

Mr. Powell Writes a Memo
by James Allison
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Author's note: Edward R. Murrow was the foremost broadcast journalist of his day, and remains even now the most respected one among his kind. He was hailed for his courageous stand against the bully red baiting of Senator Joseph McCarthy; his exposure of the exploitation of migrant farm workers; and his dramatic eyewitness reporting of the Battle of Britain in World War 2, as air raid warnings wailed in the background.

He had faded from the public mind when in 2005 a Hollywood film that featured his fight with McCarthy introduced him to a new generation 40 years after his death. The film title, "Good Night and Good Luck," was his signature broadcast sign-off.

His television broadcasts, especially his celebrity interviews, made his deplorable chain smoking so apparent that his scripted role in this play would have seemed incomplete without it. His friendship with Lewis Powell, however improbable, was real.

I thank Nancy Price for her suggestion that I write a dramatic treatment of the Powell memo as a precursor of the U.S. Supreme Court decision in Citizens United v. Federal Election Commission (2010).

Characters (in order of appearance):

Master of Ceremonies

Edward R. Murrow (nee Egbert Roscoe Murrow)

Lewis F. Powell, Jr.

Offstage voices: TV director; Ralph Nader; Anonymous; William H. Rehnquist

Master of Ceremonies: Welcome to the summer of 1971, a tumultuous year in America. Republican Richard Nixon is president. His odd recipe for government is a little liberal, a little conservative, a pinch of corruption.

Surveys show that Americans think business is out for itself, the public be damned. Economic stagnation is in the air.

We have troops bogged down in Vietnam. Half a million. Antiwar demonstrations rock our nation's capitol. Riots fire the big cities. Last year, in Ohio, we had National Guard riflemen shooting students on the Kent State campus.

Business sees Nixon as a scary puzzle. He wants to repeal Kennedy's investment tax credit. Raise the tax on capital gains. Put the brake on tax shelters. Stronger regulation of occupational safety, of air pollution. **A Republican president wants stronger regulation!**

Consumer and environmental movements sprout up overnight. Friends of the Earth. Common Cause. Public Citizen. And it wasn't so long ago that Ralph Nader sprang out of the shadows, grabbed General Motors and shook it like a rag doll on the issue of auto safety.

And Congress! Can we believe what Congress just gave us? The Environmental Protection Agency. The Occupational Safety and Health Administration. Clean air legislation. A ban on cigarette ads on radio and TV. Cancellation of funding for the Supersonic Transport.

Well, corporate America is worried. So is a gentleman in Richmond, Virginia. This corporate lawyer, sensing a mortal threat to our whole free enterprise system, dictates a 34-page memo. Double spaced. "Confidential." It is a detailed plan to counterattack this assault on American capitalism. He hands it to a friend and neighbor, who happens to be an official of the U.S. Chamber of Commerce.

Headquartered in Washington, D.C., the Chamber snaps to attention. It prints the

memo in the official newsletter for all its members to see. Months later it forms a task force of leaders--business, professional, academic--to review the memo and recommend a course of action. These 46 leaders make a Who's Who of corporate America.¹

In November, 1973, the task force reports. It agrees with the memo. It calls for action, but some tycoons have already acted. Joseph Coors, the Colorado beer baron. Coors has given its first quarter million dollars to what becomes the Heritage Foundation, granddaddy of right-wing think tanks.

Corporate warriors beg the memo's author: Won't you take charge? Won't you organize and lead our counterattack? But he politely refuses every request. He's very sorry. It just wouldn't look right. And he explains: Two months after I wrote that memo, President Nixon nominated me for the U.S. Supreme Court. And here I sit, in my new black robe, adjudicating cases that touch on corporate America. It wouldn't look right.

Today's reader finds the memo strangely familiar. It's like a blueprint of the last 40 years of American history; of corporatism triumphant.

Who was this gentleman of Virginia? Did he quietly watch from the rear as corporate America followed his order of battle? What else might he do to realize his dream of corporate rule in America? And what **did** he do?

[Fade out.]

[Fade in.]

[At center stage we see two chairs angled toward each other and the audience. The chairs are separated by a small table that bears a large, empty ash tray. The stage represents the CBS television studio from which Edward R. Murrow broadcasts his celebrity interview show, "Person to Person."

Murrow strolls in from stage left, an unlit Camel cigarette in one hand, a script of this play in the other. He smiles, waves at the audience, and sits down in the chair at stage left. With the cigarette in his mouth he begins to leaf through the script.]

Offstage TV director: 10 seconds, Mr. Murrow!

[Murrow lays his his cigarette on the edge of the ash tray. From now on the cigarette action is up to the actor. Murrow fixes his gaze on his wrist watch, nods in cadence with the second hand, then looks toward the audience.]

Murrow: Good evening. This is Edward R. Murrow, broadcasting from the CBS television studio, with tonight's edition of "Person to Person," our celebrity interview show. My guest tonight is Lewis F. Powell, Jr., former Associate Justice of the highest court in the land, the U.S. Supreme Court.

