

Securities and Exchange Commission Historical Society
Oral History Project
Interview with Paul Gonson
Conducted on February 23, 2011, by James Stocker

JS: This is James Stocker. Today is February 23, 2011. I'm talking with Paul Gonson, who served as Solicitor of the Securities and Exchange Commission from 1979 to 1998 and since then, has been a member of the firm K&L Gates. Our subject is the role of the Supreme Court in shaping securities regulations in the United States. Welcome, Paul.

PG: Thank you. I'm very happy to do this oral history for the SEC Historical Society. I think it's an interesting subject and I'm pleased to have been asked to do it.

JS: We're real happy to have you here. When you were a law student, did you ever think that you would argue cases in front of the Supreme Court?

PG: No, I never did. But I'm very happy to have reached that point in life where I have. I did look at my law school yearbook and in the yearbook it indicates, "What would you like to do? What kind of career would you like to have?" A lot of people put "general practice," and I wrote "constitutional law." I guess I did have some idea at that early stage that that's what I wanted to do.

JS: While you were a student, did you do an internship or a clerkship in the federal courts?

PG: No, I didn't. I wish I had, but after I graduated, I was drafted in the Army, this was back

in the fifties, for two years, and then went in to work for a law firm in Buffalo, New York, my home town.

JS: Did your work there involve securities?

PG: Not very much, although I started a law firm together with two good friends, old friends, classmates of mine. We did a little bit of securities law. Looking back, I think we were probably violating the securities law while we were doing it. We were in Buffalo and we were handling matters in Cleveland, Ohio, which wasn't very far from Buffalo, and up in Canada, which is only across the Niagara River. Thus, we were involved in interstate and international work and oblivious of the fact that that had some implications that we were then not aware of.

JS: So in your early years of work at the SEC, did you work on Supreme Court cases at all?

PG: Actually, I did fairly early. I came to the SEC in 1961 and by the middle-sixties, I was already involved in quite a few appellate cases in the Supreme Court and U.S. courts of appeals. There was a case early on where I did go to the Supreme Court, as a junior lawyer working on a brief with senior lawyers. Then gradually, relatively early, I got involved in Supreme Court cases in a junior capacity and of course, over the years, moved up into a senior position.

JS: Do you remember what the first case, before the Supreme Court, was that you worked

on?

PG: Yes, the first case was called *Caplan v. Anderson*. It was a case involving the reorganization under the Bankruptcy Act of a company called TMT Trailer, Inc. TMT Trailer stood for Trans-Marine Transportation. It was the first venture in what was called piggyback freight hauling. As you know, sometimes truck trailers sit on railroad flatbed cars and are pulled along. This was an idea where they were going to put containerized freight in ocean-going vessels and move them that way.

The company got in trouble, went into bankruptcy reorganization. I remember asking the clerk of the court what TMT stood for. He told me, "Too much time and too much trouble." That was his point of view. That case went to the Supreme Court and there was an interesting colloquy set forth in the opinion of the Supreme Court between me and the federal district judge. That was the basis on which the Supreme Court reversed the judge. Here I am quoted in the Supreme Court case. That was pretty thrilling for me.

JS: How old were you at that point?

PG: Probably in my early thirties.

JS: Oh, that's quite young.

PG: Relatively.

JS: All right, let's talk for a minute in general terms, about the role of the judicial system in financial regulation. Why does so much of the SEC's work end up in the courts, and in particular, before the Supreme Court?

PG: There's two or three reasons. The first reason is that most of what the SEC does is subject to judicial review. That is, under the laws it administers, when people don't like the way the SEC has acted or rules they have promulgated or cases that they've brought against persons who have lost those cases, recourse is available to the courts. Sometimes recourse is available in trial courts, sometimes directly to a court of appeals. Eventually some of these cases will reach the U.S. Supreme Court.

JS: So this is in cases of enforcement?

PG: There are enforcement cases where the SEC brings lawsuits. There are also challenges that can be brought in court against SEC rulemaking, specifically provided by statute. In addition to that, there are cases that are appeals of adverse decisions by administrative law judges within the SEC. Those are also appealable to courts of appeals.

Then there are a variety of other cases, under the Administrative Procedure Act, even Freedom of Information Act appeals. If someone who asked for information from the SEC, didn't get it, they can then appeal the denial. Then there are a handful of cases which are defensive cases. The SEC handles cases brought against it. Sometimes

appeals are taken from those cases. So there are a variety of cases which may reach the Supreme Court.

The statistics are interesting. Every year the court takes probably at most one hundred cases to be decided on the merits. There are approximately 3,000 requests for review, maybe more. So one can see that the number of cases taken is small and the chance of getting to the Supreme Court is very small.

JS: What percentage of securities-related cases in federal court end up going before the Supreme Court?

PG: Are you talking about securities cases or general?

JS: Securities cases.

PG: A relatively large percentage, notwithstanding a very small statistical percent, as I mentioned 100 or fewer out of 3,000 requests. When the government asks the court to take a case or the government responds to somebody else's request and says it thinks the case is important, then the odds of granting review go way up, usually over 50 percent. So the chances are more than one out of two that the Court will hear the case.

JS: Within the SEC, how is the Solicitor's office organized to deal with Supreme Court cases? Were there certain individuals that were tasked only with the Supreme Court or

did appellate lawyers work in all the different courts at different times?

PG: The latter is true, Dr. Stocker. There are a group of lawyers in the General Counsel's office who specialize in appellate work. These lawyers handle appeals in courts of appeals and they also handle cases in the Supreme Court. Generally they follow the case as it goes through the courts. If they've been working on a case in the court of appeals and that case eventually reaches the Supreme Court, then the same staff stays with that case. In some sense, it's the luck of the draw as to which cases will end up there.

JS: Why don't you tell me a little bit about the role of the SEC in private cases before the court? Often times it files friend of the court briefs, right?

PG: That's correct. We say in Latin, "amicus curiae," or amicus briefs. The SEC has a very active role in amicus briefs and sometimes even in arguing cases as amicus in the Supreme Court. The way it works is something like this. Private actions under the securities laws are viewed by the SEC sometimes as a supplement to their own law enforcement cases. After all, the SEC is a relatively small agency, given the size of the U.S. government. It administers and regulates a huge securities market. So it views private actions as a necessary supplement to its own law enforcement actions.

Furthermore, the SEC is, for the most part, unable to recover damages for investors who have been injured, whereas investors can obtain these damages in private actions. So for those reasons, the SEC generally supports private actions. The procedure is that

sometimes a request will be made by a court for the SEC to come in. It's not unusual for the U.S. Court of Appeals for the Second Circuit, the federal appellate court in New York City, to ask the SEC to come in and give their views on certain issues they might find difficult.

The Supreme Court, several times during the year, will issue a one-line order to the Solicitor General, who is a senior official at the Department of Justice. The Solicitor General is the person who handles cases for the U.S. government in the Supreme Court. That one sentence order will say something like, "The Solicitor General is invited to submit his views on this such-and-such case." It could be any kind of a case. If the case involves securities, then typically the Solicitor General will then ask the SEC to draft a brief that would respond to the Court's invitation. Much more often, however, the SEC on its own initiative keeps its ear to the ground, follows litigation around the country, particularly important litigation, and seeks on its own initiative to enter these cases.

JS: Was this the practice before you became Solicitor?

PG: Yes, it was.

JS: About how many amicus briefs are filed a year, would you say? It may change from year to year.

PG: In all courts, not just the Supreme Court, my guess would be around forty or fifty, quite a

few.

