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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 5, 1980

Memorandum to: The Chief Justice

Mr. Justice Powell

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

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

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

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

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

Sincerely,

Bill

cc: The Conference