, as an electronic exchange. They converted. The open outcry, what you see in the movie Trading Places, if you see that one where they're all screaming at each other on the floor of the NYMEX, throwing paper. Sprecher was one of the first ones to move—now it's like ancient history, nobody trades in a pit anymore. But Sprecher was one of the first ones to move to an electronic exchange, and he did it in the natural gas market and that's where these swaps were traded.

Sprecher, at our hearing, came out and said, "I'm in favor of regulation. We should be regulated like NYMEX." And that was a critical development. NYMEX, of course, wanted ICE to be regulated because they didn't like all their business going over to the unregulated exchange. So we had both exchanges supporting regulation and the Bush administration, the CFTC, Walt Lukken was the chair at the time, they went back and said, "Senator Levin, we'll get back to you on it." And they came out, actually issued a report in favor of having that market regulated. And then in 2008, in the beginning of 2008, on the Farm Bill, Congress passed legislation to regulate that market.

So that was a significant investigation, which directly led to the legislation to regulate the swaps natural gas market. Now, that was the spring of '08, and then we had, in the fall of '08, the financial crisis, which led to Dodd-Frank, which led to the regulation of all the other swaps

markets. In the Farm Bill of '08, it was really the energy swaps that got regulated. And then in Dodd-Frank, all swaps got regulated in a much larger comprehensive scheme.

KD: Great. Well, we need to get you to the CFTC here.

DB: Yes, all right.

KD: You were selected as general counsel in 2009. Did you go to work for Gary Gensler at that point?

DB: Yes. Right.

KD: What was your impression of the general counsel's office over there? How many people did you have?

DB: When I got to the CFTC, the general counsel's office was grossly, grossly understaffed. Again, CFMA under deregulation, it was in a deregulatory mode for eight years prior to the financial crisis. And it was maybe 16 to 18 people in OGC at CFTC at the time. So it needed a substantial increase in resources.

And as a result of the financial crisis and the change in administration to the Obama administration, I forget the exact number, maybe $100 million something budget increase. And we were fortunate, there was misfortune in the financial industry, but it was fortunate that we had significant ability to hire up. So a lot of the lawyers on Wall Street who had been working in swaps, CFTC did not have swaps market expertise, we were a futures market regulator. We had essentially no swaps market expertise, particularly legally.

So when we got the budget increase under the Obama budget, and while Gary was chair, OGC had ability to hire up, and we were able to get a lot of attorneys who had been working in New York and the swaps market. There was a big contraction in that legal employment sector as a result of the financial crisis. So we were able to pick up people off the street at the time and bolster our resources. Eventually, we got—the peak when I was there was something like 55. So we got a substantial bump-up during the time I was there, but we had the entirely new regulatory program.

KD: Was writing the Dodd-Frank rules a lot of your responsibility at that point?

DB: Yes, and that was a huge... I arrived at the CFTC in May of '08, end of May '08, no, excuse me, '09, May of '09. And then Dodd-Frank was passed in July of 2010. So that whole first year was legislative, working with the Congress and the other administration financial regulatory agencies and entities, SEC, Federal Reserve, Treasury, on the legislation, working with the Congress, getting that passed. And then the next three years I was there was on the rulemaking, which was about 90 percent of my time.

KD: Wow. So you were all Dodd-Frank all the time when you were at the general counsel's office.

DB: Yes, it was exciting and exhausting at the same time.

KD: Okay.

DB: For a lawyer, doing something like this is really—if you do it once in a lifetime, you're lucky, that in your area, there's major legislation that really establishes a new legislative regime. Many people go lifetimes; lawyers go careers without doing that. So this was really a unique opportunity, comes around once in a lifetime almost. There's the Great Depression when the SEC was created, for example. You know the folks who worked on the SEC legislation are all legendary. Felix Frankfurter and James Landis and William O. Douglas, those legendary figures.

And then securities laws go for decades before they get really... And then there's some crisis or the market changes and Congress has to address it. Well, Dodd-Frank was really the first major legislation since the Commodity Exchange Act in the 1930s. Dodd-Frank was really a unique experience. And then I worked on, I think it was 40-something rulemakings at the CFTC in those four years.

KD: Something I'm interested in is the general counsel, a lot of people are in the mix with the rulemaking, but one of the things you have to worry about is writing defensible rules, things that are ironclad and that are going to hold up when they're challenged. Tell me about that part of your work.

DB: Well, that's actually a key part of it. And we took the attitude, I took the attitude that there are three people who this really makes the biggest difference in the world to how you do this, and that's the judges on the Court of Appeals that are going to be reviewing it. These things have to be written so those three people are convinced, and that's the key audience here.

Now, at the time at the CFTC, and this dovetails into the SEC, the SEC had run into a pretty bad streak. The SEC had lost something like six straight cases in the Court of Appeals during preceding years. There was *Business Roundtable*. They were getting rules thrown out left and right on procedural fouls and on economic analysis that they were improperly considering, not sufficiently considering the economic costs and benefits. And SEC had run into this buzz saw on the US Court of Appeals.

And frankly, the CFTC, when we got there... The CFTC also has Section 15 A in the Commodity Exchange Act that says, before you pass any rule, you have to consider the economic costs and benefits. And frankly, the CFTC had not really paid a whole lot of attention to that. The CFTC's economic considerations were nowhere near as robust as the SEC's and the SEC's were getting thrown out.