[**Powell** strides in from stage right, a thin smile on his face. They shake hands like old friends, which in fact they are. **Powell** takes his seat.]

Murrow: Welcome, Lew. I hope I can call you that.

Powell: Yes, sir. And I think I will call you Ed.

Murrow: Let me explain to our audience. Lew and I met many years ago at a national conference of college students, when we were student body presidents. Lew represented Virginia's Washington and Lee, and I represented Washington State. So we've known each other a long time.

Powell: And pretty well, too. As students we took the grand tour of Europe together.

Murrow: With absurdly youthful photos to prove it.

Powell: And we met much later in London, during World War 2, when I was a lowly Air Corps officer, and Ed was a world famous broadcast journalist. [He mimics Murrow's famous delivery during the Blitz.] "**This** . . . is London."

Murrow: Pretty good imitation. But keep your day job.

Powell: After North Africa I wound up in a hush-hush intelligence group, in Britain and Europe, that decoded secret messages sent out by the German military.
You know something funny about your letters?

Murrow: What might that be?

Powell: They always called me "Dear Judge." When I was in fact, and wanted to be, nothing of the kind.

Murrow: Didn't I always know better? Anyhow, long before the war you got your law degree at Washington and Lee, then went to Harvard for another year and a Master of Laws in 1932. Why study law?

Powell: Like many Southern boys, I was fascinated with history. And the way it was written, lawyers and soldiers made history. I would fantasize about the Civil War. At Chancellorsville I would do some heroic deed to save the life of Stonewall Jackson, and win the war for the south. Or at Gettysburg, I would do something to move General Longstreet sooner into line, and give us victory there.

Murrow: But you pursued law, not the military.

Powell: Well, in Lexington Virginia Military Institute is just down the hill from Washington and Lee. No disrespect, but maybe that was a little nudge toward law.

Murrow: Tell us about your practice.

Powell: Before and after the war, I was partner in a substantial Richmond firm. Mainly corporate law. Mergers and acquisitions. Railway litigation.

Murrow: Some have called you a "rainmaker" in Richmond legal circles.

Powell: I have heard that expression.

Murrow: Of course the big dog in Virginia was tobacco. What about that?

Powell: I litigated many cases for tobacco, and served on the Philip Morris board. I took up smoking, but just for a show of solidarity; I never learned to inhale. My wife, a fine athlete and a doctor's daughter, was always after me to quit, and I did quit.

Murrow: But you thought the New York Times was unfair to big tobacco. Biased. Hypercritical.

Powell: Yes.

[Offstage voice, later revealed to be that of Ralph Nader]: Biased! Hypercritical! Lewis Powell, **science denier**. Lewis Powell, **dancing with the devil, for a dollar!**

Offstage TV director: Cut! Go to commercial break!

Powell: Who was that?

Murrow: You agreed to keep quiet until your cue. Now, will you keep your mouth shut until your cue? **Will you?**

[Offstage voice, later revealed to be that of Ralph Nader]: Okay. Sorry.

Murrow: All right.

Offstage TV director: 10 seconds, Mr. Murrow!

Murrow: Back with my guest, Lewis Powell. You had a deep belief in community service.

Powell: And we had some perilous times in the 1950s. I chaired the Richmond School Board during Virginia's campaign to resist desegregation. The state was in flagrant defiance of the Warren Court's famous ruling in Brown v. Board of Education.

Murrow: What position did you take?

Powell: It was a mistake to defy the Supreme Court. Behind the scenes I managed to change some minds. But nothing much happened until some influential businessmen decided that school segregation was bad for business. They saw North Carolina booming right next door, while nobody wanted to invest in Virginia. And that did it. That was the beginning of the end of school segregation in Virginia--with or without the blessing of Virginia's political boss, my friend Senator Harry Byrd.

Murrow: You became well known among your peers, and began to get national recognition.

Powell: Yes, sir. Elected ABA President in 1964. That was the start. American Bar Association.

Murrow: You have been called a lifelong Democrat. But your correspondence from the late 1930s reveals your disgust with Roosevelt's New Deal. And a southern Democrat attempt to undermine his policies!

Powell: Ed, you've been reading my private letters!

Murrow: **Not** private. One can read them right there, in the Powell Archives at Washington and Lee. And I have a good research staff.

Powell: Very well. But a southern Democrat can be a complicated thing.

Murrow: Lew, you shock me!

Powell: Well now, Ed, **you** surprised **me** a few times. In your toe to toe fight with Senator Joe McCarthy, for instance. You cornered McCarthy and went for the jugular. Quite the relentless killer! Good heaven above!

Murrow: Fair enough. Anyhow, in 1969 the new Republican President, Richard Nixon, offered you a place on the Supreme Court. You were flattered. You heard the national call of duty again.

Powell: Yes, but the sound was faint. Not like 1941, when I dropped everything and ran off to fight World War 2. I was 62, no judicial experience, thought the work would kill me. Life was sweet. Comfortable. My wife was overjoyed when I turned it down.

Murrow: You turned it down. But your friends kept the drum beat going. Friends with connections, writing letters to influential people.

