

ORAL HISTORY OF THOMAS NEWKIRK

With Dr. Harwell Wells

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Harwell Wells: We're here, talking to Tom Newkirk at the Washington D.C. office of Jenner and Block, April 5th, 2019. This is an oral history for the SEC Historical Society. We're talking about Tom's long career at the SEC.

Harwell Wells: Tom, thank you for the interview.

Thomas Newkirk: Well, thank you Harwell for coming here, I really look forward to our conversation.

Harwell Wells: Thanks so much. We like to start asking our participants about their background. So, where did you go to college and law school? Why did you choose to go to law school?

Thomas Newkirk: I was in Cornell, I was a junior there, it was a notable art school. I was sort of bored. I took some psych tests and they determined that I would be a good accountant, or a good lawyer. So, as a lark, I took the LSAT test and did well. There I was as a junior and Cornell had a program where you could combine your senior year both as both an undergrad, and as a first year law school.

Thomas Newkirk: So, as a complete lark, I said, "Okay, I'll go to law school next year, if they'll let me in." And they did, and see how I like it. I loved it, and that's where it all started.

Harwell Wells: So, you came out of Cornell fairly young?

Thomas Newkirk: Yes.

Harwell Wells: I should ask how you got interested in securities law. Was there something at Cornell that particularly interested you?

Thomas Newkirk: I was always interested in business, and the business side of it. I had a good professor at Cornell, Dave Ratner, whose name will come up later in our conversation. I had a securities course with him. I thought that it had a lot of interesting intellectual content in it. I seemed to get it.

Thomas Newkirk: So, when I went to Donovan Leisure out of law school, I did securities work there. Securities and securities litigation primarily, in the time I spent there. That's how it happened.

Harwell Wells: And how long were you at Donovan Leisure?

Thomas Newkirk: I'd say about five and a half years. I was there twice. I was there about five years in New York, and then I was in the Washington office for two years after I'd spent some time working for the congress on the securities industry study.

Harwell Wells: So, what did then ... you were in New York at Donovan Leisure and what led you to Washington?

Thomas Newkirk: I saw that sometime in the fall of 1971, I think it was, that the Senate had authorized creating something called the Securities Industry Study to look at the back office failures that took place in the late 60s, they almost took Wall Street down. I saw that my professor Dave Ratner was going to be the chief counsel for the special securities study. So, I called him up and said, "This sounds interesting, can I come down and work for you?"

Thomas Newkirk: He called back to me a couple of weeks later, and he said, "No. One of the senators has got somebody they want to place on the staff. I haven't got a space for you."

Thomas Newkirk: Then I think in January of 1972, he called me back, completely out of the blue. He said, "I managed to get rid of that guy who was put on my staff. I've got space for you now, can you come down?" I think a week later I was down here in Washington, for the Securities Industry Study. That's how it got started.

Harwell Wells: Very quickly, why was it a good time to take a break from Donovan? Did you want to try something else?

Thomas Newkirk: I had been doing it for five years. I was interested in the subject. I had thought the world of Dave Ratner and thought that working for him for a 10 month study couldn't hurt my career, plus it would be a lot of fun. I think both probably turned out to be true.

Harwell Wells: What did you actually do? What was the Security Study actually? You said it was looking at Wall Street after the back office crisis. What did your work on it actually entail?

Thomas Newkirk: My responsibility was to work on the issues of the application of the anti-trust laws to the securities industry, and to the fixed commission rates that were in place at that time. As you know, the fruit of working on the fixed income rates eventually ended up with May Day and the illumination of fixed securities transaction fees.

Thomas Newkirk: So those were my two areas of focus. One other thing I was responsible for too, quite frankly, I can't remember what it was.

Harwell Wells: So, we can credit you with the loss of the fixed commissions?

Thomas Newkirk: No, I think that belongs to Dave Ratner. One of the things we did at the time was, while we there, there was an attempt to raise the commission rates. Dave sent a bunch of letters to --I think it was Bill Casey then was the chairman -- bunch of letters raising questions about, "Well, if we're going to a regulatory industry pricing model, just like the electric companies or the other utilities do, there's a basis for what they're charging, and it's built up from the bottom. So, send me all the stuff that you've done that builds this up."

Thomas Newkirk: Of course, there were no such things. It was purely numbers negotiated among the big players. I think Dave did a good job really torturing the SEC about the approval of the rate increases. That, and lots of other things that were in place. They were unsustainable, there were a whole bunch of secondary markets developed to compete with the NYSC to attack the fixed rates. So, I don't think we can claim credit for that. We contributed to it, it was really the economics eventually destroyed the fixed commission rates.

Harwell Wells: Okay. I know you didn't head to the SEC for a number of years after that. But being in Washington at this time, was this your first significant exposure to the SEC directly? What sort of interactions did you have?

Thomas Newkirk: That was really my first time I had any real serious connections with the SEC, other than being one of the junior associates working on either litigated issues or on filings.

Harwell Wells: What was your impression of them at that time in the early 70s?

Thomas Newkirk: Hard working, aggressive people, smart, and believed in what they were doing.

Harwell Wells: So, you said you spent 10 months on the senate committee?

Thomas Newkirk: It turned out to be about 12 actually.

Harwell Wells: Okay. What after that?

Thomas Newkirk: By that time my wife had moved on, she's a lawyer also. She had gotten a job that she liked. Donovan and Leisure said, "Well, if you want to come back to us, come back to New York." I said, "That's not going to work." So, they put me in the Washington office for an indeterminate time but the deal was that eventually I'd have to go back to New York if I wanted to stay with the firm. After two years, they said, "Come back." My wife said, "Have a nice time."

Thomas Newkirk: So, I eventually ended up at the office of Legal Counsel working for, at the time, you know Scalia, which was just a great experience, wonderful man, wonderful boss. So, I was at the Office of Legal Counsel. There, eventually, I got involved in the creation of the Department of Energy and the people I met in the course of doing that, led me to work over at the Department of Energy first as Assistant

General Counsel, then as Deputy General Counsel. I stayed there for a total, I think, of almost eight years, seven years.

Harwell Wells: So, it's an interesting ... I don't think it's a common path to go from the Department of Energy back over to the SEC. So, I wonder if you could talk a little about what led to that transition?

Thomas Newkirk: Well, one of the things that we did at the Department ... well two things about the Department of Energy that were of interest. One was building something new when I got there, was really great. Very challenging, very rewarding. But the other thing we were doing, and the main thing that it did that people were aware of, was the fact that we were responsible for the price controls on oil and gas, primarily oil.

Thomas Newkirk: Eventually it was deregulated, so it was a lot of tail end work to do with respect to the litigation arising out of it. It had become not a valuable skill set to have. Plus, the place had become sort of old government, it was huge. I decided I needed to do something else to get retooled, to improve my different skill sets. So that I had more options. As a result, I started applying for jobs at the SEC. I applied three times for what were now S O positions, at the time were SES positions.

Thomas Newkirk: The first one, Bill McLucas got the first position that I applied for. The second one was Phil Parker as the Chief Counsel. And eventually I met a third time with Gary Lynch about the Chief Litigation Counsel position and Gary took a huge chance on me, and I'm appreciative for it ever since.

Harwell Wells: So, I want to hear in a minute, obviously about your career at the SEC, but can you compare just ... because you mentioned the DOE had become sort of old government. Can you compare the working life, or what your experience was in very large bureaucracy or like you said, I believe the Department of Energy had become, as opposed to the SEC. Which was certainly smaller at the time that you joined it?

Thomas Newkirk: The Department of Energy was huge. My group was huge, 100's of lawyers in my group. It started off being sort of like the people on the price control. Were sort of like people at the SEC, they believed in the mission. It was new, it was in the news. It was demanding, intellectually. The pricing regulations were extraordinarily complicated, very difficult to master. That was fun. I'm not sure it was good for the economy, but it was fun to do.

Thomas Newkirk: It morphed into being old government. There wasn't a sense of drive that you saw every day. I went to the SEC, people who were driven and believed in what they were doing, worked hard, very smart, very collegial, quite a small group. I found it was a very comfortable place to work.