The first challenge was not in the Court of Appeals on it, it was through the Inspector General. Somebody went to the Inspector General and said, "You got to look at these cost considerations. They're really lousy." And the Inspector General came up with a pretty scathing report on the CFTC's consideration. So we were in a, you're looking at the way the Court of Appeals was handling the SEC's cases, and then we saw historically what the CFTC had done on cost benefit. I said, "We got to really clean up our act here. We got to get these things in shape to pass muster in the US Court of Appeals for the DC Circuit because they're ripping these things apart for the SEC."

So a lot of what we did, and this is creating a whole program out of nothing, the cost considerations. One of the criticisms was at the CFTC, all these costs benefit things are written by the lawyers, not by the economists. But the economists in the agency had never written any of

these before. Economists at the CFTC, you go to the CFTC as a PhD economist, they want to study markets. They want to study why things happen in the market. They're not really into rule writing, into justifying some rule. So there was a bit of a culture change and reorienting to the agency, how to get this done, but it was really, really important.

But the effort here was to make sure rules were defensible. So we really paid attention to those SEC cases. SEC, I don't want to say, it's probably too much to say they did us a favor, but we were able to benefit from the hard lessons the SEC was learning over those years, to avoid those pitfalls. So we spent a lot of time studying those cases, writing up our rules to avoid the same problems that had been identified.

But it was getting these things past judicial review. Gary said, "I don't want my rules overturned on judicial review. You've got to make sure that they're not." So yes, we spent a lot of time doing that.

KD: Okay. You moved on from the general counsel's office to private practice for a short time, is that right?

DB: Correct. About four and a half years. That's right. Right.

KD: Okay. Talk about coming back as a Commissioner to the CFTC. What had changed over that period? What was the same?

DB: Well, the change was that I was a Commissioner and I was in the minority, as opposed to being general counsel in the majority. Well, I was general counsel working for the chair. So when I was general counsel, I knew everything that was going on. I knew all what the staff was doing. I really had my pulse on everything that was happening, and my staff knew everything that was going on.

As a minority Commissioner, the chair controls the agenda. You only sort of find out what you're told or what your staff can find out. I had three excellent staff people at the CFTC, Erik Remmler, Lucy Hynes, and Sebastian Pujol, career people at the CFTC. And they became my eyes and ears, basically, which is a whole different thing for me too. As general counsel, people would talk to me. I could go myself and walk the halls and people would talk to me. And of course, I had a GC office that would tell me what's going on too. So I had great information sources as GC.

Now I'm a Commissioner, your information, surprisingly, is much more filtered. And the staff of the agency works for the chair and the chair controls the staff. So they're not as free to tell a minority Commissioner about what's going on as they would be if you're on the same team, so to speak.

So that was a change, ability to... It was a surprise to me as a Commissioner, I felt further away from a lot of stuff going on than I did as general counsel, even though I was a Commissioner. But I wasn't just advising, I was actually giving opinions, which was a different role, which was nice to be able to do after advising other people what they should do. After all those years, I got to actually say what I thought.

KD: Right. Talk about the relations between the Commissioners and how decisions were getting made, how things were getting done.

DB: Well, I'm very proud of my time at the CFTC. I think that we worked really well together. We had a whole range of viewpoints on that CFTC when we were there. And we had disagreements on the rulemakings. I dissented on a number of them, I voted no. I was outvoted on some of them. There were others I voted for.

So the whole time I was a Commissioner I was in the minority. I was actually appointed by President Trump as a Democratic Commissioner. Chris Giancarlo was the chair when I got there and then Heath Tarbert took over. I had good relationships. I knew Chris before I got to the agency. I'd known him for a number of years.

One of my advantages going to the CFTC is that I had personal relationships with most of the Commissioners before I went there. So I had longstanding, very positive personal relationships before I got there, of mutual Trust. And then the ones that I didn't know before, I was able to develop good relationships, even where we might disagree substantively. So we had robust discussions, we had good private discussions, we had good discussions in public. And I think as a collegial body, it functioned pretty well.

As I said, we agreed on certain things and we presented a unified front. And we disagreed on certain things, and we put our arguments out there and we voted, and then we moved on to the next issue. And there was no, we didn't engage in petty disputes that some agencies sometimes devolve into. So I'm very proud of the time that I spent there, and I think it worked pretty well. I didn't get my way all the time, but it worked pretty well.

KD: Who was the chair when you were there?

DB: Chris Giancarlo, when I got there, was the chair. And then he left, I think in 2019 maybe, Chris left. I got there in 2018, I think Chris left in 2019. And then Heath Tarbert, who had been assistant secretary at Treasury, came over and was chair.

And we were able to, both with Heath and Chris, we'd sit down and go over the issues and say, "Where are you on this? Where are you on that? What do you need for this? What do you need for that?" And I said, "Well, we'll never be able to agree on this, so we'll agree to disagree." And others, we said, "Well, if you give me this, I could vote for that," type thing. So we had those discussions.

KD: One of the things you were talking about during your time on the CFTC Commission was decentralized finance, and that's something that's going to come up again. And you were also concerned about the overlap between SEC regulation and CFTC. Tell me a little bit about that issue.

DB: Well, so we had, when I was there, people were starting to come up and say, "We really need some regulation. We need some regulation in the digital assets or cryptocurrency area." And I said, "Oh what regulation? The technology is just new, these markets haven't been really developed. I don't know that at this point in time how to regulate it. I don't want to straitjacket the technology. If we put in, 'this is how it should be,' people will develop the market around the regulatory structure. And you tell me, how do we regulate... What is the Bitcoin market?"

