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Freedom of Information Act - No Improper Withholding if Records are Removed from Agency Prior to Freedom of Information Act Request Case Notes

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CASE NOTES


Henry Kissinger was appointed Assistant to the President for National Security Affairs in January 1969. In September 1973, he was appointed Secretary of State. However, he retained an advisory position with the National Security Council until 1975. Throughout his tenure of office, Kissinger’s secretaries monitored and made transcripts of his telephone conversations. In October 1976, shortly before he left the State Department, Kissinger removed the transcripts from the department. Eventually, he deeded them to the Library of Congress.¹

Kissinger did not receive permission to remove the documents from any of the federal agencies responsible for document maintenance. However, he received an opinion from the Legal Advisor to the State Department that the transcripts were private, not agency, records. When Kissinger removed the records, there was no State Department review of their contents.²

While Kissinger was Secretary of State, three different Freedom of Information Act (FOIA)³ requests for transcripts of his telephone conversations were filed with the State Department. William Safire, a New York Times columnist, filed his request before the transcripts were removed from the State Department.⁴ The Military Audit Project (MAP) and

². Id. at 140-41.
⁴. 445 U.S. at 142-43. Safire requested transcripts of those conversations between January 21, 1969 and February 12, 1971 in which either his name appeared or Kissinger discussed leaks with certain named officials. Id.
the Reporter’s Committee for Freedom of the Press (RCFP) filed their requests after the transcripts had been removed.\textsuperscript{5}

The State Department denied all three requests. The Department reasoned that Safire sought transcripts made while Kissinger was National Security Advisor, and, therefore, the transcripts were not agency records subject to FOIA disclosure. Safire argued unsuccessfully on administrative appeal that the location of the transcripts in the State Department rendered them agency records. The State Department denied the MAP request by stating that the transcripts were not agency records and that the department no longer had custody and control over the transcripts. MAP filed an administrative appeal, but the decision was affirmed. The State Department denied the RCFP request for the same reasons given to MAP.\textsuperscript{6}

The three parties then filed suit in federal district court, naming Kissinger, the Library of Congress, the Secretary of State, and the State Department as defendants. Plaintiffs sought a judgment declaring that the transcripts were “agency records”\textsuperscript{7} subject to FOIA disclosure, and that they had been improperly removed and withheld. Plaintiffs requested the court to compel the Library of Congress to return the documents to the State Department with directions to process them for FOIA disclosure.\textsuperscript{8}

On summary judgment, the district court held that the documents produced while Kissinger was Secretary of State were agency records. In addition, the court concluded that the transcripts had been wrongfully removed because there had been no prior approval by the responsible agency. The court acknowledged that the Library of Congress was not an agency subject to FOIA disclosure requirements, but invoked its equitable powers and ordered the Library to return the transcripts to the State Department. The order further required the Department to determine which transcript summaries were exempt from FOIA and to provide the non-exempt documents

\textsuperscript{5} Id. at 143-44. MAP requested all the transcripts made while Kissinger was Secretary of State. RCFP sought the transcripts made while Kissinger was Secretary of State and National Security Advisor. Id.

\textsuperscript{6} Id.

\textsuperscript{7} Under FOIA, only agency records are subject to disclosure requirements. 5 U.S.C. § 552(a)(4)(B) (1976).

\textsuperscript{8} 445 U.S. at 144-45.
to plaintiffs. Relying on the mistaken assumption that the request for transcripts made while Kissinger was National Security Advisor had been withdrawn, the court denied those requests.9

Both parties appealed the lower court decision. The court of appeals affirmed the holding that the transcripts made while Kissinger was Secretary of State were agency records subject to FOIA disclosure. As to the request for the summaries made while Kissinger was National Security Advisor, although it had not been withdrawn, the court held those documents need not be produced. Both Kissinger and RCFP filed petitions for certiorari.10

Affirming in part and reversing in part, the United States Supreme Court first reviewed the MAP and RCFP requests. The Court held that the district court had no authority to order the transfer of the transcripts from the Library of Congress to the State Department.11

In determining whether the district court had jurisdiction to order the transfer of the transcripts from the Library of Congress, the Court looked first to the Federal Records Acts.12

9. Id. at 145.
10. Id. at 145-46.
11. Id. at 146-55.
   It is the purpose of this chapter, and chapters 21, 31, and 33 of this title, to require the establishment of standards and procedures to assure efficient and effective records management. Such records management standards and procedures shall seek to implement the following goals:
   (1) Accurate and complete documentation of the policies and transactions of the Federal Government.
   (2) Control of the quantity and quality of records produced by the Federal Government.
   (3) Establishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records and with respect to the effective and economical operations of an agency.
   (4) Simplification of the activities, systems, and processes of records creation and of records maintenance and use.
   (5) Judicious preservation and disposal of records.
   (6) Direction of continuing attention on records from their initial creation to their final disposition, with particular emphasis on the prevention of unnecessary Federal paperwork.
   (7) Establishment and maintenance of such other systems or techniques as the Administrator considers necessary to carry out the purposes of this chapter, and chapters 21, 31, and 33 of this title.
Assuming that Kissinger wrongfully removed the transcripts, the Court nevertheless denied MAP's and RCFP's prayer for return of the transcripts to the State Department. The Court found that the Records Acts do not expressly provide for a private cause of action\textsuperscript{13} and refused to imply such a right. The Court first reasoned that the Acts only proscribe specific conduct by government officials; they do not provide private individuals with rights to inspect government documents. Secondly, the Court reasoned that, since the Records Acts already provide for administrative remedies, the Court should be "wary of reading others into it."\textsuperscript{14} Finally, the Court determined that the purpose of the Acts is to aid federal government by establishing a system of records maintenance rather than to protect the rights of private citizens.\textsuperscript{15}

The Court next considered whether FOIA, unlike the Records Acts, provides plaintiffs with a private cause of action. The Court acknowledged that Congress enacted FOIA to foster public access to otherwise unavailable agency records. However, the Court determined that the statute authorizes the federal courts to order disclosure only where an agency has (1) improperly; (2) withheld; (3) agency records.\textsuperscript{16} The Court further determined that a plaintiff must make a showing of all three requirements before the courts can exercise jurisdiction.\textsuperscript{17}

The Court held that the district court had no jurisdiction to order return of the transcripts because there had been no improper withholding.\textsuperscript{18} The Court reasoned that there is no

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The Records Acts provide effective management of government records; the Records Disposal Act provides efficient systems for the disposal of obsolete records. 44 U.S.C. §§ 2901-3314. (Both acts will be referred to as the Records Acts.)

13. The Records Acts were not enacted to give private citizens the right to inspect government records, or to protect them from mismanagement of government records. 44 U.S.C. § 2902 (1976). The purpose of the Acts is to aid government. See note 12 supra.

14. 445 U.S. at 149 (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)).