JS: Do you think that number changed during your time as Solicitor? Do you think you filed maybe more or fewer than the previous Solicitor?

PG: My guess it was about the same. I think since I retired in 1998 and my former deputy, Jake Stillman, with whom I worked closely for many, many years, became Solicitor, I think that practice has continued. I think it runs about the same.

JS: Let's talk for a minute about different subject areas in which the Supreme Court has played an important role. First, the definition of securities. When you joined the SEC, you must have been aware that the question of the definitions of securities was likely to be a difficult question that you would face time and time again in court.

PG: Yes, it was. It is very interesting that although the securities laws do contain a definitional section, defining what a security is, that issue goes to the courts frequently. The section will say, for example, a security is a stock, a bond, a note, a certificate of indebtedness, an investment contract, and so on. But even those definitions are then subject to different kinds of constructions.

There were some early cases on the definition of security that went to the Supreme Court. In those days, relatively early days, the courts of appeals had a very restrictive view of what was a security, and so novel or unique kinds of transactions were held not to be

securities. In the first five cases that went to the Supreme Court on the definition of a security, the courts of appeals held in every one of those cases that the transaction was not a security. In every one of those cases, the Supreme Court reversed and held that it was a security.

One of those cases was a case called *Joiner*. That was an interesting case where promoters were selling interests in land adjacent to operating oil wells. The pitch was not that the buyer was going to sink an oil well, but that he was going to benefit incidentally from the increasing value of land because it was located next to an oil well. The SEC said that that was a security. The lower court said, "No, it's real estate." The Supreme Court reversed it and said, "Yes, that is a security."

The next case was a very famous case called *Howey*, which involved the definition of an investment contract in the definitional section of what is a security. There, a promoter was selling orange groves in Florida together with a contract to harvest and market the oranges. It wasn't expected that any of these buyers would actually go down to Florida and pick their oranges.

What they were doing was a combination of buying a small piece of the orange grove and entering into a contract to manage it. The lower court, again, said that this was real estate, not a security. The Supreme Court said, "No, it is a security because it's an investment of money, a joint enterprise with the results, the profits, to come from the efforts of others."

JS: That's the so-called Howey test.

PG: That's the great, famous Howey test still used today, a very important test. The next two cases were insurance cases. One was called *SEC v. Variable Annuity Life Insurance Company* and the acronym was VALIC, so is called the VALIC case. The next case, shortly after that, was *SEC v. United Benefit Life*.

In those cases, there were insurance policies that were sold where the return on the policy was not based on the life of the insured; it was based upon the results of investments in the stock market. These were called variable annuities, which was why the company was called the Variable Annuity Company. Variable annuities were held to be securities, because the results were dependent on the stock market.

In a case called *Tcherepnin v. Knight*, the Supreme Court held that, with drawable shares in a credit union were securities, were akin to stock in a company. Those were the five cases we sometimes call the expansion area or the expansion phase of the definition of a security.

JS: Were all these cases before you joined the Solicitor's office?

PG: These were all before I joined, except for *Tcherepnin*.

JS: So after *Tcherepnin v. Knight*, what changed?

PG: Well, then it was really interesting. The message being given to the lower courts was that the Supreme Court in these decisions was expansive in the definition of a security. So they got the word and they—trial courts and courts of appeals—started construing the transactions before them as securities.

Then the Supreme Court entered, and as scholars sometimes say, the pendulum swings back again. Now we have a more restrictive era, where the Supreme Court takes these cases where the courts of appeals had held they were securities and reverses them and says, "No, they're not securities."

JS: This is beginning in the 1970s?

PG: Around the 1970s, that's correct. That coincides with the arrival on the Supreme Court of Justice Powell. I don't mean to suggest that Justice Powell was the sole influence, but he was a very influential person on the Court. Justice Powell had been a corporate and securities lawyer in Richmond, Virginia and was the only justice on the court that had a background in corporate and securities law. He was influential with his colleagues, none of whom had a similar background. He also was a very conservative man and his opinions reflect that conservatism.

JS: Did you ever meet Justice Powell?

PG: I did, as a matter of fact. I met him on several occasions. I was once master of ceremonies of a program at the Supreme Court at which he was speaker, and I introduced him. I have a nice photograph of Justice Powell and me.

JS: Was this while you were Solicitor?

PG: Yes, it was. The first case, and this was what I call the restrictive era, was called the *Forman* case. The state of New York had passed a law giving special benefits to low-cost housing. Based on this law, a huge development was built in the Bronx called Co-op City.

In order to get an apartment in that development – this was a co-op development, peculiar to New York and only a handful of other states – one had to buy stock in that co-op. You bought the number of shares dependent upon the number of rooms in your apartment. So if you were buying a five-room apartment, you'd buy five shares of stock.

This was a private action. In this private action, the persons who had bought this stock and who, for one reason or another became disillusioned with the apartment project, took the position that this was a security, and that, under the securities laws, they should've been given a lot more information than they were given. They sued and the Second Circuit Court of Appeals in New York held that it was a security. The Supreme Court reversed and said, "No, it's not a security. It's real estate." The Court said that this was

an effort by the State of New York to provide low-cost housing. It's just a peculiarity of the way you get into the housing that you have to buy "stock." Then they defined what the attributes of stock were, which would exclude this kind of stock purchase.

There was an interesting byplay. Justice Powell spoke with a soft Southern accent. He was a very gracious gentleman. I argued that case for the SEC. When I argued that the provision in the securities law called the intrastate exemption from SEC registration, that is, if stock is offered and sold only within one state, it doesn't have to be registered with the SEC, would have exempted this entire issue, he jumped all over me.

I never saw him so angry. He said something to the effect that, "Don't you know that any lawyer worth his salt would never rely on that intrastate exemption, because just one incidental sale to an out-of-state person will void it and then everybody will get in trouble." It reflected his own personal interest and knowledge of the securities laws. I was really quite taken aback at the strength of this Southern gentleman's remark to me.

JS: So what was the SEC's position in this case?

PG: The SEC argued that it was a security. There had been one case in the Second Circuit and then a second case following, also in the Second Circuit. There had been three judges on one panel in the Second Circuit and three judges on the second panel. So you already had six federal judges saying it was a security. I thought that was a respectable number of judges to support the SEC's position.

JS: Did you expect opposition from various members of the Court?

PG: Well, we did, yes. We're realists and we expected that this would be uphill. It did prove to be uphill because the Court, as I said, did reverse. I always like to count the noses, although it doesn't help. The case, I think, was six to three. So you had six Supreme Court justices saying it was not a security and you had three saying it was. When you added the three who dissented to the six in the Second Circuit, you had nine federal appellate judges in favor of the SEC's position and only six opposed to it. But, of course, that's not the way the system works.

JS: Was this your first time to argue before the court?

PG: Yes, it was.

JS: And how did you prepare for that?

PG: I prepared for it very studiously, as you can imagine. I used to prepare a notebook, which I would take with me. The notebook would have the argument I would give. But you never give the argument that you want to give. We lawyers like to say that when you're arguing in the Supreme Court, you really make three arguments. The first argument you make is the argument you intend to make. The second argument you make is the argument you actually do make. The third argument is, when you walk out of the Court,

the one you wish you had made.

The way it works in the Supreme Court is that it's mostly a question and answer session. You get a few words out; you get your name out, and maybe one or two opening sentences. Then some justice will ask a question and another justice will ask another question and it's all questions and answers. The reason for it is you're not there to give a speech to impress your wife and kids and your parents, who are in the audience.