Back then, it was just the start of all this altcoin stuff. It hadn't really exploded yet. But as you mentioned, DeFi was also coming. And there was the notion that was sort of gaining currency, that it was this thing that was there and because there was no actor behind it that you could identify it was not subject to regulation. Who are you regulating?

And I found that very concerning, and I made a statement to that effect in 2020, that all this activity is subject to the Commodity Exchange Act, whether there's somebody there or not. And the question is, who's really putting this out there? And if there's somebody, to the extent that somebody's actually doing something to develop this, they might be the person who was held accountable for that activity.

And the notion which also was gaining credence was—and this goes way back centuries—something like intermediaries are bad. Intermediaries in the system are just sucking money out, and they don't contribute to productivity. It's not the farmer who toils in the field and the sweat of his brow, he doesn't earn the money, it's some middleman, a trader and banker who then sells it off. So these middle people are leeches in the system.

But that's another reason why DeFi is so great, because everybody's just retail against each other and you don't have any middlemen. And the classic example that's used is like the farmer in Nigeria who can't get to the bank. The farmer in Nigeria's going to get a cell phone, and he has access to money, that's what they talk about, the advantages of this technology. And maybe that will help people get access to some type of currency or whatever, and you don't have to Chase, to JP Morgan in Lagos, Nigeria. You can have more access. There is a question of access. I don't mean to belittle it too much, but I think it's a little oversold.

But the concept that it's great that you don't have intermediaries. Intermediaries do help people. If you have a 401k or you have any type of investment, you can either do it yourself or you can get somebody to help advise you. And if you want to trade it against JP Morgan and Goldman yourself, more power to you. If you want somebody to say, "Okay, maybe what you want to do is get an index fund," or this or that. Have a financial advisor help you make these decisions and also trade for you. Do you really want to trade yourself or do you want somebody to go to the market on your behalf? And they have fiduciary duties to you, intermediaries in a lot of contexts, so they really are working for you.

So the concept that intermediaries are automatically bad and that the technology is so much better because there's no intermediaries, I was concerned that that was starting to get widespread acceptance uncritically, that let's get rid of intermediaries.

And the fact is, on a regulatory system, the other advantages, which I talked about, of intermediaries is, at least on that CFTC side, it's true on the SEC side too, the point of regulation is the intermediary. We regulate the broker... Who can trade on the exchanges? Broker-dealers, and the commodities as futures Commission merchants. The retail people do not go directly onto the exchange, you got to be a member of the exchange and the members are regulated. So if you go onto one of these apps that you trade through, you're not on the exchange, in a securities exchange. You're trading through a broker dealer on the exchange or an investment advisor, whatever.

And they're the ones who are regulated. They're the ones with the incidence of regulation. They got to follow these rules. If you have a system without intermediaries, then all the more

likelihood that that regulation is going to fall on you as an individual. It's you can do this, you can't do that. You have to have a certain amount of capital to trade, or you have to post margin, you have to do this, you have to do that. So we have a system actually where retail people can participate, and the burden of all that regulation falls on the intermediary. And that's, I think, a significant benefit of having the intermediary system because they're the ones who are responsible for a lot of complying with the regulation. And if you don't have them, we're going to have to regulate people directly.

KD: Right.

DB: If you use an algorithmic program, your algorithmic program has to have protection against fat finger. And your algorithmic program can't do too many too quickly. And that's going to regulate individuals where they're not subject to regulation. So I was pointing that out too.

KD: Was the CFTC just kind of watchfully waiting at this point and seeing how the market ended up?

DB: Yes, that's the mode we were really in.

KD: Okay. So let's get you to the Securities and Exchange Commission. Did Gary Gensler bring you in?

DB: Yes.

KD: Okay. Now, I assume that there weren't 18 or 20 people in the general counsel's office at the SEC. Tell me about that office.

DB: Well, we had, I think it was about 155 when I was there. A fair size of my OGC at CFTC was the administrative law section. At the SEC, actually, it was agency operations part of it. It deals with the contracting, deals with personnel, it deals with the document requests. That's the part that keeps the agency running. There's the building, the leasing, the document requests, the personnel. The SEC is an organization that has buildings, it has HR, it's got contracts in how it operates, all that needs lawyers.

KD: What was the office? What was the name of the office that handled that?

DB: The Administrative... It's within OGC. I think it's Administrative something or other. I forget the exact name.

KD: Okay. Well, like a branch or what was it?

DB: Yes.

KD: Okay, great. Talk about some of the other ones.

DB: We had an appellate section. Apart from the Solicitor General in the Department of Justice, I think OGC, SEC appellate is, if not the top, certainly among the top. It's absolutely premier, the appellate attorneys in that appellate office. And they argue the cases in the court of appeals for the agency, sometimes in district court depending on where the jurisdiction lies. But appeals of

agency orders, not ongoing enforcement cases, which are handled by the Enforcement Division, but all the regulatory issues will go through, if the rulemaking is challenged, that will go into the appellate division. So that is just a group of really highly talented lawyers. As I say, it's probably, other than the Solicitor General's office, it's of that caliber. It's really of that caliber.

KD: Who were some of the folks in the appellate section?

