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.

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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.

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