SMU Law Review

Volume 71
Issue 3 *Texas Gulf Sulphur 50th Anniversary Symposium Issue*

Article 3

January 2018

Equal Access to Information: The Fraud at the Heart of *Texas Gulf Sulphur*

Stephen M. Bainbridge
UCLA School of Law

EQUAL ACCESS TO INFORMATION: THE FRAUD AT THE HEART OF *TEXAS GULF SULPHUR*

*Stephen M. Bainbridge**

ABSTRACT

The Texas Gulf Sulphur *decision was the seminal moment in the creation of the modern federal insider trading prohibition. In the half century since it was decided, however, courts and commentators have overlooked the glaring flaw in the court's analysis.*

In the key part of the opinion, in which the court laid out the equal access standard, the court grossly misrepresented the precedents on which it relied. The court cited two state law opinions that were wholly irrelevant to the problem at hand. It cited two law review articles, but those articles simply do not say what the court claimed they said. Finally, the court made a bald, unsupported statement of Congressional intent that is demonstrably false.

The insider trading prohibition thus rests on a foundation of sand.

TABLE OF CONTENTS

I. THE EQUAL ACCESS POLICY 645
II. EQUAL ACCESS REJECTED 647
III. JUDGE WATERMAN'S MISUSE OF PRECEDENT 648
  A. THE STATE CASES 648
  B. THE LAW REVIEW ARTICLES 649
  C. *CADY, ROBERTS* 650
  D. THE LEGISLATIVE HISTORY 651
IV. CONCLUSION 652

AS its quinquagenary approaches, it is appropriate that *Texas Gulf Sulphur* (*TGS*)[1] be commemorated by this Symposium and other events that will likely occur. As of April 2018, Westlaw reported that *TGS* had been cited in 1,055 judicial decisions and 1,300 law review articles. It was recognized almost immediately as a profoundly important

* William D. Warren Distinguished Professor of Law, UCLA School of Law. I thank Sung Hui Kim, Donald Langevoort, Adam Pritchard, Marc Steinberg, and William Wang for comments and suggestions, and Andrew Verstein for going above and beyond the call of duty. I am solely responsible for the opinions and any errors herein.

1. *See generally* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

decision. Today, fifty years later, it remains one of the most important and frequently cited securities law decisions.[2]

I come not to praise *TGS*, however, but to bury it. After all, the core of *TGS*'s insider trading regime lasted just twelve years before it was decisively rejected by the Supreme Court. In *TGS*, Judge Sterry R. Waterman's majority opinion interpreted Securities Exchange Act § 10(b) and SEC Rule 10b-5 thereunder as mandating that:

> [A]nyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed.[3]

Just over a decade later, however, in *Chiarella v. United States*, Justice Powell's majority opinion expressly rejected that proposition, explaining that "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.[4]

Why did the Supreme Court cut the heart out of the *TGS*? Justice Powell's main concern was the risk that broad application of the equal access test would criminalize legitimate trading activity.[5] In doing so, however, Powell overlooked an even more fundamental problem; namely, Judge Waterman not only invented equal access out of whole cloth, but also compounded his fraud by outright misrepresentation of the few precedents he cited.[6]

In the key part of the opinion, in which Judge Waterman laid out the equal access standard, the court grossly misrepresented the precedents on which it relied. The judge cited two state law opinions that were wholly irrelevant to the problem at hand.[7] He cited two law review articles, but those articles simply do not say what the court claimed they said.[8] He

2. Alan R. Bromberg, et al., 1 Bromberg & Lowenfels on Securities Fraud § 1:16 (2d ed. 2017) (stating that "few cases have been cited more frequently in private litigation").

3. *Texas Gulf Sulphur Co.*, 401 F.2d at 848.

4. Chiarella v. United States, 445 U.S. 222, 235 (1980).

5. *See infra* notes 20–26 and accompanying text.

6. A friend who read an earlier draft of this paper defended Judge Waterman's opinion as an embrace of a new federal common law within statutory domains claimed as appropriate subjects for federal intervention. It is certainly true that federal courts were proactively carving out a broad federal common law of corporations during the 1960s and 1970s. *See* Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 Wash. U. L.Q. 565, 613 (1991) ("In the early 1970s, courts gave SEC rule 10b-5, designed originally as a catch-all anti-fraud provision, an increasingly expansive reading that in time might have led to a federal common law of corporations."). Yet, even if that process was legitimate, surely it did not excuse abusing the precedents. *Cf. In re* Troy, 306 N.E.2d 203, 218 (Mass. 1973) (holding that a judge may be disciplined for misconduct "if it is established by credible evidence that a judge, over a protracted period of time, has followed a course of judicial conduct which is in utter disregard of the law and of established rules of practice").

