I said that I believed it had been used even after the nomination since it was so commonly known. I would like to refer to the New York Times, Wednesday, November 3, 1971, where the following is reported:

> Reacting to the criticisms that during the May Day protest in the District of Columbia many individuals had been swept into the police mass arrest net and held without opportunity to make bail, Mr. Rehnquist replied that an undeclared qualified martial law had existed.

I would also like to refer to the Washington Post of Sunday, November 7, 1971, in which the following occurs in the B section (I do not have the page number):

> At the last mass arrests that were made by Washington police in the May Day, Rehnquist espoused the doctrine of qualified martial law.

I only mention those two items because Senator Cook had indicated he was going to bring forth some evidence that this was not the accepted newspaper reporting.

Thank you, sir.

Senator HART. Gentlemen, thank you very much. As has been true on other occasions, your testimony has been relevant and of great significance. Thank you.

Mr. MITCHELL. Thank you.

Mr. RAUH. Thank you.

Senator HART. Before I recognize Senator Kennedy, let me say that next we shall hear on behalf of himself and members of the congressional black caucus and a very distinguished colleague of mine of the Michigan delegation in the House, the Congressman from the First Michigan Congressional District, the Honorable John Conyers.

Senator Kennedy?

Senator KENNEDY. Mr. Chairman, yesterday I asked that a memo utilized in questioning Mr. Powell be made a part of the record. It was the memo regarding the consensus of the FBI conference that the FBI ought to enhance the paranoia endemic in the New Left so as to "get the point across there is an FBI agent behind every mailbox."

I said it was not a classified memo because it did not have the usual stamped classification in the usual place. However, I now notice that at one point the text says that it should be given the security afforded a document classified confidential. Although the memo has appeared many times in the media, I file it now with the suggestion that the committee determine from the FBI whether there are any continuing national security reasons for treating it as a classified document.

Senator HART. Before I say yes, shall I have a newspaper copy?

Senator KENNEDY. You figure that.

Senator HART. This will be placed in the record.

Congressman, we first welcome you, and then we express our appreciation that you have been willing, and that your schedule permitted you, to wait.

STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; ACCOMPANIED BY HON. WILLIAM CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI, AND HENRY L. MARSH III, ATTORNEY

Mr. CONYERS. Thank you, Mr. Chairman, Senator Hart, and the distinguished members of this committee.

Again I am very honored to come before you. I bring with me my dear friend from Missouri, Congressman William Clay; and to my right, I bring a distinguished attorney from Virginia, Henry L. Marsh III.

I will say more about him as we proceed.

I am here, Mr. Chairman, under the authority of the black congressional caucus which, as you probably know, is composed of the Honorable Shirley Chisholm, of New York; my colleague, William Clay, of Missouri; Congressman Charles Diggs, of Michigan; Congressman Robert Nix, of Pennsylvania; Congressman Augustus Hawkins, of California; Congressman Louis Stokes, of Ohio; Congressman Charles Rangel, of New York; Congressman Ronald Dellums, of California; Congressman Walter Fauntroy, of Washington, D.C.; Congressman Parren Mitchell, of Maryland; Congressman Ralph Metcalfe, of Illinois: and Congressman George Collins of Illinois.

We are delighted to be here even though the wait has been a long one. I would suggest that there is little room to quarrel with the view in connection with the nomination of William H. Rehnquist to the Supreme Court, that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the High Court. Beyond these requisites, his judicial philosophy is of the highest importance, and that is what we will emphasize and dwell upon in the time we have before you.

That is to say, his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution, are clearly affected by his basic convictions on the socioeconomic issues of the day.

It is fundamental that an individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past.

No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and social and political understanding, by his experiences, and by his personal sense of justice regarding the great questions of his age.

And so, in passing on the very heavy question before you, might I quote from Professor Black of the Yale Law School, who has been mentioned during these proceedings. He wrote a passage that summarizes a great many pages of the testimony that will be inserted into the record:

> * * * there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.

Our statement is replete with evidence of what might be called the socioeconomic viewpoint of the nominee in question.

We cited him at length to illustrate an outlook on life. We mentioned statements and illustrations from speeches, quotations, and activities that are perhaps not new to you and which have apparently been

gone over a good many times, but they do illustrate an outlook on life, a view of the world, which is too narrow, too ill suited for the times, and clearly out of step with the new responses that have emanated from the courts in an attempt to harmonize age-old challenges that still yet require constitutional interpretation.

Although it could be argued that no one of these statements taken alone presents in and of itself a serious threat to civil rights or civil liberties, it is maintained by us that they, taken as a whole, do, in fact, reveal a philosophy so rigid and conservative that it cannot help but have a chilling effect upon those who have struggled so valiantly to achieve the small gains made in the last 17 years under a system of law which has grudgingly given support and shelter to those legal doctrines that enshrine the first amendment and the 14th amendment.

We are presently witnessing increasing numbers of violent acts of State terror in America: The overreaction of law enforcement officers in Watts, Newark, and Detroit; the massacres at Kent State, Jackson State, and Orangeburg. The tragedies at Attica and San Quentin are current examples of attempts to spread a psychology of fear among oppressed ethnic groups who are demanding power and freedom. And so, nearly 200 years after the establishment of this Government, the contradictions and antagonisms have become regulated and institutionalized, but not eradicated.

The question becomes then whether the Constitution will be used to moderate the conflicting racial and economic struggle in America and keep it within the bounds of law and order, or whether it can be used as a document to lead us to a unified, harmonious, and peaceful society.

To reconcile traditional antagonisms rather than regulate them is the new challenge confronting the Supreme Court of the land.

What are we to say of an individual nominated for the Highest Court who views the Constitution with an ante bellum eye, who sees the gigantic steps forward by the Court as requiring two giant steps backward, and one whose philosophy if it had been consistently applied since the inception of the Republic would by now have left us with very little progress in the areas of civil rights and civil liberties.

A careful study of these excerpts from Mr. Rehnquist's remarks reveals a clear call for the curtailment of due process, of habeas corpus, and of freedom of speech. You will find the justification for wiretapping and other surveillance. The expressed fear of nonviolent disobedience is to be met by force. It's all there: The defense of Haynesworth, the SACB, and the handling of the May Day demonstrators.

And so, in brief conclusion, the real question is: Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together? Make no mistake about it, the Court is viewed as the last hope by millions of Americans—especially blacks and other oppressed minorities.

Short of the ultimate fulfillment of the American dream, that hope must be maintained. Holding our society together may well depend on maintaining the faith, which still survives even among the most disaffected, that in our highest courts there may still be found equal justice under law.

We can ill afford to move backward at a time when we are moving forward at a dangerously low rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions.

The Senate has not only the responsibility, if I may humbly suggest, to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm that might be done.

Again, as Professor Black observed—

. . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this Nation, the Senate is respectfully urged to advise the President negatively on this nomination.

I hope that the chairman and members of the committee will permit these Members of Congress and distinguished counsel from Virginia to make these suggestions because it seems very clear to me that unless this view is approached in evaluating this and the other nomination confronting you perhaps a rather serious mistake might be made. In other words, we are suggesting something that is really not new, but has been used and employed by the Senate in being that middle link between a nomination and a commission of Presidential nomination many, many times.

We are asking now that it be carefully reviewed, thoroughly considered, and fairly applied in the instant nomination.

Senator HART. Congressman, you have also a prepared statement which, I take it, you want to be printed in the record in full as if given.

Mr. CONYERS. Yes, Senator; I do ask that this statement be included in the record.

The CHAIRMAN (presiding). We will take it.

(The statement follows:)

TESTIMONY BEFORE SENATE JUDICIARY SUBCOMMITTEE CONSIDERING THE NOMINATION OF WILLIAM H. REHNQUIST TO THE SUPREME COURT OF JUSTICE

PRESENTED BY HON. JOHN CONYERS, JR., MEMBER OF CONGRESS ON BEHALF OF HIMSELF AND MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS

Mr. Chairman and distinguished members of the Judiciary Committee, I consider it a privilege to appear before you in consideration of this Supreme Court nomination.

There would seem to be little room to quarrel with the view that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the high court. Beyond these requisites, his judicial philosophy is of the highest importance. That is to say his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution are clearly affected by his basic convictions on the socio-economic issues of the day. An individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past. No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and

social and political understanding, by his experiences, and by his personal sense of justice regarding the great questions of his age.

In passing on the fitness of Supreme Court nominations, the Senate cannot ignore the candidate's total outlook. As Charles L. Black, Professor of Law at Yale University, recently wrote:

". . . . there is just no reason at all for a Senator's not voting, in regard to to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."

We are today fully aware that the Constitution we live under and the laws we are judged by are not a lifeless set of wooden precepts moved about according to the rules of a mechanical logic. At least, the law is never that in the hands of great judges. The Constitution of today is what the judges of the past have made it and the Constitution of tomorrow will be what the judges appointed in our time will make it.

Appointments to the Supreme Court must be judged by time-honored standards not by immediate political opportunities or considerations. Presidential administrations come and go; laws are made and repealed; but judicial pronouncements set the course for generations. If tested by these standards, no man of just ordinary insight can be acceptable Court material. Judicial philosophy is an essential consideration of a nominee's fitness for the Court because of its potential effect on our law and the direction of our society. Furthermore, it is consistent with the Senate's constitutional role to examine this philosophy. Article II states: ". . . (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court". In giving its advice on a Presidential decision, like the selection of a Court nominee, the Senate must consider those things which went into making that decision. If it did not, it would not be able to advise properly, and would consequently be shirking its duty as spelled out by Article II.

It would be paradoxical to contend that the considerations which play a large part in the President's choice of a nominee are improper for the Senator in making the same decision.

In the *Federalist Papers*, Alexander Hamilton makes the following commentary on the advice-giving function of the Senate:

To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

Hamilton's passage supports the notion that Senators should or ought to consider anything which they believe to bear on the wisdom of the nomination. Foremost among these considerations would be the judicial philosophy of the candidate.

There is ample precedent for the consideration of a nominee's judicial philosophy as a condition of his fitness for the Bench. An examination of Supreme Court nominations since 1900 reveals that great attention has been paid to the philosophy, record, and attitudes of nominees. In every case of opposition since 1900, the socio-judicial philosophy of the nominee was the focal point for opposition.

President Nixon made it very clear in his nominating statement that he chose William H. Rehnquist for his conservative judicial philosophy. In other words, he chose Mr. Rehnquist because he felt the nominee's world view would be good for the country as reflected in his judicial performance. Since the Senate must advise the President on his choice, it would seem that the Senate would have to decide whether the nominee's judicial philosophy would be good for the country. The specific question raised here is whether the nominee is properly equipped to deal with the social and economic issues of his day. To paraphrase Justice Frankfurter, we should explore the depth of his insight into the problems of his generation. This raises the fundamental question—where does Mr. Rehnquist's sense of justice lie in respect to these issues?

The best source for divining a man's worldview is in his record as a practicing professional. In the case of William H. Rehnquist, that record covers his years as

a practicing lawyer and as chief counsel for the Department of Justice. It is that record which is under scrutiny here.

One might agree with Mr. Nixon when he says that "the rights of society and defendants accused of crimes" must be maintained, that "the peace forces must not be denied the legal tools they need to protect the innocent from criminal elements," that "we can strengthen the hand of the peace forces without compromising our precious principle that the rights of individuals accused of crimes must always be protected." But we need not agree with his lawyer's lawyer, the nominee, that such methods as wiretapping, mass arrests, preventive detention, no-knock, abrogation of the rights of the accused, and the extension of executive privilege are desirable means of achieving these ends. The following catalogue of statements exemplifies a viewpoint which would necessarily be a part of the judging equipment the nominee would bring to the high Court.

In the *Civil Service Journal*, "Public Dissent and the Public Employee", January–March, 1971, vol. II, No. 3, p. 7, he wrote:

If Justice Holmes mistakenly failed to recognize that dismissal of a government employee because of his public statements was a form of restraint on his free speech, it is equally a mistake to fail to recognize that potential dismissal from government employment is by no means a complete negation of one's free speech.

The government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employees even though that same government as a sovereign has no similar constitutionally valid claim to limit dissent on the part of its citizens.

In a speech before the Newark Kiwanis Club, he stated: In the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force is required to enforce the law, we must not shirk from its employment.

In testimony on March 9, 1971, before the Senate Judiciary Subcommittee on Constitutional Rights, he stated:

While there is obviously no justification for surveillance of any kind that does not relate to a legitimate investigation purpose, the vice is not surveillance per se, but surveillance of activities which are none of the government's business.

. . . we believe that stringent physical and personal security measures can greatly reduce the risk of improper access and dissemination so that it poses no greater threat to personal privacy than manual data storage.

From there he continued,

I think it quite likely that self-discipline on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering. No widespread system of investigative activity . . . is apt to be perfect either in its conception or in its performance. The fact that isolated imperfections are brought to light, while always a reason for attempting to correct them, should not be permitted to obscure the fundamental necessity and importance of federal information gathering, or the generally high level of performance in this area by the organizations involved.

. . . the Department (of Justice) will vigorously oppose any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinary important function of the federal government.

In testimony on March 17, 1971, before that same subcommittee, he stated:

I do not conceive it to be any part of the function of the Department of Justice or of any other governmental agency to survey or otherwise observe people who are simply exercising their First Amendment rights.

When you go further as, say: 'Isn't a serious constitutional question involved?' I am inclined to think not. . . . This practice is undesirable and vigorously should be condemned, but I do not believe it violates the particular constitutional rights of the individuals who are surveyed.

In response to a question by Senator Ervin asking if surveillance tended to stifle the exercise of First Amendment rights, Rehnquist replied:

No. When the Army did this—and it apparently was generally known that they were doing it—about 250,000 people came to Washington on two occasions to protest the President's war policies.

In a speech entitled "Privacy, Surveillance, and the Law" delivered March 19, 1971, he commented:

The argument in support of the contention that information gathering *per se* may violate First Amendment rights is that such information gathering may have a 'chilling effect' on the exercise of First Amendment freedom.

I have previously stated my belief that the First Amendment does not prohibit even foolish or unauthorized information gathering by the government.

In remarks before the Federal Bar Association presented September 8, 1970, he observed:

The free-speech guarantee of the First Amendment is probably the best known provision of our Constitution. It is entirely proper that this is so, since the right of freedom of expression is basic to the proper functioning of a free, democratic society. Less well-known but, equally important, are those restrictions on complete freedom of speech which result from the balance of competing interests in the jurisprudential scale—the need to preserve order, the need to afford a remedy to the innocent victim of libel, the need of government to govern.

There is a tendency on the part of young people entering the government service to feel that they should have complete and unrestrained freedom to speak out on political and policy matters, regardless of how detrimental their speech may be to government programs in general or to the proper functioning of their own assigned responsibilities within the departments.

In a speech titled "Law Enforcement and Privacy to the American Bar Association panel in London on July 15, 1971, he defended government wiretapping under court order in criminal cases, and without court order in national security cases, both domestic and foreign:

Is the invasion of privacy entailed by wiretapping too high a price to pay for a successful method of attacking this and similar types of crime? I think not, given the safeguards which attend its use in the United States.

In a statement for the Arizona Judicial Conference of December 4, 1970, titled "Official Detention, Bail, and the Constitution", he remarked:

. . . . minimizing the use of money bond does not eliminate the social need to detain those persons who pose a serious threat to the public safety.

I believe that society has the right to protect its citizens, for limited periods through due process procedures from persons who pose a serious threat to life and safety. We do not believe a free society can remain free if it is powerless to prevent wanton misconduct by dangerous recidivists during pretrial release. I believe the pretrial detention provision of the D.C. Crime Bill accomplishes this result in a manner entirely consistent with the spirit and letter of the U.S. Constitution.

With the plethora of rights recently granted him by the U.S. Supreme Court, the criminal defendant can and does do a good deal more than merely present evidence at trial. He attacks by motion and writ every phase of the proceedings against him, with the result that the time between indictment and trial has been necessarily lengthened.

Those opposing pretrial detention assert two constitutional arguments, one based upon the Eighth Amendment and one based on the due process clause of the Fifth Amendment. Neither provision, in my opinion, bars the enactment of pretrial detention provisions in anti-crime legislation.

In balancing the interest of the individual and those of society, I think that the pretrial detention concept represents a rational and constitutional solution to a complex problem.

In a statement before the Subcommittee on Constitutional Rights in 1971, he remarked on S. 895, the Speedy Trial Act of 1971 which would guarantee trials within sixty days, that ". . . this provision is not only draconic, but quite one-sided in its sanctions". The sanctions for the defendant are cited below:

First and foremost of these . . . would be an effort by statute to modify all or part of the exclusionary rule which now prevents the use gainst a criminal defendant of evidence which is found to have been obtained in violation of his criminal rights.

He contended that a system which would permit "a convicted defendant to spend the next ten or twenty years litigating the validity of the procedures used in his trial, is a contradiction in terms". Furthermore, he commented:

". . . the total lack of finality to any judgment of criminal conviction, so long as the prisoner may conceive some new claim of violation of his constitutional rights which occurred at this trial, is itself an affront to the notion of a system which promptly administers criminal justice. Under present practice, either a state or federal prisoner may relitigate again and again the validity of procedures used to convict him, so long as he can think of some new constitutional argument which has not been directly disposed of adversely to him in the rulings on his past petitions.

The Department believes that the modification of the federal habeas corpus statute, in order to more effectively screen out genuinely serious constitutional

violations from the mass of frivolous and technical petitions now filed, is an essential element in the search for the prompt administration of criminal justice.

In those same hearings, he remarked on habeas petitions:

". . . it has been availed of time after time to relitigate issues which not only have nothing to do with the guilt or innocence of the defendant, but nothing to do with the underlying fairness of the fact finding process by which he was found guilty.