You're there to try to persuade the Court. The Court is only interested in what it's interested in, so it's only going to ask you questions about what it thinks it wants to know. The art, of course, is trying to weave into your answers the arguments you hope to make.

Also, you have to try to anticipate the questions. The reason I used the notebook was I would anticipate as many questions as I could that might be asked and then I would have a separate page with the answer for each question, and a tab on the edge of the page. So if the question were asked that I had anticipated, I would flip the tab on the relevant page in the notebook and I would have notes to answer the question.

As many times as I went to the Supreme Court – others have said this too – one is always impressed with the majesty and the dignity of the court and what it stands for.

JS: Within the SEC, did you have a team of people that were helping you to prepare for that?

PG: Oh yes, indeed, of course. There were a lot of helpers. The SEC goes to the Supreme Court through the Solicitor General. As I mentioned, the Solicitor General is a high official with the Department of Justice and represents the government in the Supreme Court. So in addition to having SEC lawyers being helpful, there are lawyers in the Solicitor General's office who also work on this brief and who are very experienced in Supreme Court practice. They're very helpful.

JS: When you argued before the court, the Solicitor General was there with you at the time?

PG: Yes, he was usually there for these court hearings.

JS: What other cases during the 1970s also helped to further define the definition of security?

PG: Well, there was an interesting case after that called *Teamsters v. Daniel*. Mr. Daniel was a truck driver who belonged to the Teamsters Union. The Teamsters Union had its own pension plan. Instead of each employer having a pension plan, the Teamsters Union had a union-wide pension plan. No matter who the truck driver drove for, the pension plan would be administered by the union, not by the particular employer, because often truck drivers drove for different employers.

The pension plan provided that if you served twenty consecutive years of Teamsters Union employment, you were eligible for a pension. Mr. Daniel had had a break in service for a few months early in his career and so when he retired after twenty years he

was told he was not going to get any pension. Obviously he was quite disappointed.

He sued the Teamsters Union on the ground that this pension agreement was a security. He was successful in the Seventh Circuit Court of Appeals. That's the federal appellate court in Chicago. The Teamsters Union appealed to the Supreme Court. The Supreme Court reversed and held that it was not a security. It held generally that ERISA, which is the federal law governing pension plans, and the law concerning collective bargaining agreements, that is the labor laws, would be the laws that would apply, not the securities laws. The Court said it was not necessary to have the overlap of the securities law to this existing body of federal law.

JS: Now this case was in 1979. That's the same year you became Solicitor, right?

PG: Yes, it was.

JS: So this must have been one of your first big cases.

PG: Well, it was a big case. This was also a case, by the way, in which the Solicitor General supported the Labor Department, which opposed the argument that this was a security.

JS: So this was one of your first experiences with intergovernmental conflicts.

PG: Yes, it was.

JS: What other cases took place during this restrictive phase?

PG: Well, another case involving the definition of securities was a case called *Marine Bank v. Weaver*. That case involved a question as to whether a certificate of deposit (CD) issued by a federally regulated bank and insured by the FDIC was a security. In the lower courts – the Supreme Court people always call all courts that are not the Supreme Court the lower courts – in trial courts and in courts of appeals, the SEC and the FDIC were on opposite sides of that question. The SEC was arguing that CDs are securities and the FDIC was arguing that they were not.

When the *Marine Bank* case reached the Supreme Court, the Solicitor General, who likes to say that the United States should speak with one voice in the Supreme Court, didn't like this conflict between the banking agencies and the SEC. He certainly was not going to permit briefs to be filed in the Supreme Court by the federal agencies arguing against one another.

So he put the general counsels of the SEC and of the three bank regulatory agencies -- the FDIC, the Comptroller of the Currency, and the Federal Reserve System -- in a conference room in his suite. He locked the door and said, "You guys aren't coming out until you reach a common position that we can assert to the Supreme Court." So after some arguing and pounding on the table, we finally did reach a common position where each of us was going to be able to sign this joint brief in the Supreme Court. The

common position was that CDs were not securities, but each of the agencies put in a few footnotes in that brief, reserving positions. The text of the brief said a CD was not a security, but the footnotes were giving all kinds of exceptions to the text.

From the SEC's point of view, there were two prominent footnotes. One footnote expressed a concern that if CDs are not securities, then money market mutual funds, which are regulated by the SEC, might not then be subject to SEC regulation under the Investment Company Act, because the Investment Company Act says that these mutual funds have to invest in securities. When these money market funds would buy CDs that weren't securities, they may not be mutual funds and not subject to SEC regulation. So we asked the Court to say that in some circumstances CDs would be securities.

The second footnote had to do with what are referred to as jumbo CDs. There was then, and still is, a market for bank certificates of deposit issued by brokerage firms in denominations of more than \$100,000. These jumbo CDs issued by brokers are instruments the SEC felt it ought to be able to regulate because it ought to be regulating the brokerage industry that sells them. So it argued in that second footnote that there should be jurisdiction in that instance too.

When the Supreme Court decided the case, it held, as all four agencies had asserted, that CDs issued by a federally regulated bank and insured by the FDIC were not securities. Then it went on to say that in some circumstances, they could be, which was a great line. Thereafter, to make what's now becoming a long story short, money market funds

eventually were held to be invested in securities and then, in that case, CDs were securities.

In a subsequent case called *Gary Plastic v. Merrill Lynch*, the U.S. Court of Appeals for the Second Circuit held that when Merrill Lynch was selling these jumbo CDs, under circumstances where it agreed to redeem them and to make a market so that they could be resold before maturity, that they were securities. So the two footnotes actually did help and it worked out.

JS: So in that second case, the SEC was arguing against Merrill Lynch?

PG: No, that was a case in the Second Circuit where the SEC did not participate. I'm just talking about the Supreme Court.

JS: Then after *Marine Bank v. Weaver*, the Supreme Court went back into another expansive phase?

PG: Yes, they did. The pendulum swung the other way. Now the courts of appeals were getting the new message that they should be very cautious and conservative defining what's a security. They started to say, "No, they're not securities," and the Supreme Court started to reverse them again. So you had this long series of cases in which the Supreme Court is reversing courts of appeals one way or the other. So the pendulum swung back to what was probably another expansive phase and there were several cases in that phase.

I could go into some of those for you.

One was a case which involved the sale of 100 percent of the stock in a corporation. You know, companies are organized in different ways. Some are organized as partnerships, some sole owners who operated as DBA, "doing business as," filing with their local county clerks' office. Some would set up a corporation and issue 100 percent of the stock to themselves. When that kind of a company sells 100 percent of the stock, a sole owner of a company selling 100 percent of the stock to another purchaser, is that sale of the stock a security covered by the securities laws or really a sale of the assets of the company?

Over the years, ten courts of appeals around the country had decided that issue. Five of them held yes and five of them held no. The argument was made that this is the sale of a business and not of stock and so-called sale of a business doctrine precluded it from being a security. The other said, "Well, stock is stock. If it meets the requirements as defined by the Supreme Court, transferability, negotiability, limited liability, then it is stock." The Supreme Court finally took the case to resolve what is sometimes called conflicts in circuits, and the SEC supported the view that it was a stock, a security. The Supreme Court held, yes, it was stock and held that it was subject to the securities laws.

Another case was *Reeves v. Ernst & Young*. In that case the question was whether a certain note was a security. The securities laws say notes are securities, but not all notes are securities. Without going into detail, there are exceptions to the circumstances under

which a note can be a security. These were transactions between banks, which were very sophisticated entities. The Supreme Court held that yes, that was a note and it was a security. You do have a variety of cases on that subject. The SEC did support Reeves in the argument that that note was a security.

