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**From:** CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ]  
**To:** Jay P. Lefkowitz/OPD/EOP@Exchange [ OPD ] <Jay P. Lefkowitz>  
**Sent:** 1/15/2003 8:18:23 AM  
**Subject:** : Re: FW: q and a.doc

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)  
CREATOR:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )  
CREATION DATE/TIME:15-JAN-2003 13:18:23.00  
SUBJECT:: Re: FW: q and a.doc  
TO:Jay P. Lefkowitz ( CN=Jay P. Lefkowitz/OU=OPD/O=EOP@Exchange [ OPD ] )  
READ:UNKNOWN  
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I think these answers would suggest a brief where we embraced the Powell opinion, embraced diversity as a compelling governmental interest, and expressly embraced the idea that race could be a factor in admissions. Assuming we file the narrow tailoring brief that I think will be filed, that is all inaccurate. Instead, we should say:

Q: Why is the Michigan program unconstitutional? Isn't diversity a compelling government interest? Isn't ensuring that minorities are represented in colleges a compelling government interest?

A: The Michigan program is unconstitutional because race-neutral programs should be employed, where possible, to achieve the goal of ensuring diversity and ensuring that minorities have access to and are represented in universities. And we know from Texas, Florida, and California that such race-neutral programs in fact will work to ensure diversity and ensure that minorities have access to and are represented in universities. Diversity and remedying the continuing effects of societal discrimination against minorities are very important goals, but they must be achieved where possible through race-neutral programs such as the Texas program.

Q: You say "where possible." What if race-neutral programs do not work?

A: They do work, as we have seen in Texas, Florida, and California. And if there were ever a case where they did not work, then the courts would assess a university's admissions program under the standards that the Supreme Court has outlined for such circumstances.

Q: Is your position consistent with that of Justice Powell in Bakke?

A: Ensuring diversity and ensuring that minorities are represented in universities are very important goals, but must be achieved where possible through race-neutral programs such as the Texas program. The need to employ race-neutral programs, where possible, to achieve diversity is a consistent element of Supreme Court opinions over the past 20 years. And we know that these race-neutral programs work. (Justice Powell's opinion does not address the question whether race-neutral programs can achieve these goals.)

Q: If the goal of advancing diversity and ensuring that minorities are represented are permissible goals, why is it that a university must choose race-neutral programs rather than race-based programs to achieve those goals? Is there any real difference?

A: There is a real difference because race-neutral programs treat us all as individuals and do not define us solely as members of racial groups. That is why the Supreme Court has emphasized that race-neutral programs must be the first choice and race-based programs employed only as a last resort.