In a speech delivered May 5, 1970, at Appalachian State University in Boone, North Carolina, he defended the Mayday arrests:

". . . the doctrine which there obtains is customarily referred to as 'qualified' martial law. In that situation the authority of the nation, state, or city, as the case may be, to protect itself and its citizens against actual violence or a real threat of violence is held to outweigh the normal right of any individual detained by governmental authority to insist on specific charges of criminal conduct being promptly made against him, with the concomitant right to bail or release pending judicial determination of those charges. The courts limited the duration of the power to the duration of the emergency, however, and have also insisted that the claim of violence be not a mere sham.

Police officials, he defended, "have the authority to detain individuals during the period of an emergency without being required to bring them before a committing magistrate and filing charges against them".

In a speech at the University of Arizona on April 22, 1970, he commented on *Miranda v. Arizona*:

I submit it is not at all unreasonable to suggest that the government, if it felt the occasion warranted such action and especially if it were acting under a mandate from Congress, would be entirely within the role allocated to it under the adversary system if it were to ask the Supreme Court of the United States to overrule the decision in Miranda v. Arizona. . . .

I say this not to indicate that such a request should be made or will be made, but simply to point out that under our system the United States, no more than any other litigant is required to accept any particular decision of the Supreme Court in the field of constitutional law as *stare decisis*.

In a Justice Department memorandum of September 5, 1969, on Clement Haynsworth, he wrote:

The legal and ethical question raised by these facts is whether a judge, who owns stock in one corporation should disqualify himself when the second corporation is a party litigant in his court. . . .

. . . It is clear from the facts presented that the Deering-Milliken officials who dealt with vending machine suppliers had no idea that Judge Haynsworth had any connection with any of these companies. As a matter of common sense, as well as of law, it is not possible to identify any conceivable effect that a decision one way or another in the Darlington case would have had on the fortunes of Vend-A-Matic.

There is no doubt in my mind that these (court) precedents support the conclusion, equally readily reached on common sense ethical considerations, that Judge Haynsworth ought not to have disqualified himself in the Darlington case. While the spirit as well as the letter of the statute and canons must be faithfully applied, questions of disqualification are to be decided in exactly the same manner as a judge decides substantive legal questions which regularly come before him.

In the *New York Law Review* in an article titled "The Constitutional Issues—Administration Position," vol. 45, 1970, p. 628, he wrote:

First, may the United States lawfully engage in armed hostilities with a foreign power in the absence of a Congressional declaration of war? I believe that the only supportable answer to this question is "yes" in the light of our history and of our Constitution.

Second, is the constitutional designation of the President as Commander-in-Chief of the Armed Forces a grant of substantive authority, which gives him something more than just a seat of honor in a reviewing stand? Again, I believe that this question must be answered in the affirmative.

Third, what are the limits of the President's power as Commander-in-chief, when that power is unsupported by congressional authorization or ratification of his acts? . . . But I submit to you that one need not approach anything like the outer limits of the President's power, as defined by judicial decision and historical practice, in order to conclude that it supports the action that President Nixon took in Cambodia.

In the Arizona Law Review article, "The Old Order Changeth: The Department of Justice under John Mitchell," vol. 12, 1970, p. 251, he stated.:

Attorney General Mitchell, on the other hand, has felt that the Department of is but one of the several instrumentalities engaged in the process of administering criminal justice, and that under our adversary system the role of the Department is basically that of advocate for the prosecution.

In testimony of October 5, 1971, before the Senate Judiciary Subcommittee on the Separation of Powers on increasing the authority of the ASCB, he asserted: . . . It is my opinion that the order was a valid exercise of powers that Congress has specifically conferred upon the President. The order cannot therefore be considered in any sense as a usurpation of the powers of Congress. . . .

Congress has given the President by statute responsiblity for making regulations for the employment of individuals by the Civil Service, and of ascertaining the character and ability of federal job applicants. . . .

Congress has also by statute given the President power to delegate functions vested in him by law to any department or agency in the executive branch. . . .

What President Nixon has functionally accomplished by the Executive Order is simply to transfer from the Attorney General, where it previously resided, to the Subversive Activities Control Board the function of listing organizations for the information of federal employing agencies. As noted, this is part of a function which, in the absence of delegation by him, Congress has by law confided to the President.

Testifying on April 1, 1971, before the House Judiciary Subcommittee No. 4, Mr. Rehnquist remarked:

The desirability of obtaining some such declaration of policy in the Constitution outweighs the disadvantages of this particular proposal . . . (but) would not be a substitute for legislation. . . .

It may well be that the Supreme Court will likewise broaden its past interpretations in this area. Certainly even a modest expansion of the 14th Amendment decisions dealing with sex would obviate the more egregious forms of differences of treatment which result from governmental actions. With this prospect of expanded constitutional protection of women's rights without the necessity of an added constitutional provision, the committee might conclude that it should await resolution of the cases before it by the Supreme Court of the United States, in order to see whether there is a substantial area of different treatment of men and women which is not prohibited under the Constitution, but with respect to which there is a national consensus in favor of prohibition.

In testimony of June 15, 1964, before the Phoenix City Council on the topic of public accommodations ordinance for that city, he declared:

I am a lawyer without client tonight. I am speaking for myself. I would like to speak in opposition to the proposed ordinance because I believe the values it sacrifices are greater than the values it gives.

I venture to say there has never been this sort of an assault on the institution (of private property) where you are told, not what you can build on your property, but who can come on your property.

What has brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the lost frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government.

Concerning that same ordinance, he wrote, in a letter to the editor of the *Arizona Republic* of June, 1964:

I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theatre to choose his own customers . . . Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health and safety regulations which are also limitations on property rights.

If in fact discrimination against minorities in Phoenix eating places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all.

The founders of this nation thought of it as the "land of the free" just as surely as they thought of it as the "land of the equal."

Unable to correct the source of the indignity of the Negro, it redresses the situation by placing a separate indignity on the proprietor.

On the subject of Phoenix's proposed school integration plan, the nominee wrote, in a letter to the editor of the *Arizona Republic* of September 9, 1967:

We are no more dedicated to an "integrated" society than we are to a "segregated" society. We are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served as well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small minority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

On the subject of G. Harrold Carswell's nomination, he wrote in a letter dated February 14, 1970, to *The Washington Post:*

My criticism of your editorial, however, goes beyond these misimpressions. The Post is apparently dedicated to the notion that a Supreme Court nominee's subscription to a rather detailed catechism of civil rights decisions is the equivalent of subscription to the Nicene Creed for the early Christians—adherence to every word is a prerequisite to confirmation in the one case, just as it was to salvation in the other. Your editorial clearly implies that to the extent the judge falls short of your civil rights standards, he does so because of an anti-Negro, anti-civil rights animus, rather than because of a judicial philosophy which consistently applied would reach a conservative result both in civil rights cases and in other areas of the law. I do not believe that this implication is borne out.

Thus, the extent to which his judicial decisions in civil rights cases fail to measure up to the standards of the Post are traceable to an over-all constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants.

Regarding the Warren Court, he remarked in an article printed in *U.S. News and World Report* of December 13, 1957 (vol. 13):

Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the court under Chief Justice Earl Warren.

On that same topic, he wrote in an article printed in the *American Bar Association Journal,* "The Bar Admission Cases: A Strange Judicial Aberration", vol. 229, 1958:

A decision of any court based on a combination of charity and idealogical sympathy at the expense of generally applicable rules of law is regrettable no matter whence it comes. But what could be tolerated as a warm-hearted aberration in the local trial judge becomes nothing less than a constitutional transgression when enunciated by the highest court of the land.

On the subject of progressives, he was quoted in a *New York Times* article of May 2, 1969 on page 1 as saying:

I suggest to you that this attack of the new barbarians constitutes a threat to the notion of a government of law which is every bit as serious as the 'crime wave' in our cities . . . the barbarians of the New Left have taken full advantage of their minority right to urge and advocate their views as to what substantive changes should be made in the laws and policies of this country.' "

Mr. Rehnquist is cited at length to illustrate an outlook on life, a view of the world which is too narrow, too ill-suited to the times and clearly out of step with the new responses that have emanated from the Courts in an attempt to harmonize age old challenges that require constitutional interpretation. Although it could be argued that no one of these statements taken alone presents a serious threat to civil rights and liberties, it is maintained that they, taken as a whole, reveal a philosophy so rigid and conservative that it cannot help but have a chilling effect upon those who have struggled so valiantly to achieve the small gains made in the last seventeen years under a system of law which has grudgingly given support and shelter to those legal doctrines that enshrine the First Amendment.

We are presently witnessing increasing numbers of violent acts of state terror in America. The over-reaction of law enforcement officers in Watts, Newark and Detroit. The massacres at Kent State, Jackson State and Orangeburg. The tragedies at Attica and San Quentin are current examples of attempts to spread a psychology of fear among oppressed ethnic groups who are demanding power and freedom. And so, nearly 200 years after the establishment of this government, the

contradictions and antagonisms have become regulated and institutionalized, but not eradicated.

The question becomes then whether the Constitution will be used to moderate the conflicting racial and economic struggle in America and keep it within the bounds of law and order, or whether it can be used as a document to lead us to a unified, harmonious and peaceful society. To reconcile traditional antagonisms rather than regulate them is the new challenge confronting the Supreme Court of the land. What are we to say of an individual nominated for the highest Court who views the Constitution with an ante-bellum eye, who sees the gigantic steps forward by the Court as requiring two giant steps backward and one whose philosophy if it had been consistently applied since the inception of the Republic would by now have left us with very little progress in the areas of civil rights and civil liberties. A careful study of these excerpts from Mr. Rehnquist's remarks reveals a clear call for the curtailment of due process, of habeas corpus and of freedom of speech. You will find the justification for wiretapping and other surveillance. The expressed fear of nonviolent disobedience is to be met by force. It's all there—the defense of Haynesworth, the SACB and the handling of the Mayday demonstrators. The real question is: Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together? Make no mistake about it, the Court is viewed as the last hope by millions of Americans—especially Blacks and other oppressed minorities. Short of the ultimate fulfillment of the American dream, that hope must be maintained. Holding our society together may well depend on maintaining the faith, which still survives even among the most disaffected, that in our highest courts there may still be found equal justice under law. We can ill-afford to move backward at a time when we are moving forward at a dangerously slow rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions. In considering the nomination of Mr. Rehnquist, we might consider the words of Robert Frost:

> The woods are lovely, dark and deep,
> But I have promises to keep,
> And miles to go before I sleep,
> And miles to go before I sleep.

And, we have promises to keep in maintaining a Court which is responsive to a changing America and we dare not sleep—not now.

The Senate has not only the responsibility to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm he may do the country. Again, as Charles L. Black has observed:

> . . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this nation, the Senate is respectfully urged to advise the President negatively on this nomination.

Senator HART. I take it that in addition to your prepared statement you are saying "Amen" to what Mr. Clarence Mitchell and Mr. Joseph Rauh advised the committee during the period you and Congressman Clay were present, is that right?

Mr. CONYERS. That is correct.

We did additionally have an opportunity to review the statement, and we would adopt it as our own.

We would like to point out that it is not necessary to find a member of the Klan or Birch membership lurking in the closets of a nominee to reach the point that disturbs us so much. That is to say, obviously conduct of that magnitude would reduce the inquiry of this committee

to a rather nominal function but the problem that confronts us here, and confronts us in a number of the nominations that the Senate must decide upon, are rarely that easy.

Usually it will require a careful review of all the statements of a nominee, all of his acts, the totality of his conduct put into perspective of the time and the period and the situation under which it occurred.

We do not have any trouble whatsoever, Mr. Chairman, and members, in saying that in applying a reasonable and fair test in the world view, into the outlook of this nominee, that the positions that he would espouse from the Court, based on what he has said and done in his capacities in public life up until now, could clearly indicate to us a danger as certain as if we found some obviously compelling evidence that would disqualify him by its revelation.

Senator HART. Thank you, gentlemen. You watch us every day and we pretend we think we can get into the shoes of a black American or see life as a black American sees it and we know we are kidding ourselves. This does not excuse us from making the effort, but having testimony from you, speaking for the black caucus, is an enormous help. Thank you.

Mr. CONYERS. Mr. Chairman, may I point out that there is yet another statement coming from precisely the same people. If there are no questions that would be put to us on the nomination of Mr. Rehnquist, then concerning the statement on the other nominee, I would raise the question with the Chair with respect to the hour and whether it would be best presented at this point or at another time or under whatever procedure these hearings are being conducted.

Senator BAYH. While the Chair is deciding that, may I ask one question of our witness?

First of all, we appreciate the fact that although the Constitution does not technically give the "other body" a voice in the nominating process, this is not the first time that those of you in the House who are deeply concerned about this area of human rights felt compelled to make what I feel have been significant contributions to the deliberative process in the Senate as we look over the nominations and I am glad you have done so.

Do you, any of you, have any specific information pro or con relative to some of these specific issues that you have heard us discuss with Mr. Mitchell and Mr. Rauh as to Mr. Rehnquist's position on the equal accommodations matter, the school desegregation matter, or the voting practices, the allegations that certain types of intimidation were utilized against the minority, or can you give us any specific instances, or any specific evidence that would further elaborate on what has been said in this area?

Mr. CONYERS. Senator, we do not have any factual or firsthand information that would shed any light on the questions that you raise. I am hopeful that you will, in addition to that, perceive that the questions that we raise do not really require that.

We are perfectly satisfied and willing to accept the nominee on the basis of his public statements that he chooses not to separate himself from his official capacities. Just as you and I have our public records which we would find very difficult to separate from us, I presume the same applies to him.

I am perfectly willing to assume that it was upon that basis that not only the President saw fit to nominate him but that he would ask us to see fit to evaluate him.

Senator BAYH. Of course, I am sure you recognize that there might well be a distinction between the information or evidence necessary to convince us personally, and that, once having been convinced personally that a certain cause is just or a certain nominee is qualified or unqualified, needed to explore the whole record to find whatever evidence might be available so that others might share our belief. It is in that direction I asked the question but I appreciate your comment.

Mr. CLAY. Senator, I think that when you read our whole position paper you will find that the underlying basis for our opposition to Mr. Rehnquist is based primarily on his judicial philosophy, and what we are saying in effect is that when judicial philosophy becomes a primary basis for nominating a person to the Supreme Court that it also must become the primary consideration for this Senate in confirming that person for the Supreme Court, and it is our contention that any person who has a documented history of anticivil rights positions, and anticivil liberties positions and philosophies is unequivocally unqualified to sit on the Supreme Court of the United States.

It was in that light that we prepared this position paper, and are presenting it to you.

The CHAIRMAN. Now, as I understand it, you want to testify against the other nominee.

Mr. CONYERS. Mr. Chairman, we would be willing to defer this. We are prepared——

The CHAIRMAN. I would rather go on; let's clear this whole thing one way or another.

If you are prepared to testify, proceed.

Mr. CONYERS. Very well, thank you.

Mr. Chairman, would you excuse my colleague, Mr. Clay, who is attending on behalf of myself a meeting of the black caucus. His presence is urgently required.

Mr. Chairman and members, I will read only briefly from the prepared testimony. I ask to have the entire statement included in the record.

The CHAIRMAN. It will be admitted.

Mr. CONYERS. In considering the nomination of Mr. Louis F. Powell or in fact any other nominee to the Court, I do not think anyone would deny the Presidential prerogative of examining a potential candidate's philosophy before placing his name before the Senate for confirmation nor is there any requirement of the type of philosophy a nominee should espouse. But it also follows that there is nothing to preclude the Senate from laying bare that nominee's predilections, but even more than that, it has a responsibility to do so.

May I point out that many of the Founding Fathers feared that nominal "advice and consent" of the Senate on nominations to judgeships would create a dependency of the judiciary on the Executive.

It was their intent to make the judiciary independent by insisting on joint action of the legislative and executive branches of each nomination.

Consequently, again it has been pointed out with relation to the Senate's constitutional duty in advising on presidential nominations that "a Senator voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so."

I trust that the distinguished members of this body will not regard it as presumptuous if I reiterate the basis upon which the approach ought clearly to be made in terms of the evaluations and the weighing of credentials and the examinations of a nominee.

It is obviously a heavy responsibility, it is burdensome, but I think that not to be looking carefully at the world view of the outlook that has developed through the nominee's own set of experiences is to omit and eliminate a very wide and important part of your responsibility in making the decision as to whether to advise the President favorably or unfavorably with regard to the nomination.

Competency as a legal technician is not sufficient cause for appointment to the Supreme Court. Since judges by definition must sit in judgment, exercising what Oliver Wendell Holmes called the "sovereign prerogative of choice," they must bring more to their task than a highly specialized technocracy. What a judge brings to bear upon his decision is the weight of his experience and the breadth of his vision, as well as his legal expertise.

In the words of Felix Frankfurter, a Justice ought to display both "logical unfolding" and "sociological wisdom." Or, as Henry Steele Commager put it: "Great questions of constitutional law are great not because they embody issues of high policy, but of pub ic good, of morality." Similarly, great judicial decisions are great not because they are brilliant formulations of law alone, but because they embody high-mindedness, compassion for the public good, and insight into the moral implications of those decisions.

With that background we would urge a careful consideration of the nominee, and suggest that such consideration might lead to a negative vote and a rejection of his nomination on the part of the Senators here and in the body as a whole.

You see, for the past few days the press and the supporters of the nominee have been treating us to a view of Mr. Powell which would have us believe that he was the champion of the successful, gradual integration of the Richmond school board, and presided over the "successful, disturbance-free integration of the city's schools in 1959."

While it is true Mr. Powell sat on the school board of the city of Richmond from 1950 to 1961, serving as its chairman during the last 8 years of that period, something less than successful integration took place.

The opinion of Circuit Judge Boreman, a distinguished member of the court not noted for his liberal views, in a case entitled *Bradley* v. *School Board of the City of Richmond, Virginia*, participated in by distinguished counsel who sits here with me, clearly documents the fact that in Richmond, only a matter of months after Mr. Powell had

left the city school board, after serving as a member and chairman all those years, the court in the case found a "system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue."