Harwell Wells: If I can ask as aside for a question, so by the time you joined, the SEC would have been 50, 40 years old? Have you ever wondered how the SEC managed to maintain to not fall into the rut you described at the other agencies?

Thomas Newkirk: I don't know whether that was my thought at the time or thinking about it subsequently. But I think one of the keys was that it didn't have anything to give away to people. In a sense of agencies that are really licensing people and could give out benefits of one sort of another. Whether they be television licenses, or other things. As a result, I think that I'm not a great believer in the regulatory capture model, but there is some of it.

Thomas Newkirk: At the SEC, I didn't think there was any of that, and I still think there isn't any of that. The end of the securities industry certainly can be heard at the SEC, but I don't think they ever became captured by the SEC.

Harwell Wells: Okay, so you joined the SEC in 1985 as Chief Litigation Counsel and heading up the trial unit. I guess as a way to introduce this, can you talk a little bit about what the trial unit actually did within the larger enforcement division?

Thomas Newkirk: The model in the home office was that through the investigative groups that did the investigations and. Then if there's going to be litigation, it was handed over to the trial unit. At the time I went there, I think there were eight, or nine, or 10 people in the trial unit. But the trial unit people weren't much involved in the course of the investigation. There was a tension between the investigative people, and the trial unit people. The trial unit people thought that the investigative people didn't do thorough of investigations. The people in the investigation group thought that the trial unit people were afraid to try cases.

Thomas Newkirk: Some of the tension is natural, no litigator ever saw too little evidence. But at the same time, there was tension there, it wasn't a happy situation. I think one of the things that Gary wanted me to do was to try and find a way to reduce the unhealthy tension between the people in the investigative side and the trial unit people.

Harwell Wells: What did you do then to try to overcome that?

Thomas Newkirk: Well with Gary's support, there was more integration of the work. People in the trial unit were brought into cases earlier, before the decisions were made, so that they could contribute in terms of seeing how you'd see evidence as a trial unit person, as opposed to an investigative person. I think that that gave rise to its own tensions. I think by and large that it worked better for everybody involved. I think that's something that's being continued.

Harwell Wells: Okay, to expand on that, how did you approach your role as a supervisor? That is, I assume you didn't do a lot of litigation if you were actually running the unit. If you can talk about-

Thomas Newkirk: My dream was to do litigation, but it didn't work out that way. I was probably naïve in believing that, believing that I could do that.

Thomas Newkirk: By encouraging people to be respectful of the people you're dealing with. To understand it from their point of view, as to what they were trying to do. I got a lot of help from the associate directors, and from Gary to tell people, "We're going to do this." And people did it.

Harwell Wells: Was there a sense ... so you joined in 1985, which it seems to be just about the time a lot of stuff was really getting started with obviously the Drexel and the Milken matters. Was there a sense that there was a need to beef up the trial unit? Did they want to raise its profile? Or was it just that happened to be a position that was open for you?

Thomas Newkirk: It just was a position that was open, and my predecessor had moved on. They needed a chief litigation counsel, and I was just so lucky that Gary picked me.

Harwell Wells: So, what was going on in 1985 when you joined? I want to get to the very long, drawn out-

Thomas Newkirk: The cases that were there when I first arrived there, there was I think Baldwin-United was the big accounting case. There were a bunch of cats and dogs. There were not big cases. A couple of ... I can't remember the name of the firm, but there was a fairly large firm that we basically ended up putting out of business, and deservedly so.

Thomas Newkirk: The first Geraci case had just been ... I think it had been filed in I think 1984. It was developed in what was then the Washington regional office. It was taken into the home office. That went on for close to 10 years. That was a big case. People who watched TV at the time, you would see Brannan with his helicopter, making pictures for the junk that he sold to investors. A lot of IPO's that were just companies that you never heard of then, and you never heard of since.

Thomas Newkirk: Those were the two, the Baldwin-United, and the first Geraci cases were the big name cases that were there when I got there. Baldwin-United was eventually settled on a satisfactory basis, and eventually after many years of trench warfare, we won the first Geraci case as well. As a result of it, of course, he decided he was going to avoid paying back the \$80 Million that we recovered at the time to the bogus bankruptcy. And subsequently went to jail for bankruptcy fraud.

Thomas Newkirk: The big thing that happened first while I was there was in my first court appearance for the SEC was in, I think, May of 1986. Bringing the temporary restraining order against Dennis Levine and the insider trading cases. As you know the Dennis Levine case led to all the big cases, the big broker dealer cases that took place from then on through the end of the 80s.

Harwell Wells: So how did that ... can you talk a bit more about that? Because it seems you walked in the door at the right time.

Thomas Newkirk: I walked in the door at the right time. Somebody else had done all the work, and basically handed the file over to me, and said, "Go to New York and file this case." I was scared to death.

Harwell Wells: Why?

Thomas Newkirk: I hadn't done a securities case. I had done some work as an associate in Donovan Leisure, but I hadn't been in a court, other than doing pro bono stuff on my own straight up in a securities case. It was really a huge deal for the Commission and I was scared, and scared was good. I was really prepared.

Harwell Wells: So, you start out with the Dennis Levine case, can you talk about how that evolved over the next few years, and the other kind of litigation? Obviously, there were criminal cases, there were civil cases, there were-

Thomas Newkirk: The criminal case. You recognized that he was dead in the criminal case. The coin of the realm in the Department of Justice's cooperation. And he eventually gave us Boesky, and Boesky he had something to give too. He had Milken to give. Boesky had a bunch of other people to give as well. Who were tipping him on deals basically. That's how the Milken case develops. They all developed out of the Levine case. That's what we did for lots of people -- what the staff did for years after the Levine case.

Harwell Wells: So, Milken is especially notable for litigation, fighting the charges at least for a while. How did you handle that litigation dealing with him, dealing with obviously he had a lot of resources for a lot of very talented lawyers.

Thomas Newkirk: This was before electronic document review, and all that stuff. So, we had a warehouse full of documents. The question was, how are we going to get through this stuff even though all the people that worked on the investigation carried over, and did the work on the litigation, and at least half of the trial unit were working on the Milken-Drexel case. But we needed more ammo, and the FDIC had brought a case against Drexel arising because of the banking losses that had occurred also as the FDIC claimed. Because of the misconduct that occurred at Drexel. It involved the same core document, and information. The FDIC had hired Cravath to do the litigation for them. I thought well this is a good opportunity to leverage on their thing.

Thomas Newkirk: So even there was a provision in the securities laws that lets the SEC keep anybody who wants to be consolidated with the SEC case, the SEC had the power to consent to let other people participate in an SEC case. I thought, "Well, why don't we call the people at Cravath and see if they want to work with us on this case? If they do, we'll consent to it, and we'll leverage up on their resources." That's what we did, and it worked out really well.

Harwell Wells: Has anyone done that since?

Thomas Newkirk: I don't believe anybody's done it sense, but I'm not aware of the staff having done that since then.

Harwell Wells: Let me ask a question at least relating to that, or perhaps connected to it. You said there were eight attorneys in the trial unit when you joined?

Thomas Newkirk: Right, eight or nine.

Harwell Wells: Eight or nine, which seems to be a number that would be dwarfed by the litigation division of any large law firm. So, in other ways, how did you deal with, or what ways did you try to leverage what ... I wouldn't say out gunned, but clearly the other side had a lot of-

Thomas Newkirk: Outnumbered, not necessarily out gunned.

Harwell Wells: Outnumbered, I think that's better.

Thomas Newkirk: I think that's true almost all the time in government. In big cases you're always outnumbered. It wasn't just the people in the trial unit that worked on the cases. The people that worked on investigations, or at least some of the people that worked on the investigation would be brought out, either willingly, or unwillingly into the trial unit to work on the litigation.

Thomas Newkirk: Plus, we had the advantage, I think, of having worked on it. The people in the investigation had worked on it for a number of years. And they really knew the case. So that the lack of asymmetry and resources really wasn't that big a problem. Because we had already been through the documents and had that stuff. I never really felt we were overwhelmed.