Powell: Their doing, not mine.

Murrow: Hmm. But why would a man like Nixon offer you the job?

Powell: He hated the liberal Warren Court. Probably thought I was a conservative critic of that Court, and I was--but respectful. I thought it went too far in the protection of criminals. Miranda rights and all. He was tired of seeing his nominees shot down by the American Bar Association and the United States Senate. Probably knew I had supported Eisenhower for president, later Nixon over Kennedy, then Nixon over Humphrey. Probably knew I helped him win Virginia.

[Offstage voice, later revealed to be that of Ralph Nader]: That's **it!** What **pussyfooting!** You guys are **unbelievable!**

[Offstage TV director]: Hold it, Ralph. That's not your cue.

[Offstage voice, later revealed to be that of Ralph Nader]: Cue, my foot! We're here to explain a huge puzzle, the astounding flop of the Carter administration. A turning point of modern American history! Completely under the radar! Shake a leg, Ed!

Murrow: Let him talk.

[Offstage voice, later revealed to be that of Ralph Nader]: All right. It's 1977, '78. Nixon is gone, slunk off in Watergate disgrace. Democrats control the White House **and** both houses of Congress. High expectations! But what do we get?

Tax reform comes up, but goes down in defeat. Ditto a new consumer protection agency. Ditto reform of health care, labor relations laws. A proposal to tie minimum wage to

manufacturing wage. Election day voter registration. A **whole string** of liberal policy initiatives, all come up and go down to defeat-- **with Carter in the White House, and Democrats ruling Congress!** Why? What's going on here?

Murrow [to the offstage voice]: Very well. You've made your point. Trust me, we'll get there. Just hold your horses, Ralph.

[To Powell] Now, then. Lew, you had a neighbor in Richmond named Eugene B. Sydnor [pronounced "Sid-ner].

Powell: Yes, sir.

Murrow: Owned a department store.

Powell: Yes, sir.

Murrow: Close ties with the U.S. Chamber of Commerce.

Powell: Yes.

Murrow: In 1971 he chaired its Education Committee.

Powell: I believe so.

Murrow: That August you two had a little talk. Sydnor was impressed. "Write it up," he said. "I'll take it to the U.S. Chamber of Commerce!"

Powell: I think I see what's coming here. But you have to remember the historical context, Ed.

Murrow: Isn't that what they always . . .

Powell [interrupts]: It was a **terrible** time. Dangerous. **Sure** corporate America was alarmed. So was I. So I sat down and wrote Sydnor's memo.

Murrow: Hold on. Letters from Sydnor show that the two of you discussed these matters three months **before** that August conversation. In fact, you had already discussed them in Washington with **Chamber of Commerce executives**.

Powell: Could be. It was a long time ago.

[Offstage voice, later revealed to be that of Ralph Nader]: All of a sudden his memory doesn't serve him so well.

Murrow: Cool it, Ralph. [To Powell]: In fact, you had been railing about the same issues for years.

As the new ABA president you gave a big law and order speech; 3,000 lawyers stood and cheered.

J. Edgar Hoover complimented you for an article called "Civil Liberties Repression: Fact or Fiction?" Your message: Law abiding citizens have nothing to fear. (He even had it reprinted in an FBI journal.)

You spoke to university presidents about "Anarchy on Campus." Your message: Campus rioters should be expelled, and their faculty supporters should be dismissed. Expelled and dismissed!

A pretty hard line, Lew.

Powell: Maybe we should get back to the memo.

Murrow: Here's my copy. [Reads.] "August 23, 1971. To Mr. Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce. From Lewis F. Powell, Jr." At the top it says "Confidential Memorandum: Attack of American Free Enterprise System."

"Attack of?" Shouldn't it say "attack on"? Who's attacking whom? And why "confidential"?

Powell: Maybe a habit from my days in military intelligence.

Murrow: Hmmm. Anyhow, about a week later the Chamber sent it around to its members. It's long--over 6,000 words--not a casual essay. But let's take a few high points. After all, it has been called ". . . the seminal plan for one of the most successful political counterattacks in American history."²

Powell: Go ahead.

Murrow: You named several villains who were attacking our economic system.

Powell: Yes.

Murrow: Foremost Ralph Nader. What did you call him?

[Anonymous offstage voice]: ". . . the . . . most effective antagonist of American business . . . idol of millions of Americans."

Murrow: You quoted Fortune magazine:

[Anonymous offstage voice]: "The passion that rules in him . . . is aimed at smashing utterly the target of his hatred, which is corporate power. He . . . says . . . that a great many corporate executives belong in prison--for defrauding the consumer with shoddy merchandise, poisoning the food supply with chemical additives, and willfully manufacturing unsafe products that will maim or kill the buyer. He . . . is not talking . . . about 'fly-by-night hucksters' but the top management of blue chip business." (Fortune, May 1971, p. 145.)

Powell: Yes. But the most disquieting voices came not from the far left--always there, always a small minority--but the center. The universities, the church, the media, intellectual and literary journals, arts and sciences, politics.

Murrow: Speaking of Ralph Nader, the scourge of General Motors . . .