DB: There was Michael Conley. Michael Conley was the head of the office at the time, and I had met him previously. I never worked with him. Legendary in the office was Jacob Stillman, who ran the office for many years. I'm sure many people in the Historical Society have talked about Jacob Stillman. And he really established the reputation of that office. I think Jacob hired Michael. Michael just retired this past January.

KD: Okay.

DB: Michael was a Supreme Court clerk. We have a number of former Supreme Court clerks in that office. And other appellate clerks. So there's the appellate office and then there's an office on, I forgot the names, I should have had my org chart here. But the Office of Administrative Appeals is the ultimate adjudicator when something goes through an administrative judge. And that's a whole other topic about what's happening with that program these days.

So, the Commission has this quasi-judicial function. And despite all the issues, it still has it for certain types of issues coming up. If you're suspending somebody, suspending a license suspension, not so much the civil penalties these days for other legal issues, because those are being challenged in court. But disbarment of attorneys before the SEC, revoking certain types of licensing, those will go through the administrative appeal and the Commission is the ultimate decision maker. They act as a court and this unit in OGC is sort of like the clerks of the court. We write proposed decisions and circulate those, and Commission offices review those and decide whether they want to accept it or modify it. And it's a Commission decision, but we essentially process that for the Commission and write and propose decisions and opinions for the Commission.

There's a whole group of attorneys who do that. And then there's an enforcement group. Anytime a Commission approves an enforcement action, the Division of Enforcement will bring an enforcement action to the Commission for approval. Now, when I was there, if the Commission wanted to file an enforcement action against somebody, the Commission had to approve it. The Enforcement Division couldn't just go off on file, but they could investigate. They could investigate and begin an investigation without Commission approval. This is an issue that's sort of gone back and forth over the years. Recently, the current Commission said, "No, now you have to get Commission approval to initiate an investigation." But when I was there, the Enforcement Division could initiate, but if they wanted to file in court charges, impose a penalty, you have to get Commission approval for that. So OGC... This was at the CFTC too, general counsel's office, both agencies. As the Commission's lawyers, we would advise the Commission on whether to approve the filing of the action of the Enforcement Division.

And this is really a reflection that you need a more detached legal view than just the Enforcement Division. Now, it's no reflection on the quality or the competency of your Enforcement Division, their SEC Enforcement Division is extremely highly talented as well. They have people who do this for a living, who have got former US attorneys and prosecutors

and high-quality legal work. But you want to separate the passion. You want them to be passionate, but you need to have a more dispassionate view when you're actually going to go into court and file. And so OGC serves that function, sort of the slightly more detached look than the Enforcement Division might have to advise the Commission.

Now in practice, when enforcement wants to bring a case, there are several types of cases. There's the routine cases which are non-controversial. And then there's the ones that may be a novel legal theory, maybe the facts aren't so clear, there's more litigation risk. Does the Commission want to take this litigation risk? The Enforcement Division will say, "We believe there's a violation, but the facts aren't the best facts for proving it." Or, "Here's something that's outrageous, but we've never really prosecuted it in particular before. Do you want to try to extend the theory for this?" Those types of cases, they'll bring OGC in earlier in the process, rather than developing the whole case and laying everything on us a week before, so it's like a month before. But they'll work with OGC as the case is being developed and say, "Hey, OGC, what do you think about this?" Or, "We'd like your perspective." Because they don't want to get too far down the road only to have OGC say no. So when a matter goes before the Commission and there's these regular closed meetings, closed enforcement meetings, it's the Division of Enforcement will present the case, and OGC will be there too.

And in the non-controversial ones Enforcement will present, the Commission will generally approve. On the ones that might require some discussion about legal theory, they'll ask OGC for its opinion, and we'll give our opinion. And by the time it gets to the Commission, I wouldn't say we've discussed it with enforcement, they'll have discussed it with us. We'll have our views. We're not necessarily in lockstep. We try to get on the same page. You don't want to go into the Commission meeting... The Commission has indicated, at least while I was there, they did not really want to mediate between Enforcement and OGC. They don't want to have to decide which lawyers are correct. They say, "You guys come up with a unified view and recommendation. We don't want to arbitrate between legal offices." So we take that to heart. I think that's valid from the Commission's perspective, I totally get it.

But it doesn't mean we're totally in lockstep on everything. Enforcement might say, "Well, we think da, da, da, da. OGC thinks the risk is... might have a slightly different view on this." And we'll say, "Yes, we agree with Enforcement on this, but we think it's actually pretty risky to do it." That's sort of how it might get presented in that context. We won't argue with each other, but there could be differences in views that might get articulated, and that all becomes information for the Commission to consider whether it wants to approve the action or not, or tell Enforcement, "Go back and develop some more facts," or whatever. So those will require back and forth between our enforcement attorneys. I think we had 11. I think we had a group of 11 attorneys working on these.

There are 1100 enforcement attorneys in the agency, so there's a lot of cases. I don't have the number of cases filed a year, but it keeps our 11 attorneys busy. Only a few of those rise to this level that I'm talking about, of serious controversy, and then the general counsel might get pulled into the subset of those that are really the big, higher profile, more cutting edge, tougher questions. So a lot of these enforcement cases, there's the routine ones, there's the slightly non-routine ones, and then there's the highly controversial ones, which are a minority.

KD: Yes. Are there any of those that you can talk about? Those highly controversial ones, the ones that... Or even in the abstract, what types of cases might they be? That sort of thing.

