Justice Louis Powell and the Evolution of Modern Securities Law: A Review of a History of Securities Law in the Supreme Court by A. C. Pritchard and Robert B. Thompson

*By James A. Deeken**

The words "Supreme Court" tend to stir up current social issues and intermingled constitutional law issues. Public news attention tends to focus on the "headlining grabbing" issues the Court considers, while less glamorous but still important ones are cast to the side or even overlooked.

Against that grain, authors and professors A. C. Pritchard of University of Michigan Law School and Robert B. Thompson of Georgetown Law School have drawn upon access to internal court records, notes among justices, early draft opinions and even interviews with former court law clerks the authors to assemble an in-depth and well researched study of the history of the Supreme Court's securities law jurisprudence.

The Supreme Court began to delve into modern securities law shortly after, and in some cases concurrent with, the passage of the four modern Great Depression era securities law statutes. During the years immediately after World War II, and the 1950s and 1960s, the Court's jurisprudence with securities law largely had a wide-reaching bend to it where deference was generally afforded to the Securities and Exchange Commission and where efforts to enlarge the reach of the securities laws through judicial interpretation were seldom met with push back.

The first securities law cases met a Supreme Court that was skeptical to the power of the SEC to advance its interpretations of securities law. But that initial adversity quickly eroded as justices with a conservative bend retired to be replaced with appointees of President Franklin Roosevelt.

An example of that shift highlighted by the authors can be seen in *SEC v. Chenery Corp.* which was addressed twice by the Court. Initially in 1943 (*Chenery I*) *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 87 L.

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Ed. 626 (1943) and then again in 1947 (*Chenery II*)[1] as the case rose back to the Supreme Court after initially being remanded back to the Second Circuit. The change in disposition was one that allowed the SEC to adopt positions outside of a formal rule making process, resulting in a decision where the remaining judges who constituted the majority in *Chenery I* dissented.

That period of deference by the Court to the SEC's positions on securities law issues would largely continue unabated for several years.

The appointment of Louis Powell to the Supreme Court helped alter the course of the Court in its formerly deferential views of the securities laws. In fact the authors view Supreme Court's approach to securities law in three separate phases: (i) the pre-Powell era where the laws were interpreted and applied expansively, (ii) the period during Justice Powell's service where the court adopted a more constrained view of expanding securities laws through judicial interpretation and (iii) the post Powell period where the court oscillates without a clear consistent approach.

When Justice Powell joined the court in 1972 he had a somewhat unusual background that in had spent a large part of his career not as a litigator but as a private business lawyer who specialized in corporate and securities law. His background gave him immediate credibility among his peers as an expert on securities law matters. He would buttress his expertise with pre-trail memos, from time to time, on securities law issues that came before the court in an effort to jump ahead and guide the Court's thinking. The result was that he wrote a highly disproportionate number of the Court's opinions on securities law matters during his time on the Court.

Although Powell was a moderate on the catchy constitutional law issues that drove public attention, he was somewhat more conservative on business and securities law matters. His approach may have been a result of his past private practice in helping clients navigate the government's increasing regulatory stake.

With the appointment of William Rehnquist and the entrance to the Court of Warren Burger, as Chief Justice, the line of the Court was changing away from its more expansive past leanings. The authors explain that through a series of opinions, Powell was able to take four steady votes (including his own) that he had on the court for a restrained view of securities law and worked to bridge gaps in obtaining a swing vote on several key security law court decisions.

His ability to put together majorities took a skill at consensus building. The authors view three cases in the 1970s that limited securities fraud case actions as examples where other justices aligned with Justice Powell: *Blue Chip Stamps v. Manor Drug Stores*,[2] *Ernst & Ernst v. Hochfelder*[3] and *Santa Fe Industries, Inc. v. Green.*[4] In each of those opinions Justice Bryon White and Thurgood Marshall voted with the majorities despite a prior preference for more expansive opinions. *Santa Fe Industries*, in the view of the authors, was particularly important as it prohibited plaintiffs bringing breach of fiduciary duty claims as securities claims in cases where deception, misrepresentation or deficient disclosure did not exist, limiting federalization of state corporate law.

Powell was able to use the respect that he had among his colleagues on business matters and skills to author key securities law cases with narrow majorities that continue to have implications today.

Two of them were *Chiarella v. United States*[5] providing that a duty to avoid trading does not arise by the mere possession of material non-public information and *Dirks v. SEC*[6] which gave rise to the requirement that an insider "tipper" in an insider trading case brought under the traditional theory of insider trading must have expected to receive a personal benefit in connection with disclosure of material non-public information for insider trading liability to result.

The work is not a potential for improvement. Much of the book focuses on Justice Powell and the book at many times reads more like a biography of the Justice that is bookended by a summary of the law before his time and the law since then rather than a book more neutrally focused on the Court as a whole.

For example, the authors spend 11 pages discussing the *Dirks* case where Powell had a central role but only spend only a few pages on a subsequent but at least equally important case decided after he left the Court, *United States v. O'Hagan*,[7] which adopted the misappropriation theory of insider trading.

Secondly, for lawyers who don't regularly litigate securities fraud and other related cases on a regular basis, the background of the underlying law and importance of the related cases is more shallow than what it would be in a book aimed at a general audience.

None of these however undermine the work's use as a resource for understanding the Court's decision making as it navigated securities law issues of first impression over the nine decades from the enactment of the modern securities statues.

NOTES:

[1]*SEC v Chenery Corp.*, 332 U.S. 194 (1947).

[2]*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539, Fed. Sec. L. Rep. (CCH) P 95200, 1975-1 Trade Cas. (CCH) ¶ 60351 (1975).

[3]*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668, Fed. Sec. L. Rep. (CCH) P 95479 (1976).

[4]*Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S. Ct. 1292, 51 L. Ed. 2d 480, Fed. Sec. L. Rep. (CCH) P 95914 (1977).

[5]*Chiarella v. U. S.*, 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348, Fed. Sec. L. Rep. (CCH) P 97309 (1980).

[6]*Dirks v. S.E.C.*, 463 U.S. 646, 103 S. Ct. 3255, 77 L. Ed. 2d 911, Fed. Sec. L. Rep. (CCH) P 99255 (1983).

[7]*U.S. v. O'Hagan*, 521 U.S. 642, 117 S. Ct. 2199, 138 L. Ed. 2d 724, Fed. Sec. L. Rep. (CCH) P 99482, 191 A.L.R. Fed. 747 (1997).

