

Bakke Case, 9/77

Folder Citation: Collection Office of the Chief of Staff Files; Series: Hamilton Jordan's Confidential Files; Folder: Bakke Case, 9/77; Container 33

To See Complete Finding Aid:

http://www.jimmycarterlibrary.gov/library/findingaids/Chief_of_Staff.pdf

THE PRESIDENT HAS SEEN.
THE WHITE HOUSE
WASHINGTON

September 6, 1977

MEMORANDUM FOR THE PRESIDENT

FROM: STU EIZENSTAT
BOB LIPSHUTZ

SUBJECT: Bakke

Stu
PL

Stu - Bob
I agree to
a) Strong affirmative
action
b) no rigid quotas
Remanding may be
ill advised -
Jump into drafting
process -
J.C.

Attached are our comments on the Bakke brief. We conclude that substantial revisions are necessary. In particular, the brief should:

- 1) strongly endorse affirmative action;
- 2) clearly differentiate affirmative action from quotas; and
- 3) request that the Supreme Court remand the case to gather the facts necessary to determine whether the University of California's program actually operates as a rigid quota.

Remanding the case is the least controversial way of dealing with it. Remand is appropriate since the evidence is vague on a number of key issues. Justice agrees that the factual record is poor but apparently feels that remand would be unfair to Bakke, since the University bears much of the responsibility for the sorry state of the record. We believe, however, that--from the perspective of the United States--the issue is too critical to be decided in the absence of knowledge of all relevant facts.

If you agree with our recommendations, we believe it would make sense for us to sit down with the Justice lawyers who will actually be doing the rewriting and explain our concerns to them. In any event, we should certainly have an opportunity to review the brief after it has been revised and before it is filed.

Even if it is decided not to request a remand, we would hope that the other substantive suggestions in this memorandum are seriously considered.

THE WHITE HOUSE
WASHINGTON
September 7, 1977

Stu Eizenstat
Bob Lipshutz

The attached was returned in the President's outbox today and is forwarded to you for your information and appropriate handling.

Rick Hutcheson

cc: The Vice President
Midge Costanza
Hamilton Jordan
Frank Moore
Jody Powell
Jack Watson

RE: BAKKE

ADMINISTRATIVELY
CONFIDENTIAL

THE WHITE HOUSE

WASHINGTON

September 6, 1977

MEMORANDUM FOR THE PRESIDENT

FROM: STU EIZENSTAT *Stu*
BOB LIPSHUTZ *BL*

SUBJECT: The Bakke Brief

The brief which the government files in the Bakke case will not simply be a legal document. Rather, it will be seen as a statement of this Administration's policy on an issue--affirmative action--which is an integral part of large numbers of Federal programs. Our position should be set forth as clearly as possible.

Your policy in this area is and has been that you vigorously support affirmative action as a necessary tool in the effort to overcome the legacy of discrimination, but that you oppose rigid quotas. The brief should say that. It should also specifically identify and support the several government programs which enforce affirmative action requirements. The brief should then describe as clearly as possible the difference between acceptable affirmative action devices, such as goals, and impermissible quotas. Finally, the brief must consider the principles developed in light of the particular facts of this case.

The balance of this memo outlines the general problems we see in Justice's brief, as well as a section-by-section analysis which is somewhat more specific. If the Administration's position on this important and controversial issue is to be set forth in an accurate and comprehensible fashion, the brief should be rewritten.

I. PROBLEMS WITH THE BRIEF

A. Lack of Commitment to Affirmative Action

The brief, as now written, does not clearly express this Administration's firm commitment to affirmative action. Such a statement of commitment is needed for both legal and political reasons. The brief, however, appears internally contradictory on this point; while the tone of some sections is supportive of affirmative action, the tone of others could be seen as distinctly unfriendly to such programs.

In a fundamental sense the brief is, in its own word, too "dispassionate." There should be more consistent advocacy of this Administration's policy and programs.

B. Failure Clearly to Identify the Characteristics of Permissible Affirmative Action Programs

The brief does not clearly articulate the distinction between affirmative action and quotas. It determines that the University of California's program is impermissible, but it does not explain why. The result is that the brief offers little or no guidance to universities or others sincerely wishing to employ principles of affirmative action in a constitutional manner.

There is no bright line separating quotas from affirmative action, but we have a responsibility to capture the distinction as clearly as possible. The difference can be drawn in the following terms:

-- Affirmative Action

The purpose of affirmative action programs is to assist our society in overcoming the effects of discrimination. Because of discrimination--which was overt until the recent past and often exists today in subtler forms--it is often necessary to--

1) recruit minority or female candidates for university admissions (or jobs) in an affirmative manner;

2) evaluate the potential of minority applicants in a sensitive fashion, realizing that a black with less impressive paper credentials may in fact have as much potential as a more highly credentialed white; and

3) decide consciously to select some minorities from among those applicants having roughly comparable potential. Here it is appropriate--as in most other human endeavor--to set realistic goals toward which to strive.

