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LOUIS E. LEVINTHAL
COUNSEL

October 20, 1972

Bernard G. Segal, Esquire
Schnader, Harrison, Segal & Lewis
1719 Packard Building
Philadelphia, Pennsylvania 19102

Dear Bernie:

Enclosed herewith is the letter which I sent off to the New York Times in re Mr. Justice Powell.

I imagine it probably will not be printed as it refers to an article dated September 29, 1972. I had hoped to get to it before this, but I was tied up in court trying a case in which your partner, Bernie Smolens, was ably and imaginatively representing the plaintiff.

Sincerely,

Bill

William T. Coleman, Jr.

WTC, JR:epe

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*Charles
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LOUIS E. LEVINTHAL
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October 19, 1972

The Editor
The New York Times
New York, New York

Dear Sir:

The Times for September 29, 1972, contained a news story by Fred P. Graham which commented upon a memorandum written by Justice Lewis F. Powell, Jr. of the Supreme Court of the United States at the time he was a practicing lawyer. According to the story, the memorandum urged the United States Chamber of Commerce "to mount a campaign to counter criticism of the free enterprise system in the schools and the news media -- particularly television." To me, this news story carried the indirect implication that the contents of this confidential memorandum reflected a disposition of Mr. Justice Powell which would influence his decision in cases involving business now before the Supreme Court.

I feel that the reference to this memorandum and the implications of the reference in the news article are misleading. They do not serve to advance rational discussion or an understanding of the performance of the Supreme Court.

Before his appointment to the Court Justice Powell, as a practicing lawyer, was under a professional duty to assist clients which he represented. This duty might well include giving the client, upon request, the best advice possible upon a given subject, regardless of the lawyer's personal views. The history of the Supreme Court shows clearly that lawyers appointed to the Supreme Court, most of whom were active as politicians, high elective or appointive government officials, law professors or practicing lawyers before their appointment, have often espoused positions in their new role as Judges which have been contrary to the views they expressed in their previous roles. Former

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Chief Justice Hughes, as a practicing lawyer, actively represented some of the most important business interests in the country. His decisions as Chief Justice, however, were often directly contrary to at least the short run views of the business community at that time. The late Justice Jackson, while Solicitor General, issued an opinion which could have formed a basis for President Truman's subsequent seizure of the steel mills. However, Justice Jackson voted with a majority of the Supreme Court in determining that the seizure was unconstitutional. Again, a lack of understanding the nature of judicial decision is reflected in the comments of those who say that Justice Frankfurter became conservative after he became a Justice merely because some of his votes were not controlled by views he had expressed when a law professor or political advisor to Presidents Wilson and Roosevelt.

I did not agree with every position taken by Justice Powell when he was a practicing lawyer. I am certain I will not agree with every one of his positions as a Justice of the Supreme Court. However, I am fully confident that as a Justice he is and will be guided in his decisions by the facts of the case before him, the legal precedents which in his view govern those facts, and the mix of law, public policy and statesmanship which must be applied in deciding questions of public law and constitutional law. Mr. Justice Powell has been on the Court for less than a full term, but instances come to mind, even for that short time, in which his votes on the decision of a case were not such as would have been expected from a casual review of his opinions expressed as a practicing lawyer.

The most dramatic example relates to wiretapping. On November 3, 1971, the Times printed an article by attorney Powell supporting in a general way the use of wiretapping and minimizing its effect on civil liberties. On June 19, 1972, Justice Powell authored the unanimous decision of the Court in United States v. United States District Court, which prohibited the use of warrantless wiretapping in so-called "domestic security" cases. Justice Powell's opinion recognized the chilling effect of an unsupervised government use of wiretapping upon free speech and other First Amendment rights.

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Let us consider another vital area of law. Attorney Powell was counsel for various school boards in Virginia. His name appeared on a friend of the court brief filed by the Commonwealth of Virginia in the case of Swann v. Charlotte-Mecklenberg Board of Education. That brief unsuccessfully urged the Supreme Court to limit the power of Federal courts to interfere with neighborhood schools and to require the busing of pupils. However, on September 1 of this year, Justice Powell, sitting as Circuit Justice, denied a stay of a desegregation order entered against Richmond County, Georgia. The request for a stay was based on section 803 of the Education Amendments of 1972, providing for stays pending appeal of orders requiring busing to achieve racial balance. In denying the request, Justice Powell relied chiefly on that part of the decision in the Swann case which held that similar language in the 1964 Civil Rights Act was not intended to apply to orders involving "de jure" segregation. Thus, in effect, he refused to interfere with immediate implementation of a busing order.

The Times has long performed an important public function by reporting fully and accurately the work of the Supreme Court. The work of that Court, as we know, often ranks in importance with that of the President and Congress. For this reason it is all the more important that news reporting of the work of the Supreme Court be fair and that individual Justices be evaluated on the basis of their performance on the Court. This end cannot be served by misleading inferences drawn from public positions which they may have taken as advocates before their appointment to the Court.

Very truly yours,

William T. Coleman, Jr.

WTC, JR:epe