DB: Let me think if I can mention one that... Well, I think a lot of the crypto cases, the digital asset cases, there's a whole lot of fact patterns in those. And it's no secret that a lot of people thought the SEC was stretching precedent to apply the Howey Test to crypto. SEC people thought, "No, it's not stretching it. Howey applies to everything." And they've applied it to... SEC puts out the list of chinchillas and whiskey and all the things that Howey applies to, and why should digital assets be any different? But digital assets are different. And there's also the focus, the public attention, Congress is interested. It's a whole thing in and of itself.

So like a digital asset case, if you're bringing it against a market participant, that has not been subject to an exchange, for example. One of the cases was the first time you bring it against a certain entity for not registering. You conducted this activity and you failed to register your activity as a security registration. And this entity wouldn't be the issuer, but might be, again, some intermediary. So that type of thing would be the type of case that would get that type of attention.

KD: Gotcha, okay.

DB: The other area generally would be insider trading, because those fact patterns often are novel fact patterns. Who's getting what information and how they got it. And so that would be the type of area that might raise the type of question that you and general counsel would get involved in. Yes, that seems logical to extend the principle to this entity, but the SEC... Increasingly in those types of situations, people will raise the defense, "Well, it's not covered by a rule. We need notice. There was no notice that this person would ever be covered." That would be the type of objection that you would get in a case like that where you're extending it.

"Well, the principle's clear. You can't do X, and it applies to everybody." And, "Well, we never knew it applied to this type of person." So whether you agree with a substance or not, you know that that type of defense is coming and so the Commission needs to be aware of it. And there's different views on the Commission about when you extend a principle through an enforcement case, is that fair to everybody out there? There's this element, people will say, "Well, we should know the rules before, not after we do something, right? So if you wanted these people to be covered, you should tell us." And then people in the agency, some may say, "Yes, that's right. We should have done a rule on it." Others will say, "The principle's out there. You should get a lawyer before you do these types of activities." And any lawyer will advise you, "Don't do it." So anyway, but that's the type of debate that happens.

KD: Okay. Did you also have an amicus group in the general counsel's office?

DB: No, the appellate division would handle all the amicus briefs.

KD: Okay. How active were you in the amicus area during your time?
DB: It happened occasionally. We occasionally got requested to do it. I wouldn't say it was a huge load, but we did participate in several. I don't remember which ones, but I remember we did participate in several. My impression from talking to others is that the practice is somewhat diminished from what it might've been at the peak. But we still did it, but maybe not as much at another time.

KD: Okay.

DB: And we would do it, when I was there, basically when we were asked. We wouldn't search out things to do. A court would ask us, or a party would ask us to do it, and then we'd evaluate whether we should do it or not.

KD: Okay. It sounds like during your time, you're really doing a lot of responding or reacting to what's happening out there. There's a lot of new things happening. Did swaps come up again, I think, and also SPACs?

DB: Well, swaps, yes. So there was finishing up the rule-makings from Dodd-Frank on swaps. I don't remember the exact sequence of the security-based swap execution facilities and repositories, the licensing and finishing the swap regulations, that was on the agenda. And SPACs were another issue that... The SPAC rule-making was also ongoing when I was there.

KD: Okay. This is a long time after Dodd-Frank. Why were the rules still being made at that point?

DB: That's a good question. The CFTC actually ended up, under Chair Tarbert, finishing all the Dodd-Frank regulations. So technically even CFTC finished everything like in 2019, 2020. We did the bulk of it before that, and there were just a few things that were persistent. After the initial push, after the basic infrastructure got in in the early years, these other things got... I wouldn't quite say back burner, but the urgency had dissipated to get those other things done, and they were hard to do. So the inertia of finally completing all these big complicated rules where there wasn't the urgency, got extended out. And I think that's what happened to the SEC as well. SEC has so many pressing responsibilities that it's really a question of prioritization.

You didn't quite ask me this, but I just have to say it at this point in time, that being at both agencies, Dodd-Frank was passed really... And it wasn't so apparent at the time, but 95 percent of the swaps market is really CFTC sided. The security-based swaps, that's important, it's part of Dodd-Frank, but really, the bulk of swaps are not security-based swaps, they're just swaps. And so as the implementing regulations were going through, it became apparent, and I think Mary Shapiro, the chair of the SEC recognized it at the time, really let the CFTC go first on it and let them do their regime. And even if that means that we're going to end up having to follow them, that's okay, and sort of swallow the agency's... you know, didn't get hung up on agency pride and, "Oh, we're co-equal on this," and realize that the bulk of the market's there at the CFTC.

So that's a function of how it happened. The CFTC ended up doing a lot of these things first, and then the SEC would follow on to the extent they could. And by the later years, the CFTC regime had been up and running, so it was a good model, the industry had accepted it, and the SEC could just accept a lot of what the CFTC had done. But the other thing that Mary Shapiro did, is when this was happening in real time back after Dodd-Frank was passed, there were these joint rulemakings: there was the swap-definitional rulemaking, the swap-dealer-definitional rulemaking. Those had to be done jointly. And SEC had, in addition to Title VII, which is the swaps and security-based swaps, had all sorts of other obligations coming out of Dodd-Frank. And as I said, on the swap side, they were really 5 percent of this, and it was mostly a CFTC thing.