JS: Is it fair to say that, in general, the SEC takes positions in favor of a more expansive definition of securities?

PG: I would say the answer to that is yes. Part of the reason is that that issue is what is called jurisdictional. That is, if the transaction or the document is a security, then the SEC has jurisdiction over it. If it is found not to be a security, the SEC has no jurisdiction because, for the most part, the SEC laws limit it to securities. If a Supreme Court case would hold that a transaction would not be a security that would mean that the SEC was no longer entitled to police those kinds of transactions. So, in part to preserve its own jurisdiction, the SEC commonly has taken an expansive position on what is covered as a security.

JS: Can you think of any counterexamples to that, maybe an instance in which the SEC took a position, either before the court or in an amicus brief, that a contract or something was not a security?

PG: I can think of other examples in which the SEC has taken positions against the interest of investors, but I can't, off the top of my head, remember a case in which the SEC did that.

JS: You obviously still follow cases before the Supreme Court. Do you think that the Supreme Court has already said its last word on the definition of securities or is this likely to come back up?

PG: I think it will be one of the eternal issues, because without going into detail, cases that never reached the Supreme Court have held a huge variety of things that could be securities. For example, pyramid promotion schemes, where you bring in somebody to sell cosmetics or something, and when you bring them in, you get a bonus. Those have been held to be securities.

Whiskey warehouse receipts, where you put whiskey in a warehouse and you get a receipt for the whiskey. Now you're not selling whiskey, but you're selling receipts back and forth. Those have been held to be securities. Certain coin programs have been held to be securities. Wherever there's an opportunity for investment, where somebody else is doing the work and the investor is really passive, those are securities. The SEC could, pretty vigorously, argue that those are securities.

JS: Let's move on a little bit and talk about civil liabilities and the implied rights of action. What laws and SEC rules govern this area?

PG: The implied right of action, of course, focuses on the word implied. There are in the securities laws express actions that give investors, for violation of laws, the right to go to

court to sue. Some of these remedies are effective, some, as a practical matter, are not very effective.

There has grown up the question as to whether other SEC laws, which themselves do not have express rights of action, nonetheless allow investors to sue for violations of those laws. We call those implied rights of action or the implication of the right of action. These are by definition all private actions, not SEC actions. When the SEC participates in these cases, it's always participating as amicus since these are not the SEC's own cases.

There was, in this area, also an expansive period and, as in the definition of securities, then a more restrictive period. In the expansive period, early on the courts dealt with a very famous section of the federal securities laws, Section 10b of the Securities Exchange Act, which is an anti-fraud section, and then Rule 10b-5 that was enacted by the SEC in 1942. The statute was passed in 1934, the rule in 1942.

There is no suggestion in the legislative history at either of those times that Congress or the SEC ever thought it was granting an express action to investors. But in 1946, a federal trial court in Pennsylvania held that if someone violated that rule and an investor was injured, the investors could sue that person. The holding was based on a common law doctrine that said that if there's a right given in the law, then there should be a remedy for violation of that right.

That was a famous tort doctrine that was in the common law for centuries and adopted by

the federal courts. Based on that, there was a series of cases that developed causes of action. In the Supreme Court, there was a case called *J.I. Case v. Borak*, which found that if there was fraud in a proxy, asking investors to vote for boards of directors, then that was actionable and investors could bring a lawsuit. That decision was based on the proxy section of the Securities Exchange Act, not Section 10b and Rule 10b-5.

In *Superintendent of Insurance v. Bankers Life*, the Supreme Court assumed that, under Section 10b and Rule 10b-5, there was an implied right of action. Thereafter, there were many cases in the Supreme Court that set forth elements of this private right of action, without any analysis as to whether the private right of action existed. You had embroidery on something which was not statutory and which was all judge-made.

The Court held that you have to be a purchaser or seller of securities to have standing under 10b and 10b-5 in the *Blue Chip* case. In that case, an issuer of securities had defrauded buyers of stock. The remedy was that the issuer had to offer rescission, that is, to offer those stockholders the right to get their money back. In the offer of rescission, there was fraud again. People were induced not to take that offer, and the issue then arose as to whether persons who don't buy or don't sell, but merely hold stock, based on fraud, have a right to sue. The Supreme Court said, "No, they don't, because the law says you have to be a purchaser or seller," and also for policy reasons. Since the persons were merely holders and neither purchasers or sellers, the Supreme Court said there would be no remedy.

JS: So the SEC filed an amicus brief in this?

PG: We did, in which we supported the right of defrauded holders of security to sue. But the Supreme Court said no.

JS: Did you work on the preparation of that?

PG: I did help on that. In a case that I argued, called *Ernst & Ernst v. Hochfelder*, the question was whether negligence would be a sufficient basis for 10b-5 liability. The Supreme Court held that this would not be enough, that the wrongdoer had to act with *scienter*, which it described as a mental state embracing an intent to defraud, manipulate or deceive.

So unless the person had this mental state, the person would not be liable for securities fraud. The court went on to say that that scienter could sometimes be established by recklessness, you wouldn't have to have an actual intent to defraud. Many cases, thereafter, held that scienter was established by reckless conduct. The SEC argued in *Hochfelder* that negligence would have been sufficient.

JS: Were there any other cases during your time as Solicitor that concerned this issue of implied rights of action?

PG: There was a case called *Piper v. Chris-Craft*. This was a tender offer case. Instead of

shareholders suing for violation of the tender offer rules, the one who sued was the disappointed bidder, that is, the one who lost out to someone else in the tender offer. The Supreme Court held that there was no standing in a disappointed bidder to sue for violation of the tender offer rules, because they were designed to protect investors and not bidders. The SEC did not participate in that case.

JS: What about the *Huddleston* case?

PG: The *Huddleston* case is a case I also argued. That was a case involving the so-called overlap of remedies. In that case, there were two remedies involved: One was Section 10b that I've referred to, a very broad, blunderbuss remedy and the other was Section 11 of the Securities Act of 1933.

Section 11 gives remedies for persons who are defrauded in the offer or sale of securities, usually in the initial offer of securities. For technical reasons, Section 11 was not available in this case. The issue was a very interesting one. Where Congress had carefully delineated, as it did in Section 11, who could sue, what the remedies would be, how much the recovery would be, which persons were liable, what the statute of limitations would be and so on, should that remedy be exclusive or could the generally-worded 10b and 10b-5 also apply?

Congress was, the argument went, expressly saying that it wanted Section 11 to apply to these kinds of cases. So, to overlay Section 10b on that, with none of those limitations or

restrictions, would be wrong. The Court, however, held that Section 10b did apply, that the overlap of sections is not unfortunate and that 10b could apply even though other sections as well applied. That was a win for investors and for the SEC, which supported them.

JS: Were there any other cases that you'd like to talk about in this regard?

PG: I think it probably is worth just a mention or two about the insider trading cases. These are cases, for the most part, which were SEC party cases. But there are a handful of cases in which private investors sued as well. Insider trading is not defined in the securities law or in any SEC rule. It grew up case-by-case in the courts and administrative decisions of the SEC's administrative law judges. There were several cases that went to the Supreme Court that helped define and shape the doctrines and the theories of insider trading.