Powell: Yes?

Murrow: You sent your confidential memo to an old college friend.

Powell: Ross Malone. He preceded me as President of the American Bar Association.

Murrow: But what is he in the summer of '71? He's Vice President and General Counsel of **General Motors**. The U. S. Chamber will listen to **him**. You ask him to tell the Chamber to lead the defense of our free enterprise system. Your enclosed memo provides the plan.

Powell: Yes.

Murrow: You named friends, as well as enemies like Nader: Journalist Joseph Alsop. Economist Milton Friedman.

Powell: Yes, but there sat all those others who should have known better, titans of free enterprise watching their own destruction.

Murrow: How so?

Powell: Well, where did the universities get their money? Tax funds, capital funds-- generated or controlled by American business. Who ran the universities? Boards of trustees, leaders of our free enterprise system.

Murrow: I see.

Powell: And what about your CBS? Who owned and controlled the media? Corporations. Corporations that lived off the profits of free enterprise. It was suicide--unless they changed their ways, and fast. They had to fight back. They had to unite, prepare for the long run, put some serious money into the counterattack.

Murrow: You made business sound like a 98-pound weakling.

Powell: When I wrote that memo, it was. It had lost influence at all levels of government. And I said that any businessman who didn't believe me should just try to lobby Congress for the business point of view. The politicians were falling all over themselves to legislate for the benefit of the consumer.

Murrow: But you yourself had lobbied the Virginia legislature. For business! For bank mergers! Successfully!

Powell: Congress was different.

Murrow: And you told us how to change that. But what did you write about the **courts**? Mind you, this is before you became a judge.

[Offstage voice]: Powell wrote: "American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, **especially with an activist-minded Supreme Court**, the judiciary may be the most important instrument for social, economic and political change."

Murrow: Imagine that! But they look so quiet and dignified in those black robes, so distant. Nine umpires, just sitting up there, watching the action, calling the legal balls and strikes. A bunch of activists? Come on, Lew.

Powell: You'd be surprised. At the Supreme Court the ACLU filed dozens of briefs every year, along with labor unions, civil rights groups, public interest law firms. We had to counter that.

Murrow: Can you summarize your premise?

Powell: Yes, sir. Business is in trouble. Corporations. Our American free enterprise system. The attack is on, and the hour is late. That was my fundamental premise.

Murrow: Dated August 23, 1971. And soon after that, here comes Richard Nixon again, same offer as before. His Attorney General, John Mitchell, appeals to your sense of national duty. You say you need to think it over. But some sly devil tells Nixon he should phone you himself. And Nixon does exactly that. How can you refuse a president's personal call to duty? And who knows? Maybe you're thinking about that attack on our system--and that activist-minded Supreme Court.

This time you accept. And on October 22 this Republican president nominates this lifelong Democrat, of sorts, to the Supreme Court--along with William Rehnquist, a hard right-winger from Nixon's Justice Department. The nomination comes two months after your memo.

Powell: Your chronology is correct.

Murrow: You worried about your Senate confirmation.

Powell: Yes. We had a liberal Senate **and** Court, the tag end of the famous Warren Court. It even had one legendary veteran of Roosevelt's New Deal, Justice William O. Douglas. I was supposed to replace another such legend, Justice Hugo Black. Douglas wasn't too thrilled about that. In private he called me "a country-club lawyer to replace a populist."

Murrow: Ironic. Way back, when Roosevelt appointed Black, you villified both him and Roosevelt in a letter you wrote at the time.

Powell: Those letters again.

Murrow: You warned Mitchell about your chumminess with business and corporations, your all-white country club. The slow pace of school desegregation on your watch in Richmond. Your public criticism of Martin Luther King.

Powell: Yes, sir.

Murrow: Did you tell him about your memo to the Chamber of Commerce?

Powell: I don't think so.

Murrow: Why not?

Powell: [Long pause.] I couldn't say.

Murrow: Did anybody on the Senate Judiciary Committee bring it up?

Powell: No, sir.

Murrow: Now, the FBI investigates Supreme Court nominees for the information of the Senate. Did the FBI know about the memo?

Powell: I don't know.

Murrow: Did you tell the FBI about it?

Powell: I don't remember.

[Offstage voice, later revealed to be that of Ralph Nader]: He doesn't remember?
Ha!

Murrow: Well, there's no evidence that you told. I've read the FBI field report. October 26, 1971. **Not once** did the memo come up. Several black lawyers deplored your nomination, but everything else looked favorable.

So, on to the Senate. Rehnquist expects a hard time, and gets it. Quite a few senators vote against him--26, to be exact. But in he goes. Your memo never comes up, and you sail in with a vote of 89-1.

Powell: To my great relief.

Murrow: The one Senator who voted against you was Fred Harris, Oklahoma. A kind of populist Democrat. He called you an "elitist" with no compassion for "little people."

Powell: His privilege.

Murrow: Can it be that you did not want that memo to come up?

Powell: Why? I had talked about those things before, it was no secret.