15. 445 U.S. at 149.

16. FOIA provides: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (1976).

17. 445 U.S. at 150.

18. Id. Since the Court held there was no improper withholding, it was unnecessary to determine whether the transcripts were "agency records." The Court only had to show that one of the requirements had not been contravened. Id. at 146-47.
withholding where the document has been removed from agency possession prior to the request. Rejecting plaintiffs' argument that refusal to institute legal proceedings to retrieve the documents constitutes withholding, the Court ruled that the usual meaning of "withhold" presupposes possession or control. The Court noted that neither FOIA nor its legislative history define "withhold." Therefore, the Court scrutinized the structure and purpose of FOIA and found that Congress intended to use "withhold" in its normal sense; the agency must have possession or control of the documents and not merely fail to sue third parties.\(^\text{19}\)

The Court looked to three sources which suggest that agency possession or control is a prerequisite to triggering FOIA disclosure requirements. First, legislative debates suggest that the purpose of FOIA is to allow "access to information possessed by Government servants."\(^\text{20}\) Second, the Attorney General's guidelines issued pursuant to FOIA state that FOIA is applicable "only to records in being and in possession or control of an agency."\(^\text{21}\) Finally, court decisions indicate that FOIA only requires agencies to disclose those agency records over which they have possession or control.\(^\text{22}\)

The Court then considered the purposes of FOIA. The Court found that the Act does not impose obligations on agencies either to create or retain records.\(^\text{23}\) Rather, the purpose of FOIA is to provide access to government records. The Court reasoned, first, that if FOIA does not require an agency to create or retain records, it cannot require an agency to retrieve documents which are no longer in its possession. Whether an agency decides to remove, or not create or retain, records, the effect is the same on a FOIA request. The documents will not be available to the requester.\(^\text{24}\)

\(^{19}\) Id. at 151.

\(^{20}\) Id. (quoting 112 CONG. ROLL. 13007 (1966) (Remarks of Rep. Monagan)).

\(^{21}\) 445 U.S. at 151 (quoting Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 23-24 (June 1967)).

\(^{22}\) 445 U.S. at 151-52. Here, the Court relied on dicta in NLRB v. Robbins Tire & Rubber Co. 437 U.S. 214 (1978) which states: "FOIA requires the records and materials in possession of federal agencies be made available on demand to any member of the general public." Id. at 221 (emphasis added).

In Robbins, the Court held that the witness statements requested fell within the nine statutory exemptions and, therefore, were not subject to FOIA disclosure. Id. at 242-43.

\(^{23}\) See note 12 supra.

\(^{24}\) 445 U.S. at 152-53.
Secondly, considering further the purpose of FOIA, the Court looked to the procedural provisions of the Act to determine whether Congress intended to oblige agencies to retrieve documents at the request of private individuals. Sections 552(a)(6)(A) and (B) of FOIA provide a ten day extension in the event an agency is unable to respond to a request within ten days. The Court concluded that the purpose of this statutory exemption is to provide time for searching and collecting rather than litigation; litigation would clearly take more than ten days.

In addition, the Court looked to Section 552(a)(4)(A) of FOIA which allows an agency to set fees for direct costs of document searches and duplications. When the search is extensive, the agency may apportion costs to the requester. The Court reasoned that the permissible costs are those which an agency normally incurs in complying with a FOIA request. It is unlikely that Congress intended that the costs of a "search" include litigation expenses; hence an agency search was not meant to include initiation of legal proceedings.25

In conclusion, the Court held that Congress never intended FOIA to displace the Records Acts. The purpose of the Records Acts is to safeguard against, and retrieve, wrongfully removed agency records.26

To summarize, the Court found that its definition of "withhold" disposed of both the MAP and RCFP requests. The plaintiffs filed their requests after the transcripts had been removed from the State Department. Since Kissinger and the Library of Congress had control and possession of the transcripts, and the State Department had lost possession and control, there was no withholding of agency records. Without a showing that records had been withheld, plaintiffs could not establish liability in a FOIA suit.27

The Court dealt with the Safire request separately. Safire requested transcripts of conversations from Kissinger’s tenure as National Security Advisor. After Kissinger was appointed

25. Id. at 153-54.
26. Id. at 154. The Court noted that recent Supreme Court cases support this holding. Both Renegotiation Bd. v. Bannercraft, 415 U.S. 1 (1974), and NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), provide that FOIA does not depart from prior practices; the intent of the Act is to provide access to government records. 445 U.S. at 154.
27. Id. at 154-55.
Secretary of State, the transcripts were transferred to the State Department. The Court held that the transcripts are not agency records and, therefore, do not fall within the pur-view of the Act.\textsuperscript{28}

The Court acknowledged that, under FOIA, the Executive Office of the President is an agency. But, looking to the legis-lative history, the Court found that the Executive Office does not include the Office of the President or his immediate per-sonal staff. Since Safire's request was for transcripts made while Kissinger was Assistant to the President, the Court con-cluded that the transcripts were not agency records when made.\textsuperscript{29}

Next, the Court rejected plaintiffs' argument that the transcripts made while Kissinger was National Security Advisor may have been National Security Council records and, therefore, subject to FOIA.\textsuperscript{30} The Court reasoned that when Safire requested transcripts from those conversations relating to the internal secrecy of the White House, he requested tran-scripts of conversations in which Kissinger was acting only in his capacity as presidential advisor. The Court further rea-soned that when Safire requested those documents in which his name appeared, he never asserted that those documents were National Security Council documents; he maintained that they were State Department documents. Thus the Court found no need to address the issue of whether the State De-partment violated the Act by refusing to produce the records of another agency.\textsuperscript{31}

Rejecting plaintiffs' argument that the transcripts were agency documents because they had been on file in the State Department, the Court stated that "[W]e simply decline to hold that the physical location of the notes of the telephone conversations render them 'agency records.' "\textsuperscript{32} The Court ar-gued that the transcripts were not generated or controlled by the State Department. Further, they served no State Depart-

\begin{itemize}
  \item \textsuperscript{28} Id. at 157. See note 7 \textit{supra} and accompanying text. See Forsham v. Harris, 445 U.S. 169 (1980), a companion case to \textit{Kissinger} decided on the same date, where the Court also construes the term "agency records" under FOIA.
  \item \textsuperscript{29} Id. at 156.
  \item \textsuperscript{30} The Court declined to decide when the transcripts could become National Security Council records under FOIA. \textit{Id.}
  \item \textsuperscript{31} Id. at 156-57.
  \item \textsuperscript{32} Id. at 157.
\end{itemize}
ment purpose. Concluding that the transcripts were not agency records, the Court upheld the lower court's refusal to order disclosure.33

Justice Stevens, concurring in part and dissenting in part, agreed with the Court that there is no withholding unless the agency has either custody or control of the records. However, he rejected the Court's approach which equates custody with physical possession. Stevens argued that there is a withholding if an agency has legal custody of, or a legal right to, records but declines to retrieve them.34