Mary Shapiro prioritized that within the SEC to work with Gary Gensler at the CFTC and get those joint rulemakings done. Those were really gating rulemakings for the CFTC. The CFTC couldn't have done what it had done as quickly as it did without the SEC being in partnership.

And Mary Shapiro committing to working with Gary to get those fundamental swap definition and swap dealer definition rulemakings done, so she put those on the fast track when she was chair. So the SEC, I think, and Mary deserve credit for coming out of the gate real quickly, working with the CFTC to get the whole thing going. But always the security-based swap thing was—the SEC has so many other priorities, it just never really rose to something that... It sort of kept getting pushed later to get done. And they could follow the lead of the CFTC.

KD: Okay. When Gary Gensler... I assume Gary Gensler approached you to be general counsel, is that the way it worked?

DB: Yes.

KD: What did he talk about? What did he want to want do so far as the SEC could have a program?

DB: Well, one was the treasury market. The SEC's authority under the treasury market had really not been exerted, so that was going to be an area of focus. Market structure was another focus, looking at that. Equity market structure, and then the climate rule. Those are really the... Let's see. Well, I think if I had to rate the top three, equity market structure, climate, and treasury market, plus all the other things that ended up happening. But those were the marquee issues and challenges, which, as I said, CFTC, we just finished, under Chair Tarbert, all the Dodd-Frank rules.

So at CFTC, we were entering into a post rulemaking phase. And the SEC agenda at the time, in 2021, starting out there was all of a sudden a full agenda. So that was really an exciting opportunity for me to reunite with Gary. And I had expressed to him that if he needed help, I was certainly interested in helping any way I could. So that's sort of how that relationship developed. But things like that, treasury market, climate, equity market structure were issues that were being teed up.

KD: Okay. You said they were being teed up, which ones actually made it to the green?

DB: Well, climate and treasury market were the ones that... Well, there were proposed rules on all those areas. There were proposed rules on equity market structure. Before proposed rules, there was the climate rule that got proposed, a number of rules on treasury. The treasury dealer registration, treasury trading systems, and treasury clearing. The treasury clearing was finalized. Treasury dealing, the dealer rule was finalized too. The dealer that got involved in the litigation. Equity market structure, two of the rules got finalized. The climate rule was finalized as well. The climate rule then was challenged, and now the SEC has decided not to defend it anymore. So we'll see where that goes.

So there's varying degrees of implementation and challenge depending on the particular rule. Equity market structure hasn't been challenged legally, but getting the rule out of the agency was not the final step often for a number of these things. There was the additional appellate stage of getting it past the courts. So just getting the rulemaking out of the agency was not the end of the game here.

KD: Yes. Was that increasing? As far as you could see, was that a change from the way things had been 10, 20 years ago?

DB: As a matter of degree, I think so. Certainly, as we talked about earlier, SEC rule makings have always been challenged, and there have been periods where people had a lot of success challenging SEC rulemaking, so the agency's record and reputation in the courts has waxed and waned.

Courts throughout history have not been hesitant to second-guess the SEC. I'd be curious to see what the other ones you've talked to, to see their responses on this, but I've looked at a lot of past SEC cases, and as I said, the courts have not been hesitant to overturn SEC actions throughout history, but what's different recently is the willingness of industry, trade associations and the mainstream participants, to challenge...

I think in the past a lot of the SEC litigation goes into several categories. First of all, there's private actions. Okay? A lot of cases get into the courts where private litigants sue each other that don't involve the agency. They're challenging some interpretation of the securities law, not necessarily the agencies. That's one case.

The other case is where the SEC is going after a particular entity that could be life or death or significant consequences for that single entity and that entity will challenge it in court. Again, that's happened throughout SEC history. What's happened recently is more like the trade associations and well-established market participants, but mostly the traders who have ongoing relationships with the agency on a daily basis.

Traditionally, some of those have been much more reluctant to actually litigate the agency, because they don't want to jeopardize their ongoing working relationship, and suing the agency would be seen as a declaration of war against the agency, and they're concerned that that would jeopardize that working relationship. I think in the last several years, that concern has not really prevented people from suing the agency anymore. They felt that the stakes were high enough and the working relationship was not... That it was already somewhat not great. So we've seen greater trade association challenges in recent years to the rule makings.

KD: Interesting. So the gloves are off, so to speak?

DB: Yes.

KD: How much of your time as general counsel were you concerned with crypto? Because for the average person, this was on the SEC's plate the whole time. There was the struggle with crypto.

DB: Well, it was definitely part of it. When I was there we got a specific crypto person. When I started out, there was no single person devoted to crypto in the office of General Counsel, but then there was so much going on in the agency on it that we needed somebody, just a couple people, really, to devote significant amount of time. One person full time, another supervisor about half time, on it, to keep track of the task force, internal task force, to keep up with enforcement actions, to work with the chair's office. So the office had an increase in resources on it, and then I spent a good chunk of my time on it. It didn't consume me, but it definitely... I was spending time on it for sure.

KD: What was happening beyond just reacting to the cases or concerns about fraud or markets that were not functioning properly? What was the SEC trying to do programmatically?

DB: Well, we were trying to develop an end game, basically. The goal was to get a regulatory regime. The question was how to get there. So the choice really was between coming out with a rulemaking, or the other option which the agency was pursuing, we wanted to do it, was to try to negotiate a settlement in the enforcement cases to try to get through negotiation with these enforcement cases.