I was involved in several of those. I argued a case called *Dirks v. SEC* back in the early seventies. Then the last case I handled before I left the SEC in 1998 was a case called *U.S. v. O'Hagan*, a criminal insider trading case in which the Supreme Court upheld another theory of insider trading, the so-called misappropriations theory of insider trading. There are now two theories of insider trading blessed by the courts, but found nowhere in the statute. Even today, and we're talking now in 2011, there still is no definition of insider trading in the law or in any SEC rule, but many, many cases on the subject. So really, if you want to know insider trading law you have to go to case books

and read those decisions.

JS: Were there any cases before the Supreme Court that dealt with civil liability, in the case of misstatements? Or were those more in the circuit courts?

PG: There were some cases. One of my favorite cases is the *Affiliated Ute* case. Affiliated Ute was an Indian tribe in Alaska and they had been given, under federal law, certain rights to stock in certain companies. There were several banks up in Alaska that were making a market in this stock. That is, they were buying stock and selling stock.

They had actually two markets. They had what was referred to as the white man's market and they had a market called the Indian's market. In the white man's market, the prices were much higher, so when the Indians went to buy stock or sell their stock, they were dealing in a lower priced market. The bank never told the Indians about this white man's market.

The Supreme Court held that that was a violation of the law. I used to teach securities law at Georgetown Law School for many years and when I taught this case, I always used to say, "Never stand mute before an Affiliated Ute." While it sounds corny, students always remembered that phrase. So it's one of these clichés you try to give to help a student remember a case.

JS: That sounds like a good way to do it. Let's talk about cases that were not directly related

to securities, but that were nonetheless considered important to the SEC's work. Did the SEC participate in cases that were not related to securities?

PG: Yes, they did. The SEC used to watch all the cases that went to the Supreme Court, even in other areas of the law. The reason for that is that sometimes these cases would have an indirect impact on the SEC.

JS: How did you do that? Did you have a staff of interns or clerks that would be charged with monitoring everything that came out of the Supreme Court?

PG: No, we regular lawyers in the General Counsel's office monitored all the cases that went to the Supreme Court. The Supreme Court, when it grants review or certiorari, as it's called, does so in a public way. There are newspaper reports and so on. The Court takes only about eighty to a hundred cases a year, so it really isn't that many.

So we did monitor those cases that weren't securities cases. In some of them, we would try to persuade the Solicitor General to put language in the Solicitor General's brief that might be helpful to the SEC. We looked particularly at cases involving the banking laws, the commodity laws, cases that were sort of in the neighborhood of the SEC realm. We used to call this the greater SEC metropolitan area of interest.

There's one case that's probably worth talking about, which is *Equal Employment Opportunity Commission v. Arabian American Oil Company*.

JS: This is in the early-nineties.

PG: Right, this is sometimes called *EEOC v. Aramco*. In that case, the issue arose as to whether the Civil Rights Act, which provided against discrimination in employment, applied to U.S. citizens employed by a U.S. oil company in Saudi Arabia. The phrase that's sometimes used is whether these laws would apply extraterritorially.

The SEC was concerned about this case, because the SEC chases wrongdoers all over the world. It tries to find money that's hidden all over the world and it applies its laws extraterritorially. We were concerned that if the Supreme Court would hold, and we thought it was going to hold, that the civil rights laws did not apply outside the United States, thereafter we would be faced in our own court cases with defendants who would say, "Look, the Supreme Court said that there is no extraterritorial jurisdiction."

We went to the Solicitor General and the antitrust division of the Department of Justice, which had similar concerns, because it was seeking to apply U.S. antitrust laws extraterritorially. The government was opposing the extraterritorial reach of the civil rights law in that case. We said, "We'd like to put something in the government's brief that reserves the extraterritorial power of the SEC and the antitrust laws." The Solicitor General agreed to that.

We wrote up some material, which was put in that brief and it worked very well. The

Supreme Court held, as we had expected, that the civil rights laws did not apply overseas, but said that it is well recognized that the securities laws do apply extraterritorially. That's an example of one case which was quite successful.

JS: I can imagine that other agencies within the government were concerned about this as well, the Justice Department, for instance.

PG: Yes, they were concerned about this. But we wanted to be specific enough to have language that wasn't general language, but also language that said that the securities laws would apply. The Justice Department was on the other side. Their concern was against extraterritorial reaches. But the Solicitor General was amenable to highly specific language, which worked.

JS: Were there any other cases you'd like to talk about, perhaps *Morrison v. Olson*?

PG: Well, that's kind of a complicated case. In *Morrison v. Olson*, the issue concerned the special counsel, which no longer exists. There was a law at that time giving the special counsel the right to investigate and to prosecute government officials for wrongdoing. The special counsel could be removed only for cause. That is, that the attorney general or the president could not remove the special counsel unless the special counsel did something wrong.

The special counsel was not serving at will, as for example, the attorney general serves.

The issue then was a technical one as to whether, under our system of government, high officials could serve who were not being able to be removed at will by the president or by the attorney general.

The reason for the SEC's interest was that, around that time, defense lawyers were arguing in SEC cases that SEC cases could not be brought by SEC lawyers. They argued that SEC cases had to be brought by Department of Justice lawyers. That was because, they said, the five SEC commissioners, the chairman and the commissioners of the SEC, served for fixed terms. They can be removed only for cause and not at the will of the president. Therefore, this became, they said, a constitutional issue. Article II of the Constitution provides that the president shall take care that the laws be faithfully executed. This is the so-called Take Care Clause.

The defense lawyers argued that since the SEC commissioners, who approved bringing of SEC lawsuits, could not be removed by the president, then the president was not able to take care that the laws were being faithfully executed. On the other hand, the attorney general can be removed by the president for any reason. Therefore, they asserted, it has to be his lawyers, or the Department of Justice lawyers, that bring these cases. The SEC's argument was that the president can take care that the laws be faithfully executed in many other ways, other than having the ability to remove the officials at the agency that authorized these lawsuits.

When this special counsel case, *Morrison v. Olson*, came up, we felt that we wanted to

come in there and support the notion that someone like the special counsel, who can be removed only for cause, nonetheless is a valid appointee. The court held yes, it was. That was our interest in that case.

There's some interesting footnotes. Morrison, the plaintiff, was Alexia Morrison, who had been the chief trial counsel for the SEC at an earlier stage in her career. The Olson was Theodore Olson, who later became Solicitor General and who argued *Bush v. Gore* in the Supreme Court after the 2000 Presidential election

JS: Quite a mix of personalities there.

PG: She was trying to say he had done bad things. Eventually she dropped the case, after her authority was upheld.

JS: So how would you describe the interaction between the SEC and other agencies of government, in regards to Supreme Court actions? Was it genuinely positive or were there times at which they conflicted?

PG: I would say that they have been generally positive. The SEC has enjoyed, over the years, in my tenure there, which was over thirty-five years, very good relations with the Solicitor General personally and with his staff. The Solicitor General's staff is usually composed of a mix of younger lawyers and seasoned ones who had a stint as clerks to Supreme Court justices. They are very bright, hard-working and very good lawyers.

Over the years the senior lawyers in the Solicitor General's office often told me that they thought that the SEC's appellate shop had the best appellate lawyers of any agency in the government; of course, not including the Solicitor General's office, which they always said was number one. The SEC did have, and still has, very good relations with the SG. Sometimes they would get into disputes with other agencies. I mentioned earlier the dispute concerning the Marine Bank case, whether a bank CD was a security and how the bank agencies and the SEC disagreed. The Solicitor General was able to get that dispute resolved.

JS: How much of this depended on the personality of the SG and how much of it was related to the subject area in which there were natural conflicts between the interests of, say, the Justice Department and the SEC?

