Chambers of
The Chief Justice

Supreme Court of the United States
Washington, D.C. 20543

January 4, 1980

Re: 78-1202 - Chiarella v. United States

Dear Lewis:

As you may recall from Conference, I was prepared to affirm the conviction and file a dissent along the lines of Dean Keeton's observation that "any time information is acquired by an illegal act it would seem that there should be a duty to disclose the information." Keeton, Fraud, 15 Tex. L. Rev. 1, 26 (1936). Here, Chiarella, literally in the shadow of the warning signs in the print shop, acquired private information by illegal means -- misappropriating nonpublic information entrusted in him in the utmost confidence by the acquiring company. I strongly believe this illegal conduct imposed upon him a duty to disclose or to abstain from trading on the information; his failure to abide by the disclose-or-abstain rule violated Rule 10-b-5.

Your thoughtful opinion now shifts the emphasis and basis of reversal. Since (1) the mere possession of non-public information is not sufficient to create a duty to disclose, and (2) the "Keeton theory" was not submitted to the jury, you have made a good case for reversal. Nonetheless, I am unable to join your opinion as now drafted. At page 7, the opinion suggests that liability for nondisclosure must be "predicated upon a . . . duty to disclose arising from a relationship of trust and confidence between the parties to a transaction." Similarly, at page 9, the opinion speaks of "a relationship between petitioner and the sellers that could give rise to a duty." My concern obviously is that this language can be read to undermine the notion that an absolute duty to disclose-or-abstain arises from the very act of misappropriating nonpublic information. Your language gives me pause. Possibly we can work out an accommodation.

Your focus on what was not submitted to the jury was not -- at least in my recall -- explored in any depth in Conference. I will try to put together some specific language that would clear this up for me.
I could not accept any idea that "blue collar" fraud is less culpable than a "white collar" variety. I do not read you as suggesting anything like that but it should be affirmatively negated if possible.

More later.

Regards,

Mr. Justice Powell

Copies to the Conference