"If you do this, this will be permitted," basically. Through negotiation, get some rules of the road, and then after you got that, after you develop that, you could move that into a rulemaking and develop a broader rule rather than sort of declare, "Here's the rule," and notice a comment.

The agency was trying to get there through that method. The problem, what happened was FTX blew up, and when FTX blew up, we got hammered, criticized from both directions that, "You hadn't done enough. You hadn't done enough to prevent... You were too lenient... Because of your leniency FTX happened, you weren't watching, you weren't vigilant, it's on your watch, it's your fault," the agency was criticized for that. The agency was still criticized for clamping down on the industry, not allowing innovation, being too legalistic, regulation by enforcement.

So the agency was in a really tough position, but as happens when there's a major blow up, big collapse, big fraud on your watch, so to speak, the regulator gets blamed, and that creates a very defensive posture for the agency. So after the FTX collapse... And it wasn't just the FTX collapse. That had been preceded by events earlier that year. Other entities getting into trouble that you're going to negotiate your way out of it...

The agency ends up retreating to the harder enforcement line in those types of situations. It can't, "Okay, well, let's discuss." I mean, it just doesn't work in that environment where you have massive fraud. So that polarized the entire situation and made the negotiated process forward much harder to pursue, if not impossible to pursue.

KD: Okay. Some of the specifics. The SEC took action against some celebrity touts that were promoting Bitcoin. Was that something that your office weighed in on?

DB: Well, again, I don't remember the particulars, but yes, Enforcement would've proposed them. We would be at the table with them recommending Commission, and so yes, those occurred at that point in time.

KD: There was also insider trading action against Coinbase.

DB: I just don't remember. Again, I can't recall the particulars of that. I can't recall some of these particulars we were dealing with. There's like 20 a week or something like that. There's a lot. I know the major ones stand out, but they're still... I have to go back and check the particulars.

KD: Yes, that's okay. I just wanted to get a sense of what some of the highlights were as you're trying to bring some order out of this chaos.

DB: Well, I guess there was a lot of litigation against a variety of entities at the time, and there was Coinbase, there's Ripple... There's two types. There's the issuer, or issuer issues, whether the issuer should have registered them as securities, and then there's the intermediaries, who are

trading things that issuers didn't register as securities, and there's a number of entities in each of those categories. There was a lot of high prominent litigation going on with these.

KD: Okay. Anything else we should talk about regarding your time as general counsel at the SEC?

DB: Well, I think you mentioned the breadth of the rule makings that were going on. When I got to the SEC and I talked to people, people would say, "Oh, the general counsel is the sixth Commissioner," something like that, and my experience was very different. There were five Commissioners when I was at the SEC. There was no sixth Commissioner as a general counsel. I think the significant challenge, as far as I was concerned, was ensuring that rule makings that were initiated in one division of the SEC were people with expertise, and we had our experts at OGC.

We had our Corp Fin team, we had our IM team, and we had our Trading and Markets team, and we had subject matter experts, many of whom had worked in those divisions, and there was back and forth between the divisions and OGC in terms of careers and people. We had people for varieties of stages of their career, some who'd been decades in these subjects who knew it cold. Some were younger attorneys who were learning it.

With the divisions at the SEC, I'd say 160 attorneys in OGC, I said 55 of these are in what I call the agency operations, and then we had the appellate division, the division that I said, the number of attorneys who are actually working with subject matter on the divisions, it's only a few dozen. We have 11 or 12 on Corp Fin, another 10 or something, I forget the exact numbers each working with the division. So when you're getting multiple rule makings for multiple divisions coming through, and the division will set up a rule to the Commission, a rule that...

In SEC area, when I was in private practice, we got on many securities issues, you'd have partners who were Corp Fin specialists, and then you have other partners who were brokerage dealers, and when we get a securities issue, part of the thing was making sure everybody in the firm who might know something about it was aware of it so you get the best legal advice to the client. But securities law these days is so specialized in each of these areas, you could spend an entire career as a broker-dealer lawyer, and you're not the person that you would be the go-to person for a Corp Fin question. The statutes are different, the whole expertise is different, or examinations and enforcement.

Part of the role of OGC in this environment with all these multiple rule makings was making sure that all the appropriate people with all the appropriate expertise were reviewing the rule to make sure there were no unintended consequences of a Corp Fin rule doing something or having some effect on something that... I am an investment company or whatever. It's sort of easy to say, but I think it was one of the challenges we faced, and the SEC faces it institutionally. Not to get into stovepipes, to break down these, but I think IM has 80 attorneys on its own. They have a whole staff there. So you get a very well-developed rule, very IM-specific, and I'm not picking on IM, I'm just using them as an example, but how does that affect, what do the Corp Fin people think about it, and who's got the cross-cutting knowledge? There were people at OGC that did. So part of our function was to help integrate these things.

As general counsel, the role was to provide sound legal advice. I wasn't really a Commissioner opining on what they should do or not. I don't know what it was like when people thought that.

Maybe a different day, maybe a different chair too, what the chair wants his GC or her GC to do, but I had my hands busy on just providing sound legal advice and ensuring that we were providing that legal advice to ensure that the rules were—it was up to the Commission whether to take these litigation risks or not. None of what happened, none of these legal challenges and what we ended up facing in courts were a secret. It was no big surprise what issues were challenging for them were but make sure that the Commission's going into it with the best defense possible, and it's aware of those issues. So it was a very interesting time to be there.