What the very words of the U.S. Court of Appeals, Fourth Circuit, indicate beyond any doubt is that Mr. Powell's 8-year reign as chairman of the Richmond School Board created and maintained a patently segregated school system, characterized by grossly over crowded black public schools, white schools not filled to normal capacity, and the school board's effective prepetuation of a discriminatory feeder or assignment system whereby black children were hopelessly trapped in inadequate, segregated schools.

The entire text of the *Bradley* opinion is submitted for the record of these proceedings so that it may be carefully scrutinized by this committee and Members of the Senate in order that a more accurate view may be gained of the conditions that existed under the Powell administration.

(The opinion referred to follows:)

BRADLEY V. SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA

Minerva Bradley, I. A. Jackson, Jr., Rosa Lee Quarles, John Edward Johnson, Elihu C. Myers and Elizabeth S. Myers, Appellants,

v.

The School Board of the City of Richmond, Virginia, H. I. Willet, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. Oglesby, Alfred L. Wingo and E. T. Justis, individually and constituting the Pupil Placement Board of Commonwealth of Virginia, Appellees.

No. 8757.

United States Court of Appeals

Fourth Circuit.

Argued Jan. 9, 1963.

Decided May 10, 1963

Action by Negro pupils, their parents and guardians to require transfer of pupils from Negro public schools to white public schools and, on behalf of all persons similarly situated, for injunction restraining defendants from operating racially segregated schools. The United States District Court for the Eastern District of Virginia, at Richmond, John D. Butzner, Jr., J., ordered that individual infant plaintiffs be transferred to schools to which they had applied but refused to grant further injunctive relief and plaintiffs appealed. The Court of Appeals, Boreman, Circuit Judge, held that where a reasonable start toward maintaining nondiscriminatory school system had not been made, plaintiff pupils, on behalf of of others in class they represented, where entitled to injunction restraining school board from maintaining discriminatory "feeder" system whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to transfer to white schools, they must meet criteria to which white students of same scholastic aptitude would not be subjected.

Reversed in part and remanded.

Albert V. Bryan, Circuit Judge, dissented in part.

1. Schools and School Districts⇐155

Case of one of pupils who brought action to require transfer to pupils from Negro public schools to white public schools became moot, where he was assigned by Pupil Placement Board to integrated junior high school to which he had applied.

2. Schools and School Districts⇐155

School board and superintendent of schools were proper parties to action to require transfer of pupils from Negro public schools to white public schools where, although state Pupil Placement Board has authority over placement of pupils and local officials refrained from making recommendations to Board, approximately 98 percent of placements were made routinely as result of regulations of school board pertaining to attendance areas and Pupil Placement Board had no inclination to vary those attendance areas, although it had authority to do so. Code Va. 1950, §§ 22-232.1 to 22-232.31.

3. Schools and School Districts⇐154

That Negro applicants for enrollment in the first grade of white public schools were assigned to such schools, that two high schools had been constructed to accommodate all students in attendance areas, that any Negro student attending white school was, upon promotion to another school, routinely assigned to white school, and that some Negro students had been assigned to schools in white attendance areas did not evidence reasonable start toward maintaining nondiscriminatory school system, where pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to obtain transfer to white school, pupil must meet criteria to which white student of same scholastic aptitude would not be subjected. Code Va. 1950, §§ 22-232.1 to 22-232.31.

4. Schools and School Districts ⇐155

Where a reasonable start toward maintaining nondiscriminatory school system had not been made, plaintiff pupils, on behalf of others in class they represented, were entitled to injunction restraining school board from maintaining discriminatory "feeder" system, whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to transfer to white schools, they must meet criteria to which white students of same scholastic aptitude would not be subjected. Code Va. 1950, §§ 22-232.1 to 22-232.31.

5. Schools and School Districts ⇐154

It was primarily the duty of school board to eliminate discriminatory system with respect to placing of students in schools.

Henry L. Marsh, III, Richmond, Va. (S. W. Tucker, Richmond, Va., on brief) for appellants.

Henry T. Wickham, Sp. Counsel, City of Richmond (J. Elliott Drinard, City Atty., Richmond, Va., and Tucker, Mays, Moore & Reed, Richmond, Va., on brief) for appellees, The School Board of the City of Richmond, Virginia, and H. I. Willet, Division Supreintendent of Schools.

Before Boreman, Bryan and J. Spencer Bell, Circuit Judges.

Boreman, Circuit Judge.

[1] This is a school case involving alleged racially discriminatory practices and the maintenance of public schools on a racially segregated basis in the City of Richmond, Virginia. In September 1961 eleven Negro pupils, their parents and guardians instituted this action to require the defendants to transfer the pupils from Negro public schools to white public schools.[1] The plaintiffs also pray, on behalf of all persons similarly situated, that the defendants be enjoined from operating racially segregated schools and be required to submit to the District Court a plan of desegregation. The District Court ordered that the individual infant plaintiffs be transferred to the schools for which they had applied. This appeal is based upon the refusal of the court to grant further injunctive relief.

[2] Defendant, Virginia Pupil Palcement Board, answered the complaint, admitting that plaintiffs had complied with its regulations pertaining to applications for transfer but denying discrimination and other allegations of the complaint. The defendants, School Board of the City of Richmond and the Richmond Superintendent of Schools, answered and moved to dismiss on the ground that sole responsibility for the placement of pupils rested with the Virginia Pupil Placement

[1] Of eleven original pupil plaintiffs, one was assigned by the Pupil Placement Board to an integrated Junior High School to which he had made application before the hearing in the District Court. His case became moot.

Board pursuant to the Pupil Placement Act of Virginia, Sections 22–232.1 through 232.17, Code of Virginia, 1950, as amended.[2]

The defendants interpreted the bill of complaint as attacking the constitutionality of the Pupil Placement Act and the motions to dismiss were grounded also on the theory that constitutionality should first be determined by the Supreme Court of Appeals of Virginia or the case should be heard by a District Court of three judges. The court below correctly denied the motions to dismiss after determining that the constitutionality of the Act had not been challenged by plaintiffs.

The record discloses that the City of Richmond is divided into a number of geographically defined attendance areas for both white and Negro schools. These areas were established by the School Board prior to 1954 and have not been materially changed since that time. It is admitted that several attendance areas for white and Negro schools overlap. The State Pupil Placement Board enrolls and transfers all pupils and neither the Richmond School Board nor the city Superintendent of Schools makes recommendations to the Pupil Placement Board.

During the 1961–62 school term, 37 Negro pupils were assigned to "white" schools. For the 1962–63 school term, 90 additional Negro pupils had been so assigned. At the start of the 1962–63 school term, all of the "white" high schools had Negro pupils in attendance. Negro pupils also attend several of the "white" junior high schools and elementary schools.

Certain additional facts are clearly established by the record. The City School Board maintains five high schools, three for whites and two for Negroes; five junior high schools for whites and four for Negroes; eighteen elementary schools for whites and twenty-two for Negroes. As of April 30, 1962, there were 40,263 pupils in Richmond public schools, 23,177 Negroes, 17,002 whites and 84 nonwhites of a race other than Negro but considered white for the purpose of assignment in the Richmond public school system. Only 37 Negroes were then attending schools which white children attended, 30 of those being in the "white" Chandler Junior High School. Three of the remaining seven were in attendance at the "white" John Marshall High School, one attended the "white" Westhampton junior High School and three handicapped children attended the Richmond Cerebral Palsy Center. With the possible exception of the three last mentioned, these children had sought transfers from Negro schools and all but one were able to satisfy the residential and academic criteria which the Pupil Placement Board applies in case of transfers but not in case of initial enrollment. The remaining child had been admitted by court order in earlier litigation.[3]

The 1961–62 Directory of the Richmond, Virginia, Public Schools shows "White Schools" in one division and "Negro Schools" in the other. The "White Schools" are staffed entirely with faculties and officials of the Caucasian race. The schools listed as "Negro Schools" are staffed entirely with faculties and officials of the Negro race.

Thus it is clear, as found by the District Court, that Richmond has dual school attendance areas; that the City is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation

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[2] Raised below (but not involved in this appeal) was the issue as to the joinder of the Richmond School Board and Superintendent of Schools as parties defendant. Correctly, we think the District Court held:

"* * * The State Pupil Placement Board has authority over the placement of pupils, and the local officials refrain from making recommendations to the Board, but approximately 98 per cent of the placements are made routinely as a result of the regulations of the School Board pertaining to attendance areas. The evidence shows that the State Pupil Placement Board has no inclination to vary these attendance areas, although undoubtedly it has authority to do so. In view of this situation, the School Board and the Superintendent of Schools are proper parties."

[3] On September 2, 1958, a suit styled Lorna Renee Warden et al. v. The School Board of the City of Richmond, Virginia, et al. was instituted in the District Court, praying, *inter alia*, that a permanent injunction be entered restraining the Richmond School Board and its division Superintendent of Schools from any and all actions that regulate or affect, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants.

That suit was decided on July 5, 1961. The District Court ordered that the then one remaining Negro plaintiff be transferred from the Negro school located five miles from her home and admitted to the white school in her neighborhood. However, the court denied class relief stating: "There is no question as to the right of the infant plaintiff to be admitted to the schools of the City of Richmond without discrimination on the ground of race. She is admitted, however, as an individual, not as a class or group; and it is as an individual that her rights under the Constitution are asserted."

The court refused to grant a permanent injunction and dismissed the case from the docket.

from the school. Upon graduation, the pupils are assigned in the manner found by the District Court to be as follows:

"* * * [A]ssignments of students based on promotion from an elementary school to a junior high school to high school are routinely made by the Pupil Placement Board. These assignments generally follow a pattern, aptly described as a system of 'feeder schools', that existed prior to 1954. Thus, a student from a white elementary school is routinely promoted to a white junior high school and in due course to a white high school. A Negro student is routinely promoted from a Negro elementary school to a Negro junior high school and finally a Negro high school. In order to change the normal course of assignment based on promotion all students must apply to the Pupil Placement Board. The majority of the plaintiffs in the present case are such applicants."

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond Negro public schools. Of the 28 Negro schools 22 were overcrowded beyond normal capacity by 1775 pupils and the combined enrollments of 23 of the 26 white schools were 2445 less than the normal capacity of those schools. For the current 1962–63 school term, the applications for transfers from Negro to white schools of only 127 Negro pupils had been granted.

Four of the infant plaintiffs, who had completed elementary school, sought admission to the white Chandler Junior High School. After comparing test scores of these pupils with test scores of other pupils, the Pupil Placement Board denied the applications on the ground of lack of academic qualifications. These plaintiffs contended that pupils from white elementary schools in the same attendance area are routinely placed in Chandler Junior High and thier scholastic attainments or qualifications are not scrutinized by the Pupil Placement Board. The District Court concluded that academic criteria were applied to Negro pupils seeking transfer based on promotion, which criteria were not applied to the white pupils promoted from elementary schools to junior high schools. This, said the court, is discriminatory and is a valid criticism of the procedure inherent in the system of "feeder schools". The court further stated:

"Proper scholastic tests may be used to determine the placement of students. But when the tests are applied only to Negroes seeking admission to particular schools and not to white students routinely assigned to the same schools, the use of the tests can not be sustained. Jones v. School Board of the City of Alexandria, 278 F. 2d 72 (4th Cir. 1960)."

Another of the Negro plaintiffs, who was promoted from a Negro junior high school, sought admission to the "white" John Marshall High School. His application had been denied because he lived thirteen blocks from the John Marshall High School and only five blocks from a Negro high school. However, it was pointed out in the court below that this plaintiff lives in the attendance area of the John Marshall High School and, had he been a white student, he would have been routinely assigned there without considering the distance of his residence from that school or from another high school. The District Court said: "* * * Residence may be a proper basis for assignment of pupils, but it is an invalid criteria when linked to a system of 'feeder schools'. Dodson v. School Board of the City of Charlottesville, 289 F. 2d 439 (4th Cir. 1961)."

The remaining five plaintiffs sought transfers from the Graves Junior High School (Negro) to the "white" Chandler Junior High School. They were denied transfer by the Pupil Placement Board because of lack of acdemic qualifications. The evidence showed that the same standards for determining tranfers, upon application, from one junior high school to another junior high school were applied by the Board indiscriminately to both white and Negro pupils. The District Court stated:

"* * * Were this the only factor in this phase of the case, the issue would involve only judicial review of the decision of an administrative board. However, the situation of these plaintiffs must be considered in the context of the system of 'feeder schools', which routinely placed them in the Graves Junior High School while white students routinely were placed in Chandler Junior High School. The application of scholarship qualifications under these circumstances is discriminatory. Green v. School Board of the City of Roanoke [304] F. 2d [118] (4th Cir., May 22, 1962)." [4]

With respect to a determination of the rights of all of the infant Negro plaintiffs, the District Court held:

"The foregoing facts and conclusions of law require the admission of the plaintiffs to the schools for which they made application."

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[4] The case to which the District Court referred is styled Green v. School Board of City of Roanoke, Virginia, and is now reported in 304 F. 2d 118.

An appropriate order was entered enjoining and restraining the defendants from denying the infant plaintiffs, therein named, admission to the schools for which they had made application. The defendants have not appealed from this order.

It follows that each infant plaintiff has been granted the relief which he or she individually sought. But the District Court, although expressing its disapproval of the "feeder school system" as now operating in the City of Richmond, denied further injunctive relief. The case was ordered retained on the docket for such further relief "as may be appropriate".[5]

The conclusion of the District Court that a "reasonable start toward a non-discriminatory school system" had been made appears to have been based primarily upon consideration of four factors discussed in its opinion as follows:

"Rigid adherence to placement of students by attendance areas has been modified in four respects. First, the Chairman of the Pupil Placement Board testified that any Negro child applying for enrollment in the first grade of a white public school in his attendance area is assigned to that school. Second, the Superintendent of Schools testified that George Wythe High School and John Marshall High School had been constructed to accommodate all high school students in their respective attendance areas. Counsel stated in argument that six Negro students had applied for admission to George Wythe High School for 1962 and all had been accepted. Third, a Negro student presently attending a white school, upon promotion to a higher school, is routinely assigned to a white school. Fourth, some Negro students have been assigned to schools in white attendance areas."

In the context of this case the principal questions to be determined may be stated as follows: (1) Are these four basic factors cited by the District Court sufficient to evidence a reasonable start toward maintaining a non-discriminatory school system and consistent with the true concept of equal constitutional protection of the races; and (2) should the court have granted further injunctive relief? We think question (1) must be answered in the negative and question (2) in the affirmative in view of the discriminatory attitude displayed by the Pupil Placement Board toward the transfers sought by the infant plaintiffs in the instant case and which transfers, denied as the result of discriminatory application of residential and academic criteria, were effected only through this protracted litigation.

It is notable that there is no assertion here, as in some of the other school cases, of a defense based upon a claim that a reasonable start has been made toward the elimination of racially discriminatory practices coupled with a suggestion that additional time, consistent with good faith compliance at the earliest practicable date, is necessary in the public interest. Instead, the answer of the City school authorities denied that anything done or omitted by them had given rise to the present litigation. The answer of the Pupil Placement Board admitted that the plaintiffs had complied with its administrative procedures but denied and demanded strict proof of racial discrimination.

One of the interrogatories served by the plaintiffs was: "What obstacles, if any, are there which will prevent the racially non-discriminatory assignment of students to public schools in the City of Richmond at the commencement of the 1962–1963 school session?" The local school authorities side-stepped the question by claiming to be unable to answer because all power to assign students to schools had been vested by law in the Pupil Placement Board. That Board replied to the interrogatory as follows: "* * * [T]hat to the extent that such question

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[5] In its written opinion the District Court stated as follows:

"The plaintiffs prayed that the defendants be enjoined from continuing discrimination in the city schools and that the School Board be required to submit a desegregation plan. The Court has weighed all of the factors presented by the evidence in this case and finds that the defendants have taken measures to eliminate racially discriminatory enrollments in the first grade. Apparently they are eliminating discriminatory enrollments in George Wythe High School [white] and they are routinely assigning Negro students in white junior high schools to white high schools.

"While the School Board has not presented a formal plan of desegregation, the Court finds that the defendants have made a reasonable start toward a non-discriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term. In view of the steps that have been taken in this direction, the Court concludes that the defendants should be allowed discretion to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of 'feeder schools'.

"In Brown v. Board of Education, 349 U.S. 294, 300 [75 S.Ct. 753, 99 L.Ed. 1083] (1955), the Supreme Court stated 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' The Court is of the opinion that the relief decreed in this case is sufficient at this time in view of the evidence presented. The refusal of broad injunctive relief now is not to be construed as approval to continue the 'feeder school system' as it is now operated. See Hill v. School Board of the City of Norfolk, Virginia, 282 F.2d 473 (4th Cir. 1960), Dodson v. School Board of the City of Charlottesville, 289 F.2d 439 (4th Cir. 1961).

"This case will be retained on the docket for such further relief as may be appropriate."

implies discrimination, such implication is denied and that such question lacks sufficient specificity to evoke an intelligent answer which does not involve broad conclusions or have argumentative deductions. Aside from that, and under Brown v. Board of Education, *these defendants know of no reason why students should not be assigned to public schools without discrimination on the ground of race, color, or creed.*" (Emphasis added.)

The Superintendent of Schools testified that the City School Board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils. He stated that some new schools and additions to existing schools had been provided. The record discloses that the earlier litigation, Warden v. The School Board of the City of Richmond, referred to in our footnote 3, was instituted on September 2, 1958. At a special meeting held on September 15, 1958 (approximately two weeks after the beginning of the school term), the School Board voted to request the Pupil Placement Board to transfer the pupils then attending the Nathaniel Bacon School (white) to the East End Junior High School (white), and that a sufficient number of pupils be transferred from the George Mason (Negro) and Chimborazo (Negro) schools to the Nathaniel Bacon building to utilize its capacity, thus converting Nathaniel Bacon to a Negro school.

The attitude of the City school authorities, as disclosed by the Superintendent of Schools in his testimony, is and has been "that the state law took out of the hands of the School Board and the Superintendent of Schools any decision relating to the integration of schools [and that] * * * it has been a feeling of both the School Board and the Administration that any conflict that might exist between the state and federal law should be decided by the Courts, not by the School Board and the Administration."