7. *See infra* note 26 and accompanying text.

8. *See infra* notes 30–35 and accompanying text.

misquoted a key SEC precedent.[9] Finally, Judge Waterman made a bald, unsupported statement of congressional intent that is demonstrably false.[10]

Oddly, not only did Powell ignore Waterman's sleight of hand, but so has the literature since *TGS*. This essay sets the record straight.[11]

I. THE EQUAL ACCESS POLICY

The relevant passage of Judge Waterman's *TGS* majority opinion is worth quoting in full, including citations, so that we can thoroughly parse the court's reasoning:

> Whether predicated on traditional fiduciary concepts, see, e.g., Hotchkiss v. Fisher, 136 Kan. 530, 16 P.2d 531 (Kan.1932), or on the "special facts" doctrine, see, e.[g]., Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853 (1909), the Rule [10b-5] 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, see Cary, Insider Trading in Stocks, 21 Bus.Law. 1009, 1010 (1966), Fleischer, Securities Trading and Corporation Information Practices: The Implications of the Texas Gulf Sulphur Proceeding, 51 Va.L.Rev. 1271, 1278-80 (1965). The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation has "access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone" may not take "advantage of such information knowing it is unavailable to those with whom he is dealing," i.e., the investing public. Matter of Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961). Insiders, as directors or management officers are, of course, by this Rule, precluded from so unfairly dealing, but the Rule is also applicable to one possessing the information who may not be strictly termed an "insider" within the meaning of Sec. 16(b) of the Act. Cady, Roberts, supra. Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed . . . . The core of Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities

9. *See infra* notes 36–43 and accompanying text.

10. *See infra* notes 44–47 and accompanying text.

11. In order to address an issue raised by some readers of earlier drafts, let me be clear that this article is intentionally agnostic on *TGS*'s merits. The question is not whether it was decided correctly, but whether it was decided honestly. In addition, this article is also agnostic on the questions of whether the regime Justice Powell created to replace *TGS* was correct or based on an honest analysis of precedent. On those questions, see generally Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589 (1999) (criticizing both *TGS* and *Chiarella*).

transactions.[12]

This passage raised two critical questions: Did the court actually mean "anyone"? Did it really mean "equal"?

Notice that the quoted passage suggests a possible limiting principle in the suggestion that liability attached to persons who have "access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone."[13] If read literally, that passage should have precluded most instances of outsiders trading on market information, but no court ever invoked it to limit the scope of liability.

In fact, *TGS*'s progeny quickly expanded the scope of liability. First, it quickly became apparent that "anyone in possession of material inside information," really meant anyone. The prohibition applied with equal force to outsiders possessing such information as it did to insiders.[14] Indeed, some post-*TGS* decisions came "close to suggesting that it is inherently unfair for one party to trade with another whom he knows or should know does not possess certain material information."[15]

Second, the prohibition was rapidly extended to include not just inside but also market information. Market information is commonly defined as information about events or developments that affect the market for a company's securities, but not the company's assets or earnings. It typically emanates from non-corporate sources and deals primarily with information affecting the trading markets for the corporation's securities. Inside information typically comes from internal corporate sources and involves events or developments affecting the issuer's assets or earnings.[16] Within just a few years after *TGS*, the SEC was aggressively seeking to extend the equal access principle to include the use of material nonpublic market information.[17]

Taken together, these developments demonstrate the sweeping breadth of the *TGS* prohibition. They confirm that "anyone" meant "just about anyone" and "equal access" meant "pretty much equal access," such that the disclose or abstain rule captured almost all trading by insiders and outsiders.[18] To be sure, no case ever reached the logical extreme of re-

---

12. SEC v. Texas Gulf Sulfer Co., 401 F.2d 833, 848, 851–52 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

13. *Id.* at 848 (quoting *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961)).

14. *See* SEC v. Maio, 51 F.3d 623, 631 n.10 (7th Cir. 1995) (noting that "it is a commonplace that the term 'insider trading' is a misnomer").

15. Arthur Fleischer, Jr. et al., *An Initial Inquiry into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798, 806 (1973).

16. *See* Roberta S. Karmel, *The Relationship Between Mandatory Disclosure and Prohibitions Against Insider Trading: Why A Property Rights Theory of Inside Information Is Untenable*, 59 BROOK. L. REV. 149, 154 (1993) (discussing distinction between inside and market information).

17. *See* Fleischer et al., *supra* note 15, at 801–02 (discussing SEC enforcement efforts relating to market information).