Stevens also argued that the majority's conclusion is inconsistent with the congressional purpose behind FOIA. The purpose of FOIA is to provide maximum disclosure of government documents to private citizens.35 But, Stevens noted, this decision exempts wrongfully removed documents from the disclosure requirements. Stevens expressed a fear that government officials could avoid FOIA requests by removing potentially embarrassing documents from their files.36

Concurring and dissenting, Justice Brennan agreed with the majority's conclusion that FOIA disclosure should not be conditioned on the legality of a removal. However, he disagreed with the Court's holding that FOIA could not reach previously removed documents. Acknowledging Stevens' definition of improper withholding as the most workable, Brennan urged Congress to fashion a rule concerning the retention of documents for FOIA purposes.37

The Kissinger decision provides that there is no improper withholding under FOIA if the agency no longer possesses or controls the documents requested by a private party.38 The Court concluded that, because there was no withholding, the district court did not have jurisdiction to order disclosure.39

33. Id. at 157-58.
34. Id. at 161-66 (dissenting opinion).
36. 445 U.S. at 161 (dissenting opinion).
37. Id. at 158-60 (dissenting opinion).
38. Brennan argued that "[i]f FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester." Id. at 159.
39. Id. at 155.
By ruling against the plaintiffs on the threshold issue of jurisdiction, the Court failed to consider whether its decision was consistent with the Congressional intent underlying FOIA.

The result contradicts the Congressional purpose underlying FOIA to provide private citizens with access to all government documents, except those which the legislature has specifically exempted. Prior cases construing FOIA have held that FOIA should be liberally construed and the exemptions should be narrowly interpreted in order to provide maximum disclosure. But, by narrowly interpreting "withhold," the Court avoided the legislative mandate of maximum disclosure.

This result clearly contravenes the purpose of FOIA. But, more importantly, the decision may lead to serious infringement of the right to access derived from the first amendment. If simple removal defeats FOIA disclosure obligations, requesters may find documents removed. There is significant potential for abuse. Agencies may systematically remove all important or embarrassing documents from the agency's premises. If FOIA remains unamended after Kissinger, private citizens will retain their right of access; however, the question remains whether removal of documents may render the right meaningless.

The Supreme Court ruled against the plaintiffs on the

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40. See note 35 supra.

41. In Robbins, the Court stated that "the Act is broadly conceived" and its "'basic policy' is in favor of disclosure." 437 U.S. at 220. The Court held that the witness statements requested were exempt under Section 552(b)(7)(A) and, therefore, were not subject to FOIA disclosure. Id. at 242-43.


42. Stevens argued that "[i]t is the creation of such an incentive, which is directly contrary to the purpose of FOIA, rather than the result in this particular case, that prompts me to write in dissent." 445 U.S. at 161-62 (dissenting opinion).

43. The right to access is derived from the first amendment rights of freedom of speech and press. Underlying these rights is the assumption that private citizens must have the right to know; an individual's right to speak or publish is meaningless without adequate information. The right to know necessarily implies a right to access to government records. The right to know is ineffective without access to government records because an individual would otherwise be unable to find adequate information concerning government operations. The Constitutional Right to Know, 4 Hastings Const. L.Q. 109 (1977).

44. Stevens argued that the majority's holding "creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests." 445 U.S. at 161 (dissenting opinion).
threshold issue of jurisdiction when it found that the district court did not have the power to order the return of the documents to the State Department. It thus avoided questions concerning the purpose of FOIA which is to provide maximum disclosure of government records. The Kissinger decision allows an agency to frustrate the Act by simple removal of documents from the agency's premises. Moreover, the holding may seriously infringe on the right of access which will become meaningless if agencies systematically remove key documents.

Teresa Craigie
AGRICULTURAL LABOR RELATIONS—SUPERIOR COURT HAS JURISDICTION IN A FARM LABOR DISPUTE TO ENJOIN PRIMARY PICKETING THAT OBSTRUCTS ACCESS—Kaplan's Fruit & Produce Co. v. Superior Court, 26 Cal. 3d 60, 603 P.2d 1341, 160 Cal. Rptr. 745 (1980).

The Agricultural Labor Relations Board (ALRB) certified\(^1\) the United Farm Workers of America (Union) as the collective bargaining agent for Kaplan's Fruit and Produce Company's (Kaplan's) Porterville farm in 1976.\(^2\) In November of 1977, after a collective bargaining agreement had not been reached, the Union began to picket Kaplan's wholesale outlet in Los Angeles.\(^3\) On December 9, 1977, Kaplan's obtained a temporary restraining order against Union picketing but the superior court denied the company's request for a preliminary injunction.\(^4\) The court found that although the evidence supported a charge of obstructed access, it failed to establish the "violence or threat of violence" from the picketing which is

\(^1\) Certification is a major requirement of the ALRA. It is an unfair labor practice to bargain with, recognize, or sign a collective bargaining agreement with any labor organization not certified pursuant to the Act. CAL. LAB. CODE § 1153(f) (West Supp. 1981). Basically the certification process requires that each bargaining representative be elected by secret ballot and be confirmed by the ALRB as the fair winner of the election. Aware of the crucial nature of the certification requirement, growers have contested the certification of certain farm labor groups to remove any possibility of reaching an early collective bargaining agreement, knowing that the charge would be investigated and possibly appealed. For a discussion of the mechanics of the certification process, see Levy, The Agricultural Labor Relations Act of 1975 — La Esperanza de California para el Futuro, 15 SANTA CLARA L. REV. 783 (1975). For a discussion of delay tactics used by the growers in the certification process, see Rutkowski, Future of the United Farm Workers, 1978 SAN FERNANDO L. REV. 21.

\(^2\) 26 Cal. 3d 60, 66, 603 P.2d 1341, 1344, 160 Cal. Rptr. 745, 747.

\(^3\) Id. 603 P.2d at 1344, 160 Cal. Rptr. at 748. Both the ALRB and the California Supreme Court classified the picketing as a primary strike and not as a secondary boycott. A primary strike is picketing directed against the employer with whom the union has a dispute. BLACK'S LAW DICTIONARY 1071 (5th ed. 1979). A secondary boycott is picketing directed at one business establishment, with which there is no dispute, to induce that business to put pressure on the employer with whom the union has a primary dispute. BLACK'S LAW DICTIONARY 1213 (5th ed. 1979). The distinction between the two is crucial to construction of CAL. LAB. CODE § 1154.