Murrow: But you did mark it "confidential," one notch below "secret." And Senator Fred Harris, the populist Democrat: I wonder what he might have done with that memo.

Powell: Who can say?

Murrow: Yes, who can say? But months later, your confirmation safely past, up pops Jack Anderson--the reigning muckraker of the day. Hundreds of newspapers run his column. Well known to the TV crowd. What could he possibly have on you?

Powell: Ed, that's a rhetorical question if ever I heard one!

Murrow: Right. Jack Anderson has dug up your confidential memo, and studied it carefully. It's worth two separate columns! He's worried. Your pro-business attitude might color your judgments on the bench--make you more partial than we have a right to expect from a judge

on our highest court. There's a flurry of media attention, but it soon melts away.

Powell: And some on the right **welcomed** the publicity.

Murrow: No doubt. In fact, the Chamber of Commerce formed that task force just two months later, and published its report the following year. Anyhow, the Anderson flap comes too late to spoil the party. Already sworn in, you are the first Supreme from Virginia since before the Civil War. You serve for 15 years, until 1987. The work is hard, consuming, intrusive, more demanding than you ever imagined.

Powell: No argument there.

Murrow: Getting back to your memo. As we look around us now, things have gone your way. Right wing cadres and think tanks proliferate. All through the land they direct the forces of business, flog the party line, bring law suits, write model bills that grateful or beholden politicians push through their legislatures. Too many to name. ALEC--the American Legislative Exchange Council. The Business Round Table. All pro-corporate, anti-labor, anti-regulation.

The unions are whittled down to a sliver. You despise them, call them worse than the old corporate Robber Barons. Ralph Nader and his raiders grow old. Thanks to the new realities of campaign finance--some of which you certainly helped to make--big corporations own the White House, the Congress, the judiciary. And not a peep from the corporate media, of course, so the public sleeps through it all.

Long after you're gone Wall Street brings us to financial disaster. Government bails Wall Street out, then sets it free to bring us some fresh disaster. And no Roosevelt in our hour of need!

Our representative democracy seems to fade and slip away.

[Offstage voice, later revealed to be that of Ralph Nader]: Brother, you can say that again. You know what we have? An imperial plutocracy, with democratic window dressing. Government by and for the wealthy few, the 1%. That's what we have.

[Fade out.]

Anonymous offstage voice: A 3-pack-a-day Camel smoker, Edward R. Murrow died of lung cancer in 1965. That was seven years before Lewis Powell took his seat on the Supreme Court! This means that parts of our story are fanciful, and not strictly factual. Nevertheless, we hope you will find our tale both plausible and informative.

Now for the conclusion of our show, "Mr. Powell Writes a Memo."

[Fade in on Murrow and Powell, seated in their original places.]

Murrow: Welcome back. Edward R. Murrow here. With Lewis Powell, former Associate Justice of the U.S. Supreme Court--an old friend of mine.

Powell: Ed, I hope there's no hard feeling between us. With my being a lawyer for big tobacco. A board member for Philip Morris. Your fatal cigarette addiction and all.

Murrow: Of course not, Lew. And I hope you took no personal offense at "Harvest of Shame"--my famous show on the corporate exploitation of migrant farm workers.

I was thinking during the break: There's been talk about the true importance of your memo. Has the left exaggerated its actual effect on the way the country has gone since 1971?

Powell: Well, there's something to that. The Chamber considered my proposals, but finally decided not to take the lead. Too ambitious, too costly. But now the Chamber is right out there in front, the main lobbyist for business. And it litigates more than before--anti-regulatory litigation.

Murrow: And there was Joseph Coors, and the Heritage Foundation.

Powell: Yes, sir.

Murrow: The national Chamber may have hung back for a while, but the Fortune 500 charged ahead. And the California Chamber, and its Pacific Legal Foundation, which fights environmental legislation.

Powell: Last I heard, there were eight of those Pacific Legal centers.

Murrow: And the Federalist Society, a new force in most of our law schools. All funded by wealthy right-wingers. Drowning us in conservative propaganda.

Powell: Ed, I surely defend your right to say so.

[Offstage voice, later revealed to be that of Ralph Nader]: Unbelievable! Don't you guys know **anything**?

Murrow: All right, what is it this time?

[Offstage voice, later revealed to be that of Ralph Nader]: Listen. In the fall quarter of 2009, the U.S. Chamber broke a record to smithereens. You want to know how?

Powell: No.

Murrow: Yes.

[Offstage voice, later revealed to be that of Ralph Nader]: It spent \$79.2 million. That's \$880,000 a day. No organization had ever spent anywhere near that much on lobbying.

Powell: Lobbying? Great heaven above! What for?

[Offstage voice, later revealed to be that of Ralph Nader]: What for? You have the gall to ask what **for**? Read your own memo! To defeat health care reform! To defeat financial regulation! To defeat climate change legislation! To **keep** tax cuts for the **rich**!

Powell [pensive]: I see.

Murrow: Getting back to the question of judicial influence. Let's examine a few of your Supreme Court decisions.

Powell: That sounds promising. Good and tangible.