Harwell Wells: Okay.

Thomas Newkirk: Except in the Drexel case, and we solved that problem.

Harwell Wells: Okay. So obviously with Drexel, and frankly with other cases, there were criminal charges as well as civil litigation. Can you talk a little bit about how you interacted with US attorneys, federal prosecutors, perhaps especially the southern district? Because I know there was a really long-running relationship there.

Thomas Newkirk: When I got there, there was already a really tight relationship between the home office and the southern district, and the New York regional office, and the US Attorneys office in Manhattan. That continued through the entire time I was there. I have every reason to believe that it continues today. That it's just a very close, complimentary relationship. I think it's good for investors, it's good for

the public. It's a rare example of really close working together without people sticking their elbows in somebody else's face.

Harwell Wells: Okay. You mentioned the regional offices. How did the trial unit interact with regional offices? They obviously had investigative units. Did they have their own trial?

Thomas Newkirk: In theory, I was responsible for all of them. Some of the regional offices had their own chief litigation counsel and worked like the home office model where the cases would be handed off. Some of the offices had, and still have a different model where basically the people that did the investigation are also the people who take the lead in the litigation.

Harwell Wells: Was there any rivalry there? A desire not to hand off to the trial unit?

Thomas Newkirk: In the home office where I had a better view of it?

Harwell Wells: Yes.

Thomas Newkirk: They were, in general, glad to have the experienced litigators to pick up the case. Probably not universal, but nobody ever said, "We want to do this ... " I'm not aware of anybody going to the director and saying, "Get rid of those trial units, I don't want them on my case here. I'm going to do it myself." I never saw that happen.

Harwell Wells: So, I don't know if you want to talk more about what you did in the Drexel matter, and with the Levine matter. Or there were a couple of other, or at least one other matter you worked on while you were at the trial unit that I wanted to ask about, which was Crazy Eddie?

Thomas Newkirk: Crazy Eddie case was a lot of fun. He was a great crook, a very clever crook while it lasted. He made the fraud run much longer than the ... the frauds were quite gross. But he had figured out how to beat the auditors in their audits. So that when the auditors went home at the end of the day, here is Henchemen who would break into the auditors trunks, and find out what their plans were for the next period of time. And he would structure his business in a way to reduce the likelihood that the auditors would ever figure out what they were doing.

Harwell Wells: But you eventually-

Thomas Newkirk: I eventually ... I like to say that all accounting frauds eventually fail. Of course, the ones that were never discovered may not have ... there may be some out there that haven't failed, some small ones. But if you're running a big scale fraud that depends on continually making your numbers to grow. I don't think it can be done.

Harwell Wells: So, one other thing you might have dealt with when you were at the trial unit, which is when you were hired, or I guess you departed the SEC. The SEC news release noted that you had also worked a good deal on emergency relief cases to freeze proceeds of insider trading and halt fraud. You mentioned already with Levine you went to get a TRO. So, you got a chance to litigate at some point.

Thomas Newkirk: Exactly. That was the only litigation I managed really to do. They were great fun because it would be a defined period of time. I wasn't going to stay on and work personally on the day to day work of the document discovery, and all the other stuff that goes on in civil litigation. So, the investigative people would tell us that because we're doing a better job of being informed, as a trial unit, what was going on. Particularly in cases that might break quickly.

Thomas Newkirk: So, you get the case, somebody on the staff side would draft the first complaint. We'd fiddle with it. We'd put together the affidavits or whatever else we'd need. Run into court and get a temporary restraining order. Most of them were ex parte. So, you had to be very careful about what you said to the judge to be accurate in what you said, and not to exaggerate because there was no other side. You knew they may show up. If they were off seat, sometimes they decided not to show up, which tells you something. But you had to be prepared that they were going to show up.

Thomas Newkirk: One of the coins of the realm at the SEC was to have the judges trust you. You didn't get a second chance if you didn't preserve your integrity with the judges. So, it's really important to make sure what was said, be careful about what was said.

Thomas Newkirk: Go to New York, file the case, go see the judge, tell him what you have. That was usually the end of it. Sometimes we'd go through a preliminary injunction thing. Usually you'd end up with agreeing to some sort of a stay, while the case develops. So, they're fun, I like doing it.

Harwell Wells: That's interesting. I hadn't thought that maintaining your reputation with the judge, who obviously you would see again over the course of a bunch of litigation would be something particularly important for you.

Thomas Newkirk: If you want ex parte relief, if the judges don't trust you, you're not going to get it. In the off-shore ones, if you don't get the emergency relief, you're trying to freeze the money here in the US. By the time you go through any process at all, the money's going to be gone. Because while you can ask the broker dealers to keep the money, they're going to say, "I can only do it if there's a court order. Otherwise, I'm going to be liable to my customer."

Thomas Newkirk: So, the ability to get ex parte temporary restraining orders for the traders who were off-shore, but the money was here. It was very important.

Harwell Wells: So, you spoke of some of the people working there at the trial unit. Did you handle hiring there? Did you choose people to come into the trial unit?

Thomas Newkirk: I took some people out of the investigative side, who wanted to get more trial experience. But I think most of the people came from outside.

Harwell Wells: Okay. What made someone particularly good at that job?

Thomas Newkirk: Very smart, good work ethic, and the ability to work and play well with others. In the government, it depends on that, not on power.

Harwell Wells: So, you were in the trial unit for about six years?

Thomas Newkirk: Yes.

Harwell Wells: Are there any other major cases of litigation, or major cases you worked on that come to mind? Particularly memorable, or even particularly colorful?

Thomas Newkirk: I think Crazy Eddie was great fun. The Levine's through the Milken thing was tremendously satisfying.

Harwell Wells: Why satisfying?

Thomas Newkirk: Because the conduct was really bad. It did a lot of damage to the economy and to the capital markets. My view was these were people that thought the rules didn't apply to them. I'm a law and order guy, I think the rules apply to everybody.

Harwell Wells: Okay. So, after six years you became associate director?

Thomas Newkirk: That's right.

Harwell Wells: And can you talk a little about your ... I'll ask two questions. First, why did you wind up deciding you wanted to do something else than heading the trial unit?

Thomas Newkirk: Well, I done the trial unit for six years. I never managed to do what I hoped to do there, which was to try cases myself. So, I thought it was time to do something different. One of the associate director positions opened up. I thought the investigative side, I thought that would be fun to do for a while and satisfying to do for a while. To put the puzzles together, rather than try to hold the puzzles together in the litigation. It was very rewarding.

Thomas Newkirk: In transitioning between the trial unit and the associate director position, I got involved in the Prudential investigation. I think I got first involved it when I was head of the trial unit. Then I continued to work on it with the people in the investigative side on the Prudential case. Which is the case that I worked on there, which I think I'm proudest of during my time at the SEC.

Harwell Wells: Let's go ahead and ... I'm sorry-

Thomas Newkirk: The Prudential case involved Prudential's fraudulent sales of hundreds of, billions of dollars. I think it was \$8 billion of poorly thought out, limited partnerships that they sold to moms and pops. Some of it had tax benefits in them. Some of them had promises of returns that were never going to happen. The whole thing collapsed in '89, '90, '91, leaving retail investors with huge losses.

Thomas Newkirk: A couple of good things came. In the Prudential case, we got them to the table fairly quickly. We had the assistant director who was in charge of the day to day running of the case was Jerry Eisenberg who decided, "We're going to try something different with these people." They put together basically a book of the key evidence which basically would have been the core evidence if the case went to trial. And invited the people from prudential to come in, and said, "Here's what we have, now let's talk turkey, because we've got you cold." When you go through this, you're going to find out we got you cold.

Thomas Newkirk: I think they didn't tell us they agreed, but they did agree to settle the case and we ended up negotiating a settlement with them that was unique, whereby it was uncapped, where they had to pay up a lot of money upfront to pay back injured investors. It was uncapped and they agreed to a point, Pollock as the administrator for the fund with non-reviewable discretion to decide who gets paid, and how much they get paid. If they wanted to participate in the program.