\(^4\) 26 Cal. 3d at 66, 603 P.2d at 1344, 160 Cal. Rptr. at 748.
necessary for the issuance of a preliminary injunction. 5

Concurrent with its action in superior court Kaplan’s filed an unfair labor practice charge with the ALRB, but upon a determination that the Union had not conducted mass picketing or blocked access, the Board declined to issue a complaint. 6 The Board’s finding was upheld on appeal to the ALRB’s general counsel who reasoned that the picketing was “primary activity” conducted in a manner that did not violate the provisions of the ALRA. 7

Kaplan’s then petitioned the court of appeal for a writ of mandamus to compel the superior court to issue the preliminary injunction. 8 The court granted an alternative writ, 8 and later issued a peremptory writ. The California Supreme Court then granted a petition for hearing. 10

By unanimous judgment, in an opinion by Acting Chief Justice Tobriner, with a separate opinion by Justice Newman, the court held that neither the ALRA nor the Moscone Act11 divests the superior court of jurisdiction to enjoin farm labor picketing that obstructs a primary employer’s ingress and egress. 12

The court used federal precedents as a guide to determine the scope of jurisdictional preemption under California Labor Code section 1160.9 because “the ALRA apparently incorporates into California law the general features of the federal preemption doctrine.” 13 Therefore, while the legislature has

5. Id., 603 P.2d at 1345, 160 Cal. Rptr. at 748.
6. Id. at 66-67, 603 P.2d at 1345, 160 Cal. Rptr. at 748.
7. Id. at 67, 603 P.2d at 1345, 160 Cal. Rptr. at 748.
8. Id.
9. Id. Mandamus cannot displace the adequate legal remedy of appeal. The issuance of the alternative writ was a determination that Kaplan’s appellate remedy was inadequate, and that no other plain, speedy, and adequate remedy existed except the extraordinary writ. 5 WITKIN, CALIFORNIA PROCEDURE § 92 (2d ed. 1971). The alternative writ is a notice device whereby the respondent superior court must show cause why the compelled act has not been performed. 43 CAL. JUR. 3d MANDAMUS & PROHIBITION § 41 (1978). The issuance of the peremptory writ by the court of appeal was a judgment for the applicant. 43 CAL. JUR. 3d Mandamus & Prohibition § 54 (1978).
10. 26 Cal. 3d at 67, 603 P.2d at 1345, 160 Cal. Rptr. at 748.
12. 26 Cal. 3d at 65-66, 603 P.2d at 1344, 160 Cal. Rptr. at 747.
13. People v. Medrano, 78 Cal. App. 3d 198, 205, 144 Cal. Rptr. 207, 221 (1978). The California Supreme Court gave little credence to any other interpretation of CAL. LAB. CODE § 1148 than the one supported by federal precedent. One commentator has maintained that instead of blindly following federal precedent, the ALRB should con-
mandated that the procedures of the ALRA "shall be the exclusive method of redressing unfair labor practices,"14 the Act also directs the courts to "follow the applicable precedents of the National Labor Relations Act, as amended."16

Consequently, the California Supreme Court applied the controlling precedent of San Diego Unions v. Garmon.16 In that case, the United States Supreme Court determined that the test for preemption consists of a dual inquiry: exclusive jurisdiction vests in the National Labor Relations Board (NLRB) if the labor conduct either is arguably protected or is arguably prohibited by the National Labor Relations Act (NLRA).17 Subsequent decisions have recognized that the test should not be applied in a "literal, mechanical fashion,"18 because local courts retain the power to adjudicate matters of "particular local concern."19 The California Supreme Court analyzed the issue of ALRA preemption by applying the two part Garmon20 test. The court initially considered whether the union activity was conduct "arguably protected" by the ALRA, and subsequently focused on the possibility that the union activity was conduct "arguably prohibited" by the ALRA.

The court first concluded that the ALRB could not preempt superior court jurisdiction under the doctrine of "arguably protected activity."21 Board intervention extends to union activities specifically listed in California Labor Code section

sider separately those issues unique to the area of agriculture. Levy, supra note 1, at 788. For example, in the farm labor context, the issue of injunctive relief might be considered "unique" by being different from those questions with which the ALRB is primarily concerned. When compared with other labor organizations, an agricultural farm labor union has an unusually brief time to be economically effective in a strike, due to the short harvest season. For a detailed study of such factors, see Shatz, Picketing Injunctions in California: A Study of the Role of the Courts in Farm Labor Disputes, 28 Hastings L.J. 801 (1977).

17. Id. at 245.
19. 26 Cal. 3d at 68, 603 P.2d at 1346, 160 Cal. Rptr. at 749.
20. Id. at 70, 603 P.2d at 1347, 160 Cal. Rptr. at 750. This test has been followed by the United States Supreme Court since the 1959 Garmon ruling, and was recently applied in the 1978 Sears case.
21. Id.
1152 as "protected," and obstructive picketing is not such enumerated activity. Therefore, the superior court could enjoin access obstruction provided that the injunction was narrowly drawn to avoid infringement upon protected union conduct. The court rejected as "unsound" the contention of the ALRB that even if the Union were innocent of obstructing access, the balance of the picketing activity would be protected primary activity under the Labor Code. The court pointed out that Kaplan's sought to enjoin only the obstruction to access, and that the Board could not invoke preemptive jurisdiction over activity "clearly unprotected."

The court next applied the "arguably prohibited" prong of the Garmon test, and concluded that Board preemption was precluded because the issues presented to the ALRB and to the superior court were sufficiently distinct to minimize the possibility of conflicting adjudications. The court relied on Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, in which the United States Supreme Court stated that preemption by the regulatory Board hinged on the need to avoid conflicting adjudications. A court has jurisdiction over matters of "particular local concern" only when an adjudication will not unduly threaten interference with the federal regulatory scheme. The Court in Sears held that a trespass charge against a picketing labor union presented a sufficiently distinct issue from the matters that the Board was empowered to regulate. Even though the trespass occurred during a labor dispute, risk of interference with the jurisdic-

23. 26 Cal. 3d at 70, 603 P.2d at 1347, 160 Cal. Rptr. at 750. The "protected prong" of the ALRA, Cal. Lab. Code § 1152, like its NLRA § 7 counterpart, does not expressly protect such activity. The activities guaranteed protection are self-organization, the joining of labor organizations, collective bargaining, and other concerted activity for mutual aid. The right to refrain from such activities is also protected. Cal. Lab. Code § 1152 (West Supp. 1981).
24. 26 Cal. 3d at 71, 603 P.2d at 1347, 160 Cal. Rptr. at 750.
25. Id. at 70, 603 P.2d at 1347, 160 Cal. Rptr. at 750.
26. Id. The court warned that it would be easy for the Board to gain jurisdiction over areas reserved to the courts by the legislature. Such a move "would project the Board's jurisdiction into all cases of charges against a union." Id. It is not surprising, therefore, that the court defended its own mandated original jurisdiction from this possible encroachment.
28. Id. at 189.
29. Id.
30. Id. at 198.
tion of the NLRB was minimal. The courts would be concerned with the action for trespass which involved only the location of the picketing, while the Board would be faced with a complex question regarding the objective of the picketing.  