18. Even the Second Circuit accepted some narrow limits on the equal access rule. In *Chiarella*, for example, the court acknowledged that the rule was "not to be understood as holding that no one may trade on nonpublic market information without incurring a duty

quiring complete parity of information, but the SEC vigorously sought to push the law in that direction.[19]

II. EQUAL ACCESS REJECTED

In his *Chiarella*[20] and *Dirks*[21] opinions, Supreme Court Justice Lewis Powell led the Court in decisively rejecting the equal access rationale in favor of a new focus on disclosure obligations arising out of fiduciary relationships. As Justice Powell explained in *Dirks*:

> We were explicit in *Chiarella* in saying that there can be no duty to disclose where the person who has traded on inside information "was not [the corporation's] agent, . . . was not a fiduciary, [or] was not a person in whom the sellers [of the securities] had placed their trust and confidence." Not to require such a fiduciary relationship, we recognized, would "depar[t] radically from the established doctrine that duty arises from a specific relationship between two parties" and would amount to "recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information."[22]

The Supreme Court thus made clear that the disclose or abstain rule is not triggered merely because the trader possesses material nonpublic information. When a 10b-5 action "is based upon nondisclosure, there can be no fraud absent a duty to speak," and no such duty arises "from the mere possession of nonpublic market information."[23] Equal access was thus decisively rejected.

Justice Powell's principal concern seems to have been the potentially deleterious impact of an equal access test on crucial market players. He explained that trading implied a ban that "could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market."[24] He continued:

> It is commonplace for analysts to "ferret out and analyze information," and this often is done by meeting with and questioning corporate officers and others who are insiders. And information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities. The analyst's judgment in this respect is made available in market letters or otherwise to clients of the firm. It is the nature of this type of information, and indeed of

to disclose." United States v. Chiarella, 588 F.2d 1358, 1366 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980). In particular, the court acknowledged that prospective tender offerors purchasing target company shares in the period before they were required to file a Schedule 13D could not be held liable for insider trading because the offeror "does not receive information but creates it."

19. *See* Fleischer et al., *supra* note 15, at 806 ("Although no case has held that there must be parity of material information between the parties to a securities transaction, there is evidence of an SEC disposition to push the law more forcefully in that direction.").

20. *See generally* Chiarella v. United States, 445 U.S. 222 (1980).

21. *See generally* Dirks v. SEC, 463 U.S. 646 (1983).

22. *Id.* at 654–55 (alterations in original) (citation omitted).

23. *Chiarella*, 445 U.S. at 235.

24. *Dirks*, 463 U.S. at 658.

> the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally.[25]

It was in order to avoid chilling such legitimate activity that Powell sought out a policy rationale that would sweep far less broadly.[26] In doing so, however, he ignored the more serious question of whether equal access was valid in the first place.

III. JUDGE WATERMAN'S MISUSE OF PRECEDENT

Recall that the critical passage of Judge Waterman's opinion cites three sets of sources: a pair of state common law cases, a pair of law review articles, and the SEC's *Cady*, *Roberts* decision.[27] In addition, the passage makes an unsubstantiated claim about congressional intent. Not one of these citations, however, says what Judge Waterman claimed they said.

A. The State Cases

At the outset, the references to *Hotchkiss* and *Strong* can be discarded as utterly irrelevant. Both were decided long before Rule 10b-5 was adopted in 1943. Indeed, both predated the adoption of § 10(b) in 1934. Both involved state corporate law rather than federal securities law.[28] Accordingly, neither offered any relevant insight into the meaning of Rule 10b-5. Lastly, neither opinion makes any reference to the purported equal access policy. Neither opinion even uses the words equal, equality, parity, or access. In sum, Judge Waterman's citation of *Strong* and *Hotchkiss* was a sleight of hand presumably designed to mislead the unwary reader.[29] If so, it was not the last.

---

25. *Id.* at 658–59 (citations and footnotes omitted).

26. *See* A.C. Pritchard, United States v. O'Hagan: *Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. Rev. 13, 21 (1998) ("Powell also recognized that imposing a broad-based duty to the market on tippees such as Dirks could have a chilling effect on the process by which information makes its way to the market").

27. *See supra* text accompanying note 12.

28. *Hotchkiss* involved an interpretation of director fiduciary duties under Kansas state law. *See* Hotchkiss v. Fischer, 16 P.2d 531, 535 (Kan. 1932) (discussing director duties). *Strong* was decided before the ban on federal common law effected by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the opinion created common law based on "the law applicable to the Philippine Islands," which were then a territory of the United States. *See* Strong v. Repide, 213 U.S. 419, 430 (1909).

