Securities and Exchange Commission Historical Society
Interview with John Sturc
Conducted on July 14, 2006, by Kenneth Durr

KD: This is an interview with John Sturc on July 14, 2006 in Washington, DC by Kenneth Durr. Thank you for agreeing to talk to me. I would appreciate your describing how you got to the SEC, and some of your experiences getting there.

JS: In terms of how I got there, like most people, it was by accident. I had started my career in government service and after being a law clerk for a year, I was an Assistant U.S. Attorney in the District of Columbia from 1976 until either the end of 1980 or '81--I can't remember which. I went to a small law firm here in Washington and didn't like the experience.

KD: Why not?

JS: I think it was a combination of the mix of people I was working with and the mix of cases that I had. I was interested in something that was more challenging. A friend of mine, Alexia Morrison, who was my supervisor at the U.S. Attorney's office with me, was the Chief Litigation Counsel for the SEC's Division of Enforcement and I heard through a mutual friend that she was looking for people. I contacted her, and spoke with her and John Fedders, and they offered me a job in the Trial Unit of the Enforcement Division, which is where I spent my first two years.

KD: What was the function of the Trial Unit?

JS: The function of the Trial Unit then, and I think it still is today, is to be the litigation specialists who take a case once it's been determined that (a) it's been authorized and (b) it has not settled, and go to court and try to win. For want of a better term, they're the barristers of the Enforcement Division.

KD: Did you qualify for that because of your experience in the U.S. Attorney's Office?

JS: Yes. At the Commission at the time, and I think it's still true today, the lawyers in the investigative units either did not have experience going to court or did not have a lot. The Trial Unit tended to be composed of either more experienced lawyers who had been at the agency for some time or people who had come from the outside who had been to court quite a bit. One nice thing about being an Assistant U.S. Attorney is you go to court a lot. It was something that I was used to and other folks weren't.

KD: Did you handle any of the insider trading cases?

JS: That's what I was really doing when I got there. There were a series of insider trading cases which rose out of a merger of a company called Santa Fe International, which was an oil-drilling company in California that was acquired by Kuwait Petroleum Corporation, a government-owned enterprise in Kuwait. There were a significant number of options purchases--call options in advance of the merger; those were investigated before I got to the Commission. Emergency relief was obtained in a couple of them. And then I took them over and there were four or five of those cases, but I got involved in the litigation phase of them.

KD: Did Robert Romano precede you?

JS: Yes.

KD: Was he the one who started this case?

JS: Over time yes.

KD: Was he in the Litigation Unit?

JS: Right. And when he was the Deputy Chief Litigation Counsel, he and I overlapped for, I'm going to say, about a year. When he left to go to Merrill Lynch, I took over his job.

KD: It sounds like the cases growing out of Santa Fe were a pretty heavy workload?

JS: They were.

KD: So is it fair to say that insider trader was a focus of the Enforcement Division?

JS: Insider trading was a focus. An additional focus, which was also important, were transactions occurring through overseas anonymous accounts--principally Switzerland but also other jurisdictions.

KD: The two of those being related I would think?

JS: They were related and they became more related as history went on. There had been an earlier case which I was not involved in which was handled by the New York office of the SEC in terms of the work involving trading through a company called Banca della Svizzera International, where a freeze order had been entered and where the court had ordered the bank to disclose the identity of its customers in response to a subpoena which made the problem a government-to-government problem between the United States and Switzerland. That same issue arose in the Santa Fe case and so one of the focuses of the ensuing two years was how was a system to be developed by which the government of Switzerland would feel comfortable providing information to the government of the United States and nevertheless maintain its legal regime, and that took a couple years to work through. So that was a big part of what was going on in those cases.

KD: I would think that that sort of work would have been done on a very high level. I know John Fedders was particularly involved.

JS: Fedders was involved in it very much. That was among his major contributions, I think, to the agency. Michael Mann was very involved and he was sort of the staff lawyer in these two cases; he was a very bright guy and developed knowledge and expertise in the area. I was involved as well. The other thing that Michael and I developed was a strategy; what we wanted to do was to get, outside of the Swiss legal framework, as much information as we could about who the likely purchasers were.

KD: This is in the Santa Fe case?