The court then concluded that Board preemption would occur if the obstructing access coerced agricultural employees to join the union picketing of Kaplan's warehouse. The ALRA prohibits any party to a farm labor dispute from infringing upon any agricultural employee's rights protected in California Labor Code section 1152. The ALRB has jurisdiction if the obstructed access "restrain[ed] or coerce[d]" agricultural employees from the exercise of their protected rights under the ALRA. One such protected activity is the right to refrain from "any or all . . . activities" of the Union. The United Farm Workers maintained that the preemptive power of the Board was more comprehensive and was rightly invoked when anyone, not merely agricultural employees, was adversely affected by the obstructed access. The Union based its claim on the specific language found in California Labor Code section 1154(d) which states that it is an unfair labor practice for a union "to threaten, coerce, or restrain any person where . . . an object thereof is . . . the following: . . . (2) forcing or requiring any person . . . to cease doing business with a struck employer."

The court's persistent reliance on federal precedent, however, scuttled the Union's position. The court reasoned that

31. Id. The Board would be confronted with whether the picketing had a recognizable work reassignment objective, which issue is completely irrelevant to the concern of the state on a claim of trespass.


33. Id.

34. CAL. LAB. CODE § 1152 (West Supp. 1981). See also note 23, supra.

35. 26 Cal. 3d at 72, 603 P.2d at 1348, 160 Cal. Rptr. at 751. Although there was evidence that customers had been prevented from entering the store area, evidence that employees had actually been "restrained or coerced" was discounted by the court as being a "minor facet of the controversy." Id. at 71, 603 P.2d at 1348, 160 Cal. Rptr. at 751. Therefore, the Union's reading of the Act as including "any person" was necessary to prove the appropriateness of Board preemption.

36. Id. at 71, 603 P.2d at 1348, 160 Cal. Rptr. at 751.


38. 26 Cal. 3d at 74-75, 603 P.2d at 1350, 160 Cal. Rptr. at 753. The ALRB and the Union challenged the use of federalism to decide an issue concerning a state agency and a state court. Both maintained that the United States Supreme Court recognized exceptions to the NLRB's exclusive jurisdiction because of the potential clash between the sovereign rights of states and the federal system. In other words,
federal case law interpreting the construction of the NLRA applied to this issue because the language of California Labor Code section 1154 is "substantially identical" to that of the federal labor law.\textsuperscript{39} The "substantially identical" section of the NLRA was amended in 1959 by Congress so as not to apply to primary picketing activity,\textsuperscript{40} and subsequent case law limited that section to include prohibited conduct only in a secondary boycott.\textsuperscript{41} The court similarly construed section 1154(d) as limited to the secondary boycott situation,\textsuperscript{42} and because the union activity involved primary picketing,\textsuperscript{43} the subdivision did not apply. Consequently, Board jurisdiction was limited to the protection of agricultural employees\textsuperscript{44} under section 1154(a)(1). Obstruction of anyone else by the primary picketing of Kaplan’s warehouse was not an unfair labor practice.\textsuperscript{45}

Had the Union’s premise proved persuasive, the superior court could not have intervened because of a danger of conflicting adjudications. If the specialized treatment afforded agricultural employees were enlarged to protect everyone from union restraint or coercion, as the Union urged, then both the ALRB and the superior court would confront identical issues of injunctive relief. The decision in Kaplan’s Fruit obviates this danger of conflicting adjudications; the Board is unable to enjoin the access obstruction of customers, while the court is not similarly constrained.\textsuperscript{46}

Finally, the court concluded that the Moscone Act fails to divest the superior court of jurisdiction to enjoin the Union’s conduct. Basing its claim on the directive that “peaceful picketing . . . involving any labor dispute” could not be enjoined

United States Supreme Court decisions would not be applicable in the determination, since there was no question of federalism presented in a conflict between a state agency and a state court. The court in Kaplan’s Fruit dismissed this issue by stating that the decisions were based upon a desire to avoid conflicting adjudications between agencies and courts. Therefore the federalism cases were applicable to both the federal and state court systems confronting administrative agencies.

39. Id. at 72, 603 P.2d at 1348-49, 160 Cal. Rptr. at 752.
40. Id. at 73, 603 P.2d at 1349, 160 Cal. Rptr. at 752.
41. Id. at 73-74, 603 P.2d at 1349, 160 Cal. Rptr. at 752.
42. Id., 603 P.2d at 1349-50, 160 Cal. Rptr. at 752-53.
43. See note 3, supra.
44. 26 Cal. 3d at 74, 603 P.2d at 1350, 160 Cal. Rptr. at 753.
45. Id.
46. Id.
by "any judge,"47 the Union alleged next that the Moscone Act barred the courts from issuing an injunction against union activity obstructing access.48 The express language of the Act, according to the Union, prevented the issuance of an injunction by the superior court because Kaplan's sought to enjoin peaceful access obstruction, and a judge may enjoin labor activity only when it involves "fraud, violence or breach of peace."49 The court responded that subdivision (e) of the Moscone Act lists separately "breach of peace" and the "unlawful blocking of access," thereby intimating that they are different.50 The court further noted that subdivision (e) explicitly states that the section is not intended to prohibit injunctions against obstructing access.51

An apparent discrepancy existed, therefore, between the protection of peaceful picketing in subdivision (b) and the explicit approval of injunctions against obstructed access in subdivision (e). Logically, an injunction against non-violent access obstruction could not be prohibited by subdivision (b) while being allowed by subdivision (e).

The court reconciled this disparity by obeying the legislative directive to strictly construe the statute "in accordance with existing law" to avoid "unnecessary judicial interference."52 Previous California case law had defined "breach of peace" as a "disruption of public order by acts that are themselves violent or tend to incite others to violence."53 While obstructing access is not necessarily a breach of peace, it does have the potential to lead to violence.54 The court cited International Molders v. Superior Court55 which held access obstruction to be enjoinable because there existed "threat[s] of

47. CAL. CIV. PROC. CODE § 527.3(b)(2) (West 1979).
48. 26 Cal. 3d at 76, 603 P.2d at 1351, 160 Cal. Rptr. at 754.
49. CAL. CIV. PROC. CODE § 527.3(b)(1) (West 1979).
50. 26 Cal. 3d at 77 n.13, 603 P.2d at 1352 n.13, 160 Cal. Rptr. at 755 n.13.
51. Id. at 77, 603 P.2d at 1352, 160 Cal. Rptr. at 755. Subdivision (e) of CAL. CIV. PROC. CODE § 527.3 states that "it is not the intent of this section to permit conduct that is unlawful including . . . the unlawful blocking of access or egress to premises where a labor dispute exists." CAL. CIV. PROC. CODE § 527.3(e) (West 1979).
52. CAL. CIV. PROC. CODE § 527.3(a) (West 1981).
54. 26 Cal. 3d at 77 n.13, 603 P.2d at 1352 n.13, 160 Cal. Rptr. at 755 n.13.
violence” from the “absence of restrictions on picketing” that interfered with access.\textsuperscript{56} Violence is a threat or probable consequence of obstructing access, and because of this “threat,” the superior court could enjoin the Union’s activity as not being the protected peaceful picketing of subdivision (e) of the Moscone Act.