[Offstage voice, later revealed to be that of Ralph Nader]: Tangible! You want **tangible**? How about \$880,000 a day for lobbying! Is that tangible enough?

[Murrow and Powell do their best to ignore him.]

Murrow: Let's be clear on what we're doing here. We may never measure your memo's exact influence on the course of our country. But we might take some measure from your judicial decisions and their impact.

Powell: I understand. Which ones do you want to discuss? President Nixon's Watergate tapes?

Murrow: No.

Powell: Abortion, Roe v. Wade? Bakke, affirmative action and racial quotas? The death penalty?

Murrow: No.

Powell: No? Then what?

Murrow: In many ways, the biggest one of all. First National Bank of Boston Et. Al. v. Bellotti, Attorney General of Massachusetts (1978).

Powell [surprised]: You really think so?

Murrow: Yes. But I understand your surprise. Your major biographer knew you and your Court very well, but left it out of a 700-page book. But he wrote years before we began to see its true importance. He also left out Buckley v. Valeo (1976), your Court's "money = speech" decision. That's another one now ranked as a landmark case. No mention of either one.

Powell: Very well. Corporate influence on elections.

Murrow: Much in the news lately, with the Roberts Court decision on Citizens United. A majority opinion that leans on both of your precedents, Buckley and Bellotti.

Powell: All right. In Bellotti, Massachusetts had a law against the use of corporate funds to influence voters in a referendum. But we ruled that corporations had a First Amendment right to try to influence political processes. It was a 5-4 vote.

Murrow: Who wrote the majority opinion?

Powell: I did. I said the Constitution protected corporate speech. I said the Massachusetts law infringed on that speech, as the law served no compelling state interest.

Murrow: But Rehnquist, that consummate conservative, **dissented!**

Powell: Ah, yes. Bill Rehnquist.

Murrow: Let's hear him out. He cites two previous decisions to make an important point: **The Court's thinking has been inconsistent.** In 1898 it thinks corporations have constitutional personhood protections. But eight years later it thinks those protections apply only to natural persons, and not the artificial ones that corporations are.

Powell: The Court **has** gone back and forth on that question.

[Offstage Rehnquist voice:] "The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that **restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible.** The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court."

Powell: That's Bill Rehnquist. I'd know his style anywhere. He became Chief Justice, you know. Added those crazy chevrons to his Chief Justice sleeves, like a Master Sergeant or something.

Murrow: Justice Powell, are you listening? He's saying you're tossing aside tons of judicial and legislative precedent, and you're just flat wrong. States charter corporations to do business, not politics, and when they step over that line the states--their creators--have the right to rein them in.

Powell: Oh, I'm listening all right. In profound disagreement with him.

Murrow: Legal, or political?

Powell: I'll ignore that. I'll just say that Bill Rehnquist saw the matter as a corporate evasion of state regulation. Whereas I saw it as the Massachusetts legislature's self-serving attempt to silence corporate opposition. Opposition to a questionable referendum. The referendum was for a very unpopular graduated income tax. Incidentally, Justice Stevens, no friend of corporate privilege, saw it that way too.

Murrow: But you could also see it as an appearance of undue corporate influence--big money influence. Couldn't that sour the voters? Make them give up on democratic government? And might that tilt the balance the other way?

Powell: Great heaven above! Spoken like a lawyer! Ed, you missed your calling.

Murrow: Your clerk, Nancy Bregstein, wrote you a detailed memo on the case.

Powell: Yes. Nancy was extremely helpful.

Murrow: You made several comments in the margins. The effect is a kind of socratic

dialogue to shape an interpretation highly sympathetic to corporations.

Powell: Interesting.

Murrow: It's long, but you come out here: The First Amendment protects not speakers, but speech, and therefore confers free speech protections on corporations.

The dialogue hints at where you're headed. You say: "The Court has never held [that corporations] are included in 1st [Amendment] freedom--but this has been assumed."

Powell: Yes. I remember that.

Murrow: Nancy says: "The proper inquiry is to focus on the interests served by the 1st Amendment." You underlined that.

Powell: Yes.

Murrow: Nancy says: "Though corporations are not persons, they serve goals sought to be furthered by the amendment." There seems to be some heavy assuming going on here. You both seem to assume that corporate propaganda serves some common good, beyond the narrow corporate interests.

Powell: Nancy was invaluable. We were on the same wave length.

Murrow: You know, in all those reams of legal reasoning nobody noticed that a corporation is completely dumb when it comes to the kind of speech emitted so freely by a three-year-old child.

Powell: That's a layman's argument, Ed.

Murrow: Forgive me. But what about Brother Justice Byron White--an All-American halfback, but no layman. What about his dissent?

Powell: I did not find it persuasive.

Murrow: But Brethren Marshall and Brennan did. And Brother Rehnquist had his own reasons to dissent. Here's Justice White: "It has been long recognized . . . that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."

My god. Where did he get that clear crystal ball?

Powell: I remember that.

Murrow: Do you remember what you wrote in the margin?

Powell: No.