PG: I would say that I think it almost always depended on the merits. I never thought individual Solicitor Generals were trying to make personal points. I think they conscientiously agreed or disagreed with the views of the SEC. For the great majority of cases, they generally did agree, or at least went along with the SEC's positions.

The Solicitor General likes to say, as I mentioned before, that the government speaks with one voice in the Supreme Court, and that, of course, is his voice. The independent agencies like to say, and certainly the SEC has been vigorously saying, that when it has a construction of its own statute, it thinks it ought to be able to go to the Supreme Court

and give its views as to how the statute that it administers ought to be interpreted. So you have, to some extent, this sort of philosophical difference, which rarely, but sometimes, comes up.

One example was a very famous insider trading case that I had argued in the early-eighties, called *Dirks v. SEC*. This was a case in which the then-solicitor general, Rex Lee, a very fine man, disagreed with the SEC's position in that case. Dirks had lost in the D.C. Circuit, that is, the federal appeals court in the District of Columbia. Dirks was the one who asked the Supreme Court for review.

At what we call the certiorari stage – certiorari being the fancy name by which one asks for review and sometimes it's called "cert," when we say in shorthand that the cert is sought or cert is denied or cert is granted. At that stage, although the Solicitor General disagreed with the SEC's position, it allowed the SEC to oppose Dirks' petition for review and to argue its position in the opposition. But the Solicitor General added a footnote, stating his view that the SEC position was in error.

After the Court decided to take the case, a dispute arose between the SEC and the Solicitor General. I said that an independent agency ought to be able to express its own views to the Supreme Court as to the proper construction of a statute that it administers. He said he disagreed with that and that he represents the government in the Supreme Court.

We had a little to-do back-and-forth about this and I told him that I would recommend to the SEC commissioners that they authorize me to file a brief on behalf of the SEC in the Supreme Court, whether he approved or not. His response to me was that he would not authorize the filing of that brief, and he thought the Supreme Court clerk would not accept it for filing if it did not include an endorsement on it that the Solicitor General approved of its filing.

I responded that the SEC would then file with the Supreme Court a document called a petition for a writ of mandamus, fancy words for a request that the Court direct the clerk to accept the brief for filing. This procedure, of course, would then require the Court to decide whether or not it was going to let the SEC file a brief and maybe be precedent for the question as to whether individual agencies can submit briefs in their own cases when the Solicitor General differs on the merits. Apparently not wishing for that test case, the Solicitor General acceded to the SEC filing its own brief.

JS: Did this itself set a precedent, maybe not in legal terms, but in terms of practice?

PG: As a practical matter, no, because in subsequent cases, the Solicitor General's position hardened on that.

In *Dirks*, the Solicitor General filed its own amicus brief, interestingly enough, not a party brief. The SEC was the party. It filed an amicus brief setting forth its opposition to the SEC interpretation. But at the SEC's request, his brief did include some generalized

statements of support for the SEC's insider trading program. We wanted to make sure, and he agreed, that his brief focused narrowly on the specific issue involved in the case and he wasn't opposed generally to the insider trading program.

I presented an oral argument on behalf of the SEC in the Supreme Court. The Solicitor General did not present an oral argument, but just relied on his brief. The SEC lost that case, but not on the ground the Solicitor General had asserted. The Supreme Court ignored his position and simply went for Mr. Dirks on his position.

Notwithstanding that, the relations remained good between the Solicitor General and the SEC. Rex Lee was a very good man, and I don't think there were any personal animosities that resulted from that.

JS: It's nice that everyone could remain professional.

PG: I liked him because he used to jog during the lunch hour. You'd see this guy, this younger man in those days, who would run on the mall. I would sometimes run into him on the mall. I used to be a jogger too. We used to chitchat.

JS: Were there any disagreements with other agencies in cases that concerned the definition of securities? For instance, in the case of Marine Bank?

PG: Well, we talked about Marine Bank and how the Solicitor General put us in his

conference room and locked the door and said, "You guys aren't coming out until you reach an agreement." There was another dispute between the SEC and the Solicitor General in a 1987 case called *CTS v. Dynamics*, where the United States and the SEC were amicus in a private action.

A question arose as to whether the Indiana Control Share Acquisition Act, sometimes called a state anti-takeover statute, violated the Constitution and should be struck down. Both the SEC and the Solicitor General agreed that this Indiana statute violated the Commerce Clause in the U.S. Constitution, but we disagreed as to whether the Williams Act, which is the federal statute dealing with takeovers, a statute that the SEC administers, preempted Indiana's state law.

Currently, there seems to be quite a few preemption cases in the Supreme Court. That is, whether federal law means that state law would not apply. The SEC had argued in lower courts, in courts of appeals, that the Williams Act did pre-empt, took away the power, of these state anti-takeover statutes.

He disagreed with that and so we worked out a compromise, which I thought was very subtle. On the Commerce Clause issue, the brief that was filed jointly on behalf of the United States and the SEC said that the SEC and the United States believed that the Indiana law violated the Commerce Clause. On the preemption issue, rather than note the SEC's differing view, the brief simply asserted that the United States believes that the Indiana law is not preempted by the Williams Act. A sharp-eyed reader of the brief could

infer that the mention only of the United States and not of the SEC and the United States signaled the SEC disapproval of the Solicitor General's views on the preemption argument. Although I thought this was subtle, in no time at all, the newspapers, the trade publications, and later the law reviews, all pointed that out. It wasn't that subtle at all.

JS: How did the court rule on that?

PG: The court ruled that the statute survived.

JS: It ruled that it was not a violation of the Commerce Clause?

PG: I believe it did.

JS: So united in defeat, unfortunately.

PG: There is another interesting example, which was here a dispute between agencies. The Solicitor General – this was Kenneth Starr, with whom I had close relations and we had many cases together – would not offer a compromise in this case. This involved a case in the Seventh Circuit, the federal court of appeals in Chicago, titled *Chicago Mercantile Exchange v. SEC* in 1990.

The SEC had granted permission to stock exchanges to trade so-called index participations as securities. The CFTC, Commodities Futures Trading Commission, the

agency that regulates commodities, had successfully opposed this SEC interpretation in the Seventh Circuit, arguing that these index participations were commodities subject to CFTC and not SEC regulation. The Seventh Circuit agreed with that.

Unfortunately for the SEC, the Commodities Exchange Act has a winner-take-all clause. It says that if certain things are commodities, then it doesn't make any difference whether they're also securities, they win. So, consequently, even though these index participations could've been securities, if they're also commodities, there's exclusive jurisdiction in the CFTC.

The Solicitor General agreed with the CFTC on the merits and opposed the SEC's attempt to support review in the Supreme Court, even though the SEC was a named party in the case. The Solicitor General did not allow the SEC to file its own brief. Instead, he wrote his own brief, in which it summarized the SEC's views, but rejected them.

I had argued the Seventh Circuit case. I pressed Solicitor General Starr hard to get to the Supreme Court. I said to him, in effect, "Well, you know, you may agree or disagree, but this is an important issue and we should let the Supreme Court decide that." He said no, he was not going to let that happen. But to his credit, he was very careful to present the SEC's views accurately in the brief and he gave me opportunities to read the drafts and to comment on them.

There was an interesting personal epilogue, I don't know whether it fits or not, but I like

to tell it. We finally reached a point, or at least I did, where you know that you lost. I said to myself, I've lost the game. This was on the Friday before Memorial Day weekend. My wife and I were going for the weekend to Point Lookout, Maryland, a very nice state park, where the Potomac River goes into Chesapeake Bay.