JS: Yes, in the Santa Fe case, in order to make as compelling a case as possible that something illegal had happened for two reasons. One is, we didn't want the court case simply to languish because we were concerned that if it appeared to the court that no effort was being undertaken, that maybe we wouldn't get anywhere. Two, we wanted to make as compelling

a case of culpability as possible because the way we appeared to be headed was that the Swiss would insist on a standard of duel criminality, i.e., what had happened would have been a violation of Swiss law as well as United States law, and therefore it was not in violation of Swiss law to disclose this information. So that took a lot of work. Michael had the imaginative idea of taking discovery in England through Letters Rogatory, because there were some English witnesses, which was also a different way to proceed.

So it was an interesting and innovative effort.

KD: I've heard the insider trading initiative at this point described as a program. And of course Shad had his big quote about hobnail boots.

JS: Right, right.

KD: Would you characterize things this way?

JS: The Enforcement Division likes to call everything a program and I don't know why and it has been since I can remember.

KD: How coherent was this push on insider trading?

JS: It was coherent in certain respects and not coherent in others. It was coherent in the sense that the cases were identified as ones that the agency was interested in pursuing and investigating and so that was communicated both internally within the staff and I think externally to the community, which was beneficial because that meant that people who thought that there were violations would be more likely to report them than otherwise.

It wasn't the case that that's what was communicated; I don't know if that makes it coherent or not but that's what happened. People were encouraged to work on these cases and it was something that was considered interesting and desirable to do.

KD: Was a lot of this push from the top or coming from the changes that came in with Shad, or was insider trading an area of focus that people on your level and below were interested in?

JS: I think both. Yes, Shad was concerned about it and so was Fedders. The other thing that was occurring was that this was a period of very significant merger acquisition activity and there was a lot of perception in the marketplace that insider trading was occurring in significant levels. That was eroding confidence in the marketplace. Some people say that insider trading is a victimless crime, so to speak, but there were some victims in the options markets -- people who are obligated to make markets had to sell contracts. And then they would have to pay on those contracts and they were stuck, essentially subsidizing people. So it was not victimless.

KD: How did the Santa Fe case work out? Did you take that through to the conclusion?

JS: We did and ultimately the way it worked out was in the end, the government did provide the names of the traders pursuant to a mutual assistance agreement in criminal matters and once that transpired, the case settled. Now this is the New York case; there were a other cases. There was one in Seattle and there was one in San Francisco. There might even have been a fourth one; I can't remember.

KD: Were you also involved in the Thayer case?

JS: I personally was not, except on the side. The Thayer case was really handled on an investigative basis by Carmen Lawrence and Phillip Parker. Alexia was the trial lawyer in that case.

KD: You said on the side--would that just be informal sitting around and talking?

JS: Yes. I was down the hall; I'd hear about it but I was not working on it.

KD: How much of that took place?

JS: A lot.

KD: I'd like to get a sense of what the culture was like in these years.

JS: I don't know that it's any different now and it's not different than my experience in the U.S. Attorney's Office. I think one of the advantages of government service, compared to my experience in the private sector, is it's very collegial. First of all, people are more likely to be working on similar matters than in a law firm. Secondly, while people worry about time, you're not marketing your time and you're not selling your services on a per-hour basis, so people have more opportunity to talk to each other about what their common professional interests and their common issues. Because people are working towards a common goal through the agency, there's also more of a sense of a common mission. That tends to promote, I think, a high degree of collegiality, like being on a faculty.

KD: The sense of common mission, I would think that it must change over time and place--

JS: I'm sure it does.

KD: What was the focus in the early '80s? What were the priorities or what sorts of things did you and your colleagues share as part of that sense of mission?

JS: I don't know that it was that profound. Insider trading was certainly a significant one; there were a lot of market manipulation cases at the time in the penny stock and other markets. There were a number of cases involving, for lack of a better term, various get rich quick schemes--gold for tax dollars-type stuff. There were some accounting and financial reporting cases but not as many, although that was already becoming an increasing focus and that was something that was a concern both to Fedders and to Shad. Before John was in the Division of Enforcement, the accountants were all sort of assigned to different groups of lawyers on a one-on-one basis. John centralized that and I think appointed the first Chief Enforcement Accountant and brought in a very high-energy partner from what was then Peat Marwick Mitchell, now KPMG, to be the first Chief Enforcement Accountant.

KD: Who was that?

JS: Glen Perry. That was very significant, I think, because Glen came from a background of auditing big companies. He had a sense for what was right and what was wrong in terms of accounting and created a sort of high visibility, high profile role for the accountants within the division that continued and indeed has expanded.

KD: These were the things the lawyers would have missed?

JS: Of course they would.

KD: At this point you get promoted to Associate Director?

JS: I did in 1984, yes.

KD: How did your job change at that point?