KD: Tell me about the decision to move on. Did you go into private practice again?

DB: No. When I left the CFTC—people can do the math here, but you can see, it's all on the internet anyway. When I left the CFTC the first time, when I left after being general counsel in 2013, I had 30 years of federal service, and so I had never intended... When I graduated from law school, I never intended to spend 30 years in federal service. I had the choice at a time in the late eighties, they came to me and said... Well, not just me, but as a federal employee, "Do you want to go into FERS or do you want to stay in the CSRS?" The CSRS, Civil Service Retirement System in effect at the time, had a much higher payout on your salary base than if you switched over into FERS, although the FERS had the savings plan, and I said, "I will never be in the federal government that long where CRS is going to give me any benefit," and then 20 years later, something years later, I ended up leaving, but I had these positions that we've been talking about, permanent subcommittee on investigations, deputy assistant secretary at DOE, general counsel at CFTC, which were just wonderful, wonderful opportunities.

For a lawyer to be where the action is, Congress passing a law, doing congressional investigations, it was very exciting stuff for me to say the least. So I left the CFTC after 30 years, and then I got this opportunity to come back as a Commissioner of the CFTC. So I said, "Okay, I'll go back to federal service," and then Gary gave me the opportunity to come back to do this agenda, this very active, exciting agenda at the SEC. I said, "Well, that's another great opportunity," but by that time, I'd been back in federal service for another five years, and so that put me up to almost 35 years of federal service, and as much as I enjoyed it, it's not the only thing I've ever wanted to do.

Again, it was just time again to do something different. Both times I felt... I left the CFTC after 30 years nearly complete in Dodd-Frank. Both times I left, I felt, "If I don't leave now, I might not get that other opportunity that I'm looking for," so there was just time... If I wanted another opportunity to do something different, it was the time to do it, and in government, as I said, all my government service is just fantastic and great, but I did want to spend more time in the private sector. I enjoyed what I did as the SEC and the CFTC, but I also wanted it to be on the side of doing rather than telling people how to do it.

KD: I get it.

DB: I wanted another shot at doing that. So it was time again to move on, and Mitch McConnell... I'll wax a little philosophic here, but Mitch McConnell really said it best when he announced last year that he was not going to run for a majority leader. He'd been Senate Majority Leader for how many years, and he's still a senator, but he said, "Next senate, I'm not going to run for majority leader," he gave a speech on the floor of the Senate, and he said, one of the underappreciated talents in Washington, one of the most underappreciated abilities in Washington DC is to know when to close one chapter in one's career and move on to the next,

and there's just a lot of truth in that. I left both times when the going was good, which is the hardest time to leave, but I felt if I didn't... I wanted that next opportunity. So that's the reason I left both of those spots at those times.

KD: Great. Anything else we should talk about regarding your time?

DB: No, it's been... Both agencies... I do want to say that whoever's watching this, to put it down historically, I've spent a lot of my time in government, and I really wish... You asked about the CFTC and how I thought it worked. I wish Americans really had the opportunity to see how the government works, because it does work, and the criticism, waste, fraud and abuse and whatever, we have inspector generals whose job it is to figure that out, and they issue reports when they find it, and there's checks and balances, and so it does get found out. It does get rooted out.

It's not obvious where it is, but it takes a while to dig it out. You can't just say, "Oh, 10%, boom." We have what's built up over the years, the CFTC and the SEC, we have the strongest capital formation and risk management price discovery markets in the world. We have been center for capital formation, and it's due to a couple things. One, it's due to American ingenuity in entrepreneurship in the business, but it's also in the regulatory system, that when people invest their money into the United States, a) they know what they're getting, because we have the disclosures mandated by securities laws, and we have the Securities Exchange Commission that is enforcing that, and they know that we have the rule of law, so if there is somebody who tries to steal it or do something inappropriate, there's a remedy, and they can go to a court and get it back, and that court decision is independent of politics or favor of opinion. It's going to be based on the facts.

That, in civilization, over the course of human history, is actually a rare achievement and a rare accomplishment, and we've managed to accomplish that, and it's through the decades of work by people at the Securities and Exchange Commission, and you really get that from working at the SEC, that sense of a higher mission that just going into work every day and processing some application for a broker-dealer or whatever it is, that you're really part of this bigger system and project, and there's a lot of pride in the agency.

I've worked with the agency for many years. The time I was there, it really comes through. I just wish the public could really see and appreciate that it really is... I can't speak for all the government. The government that I've been a part of really works, and it's helped build this country. So there's a reason that we have billionaires and very successful people and the country is as prosperous as it is, because we've got an economic system and a capital formation system that is trustworthy and reliable. So it works. It's got its faults. It could be improved. Every day, people go into that building and argue about how to improve it, but I just think once in a while it's important to... Without sounding corny or preachy, it's really important to say it, because it's unfortunately not getting said as much or as loudly or as prominently as it should be said, and the message is clearly not getting through.

So I appreciate this opportunity to say that message, because I firmly believe it, and I try to help people can benefit from this.

KD: Yes.

DB: Thank you.

KD: That's a great point, and I've heard a lot of SEC veterans voice the same kind of sensibility, that they're proud of what they did, and they think that it did work. I really appreciate hearing about everything that you did. This has been great, particularly laying out how the General Counsel's office was structured, things like that. It has been very valuable.

DB: Thank you, Kenneth. Appreciate it.

KD: All right. You take care.

DB: Bye.