Within this basic framework affirmative action programs are flexible, and they pay close attention to qualifications. While the qualifications of minority applicants are evaluated with special sensitivity, they are viewed in the context of the overall applicant pool. The potential of the lowest ranking minorities accepted should be roughly comparable to that of the lowest ranking whites. If there are not sufficient qualified minority applicants the goal is simply not met, and no penalties are imposed.

The ultimate objective of affirmative action programs is not proportional representation of certain groups in various professions. Rather the aim of such programs is to hasten the day when they are no longer needed--when the vestiges of discrimination have been eliminated and men and women of all races can compete freely and fairly in an atmosphere where no one is concerned with race or sex.

-- Quotas

Unlike affirmative action programs, quotas are rigid. They do not respect qualifications. Minority applicants with markedly less potential than the lowest ranking whites will be accepted simply to meet a quota. The long range objective of quotas is to insure proportional representation of various groups in universities, professions, etc. In short, quotas--unlike goals--have no sunset provision.

-- Implications for Brief

The distinctions between affirmative action programs and quotas are not always easy to apply, but they exist and should be articulated in the brief. In addition to lack of clarity, moreover, even where it is most lucid the brief is too narrow. It correctly argues that an applicant's race may be taken into account in evaluating his or her potential, but it strongly implies that this is the only legitimate use of race. In fact, as noted above, affirmative action programs also consciously consider race to insure that some minorities are indeed selected from among applicants having comparable potential. The brief should recognize and support both uses of race in the selection process.

C. Lawfulness of the University's Program: Possibility of Recommending REMAND

The narrow issue in this case is whether the University's special admissions program operated in a constitutional manner. The brief concludes that it did not. Here it equivocates, however, stating that the program might be found permissible if the facts were clearer. (At p. 86, the brief says that the Supreme Court should not exclude "the possibility that a similar program, or indeed the Medical School's own program, could be sustained on an adequate record.")

We agree that the facts are poorly developed in the lower court record, as the brief itself indicates in several other places. For that reason, it would make sense to request that the Court make no finding on the constitutionality of this

particular program but instead remand the case for further factual development. Requesting a remand is the simplest and least explosive way to deal with the lawfulness of the University's program; it is also a responsible legal position.

Briefly, there are several areas of disputed facts. First, the University has contended that its program was in fact open to disadvantaged applicants of all races. If true there may not be a legal infirmity, since a court would likely find no constitutional problem with creating a special program for disadvantaged applicants generally.

Even if, as seems likely, the program was aimed specifically at minorities, other crucial pieces of evidence are missing:

1) How did the program operate in fact? Was this a rigid quota, in which 16 minorities were selected regardless of how their qualifications compared with those of white applicants? Or did the University set a goal of 16 minorities which it earnestly tried to meet, assuming it could find candidates whose qualifications roughly compared at least to the lower ranking whites admitted? While the record suggests that the program was overly rigid, it is not clear on this critical issue. On one occasion, for example, the University had accepted 16 minority applicants but one declined. Instead of filling the vacancy with another minority applicant--and there were minorities on the waiting list for the special program--it apparently selected a white. (See footnote at p. 7.) Hence there may have in fact been more flexibility and concern for qualifications in the program than appears at first blush.

2) Was it rational for the University to set a target of 16 percent? If, given the size of the likely pool of minority applicants, that figure is unrealistically high, then the school may have had to blink at qualifications in order to meet it. There is, however, no evidence on how this figure was selected.

Given the sorry state of the record developed by the parties to the suit, we should not ask the Court to declare the University's program unconstitutional. Instead the brief should outline the governing principles, explain that the record is not sufficiently clear to permit a reasoned application of those principles, and request that the case be remanded for fuller factual development. If it is determined that the University in fact utilized a rigid racial quota, then the program should be declared unconstitutional.

D. Tone of the Brief

The brief as now written is replete with problems of tone. Certain phrases such as "race conscious," while terms of art, could be misunderstood by the public and the media and would be better replaced by a phrase such as "minority sensitive" (with minority defined to include blacks, Hispanics, and Asian Americans). In addition to problems of phrasing, however, certain sections of the brief are simply insensitive--even offensive--and if taken out of context would be damaging. Examples of such passages, which should be modified or deleted, are found below in the section-by-section analysis of the brief.

II. SECTION-BY-SECTION ANALYSIS

As is customary, the brief begins with a short statement of the issues presented, then outlines the interest of the government, states the facts in the case and summarizes the opinions of the lower courts. Finally, the lengthiest portion is devoted to the argument.