Murrow: A three-letter word: R-o-t, "Rot!" Exclamation point. You thought it "rot" that corporations, unless regulated, might come to dominate our democratic electoral process.

Powell: Not very collegial toward Brother White.

Murrow: And flat wrong, as we see today. Given your lifelong labors in behalf of corporations, did you consider recusing yourself from this case?

Powell: No.

Murrow: Do you have second thoughts about your swing vote in Boston v. Bellotti? That little foot in the door? Where you said it was okay that corporate money be used to sway the vote in a referendum?

Powell: [Long silence.]

Murrow: Lew?

Powell: Yes. Forgive me. I was off in a reverie, thinking about Bill Rehnquist and Byron White. Nixon called Rehnquist "The Clown" because of his flamboyant clothing. Speaking of a foot in the door, I remember his Wallabees.

Murrow: [Mystified.] Wallabees? Those casual shoes with the crepe rubber soles?

Powell: Yes. They show up in photographs--a sartorial dissent from Supreme Court sobriety. **I** should talk. I always changed into Hush Puppies in the office. Of course I was more discreet than Rehnquist. No photos of my Hush Puppies. In the summer break he would go off to some remote town where nobody could find him. He said that if we really needed to get him, we should "call the cops."

Murrow: Lew, you have hidden--I was about to say "depths." Maybe I should say "hidden shallows."

Powell: There's a gymnasium on the fourth floor of the Supreme Court building. The clerks called its basketball court "the highest court in the land." And when Byron White drove to the basket, those young clerks thought twice about stopping him.

Murrow: More than respect for the robe!

[Long pause.]

Powell: Ed, let me tell you something. As a Supreme Court Justice, you cannot hide from your law clerks. And your clerks cannot hide from you. Behind my back, my clerks joked about my pro-business bias. They called it my **corporate dignity doctrine**. My conviction that business could do no wrong. They said that business petitions to the Court might as well be addressed "Dear Lew."

Murrow: Well, that's how clerks talk.

Powell: Of course. And maybe they were **right**. But you asked if I had second thoughts about my swing vote in Boston v. Bellotti. The answer is "yes."

Murrow: Really?

Powell: Maybe you think I would have cheered our national progress since 1971, pretty much down the road laid out in my memo. But I never liked extremes. My way was compromise and moderation. Have we gone too far on the course I urged in 1971? Well, presidents, Congress and the courts have deregulated corporate America, just as it wanted. Look what we got in return. Smart Wall Streeters figured out how to securitize imaginary commodities! Irresponsible risk run amok! The biggest economic debacle since the Great Depression. And no real reform in sight.

Murrow: Lew, you surprise me.

Powell: Well, I was a moderate conservative, but practical. For instance, after I left the Court I turned against the death penalty. It's constitutional, but it just doesn't work. Lord knows we tried to make it work, turning it this way and that. But so many people think it so horrible, they file these incessant appeals that clog the whole criminal justice system. And if so few convicts are actually executed, how can the death penalty be a plausible deterrent to capital crimes anyway? That's my practical side.

Murrow: I see. Do you have any thoughts about the present Supreme Court, the Roberts Court?

Powell: I don't like the way the Roberts Five have usurped the legislative role--inviting plaintiffs to let the Court make bold new law. That's what they did in Citizens United. They've diminished the legislative branch, upset the balance of power. I wish the Roberts Five would pull in their horns and retreat to the safety of narrow rulings for a while. Maybe a long while.

Murrow: And the Citizens United ruling? That in federal elections corporations can spend all they want, electioneering right up to Election Day, and the feds can't do a thing about it.

Powell: I do not admire the majority opinion in Citizens United. I think it's weak. The liberal Justices of my day would have torn it to bits. Their clerks would have made the most appalling jokes about its authors. Indeed, Justice Stevens did tear it to bits in his dissent, a real masterpiece.

Murrow: With that final thought, thank you for sharing your . . .

[Offstage Nader voice:] Not so fast, Powell!

Powell: Who is that?

[Offstage Nader voice:] You know who I am. The one whose Raiders grow old. Ralph!

Powell: What can I do for you, Mr. Nader?

[Offstage Nader voice:] Powell, I've seen another one of your FBI files. Dated 1964, years before you joined the Supreme Court. The agent was going on about what a staunch friend you had been to the FBI and its Director, J. Edgar Hoover. How you had pushed Hoover's books in the Virginia schools. How you were hell on communism. How you wanted Hoover's ideas on how to conduct your presidency of the American Bar Association.

Powell: Is that all?

[Offstage Nader voice]: Not quite. Some agent made a handwritten note on this report. Do you know what it says? It says, about you, **"He seems to be pretty gullible and I would add naive."**

Powell: [Long pause.] What do you want, Nader?