JS: A lot, because I didn't have time to do litigation, although I did keep my hand in it a little bit probably more than I should have and changed more to a focus on supervising a large number of investigations.

KD: And you've got a bunch of teams that you're watching?

JS: Right.

KD: How much of their focus was insider trading?

JS: It turned out to be a lot but that was by happenstance as opposed to design. The reason that I say that is in 1985 we got assigned to what became the Dennis Levine insider trading case. At the time it was not a matter that people were rushing on.

KD: Why not?

JS: It appeared to be a road that would lead nowhere, notwithstanding the Santa Fe and the Banca della Svizzera cases. There were other cases that were extant regarding trading through overseas banks that weren't going anywhere--very difficult to figure out. And so there were a number of them where people were spending a lot of time and effort trying to figure out what had happened and who the traders were without getting anywhere, and so this had the appearance of being just another one of those.

KD: And those other overseas bank cases, did all of them just fade away?

JS: The one I'm thinking of did. I don't think any case was ever brought from it, although there was a lot of work.

KD: There was another notable case in there that became the Carpenter case.

JS: Right.

KD: The journalist Foster Winans?

JS: Right.

KD: Was that in your office?

JS: I did not work on that one. That was Lynch's case and I'm not remembering who the staff lawyers were on it. I know again that was another case that Alexia Morrison took to court.

KD: Let's talk a little bit about the legal underpinnings to what you were doing. My understanding is that you could really have two kinds of insider trading cases--one growing out of the more traditional, is it 16(b), which deals with real insiders—corporate officers and holders of 10 percent of a company?

JS: Not really. I mean you're right, and that was in terms of U.S. securities law the dominant issue at the time. In order for there to be an insider trading violation, there has to be a purchase or a sale of a security by a person while in possession of material non-public information and then there has to be a breach of a duty of trust or confidence and that initially arose out of a case called Chiarella in the Supreme Court. Chiarella was a printer and there were a lot of cases like this. Chiarella was a printer in New York who would print up offering material for tender offers. He would take the information and then buy or sell stock using it. The Supreme Court held that he could not be liable in the absence of proof that he had breached a duty, which they defined in terms of a fiduciary duty. And the question became, well what's a fiduciary duty? There was a lot of pessimism -- could you make a claim as to a person who had no duty of loyalty to the shareholders of the company, whose stock one was buying or selling, which created a conundrum.

KD: And this was pessimism within the Commission?

JS: Yes, I think so because Chiarella was a significant loss, and which created a conundrum because if I was hypothetically the investment banker, not for the company being acquired but the company making the offer, in theory I could do whatever I wanted. I didn't owe these shareholders anything.

The Misappropriation Doctrine was a response to that. It was initially developed and frankly I'll have to look it up; I can't remember the name of the case. There was a criminal case in New York in which the theory was initially developed and the theory arose out of the application not of insider trading law but in the mail fraud statute. The theory which ultimately was accepted by the Supreme Court in the O'Hagan case more than a decade and a half later or maybe a decade later--was that if the information was being used in breach of a duty of trust or confidence, that was sufficient, even if it was not a breach of duty of trust or confidence with the person who was on the other side of the transaction.

KD: So you were working under this Misappropriation Doctrine?

JS: …which was not yet widely accepted. There was a District Court opinion that was affirmed by the 2nd Circuit; there was then a case winding through the courts that the Supreme Court ultimately decided in 1983, called Dirks, which dealt with a different issue—tippee liability which was also a loss for the Commission but which contained a footnote -- Footnote 14 that suggested various different kinds of duties that could be implicated in insider trading law.

One of the issues that was being developed in parallel to the overseas secrecy cases were a number of cases not dissimilar in terms of their facts to that which was in *Chiarella*, cases involving insider trading rings where the source of the information was the office manager for a major law firm, printers again, and then that again came to the floor in *Carpenter* because the information as to *Carpenter* was different in kind. It didn't have anything to do with the actual fundamentals of a particular corporation; it had to do with what was the *Wall Street Journal* going to write tomorrow. *Carpenter* was prosecuted on the theory that the fraud was on the *Journal*; it was the theft of its intellectual property fundamentally and

then the exploitation of the injury to the *Journal* being that if its intellectual property was stolen and misused that would cast doubt on its credibility as a publication--its integrity which in turn was what it was really selling in the long run.

KD: As you watched these cases unfold and seeing things happening in the District Court that were putting into question or suggesting new avenues, how were you adapting your enforcement approach and instructing those teams to do something?