Thomas Newkirk: I think the first shock that he gave the company was when he decided that people are going to get interest on their payments. Not just the loss for investment that they made five, or six years ago. But they're going to be paid for the time value of the money that they got.

Thomas Newkirk: Plus, he was tough and fair, in terms of measuring what people's losses were. So, it ballooned to well over \$1 Billion. Drexel was on the hook to pay whatever the amount was.

Harwell Wells: Prudential.

Thomas Newkirk: Prudential, I'm sorry, thank you. It's one of a few cases where investors were really compensated in whole by the SEC.

Harwell Wells: I was struck by going back and looking at some documents because it's interesting looking at newspaper stories where when Prudential first announced this, they estimated it would cost them about \$300 Billion. Of course, it wound up, as you said, cost them well over \$1 Billion. Was it the SEC's thought to get Commissioner Pollock to administer this, or was that something Prudential brought forward?

Thomas Newkirk: It may have come from the defense side. We were tickled pink about it, because we knew his integrity and his concern for investors was unmatched. I don't know, I do think that it came from the defense side.

Harwell Wells: So, it sounds as though Prudential really stands out in your memory as a matter you're particularly proud of working on.

Thomas Newkirk: Right.

Harwell Wells: Was it the amount of it? Was it the egregiousness of Prudential's behavior? Because clearly these were horrible investments for retail investors.

Thomas Newkirk: Yeah, the product that they sold was bad. A lot of people bought it and saw a huge number of investors. All the ones who participated in the program were compensated in full. There just aren't that many SEC cases where that many mom and pops get back their losses due to a securities fraud.

Harwell Wells: Is it because the typical fraudster would have not have the money by the time they got caught?

Thomas Newkirk: Well certainly with the pump and dumps, that's the case. With the large brokerage firms, the answer is no company who knows about the Prudential case, and all that would ever agree to an open-ended deal like that. I can't imagine that they would. So, I think that probably is ... so then you have the problem of trying to figure out what the losses really are. I haven't been involved in haggling like that at the SEC, but I expect there's a lot of haggling going on. And they end up being some sort of compromise as to what the amounts are. I don't really ... the only people inside that are making the sausages are going to know what the components really were, and I don't.

Harwell Wells: So, I'm curious about something. I happened to learn this about the Prudential matter. But I think it's something that has become generally concerning people who represented Prudential. Because the book Serpent on the Rock, which is about this case, Gary Lynch was Prudential's lawyer, who in fact obviously hired you to join the SEC. You're sort of in a reverse position now, in that you must find yourself representing clients against people you might have known while you're still on the staff.

Harwell Wells: What is it like to find yourself on the other sides of the table from people you've worked alongside?

Thomas Newkirk: That's fun too. You can be friends with people, and still be a civil, hard fighting adversary against them at the same time. That's one of the nice things about that law, is that you can do that. That touches a little bit on something else we talked about. I think it was the revolving door. I think that people who think there's something wrong with the revolving door, have it all wrong. Particularly in terms of the SEC. Because the people who work at the SEC, I think leave with

the SEC ethic with them. Which doesn't mean they're not going to fight you tooth and nail. But at the same time, you know that the vast majority of the people who leave the SEC go to private practice strongly encourage their clients to comply with the law. I'm a true believer in that. I really believe that I see it, every day.

Harwell Wells: Okay. So, I want to back up for a sec. So, you become associate director in 1993. I have to ask, what was your role as associate director? Because there are accounts that say you oversaw a lot of cases. What does that actually day to day mean about your involvement in what you were doing?

Thomas Newkirk: Well, my joke used to be ... it was to tell people my job for people working for us was to get their degree out of their way so that they could do their jobs. I had a very ... I had really brilliant assistant directors the entire time I was there. I would give them guidance. I would take a second look at what they're going to do. I would work with them to formulate plans for either for settlement, or litigation, or dropping the case as it may be.

Thomas Newkirk: So, one of the beauties of the job is I got to pick what I wanted to work on. But my job really was to provide ... to be a check on my staff. To make sure that they aren't drinking their own Kool-Aid too much. But at the same time, to protect them from things that start getting in their way.

Harwell Wells: Okay. So, I want to talk a little bit about setting priorities, and how you chose to pursue certain cases. I'm aware that, of course to some extent, your job would have been reactive, you've got to respond to a major case there rises. But still in conducting interviews I've found out that there's always going to be people who do pump and dump. There's always going to be insider trading. There's always going to be micro-cap fraud.

Harwell Wells: How did you distribute your resources to manage to cover both those, and the giant breaking cases? Be it at Enron or whatever?

Thomas Newkirk: The job was to ... the enforcement divisions always try to maintain its fingers into each of the different types of ... or be active in each of the different types of violations that occur. So that people don't think, "Well, if I do this type of thing, I can get away with it." And in terms of providing opportunities from my staff, I try to give them the experience to work on each of the different types of cases that they'd have to. Because it provides something new for them to do, a new area to explore.

Thomas Newkirk: That's how I did it. You get guidance from the chairmen, from the commissioners, from the director about new areas to focus on. Or maybe we need to spend more time focusing on this area, like that. So, you go looking for cases in that area. When I was there, it was quite a reactive thing. The joke would be that particularly when the accounting cases started that everybody would race to the early edition of The Times, and The Journal to see what was

going on. Because usually the default position was that people who found the case, got to keep it.

Thomas Newkirk: So, I would go make sure I read the newspaper early every morning. I always complained that the people in New York could get The New York Times at 2:00 in the morning, get the early edition there, so they had an advantage. But that really was entrepreneurial in that sense. But again, it was reactive to what you learned what was happening. I can't think of any cases that I worked on that were significant, that were brought to me by a whistleblower, which is different now. I think they do get really good whistleblower cases. I don't recall having gotten any at the time I was there. There may have been one or two, but nothing that sticks in my memory.

Harwell Wells: Was there ever a sense that some cases were things you sort of had to deal with because of big scandal that erupted? Whereas, in other cases you really wanted to perhaps send a message to ... there was a developing fraud in a new area where otherwise to make it clear that the SEC was paying attention to a particular issue?

Thomas Newkirk: Absolutely. The point was to ... that's the deterrence part of it, to let them know that we're there, and we're looking. We started off with talking about insider trading stuff, and one of the things about it is we seem to see every 10 to 12 years or so, you see a burst of insider trading cases. I think that's because a lot of people involved in those cases are relatively young, and don't know the history of what happened before. So, it's important for the SEC to bring those periodic insider trading cases to remind people that the consequences of getting caught are really bad.

Harwell Wells: Sure. So, this might be getting a little ahead of ourselves, but when you think of priorities, when you think of how you decide what you need to pursue, were those decisions that you would have discussions on within the division of enforcement? Because, as we can also discuss, each chair seems to come into the SEC with the sense that certain issues need to be dealt with. With some issues that they want to pursue. Perhaps I could ask about Chair Levitt and the numbers game, because that seemed to make a splash at the time, but also lead to a ... I won't say if it leads, but it was connected in time with accounting enforcement matters.

Thomas Newkirk: Well Arthur raised the importance of it. But most of the accounting cases that I worked on, grew out of restatement. Eventually it fell apart. A couple of them didn't develop that way, but most of them developed out of restatement. You see the company's done a restatement. What's behind it, is it just errors, or are they frauds?

Thomas Newkirk: For whatever reason, I think in the late 90s, we saw huge accounting cases surfacing. You have to wonder what was going on there. There's Sunbeam ... if we talked about Crazy Eddie, there's Sunbeam and then there was Waste

Management, and Ahold and the ones I worked on, and Cendant, and Tyco, and Time Warner. They were really bad conduct. And stuff that was really hard to figure out. How people thought that they were going to keep ... when was it going to fall apart? Because each year required more finagling than the year before to keep the balloon up in the air. Eventually they burst. With respect to many of them, some of them we helped burst them.

Harwell Wells: Did you ever figure out why ... did you ever reach a conclusion about why people would engage in accounting fraud if as you said, it would snowball into something that inevitably come out?