The Union contended that the discrepancy between the two subdivisions should be reconciled by construing the term “unlawful” in subdivision (e)\textsuperscript{57} to mean that relief for obstructed access is limited to an action at law.\textsuperscript{58} The equitable relief of an injunction would then be unavailable. Although Justice Newman, concurring, agreed with this interpretation,\textsuperscript{59} the court concluded that the “common sense” use of the word should prevail, because any other interpretation would be “narrow, technical, and unsound.”\textsuperscript{60}

The court’s decision effectively empowers the judiciary with the ability to hear, at least initially, any primary farm labor dispute. By ruling that neither the ALRA nor the Moscone Act preempts superior courts from enjoining obstruction to access, the court encourages parties charging such obstruction in a primary labor dispute to engage in forum shopping to take advantage of local prejudices. As Justice Newman points out, it is “disappointing” that the court chooses to needlessly regress to the status quo before the ALRA.\textsuperscript{61}

The California Supreme Court did issue a warning that “caution and precision” should prevail in weighing the evidence when granting an injunction.\textsuperscript{62} Vacating the order below, the court expressed a strong suspicion that the superior court did not “engage in the process of weighing the evidence.”\textsuperscript{63} However, any reprimand implicit in the court’s statement was nullified by the observation that the evidence had not been

\textsuperscript{56} 26 Cal. 3d at 78, 603 P.2d at 1352-53, 160 Cal. Rptr. at 755.
\textsuperscript{57} See note 51, supra.
\textsuperscript{58} 26 Cal. 3d at 79, 603 P.2d at 1353, 160 Cal. Rptr. at 756.
\textsuperscript{59} Id. at 83-84, 603 P.2d at 1356, 160 Cal. Rptr. at 759 (Newman, J., concurring).
\textsuperscript{60} Id. at 79, 603 P.2d at 1353, 160 Cal. Rptr. at 756.
\textsuperscript{61} Id. at 84-85, 603 P.2d at 1357, 160 Cal. Rptr. at 759-60 (Newman, J., concurring).
\textsuperscript{62} Id. at 81, 603 P.2d at 1354, 160 Cal. Rptr. at 757.
\textsuperscript{63} Id. at 80, 603 P.2d at 1354, 160 Cal. Rptr. at 757. The court noted that the findings of fact conflicted between the ALRB and the superior court regarding the existence of access obstruction.
evaluated because the superior court believed "it lacked jurisdiction to enjoin blocking of access."64

The court's effective removal of the state agency from regulation of many possible farm labor controversies, and its granting to the court of primary jurisdiction over such matters, creates a potential for abuse.65 A study of recent farm labor cases suggests that very little evidence is actually "weighed" before a temporary restraining order is issued.66 Further, the issuance of a temporary restraining order can "terminate the entire controversy"67 by tying the farm workers' hands during the entire short harvest season, which is the farm workers' most economically effective interval. Any injunction, therefore, cautioned the court, should be narrowly framed to safeguard "presumptively protected" activity and to limit abuse of the injunctive process in the farm labor field.68

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64. Id. at 80, 603 P.2d at 1354, 160 Cal. Rptr. at 757.
65. Id. at 81, 603 P.2d at 1354, 160 Cal. Rptr. at 757. The court was careful to avoid the impression that the superior court's decision in this case was an example of judicial abuse. The issue of judicial abuse was not even suggested until after the present proceeding had been disposed of by remand.
66. See Shatz, note 13, supra.
67. 26 Cal. 3d at 81, 603 P.2d at 1354, 160 Cal. Rptr. at 757.
68. Id.
SECURITIES REGULATION—RULE 10b-5: A MERE FAILURE TO DISCLOSE, ABSENT A DUTY TO DISCLOSE NON PUBLIC INFORMATION, DOES NOT CONSTITUTE A VIOLATION OF RULE 10b-5 OR SECTION—10(b)—Chiarella v. United States, 445 U.S. 222 (1980).

Vincent Chiarella was employed as a “markup man” in the composing room of Pandick Press, a printing concern hired by several corporations. Between September 1975 and November 1976, Chiarella handled the copy for five separate takeover bids involving these corporations: four tender offers and one merger. Despite measures taken to insure confidentiality, Chiarella, combining his expertise as a stock trader and the information contained within documents, deduced the identities of the acquiring companies and the target companies. Chiarella then purchased stock in the target companies. When each tender offer or merger was publicly announced, Chiarella immediately sold his purchased shares for a profit, netting more than $30,000 over the course of fourteen months.

In early 1977, the Securities and Exchange Commission (SEC) initiated an investigation of the employee’s stock trading activities. In May, Chiarella entered into a consent decree in which he agreed to return all profits from his use of non public information in stock trading. That same day, Chiarella was fired by his employer.

Eight months later Chiarella was criminally indicted in the United States District Court for the Southern District of New York on seventeen counts of willful misuse of material...
non public information in connection with the purchase and sale of securities. After unsuccessfully moving to dismiss the indictment for failure to state a crime, defendant was convicted by a jury on all seventeen counts of violating section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act) and SEC rule 10b-5. The court instructed the jury that a violation of the rule had occurred if it found that Chiarella had willfully failed to inform sellers of target company securities that he possessed material information which would catapult the value of that stock once the information became public. Based on these instructions, the jury found that the rule had been violated.

The Second Circuit Court of Appeals affirmed the conviction and held that anyone (corporate insider or not) who regularly receives material non public information may not use that information to trade in securities without first incurring an affirmative duty to disclose. And if the information cannot be disclosed, the person must abstain from buying or selling the securities. The Second Circuit thus framed a “regular access to market information" test premising the duty to dis-

5. 15 U.S.C. § 78j(b) (1976). Section 32(a) of the 1934 Act makes it a crime to willfully violate the Act. 15 U.S.C. § 78ff(a) (Supp. II 1976). Chiarella was convicted of 17 counts of violating the Act because he had received 17 letters confirming the purchases of securities.

6. 17 C.F.R. § 240.10b-5 (1979). Rule 10b-5 provides:
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

7. The test of “materiality" is whether a reasonable investor would consider the information important in determining his course of action. See, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied 394 U.S. 976 (1969).

8. Chiarella is the first case in which criminal liability has been imposed upon a purchaser for § 10(b) non disclosure. 588 F.2d at 1373. Chiarella was fined and sentenced to one year in prison, which was suspended except for one month and a five year probation. Id. at 1364 n.7.