29. A friend who read an earlier draft of this paper argued that the cites to *Hotchkiss* and *Strong* are accurate as they relate to the first part of the key sentence. I disagree. Recall the key passage:

> Whether predicated on traditional fiduciary concepts, see, e.g., Hotchkiss v. Fisher, 136 Kan. 530, 16 P.2d 531 (Kan. 1932), or on the "special facts" doctrine, see, e.g., Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853 (1909), the Rule [10b-5] 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.

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968). I read that passage as implying that Rule 10b-5 was predicated on the state common law of corporations and that they inform that policy of the rule. If my reading of that passage is correct, neither implica-

B. The Law Review Articles

Next Judge Waterman cited a pair of law review articles for the proposition that Rule 10b-5 "is based . . . on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information."[30] Neither article is particularly authoritative, and, more importantly, neither says what Waterman claims.

The first was not a formal article but rather a mere transcription of informal remarks by, among other speakers, former SEC Chairman William Cary.[31] Cary's prestige entitled the transcript to some deference, but a panel discussion surely deserved less deference than a fully thought-out, formal article. But even if the transcript somehow commanded deference, there is a more serious problem.

On the page identified by the court's pinpoint citation (1010), there is no express reference to equality of information. Instead, there are simply some general platitudes about the need for integrity and high standards of conduct. On the following page, Cary states "that insiders having access to material information available for a corporate purpose may not take advantage when it is not yet known to the public,"[32] but that statement is not a description of congressional intent, rather simply part of a summary of the SEC ruling in *In re Cady, Roberts & Co*.[33] In fact, the words "equal," "equality," or "parity" nowhere appear in the opinion, nor does the phrase "legislative intent." Therefore, the transcript simply does not support the proposition for which it is cited.

The second article upon which the court relied was written by Arthur Fleischer, who eventually became a distinguished and highly respected member of the New York securities and corporate bar, but was just a mid-level associate at Fried, Frank when he wrote the article in question.[34] In the pages identified by the Second Circuit's pinpoint citation, there is but a single relevant statement; to wit, "As has been seen, an essential function of the Exchange Act was to create markets free from manipulation and from trading based on undisclosed corporate information."[35] The supporting footnote refers the reader to footnotes 21–26 and the accompanying text. But the passage to which one is thereby sent sim-

---

tion is correct. Unlike Rule 10b-5, the state cases were founded on breach of fiduciary duty rather than fraud. *See supra* note 28 and accompanying text.

30. *Texas Gulf Sulphur Co.*, 401 F.2d at 848. *See supra* text accompanying note 12.

31. *See* James Farmer et al., *Insider Trading in Stocks*, 21 Bus. Law. 1009, 1010 (1966).

32. *Id.* at 1011.

33. *See generally* 40 S.E.C. 907 (1961).

34. *See* Arthur Fleischer, Jr., *Securities Trading and Corporation Information Practices: The Implications of the Texas Gulf Sulphur Proceeding*, 51 Va. L. Rev. 1271, 1278–80 (1965). Interestingly, Fleischer was a protégé of Cary. *See* Stanislav Dolgopolov, *Insider Trading, Chinese Walls, and Brokerage Commissions: The Origins of Modern Regulation of Information Flows in Securities Markets*, 4 J.L. Econ. & Pol'y 311, 341 n.146 (2008) ("Chairman Cary later acknowledged that the 'ghost writer' of the Cady, Roberts decision was his assistant Arthur Fleischer, Jr.").

35. Fleischer, *supra* note 34, at 1279.

ply asserts, without relevant reference to the legislative history, that § 10(b) and 16 were broadly directed at preventing abusive trading practices. Nowhere in the passage does Fleischer identify any relevant evidence of a congressional intent that investors have equal access to information. Indeed, neither "equal" nor "equality" are used anywhere in the entire article, while the word "parity" appears in an irrelevant context.

C. *Cady, Roberts*

Judge Waterman cited the SEC decision in *Cady, Roberts*, for the proposition that "anyone who . . . has 'access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone' may not take 'advantage of such information knowing it is unavailable to those with whom he is dealing.'"[36] But, even assuming *Cady, Roberts* had any significant precedential value, Judge Waterman failed to acknowledge that that decision was far more limited in scope than *TGS*.