JS: People would start to focus on proving what was the duty, what was the nature of the relationship between the people who had information, how they conveyed it, what instructions were given with the information as to use or misuse. That became a major focus of what people were doing. The other thing that was taking place on an investigative basis was that given the prevalence of insider trading rings—that's what I'll call them—and people who were in a position to acquire information on a variety of matters. There are two different kinds of insider trading cases. There are the one-off, corporations being taken over, somebody on the Board knows of it and tells their friend at the golf club and that person says, oh, hot tip, I'm going to do something with this. Then there were the cases involving people who were really in the financial services industry, whether directly for broker/dealers or for service providers, who would regularly misuse information and those became a focus on an investigative basis. People would look for patterns and so that was a big part initially in the Dennis Levine case, trying to figure out what's the pattern because once you knew the pattern then you could better find out who the trader was even if the trading was coming through an overseas account--or conversely in other cases, the source.

KD: Even though you've got these cases that you're looking at there's no definition of insider trading. You can't say at any given time "if we prove this we're good," right?

JS: There wasn't as clear a definition as one might like. The two issues that were always in play were—one, the issue of duty and the second, was what is the level of knowledge or use, meaning, is it enough merely to know the information or must the information have been used for a particular purpose? That typically was a lesser issue.

KD: Duty being the first one?

JS: Duty being the first one.

KD: Which gets to the fiduciary.

JS: Right, that is the fiduciary duty issue.

KD: Are you just getting more into the fraud angle?

JS: It was more "did the dog eat the homework" or not. "Yes, I knew this but I thought it was a great company and didn't"--the information didn't matter. But there's a split in the courts about whether the standard the Commission had to prove was possession, knowledge versus use, i.e. something that motivated the transaction which is still an issue, but it's been more clarified because the Commission has issued rules on that subject. It amended 10b-5 in the insider trading area in the 1990s to essentially create a rebuttable presumption that if you possessed it you used it.

KD: So before that there's the issue of scienter?

JS: Right, which is the same thing, but that's an issue in every case.

KD: You got the Insider Trading Sanctions Act--

JS: Right.

KD: --in '84 or so?

JS: Correct.

KD: Where did the push for that come from and how did that change the way you did your work?

JS: The push for it again came from Shad and Fedders. It was valuable in that one of the problems that the government had been facing prior to the act was that, from a financial point of view, insider trading carried little risk in that the liability was limited to repayment of profits plus prejudgment interest. So if you were trying to do a risk reward there was much risk. The Insider Trader Sanctions Act created significantly greater risk from a financial point of view. Now in truth, I've never been of the view that that's the real deterrent; the real deterrent is people being afraid to go to jail. What made the effort on insider trading successful ultimately was not just that, but the active cooperation of the Justice Department.

KD: Did the RICO statutes have anything to do with that?

JS: No, it didn't. First of all those are very difficult to charge and prove; they were rarely used in the securities law areas. Sometimes, but rarely. More fundamentally was the fact that was a level of risk that most people--at least in the insider trading ring type cases where you've got something that is a true scheme rather than a thoughtless act that's the kind of sanction that people think about.

KD: As long as you've got the Justice Department involved, did you throw people in jail before insider trading sanctions?

JS: Yes and subsequently but equally importantly--I mean one of the problems in any kind of white collar case, this isn't just true of insider trading; it's true elsewhere, in terms of development of a case, although it's more true in insider trading than accounting cases--actually it's much more true now that I think about it--is that the ability to prove a case directly is very limited absent the cooperation of an insider. And the incentive to become in effect a state's witness is not high -- you're going to be a pariah; you're going to be a snitch; you're going to be a fink--whatever you want. You will be admitting one's own culpability and so why do that? If the reason to do that is stay out of jail, that's a strong reason to do it. That made a huge difference in the ability to investigate and ultimately resolve these cases.

KD: How many instances like that did you have before the bank case started?

JS: There were certainly some. There was a major insider trading case that's before my time that the agency brought involving some bankers at, I think Lehman and another bank, called the Courtois Case, which is actually written up in a book by Jim Stewart called *The*

Prosecutors. There was a parallel criminal investigation in connection with the Santa Fe International case which ultimately did not result in any criminal prosecutions but which was of great benefit in terms of one, establishing duel criminality and two, keeping the momentum up in the case. So that was a big benefit.

Obviously, there was a criminal case in Thayer. I don't remember the others; I'm sure there were.

KD: You weren't spending lots and lots of time deposing people who had turned, so to speak?