9. Id. at 1365.

10. “Market information" concerns transactions in a corporation's securities that will have an impact on their prices, independent of expected changes in the cor-
close on regular access to non public information.\textsuperscript{11}

On certiorari,\textsuperscript{12} the United States Supreme Court reversed the conviction, holding that absent a duty to disclose arising from a special relationship between buyer and seller, there is no criminal liability under section 10(b) of the Act or the regulations. Moreover, non disclosure can constitute fraud under rule 10b-5 only where there exists a duty to disclose arising from that special relationship. Thus, in a 6-3 opinion,\textsuperscript{13} the Court found that: (1) no duty arose from impersonal market transactions; and (2) no broad duty to disclose existed merely because an individual possessed material, non public information.

Writing for the majority, Justice Powell first considered the language of the statute and its legislative history.\textsuperscript{14} Although acknowledging that section 10(b) was a catch-all clause designed to deter fraudulent trading practices, he found no specific guidance from the statutory language\textsuperscript{15} or legislative history\textsuperscript{16} in addressing the issue of silence as a violation of a corporation's earning power or assets. See Fleischer, Mundheim & Murphy, \textit{An Initial Inquiry into the Responsibility to Disclose Market Information}, 121 U. Pa. L. Rev. 798, 799 (1973); ALI Fed. Sec. Code § 1603, comment 2(j) at 657 (1980).

11. The Court of Appeals relied on 


13. The minority decision by Justice Powell was joined by Justices Stewart, White, Rehnquist, and Stevens. The Chief Justice and Justice Blackmun, joined by Justice Marshall, dissented. Separate concurring opinions were submitted by Justices Stevens and Brennan.

14. Chiarella v. United States, 445 U.S. 222, 225-26 (1979) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976)). In \textit{Ernst}, an accounting firm which negligently and mistakenly reported an inaccurate corporate financial position, was held not liable under section 10(b), although they had an affirmative duty to investigate the truth of the data they received. The Court found that the language of the anti-fraud statute did not extend liability for negligence.

15. The clause is couched in broad terms: "it shall be unlawful for any person . . . [to] employ any device, scheme, or artifice to defraud . . . ." 17 C.F.R. § 240.10b-5(a) (1979).

lation of section 10(b).

Citing SEC and federal court decisions which upheld civil liability for section 10(b) non disclosure violations by corporate insiders, Justice Powell found duty to be the critical element in these administrative and judicial determinations of fraud. From these cases, Justice Powell concluded that, in a situation where the individual fails to disclose material information, he commits fraud only where he has a duty to disclose. This duty arises from a fiduciary or similar relation of trust and confidence between traders.

In Chiarella, the Court held that the petitioner’s use of non public information was not fraud under section 10(b) unless there was an affirmative duty to disclose. The Court, however, failed to address whether Chiarella in fact owed a duty to disclose or refrain by reason of his employment with the printing company. Rather, the Court found error in the trial court’s failure to give sufficient jury instructions regarding the critical element of a duty to disclose, namely, a special relationship between traders. Thus, the Court rejected the broader concept of duty established by the trial court’s “ma-

17. Cady, Roberts & Co., 40 S.E.C. 907 (1961) (broker/dealer was held liable for trading on non public information, even though the stock was sold to persons not previously stockholders). Premised on the insider’s easy access to non public information and the inherent unfairness of allowing an insider to trade without requiring disclosure, Cady reaffirms the standards of common law fraud (i.e., a duty arising from a fiduciary or similar relationship of trust or confidence must exist). For a discussion of the element of common law fraud see James & Gray, Misrepresentation Part II, 37 Md. L. Rev. 488, 523-27 (1978).

18. See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968). Two corporate insiders were held in violation of the antifraud provisions of securities laws because they disclosed material inside information to individuals who subsequently entered into transactions on the basis of that information. See also Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Speed v. Transamerica Corp., 99 F. Supp. 808, 829 (D. Del. 1951).

19. 445 U.S. at 228. The Court cited General Time Corp. v. Talley Indus. Inc., 403 F.2d 159, 164 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969), to support the proposition that a purchaser of stock who is neither an insider nor a fiduciary owes no duty to disclose material facts to a seller.

20. The purpose of such a duty guarantees that corporate insiders who have an obligation to place the shareholders’ welfare before their own, will not benefit personally through fraudulent use of material non public information. 445 U.S. at 230. But see SEC v. Texas Gulf Sulphur Co., 401 F.2d at 848, which suggests a broader policy concern: “[t]he Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information.”
terial, non public information" test for liability. Furthermore, the Court determined that the Second Circuit's "regular access to information" test was unworkable and "insufficient to support a duty to disclose."

Although Justice Powell recognized that the Second Circuit sought to maintain a system insuring equal access to necessary information in securities trading, he found two flaws in the court's reasoning. First, every instance of financial inequity does not constitute fraud under section 10(b). Second, and most importantly, the element of duty required to make nondisclosure fraudulent was not demonstrated in Chiarella. Refusing to impose a general duty on all participants of market transactions based solely on the use of material non public information, the Court found that no duty had resulted from Chiarella's impersonal, arm's length transactions with sellers of target company securities.

The Court relied both on the Williams Act and the SEC's more recent application of section 10(b), yet declined to extend liability in the Chiarella case. Justice Powell noted that the Williams Act "limits but does not completely prohibit" a tender offeror's purchases of target stock prior to public announcement of the offer. He concluded, therefore, that Congress had not intended broad and unending liability under section 10(b). Similarly, the Court cited the SEC's action to bar "warehousing" under its power to regulate tender

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22. Id., at 231 n.14. The Court emphasized that a duty arises from a relationship between parties and not merely from one's ability to acquire information because of his position in the marketplace.
23. Id. at 232.
24. Justice Powell interpreted the Court of Appeals decision as "rest[ing] solely upon its belief that the federal securities laws have 'created a system providing equal access to information necessary for reasoned and intelligent investment decisions.'" Id. (quoting 588 F.2d at 1362).
25. 15 U.S.C. §§ 78m(d), 78n(d) (Supp. II 1978). The Williams Act imposes disclosure obligations on potential tender offerors whenever they purchase more than five percent of the stock of a target company.
27. 445 U.S. at 233.
28. Id. at 233-34. The Second Circuit, however, had rejected this same argument on the basis that the purpose of the Williams Act was to prevent the "stampede effect" associated with tender offers, not simply to limit § 10(b) liability. 588 F.2d at 1367.
29. "Warehousing" occurs when a proposed tender offeror gives advance notice
offers, rather than under section 10(b), as a significant indication that the SEC meant to limit the scope of section 10(b) liability.\textsuperscript{30} Refusing to read the 1934 Act "more broadly than its language and the statutory scheme reasonably permit,"\textsuperscript{31} the Court reversed the criminal conviction.\textsuperscript{32}