We had our kayaks on our car and our tent in the trunk. Frequently we would go out there to tent camp and then kayak. Unfortunately, because I was being delayed in Judge Starr's office, I didn't get out as early as I hoped. My wife and I got off late and we got to Point Lookout just as it was getting dark. It was just starting to rain, and we had to pitch our tent as quickly as we could, before the deluge came.

While we were doing that, we hear a siren. A Maryland State Trooper, with his light revolving on top of his car, comes up to our campsite and says to me, "Are you Paul Gonson?" I said, "Yes, what did I do wrong?" He said, "I have a very important message. The Solicitor General of the United States wants you to call him right away." I said, "My gosh, how did you find me?"

Anyway, the short answer was that my wife's mother was living with us and we always wanted her to know where we were, so we left a phone number and I guess somehow or other, Starr found where we were. These were the days before cell phones. I asked the trooper, "Is there a phone around here someplace?" He said, "Well, about three miles from here on a telephone pole there is an outdoor phone. I'll lead you there."

I followed him in the car. Now it's pouring rain and it's dark. Judge Starr is still in his office and he's still working on the brief, which, as I said, has to be filed the Monday after Memorial Day. He's made some language changes and he wants to run those language changes by me to make sure I don't have any objections. At that point, of course, I had lost the war. I think that was very gracious of him to offer to do that, but it didn't work well with my wife, who had to put up the tent all by herself in the dark and in the rain. (Laughter.)

JS: That's a great story. Apparently the work of the Solicitor does not end at his office doorstep.

PG: (Laughter.) That's right.

JS: A job never done. Chicago Mercantile was fought in the Seventh Circuit court, correct? Was it Judge Easterbrook that decided the case?

PG: It was Judge Easterbrook, yes, the famous Judge Easterbrook. He was, in an earlier era, a deputy Solicitor General with whom I had worked on a number of cases, including a case called *Edgar v. Mite*, which was a forerunner to the so-called second generation state anti-takeover statutes. He had argued that case. He thereafter became a law professor at the University of Chicago, became part of the so-called Chicago School with Judge Posner, who also taught at that time and they both ended up on the Seventh Circuit, conservative and very good judges.

JS: Did you find that it made a big difference whether or not a judge had a background in securities law?

PG: Yes, indeed. I thought that was very important. Usually the courts that did tended to get it right. Sometimes I would lose a case and I would reflect and say, in the deepest innermost recesses of my heart and mind, that the decision probably was correct, even though I lost. You have a client, which of course, was the SEC and you try your best to try to support its positions.

I did find that courts in the Second Circuit, where many of these securities cases are held, the trial judges there and in the court of appeals are really sophisticated in the securities laws. They get many of these cases and they're very good.

That's also true generally in the big cities, in Chicago, Los Angeles, Miami, where there are big centers of securities laws, less so out in the hinterlands. Although, I think federal judges act conscientiously; they are generalists. They try every kind of a case imaginable. They try criminal cases, they try patent cases, they try antitrust cases. They do their best in every case they have.

JS: We've talked about your long distinguished career at the SEC. Let's talk a little bit about what came afterwards. You entered into private practice. Did you continue working on issues related to the Supreme Court after leaving the SEC?

PG: Well, I did. I had several Supreme Court cases. As I mentioned, I left the SEC in 1998 and went to a private law firm, where I've been for over twelve years and I'm now semi-retired. A few years ago there was a very interesting case, and now I'm on the other side, representing a stockbroker. I used to like to say that for many years I sued stockbrokers and now I defend them. But of course, the same law applies.

This case was a case that dealt in its own way with a dispute between the SEC and the Solicitor General, who was Paul Clement. This case was *Credit Suisse v. Billing* case, decided in 2007. In this case, I did not represent the SEC. I represented one of the defendants in the case. The case was brought under the antitrust laws, not the securities laws. But the alleged conduct was all securities-related. It was a very, very big case. It was a class action brought by thousands of investors against ten of the largest investment banking firms in the country.

JS: This case was *Credit Suisse Securities v. Billing*?

PG: That's correct. I represented one of these ten firms. The firms had formed underwriting syndicates to sell shares of stock in initial public offerings of hundreds of high tech companies between 1997 and 2000. In early 2000, as I'm sure everyone will recall, this high-tech bubble burst and the market value of these stocks tumbled down, losing trillions of dollars in value.

These thousands of investors formed a class action and brought this antitrust suit and claimed that these ten underwriting firms had unlawfully conspired with each other in violation of the antitrust laws and that they would not sell shares of a popular new issue of stock, sometimes referred to as a hot issue, unless the buyer agreed to pay so-called anti-competitive charges over and above the share price in one or more of three ways.

First, the plaintiffs argued in their complaint, the buyer had to agree to buy additional shares of the same security at even higher prices. This is a practice called laddering. Or they had to pay unusually high commissions on subsequent securities purchases from the underwriters. Or three, that they would have to purchase less desirable securities in order to get the desirable ones, a practice in antitrust law called tying. This alleged conspiracy was said to raise the prices artificially.

In the trial court, the defendants made a motion to dismiss the antitrust action on the ground that all of the conduct was securities-related and the federal securities laws outlawed this alleged conduct and dealt effectively with this kind of case. We argued that the securities laws implicitly precluded the application of the antitrust laws to this conduct. We said that if anybody was going to bang the heads of these people, the SEC was supposed to do it, not the antitrust people. Secondly, you could bring these cases under the securities laws. The reason they were brought under the antitrust laws is that under securities laws you get single damages. Under the antitrust laws, if you win, you get treble damages, that is, you get three times the amount of damages.

Furthermore, the antitrust cases are much easier to pursue than are securities cases, because securities cases have elaborate protections that Congress has given in statutes to prevent perceived abuses. These statutes, of course, would not apply to antitrust cases. It was advantageous to bring the cases in the antitrust field.

When we made the motion to dismiss that the securities laws preempted the antitrust laws, the trial court sent a request to the SEC and a separate request to the Antitrust Division of the Department of Justice, asking each of them to file an amicus brief expressing their views. The SEC's brief said that the motion to dismiss should be granted and it said so to protect its own jurisdiction. The Antitrust Division brief said the motion should be denied and that the case should proceed under the antitrust laws. Their view was that if conduct violates two laws, both laws should apply.

The trial court granted the motion and dismissed the case. On appeal, the Second Circuit Court of Appeals also asked the agencies each to file an amicus brief and they each told the Second Circuit the same position that they had asserted in the trial court. The court of appeals, however, reversed the trial court and held that the case should proceed under the antitrust laws and sent the case back, to be processed under the antitrust laws.

The defendants then asked the Supreme Court to take the case and the Supreme Court did. The Supreme Court reversed the court of appeals and it held that the securities laws did oust the antitrust laws. When the case got to the Supreme Court, the Solicitor General was faced with two agencies already on record asserting opposite positions.

Neither agency was a party to the case. The case, of course, was a private action.

After much negotiation, as you can imagine, the Solicitor General refused to let the SEC file its brief in the Supreme Court. Instead, the Solicitor General filed a brief on behalf of the United States, agreeing in part with the SEC, agreeing in part with the Antitrust Division, satisfying neither agency. It attempted to set forth a middle ground.