The following is taken from the testimony of the Chairman of the Pupil Placement Board:

"*Q. Well, what do you do where you have overlapping school zones and school areas?*

"A. You have got that, of course, in Richmond.

"*Q. Yes.*

"A. Normally, I would say fully 99 per cent of the Negro parents who are entering a child in First Grade prefer to have that child in the Negro school. Judging by the small number of applications we get, that must be true. Now, we do not think that this Board was appointed for the purpose or that the law required the attempt on our part to try to integrate every child possible. What we thought we were to do was to be completely fair in considering the requests of Negroes, we will say, to go into White schools, but certainly not trying to put those in that didn't want to go in.

"Now, when a Negro parent asks for admission of his child in the First Grade of a White school, very clearly he is asking for desegregation or for integration, or whatever you want to call it, and he gets it. And it is true that *in general there will be two schools that that child could attend in his area, one White and one Negro, and we assume that the Negro wants to go to the Negro school unless he says otherwise,* but if he says otherwise, he gets the other school." (Emphasis supplied.)

It is true that the authority for the enrollment and placement of pupils in the State of Virginia has been lodged in the Pupil Placement Board [6] unless a particular locality elects to assume sole responsibility for the assignment of its pupils.[7] The School Board of the City of Richmond has assumed no responsibility whatever in this connection. It does not even make recommendations to the Pupil Placement Board as to enrollments, assignments or transfers of pupils. It here defends charges against it of racial discrimination in the operation of the City's schools on the ground that the sole responsibility is that of the State Board. At the same time the system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue. Though many of the Negro schools are overcrowded and white schools are not filled to normal capacity, the only effort to alleviate this condition has been to provide new buildings or additions to existing buildings, a move obviously designed to perpetuate what has always been a segregated school system.

It is clear that the pupil assignments are routinely made by the Pupil Placement Board. The Chairman of that Board says that now initial enrollments are on a voluntary basis and a Negro child may be enrolled in a white school upon

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[6] Va. Code Ann. §§ 22—232.1-232.17 (Supp. 1960).
[7] Va. Code Ann. §§ 22—232 18-232 31 (Supp. 1960).

request. But in the absence of a request, the long established procedure of enrollment of Negro children in Negro schools and white children in white schools persists. Then the "feeder" system begins to operate and the only means of escape is by following the prescribed administrative procedure of filing requests or applications for transfer. The difficulties to be encountered in pursuing this course are graphically demonstrated by the experiences of the infant plaintiffs in this litigation. They were able to escape from the "feeder" system only after the District Court made possible their release by ordering transfers.

A Negro child, having once been caught in the "feeder" system and desiring a desegregated education, must extricate himself, if he can, by meeting the transfer criteria. As this court said in Green v. School Board of City of Roanoke, Virginia, 304 F.2d 118, 123 (4th Cir. 1962).

"* * * These are hurdles to which a white child, living in the same area as the Negro and having the same scholastic aptitude, would not be subjected, for he would have been initially assigned to the school to which the Negro seeks admission."

It was pointed out in Jones v. School Board of City of Alexandria, Virginia 278 F.2d 72, 77 (4th Cir. 1960), that, by reason of the esixting segregation pattern, it will be Negro children, primarily who seek transfers. The truth of the statement is evidenced by the fact that in Richmond only 127 Negro children out of a total of more than 23,000 are now attending previously all-white schools. This court further said in Jones, supra: "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated * * *" 278 F.2d 72, 76.

In recent months we have had occasion to consider the legality of other "feeder" systems found in operation in the public schools of Roanoke County, Virginia, and in the City of Roanoke, Virginia. See Marsh v. County School Board of Roanoke County, Va., 305 F.2d 94 (4th Cir. 1962), and Green v. School Board of City of Roanoke, Virginia, 304 F.2d 118 (4th Cir. 1962). In those cases, in opinions prepared by Chief Judge Sobeloff, the unconstitutional aspects of the systems there in operation were discussed in the light of the decisions of the Supreme Court in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and in the light of numerous prior decisions of this and other courts. We find it unnecessary to again cite or review the pertinent decisions applicable to the maintenance of racially segregated school systems. In the Marsh and Green cases we reached the conclusion that injunctive relief, not only for the individual plaintiffs but for those who might find themselves confronted with the same problems, was justified.

A start has, indeed, been made to end *total* segregation of the races in the Richmond schools. The first step has been taken, one which, no doubt, was distasteful to those who are traditionally and unalterably opposed to an integrated school system. But, upon this record and from the statements of the school officials, we find nothing to indicate a desire or intention to use the enrollment or assignment system as a vehicle to desegregate the schools or to effect a material departure from present practices, the discriminatory character of which required the District Court to order relief to the infant plaintiffs before it. In the present status in which the case was left by the District Court, the school authorities are yet free to ignore the rights of other applicants and thus to require the parents of new applicants to protest discriminatory denials of transfers, to require an infant applicant with his or her parents to attend a hearing on the protest which is not likely to be held earlier than August of 1963, and then to require the applicants to intervene in the pending litigation (possibly to be met with defensive tactics calculated to result in delay), the applicants fervently hoping to obtain relief from the court not long after the beginning of the 1963–64 school session if such relief is to be meaningful.

The School Board of the City of Richmond has abdicated in favor of the Pupil Placement Board leaving the latter with a school system which, in normal operation, has demonstrated its potential as an effective instrumentality for creating and maintaining racial segregation. Nearly nine years have elapsed since the decisions in the Brown v. Board of Education cases and since the Supreme Court held racial discrimination in the schools to be unconstitutional. The Richmond school authorities could not possibly have been unaware of the results of litigation involving the school systems of other cities in Virginia, notably Norfolk, Alexandria, Charlottesville and Roanoke. Despite the knowledge which

these authorities must have had as to what was happening in other nearby communities, the dual attendance areas and "feeder" system have undergone no material change.

Assignments on a racial basis are neither authorized nor contemplated by Virginia's Pupil Placement Act. We are told that initial assignments are now made on a purely voluntary basis but the Placement Board *assumes* that a Negro child prefers to attend a school with children of his own race and he is so assigned unless otherwise requested. Richmond's administration of her schools has been obviously compulsive and it is evident that there has been little, if any, freedom of choice.

"Though a voluntary separation of the races in schools is uncondemned by any provision of the Constitution, its legality is dependent upon the volition of each of the pupils. If a reasonable attempt to exercise a pupil's individual volition is thwarted by official coercion or compulsion, the organization of the schools, to that extent, comes into plain conflict with the constitutional requirement. A voluntary system is no longer voluntary when it becomes compulsive." See Jeffers v. Whitley, 309 F.2d 621, 627 (4th Cir. 1962).

[3–5] Notwithstanding the fact that the Pupil Placement Board assigns pupils to the various Richmond schools without recommendation of the local officials, we do not believe that the City School Board can disavow all responsibility for the maintenance of the discriminatory system which has apparently undergone no basic change since its adoption. Assuredly it has the power to eliminate the dual attendance areas and the "feeder" system which the District Court found to be primarily responsible for the discriminatory practices disclosed by the evidence. It would be foolish in the extreme to say that neither the City School Board nor the Pupil Placement Board has the duty to recognize and protect the constitutional rights of pupils in the Richmond schools. That there must be a responsibility devolving upon some agency for proper administration is unquestioned. We are of the opinion that it is primarily the duty of the School Board to eliminate the offending system.[8]

In these circumstances, not only are the individual infant plaintiffs entitled to relief which has been ordered but the plaintiffs are entitled, on behalf of others of the class they represent and who are similarly situated, to an injunction against the continuation of the discriminatory system and practices which have been found to exist. As we clearly stated in Jeffers v. Whitley, 309 F.2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect *a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race.* The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and "feeder" system, if initial assignments are to be on a nondiscriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed.

If, upon remand, the defendants desire to submit to the District Court a more definite plan, providing for immediate steps looking to the termination ofthe discriminatory system and practices "with all deliberate speed," they should not only be permitted but encouraged to do so.

The District Court should retain jurisdiction of this case for further proceedings and the entry of such further orders as are not inconsistent with this opinion.

Reversed in part and remanded.

ALBERT V. BRYAN, Circuit Judge (dissenting in part).

I see no need for the prospective injunction. With fairness and clarity the opinion of the Court comprehensively discusses and approves the course the District Court prescribed for the defendants to follow in the future. With no reason to believe his directions will not be respected, the District Judge refused the injunction. In this he exercised the discretion generally accorded the trial judge in such situations, especially when the necessity for an injunction must be measured by local conditions. Of these we have no knowledge more intimate than his. I would not add the injunction.

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[8] Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Brown v. Board of Education, 349 U.S. 294, 75 S.Ct 753, 99 L.Ed. 1083 (1955); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed 2d 5 (1958).

Mr. CONYERS. Under his guidance, the Richmond School Board maintained a "discriminatory 'feeder' system, whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools." To transfer to white schools, they had to "meet criteria to which white students of the same scholastic aptitude were not subjected."

The court found, not the black congressional caucus, not those who would rail against the nominee, but the court found that, including the years when Louis Powell was the leading policymaker on the Richmond School Board, the plaintiffs in the Bradley case were "able to escape from the 'feeder' system only after the district court made possible their release by ordering transfers."

And the judge describes in two sentences the state of the Richmond public school system which Mr. Powell and his supporters so rather proudly point to as a prime example of his "sensitivity" to the needs of black people:

". . . it is clear, as found by the district court, that Richmond has dual school attendance areas; that the city is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation from that school."

The deleterious effect of 8 years of Lewis Powell's control over the education of the black and white children of the city of Richmond is clearly pictured in the statistics cited by the court:

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond public schools. Of the 28 Negro schools, 22 were overcrowded beyond normal capacity by 1,775 pupils, and the combined enrollments of 23 of the 26 white schools were 2,445 less than the normal capacity of those schools.

As of 1961 when Mr. Powell left the Richmond School Board only 37 black children out of a total of more than 23,000 were attending previously all-white schools in the city of Richmond. A fair examination of the evidence suggests that Lewis Powell, in this instance, certainly was no respecter of the decrees of the very Court for which his nomination is now being considered. For in *Brown* v. *Board of Education* and *Cooper* v. *Aaron*, the Court had found that it was primarily the duty of the school board to eliminate segregationist practices in the public schools. But as the *Bradley* opinion notes, the Richmond School Board could not even claim that a reasonable start had been made toward the elimination of racially discriminatory practices.

It said, "The superintendent of schools testified that the city school board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils." Rather than admitting that it had failed, the Richmond School Board was blaming the "Pupil Placement Board" and others for what was clearly, as the Court decreed in *Bradley*, its own miserable dereliction of duty. Mr. Powell, in a letter to the city attorney, dated July 20, 1959, wrote that "The entire assignment prerogative is presently vested in the State pupil placement board, and although the law creating this board may be shaky, it has still not been held invalid.

In any event, it is our basic defense at the present time. Here, Mr. Powell is clearly letting a weak governmental agency take the blame for what in fact were his own segregationist policies where pupil assignment was concerned.

Numerous other cases which deal with the conditions of the Richmond schools during the era of Mr. Powell's chairmanship document the horrendous conditions which he helped to perpetuate and institutionalize.

In *Warden* v. *The School Board of Richmond*, a special meeting of the School Board of Richmond on September 15, 1958, is shown to have recommended that an all-white public school be converted to an all-black school in order to perpetuate segregation. Obviously, Mr. Powell's sanction of the maintenance of a dual system of attendance areas based on race offended the constitutional rights of the black schoolchildren who were entrapped by Powell's policy decisions.

From the foregoing evidence, and much other, it does not appear that Mr. Powell was a neutral bystander during these critical years of Richmond's history. In fact, the record reveals that Mr. Powell participated in the extensive scheme to destroy the constitutional rights that he had sworn to protect.

When Lewis Powell resigned from the Richmond School Board in order to take his place on the Virginia State Board of Education, an editorial in the March 3, 1961, edition of the Richmond Times-Dispatch praised him for the fact that "the two new white high schools were planned and built during his chairmanship." There were those in Richmond who had good cause to be justly proud of the masterful way in which Mr. Powell had perpetuated the antiquated notions of white supremacy through a clever institutionalization of school segregation.

Now, with regard to his role as a member and later chairman of the Virginia State Board of Education, the defenders of his record in the field of education proudly point to his support of the "Gray proposals" in the 1950's as proof positive of his "courage" in the face of those who were advocating the stiffer line of "massive resistance" vis-a-vis the Brown decision. His early support of these proposals, it can be documented, was translated into his later actions as a member of the State school board, which, I shall show, also served to foster substantive segregation in the public schools—this time on a statewide scale.

On August 30, 1954, the Governor of Virginia appointed a Commission on Public Education (known as the "Gray Commission") to examine the implications of the Supreme Court's *Brown* v. *Board of Education* decision of May 17, 1954, for the school segregation issue in the State of Virginia.

The Gray Commission made at least three separate reports to the Governor—on January 19, 1955, June 10, 1955, and November 11, 1955. In summary, these "Gray Proposals" called for legislation which would provide "educational opportunities for children whose parents will not send them to integrated schools," and the description of the Gray Commission operation which I think is critical to our understanding of the issue being raised here, is as follows: They were set up "to meet the problem thus created by the Supreme Court, the Commission proposes a plan of assignment which will permit local

school boards to assign their pupils in such manner as will best serve the welfare of their communities and protect and foster the public schools under their jurisdiction. The Commission further proposes legislation to provide that no child be required to attend a school wherein both white and colored children are taught and that the parents of those children who object to integrated schools, or who live in communities wherein no public schools are operated, be given tuition grants for educational purposes."

In order to implement the tuition grant strategy, the Gray Commission called for the amendment of section 141 of the Virginia constitution—which had formerly prohibited public funds from being appropriated for tuition payments of students who attended private schools—so that "enforced integration (could be) avoided."

I also would seek permission to include the text of the Gray proposals into the record of these proceedings, it is not long.

The CHAIRMAN. They will be admitted.

(The material referred to follows:)

REPORT OF THE VIRGINIA COMMISSION ON PUBLIC EDUCATION (GRAY COMMISSION), NOVEMBER 11, 1955

(From Race Relations Law Reporter, Volume 1, Number 1, 1956)

EDUCATION—PUBLIC SCHOOLS—VIRGINIA

On August 30, 1954, the Governor of Virginia appointed a Commission on Public Education (known as the "Gray Commission") to examine the effect of the decision of the United States Supreme Court in the *School Segregation Cases* and to make recommendations. A portion of the report of that Committee, including recommended constitutional [a] and legislative changes, appears below.

REPORT OF COMMISSION ON PUBLIC EDUCATION

RICHMOND, VA., *November 11, 1955.*

TO: THE HONORABLE THOS. B. STANLEY, *Governor of Virginia*

Your Commission was appointed on August 30, 1954, and instructed to examine the effect of the decision of the Supreme Court of the United States in the school segregation cases, decided May 17, 1954, and to make such recommendations as may be deemed proper. The real impact of the decision, however, could not be fully considered until the final decree of the Supreme Court was handed down and its mandate was before the Federal District Court for interpretation. This did not take place until July 18, 1955.

The Commission and its Executive Committee have held many meetings, including a lengthy public hearing, wherein many representatives of both races expressed their views, and the Commission has made two interim reports, one on January 19, 1955, and the other on June 10, 1955. It now submits its further recommendations for consideration by Your Excellency.

* * * * * * *

SUMMARY OF LEGISLATION PROPOSED

The Commission has been confronted with the problem of continuing a public school system and at the same time making provision for localities wherein public schools are abandoned, and providing educational opportunities for children whose parents will not send them to integrated schools.

To meet the problem thus created by the Supreme Court, the Commission proposes a plan of assignment which will permit local school boards to assign their

[a] On January 9, 1956, the electors of Virginia voted on a proposal to call a convention to amend the Virginia Constitution (see Appendix III, below). Unofficial returns indicated that the proposal was adopted.

pupils in such manner as will best serve the welfare af their communities and protect and foster the public schools under their jurisdiction. The Commission further proposes legislation to provide that no child be required to attend a school wherein both white and colored children are taught and that the parents of those children who object to integrated schools, or who live in communities wherein no public schools are operated, be given tuition grants for educational purposes.

There has heretofore been pending before The Supreme Court of Appeals of Virginia the case of *Almond* v. *Day*, in which the court had before it for consideration the question of whether the Legislature could validly appropriate funds for the education of war orphans at public and private schools. On November 7, 1955, the Court rendered its decision and held, among other things, that § 141 of the Constitution of Virginia prohibited the appropriation of public funds for payments of tuition, institutional fees and other expenses of students who may desire to attend private schools.

If our children are to be educated and it enforced integration is to be avoided, it is now clear that § 141 must be amended. Moreover, unless this is done, the State's entire program, insofar as attendance to private schools is concerned, involving the industrial rehabilitation program for the physically and mentally handicapped, grants for the education of deserving war orphans, grants in aid of Negro graduate students, and scholarships for teaching and nursing, to remedy shortages in these fields is in jeopardy.

Accordingly, it is recommended that a special session of the General Assembly be called forthwith for the purpose of initiating a limited constitutional convention so that § 141 may be amended in ample time to make tuition grants and other educational payments available in the current year and the school year beginning in the fall of 1956. A suggested bill for consideration of the General Assembly is attached hereto as Appendix III.

Contingent upon the favorable action of the people relative to the amendment of the Constitution herein proposed, your Commission recommends the enactment of legislation in substance as follows:

1. *That school boards be authorized to assign pupils to particular schools and to provide for appeals in certain instances.*

Such legislation would be designed to give localities broad discretion in the assignment of pupils in the public schools.

Assignments would be based upon the welfare of the particular child as well as the welfare and best interests of all other pupils attending a particular school. The school board should be authorized to take into consideration such factors as availability of facilities, health, aptitude of the child and the availability of transportation.