JS: No.

KD: Let's talk a little bit about getting to that big instance when you did.

JS: Yes.

KD: How did the Bank Leu case come to you?

JS: It was really pretty much by accident. There was an anonymous letter sent to Merrill Lynch. They did an internal investigation and reported that to Gary Lynch and then Gary assigned the matter to me.

KD: So Gary Lynch is running Enforcement at this point?

JS: Yes

KD: What was the transition like from Fedders to him, putting aside some of the un-pleasantness--

JS: Right.

KD: --did he bring a different approach to Enforcement?

JS: In terms of substance I would say no; in terms of style I'd say somewhat yes, but it really is just a function of personality. The transition unfortunately was abrupt and it was accompanied not surprisingly by a period of uncertainty because Gary was initially appointed as the Acting Director. It was not immediately apparent whether he would remain as the Director or not at the time. Gary and I are the same age; we were then the two senior people at the ripe old age of 33 and 34. Gary had gray hair prematurely but it wouldn't have been surprising if somebody with more gray hair showed up on our doorstep, so there was some uncertainty there.

KD: Was there uncertainty as to what the focus of Enforcement would be as to insider trading?

JS: I don't think so. Gary had been at the agency his whole career. He had been doing what he was doing for a couple of years. I know Fedders thought very highly of him, so did Chairman Shad. We weren't getting a new Chairman and at the end of the day the Chairman sets the agenda. The Commissioners weren't turning over; it was a reasonably consistent group.

KD: Before we sidetracked off into the transition we were talking about what became of the Levine case.

JS: Right.

KD: Can you just give me a sense of how that developed within your office; how you figured out who to staff it and what your role was?

JS: My role was, certainly through the point where we got to bring a lawsuit, or close to being at the point of the lawsuit, largely supervisory. The lawyer was working on it day-to-day was Peter Sonnenthal. He had a financial analyst working with him and I regret that I don't remember his name. And also regrettably he died some years ago.

KD: Ed--?

JS: Yes.

KD: Freeman?

JS: No. But Ed is the right first name. There were two problems; one is that initially the bank wasn't providing any information and it was asserting that we didn't have jurisdiction over it. The second problem was that what we were initially following was not just the bank's trading but trading by a group of people in their own accounts which are a group of Merrill Lynch brokers and friends and relatives.

KD: Are these the ones in Caracas?

JS: There was the Caracas group and then there were others; it wasn't just them. Unlike the situations of which *Chiarella* was an example there were others; you couldn't just say well this information has to have come from X-bank or Y-law firm because there was no single link between and among all of the transactions. So that was one problem; the other problem was that initially the bank was not cooperating and asserting that we didn't have jurisdiction over the bank. And Ed Harrington is the name of the analyst. Peter and his supervisor, Leo Wang, may have found out from the bank; they may have otherwise. I think the bank was attempting to cooperate so to speak to the extent it felt it could without violating bank secrecy law, or the lawyers thought it could. They found out who it was who was managing the account of the bank, because eventually they learned that the bank was involved--the bank was trading in parallel because that would have come through a U.S. brokerage firm records. And they ultimately found out the name of the person who was managing the accounts, a fellow named Bruno Pletscher. Leo's supervisor was a lawyer named Paul Fisher and it was Paul's idea to enlist the assistance of the Customs Service to do what was called a border watch. And so a border watch was put out for Bruno Pletscher, meaning that if he came into the country, the Customs Service was supposed to give us a call that he was around. I gather one problem with working in the Bahamas is that there's not a whole lot to do if you're living there as opposed to being a visitor. So eventually Pletscher showed up in New York. The subpoena was ginned up and Harrington went to the Waldorf Astoria Hotel and found out the room he was in and knocked on the door and served the subpoena on him, which had the value of establishing clearly the Commission's ability to obtain jurisdiction over the bank to get the records because they had served an employee of the bank in the United States, which is where the two issues of what's insider trading and international accounts comes full circle because

that brought this issue back into the Banca della Svizzera and Santa Fe cases albeit with a different country but also involving a Swiss bank.

KD: Bank Leu was a Swiss bank?

JS: It was a Swiss bank but this particular unit was a Bahamian bank and so that then made the ability of the bank to resist the subpoenas much more difficult and put the bank in a different circumstance and I presume prompted the bank's lawyers, Harvey Pitt and Bob Rauch, to view the matter very differently and what I know about what they did really is what I read in the books as opposed to what they've told me. They're pretty discreet guys. But evidently that led them to get a different story of what was happening out of the bank.