Thomas Newkirk: I don't think they had that realization. I think part of it was driven because the development that had taken place, and compensation tied more and more to financial results. I think that put, I don't want to say pressure, because that's not the right word. An inducement to engage, to make the numbers. To get their bonuses, which were to be huge multiple of what their basic salary was, because of the way the tax laws work.

Thomas Newkirk: I think that happened along with it was certain failures in the auditing firm. The combination of the consulting business, and the auditing business put pressure on the auditors not to be too tough. Because the firms would make the profitable side of ... that the auditing business wasn't very profitable. The consulting business was fantastically profitable.

Thomas Newkirk: Some of the individual auditors were just corrupt. Others convinced themselves that they don't need to look at things so hard. It was sort of adverting their eyes. It was a serious failure. It made it possible to let the frauds run for as long as they did. Many of the frauds took place in the corner office, basically. Or in the executive committee people, and with top level adjustments.

Thomas Newkirk: If you look at them carefully, you can see what they were. Some of them were more ... I think of Healthsouth as being a more clever one, where basically all the fraud took place in the hundreds of places where they're providing physical therapy. It made it much harder to detect. It was a failure of the accounting firms. Part of it, I think maybe it was a failure at the SEC too, to have not paid more attention to it at the time.

Harwell Wells: So, I want to talk about some particular matters in minute, but when we discussed this before the interview, you made an interesting comment. You said the accounting fraud cases were fun, and I wonder what made them fun?

Thomas Newkirk: They were fun putting together the puzzle as to how this particular fraud took place. How it was disguised. Who the people were who were involved in it. I wasn't the guy who was going through hundreds of thousands of documents, that part was not so fun, but the staff to its credit, they plowed through. The staff would plow through that stuff, and in many cases it was done by hand because electronics weren't used to the same extent that they have become.

Thomas Newkirk: Once you see the pieces and see them falling together, it was just fun.

Harwell Wells: Was investigating them particularly difficult? For instance, did the lawyers in enforcement need accounting expertise? I'm also curious because what you just described about Healthsouth makes it sound like an incredibly complicated scheme to put together.

Thomas Newkirk: It was an incredibly complicated scheme to put together. Like all, it eventually fell apart. I'm sorry, what was the question again?

Harwell Wells: I was asking how the actual investigations went. Because some like Healthsouth must have been very difficult to actually find the particular pieces to put together. How you would supervise or oversee-

Thomas Newkirk: It required a lot of ... that wasn't one of my cases, but my belief is eventually it became a cooperating witness who helped put it together. It was complex enough so that you may recall that the district judge ... the SEC sought a preliminary injunction against them. And the district judge in Alabama denied it, which I think didn't reflect well on her, but it reflected also on how complex the scheme was there.

Harwell Wells: Let me ask about a few of the particular cases, and one colorful case to start with is Tyco.

Thomas Newkirk: Tyco, the most interesting thing about Tyco is how ... and what was unusual about it was how it got started. Because this didn't come from a restatement, and it didn't come from an article in the Wall Street Journal that somebody was raising questions about Tyco's accounting. It came to me because I got a call from my friend John Moscow who was, I think the deputy district attorney in New York. He called and he said, "I want to come down with Bob Morgan and have breakfast with you." I said, "Sure."

Thomas Newkirk: He came down and he said, "We're doing an investigation of Kozlowski. It's a tax case based on his avoiding sales taxes on the art he bought. That he sent empty boxes to New Hampshire where there's no sales tax, and hung the art up in his apartment in Fifth Avenue." But in the course of that, issues came up about his misappropriation of funds from the firm, and about some of their accounting issues. They said, "We don't have the resources to do this. We need your help. Pretty, pretty, pretty please we'll bring this case to you, but you have to agree not to take this case to your friends over at the US Attorneys office, because they'll steal the case from us."

Thomas Newkirk: Morganthau or Moscow said, "These guys are going to go to jail, and they're going to go to a state penitentiary. That's a suitable outcome for these people. So, would you agree with us?" And I agreed. I said, "I can't do it myself, I got to go to the director." I talked to the director about it, and the director said, "Yeah, have at it." That's how the case began.

Thomas Newkirk: It too was a very complicated case involving stuff that could be without a red face describing some of the issues as being not so clear. So it took a lot of work to ... some of the stuff was clear. Bribe to a director, for example, is pretty straight up. I think Jim Walsh ended up pleading to a case, pleading to a felony in state court. But some of it was very hard to put together. It wasn't concluded, it was wrapped up after I left. But the case was, as we would describe, was in the can at that time. It was just getting it filed, then negotiating the settlement.

Thomas Newkirk: So that was really a hard case to put together. Just because it had a lot of different moving parts in it as well. Which ones were ... and at that point, the staff were getting tips from people, any of which were plausible, many of which were plausible and didn't work out. Some of them turned out to be very valuable. That's one of the things that's made it hard to pull the case together.

Harwell Wells: In the sense that you had to work throughout all the tips and were not sure-

Thomas Newkirk: I had to work through all the tips and not to leave something that was important to side. And also putting the core case together as well. There were difficult issues. Some of the issues were difficult.

Harwell Wells: What about the Sunbeam case? Chainsaw Al Dunlap had gotten himself, perhaps a lot like Kozlowski had gotten himself a lot of publicity.

Thomas Newkirk: Had gotten himself a lot of publicity. You know, here was a guy who built this great reputation at Scott, which he was never caught for. He went and did the same thing at Sunbeam basically. Making acquisitions, creating huge reserves in the course of the acquisitions and then bleeding the reserves back into earnings as time went by to boost the earnings. It was completely bogus.

Thomas Newkirk: He managed to do it before at Scott and wasn't caught, at least that's my belief. He did the same thing at Sunbeam, and he did get caught because it just became unmanageable. To their credit, the auditors did eventually figure it out. The company got rid of him, got a reasonable settlement for the case. The case with him was a fight. Eventually we ended up settling that case too, with the help of a mediator. And showing that we were prepared to go to trial, let's call your first witness.

Harwell Wells: Why was it such a fight?

Thomas Newkirk: It was in his nature.

Harwell Wells: Okay.

Thomas Newkirk: That's my take on it. I subsequently seen what's really interesting that before he got to Scott, he had done something at a paper company in upstate New York that failed after he left. That was never discovered by the head hunters that

placed him first at Scott, then at Sunbeam. I just learned that in preparing for this conversation.

Harwell Wells: Yes.

Thomas Newkirk: He had a history before he got to Scott, that was not disclosed to the head hunters who placed him. Or at least that's the story that I read in preparation here.

Harwell Wells: Okay. So, I want to talk about Waste Management. Both because it was an interesting case in itself, and because it related, and Anderson was connected. It seemed to be two parts to that. So, I wonder if you could start by talking a little bit about the Waste Management case?

Thomas Newkirk: Waste Management was just the grossest type of accounting fraud. The thing that sticks in my head is with respect to their dumpsters and one of the ways they boosted their numbers was with respect to their depreciating assets. They all became more valuable, the more they used them, the more valuable they became. So that the scrap value became much greater for a beat up dumpster, or for a truck that had gone 200,000 miles, and was falling apart on the street. They kept every year that the terminal value became more valuable. The more they used it, the more valuable it became.

Thomas Newkirk: There are a lot of other frauds that took place at Waste Management too, but that's the one that struck me as the grossest one, and one that should have been so easy for the accountants to catch. In fact, the accountants, to their shame, the accountants did catch onto it eventually. But instead of doing what accountants are required to do, which was at that time to stop it. To require a restatement or to resign.

Thomas Newkirk: The people at Anderson, including people in the national office, came to an agreement with the firm about how the firm would come into compliance with GAAP over a period of years. Unheard of. In other words, Anderson agreed to provide false opinions, not only for the year in which they discovered it, but over future years until at some date in the future, and I forget what the end date was, Waste Management would be in compliance with GAAP. We call it the joke about they were going to do a creeping compliance.