Children who have heretofore attended a particularl public school would not be reassigned to a different one except for good cause shown. A child who has not previously attended a public school or whose residence has changed, would be assigned as aforesaid.

Any parent, guardian or other person having custody of a child, who objects to the assignment of his child to a particular school under the provisions of the act should have the right to make application within fifteen days after the giving of the notice of the particular assignment to the local school board for a review of its action. The application should contain the specific reasons why the child should not attend the school assigned and the specific reasons why the child should be assigned to a different school named in the application. After the application is received by the local school board a hearing would be held within forty-five days and, after hearing evidence, the school board would determine to what school the child should be assigned.

An appeal if taken should be permitted from the final order of the school board within fifteen days. The appeal would be to the circuit or corporation court. The local school board would be made a defendant in this action and the case heard and determined *de novo* by the judge of the court, either in term or in vacation. If either party be aggrieved by the order of the court an appeal should be permitted to the Supreme Court of Appeals of Virginia.

2. *That no child be required to attend an integrated school.*

3. *That the sections of the Code relating to the powers and duties of school boards relative to transportation of pupils be amended as as to provide that school boards may furnish transportation for pupils.*

In the opinion of the Commission, such is merely a restatement of existing law. However, it is felt that it should be made perfectly clear that no county school board be required to furnish transportation to school children.

4. *That changes be made in the law relating to the assignment of teachers.*

Local school boards should be vested with the authority to employ teachers and assign them to a particular school. The division superintendent should be permitted to assign a particular teacher to a particular position in the school, but not to assign the teadher to a school different from that to which such teacher was assigned by the local school board without the consent of such board.

5. *That localities be authorized to raise sums of money by a tax on property, subject to local taxation, to be expended by local school authorities for educational purposes including cost of transportation and to receive and expend State aid for the same purposes.*

Those localities wherein no public schools are operated should be authorized to provide for an educational levy or a cash appropriation in lieu of such levy. The maximum amount of the levy or cash appropriation, as the case may be, should be limited in the same manner as school levies or school appropriations are limited.

The procedure to be followed by school officials and local tax levying bodies for obtaining these educational funds would be the same as prescribed by law for the raising of funds for public school purposes. The educational funds so raised would be expended by the local school board for the payment of tuition grants for elementary or secondary school education and could, in the discretion of the board, be expended for transportation costs. Local school boards should be vested with the authority to pay out such grants and costs under their own rules and regulations.

Localities should be granted and allocated their share of State funds upon certifying that such funds would be expended for tuition grants. Any person who expends a tuition grant for any purpose other than the education of his child should be amenable to prosecution therefor.

6. *That school budgets be required to include amounts sufficient for the payment of tuition grants and transportation costs under certain circumstances; that local governing bodies be authorized to raise money for such purposes; that provision be made for the expenditure of such funds; and that the State Board of Education be empowered to waive certain conditions in the distribution of State funds.*

This would be companion legislation to that dealing with the assignment of pupils and compulsory education, respectively. It would be designed to further prevent enforced integration by providing for the payment of tuition grants for the education of those children whose parents object to their attendance at mixed schools. Without such a measure, enforced integration could not be effectively avoided since many parents would then be required to choose integrated schools as the only alternative to the illiteracy of their children.

The division superintendent of the schools of every county, city or town wherein public schools are operated should be required to include in his estimate of the school budget an amount of money to be expended as tuition grants for elementary and secondary school education. The locality would be authorized to include in its school levy or cash appropriation an amount necessary for such tuition grants.

The educational funds so raised would be expended in payment of tuition grants for elementary or secondary school education to the parents, guardians or other persons having custody of children who have been assigned to public schools wherein both white and colored children are enrolled, provided such parents, guardians or other persons having custody of such children certify that they object to such assignment.

Each grant should be in the amount necessary for the education of the child, provided, however, that in no event would such grant exceed the total cost of operation per pupil in average daily attendance in the public schools for the locality making such grant as determined for the preceding school year by the Superintendent of Public Instruction.

Provision should be made for the payment of transportation costs in the discretion of the board to those who qualify for tuition grants.

No locality that expends funds for tuition grants should be penalized in the distribution of State funds. Any person who expends tuition grants for any purpose other than for the education of his child should be amenable to prosecution.

7. *That provision be made for the reimbursement by the State of one-half of any additional costs which may be incurred by certain localities in payment of tuition grants required by law.*

The Commission realizes that the payment of tuition grants in localities wherein public schools are operated may necessitate some expenditures beyond the adopted

school budgets. Since tuition grants are vital to the prevention of enforced integration, it should be provided that the State bear one-half of any excess costs to the locality.

8. *That local school boards be authorized to expend funds designed for public school purposes for such tuition grants as may be permitted by law without first obtaining authority therefor from the tax levying body.*

Local school boards should be authorized to transfer school funds, excluding those for capital outlay and debt service, within the total amount of their budget and to expend such funds for tution grants, in order to give the local boards more flexibility to meet the requirements of the tuition grant program.

9. *That the employment of counsel by local school boards be authorized to defend the actions of their members and that the payment of costs, expenses and liabilities levied against them be made by the local governing bodies out of the county or city treasury as the case may be.*

Such a measure is necessary if we are to continue to have representative citizens as members of our local school boards.

10. *That the Virginia Supplemental Retirement Act be broadened to provide for the retirement of certain private school teachers.*

The Virginia Supplemental Retirement Act should be broadened to provide for the retirement of school teachers if such teachers be employed by a corporation organized for the purpose of operating a private school after the effective date of the enactment of legislation recommended by this report.

The purpose of this is to protect the retirement status of those public school teachers who may hereafter desire to teach in private schools that are established because of the decision in the school segregation cases. Corporate entity is deemed necessary for practical administration by the Retirement Board.

11. *That the office of the Attorney General should be authorized to render certain services to local school boards.*

The Attorney General should be authorized when requested to do so by a local school board, to give such advice and render such legal assistance as he deems necessary upon questions relating to the commingling of the races in the public schools.

The localities will have many problems confronting them in view of the school segregation cases and will also have many new responsibilities, including the promulgation of a vast number of detailed rules and regulations. Under such circumstances it is felt that the office of the Attorney General should be made available to them. The Commission realizes, of course, that in order for such a measure to operate effectively the office of the Attorney General must be expanded and the necessary funds appropriated by the General Assembly.

12. *That those sections of the Code relating to the minimum school term, appeals from actions of school boards, State funds which are paid for public schools in counties, school levies and use thereof, cash appropriations in lieu of school levies, and unexpended school funds, be amended; and that certain obsolete sections of the Code be repealed.*

Local school boards should be authorized but not required to maintain public schools for a period of at least nine months. A locality may be confronted with an emergency situation.

The present procedure governing appeals from actions of school boards should be clarified so that it will not conflict with appeals in assignment cases.

The State Board of Education appears to have the authority to approve the operation of schools in a locality for a period of less than nine months with no loss in State funds. This should be made clear.

The requirement for minimum school levies or cash appropriations in lieu thereof should be eliminated and levies or cash appropriation for educational purposes authorized.

The procedure for the reversion of unexpended school funds should be broadened so as to make it apply to appropriations for educational purposes.

Those sections of the Code relating to distribution of school funds which are obsolete, being covered by the Appropriation Act, should be repealed.

The section of the Code requiring segregated schools has been rendered void by the Supreme Court of the United States and should be repealed.

The section of the Code requiring cities to maintain a system of public schools should be repealed since it duplicates another provision of the Code.

Appendix III

A BILL *To provide for submitting to the qualified electors the question of whether there shall be a convention to revise and amend certain provisions of the Constitution of Virginia*

Whereas, by Item 210 of the Appropriation Act of 1954 (Acts of Assembly, 1954, Chapt. 708, p. 970), the General Assembly sought to enact measures to aid certain war orphans in obtaining an education at either public or private institutions of learning, which said Item has been adjudicated by the Supreme Court of Appeals of Virginia, insofar as it purports to authorize payments for tuition, institutional fees and other expenses of students who attend private schools, to be violative of certain provisions of the Constitution respecting education and public instruction; and,

Whereas, the State's entire program, insofar as attendance at private schools is concerned, involving the industrial rehabilitation program, grants for the education of war orphans, grants in aid of Negro graduate students, and scholarships for teaching and nursing, is in jeopardy; and

Whereas, in order to permit the handicapped, war orphans, Negro graduate students and prospective teachers and nurses to receive aid in furtherance of their education at private schools and in order to insure educational opportunities for those children who may not otherwise receive a public school education due to the decision of the Supreme Court of the United States in the school segregation cases, it is deemed necessary that said provisions of the Constitution be revised and amended; and,

Whereas, it is impossible to procure such amendments and revisions within the time required to permit educational aid forthwith for the current school year and that beginning in the fall of 1956 except by convening a constitutional convention; and,

Whereas, because it is deemed unwise at this time to make any sweeping or drastic changes in the fundamental laws of the State, and also, in order to assure the adoption of the contemplated amendments and revisions within the time necessary to permit educational aid in the school year of 1956–57, it is deemed necessary that the people eliminate all questions from consideration by said convention save and except those essential to the adoption of those revisions and amendments specified in this Act; and,

Whereas, in order to avoid heated and untimely controversies throughout the State as to what other matters, if any, may or should be acted upon by said convention, it is believed to be in the public interest to submit to the electors the sole question whether a convention shall be called which will be empowered by the people to consider and act upon said limited revisions and amendments only, and not upon any others:

Now, therefore, be it enacted by the General Assembly of Virginia:

1. § 1. That at an election to be held on such day as may be fixed by proclamation of the Governor (but not later than sixty days after the passage of this Act), there shall be submitted to the electors qualified to vote for members of the General Assembly the question "Shall there be a convention to revise the Constitution and amend the same?" Should a majority of the electors voting at said election vote for a convention, the legal effect of same will be that the people will thereby delegate to it only the following powers of revision and amendment of the Constitution and no others:

A. The convention may consider and adopt amendments necessary to accomplish the following purposes, and no others:

To permit the General Assembly and the governing bodies of the several counties, cities and towns to appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate and graduate education of Virginia students in nonsectarian public and private schools and institutions of learning in addition to those owned or exclusively controlled by the State or any such county, city or town.

B. The convention shall be empowered to proclaim and ordain said revisions and amendments adopted by it within the scope of its powers as above set forth without submitting same to the electors for approval, but the convention will not have the power to either consider, adopt, or propose any other amendments or revisions.

§ 2. The judges of election and other officers charged with the duty of conducting elections at each of the several voting places in the State are hereby required to

hold an election upon the said question of calling the convention, on the day fixed therefor by proclamation of the Governor, at all election precincts in the State, but the several electoral boards may, in their discretion, dispense with the services of clerks of election in such precincts as they may deem appropriate. Copies of the Governor's proclamation shall be promptly sent by the State Board of Elections to the secretary of each electoral board and due publicity thereof given through the press of the State and otherwise if the Governor so directs.

§ 3. The ballots to be used in said election the State Board of Elections shall cause to be printed, and distributed and furnished to the respective electoral boards of the counties and cities of the State. The number furnished each such board shall be ten per centum greater than the total number of votes cast by said board's county or city in the last presidential election. The respective electoral boards shall cause the customary identification seal to be stamped on the ballots delivered to them. In order to insure that the electors will clearly understand the limited powers which may be exercised by the convention, if called, said ballots shall be printed in type not less in size than small pica and contain the following words and figures:

"Constitutional Convention Ballot:

"INFORMATORY STATEMENT

"The Act of the General Assembly submitting to the people the question below provides that the elector is voting for or against a convention to which will be delegated by the people only the limited powers of revising and amending the Constitution to the extent that is necessary to accomplish the following purposes, and no other powers:

To permit the General Assembly and the governing bodies of the several counties, cities and towns to appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate and graduate education of Virginia students in nonsectarian public and private schools and institutions of learning in addition to those owned or exclusively controlled by the State or any such county, city or town.

"The Act also provides that the legal effect of a majority vote for a convention will be that the people will delegate to it only the foregoing powers, except that the convention will be empowered to ordain and proclaim said revisions and amendments adopted by it within the scope of said powers without submitting same to the electors for approval, but the convention will not have the power to either consider, adopt or propose any other amendments or revisions.

"In the light of the foregoing information the question to be voted on is as follows:

"Shall there be a convention to revise the Constitution and amend the same?

"☐ For the convention.

"☐ Against the convention."

§ 4. A ballot deposited with a cross mark, a line or check mark placed in the square preceding the words "For the convention" shall be a vote for the convention, and a ballot deposited with a cross mark, line or check mark preceding the words "Against the convention" shall be a vote against convention.

§ 5. The ballots shall be distributed and voted, and the results thereof ascertained and certified, in the manner prescribed by section 24–141 of the Code of Virginia. It shall be the duty of the clerks and commissioners of election of each county and city, respectively, to make out, certify and forward an abstract of the votes cast for and against the convention in the manner now prescribed by law in relation to votes cast in general State elections.

§ 6. It shall be the duty of the State Board of Elections to open and canvass the said abstracts of returns, and to examine and make statement of the whole number of votes given at said election for and against the convention, respectively, in the manner now prescribed by law in relation to votes cast in general elections; and it shall be the duty of the State Board of Elections to record said certified statement in its office, and without delay to make out and transmit to the Governor of the Commonwealth an official copy of said statement, certified by it under its seal of office.

§ 7. The Governor shall, without delay, make proclamation of the result, stating therein the aggregate vote for and against the convention to be published in such newspapers in the State as may be deemed requisite for general information. The State Board of Elections shall cause to be sent to the clerks of each

county and corporation, at least fifteen days before the election, as many copies of this Act as there are places of voting therein; and it shall be the duty of such clerks to forthwith deliver the same to the sheriffs of their respective counties and sergeants of their respective cities for distribution. Each such sheriff or sergeant shall forthwith post a copy of such Act at some public place in each election district at or near the usual voting place in the said district.

§ 8. The expenses incurred in conducting this election, except as herein otherwise provided, shall be defrayed as in the case of the election of members of the General Assembly.

§ 9. The State Board of Elections shall have authority to employ such help and incur such expenses as may be necessary to enable it to discharge the duties imposed on it under this Act, the expenses thereof to be paid from funds appropriated by law.

2. An emergency existing, this Act shall be in force from the time of its passage.

Mr. CONYERS. Thank you, Mr. Chairman, so it may be viewed with the other recommendations which include the polling in the Gray Commissior itself. One is that no child be required to attend an integrated school.

2. That localities should be granted State funds upon certifying that such funds would be expended for tuition grants (to send, in practice, white children to segregated, all-white private institutions).

3. That the State board of education be empowered to liberalize certain conditions in the distribution of State funds (so that, in practice, tuition grants, transportation costs, institutional fees, and other expenses involved in supporting the multitudinous new white private schools could be met).

So, I think it should be clear, Mr. Chairman, without reading the entire statement which has been permitted to be put in the record, that there is a great deal to be inquired into contrary to the thinking of many of my friends, some of whom have testified before this committee, who have candidly admitted that they have not sought to inquire into the grounds either favorable or otherwise to this second nomination that is simultaneously before this committee for consideration, because I would suggest to you that the directorships of corporations of the nominee which were directly implicated in racial discrimination lawsuits involving title 7 of the Civil Rights Act of 1964 do require your examination, and might I just mention the fact that the nominee here has personally and publicly admitted that he is a longstanding member of the Country Club of Virginia as well as the Commonwealth Club of Richmond.

He has confirmed that he never sought to alter their policies against the admission of black Americans to those clubs, and so many of his supporters, I have heard, contend that his claim that he used the country club membership only infrequently is itself a defense for his voluntarily joining and frequenting openly segregated places of leisure. His volunteering the information that he belongs to these clubs is similarly held in some circles as a defense.

Neither of these facts can hide the fact that a potential Supreme Court Associate Justice saw nothing wrong in such policies as the Commonwealth Club's practice of allowing "colored servants with them to the club only if they are dressed in appropriate attire." The added so-called defense offered by his supporters—that he belongs to the University Club and the Century Association of New York (both of which are integrated)—is a direct affront to the intelligence of the American people. The acquiescence in the face of institutionalized

segregation which, in our judgment, characterizes the career of the nominee, as an educator in Virginia, finds succinct symbolism in his shrug-of-the-shoulder attitude on the issue of membership in segregated country clubs. How can a man who has never raised his voice to such distasteful segregationist practices claim to be philosophically sensitive or at all attuned to the vital issues of particular import to blacks on which he will have to exercise considered judgment as a member of the Supreme Court?

The importance of this issue becomes readily apparent when one realizes that a member of this illustrious body, Senator Edward Brooke, and if, in my judgment unfortunately, if Mr. Powell is confirmed, a fellow member of the Supreme Court, Justice Thurgood Marshall, would be precluded from joining him as a guest at a number of the clubs in which he holds membership.

I only mention for purposes of inviting discussion the fact that is dealt with in some detail, the fact that the law firm of the nominee which reputedly has in its employ over a hundred attorneys, has yet to face the question of equal employment for black attorneys as well as whites in that office.

We would conclude, if it pleases the chairman and members of this committee, that the life style, his view of government as evidenced by Mr. Powell's own activities on the boards of education, his close association with a variety of corporate giants, his public conduct, his membership in the largest all-white law firm in Richmond, his support of segregated social clubs, and his defense of the status quo, are inconsistent with the kind of jurist that we would hope you would see, as we do, is desperately needed for the court in the 1970's and in the 1980's. These considerations take on more weight when one considers the tremendous problems which our country will be facing during those decades.

I might close by raising a different kind of troubling question because we now have had some indication from the questioning that has gone on, and I have attempted to follow it as closely as I could, that the nominee has attempted to make some distinction, to our surprise, about his position in connection with the Gray Commission and the pupil placement schemes that allowed parents, white parents, to take their children out of the public school systems wherever there was an opportunity or a chance that there might be an integrated school system and send them to private schools at the expense of the State. On that note, I would conclude my remarks and with the kind indulgence of the Chair, ask if my counsel be permitted an observation in connection with this statement on the nomination.