What followed is the bank worked out an agreement with the Commission pursuant to which there were parallel paths. One is that the bank would provide information to the Commission short of the identity of the customer. The Commission would undertake a number of measures which would either seek to persuade the government of the Bahamas to permit the bank to disclose the identity of its customer or to put the bank in a position where it had a defensive necessity if it had to disclose the name anyway. So there were two efforts; one is that a subpoena enforcement action was brought under seal ordering the bank to disclose the name. Secondly a mission was sent to the Bahamas to persuade the Attorney General of the Bahamas that this was the right thing to do and so Lynch went to the Bahamas with Michael Mann; they convinced the Attorney General that the Bahamian Statute covered only banking transactions. This was not a banking transaction; therefore there was no problem and he initially agreed on it and then a short time later changed his mind, but he initially agreed.

KD: But it was too late by the time they changed their minds?

JS: By the time they changed their minds it was too late. Using that information the Dennis Levine case developed although we had a pretty good idea that Dennis Levine was the guy.

KD: Really?

JS: Yes, again based on just good investigative work by people who worked in my group, going back through the matters. One of the companies whose stock was traded was a company called Textron and Leo Wang remembered the Textron case, remembered taking Levine's testimony because he was a banker involved, and being suspicious of the guy. Based on that and another piece of information I'd rather not talk about, we pretty well thought it was Dennis Levine.

Once the bank's cooperation was obtained, then information and testimony was obtained from the bank. We also basically shut the case down; we weren't looking for information anywhere else, the idea being not to in any way to alert Levine or others with Levine that the government was even close and the Justice Department was working in parallel and so going back to your question about cooperation, what transpired was that the day that the lawsuit was filed Levine was arrested. What ultimately led him to become a government witness one would have to ask him but at the time all his assets were tied up; he was subject to a preliminary injunction and he was going to be arraigned. So there was a powerful incentive on his part to try to work things out, which he did.

KD: Did you really coin the phrase of *Moby Dick*?

JS: I think so, yes.

KD: So by the time you did that you had a sense that Levine was probably--

JS: I think that was a little later but it was around the same time, yes.

KD: Were you ever concerned about establishing the grounds on which this thing could be successfully prosecuted? It seems as if once you got into the Bahamas and once you got the name--

JS: Not really. There was some mild concern about the legal theory and I remember there was litigation initially in the Levine case. We got a temporary restraining order. We moved for a preliminary injunction. Levine resisted the preliminary injunction.

KD: What was the preliminary injunction to do?

JS: It was to enjoin him from violations of the securities laws but more importantly to maintain the freeze order on his assets.

And we had a good draw too. The judge presiding over the case was Judge Owen in New York who as a very good judge and Levine's lawyer, Arthur Liman, among other things argued that there wasn't a breach --that the insider trading laws were amiss but the advantage we had was there were 35 different deals and the facts which we developed and worked damn hard to do were pretty colorful. And somewhere in those 35 there had to be at least one where there was a classic insider trading violation.

KD: Classic insider trading being the fiduciary?

JS: Yes, that Levine was the banker for the target as opposed to the buyer. There was a lot of anxiety whether we would prevail, but anxiety over the legal theory was not what I was worried about. As part of the argument of the preliminary injunction there was a discussion about the misappropriation theory and the effect of *Chiarella* and I remember arguing to Judge Owen, because I did the argument myself, that one should not make too much of the *Chiarella* decision. It did not attempt to define insider trading; it was simply a holding that the jury instruction was wrong--that the district judge had made a mistake. And somebody later told me that I should have been a little bit more careful because it was Judge Owen who issued that jury instruction in the *Chiarella* case. He didn't say anything about it; he was pretty polite.

KD: Well at this point it's rolling out into the Boesky case and everything else that happened.

JS: Yes.

KD: Did this pretty much take up everything you were doing at this point?

JS: No, we had lots of other cases going on, but in terms of my own time, it was certainly 50-percent plus. At the end of the day it was my view that the other stuff was important but in terms of what was going to get the SEC either going or in hot water, as the case may be, this was the one.

KD: Were there any other developments on the insider trading front at this time?

JS: From a legal point of view? Yes there were. Bear in mind that the question of whether misappropriation was an accepted legal theory was accepted in the 2nd Circuit which was key. There was a subsequent case called Musella that went to the 2nd Circuit, also a printer case, where the 2nd Circuit accepted the Misappropriation Doctrine. The Carpenter case went to trial; the 2nd Circuit affirmed. The Supreme Court then affirmed on mail fraud.