Thomas Newkirk: So that lead to not just the audit partner on the case, but this involved a national office. The people in a national office who were the real guardians for GAAP. They're the technical experts. It just shocked everybody. That's what led to the conclusion that this isn't the case of one or two auditors who are off the reservation, but you're dealing with a firm that has a bad corporate culture.

Harwell Wells: The firm being Anderson?

Thomas Newkirk: The firm being Anderson. Here were gatekeepers who didn't mind the gate. When they found the gate open, didn't close it. That's why we decided that the only appropriate remedy was going to be to charge the firm. The settlement discussions lasted forever. Eventually we had a couple of false starts. Kevin O'Rourke was our bulldog trial lawyer who's been assigned to the case.

Thomas Newkirk: I think several times we pulled him back from the airport on his way to Chicago to file the case. We eventually settled the case. The sad case about the Anderson case was that they didn't learn the lesson from it. Because after that, they had the Enron case. Again, something that ... well, you saw how that played out.

Harwell Wells: Yes, I think everyone did. So, I think you've answered this question some already, but there must have been other cases where you had to weigh accounting fraud cases, to what extent do we hold the individual accountants responsible? To what extent do we hold the firm responsible? How did you wind up ... what questions would you ask when you were trying to decide a case, a matter like that?

Thomas Newkirk: Well, the model that was in place, mostly, was that if it was just the audit team that were involved in it, the appropriate remedy was just to sue them. And not to, even though respond to their superior that you could have brought the cases against the firm. But the belief was that it was not desirable to do so.

Thomas Newkirk: The decision to sue Anderson, the firm, that wasn't ultimately my decision. That was the director's decision.

Harwell Wells: Sure.

Thomas Newkirk: Or it required at least his approval. It wouldn't surprise me at all if he hadn't discussed it with the chairman before bringing that case. Again, because of the importance. There's a tension there, because these are important people for the market. You need to use judgment in what you do in that area. Particularly because there are so few of them.

Thomas Newkirk: So that was the model, but the model was also that if the firm itself, if people in the home office were involved in it, the default position would be that the firm itself is going to have to take some consequences too. As the cases go by, if you looked really carefully at all the cases that have taken place over time, you probably can't perfectly fit each on into a box, at least from the outside. And they're all settled. In every settlement there are things that went on in the settlement negotiations, and trade-offs that aren't visible outside the people who are involved in it. I think that's probably still the model.

Harwell Wells: So, I assume there was some intention, or correct me if I'm wrong, there was some intention to send a message to the accounting profession as a whole through these settlements and litigation.

Thomas Newkirk: I think that it was a shot across the bow of the firms themselves that they needed to pay more attention to what they auditing partners were doing. And allowing the home office to be involved in an ongoing fraud was completely unacceptable. There's no excuse that they could ever have made that would have convinced me, my staff, the director, the commissioner, that it's best to apply our prosecutorial discretion and not go against the firm.

Harwell Wells: Do you think it was successful in that sense?

Thomas Newkirk: Not for Anderson. I think so. Although there are a lot of terrible frauds that took place after that where the auditor should have caught them. I think that the creation of the peekaboo -- they hate that term --

Harwell Wells: PCAOB...

Thomas Newkirk: ...PCAOB, yes, in polite company. The fact that their audits are being audited. And the creation of their auditing standards has been very successful.

Harwell Wells: I think those are some of the major cases that occurred while you were serving as associate director. You also mentioned the Ahold case.

Thomas Newkirk: That's another big accounting case. Well, that takes us into our conversation about penalties for public companies.

Harwell Wells: Yes, maybe we can talk about Ahold and then lead into that.

Thomas Newkirk: After we got the remedies act, the staff gave mindful attention to what to do with that remedy with respect to public companies where ultimately the injury is going to be to ... the investors. Whether the investors who were originally defrauded, or whether that had been a turnover. Basically, it was punishing the victims.

Thomas Newkirk: The view was, lead by the director at the time, was ... and the consensus that the senior management agreed to ... unless the firm profited from the accounting errors, it was not appropriate to impose a penalty on the firm. With an exception. An exception being if the firm didn't cooperate fully with the investigation and take the appropriate ... what the staff believed to be the appropriate remedial steps to cure the problem, then a penalty would be in order. You aren't being penalized for the accounting error, you're being penalized for what you did after what you did. That line held pretty well-

Harwell Wells: And as I understand you had conversations in the division of what was appropriate?

Thomas Newkirk: We had a meeting with the senior enforcement staff, in one of the conference rooms with the director presiding, and we discussed the issue of how to deal with these things. That was the conclusion we reached.

Thomas Newkirk: I think the first big penalty cases, bit at the time, more than \$1 Million were either the Lucent or the Xerox case. Again, I believe that the litigation release at a press release that went with them, mentioned or didn't mention cooperation. Or may even have mentioned a lack of corporation, and that's why the penalty was being imposed.

Thomas Newkirk: Well that didn't hold, and the pressure was, "What are you doing to the firm? They did this terrible stuff, why aren't you punishing them more?" And losing sight of the fact of who's really being punished?

Thomas Newkirk: So eventually it grew and got, in my view, completely out of control, so that for example, by the time I left in the Shell case, at that time it was a huge penalty. Might have been more than \$100 Million. I still, and the director agreed with me, in the Ahold case we got the ... they turned themselves inside out. They got rid of all the people and everything we asked them to do in the course of the investigation. We commissioned them to do a lot of work. We were satisfied with the work they did for us.

Harwell Wells: What did you ask them to do?

Thomas Newkirk: They waived the attorney client privilege; they conducted an internal investigation. We basically got the whole investigation. When we wanted them to go out and look at something else, they went out and looked at something else and they came back with it. Sometimes there was something there, sometimes there wasn't.

Thomas Newkirk: This was in the fairly early days of basically deputizing the company. There were other examples that preceded that. We didn't invent that model. That was in place. But we exploited it to the hilt. They did their part too. As a result, we decided, my assistant director and I, we decided this is a good example to make the point that there really is a benefit for cooperation, and we didn't put a penalty on them.

Thomas Newkirk: One of my friends called me after I said who would pay the penalty. He called me and he said, "What are you doing? My client paid all this money here and the people in this case didn't pay anything. How am I going to explain it to them?" I said, "Explain to them by the cooperation that they got." And that was the end of that conversation. But it was an interesting phone call to get.

Harwell Wells: Did you find subsequently that the company sort of got the message? They knew cooperation was going to buy them ... well, not buy them, but cooperation was going to make it easier on them?

Thomas Newkirk: I think before the Ahold case, the Seaboard order came, where the commission set forth the factors that it would consider in imposing penalties on public companies. That was carried on again later in early 2000's, I think it was in the early 2000's, maybe later than that, where Khuzami gave a speech where he

said basically here are the factors we look at in imposing penalties in these cases.

Thomas Newkirk: The evidence of honoring those standards is not clear to the people on the outside, not clear to me. I think that the criticism from the Hill and from the press about not imposing fines on public companies is very hard to resist.

Thomas Newkirk: There are arguments that can be made for penalties for public companies for violations. After all, it is the entity. But if you look past the entity and see what it really is, I'm a subscriber to the Seaboard order.

Harwell Wells: So, bringing up remedies is interesting because you did see an extraordinary -- during your tenure, and I guess immediately before -- an extraordinary series of steps which gave the SEC a great many more tools than it possessed frankly during most of its history. There was a 1984 Insider Trading Act. The Remedies Act in 1990, Seaboard I think you've already covered this a little. But I guess my first question would be when you actually joined the staff, what remedies did you actually have at hand? What tools did you have?

Thomas Newkirk: The remedy was for regulated entities. There was an administrative proceeding process where you could borrow somebody from the industry, a very powerful tool. With respect to public companies, it was a statutory injunction of so called "obey the law" injunctions. Then disgorgement in some cases.

Thomas Newkirk: By the time I arrived there, outside of insider trading cases, disgorgement was sometimes sought, and sometimes was as consistently sought as it developed. It developed into a standard tool in every case where there was a benefit that the defendant obtained.