(Mr. Conyer's prepared statement follows.)

TESTIMONY BEFORE THE SENATE JUDICIARY SUBCOMMITTEE CONSIDERING THE NOMINATION OF LEWIS F. POWELL TO THE SUPREME COURT OF JUSTICE PRESENTED BY THE HON. JOHN CONYERS, JR. MEMBER OF CONGRESS ON BEHALF OF HIMSELF AND MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS

Mr. Chairman and distinguished members of the subcommittee, I appreciate the opportunity to testify before you on a matter of such great importance as the nomination of Lewis F. Powell as an Associate Justice of the Supreme Court.

In considering Mr. Powell or any other nominee to the Court, no one would deny the Presidential prerogative of examining a potential candidate's philosophy before placing his name before the Senate for confirmation. Nor is there any requirement of the type of philosophy a nominee should espouse. But it also follows

that there is nothing to preclude the Senate from laying bare that nominee's predilections, but indeed it has a responsibility to do so.

Many of the founding fathers feared that nominal "advice and consent" of the Senate on nominations to judgeships would create a dependency of the judiciary on the executive. It was their intent to make the judiciary independent by insisting on joint action of the legislative and executive branches of each nomination. Consequently, as Charles L. Black, Professor of Law at Yale University, has pointed out, such inquiry is consistent with the Senate's constitutional duty in advising on presidential nominations:

> . . . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Competency as a legal technician is not sufficient cause for appointment to the Supreme Court. Since judges by definition must sit in judgment, exercising what Oliver Wendell Holmes called the "sovereign prerogative of choice," they must bring more to their task than a highly specialized technocracy. What a judge brings to bear upon his decision is the weight of his experience and the breadth of his vision, as well as his legal expertise. In the words of Felix Frankfurter, a justice ought to display both "logical unfolding" and "sociological wisdom." Or, as Henry Steele Commager put it: "Great questions of constitutional law are great not because they embody issues of high policy, of public good, of morality." Similarly, great judicial decisions are great not because they are brilliant formulations of law alone, but because they embody highmindedness, compassion for the public good, and insight into the moral implications of those decisions.

I. POWELL'S RECORD ON THE RICHMOND SCHOOL BOARD

For the past several days, the press and Lewis Powell's supporters have been treating us to a view of Mr. Powell which would have us believe that he was the champion of the successful, gradual integration of the Richmond public schools. As *Time Magazine* put it, Mr. Powell, as Chairman of the Richmond School Board, presided over the "successful, disturbance-free integration of the city's schools in 1959."

While it is true Mr. Powell sat on the School Board of the City of Richmond from 1950 to 1961, serving as its chairman during the last eight years of that period, something less than successful integration took place. The opinion of Circuit Judge Boreman, not noted for his liberal views, in *Bradley* v. *School Board of the City of Richmond, Virginia* clearly documents the fact that in Richmond, only a matter of months after Mr. Powell had left the city School Board, "the system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue." [317 F. 2d 429 (1963) at 436.] What the very words of the United States Court of Appeals, Fourth Circuit, indicate beyond a shadow of a doubt is that Lewis Powell's eight-year reign as Chairman of the Richmond School Board created and maintained a patently segregated school system, characterized by grossly overcrowded Black public schools, white schools not filled to normal capacity, and the school board's effective perpetuation of a discriminatory feeder or assignment system whereby Black children were hopelessly trapped in inadequate, segregated schools.

The entire text of the *Bradley* opinion is submitted for inclusion into the record of these proceedings, so that it may be carefully scrutinized by this committee and members of the Senate in order that a more accurate view may be gained of the conditions that existed under the Powell administration.

Under his guidance, the Richmond School Board maintained a "discriminatory 'feeder' system, whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools." To transfer to white schools, they had to "meet criteria to which white students of (the) same scholastic aptitude (were) not subjected." [317 F. 2d, at 430.] The Court found that, including the years when Lewis Powell was the leading policy-maker on the Richmond School Board, the infant plaintiffs in the *Bradley* case were "able to escape from the 'feeder' system only after the District Court made possible their release by ordering transfers." [317 F. 2d, at 436.]

Listen to the words of Judge Boreman, as he describes the state of the Richmond public school system which Mr. Lewis Powell and his supporters so proudly point to as a prime example of his "sensitivity" to the needs of Black people:

> . . . it is clear, as found by the District Court, that Richmond has dual school attendance areas; that the City is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until gruaduation from that school.

The deleterious effect of eight years of Lewis Powell's control over the education of the Black and white children of the city of Richmond is clearly pictured in the statistics cited by the Court:

> As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond public schools. Of the 28 Negro schools, 22 were overcrowded beyond normal capacity by 1775 pupils, and the combined enrollments of 23 of the 26 white schools were 2445 less than normal capacity of those schools. [317 F. 2d, at 432–3.]

As of 1961 when Mr. Powell left the Richmond School Board only 37 Black children out of a total of more than 23,000 were attending previously all-white schools in Richmond.

A fair examination of the evidence suggests that Lewis Powell, in this instance, certainly was no respecter of the decrees of the very Court for which his nomination is now being considered. For in *Brown* v. *Board of Education* [347 U.S. 483.] and *Cooper* v. *Aaron* [358 U.S. 358], the Court had found that it was primarily the duty of the *School Board* to eliminate segregationist practices in the public schools. But as the *Bradley* opinion notes, the Richmond School Board could not even claim that a reasonable start had been made toward the elimination of racially discriminatory practices. [317 F. 2d, at 435.] "The Superintendent of Schools testified that the City School Board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils." [317 F. 2d, at 435.] Rather than admitting that it had failed, the Richmond School Board was blaming the "Pupil Placement Board" and others for what was clearly, as the Court decreed in *Bradley*, its own miserable dereliction of duty. Mr. Powell, in a letter to the City Attorney, dated July 20, 1959, wrote that "The entire assignment perrogative is presently vested in the State Pupil Placement Board, and although the law creating this Board may be shaky, it has still not been invalid. In any event, it is our basic defense at the present time." Here, Mr. Powell is clearly letting a weak governmental agency take the blame for what in fact were his own segregationist policies where pupil assignment was concerned.

Numerous other cases which deal with the conditions of the Richmond schools during the era of Mr. Powell's chairmanship document the horrendous conditions which he helped to perpetuate and institutionalize. In *Warden* v. *The School Board of Richmond*, a special meeting of the School Board of Richmond on September 15, 1958 is shown to have recommended that an all-white public school be converted to an all-black school in order to perpetuate segregation [*Lorna Renee Warden et al.* v. *The School Board of the City of Richmond, Virginia, et al.*]. Obviously Mr. Powell's sanction of the maintenance of a dual system of attendance areas based on race offended the constitutional rights of the black school children who were entrapped by Powell's policy decisions. From the foregoing evidence, it does not appear that Mr. Powell was a neutral bystander during these critical years of Richmond's history. In fact, the record reveals that Mr. Powell participated in the extensive scheme to destroy the constitutional rights that he had sworn to protect.

When Lewis Powell resigned from the Richmond School Board in order to take his place on the Virginia State Board of Education, an editorial in the March 3, 1961 edition of the Richmond *Times-Dispatch* praised him for the fact that "the two new *white* high schools (were) planned and built during his chairmanship." (Emphasis added.) There were those in Richmond who had good cause to be justly proud of the masterful way in which Mr. Powell had perpetuated the antiquated notions of white supremacy through a clever institutionalization of school segregation.

II. POWELL'S RECORD ON THE VIRGINIA STATE BOARD OF EDUCATION

The defenders of Lewis Powell's record in the field of education proudly point to his support of the "Gray Proposals" in the 1950's as proof-positive of his

"courage" in the face of those who were advocating the stiffer line of "Massive Resistance" *vis-a-vis* the *Brown* decision. His early support of these proposals, it can be documented, was translated into his later actions as a member of the State School Board, which, I shall show, also served to foster substantive segregation in the public schools—this time on a state-wide scale.

On August 30, 1954, the Governor of Virginia appointed a Commission on Public Education (known as the "Gray Commission") to examine the implications of the Supreme Court's *Brown* v. *Board of Education* decision of May 17, 1954 for the school segregation issue in the State of Virginia.

The Gray Commission made at least three separate reports to the Governor—on January 19, 1955, June 10, 1955, and November 11, 1955. In summary, these "Gray Proposals" called for legislation which would provide "educational opportunities for children whose parents will not send them to integrated schools." [*Race Relations Law Reporter, Vol. 1., No. 1., 1956, p. 242*]:

> To meet the problem thus created by the Supreme Court, the Commission proposes a plan of assignment which will permit local school boards to assign their pupils in such manner as will best serve the welfare of their communities and protect and foster the public schools under their jurisdiction. The Commission further *proposes legislation to provide that no child be required to attend a school wherein both white and colored children are taught and that the parents of those children who object to integrated schools, or who live in communities wherein no public schools are operated, be given tuition grants for educational purposes.* (Emphasis added. Ibid.)

In order to implement the tuition grant strategy, the Gray Commission called for the amendment of Section 141 of the Virginia Constitution—which had formerly prohibited public funds from being appropriated for tuition payments of students who attended private schools—so that "enforced integration (could be) avoided".

I submit the entire text of the "Gray Proposals" into the record of these proceedings, so that all may view its other recommendations, which include the following:

> 1. That no child be required to attend an integrated school.
>
> 2. That localities should be granted State funds upon certifying that such funds would be expended for tuition grants (to send, in practice, white children to segregated, all-white private institutions).
>
> 3. That the State Board of Education be empowered to liberalize certain conditions in the distribution of State funds (so that, in practice, tuition grants, transportation costs, institutional fees, and other expenses involved in supporting the multitudinous new white private schools could be met).

Thus was the idea of using tuition grants as a means of circumventing the intent and spirit of the *Brown* decision first expressed. The Gray Proposals subsequently became the policy of the State of Virginia and its Board of Education. White parents who refused to send their children to integrated public schools but who could not afford to carry the entire financial burden of sending them to segregated private schools were soon subsidized by publically-funded tuition grants, or "pupil scholarships" as they came to be called.

That Lewis Powell was a support of the tuition grant strategy there is little doubt. The actual minutes of the Virginia State Board of Education show that Powell was present at numerous meetings between 1962 and 1968 at which the regulations governing the payment of tuition grants were approved, the actual appropriations of funds for these grants were made, and annual reports summarizing the total outlay of State and local monies for the "pupil scholarships were given." The total annual outlay in Virginia for these tuition grants was enormous. During the 1962 to 1963 school year, for example, a total of $2,252,995.07 paid from State funds and local funds advanced by the State for the localities was paid out in the form of tuition grants of various forms (Minutes of the Virginia State Board of Education, Vol. XXXIV, p. 84, August 22-24, 1963).

The minutes of the State Board's special meeting of July 1, 1964 clearly indicate that Lewis Powell was present when, by a *unanimous* vote, a resolution was passed which facilitated the filing of tuition grant applications by Prince Edward County parents. This July 1, 1964 vote, which clearly documents Lewis Powell's favorable stance towards the tuition grant strategy in Prince Edward County, Virginia, is a particularly crucial one. For in the case of Prince Edward County, all public schools were closed for five full years, from 1959 to 1964. Lewis Powell was on the State Board of Education for a full three of those five years. As the text of the Fourth Court of Appeals indicates, "the county made no provision

whatever for the education of Negro children; white children attended segregated foundation schools financed largely by state and county tuition grants to the parents." [*Griffin* v. *Board of Supervisors of Prince Edward County*, 339 F. 2d 488]. For five years, only white children attending private schools subsidized by publically funded tuition grants received an education in Prince Edward County. Foundation schools, for white students only, thrived and were supported almost entirely by public funds in the form of tuition grants. They were staffed with the same white teachers as formerly taught in public schools. Despite such findings as those of the Court of Appeals in *Griffin* that such practices were constitutionally impermissible, that the payment of tuition grants to parents desiring to send their children to such schools was enjoined so long as those schools remained segregated, and that the entire tuition grant practice constituted discrimination on racial grounds [339 F. 2d, 486], there has been no indication that Mr. Lewis Powell individually or the State Board of Education collectively ever opposed the perpetuation of this practice.

On July 1, 1964 the minutes of the State Board of Education show that Lewis Powell voted for a resolution authorizing retroactive reimbursement to Prince Edward parents who had paid tuition for their children.s attendance at private schools during the 1963–4 school year. There could be no clearer or more candid declaration of Lewis Powell's intentions with regard to the school segregation issue than his support of the unanimous vote on that day. A random sampling of the entire range of the Virginia State School Board minutes from 1962 to 1968 reveals that on at least eight occasions, Lewis Powell was present at meetings at which specific tuition grants were made, not only in Prince Edward County, but all over the State of Virginia. A Survey of the minutes also has produced proof of at least three instances in which Mr. Powell was present while the "Regulations of the State Board Governing Pupil Scholarships" (tuition grants) were adopted.

Also of prime importance in evaluating Mr. Powell's behavior on the Virginia State Board of Education is the lack of information that he did anything but acquiesce in the face of the State Board's routine accreditation of segregated, all-white, private schools. For example, at a meeting of the State Board on March 26, 1964, with Powell recorded as present, a list of 65 private secondary schools was approved and accredited. These private, all-white, segregated schools included some of the same ones—Huguenot Academy, Surry County Academy, and Prince Edward Academy for which the U.S. District Court for the Eastern District of Virginia found that publically-funded tuition grants were the main support. The minutes of these meetings fail to indicate that Mr. Powell voted against the accreditation of such schools, despite the District Court's decree in *Griffin* that the further payment of the grants for use in those schools was suspended so long as they maintained segregation. Notwithstanding the Federal District Court's admonition that "the State cannot ignore any plain misuse to which a grant has or is intended to be put," [239 F. Supp at 563], the State Board of Education continued to process and approve applications for tuition grants without making any investigation to determine whether the schools were embodying racially discriminatory policies. Looking at the record, it is clear that Mr. Powell was in fact the "champion" of segregation rather than champion of integration as has been suggested.

The question can legitimately be asked—what was it that Lewis Powell was trying to preserve as Chairman of the Richmond and Virginia public schools? Was it merely, as Powell maintained in yesterday's testimony, the preservation of the public school system *per se* that he was unflinchingly interested in? I cannot condone the simplistic acceptance of Mr. Powell's literal word in this matter. For what was the public school system of Richmond in 1958 or even in 1961 but a microcosm of white supremacy—all white, under-attended, well-equipped schools *vis-a-vis* over-crowded, dingy, all-black schools. Cannot Mr. Powell's "saintly" crusade for the presentation of the Virginia-style of "equal" public education be viewed as an inherent desire on his part to preserve a system which to so fine a degree sought to further institutionalize the Virginia schools' own peculiar brand of racism? Are not his lofty pleas for the maintenance of public education at any cost often refuted by a record which finds Mr. Powell rejecting the obviously vulnerable positions in favor of more sophisticated schemes which have effectively preserved segregation.

III. POWELL'S DIRECTORSHIP OF CORPORATIONS IMPLICATED IN RACIAL DISCRIMINATION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race. Powell is a member of the Board of Directors of 11 corporations. (His firm also represents many of these corporations.)

It is vital that the distinction be drawn between Mr. Powell's behavior as an attorney and his behavior as a private citizen. One could argue that an attorney should not be held accountable for his actions due to the inherent nature of legal advocacy. But, as a member of the Board of Directors of corporations which have been adjudged guilty of violating various provisions of Title VII, Powell cannot automatically escape blame. A Director is by definition a policy-maker and shares the legal responsibility of the conduct of his corporation.

Lewis Powell is both the legal counsel and a Director of the Philip Morris, Inc., one of Virginia's largest tobacco companies (he has been a Director since 1964). Philip Morris has been the defendant in at least one major Title VII case, *Quarles* v. *Philip Morris, Inc.* [279 F. Supp 505]. Here, a civil rights action was brought by a group of Blacks in a class action. The U.S. District Court held that the evidence established that two Black employees had been discriminated against as to wages. The discrimination on the basis of race against these employees, the Court held, had been clearly proven. The Court also held that Philip Morris, Inc. had discriminated against Quarles and the Black employees hired in the prefabrication department prior to January 1, 1966 with respect to advancement, transfer, and seniority. It held furthermore that prior organization of departments on a racial basis had prevented Blacks from advancing on their merits to jobs open only to whites. New "non-discriminatory" employment policies had only partially eliminated disadvantages, the court ruled. Plaintiffs were awarded relief to compensate for damages suffered as the result of this blatant example of employment discrimination. According to the records of the Equal Employment Opportunity Commission, the Chesapeake & Potomac Telephone Co., another corporation on which Mr. Powell serves as a Director, is currently being investiagted for possible Title VII violations.

IV. POWELL'S BELONGING TO RACIALLY SEGREGATED CLUBS

Mr. Powell has personally and publically admitted that he is a long-standing member of both the Country Club of Virginia and the Commonwealth Club of Richmond. He has confirmed that he never sought to alter their policies against the admission of Blacks. Powell-supporters have been contending that his claim that he used the country club membership largely to play tennis and has only infrequent lunches at the Commonwealth Club [*New York Times*, October 26, 1971], is in itself a defense for his voluntarily joining and frequenting openly-segregated places of leisure. His volunteering of the information that he belongs to these clubs is similarly held by his supporters as a "defense."

Neither of these facts can hide the fact that a potential Supreme Court Associate Justice saw nothing wrong in such policies as the Commonwealth Club's practice of allowing "colored servants with them to the club only if they are dressed in appropriate attire." The added so-called "defense" offered by his supporters—that he belongs to the University Club and the Century Association of New York (both of which are integrated)—is a direct affront to the intelligence of the American people. The acquiescence in the face of institutionalized segregation which characterizes Lewis Powell's career as an educator in Virginia finds succinct symbolism in his shrug-of-the-shoulder attitude on the issue of membership in segregated country clubs. How can a man who has never raised his voice to such distasteful segregationist practices claim to be philosophically sensitive or at all attuned to the vital issues of particular import to Blacks on which he will have to exercise considered judgment as a member of the Supreme Court?