[Offstage Nader voice]: Your confession. After you've been Mirandized, of course. Will you just think of the harm you did to this nation of ours? I don't care about your motivation. I don't care how well intentioned you might have been, how patriotic, how many medals you brought back from World War 2. It's misguided people like you who sandbagged President Carter with corporate gold lavished on his Democratic Congress. Who deified Reagan with the magic of Madison Avenue. It's people like you who drove us into our latest depression--only this time, God help us: **with no FDR in sight, no New Deal reforms!** All of your neo-lib moderates with their deregulatory zeal. All of your Milton Friedman free-marketeers, your libertarian Alan Greenspans, your Bob Rubin-Larry Summers masters of the Wall Street universe, your hedge fund cowboys. Even the American Civil Liberties Union, which endorses corporate personhood!

Murrow: The ACLU? Corporate personhood? Are you sure?

[Offstage Nader voice]: Don't kid me, Powell. Your decisive vote in Boston v. Bellotti led us straight to Citizens United, to elections flooded with even more corporate money. There was already more than enough! One dollar, one vote! Rehnquist, of all people, got it dead right. And Byron White, and Brennan, and Marshall. And you, Lewis Powell--practical moderate, reasonable compromiser--you got it dead wrong.

Powell: [Long pause.] Perhaps. Maybe even likely. But what about you? If you stay out of the 2000 presidential race, Al Gore wins Florida without dispute, and Bush loses the presidency. No Bush, no Roberts Court, and no Citizens United!

[Offstage Nader voice]: I'm not so sure about that. Given the big money control of our government--thanks so very much to **you**--President Al Gore might have given us a Roberts Court **by some other name.**

Powell: [Edges forward as if to respond. Hesitates, and relapses in silence.]

[Fade out.]

Anonymous offstage voice: August, 1971: Attorney Lewis Powell writes: "Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."

October, 1971: Lewis Powell is nominated to the U.S. Supreme Court.

January, 1972: Lewis Powell is sworn in as Associate Justice.

1976: With Powell on the bench, the Court rules that money is speech.

1978: The Court rules, 5 to 4, that the First Amendment protects corporate speech.

Powell writes the majority opinion.

2010: The Roberts Court rules, 5 to 4, that the Constitution protects the unlimited

expenditure of corporate money on political advertising in federal elections.

Attorney Lewis Powell, 1971: “. . . the judiciary may be the most important instrument for social, economic and political change.”

[Fade in. Powell sits silent, his head bowed.]

Murrow: Here’s Justice Stevens in his Citizens United dissent: “. . . corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”

Stevens was right. But activist Courts have opened our elections to corporate cash under a flimsy pretext of constitutional free speech protection. We can sit by, do nothing, and kiss our government goodbye. We can watch in silence the steady rise of our new masters--a corporate plutocracy crowned by the Courts.

Or, we can insist that corporations are **not** people with constitutional rights. They owe their existence and their special privileges to government--to we the people. They have no legitimate constitutional claim on us. And we the people, through our states, have chartered them to do business. We have not chartered them to govern us by the proxy of public officials beholden to corporations.

But time and again we have seen that we cannot trust the U.S. Supreme Court to distinguish between natural born persons and corporations--the artificial creatures of law. And what does that tell us? It tells us that the time has come once more for the people to amend the Constitution. That is what we do when judicial interpretation subverts the common good. We replace interpretation with plain talk: Interpretation aside, we hereby **abolish** slavery. Interpretation aside, former slaves **can** vote. So can women and 18-year olds, and **nobody** will pay a poll tax. Now we must make it clear: Supreme Court interpretation aside, **money is not speech, and corporations are not persons.**

Let us move to amend the Constitution.

This is Edward R. Murrow. Good night, and good luck.

¹The 46 organizations: U.S. Steel, General Electric, CBS, Phillips Petroleum, Minnesota Mining and Manufacturing, J. C. Penney, Libby-Owens-Ford, the AMA, Kemper Insurance, the N.Y.U. Graduate School of Business Administration, Ford Motor Company, Johnson Wax, Amway, Associated Industries of Massachusetts, Illinois Association of Real Estate Boards, Chicago Association of Commerce & Industry, Georgia Business & Industry Association, Tom's Foods, Ltd., American Broadcasting Companies, National Consumer Finance Association, Associated Equipment Distributors, C. F. Hood and Associates, General Motors, U.S. Independent Telephone Association, Lee, Toomey & Kent (Washington, D.C.), Missouri Chamber of Commerce, Sybron Corporation, Greater Cincinnati Chamber of Commerce, Southern Department Stores, Whitfield, Musgrave, Selvy, Kelly & Eddy (Des Moines), School of Business Administration-Temple University, CPC International, American Iron and Steel Institute, Hill & Knowlton, Compton Advertising, The Travelers, Borg-Warner, Metromedia, Inc., California Chamber of Commerce, Interlake, Inc., Illinois Tool Works, Conahay & Lyon, Inc. (New York, N.Y.), Northern Natural Gas Co., Olin Corporation, and E. W. Scripps Co.

²Nace, Ted (2003). Gangs of America. San Francisco: Berrett-Koehler (p. 138).

References

Jeffries, John C., Jr. (1994). Justice Lewis F. Powell, Jr. New York: Scribners.

Powell Archives, Washington and Lee Law School, Lexington, Virginia.

Woodward, Bob, and Armstrong, Scott (1979). The Brethren. New York: Simon & Schuster.

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