Thomas Newkirk: The "obey the law" injunction, the real remedy was for public companies, wasn't being ensuring they obey the law, they had to obey the law anyway. The threat of contempt for violating it, the commission never brought those because they had to do the same thing to bring a contempt case as you have to to bring the new case from the start. So, there's no reason doing that.

Thomas Newkirk: So, the real tool was, of course, the reputational harm to the firm. Which firms took very seriously. If you're in the market, having a reputation for violating the security laws is not good for you in the market.

Harwell Wells: Did you find that as you got more tools to deploy against companies, or individuals, that it had actually changed their behavior? Or did it change the way you approached your work in enforcement?

Thomas Newkirk: If it's changed the behavior, it's in a way that's too small to ... the samples are too small to measure. Particularly in a public company, it's individuals who commit the violations. The fact that they may face a penalty as well as a disgorgement, or an injunction. I don't the extent to which they ... I don't think

people don't think about what's going to happen to me if I'm caught. My view is they think they're not going to get caught. Or they manage to convince themselves of their own good faith that there's nothing really seriously wrong with what I'm doing. It's sort of like being over time, a meter.

Thomas Newkirk: So, I think that the existence of penalties probably has not had a large impact on people's misbehavior. Sending people to jail I think probably does, but again, I don't think that the people who are going to jail ever thought they would, in the area we're talking about. If you're a drug dealer, it's just part of your cost of business to go to jail.

Harwell Wells: Sure. So, later on in your tenure, at the end of 2001, 2002, there are obviously an extraordinary series of cases. Starting with Enron, followed by WorldCom, followed by ... we could spell out the cases. I'm curious, I want to ask about your response to those, or how the enforcement division responded to those in a second.

Harwell Wells: But to begin with, how would you explain why suddenly a bunch of extremely large, and until then prominent firms found themselves in such basic trouble?

Thomas Newkirk: I think it's driven by individuals. Depending on which example you're looking at, either by fiddling with the numbers, with top end adjustments. Or putting excessive pressure on people below them to make their numbers. You've got a company with a lot of different divisions and you put more pressure on them than they care bear, because they want to keep their jobs.

Thomas Newkirk: So, they either ... some people convince themselves, "Well, it's in a gray area." Some people recognize they're out of the gray area, the black area. Between a choice of getting fired or worrying about someday being discovered. I'll deal with the short term, and not worry about the long term. I think it's those types of pressures that ... maintain your stock price, beat your numbers, not get caught, "I'm not going to get caught."

Harwell Wells: Did the eruption of those cases change ... it seems like so much occurred in such a short period of time. Did that put any pressure on the division? How did you choose which cases to pursue? How did you deal with the resources that you had?

Thomas Newkirk: I think that the staff ended up pursuing all the big cases. They were all big enough, nobody was going to let WorldCom go away. In fact, Chairman Pitt, at the time, took the extraordinary step ... he had an accounting case, so he ran into court and get a temporary restraining order preliminary injunction against the firm. Nobody was going to leave cases like that unaddressed by the commission. That's their core competency.

Harwell Wells: Sure. If we could turn a little bit, I'd like to talk about some of the people you worked with. Perhaps a good place to start is with the different directors of

enforcement. If I could ask about them? So, I know you were actually hired by Gary Lynch, and he was there several years before he left. You overlapped for a number of years. So, what was your relationship with him, and your perception of him as a director?

Thomas Newkirk: We worked together very closely. It was in the ... I'm not sure I had all that much contact with him in the first few months I was there. I was trying to get my feet on the ground and get on top of the things that I was doing. But with the start of the Levine case, from that point on, I worked with him very closely right through his departure.

Thomas Newkirk: He was a terrific guy to work for. All the people I worked for were really wonderful people to work for. Collaborative, quite different personalities, but all very collaborative, very supportive of the staff at the same time. Had a critical eye, doing what they should be doing. Which is keeping you from making mistakes in cases for one reason or another that were too risky. Even though there may have been a case there that one of the things that's important in a government program where resources are so scarce is you want to win most of the ones you bring. So that people recognize that if you want to litigate you'll litigate against a case that the defendant is going to lose. Or they'll raise issues that might be better addressed through a regulatory avenue, rather than through a litigation area.

Thomas Newkirk: There's a criticism of the SCA is they make a lot of law through litigation. I think a lot of it is done through litigation. I think it's particularly not so much in the public company area, but more in a regulated industry area. So, you want all the directors were appropriately, not afraid of cases, but they're never afraid of a case. But a case might not be the right case to bring. The sense to treat people fairly. I think that's ... when I was there, that was the idea. Whether it was Bill or Gary I first heard it from, be tough but fair.

Harwell Wells: What about Bill McLucas's interaction?

Thomas Newkirk: Oh, he was a great guy to work with. Very smart, very hard working, very protective of the institute, in a good way. But a very easy guy to ... not that he always agreed but he's an easy guy to have a beer with.

Harwell Wells: Then he was succeeded by Dick Walker.

Thomas Newkirk: By Dick. He knew this stuff too. He had been the director in New York, and had seen all the moving pieces. Again, he was a different guy. A little more reserved. But again, I found them all easy to deal with. They're just easy to deal with. Just a bunch of people with a common goal, and all concerned about the investors, protecting the market.

Harwell Wells: Did they come in ... I just want to finish up with Steve Cutler, but did they come in with different ... did you have a sense when there was a change between

directors, that things changed in the division? A different set of priorities? Not radically different priorities, but perhaps different emphasis?

Thomas Newkirk: Well the emphasis was really driven less by the director than by the chairman or the commission. I think Dick came to the home office as the deputy director straight from defense lawyer. He was a really good defense lawyer. I think if you asked him, I think ... is he coming? Oh, he's already been here. I would be interested in what he said about that. Because at some point after he had been there for a while, he decided that the preconceptions he came there as a defense lawyer turned out largely to be wrong. And that the people were pursuing ... we were doing the right thing, chasing after them. He said something to that effect. It didn't take him very long to figure it out. He's a very quick learner, very smart guy.

Thomas Newkirk: Yes, easy to work with.

Harwell Wells: What about the chairs then? Because you just said that the chairs were the ones who were ... we've already talked a little bit about Levitt and you said the chairs would also be setting the tone. I guess you worked under a series of them as well. I should start by asking, to what degree did you actually interact with the chairs and with the other commissioners?

Thomas Newkirk: It varied. Depending on the times I dealt with commissioners was either when a case was pretty ripe. If I had things I needed to discuss with them before the case made it to what we call the table --was presented before the commission -- they'd either call me, or one of their legal assistants would call me and ask questions. I'd go up and see them. Or if I was being told the commissioner has a concern about this case, or that case, I'd go up and we'd talk it out.

Thomas Newkirk: Again, always in a ... the culture in the building was really, when I was there, was you could disagree, but it was always mutually respectful and collegial. People disagree about things. Sometimes I'd prevail, sometimes they'd prevail. Sometimes they'd raise something that I hadn't thought about that would cause reflection.

Thomas Newkirk: Often sometimes, one of the things that comes to mind most [inaudible 01:28:18] with the last individual defendant in the case. Whether that's a person who really belongs in the case. Whether it's fair to have that person in the case. Sometimes we'd take it out.

Harwell Wells: Were any of the commissioners particularly memorable? Or you had particularly interesting interactions with? I want to talk about the chairs in a second.

Thomas Newkirk: The most challenging person to deal with was Commissioner Atkins who was very smart, and he personally read the action memos. He had a more jaundiced eye about whether a case should be charged as harshly as it was or should be charged at all. So, the discussion with him was always challenging.

Thomas Newkirk: To go back to my beginning, I spent my first year ... I went to law school as a lark, and I loved it. What I loved so about it was the [inaudible] thing, which I think probably doesn't exist anymore. A discussion with Commissioner Atkins was like that. It was an intellectual discussion about the case. I may have convinced him, he may have convinced me, we may have gone our separate ways, I usually had the votes.

Thomas Newkirk: But nonetheless, it made it really very ... it's the kind of thing that lawyers do. They argue the law, they argue the facts. He more than any other commissioner in my time there wanted to do that. So, I liked that. I might not have agreed with him all the time, but I liked it.