The importance of this issue becomes readily apparent when one realizes that a member of this illustrious Body, Senator Edward Brooke and, if Powell is confirmed, a fellow member of the Supreme Court, Justice Thurgood Marshall, would be precluded from joining him as guest at either of the aforementioned clubs.

V. EMPLOYMENT DISCRIMINATION WITHIN POWELL'S LAW FIRM

Hunton, Williams, Gay, Powell & Gibson (his law firm) at the present time employs no Black attorneys in a work force of over 100 attorneys. One or two years ago, a Black Richmond attorney, Je Royd Greene, wrote the placement office of Yale, his alma mater, and requested that it stop scheduling on-campus interviews with Hunton, Williams, charging that the firm's senior partners (including Powell) had a clearly enunciated policy which forbade the hiring of any Black attorneys—ever. Greene claims that his charge is based on a statement attesting to this notion made by one of the associates in Hunton, Williams itself. Notwithstanding Powell's denial, the fact remains that his law firm has never and does not yet employ any Black attorneys. This information is consistent with Powell's record of racial discrimination in other areas of his activities.

VI. POWELL AND THE RICHMOND ANNEXATION ISSUE

A common tactic supported by the white power structure in Virginia has been to annex areas to city areas, thereby diluting much of the Black voting strength. Recently, Richmond annexed part of the surrounding white suburbs. The net effect of this annexation was to decrease the Black population of Richmond from 55 percent down to 42 percent.

In *Holt* v. *Richmond* [U.S.D.C., ED. Va.], a suit was brought under Section 5 of the Voting Rights Act to 'de-annex' the suburbs. The suit was brought by a Black Richmond citizen as a class action on behalf of Richmond's Blacks. The Justice Department has disclosed documents which show that Powell urged Attorney General John Mitchell to reverse his ruling that Richmond's annexation of suburban areas violated Black voting rights (see the Chicago *Sun-Times*, October 30, 1971). Last August, Powell wrote a letter in an unofficial capacity—acting as an interested citizen—claiming that 43,000 suburban residents were being annexed to expand the city's tax base, not to dilute the voting power of the city's Blacks. The Justice Department, however, refused to withdraw its objection. It was held in a recent District Court opinion, that the primary purpose and effect of the annexation was to dilute the voting strength of the black citizens of the City of Richmond, a view in direct contradiction to Powell's.

Mr. Lewis Powell's lifestyle, his view of government as evidenced by his activities on the boards of education, his close association with a variety of corporate giants, his public conduct, his membership in the largest all white law firm in Richmond, his support of segregated social clubs, and his defense of the status quo, are inconsistent with the kind of jurist needed for the Court in the 1970's and '80's. These considerations take on more weight when one considers the tremendous problems which our country will be facing during those decades.

A different kind of troubling question is now being raised. One ought to closely examine the character of the nominee. One should inquire whether he has fully revealed the answers sought by the Committee. Without hastening to incorrectly interpret the answers given yesterday, it is hoped every Senator will give careful consideration to the matter of his nomination in its entirety, and to question whether the nominee has been completely candid in answering questions concerning his past.

The CHAIRMAN. All right. Have you got any questions?

Senator BAYH. Just one or two.

The CHAIRMAN. I am going to turn it over to you and when you get through we will recess until 10:30 tomorrow morning.

How long a statement do you have?

Mr. MARSH. About 5 minutes.

Senator BAYH. Shall I wait until Mr. Marsh is through?

Mr. MARSH. Thank you, Senator. I am here not only as assistant to Congressman Conyers but also as the official spokesman for the black attorneys of the State of Virginia, the Old Dominion Bar Association. We have filed our statement with the Senate Judiciary Committee, and this bar association went on record, consisting of all the black lawyers, 60 or 70 in the State of Virginia, as opposing both nominations.

Senator BAYH. Would you like to have this statement put in the record in full at this time?

Mr. MARSH. Yes, I would; in addition to a one-page supplement which I would like to have passed around.

Senator BAYH. Without objection it will be included in the record.

(The statement follows:)

NOVEMBER 8, 1971.

STATEMENT OF THE OLD DOMINION BAR ASSOCIATION OF VIRGINIA BY WILLIAM A. SMITH, PRESIDENT AND HENRY L. MARSH, III, CHAIRMAN OF JUDICIAL APPOINTMENTS COMMITTEE

Gentlemen of the committee: the question posed by the nomination of Lewis F. Powell, Jr., is whether a man who has for much of his life waged war on the Constitution of the United States should be elevated to the Supreme Court.

At no time in the history of our nation has it been more necessary to carefully scrutinize the attitude and record of persons nominated for the Supreme Court.

We believe that the survival of our nation depends on the recognition and satisfaction of the aspirations of black and other minority citizens for equal opportunity and greater participation in America's promise and that this goal will not be achieved by packing the Supreme Court with men with proven records of hostility to the Equal Protection Clause of the Fourteenth Amendment.

Since Mr. Powell has had no judicial experience, he must be evaluated and judged on the basis of his record. Lewis Powell's record is spread in the pages of the law books containing the opinions of the federal courts at all levels and on the minute books of the boards on which he served. An examination of that record makes it clear that Mr. Powell is not qualified to serve on the Supreme Court because (1) he has consistently voted to resist or ignore the decisions of the Supreme Court requiring racial integration of public schools; (2) he has supported measures and schemes which frustrate compliance with the law; (3) he has permitted those subject to his policy to violate Title VII of the Civil Rights Act of 1964; and (4) he has practiced racial segregation and discrimination in his private and professional life.

During much of the past 20 years of his life, he has been continuously voting and acting to fight the implementation of the decision of the Supreme Court in the school cases in the State of Virginia. While calling for law and order in his public statements, he has repeatedly and consistently demonstrated by his public deeds a wanton disrespect for law which is rarely found in a nominee to the Supreme Court.

For convenience, Mr. Powell's record will be discussed under the following headings.

1. Service on the Richmond School Board
2. Position on the Gray Commission Proposal
3. Service on the State Board of Education
4. Directorship of corporations practicing illegal racial discrimination

SERVICE ON THE RICHMOND SCHOOL BOARD

Mr. Powell was a member of the Richmond Public School Board from 1950 until 1961, serving as its Chairman from July, 1952 until 1961.

In such capacity and in his service on the State Board of Education, he was required to subscribe the oath of office which states in part:

> "I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Virginia . . ."

During the period subsequent to the Brown decisions, he consistently voted to resist attempts to seek compliance with those decisions.

The copy (attached as Exhibit "A") of the opinion of the Court in *Bradley* v. *School Board of City of Petersburg*, 317 F. 2d 429 (1963) demonstrated (1) the post-Brown conduct of the school board under Powell's leadership; (2) certain specific actions of the board which frustrated attempts to integrate the schools.

Position On The Gray Commission Proposal

Supporters of Mr. Powell have suggested that he deserves credit because he supported the Gray Commission Proposal. The attached summary of this proposal demonstrates its lawless nature.

The salient fact is that Powell supported the Gray Commission Proposal which contemplated and resulted in the expenditure by the State of Virginia of public funds to support private, racially segregated elementary and secondary schools in order to frustrate the implementation of the *Brown* decision. A summary of the Gray Proposal can be found in Race Relations Law Reporter, Volume 1, No. 1, pages 241–247 (1956). A copy of this Proposal is submitted as Exhibit "B".

SERVICE ON THE BOARD OF EDUCATION

While serving on the State Board of Education (1961–69), Powell consistently voted to frustrate the implementation of the *Brown* decision in Virginia. On July 1, 1964, he voted to pay retroactive tuition grants to the white parents of Prince Edward County in an obvious attempt to avoid the effect of federal court decisions forbidding payment of such grants. This action was subsequently en; joined by the federal court. See *Griffin* v. *Board of Supervisors of Price Edward County*, 339 F. 2d 486 (1964). 489, 490.

The *Griffin* opinion, enclosed herein as Exhibit "C" also contains a summary of other actions of the State Board of Education which reflected hostility to the *Brown* decision.

Because of the above stated reasons, the Old Dominion Bar Association urges this committee to recommend against the confirmation of Lewis F. Powell, Jr. We renew our previous request to be heard in opposition to this nomination.

Yours truly,

WILLIAM A. SMITH,
HENRY L. MARSH III.

NOVEMBER 9, 1971.

SUPPLEMENT TO THE STATEMENT OF NOVEMBER 8, 1971 BY THE OLD DOMINION BAR ASSOCIATION OF VIRGINIA TO THE SENATE JUDICIARY COMMITTEE

LEWIS POWELL'S DIRECTORSHIP OF PHILIP MORRIS, INC.

This Congress has recognized the importance of granting equal employment opportunity to blacks, women and other minorities by enacting Title VII of the Civil Rights Act of 1964. It is pertinent to inquire if a nominee to the Supreme Court has demonstrated in his record, a hostility to equal employment opportunity.

Lewis Powell became a Director of Philip Morris, Inc. in 1964. On 4 January 1968, a Federal Court in Virginia found that Philip Morris was guilty of discrimination against its black employees.

The Court, in the case of Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (4th Cir. 1968) held as follows:

"The court finds that the company's discrimination against Briggs and Mrs. Oatney is an intentional, unlawful employment practice. Relief under 706(g) [42 U.S.C. 2000e–5(g)] bringing their wage rates to $2.55 per hour is appropriate."

* * * * * * *

"The court finds that the defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles, and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely affects the conditions of employment and opportunities for advancement of the class." 279 F. Supp. at 519.

A copy of the Quarles opinion is attached hereto as Exhibit D. [Filed with the Committee.]

As a Director of Philip Morris, Inc., Mr. Powell had a responsibility for the conduct of the Corporation. In view of the importance of the implementation of Title VII to the effort to achieve equal opportunity, this aspect of Mr. Powell's record falls short of the standard expected of a Justice of the Supreme Court.

Mr. CONYERS. Mr. Chairman, would you yield to me for the purpose of describing counsel a little more fully before the committee? I neglected to do that. He is the vice mayor of the city of Richmond, Va., serving his third consectuive term as a member of the city council. He is a member of the executive committee and former past chairman of the black elected officials of Virginia, a partner in the law firm of Hill, Tucker and Marsh of Richmond, Va.; a distinguished civil rights attorney in his own right who has served as counsel in nearly all of the civil rights cases that have arisen in the State of Virginia. He is chairman of the judicial appointments committee, and the spokesman for the Old Dominion Bar Association of Virginia. He has been a cooperating attorney with the NAACP legal defense fund, and a member of the NAACP national legal committee and various other professional organizations.

Mr. MARCH. Thank you, Congressman Conyers, and Senator Bayh. I am not going to repeat anything that has been said earlier. I do want to reiterate the points mentioned by Congressman Conyers, and dwell on four points. On the service on the Richmond School Board, Mr.

Powell's position on the Gray Commission proposals, his service on the State board of education, and his directorship of corporations practicing illegal discrimination.

With respect to his service on the board I point out that he, as all other officers in Virginia, are required to do, was required to take an oath which reads, "I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Virginia." This is an oath that Mr. Powell took in 1950, and he took whenever he was sworn in for a term on either of the boards on which he served, which lasted for about 20 years. During the period subsequent to the *Brown* decision notwithstanding his oath he consistently voted to resist attempts at compliance with that decision.

Congressman Conyers had gone into some of those votes and I would just like to stress with respect to the State board of education, that this board had the responsibility of administering the tuition grant program in Virginia, which was the outgrowth of the Gray proposal. Mr. Powell was present, the minutes of these meetings show that he was present, when the standards were set up, when private schools were created, as substitutes for public schools, when standards were set up for the administering of tuition grants.

When localities refused to pay for grants Mr. Powell was present and votes were taken to pay the money directly to the parents. On one occasion which his proponents purport to slough over on July 1, 1964, after 11 years of litigation when the parents in Prince Edward County tried to prevent a distribution, paying tuition funds to the white parents, Mr. Powell was present representing white and I was present for the black parents, and he voted to pay those retroactive grants and he must have known this was an illegal act. The Federal courts subsequently enjoined this act. But this is an example of the type of action that was taken by the nominee.

The tuition grant program in Virginia lasted until 1969, when it was struck down by the Second Circuit Court attack that was mustered against it. Mr. Powell was on the board when the first attack was instituted, and when the grant program was partially enjoined in 1964 he was still on the board when the grant program was finally enjoined in 1969, so his complicity in the tuition grant program which paid some years from $2 to $3 million to parents attending segregated schools at public expense to avoid integration is documented.

I might point out that all of the statements made by Congressman Conyers are not opinions. They are reported decisions of Federal courts, made by judges, and I think that it is unfortunate that the Powell nomination is not receiving the scrutiny that it ought to receive from this body.

Finally, I would like to address myself to the question involved in the implications of this nomination to the Nation. I think that any Supreme Court nomination has a tremendous effect on the administration of justice in this Nation. It has an effect on lower court judges, who have been groping and grappling for solutions. It has an effect on persons in the white community who are being urged to take a stand on controversial issues, and it has an effect on black citizens who are struggling to seek equal opportunity. We suggest, the Old Dominion Bar Association suggests, to put Mr. Powell on the Court in face of his record, his record of continued hostility to the law, his

continual war on the Constitution, would be to demonstrate to us that this Senate is not concerned for the rights of black citizens in this country. Those of us who are working within the system, who have been working within the system for years, have been disturbed by many setbacks even in the Supreme Court, even in the Warren court. Freedom of choice was first tendered to the Warren court in 1963 in the Atlanta case. The court ignored it. It was tendered in 1965 in the case of Bradley against the School Board of Richmond, again a case which Mr. Powell had something to do with in that he had been formerly a member of that board. The court ignored the freedom of choice question then. We tendered this question again in 1968 in the New Kent case. Five years after it had first been tendered, the Supreme Court finally struck it down.

There are many of us who have been concerned about the pace of the Warren court. It has been the only thing we have had to work with, and we urge the Senate not to take that one weapon away from those of us who are struggling within the system to make it work for the minorities in this Nation. I will be happy to answer any questions that you may have.

Senator BAYH. I appreciate the fact that you gentlemen have taken the time to give us your thoughts. You certainly have raised some questions that have not been raised earlier, that I intend to explore. Let me consider some of these questions. I tend to follow the Professor Black philosophy that you have mentioned two or three times in your statement, Congressman Conyers, if a Member of the Senate feels in good conscience that a man sitting on the Court would do damage to the country he should vote against him.

The question that some of us are torn about is where do we draw the line? Do we look at each mominee and judge him if he is consistent with us on all points and on all issues or are there certain areas that will do irreparable damage if he is out of step or out of touch with what we feel is the right position and others that would be not considered thusly.

I felt in the whole area of equal rights, civil rights, basic human rights is that area where if a nominee is truly out of touch, out of step, I would consider him to fail.

Let me explore some other areas specifically. We have to look at specifics. Mr. Marsh, the Hill, Tucker & Marsh law firm, is that an all-black firm?

Mr. MARSH. At the present time. We have had white attorneys in our firm. It is difficult to find attorneys of either race.

Senator BAYH. I am trying to draw a distinction—I do not know whether it has been a steady pattern or not.

Mr. MARSH. No, sir. I can answer that——

Senator BAYH. Is an all-black law firm being as bad as an all white?

Mr. MARSH. No, sir; we have had two or three white interns, one who worked with our firm left to go on his own a year or so ago, so we have an open equal opportunities policy. We do not have a segregationist law firm.

Mr. CONYERS. Of course, very well known white lawyers we have heard of being discriminated against entering into a black firm, but as members of the black bar, we know that the practice is very closed in some of the larger white firms and specifically as a matter of policy

they exclude black students regardless of qualifications and young lawyers for consideration to membership in the firm. That is fairly well established. There has never been reported any reciprocal discrimination going on.

Senator BAYH. I want to draw a distinction in my own mind. The Old Dominion Bar Association, I suppose it is an all-black bar as sociation?

Mr. MARSH. I think it is at the present time.

Senator BAYH. This white club business, I have resigned from a couple of clubs myself when I found out they were following this type of pattern. In my own mind there is a question whether just membership in a club is significant. If it is part of a pattern, it disturbs me, I trust we do not have any evidence in Mr. Powell's background, as we did in Judge Carswell's background, where he was a member of an all-white public club that went through this incorporation, as you will recall, and was made into a private club with just the purpose of permitting the club then to evade or avoid the Supreme Court ruling that the public facilities not be discriminatory.

Mr. MARSH. I do not know of any such information. However, in my opinion it might very well be that the Country Club of Virginia is a public accommodation within the language of title II of the Civil Rights Act.

Senator BAYH. That was not the difference in the Carswell matter. It was a private—well, maybe it is, I do not know.

Mr. MARSH. Well, I think the distinction is this, Senator. It might very well be. I have handled litigation in Richmond against a so-called private golf course and the court held that that golf course was in effect a public accommodation because of interstate matches and other things and the very same thing appears to be true with some of these clubs. Now, we frankly have not had time to attack them and I am not suggesting here that it is. I am just—you raised the question about the public accommodations and I am saying that is an issue which in my mind is open but I am not making any accusations. Frankly, I do not think membership in a segregated club alone would be a sufficient basis for disqualifying a nominee if he is otherwise qualified. I do think that circumstance taken in context of all of the other things present with respect to Mr. Powell, is consistent with a pattern of public action on a public record, in his law firm, in his firm taking fees for representing Prince Edward County and other local governing bodies, resisting the *Brown* decision, his firm not hiring black attorneys, his firm or his being a director of Philip Morris which was found guilty of violating title 7 over a long period of time after he was a director. All of these things become a part of a pattern which I think does add significance to his membership.

Senator BAYH. I was concerned about the thrust of the Gray Commission report. I had been, of course, for some time, so much so that I asked Mr. Powell specifically yesterday a series of rather lengthy questions. The most specific one was responded to by Mr. Powell—

> I was not a member of that commission, I did not support its provision.
> Senator BAYH. You did not support its provisions?
> Mr. POWELL. No, I did not.