In concurring opinions, Justices Stevens and Brennan emphasized that the decision rested on the fact that Chiarella was convicted on improper jury instructions. Justice Brennan would have supported a broad theory of liability, but concurred in the decision because no standard for determining liability was presented to the jury. Justice Stevens went so far as to say that "we [have not] held that similar actions must be considered lawful in the future."\textsuperscript{33}

Both Chief Justice Burger and Justice Blackmun, in dissenting opinions,\textsuperscript{34} favored the appellate court's broad interpretation of section 10(b). The Chief Justice would have interpreted section 10(b) and rule 10b-5 as extensions of tort law, such that "a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading."\textsuperscript{35} Justice Blackmun, joined by Justice Marshall, emphasized: "Indeed, I think petitioner's brand of manipulative trading, with or without such [employer's] approval, lies close to the heart of what securities laws are intended to prohibit."\textsuperscript{36}

The antifraud provisions of rule 10b-5 serve principally as protective devices to prevent overreaching by public investors. Since the Texas Gulf Sulphur decision,\textsuperscript{37} rule 10b-5 has come

\begin{itemize}
  \item[30.] The SEC recognized that warehousing and insider trading rest on a "somewhat different theory." The Court, however, failed to delineate the new and different theories of liability which fall outside the realm of § 10(b). \textit{Id.}
  \item[31.] \textit{Id. (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).}
  \item[32.] 445 U.S. at 237. The Court refused to rule on whether Chiarella owed a duty to the acquiring corporation because of his position as an employee with the printing concern hired by the corporation. This theory, presented by the respondent as an alternative ground for affirmation of the conviction was not submitted to the jury. On that basis, the Supreme Court refused to consider this argument. \textit{Id.}, at 235-36. \textit{See also}, Dunn v. United States, 442 U.S. 100, 106 (1979).
  \item[33.] 445 U.S. at 238.
  \item[34.] \textit{Id.} at 239, 245 (Burger, C.J. and Blackmun, J. dissenting opinions respectively).
  \item[35.] \textit{Id.} at 240.
  \item[36.] \textit{Id.} at 246.
  \item[37.] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), \textit{cert.}
\end{itemize}
to embody the "disclose or refrain" rule which provides that persons who possess material non public information about the value of an enterprise’s securities cannot buy or sell the securities unless they first disclose the information.

The disclose or refrain rule has been the standard used by the SEC and the courts in establishing civil liability under rule 10b-5. Born in an era of growing disenchantment with manipulative practices in securities markets, the disclose or refrain rule was initially invoked against corporate insiders and then was extended against "tippees" and non insiders, such as brokers trading on information affecting securities prices. Later antifraud provisions, such as section 206 of the Investment Advisors Act and the Williams Act, expanded the scope of traditional section 10(b) restrictions governing broker/dealers, investment advisors and tender offerors. Recent court decisions and proposed SEC regulations confirm the trend toward a more liberal and expansive interpretation of liability under section 10(b). In Chiarella, the Court se-
verely restricted the trend toward parity of information and equal access to that information.

The Chiarella decision apparently rests on the failure of the trial court to properly instruct the jury regarding the duty to disclose which arises from a special relationship between traders. Upon closer examination, however, the decision may be explained as a result of the court's concern over the continuing expansion of securities liability. The Court's narrow reading of the scope of section 10(b) criminal liability seems contrary to recently proposed SEC regulations. These regulations, promulgated under section 14(e) of the Williams Act, extend beyond the traditional corporate and market insider categories of liability. As the SEC suggests, these regulations will help narrow the gap of permissible trading activity even further, although limited to the tender offer context. It is apparent that SEC interpretations and the Supreme Court's view do not coincide. Recently, the Supreme Court held that official interpretations by the Federal Reserve Board and staff were to be given great deference by courts, unless "demonstrably irrational." Like the Federal Reserve Board, the SEC has been delegated expansive authority to interpret the congressional aims, promulgate regulations, and expand the legal framework governing securities regulations. Thus, while the Supreme Court cites SEC case law and policy, but declines to apply it, one may interpret Chiarella as fundamentally at odds with prior Court decisions in the areas concerning statutorily empowered government agencies.

While Chiarella was not exactly a sympathetic party since he admitted trading on "confidential" information, nuances of the Chiarella case may have persuaded the Court to adopt a more limited view of the duty concept than it would otherwise have chosen to adopt. Chiarella was the first individual ever to be prosecuted under the criminal provisions of section 10(b). Furthermore, criminal prosecution began only after the civil litigation had ended with the result that Chiarella returned all profits and lost his job. Arguably, one may infer from Justice Stevens' concurring opinion, that this may be the

44. See note 43 supra.
right situation, but the wrong defendant to catch in the section 10(b) antifraud net. Based on similar facts, the Supreme Court may impose a broader view of section 10(b) liability, finding that a duty exists between all traders in securities.

It is not clear, however, whether a broader interpretation promoting equal access to information is desirable. If a comprehensive rule were adopted, significant administrative problems would arise. While market and corporate insiders are readily identified and easily policed, it would be far more difficult to scrutinize the activities of all persons who do not regularly receive non public information. Furthermore, enforcement of the antifraud provisions against these persons would be difficult and costly.

It is also arguable that the Chiarella Court wanted to preserve incentives for legitimate investigative activity between buyers and sellers of corporate securities. The preservation of desirable economic activity and administrative convenience are ongoing concerns which the Supreme Court must confront before extending the duty to disclose or refrain to all insider trading. These concerns, however, must be balanced against the overall purposes for enacting such antifraud legislation: to insure integrity in securities transactions and to inspire confidence in the market.

The Chiarella case stands for the proposition that a failure to disclose violates section 10(b) and rule 10b-5 only when the relationship between the parties establishes a duty to disclose. The Court's approach minimizes the importance of Chiarella's access to confidential market information: the common investor, no matter how diligently he tries, cannot legally obtain the same information, and is thus at a disadvantage when trading. The Court's holding advances an interpretation of the disclose or refrain rule which stops short of the full implications and expectations of the original antifraud

49. Chiarella v. United States, 445 U.S. 222, 238 (1979). Justice Stevens expressly states that future actions similar to those of Chiarella may not necessarily be considered lawful.

50. A "tippee" trading rule is broader and, therefore, less administrable. It is, however, limited by the requirement that the information must come from an insider.

51. The SEC would not be able to identify and police all those persons who might, on a single occasion, obtain non public information. Reliance on private actions as a policing tool would most likely result in random enforcement.
legislation and the recent SEC proposals to extend liability under section 10(b). Future decisions, however, may prove otherwise. Given the proper defendant and the proper jury instructions, the Court may extend liability under section 10(b), finding a broader duty exists between traders in securities.

Mary Beth Long