As to *Cady, Roberts*'s precedential value, prior to that decision Rule 10b-5 had been limited to insider dealing in face-to-face transactions.[37] Indeed, as a leading contemporaneous analysis of *TGS* observed, prior to *Cady, Roberts* the SEC apparently believed that Rule 10b-5 proscribed only insider trading involving fraud.[38] The difficulty this presented, of course, is that insider trading differs in important ways from the common law of fraud as it existed when the Exchange Act was adopted.[39] As Professor Dooley observed, "insider trading in no way resembles deceit. No representation is made, nor is there any reliance, change of position, or causal connection between the defendant's act and the plaintiff's losses."[40] *Cady, Roberts* thus represented a major break with prior SEC practice effected by regulatory fiat in an administrative proceeding against a regulated broker-dealer. As such, it provided little precedential support for the far broader application of Rule 10b-5 effected by Judge Waterman.

---

36. *See supra* text accompanying note 12.

37. *See* RALPH C. FERRARA ET AL., FERRARA ON INSIDER TRADING AND THE WALL § 2.02[1], at 2-15 (1998) (explaining that "early cases . . . involved only face-to-face transactions between corporate officers and shareholders" and that "Cady, Roberts was . . . the first case in which Rule 10b-5 was interpreted by the SEC to [apply to] market transactions consummated through an impersonal securities market").

38. *See generally* WILLIAM H. PAINTER, FEDERAL REGULATION OF INSIDER TRADING 155–57 (1968) (discussing the SEC's pre-*Cady, Roberts* understanding of Rule 10b-5).

39. *See* Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 440 (arguing that insider trading "is not really fraud, even though we have chosen to call it fraud in order to preserve and embellish the useful message of investor protection"); James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345, 365 (2010) ("Profiting at the expense of shareholders, although it violates fiduciary duties, does not necessarily affirmatively defraud those shareholders.").

40. Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 59 (1980).

Once again, moreover, Judge Waterman deployed *Cady, Roberts* in support of a proposition for which it did not stand. Recall that Waterman cited *Cady, Roberts* for the proposition that:

> The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation has "access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone" may not take "advantage of such information knowing it is unavailable to those with whom he is dealing," i.e., the investing public.[41]

Judge Waterman's quotations from *Cady, Roberts* in this passage are highly selective. In full, the relevant passage reads:

> Analytically, the obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications. Thus *our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs*, and thereby suffer correlative duties in trading in its securities. Intimacy demands restraint lest the uninformed be exploited.[42]

Cady, Roberts thus does not stand for the proposition that the insider trading prohibition applies to "anyone," but rather for the proposition that liability attaches only to "those persons who are in a special relationship with a company and privy to its internal affairs."[43]

D. The Legislative History

Finally, Judge Waterman claimed that that Congress intended that "all investors should have equal access to the rewards of participation in securities transactions."[44] In support of that proposition, Judge Waterman did not cite the text of the statute, which is hardly surprising because Securities Exchange Act § 10(b) nowhere mentions insider trading.[45] Likewise, he failed to cite any legislative history, which also is not surprising, because there simply is no legislative history that supports the court's

---

41. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968). *See supra* text accompanying note 12.

42. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961) (emphasis added) (footnotes omitted).

43. *See id.* To be sure, the *TGS* defendants all fell within that category, but the *TGS* holding was not so limited, and, moreover, the decision has never been limited to its precise facts. *See supra* notes 14–19 and accompanying text (discussing post-*TGS* expansion of the equal access prohibition).

44. *Texas Gulf Sulphur Co.*, 401 F.2d at 852. *See supra* text accompanying note 12.

45. *See* United States v. McGee, 763 F.3d 304, 313 (3d Cir. 2014) (observing that "§ 10(b) does not mention insider trading at all").

purported policy.[46] Instead, to the extent Congress in 1934 addressed insider trading, it did so via the disclosure and short swing profit provisions of Exchange Act § 16.[47]

IV. CONCLUSION

Judge Waterman built *TGS* on a foundation of sand. He offered no credible evidence of a congressional intent to ensure that investors had equal access to information. Instead, he cited precedents of dubious value and, worse yet, claimed they said things that they simply did not say. As a result, "[i]n regulating insider trading under rule 10b-5, the lower federal courts and the SEC" post-*TGS* were "operating without the benefit of support from the legislative history of the 1934 Act or from the language of § 10(b). In plainer words, they . . . exceeded their authority."[48]

46. *See* Richard J. Morgan, *The Insider Trading Rules after* Chiarella: *Are They Consistent with Statutory Policy?*, 33 HASTINGS L.J. 1407, 1409 (1982) ("Congress failed to provide any legislative history to guide the §'s application to insider trading transactions.").

47. *See* Dooley, *supra* note 40, at 56–57 ("The conventional wisdom is that Congress . . . expressed its concern with insiders' informational advantage by enacting § 16.").

48. *Id.* at 59.