Thomas Newkirk: Commissioner Fleischman really fell into the same category. He knew more securities law than 99% of the people at the SEC, and he really was a scholar on the subject. He again was concerned about over prosecution so was always a challenge and rewarding to deal with him because he did what lawyers do. That's what I like to do, it's what lawyers do.

Thomas Newkirk: On Fleischman, he also had again, you could have really deep intellectual what I think of, at least deep for me, discussions about the facts and the law on a case. He was always often eager to be willing to have a conversation with the staff about things instead of just making up his mind and deciding what he was going to do. Those really stick with me.

Thomas Newkirk: Chairman Pitt was the same way. You could walk into his office anytime and discuss a problem in a particular case and-

Harwell Wells: Were you able to do that with say Chair Levitt or Chair Donaldson in the same way?

Thomas Newkirk: Levitt and Donaldson were more a corporate model in their offices that you'd make an appointment ahead of time. At least I didn't, the director may have been able to walk in, but I couldn't just walk in. I'd be told by the guardians, "Make an appointment." All the other commissioners while I was there, could walk in and have a conversation, if necessary.

Harwell Wells: Okay. So, it's natural to pay a fair amount of attention to the people who were chairs, and commissioners, and directors. What about other lawyers you worked with at the SEC who left a strong impression on you? Who we ought to be aware of, who perhaps wouldn't have had as much a public profile?

Thomas Newkirk: Well, my deputy in the trial unit was Barry Goldsman, I brought in and made him my deputy when a slot opened up. He's had a fabulous career since then. He went on to NASDAQ as a chief enforcement person, or at NASD at the time, NASDAQ, NASD. He sticks in my mind. Chris Mixture who I think was Barry's successor as a chief trial unit. Again, when I was associate director, I always

wanted his input on difficult cases about the cases. I'm going to leave out a lot of people who should be in this category.

Thomas Newkirk: My assistant directors all were just superb. Jim Kaufman, Jerry Eisenberg, Eric Schwartz, Rick Sauer. I was blessed with hard charging associate directors. But who, at the same time, would be able to keep their staff from getting carried away.

Thomas Newkirk: When I was an associate director, we hired, brought in a new staffer. I told him, "I'll never criticize you for being too aggressive." That's your supervisor's job to do that. They all were appropriately aggressive and recognized good cases when they saw them. Of equal or greater importance since you don't want to bring cases unfairly, were careful not to bring cases that you shouldn't bring.

Harwell Wells: So, in 2004, you left and came straight to Jenner and Block as a partner. Am I right about that?

Thomas Newkirk: Right.

Harwell Wells: What led you to leave the SEC?

Thomas Newkirk: I had been there a long time. My plan was to go there for three to five years to get re-tooled and then move on and do something else. I loved it so much, I didn't want to leave. But after 19 years I thought, "This is getting too comfortable." I like challenges. The cases were challenging but it was time to move on.

Thomas Newkirk: Jerry Solovi, who at the time was the chairman of the firm said, "Why don't you come here?" I said, "I'm happy here, I'm not interested." He said, "Well you got to think about leaving." So, I decided, "Okay, I'll look around and see what there is." I did some interviewing, got some offers. Jerry was the most persuasive. One of the things, in addition to being a fantastically persuasive person, he also kept reminding me that it would be my place to run. In addition to that, we don't have a mandatory retirement age, and I expect you to stay here. I think you're ... I can't force you to stay, but I hope you're going to stay three to five years. But he said, "Many places you're talking to, and some of the offers you have, either they have mandatory retirement ages, or they have deals where after you reach a certain age you have to, as he described it, go beg somebody to let you stay."

Thomas Newkirk: I didn't like that idea so much. I had a lot of energy then, I still think I have a lot of energy, I like what I'm doing. That's why I ended up here. The three to five years have turned out to be 14 coming onto 15, and it's been a good gig.

Harwell Wells: So, looking back at your 19 years at the SEC, what changed the most during your time between '85 and '04?

Thomas Newkirk: Well, it was a tiny place when I started, as I mentioned about eight or nine people and a trial unit. I think the whole enforcement division, 160 or 170 people. It was very tight; we all knew each other. There was a great esprit and a sense of being the best of the best in the government. I think that it's grown huge since ... the enforcement division must be five or six times the size it was then.

Thomas Newkirk: So, inevitably there's a cost that goes with that. People who are there will complain about ... it's a bureaucratization. Some of it may be an excuse to why they have to do what they're doing. Some of it I think is they do feel that it's harder for the staff to get anything done because of the bureaucracy. That's one of the things. I think that's the downside in the growth of the place.

Thomas Newkirk: There's been some upside too. I think that the creation of the special units has been a good idea for the market, and for investors. I'm not so sure it's so great for the staff that's working in there because they get exposed to only a single area of the law, particularly if you want to leave. Being able to have an understanding of not just how an insider trading case is put together, but how an accounting case is put together, or a disclosure case is put together, or a pump and dump case is put together. We don't have them in private practice, at least in big law firms.

Thomas Newkirk: But to get broader exposure, I think that's lost to some extent for people in the specialized divisions. I think in terms of getting the job done, I think it's been a plus. I think one of the things that was done back in I guess, I think it was when Joan McKown and another person who deserves mention, put together the enforcement manual. So that everybody still doesn't follow the same hymn book, but they're closer to it.

Thomas Newkirk: To some extent it devalued the value of people who had been there. Didn't completely devalue it, but it did let people who didn't work there know how the system works, what the process is. I think that was a great innovation. I think that the development ... I don't know what's in their black boxes, but they do have black boxes now. They seem to be developing ... again, you can't tell on the outside how many good cases they're really developing out of their black box. But I think that it's using the-

Harwell Wells: The high tech surveillance.

Thomas Newkirk: The high tech surveillance. I think that's a good innovation. Probably would have happened ... I think it had to happen inevitably, but I think instead of doing it reluctantly, I think they've done it proactively. It's been a welcomed tool. I think that they're trying to be more proactive rather than reactive. Looking at what the academics are writing has helped, although I'm told a lot of the work they do on this stuff shows up in journals of economics. Turn out that the majority of them don't pan out. But there are anomalies in the market that they should be looking at.

Harwell Wells: So, you mentioned a little while ago, Dick Walker when he joined, and we'll perhaps get his view on this as well, changed his mind after having been on the defense side and then coming to the SEC. I won't ask if you've changed your mind, but now that you've been on the other side for 15 years, has that given you a different perspective about the work of the staff, and about your time at the SEC?

Thomas Newkirk: The change was started when I was at the commission. The deputizing companies to investigate themselves. That's a burden and a blessing in private practice. I think that the ... people would tell me how much it cost when I was at the SEC, not my problem. Now it is my problem, and I think that it was probably true when I was there, and it's true now. At least often the default position with respect ... I mean the big cost is document production. Witness preparation is a much smaller part of what we do.

Thomas Newkirk: The default reaction, it's why we want everything we do in our attachment to the subpoena. And the concern about if they're going to miss something if they ... it's harder than I expected to negotiate document production with the staff. Some people have the confidence or are more open to the idea of finding ways to get them what they want without burning down the barn to find the pin that may or may not be under the haystack. It varies. That's one of the hardest things I've found to deal with. Is just managing the cost of investigation.

Thomas Newkirk: In terms of ... they've gone away on a bunch of cases that I've done. I understand why they open them. They open them for good reason. It just turns out it wasn't what they thought it was. I've settled a lot of cases ... you know, they're settlements.

Harwell Wells: Alright. Thank you so much. Before we finish up, are there questions I should have asked you that I didn't? Are there issues that we should cover that you'd like to talk about?

Thomas Newkirk: I think we did it. I think our prior discussions, I think we've managed to hit everything. You asked me everything I wanted to talk about. I hope I talked about everything you wanted to talk about.

Harwell Wells: I'm going to say thank you so much for your time, and we deeply appreciate it.

Thomas Newkirk: This has been great fun, thank you so much, Harwell.