Now, there seems to be a little inconsistency there with what you gentlemen have just said. Do you have anything further to say to elaborate upon this before we look into it?

Mr. MARSH. Well, yes. I certainly think that the Gray Commission proposal was, as Congressman Conyers pointed out, a way of subsidizing segregated education at public expense for those persons who did not wish an integrated education. Mr. Powell's role from 1961 until 1969 on the State board of education was to administer this tuition grant program.

Senator BAYH. I asked was the Gray Commission report implemented into law by the legislature of Virginia?

Mr. MARSH. Yes, sir. Not in its initial form, but the essence of that proposal was section 141 of the Virginia constitution was amended, and the tuition grant program was set up in Virginia and existed until we knocked it out in court litigation. Mr. Powell was a member of the State board of education and later chairman of that board and had the responsibility of administering that program, and the records show many meetings when he was present and voting on various aspects of that program, and I have not heard of any dissent on his part. I was living in Virginia, and handling litigation at the time. It would have been news if he had dissented from some of the actions taken by the board and I know of no such action. So, I think that I do not understand his testimony. I was not here, but I think that the public record is replete with his complicity in the tuition grant program in the State of Virginia. He was a defendant each time we undertook to attack the program. He was enjoined by the court to stop paying the grants in 1969 and I do not see how—if he disagreed with it it must have been a big secret.

Senator BAYH. As I recall, and I am trying to look at the record here, he alluded to the horns of a dilemma, he did not say it this way, I suppose he said it better, but is it not possible that a member of the school board would have been on the horns of a dilemma where the Virginia State law said one thing and *Brown* v. *The Board of Education* said something else?

Mr. MARSH. Senator Bayh, I think that it is a fortunate thing for the Senate on this occasion because we have an opportunity to view Mr. Powell's actions in the eye of a hurricane, if you will. He was part of the scene, and whether or not he did what any reasonable person would do is not the question. The question is his loyalty and his fidelity to the Constitution of the United States and we suggest that there were those of us in that time who did take the position against the Gray proposals.

Senator BAYH. Was he not also subject to the laws of the State of Virginia? This Gray Commission matter is important to me. I am trying to make an objective judgment in a case which it is not easy to be objective about. I want to find the answer to these questions and you can be helpful here; just what responsibility does a school board member have, is he an administrator of a law that is passed, of a system that is established by the State legislature, or is he in a system where he can go out on his own?

Mr. MARSH. I think it is a good and fair question and I think the oath I read to you reveals part of the answer, "I swear I will uphold the Constitution of the United States." That is in the Virginia constitution, and that is first.

Senator BAYH. What else does it say?

Mr. MARSH. "I swear that I will uphold the constitution and the laws of the State of Virginia," but in our system of laws Mr. Powell must

know as an outstanding attorney that under the supremacy clause the laws of the United States prevail. So we think that although he had an obligation, his obligation was to the highest law and that under our system was the law of the Constitution of the United States. We suggest that therein lies the defect of the nomination. Maybe Mr. Powell did what any reasonable man would have done. But any reasonable man would not necessarily be entitled to sit on the Supreme Court.

Senator BAYH. We have been told that Mr. Powell urged against "massive resistance," is that accurate?

Mr. MARSH. I do not have any information to deny that. I have reason to believe it is true.

Senator BAYH. Well, then, would any reasonable man in the same and similar circumstances in the State of Virginia at that given time have urged against massive resistance?

Mr. MARSH. Certainly many of us did. All during the tuition grant programs, many whites stayed in the public schools, notwithstanding Mr. Powell's administration of the tuition grant program. Many of them stayed in schools that were ultimately black. Many Virginians did not take part in the lawlessness. I think the thing you have to keep in mind is that Mr. Powell did not have just two alternatives. He had three. The massive resistance strategy was foolish, and Mr. Powell was——

Senator BAYH. People in Prince Edward County did not think it was.

Mr. MARSH. That was the only place in the country, I would submit, that that happened and I might submit also that Mr. Powell did cooperate, attempt to cooperate, with them on July 1, 1964, by paying those, voting to pay those retroactive grants. But the point I am making is this, that because Mr. Powell had sense enough to recognize the futility of the massive resistance program and to go for a more sophisticated scheme of evading the *Brown* decision does not affect your decision. The Constitution outlaws the ingenious as well as the obvious scheme, and the fact that Mr. Powell had the knowledge to know how to evade the Constitution more effectively, as he did in the city of Richmond during the massive resistance era, without having integration, does not commend him to the Supreme Court. In other words, during the massive resistance challenge in Richmond Mr. Powell did not urge compliance with the Constitution, he urged a form of segregation which would not cause white and black children to be denied school but would permit them to have segregated schooling.

In Virginia until almost 1968 or 1969, we had very little desegregation of the schools. In most of Virginia desegregation was very slight until after the *New Kent* case was decided so we had a sad saga in Virginia's history where more than a generation of children received segregated education notwithstanding the Supreme Court, because of the actions of men like Mr. Powell who, true, rejected massive resistance, but instead embraced another form of segregation which worked when obviously massive resistance would not have worked.

Mr. CONYERS. Would the gentleman yield to permit me to emphasize that point. That is to say that to be opposed to massive resistance and to support a pupil placement program which would effectively

continue segregation in the face of court orders based on constitutional interpretations is really not to commend the nominee to this body by any stretch of the imagination. The massive resistance plan, as has been explained to me time and time again, was a plan that was based upon the theory that nobody would go to school if we had to integrate, there would be no schools for anyone, a plan so simple, so obviously destined to be overturned in the courts, that a person who really wanted to devise a more effective scheme of successfully segregating even in the wake of the *Brown* decisions would obviously turn to another alternative, and that is exactly what Mr. Powell did; and we say, Senators, not as an unwitting tool, or that he was dragged along by a State authority or laws over which he had no control; I think we have to put the gentleman in the context of the prestige and the influence and the power that he wields in the State of Virginia. He is clearly one of the 10 most influential citizens of that State, and I would suggest that his influence does not stop at the Arlington city line by any means.

A past president of the American Bar Association, we are talking about a man of great legal skill who was able to lead, and we are suggesting that, without trying to exaggerate his involvement, he was one of those who helped plan the alternative, the successful alternative, to massive resistance, and I think that if those facts could be developed, and we would be willing to continue to work on this matter so that these questions would be raised to the satisfaction of the members of this committee so that they might be spread upon the record for the rest of the Members in your distinguished body, we think nothing could be more important because if we are confronting Members who are ready to say, "Yes, I will allow the life work and the attitude, the social views, of a nominee to be considered as a part of the review that I must make under the powers of a Senator to advise and consent, to give advice and consent to the President," then these matters which are available, and have not been gone into thoroughly, should certainly lead you to the conclusions that I have come to as a Member who approached the subject with no particular partisan patience, who has no knowledge personally of the nominee, have had only the most casual reports about him, none of which were particularly negative, but an investigation and research into his roles as a member of the board in the Richmond school system and later chairman in the State board system, were so persuasive to me, and to my other colleagues, that we felt a responsibility to hope that the inquiries along the line that you have already raised now, Senator Bayh, would be further pursued, because we are very certain that the role of this gentleman during these tremendously important and difficult days for the State of Virginia will begin to take on its true characterization and I do not think it will be favorably interpreted for the nominee.

Senator BAYH. Thank you.

I think the fact that you have raised these questions will be given consideration by this committee. I appreciate the fact that you gentlemen have taken the time to come.

Senator BURDICK. I have not heard the direct testimony so I will have to read it.

Mr. MARSH. One further point, Senator, if you will indulge me, on the massive resistance period: When a group of blacks applied to a white school in Richmond, 2 weeks after the school had started they still had not been admitted; the school board voted by unanimous vote to convert that school—this was during the massive resistance era—and because of this vote all of the white teachers and all of the white children were taken out. Then the children were admitted but it was a black school. This is an example of the kind of leadership that did avoid school closing, but at what price. If it had stopped after that period, we might have one view, but the tuition grant program continued until 1969; so we think that there is a pattern here which bears some looking into, and it is all spread on the minutes of the board and in the court records. It is not conjecture.

We think we have an advantage in this situation that we do not have in the case of Mr. Rehnquist. We did vote to oppose him too, the lawyers in Virginia did, but I think in this situation we do have an advantage which I am concerned not enough inquiry is being made into.

Senator BAYH. Will you tell us why the NAACP and the National Conference of Civil Rights leadership has not taken a similar position?

Mr. MARSH. They will have to speak for themselves, Senator Bayh. I have to do what my conscience tells me is right, and at a great sacrifice, I might add, but they will have to answer for their actions. I can only say that I have lived in Virginia for the last 10 years and I fought in all kinds of cases, and frankly, Mr. Powell has been very friendly to me personally, it is not that he is not a gentleman, he has been very cordial to me, I like him as a person, and I am aware of the power he holds in Richmond, Va., but I have no problem of making a decision to let this committee know what I know about the law of the United States and how it has been frustrated in the State of Virginia and how it would be a serious mistake to put a man on the court who has participated in that frustration.

Senator BAYH. Thank you very much, gentlemen.

I do appreciate the time you have taken and the contribution you have made to our hearings.

Mr. CONYERS. Mr. Chairman, might I ask for inclusion of a couple of matters in the record? One would be the *Bradley* v. *The School Board of Richmond* decision, which is explicit about the conditions and attributes to whom the responsibility lies for the dual and segregated school system existing, and also the report of the Commission on Public Education, which is an explanation of the so-called Gray Commission.

Senator BAYH. All right, it will be put in the record.

Mr. CONYERS. I thank the Chairman, and finally, Mr. Chairman, we have copies, which are incidentally, exhibits in a desegregation case, of the law firms who were compensated at State expense for defending school boards in Virginia during the years of 1957, 1958, and 1959 and 1960, and the Powell firm figures fairly conspicuously in the defense of school boards and for that purpose, of course, we would like to have that included so that it may be brought to the attention of your colleagues and scrutinized for whatever value it may be.

69-267—71——26

Senator BAYH. Without objection, we will put that in the record. (The material referred to follows:)

Case and payee	Total	State	Fee	Expense
1961				
Swann v Charlotte-Mecklenburg Board of Education (amicus curiae brief) Hunton, Williams, Gay, Powell & Gibson	1,436.90	1,436.90	1,225.00	186.90
Swann v. Charlotte-Mecklenburg Board of Education: Hunton, Williams, Gay, Powell & Gibson	22,225.95	22,225.95	20,195.00	2,030.95
United States v. Franklin City School Board: Moyler & Moyler, Mays, Valentine, Davenport & Moore	3,789.29	1,894.64	850.00	5.54
Adams v. Elliott Richardson, HEW v. School Board, Thompson v. School Board: Bateman, West & Beale	1,978.39	989.18		
Newport News controversy: Bateman, West & Beale	1,500.00	750.00	1,500.00	
Beckett v. Norfolk: Wilcox, Savage, Lawrence, Dickson	32,920.58	16,460.29	23,677.16	9,243.42
Allen v. School Board of Accomack County: Mays, Valentine, Davenport & Moore	1,744.81	872 40	1,700.00	44.81
Lee v. Smith and Cumberland County School Board:				
(a) H James Edwards and Associates (printers)	1,731.41	865.70	1,731.41	
(b) William C Carter	10,728.69	5,364.34	10,728.69	
(c) Michael & Dent	8,068.10	4,034.05	8,068.10	
(d) C. Overton Lee	196.80	89.40	196.80	
(e) Philip J. Hirschkop	4,000.00	2,000.00	4,000.00	
Total	24,725.50	12,362.75	24,725.50	
1960				
Allen v. Prince Edward County (study made pursuant to district court order): Dr. George Zehme	3,149.72	3,149.72		3,149.72
Thompson v. School Board of Arlington County: James H .Simmonds	4,090.63	2,000.00	4,000.00	90.63
Blackwell v. School Board of Fairfax County. Wood, Testerman & Simmonds		1,866.50	1,866.50	
Blair v School Board of Grayson County Campbell & Campbell		825 00	825.00	
Crisp v Pulaski County School Board. Crowell, Deeds & Nuckols, Gilmer, Harmon & Sadler	4,833.72	2,250.00	4,500 00	333.72
Brooks v School Board of the Galax· Crowell & LaRue	830.25	550.00	775 00	55.25
Jones v School Board of City of Alexandria. Philips & Wagner	5,000.00	2,500.00	5,000.00	
Allen v School Board of Prince Edward County: Hunton, Williams, Gay, Powell	1,894.85	1,894.85	1,500.90	394.85
Beckett v. School Board of Norfolk (copies of transcript): Horace Weiss	76.20	76.20		76.20
Do	41.10	41.10		41.10
Walker v. School Board of Flood City: William H. King	1,455.36	727.67	1,262.50	192.86
Total for 1960	17,971.67	15,881.04	19,729.00	4,334.33
1959				
Allen v. Prince Edward County (copies of pleading) Lewis Printing Co	193.40	193.40		193.40
Arlington school case: Tucker, Mays, Moore & Reed	2,547.55	2,547.55	1,700.00	847.55
Charlottesville school case· Tucker, Mays, Moore & Reed	2,773.27	2,773.37	2,250.00	523.37
Thompson v City School Board of Arlington Simmonds & Bali	4,092.59	4,092.59	4,000.00	92.59
Beckett v. Norfolk, Kilby v Warren County, Allen v Charlottesville: Williams, Mullen, Pollard & Rogers	7,558.95	7,558.95	7,500.00	58.95
Beckett v. School Board of Norfolk (copy of transcript): Horace Weiss	27.30	27.30		27.30
Kilby v School Board of Warren County· W J. Phillips	2,000.00	2,000.00	2,000.00	
Newport News school case: Tucker, Mays, Moore & Reed	600.00	600.00	600.00	
Prince Edward County school case: Tucker, Mays, Moore & Reed	625.00	625.00	625.00	
Adkinson v. School Board of Newport News Robertson, Riely, Moore (State's part of fee)	10,000.00	10,000.00	10,000.00	
Allen v. Prince Edward County (copies of pleadings): Lewis Printing Co	45.00	45.00		45.00
Allen v. School Board of Prince Edward County: Hunton, Williams, Gay, Moore	4,555.08	4,555.08	4,500.00	55.08
Tones v. School Board of city of Alexandria: Lewis S. Pendleton	300.00	300.00	300 00	
Total for 1959	35,318.14	35,318.14	33,475.00	1,843.24

Case and Payee	Total	State	Fee	Expense
1958				
Thompson v. County School Board of Arlington. Simmonds, Culler, Damn & Coleburn	2,830.50	2,830.50	2,500.00	330.50
Newport News School case: Tucker, Mays, Moore & Reed	300.00	300.00	300.00	
Norfolk School case. Tucker, Mays, Moore & Reed	300.00	300.00	300.00	
Prince Edward County School case Tucker, Mays, Moore & Reed	400.00	400.00	400.00	
Charlottesville School case Tucker, Mays, Moore & Reed	1,100.00	1,100.00	850.00	250.00
Prince Edward County School case. Hunton, Williams, Gay, & Moore	2,867.29	2,867.29	2,500.00	367.29
Arlington School case. Tucker, Mays, Moore & Reed	4,699.11	4,699.11	3,750.00	941.11
Allen v. School Board of City of Charlottesville Mary W. Bible	19.64	19.64		19.64
Kilby v. Warren County (copies of transcript). Mary W. Bible	48.45	48.45		48.45
Allen v. Charlottesville Mary W. Bible	34.20	34.20		34.20
Atkins v. Prince Edward City Hunton, Williams, Gay, Moore & Powell	3,262.36	3,262.36	3,000.00	262.36
Thompson v. School Board of Arlington (copy of transcript). Mrs. Cecil Wilson	113.10	113.10		113.10
Beckett v. School Board of Norfolk (copy of transcript). Horace Weiss	48.00	48.00		48.00
Jones v. School Board of City of Alexandria Lewis Pendleton Jr	329.33	329.33	300.00	29.33
Beckett v. School Board of Norfolk. Williams, Cooke, Worrell & Kelly	17,853.28	17,853.28	17,853.28	
Total for 1958	34,205.26	34,205.26	31,753.28	2,443.98
Prince Edward County school case: Tucker, Mays, Moore & Read	543.00	543.00	300.00	243.60
Newport News school case: Tucker, Mays, Moore & Reed	1,870.64	1,870.64	1,500.00	370.64
Norfolk school case. Tucker, Mays, Moore & Reed	2,674.26	2,674.26	2,000.00	674.26
Research in connection with segregation cases re Powers of governor McC. G Finnigan	350.00	350.00	350.00	
Charlottesville school segregation case Tucker, Mays, Moore & Reed	418.12	418.12	400.00	18.12
Arlington school case Tucker, Mays, Moore & Reed	660.00	660.00	600.00	60.00
Thompson v. County School Board of Arlington Ball & Simmonds	2,003.17	2,003.17	2,000.00	3.17
Allen v. School Board of the City of Charlottesville Perkins, Battle & Minor	300.00	300.00	300.00	
Allen v School Board of the City of Charlottesville & Fendall Ellis, Superintendent John S. Battle	3,096.45	3,096.45	3,096.45	
Arlington County school case Tucker, Mays, Moore & Reed	735.93	735.93	500.00	246.18
Charlottesville school case Tucker, Mays, Moore & Reed	746.18	746.18	500.00	246.18
Davis v. County School Board of Prince Edward County: Hunton, Williams, Gay Moore & Powell	7,672.96	7,672.96	7,500.00	172.96
Thompson v. County School Board of Arlington. Simmonds and Culler	1,533.00	1,533.00	1,500.00	33.00
Total for 1957	22,603.71	22,603.71	20,546.45	1,177.13

Senator BAYH. Pursuant to the previous order of the chairman, we will recess now until 10:30 tomorrow at the same place.

(Whereupon, at 5:45 p.m., the hearing was recessed, to reconvene at 10:30 a.m., Wednesday, November 10, 1971.)