KD: In the Carpenter case?

JS: In the Carpenter case but split four to four on securities fraud, meaning that the 2nd Circuit's view on misappropriation as an element of securities fraud was still good law but also clearly indicating that there were four people on the Supreme Court who didn't think so in that context. So there were cases in other Circuits dealing with the same issue and over time most of them were going the same way; there was one in the 9th Circuit for example which was a case of mine that was tried. I think there was one in the 7th Circuit which was a case of mine.

KD: When you say a case of yours--?

JS: Meaning folks under my supervision worked it up and I remember being involved in it.

KD: How much involvement did you have with the regional offices?

JS: More on a consultative basis than any direct basis. They didn't report to me and at that time the regional offices did not report to the Director of Enforcement. Chairman Levitt decided to do that.

KD: Would they have been involved in bringing and working on some of these insider trading cases?

JS: In many instances. Certainly the New York office was, and other offices were to a lesser degree, but typically it was to a lesser degree.

KD: And would your people go in and help?

JS: Again on a consultative basis but not typically on an active basis.

KD: You were talking about the legal developments and how misappropriation was working its way in the District Courts.

JS: Right. That was continuing and ultimately there was a split because the 4th Circuit took a contrary view as did another Circuit and I'm not remembering which one it was. And that's essentially what led all this to get resolved by the Supreme Court in the O'Hagan case.

KD: So your teams were working on the Boesky case; were you still there when Milken followed?

JS: Yes; that one quickly elided from one to the other because the Levine case broke in May of 1986--boy time flies. The Levine case was resolved in June of '86. Shortly thereafter

other people who were for want of a better term part of the Levine ring also were resolved, most notably a fellow named Robert Wilkis. The principal lead out of Levine was to Boesky so working up issues on Boesky and then sending a subpoena to Boesky for documents occurred--the workup was June--July; the subpoena went out I think early August. Late August, shortly before Labor Day was when Boesky made the decision to cooperate with the government or initiated discussions with the view to doing that; those were completed mid-September. So mid-September to November 14 was a period of developing Boesky's information and working with Boesky.

KD: That's the time which he's out there trading and wearing a wire for the SEC?

JS: Right, right, right.

KD: And you're involved in developing a case here I guess.

JS: Yes. Also all of this was very unusual for the SEC, extremely hush--hush. There were only a handful of people who were aware of what was going on; all the meetings with the Commissioners were closed. And by closed I don't mean normal closed--closed meant anybody could wander in out of the Commission meeting room, but with these --before you show up you've got to be authorized to come in and attendance was very limited.

KD: A big question would be the decision to let Boesky go out there on his own for a couple months.

JS: Right.

KD: It would seem from your point of view that would be a great thing to do?

JS: From an investigator's point of view, yes. There were two concerns. One was how does one maximize the investigative value of Boesky's cooperation, and this was something the U.S. Attorney's Office was very anxious to do. They really, really, really wanted to do it this way and so they were the people who were really pushing for it. It was helpful to us because it gave us a quiet period to talk to the guy and figure out what what he knew before the media circus began.

KD: But was there a sense in the SEC that "well this is not usual for us?"

JS: Absolutely, yes. A number of the Commissioners, Shad in particular, were very concerned. It was certainly unusual because inherent in this process was putting a fair amount of trust in somebody who admitted widespread violations of law, and who had custody and control over billions of dollars.

KD: Did you ever actually sit down and talk to Boesky?

JS: Yes.

KD: What was that like?

JS: He was an interesting person. When you're a government investigator, talking to somebody is a stilted conversation because it's just not a normal interaction. The government has enormous power to hurt people. There is either a guardedness or an

anxiousness--sometimes both. Boesky struck me as a person who, notwithstanding his public persona, actually had quite a bit of insight into himself and I mean in a psychological sense.

KD: Which maybe could explain the cooperation that he provided?

JS: I think so, yes. I think he had a sense that this was an unreal world he was in and an artificial construct.

KD: At this point are you starting to think about stepping down from the Commission?

JS: I didn't leave for another four years. This was '86.

KD: Then you went into the Milken case?

JS: And others. There was the Milken case; there was the Siegel case. At that point there was another line of cases initially dealing with the Jeffries firm and Boyd Jeffries.

KD: These grew out of the Levine case?

JS: Out of Boesky. Bill McLucas handled those and they in turn led to another group of cases which were ongoing.

KD: So by the late '80s you must have felt like the insider trading cases were never going to stop coming.