Even though the SEC could not file a brief in the Supreme Court, its views were already well-known. The Supreme Court in its opinion quoted favorably from the SEC's brief filed in the district court. So even though the SEC didn't get to file a brief in the Supreme Court, it had set forth its views very well in the district courts. We, the defendants, put that entire SEC brief in our appendix, which is a little booklet that gives the opinions of the courts below and the briefs that were filed and so on. When the Supreme Court in its opinion cites to the SEC's brief, it cites to those pages in the appendix where it was set forth, so it worked out very well for the SEC and for the defendants.

With regard to the Solicitor General's brief, the Supreme Court said, and I'm quoting now, "We are aware that the Solicitor General, while recognizing the conflict, suggests a procedural device that he believes will avoid it (in effect, a compromise between the differing positions that the SEC and the Antitrust Division of the Department of Justice took in the courts below)."

Then the Supreme Court says, "The Solicitor General's proposed disposition, however,

does not convincingly address the concerns we have set forth," and then rejects the position. So while this was an attempt, bravely, by the Solicitor General to work out some compromise, it didn't work.

JS: So in your defense, you're able to exploit these differences between the positions between the SG and the SEC?

PG: Yes, we did. And it was interesting that in our negotiations with the SEC, of course, the SEC was at pains to tell us and to tell everyone else that while the SEC and the stock brokers were on the same side, the SEC was not supporting them. The SEC's purpose was its own concerns about which agency should regulate securities-related conduct. I think maybe, to some extent, it could be viewed as a turf battle. That is, if there's going to be regulation of the securities markets, it ought to be done by the SEC and not by the Antitrust Division.

JS: Do you recall any comparable experiences from your time as Solicitor, where you were in negotiations with one side or another of a case and it became clear that the position of the SEC was different from that of the SG? We already talked about cases where that had happened, but I was wondering if it was something that was discussed in negotiations with parties involved?

PG: There were a couple cases with banking agencies. Generally, it never got to the point where we actually were going to file different positions in court. Generally, the SEC

would then acquiesce. These were positions of less importance to the SEC. There were times I remember that I was in conferences with general counsels of banking agencies and the Solicitor General and his staff where they would have one position, the SEC would differ somewhat with that, and eventually the SEC just sort of let it go.

Today, this is less so. Not many years ago, if you went into a bank and you went up to the counter and said, "I want to open a savings account," the teller might say, "Well, have you ever considered buying some mutual funds? You'll get more money with mutual funds than you can a savings account." Now, this teller is not a stock broker. But if you expressed an interest, perhaps you would be sent off to somebody who is sitting at a desk at the bank and who would try to sell you some stock or mutual funds.

The SEC was concerned that investors might be confused by this, and might believe that the FDIC insurance includes these non-bank investments, which of course, it doesn't. Over the years, compromises were worked out. The SEC wanted this guy at the desk to sit upstairs, on the second floor, not in the bank lobby, so as not to convey the misimpression. The compromise is that if you go to a bank today there usually are little separate offices, closed offices, but still within the bank's lobby. That's where we got with that.

There were issues like that that were involved with some of the banking agencies. The banking agencies always were concerned about safety and soundness of the bank. If things were not going well with the banks, for example, the banking agencies' positions

were that they did not want it to be public, because they didn't want the so-called run on the bank.

If depositors were concerned that the bank was in trouble, you'd have long lines the next morning as people run in to withdraw their money. Of course, no bank has that much cash. Their money is always invested or out in loans or mortgages, and that would be very bad. Even though the FDIC insurance would cover, most people want to get their money out right away. So, the bank agencies let the banks conceal bad news.

The SEC, on the other hand, is a disclosure agency. If some of these banks were public companies or their holding companies were public companies, there would be public stockholders in these companies, and the SEC would want material adverse information out promptly.

JS: This is very interesting. You're telling me that the layout of the lobbies of banks today is basically a result of negotiations between the securities and banking regulators.

PG: It's a compromise. They're not upstairs on the second floor, where the SEC wanted them. But they're now walled off, if you will, from the tellers. The banking literature has, in big, bold type, "These investments are not insured by the U.S. government," which is another compromise. These things get worked out.

JS: That's really fascinating. Well, let's wrap up with some general reflections. In general,

what was the attitude of the SEC towards bringing cases before the Supreme Court? Did it generally try to bring as many issues before the court as possible?

PG: Generally it's sort of more or less of an appellate strategy to try to get important cases there. But really, it's more of an opportunistic reaction when they're there. After all, the cases get there not because the SEC is pushing them there, but because the Court decides to take those eighty or one hundred cases out of 3,000 that are requested. So when the securities cases would get to the Supreme Court, or other cases, as I mentioned, in the SEC's greater metropolitan neighborhood, the SEC would take an interest in them.

We believe that our goal, which was to try to be influential in shaping policy, has largely been successful, although there were, of course, up and down years. Some cases were successful, some weren't. There were scholars who wrote law review articles on this subject and pointed out that the SEC's won-loss record really was very good in the Supreme Court.

So I would think that we were quite influential in shaping policy and these policy debates would, of course, begin in the halls of the agency itself, because often these are close cases. You can imagine that if the Supreme Court takes a case, the case often is, by definition, a close case. Reasonable people will argue on both sides of that case. The case where there was the so-called "sale of business" doctrine, was taken by the Court after ten courts of appeals had split five and five.

JS: That's *Landreth v. Landreth*?

PG: Yes, you could easily see that there are differing views. Within the agency, sometimes there were big fights about the positions to take in these cases. I always used to thank God for deadlines. By that, I mean when you're in the Supreme Court and you're up-side, that is, you are the petitioner, you have forty-five days to file your brief from the time certiorari is granted.

When you're bottom-side, that is, you're defending, then you have thirty days thereafter to file your brief. I think that if it were not for those deadlines, these policy debates would never end. It's like rule-making. Sometimes the SEC takes two years to get a rule passed and that's because the lobbyists come in, the lawyers come in, Congress weighs in, everybody else weighs in, back and forth and back and forth.

When you've got thirty days or forty-five days to file a brief, you've got to resolve your policy disputes in a hurry. We all go to what is called the Commission table. The Commissioners sit, the five of them on one side, the relevant staff sits on the other side, and we discuss what the policy should be.

Sometimes within the staff, there may be disagreements about what that policy position should be. But for better or worse, you've got to decide right away because you've got to write that brief. And you can't write the brief until you know what the policy is.

JS: Thank God for deadlines. We can't live without them.

PG: Thank God for deadlines. I used to love deadlines.

JS: Can't live without them.

PG: On a personal basis, if I could add a final thought, I loved this work. I found a home doing appellate work at the SEC. From a lawyer's point of view, I don't think there's anything as stimulating or professionally rewarding as Supreme Court practice. While it sometimes takes a long time for a case to get to the high court – an example is the Billing case, this antitrust case -- I was in the case from the trial court to the Supreme Court. The case started in 2003 or 2004 and ends up in 2007. It probably took five years to get to the high court. My personal satisfaction has always been a very high one. I think the SEC has been a great place to work, anyway. I think doing Supreme Court work is the best.

As you pointed out, I was the Solicitor of the agency for the last twenty years. My deputy, Jacob Stillman, succeeded me in that position when I left twelve years ago. In the past twelve years, the SEC has enjoyed a very successful run during his tenure at the helm. Mr. Stillman came to the SEC in 1962, so this year, 2011, he's in his forty-ninth year. Next year, God willing, he will have spent fifty years at the SEC. So here's a guy up in years at the top of his game, doing the work that he loves and very, very successfully. I'm very proud of him.

JS: I think the general public probably owes all of you a big thanks for spending the many years of your careers in these positions serving the public.

PG: Thank you. I enjoyed this interview very much.

[End of Interview]