JS: The only issue I think was, how many could you get to before the statute of limitations ran out? The other part of it was that the Drexel case was fiercely resisted. The context here is what you see today: the government calls up corporation X and corporation X hires a law firm to do a self-investigation. It turns over everything it knows to the government because of its fear that it will be indicted and go out of business. That's a sea change. That thought process did not exist at the time and in addition Milken was the franchise--his firm was a big outfit. So they resisted fiercely; and the interaction between the government and a corporation at the time was just completely different. The effect of the Enron environment on how corporations react is just a sea change.

KD: Why didn't something like what happened to Drexel help create that sea change?

JS: I don't know. My guess is that it's two-fold: one is the ripple effects of the Drexel demise were not the same as the effects of the collapse of Arthur Andersen. Financial transactions are just much easier to move from place to place than the relationships between an auditing firm and a client; they're a lot more embedded. Secondly if you go back to what I said before, which was that Milken for all intents and purposes was the franchise, that was a different perception than what happened to Arthur Andersen where what you had happen was an auditor--and to be sure Enron was a big audit engagement client but as a percentage of Arthur Andersen's revenues I'm sure it was less than one-percent. And they would have gone on just fine without Enron as a client. And so the notion that the entire firm would be destroyed because of the conduct with regard to an audit partner in connection with a client was just real different.

KD: I talked a little bit about the culture of Enforcement and what things were like. Maybe I'm pushing for something more profound than there was, but did you see a change in the place you were working from the early '80s to the late '80s?

JS: Yes.

KD: What was that?

JS: First of all, when I got there, I think that the Commission was still a relatively small and frankly a relatively powerless agency, which the cases of the '80s and the efforts in the '80s did a couple things. One is that I think they began to focus public attention on enforcement of the securities laws and made it much more of a national focus--a priority. There was Congressional legislation in '84, '87, 1990; the budget of the Commission doubled in that period of time and it became much more of a focus. Secondly, for young lawyers and particularly young accountants, it made it a very exciting place to be. It increased the Commission's general visibility. I remember going to the airport in about '85--'86 or so and buying a ticket to get the shuttle to New York and I had an SEC credit card and I presented it to the person at Eastern Airlines which then ran the shuttle and they said oh, you're one of those guys? And that wouldn't have happened two--three years before.

KD: "One of those guys" being good?

JS: Yes, in a positive way.

KD: You and some of your colleagues were written up almost like you were rock stars or something.

JS: Obviously it was fun but in addition when what's you're doing becomes the subject of two Pulitzer Prize-winning books, one of which is a best-seller; they're both about legal issues, so they're going to be read by all the law students--that makes a huge difference in terms of the desirability of a place to be to work and I think the Commission became (a) competitive as a place to work with private employment and (b) certainly within the government competitive with all of the United States Attorney's Offices which I think for purposes of this kind of work was sort of the place to be.

KD: So there's a very noted effect then on the Commission itself and working in Enforcement?

JS: I think so.

KD: How about the impact of these famous cases on the law itself and on insider trading?

JS: I think clearly it had an effect on the law. I think it also had an effect on business culture. Certainly in terms of my perception in working with clients in the immediate aftermath, the consciousness about insider trading and concerns about it within industrial corporations and safeguards clearly improved. The other thing is that I think it also very much changed the culture and mores of practice within Wall Street about the uses of information, the need for client confidentiality, adhering to that, the importance of assuring the firm's reputation is not tarnished by what employees may be doing. The history subsequently shows that the Wall Street firms continue to have their issues but that's probably inevitable. But I do think that it did two things; one is, it increased consciousness in this area; secondly, it began an increase in the consciousness and power of the compliance function within those firms and

so I think that net in terms of having an impact beyond the particular matters, I think it did and that was socially beneficial.

KD: Your decision to move on?

JS: Yes.

KD: Had you felt like you had worked through everything that you were going to do?

JS: Yes; I think so. I had been there eight years and what I was beginning to see in the late '90s was that I was going through a cycle of doing the same thing over again which was fine, but necessarily when one is doing something the second time around it's not always exciting and so I decided to try something new.

KD: And you could argue that odds were that you weren't going to end up with anything as big?

JS: Almost assuredly. The events were a once in a lifetime thing.

KD: Is there anything that we haven't discussed that we should talk about before we break off?

JS: We can talk infinitely so not that I can think of. I appreciate you taking the time and I hope this was helpful.

KD: Thank you.

JS: If you want me to elaborate on it or need clarification let me know.