A. Issues Presented

While later stating (p. 24) that the case cannot properly be reduced to the question of whether race may be taken into account in making admissions decisions, it appears from the statement of questions on p. 1 that the government believes this to be the overriding issue. The questions presented should be rephrased to eliminate this inconsistency.

B. Interest of the United States

Here there should be a forthright statement of support for Federal affirmative action programs. The reference (p. 3) to the government's "dispassionate" posture should be removed.

C. Facts and Lower Court Opinions

These sections should be rewritten--particularly to emphasize the inconclusive nature of the record--if we decide to ask the Court to remand the case for fuller factual development.

D. Argument

The argument has three prongs:

1) as a general proposition, race may be taken into account to remedy prior racial discrimination (p. 27);

2) the University of California could have properly concluded that an admissions program sensitive to race was needed to address the effects of past bias against minorities in the medical profession (p. 58); but

3) the program actually developed by the University was not constitutional (p. 79).

As already noted, the third prong of the argument should be reconsidered. Instead of a flat declaration of unlawfulness, a remand to produce a better record might be appropriate. Even with respect to the first two prongs, however, there are several specific problems in addition to the more general ones previously noted, including:

1. Pages 27-32 summarize the Supreme Court decisions permitting consideration of race for the purpose of overcoming the effects of discrimination. That section should make it clear--perhaps at the bottom of p. 29--that the ultimate objective of any minority sensitive remedy is to produce a situation of complete racial neutrality.

2. Pages 32-48 are potentially damaging. The purpose of this section is simply to argue that any resort to race should be closely scrutinized by the courts, a position which should be taken but which can be stated in two pages. Instead the brief makes the point so vociferously, and at such length, that it appears to be opposed to affirmative action programs generally.

For example, the caption on p. 32 reads, "Racial Classifications Favorable to Minority Groups are Presumptively Unconstitutional." It would better read, "Rigid Classifications Based on Race Should Be Carefully Scrutinized." At p. 37, the brief argues that "any resort" to race has potentially adverse consequences--a position which appears to cut against any affirmative action programs--as does the discussion at p. 39 to the effect that the minority beneficiaries of such programs will inevitably be stigmatized. Similarly unhelpful is the suggestion on p. 46 that only white "altruists"--read "wishy washy liberals"--would be interested in establishing affirmative action programs.

Generally, the tone of pages 32-48 could be perceived as hostile to affirmative action. The section should be revised and shortened considerably.

3. Pages 48-58 purport to detail the ways in which race may be used to overcome the effects of discrimination. This is the most important section of the brief, the place where the government should spell out the distinctions between goals and quotas. Indeed, much of the brief's best work is contained in this section. Yet, as noted above, the argument is too narrow, strongly implying that race may be considered only in the process of evaluating paper credentials.

The brief also explicitly declines to cast the argument in the familiar "goal v. quota" terminology. While it is true that the terms have not heretofore been well defined, they constitute the language in which the public will conduct the debate, and better delineation is imperative.

4. At page 58, the brief begins to apply its general principles--which unfortunately have not been developed with sufficient precision--to the University of California's program. Pages 58-68 argue credibly that discrimination has hindered the participation of minorities in the medical profession.

5. At page 68, however, the gears shift, and pages 68-72 (like 32-48) may not be perceived as supportive of affirmative action. The purpose of this section is to analyze the University's "further justifications" for a special admissions program. The analysis is unnecessary, however, since the brief has already argued--correctly--at pp. 58-68 that prior discrimination against minorities in the medical profession is sufficient to justify affirmative action. These remarks at pp. 68-72--such as an expression of doubt that "minority students will enrich the classroom experience of white students" (p. 68)--should be either eliminated or severely modified.

6. At pp. 79-86, the brief details the argument that, despite the evidentiary deficiencies, the University's program should be declared unconstitutional. We have already indicated why we believe a remand on this issue should be seriously considered. Moreover, the section inartfully suggests that too many minorities may have been admitted (pp. 81, 83), that Asians should not have been included (p. 84), and that the program should have been limited to blacks (p. 85).

It is true that the purpose of affirmative action programs is to remedy discrimination. If it is clear that discrimination against Asians in the medical profession has largely been redressed--and the evidence suggests that it may have been--then it may be appropriate to modify the program to concentrate on blacks and Hispanics. The phrasing of any such suggestion must be delicate, and the idea that an affirmative action program should be limited to blacks alone is both legally and politically unsound, particularly in the Hispanic community.

CONCLUSION

In order to present this Administration's position, the brief should:

- 1) strongly endorse affirmative action; *agree*
- 2) clearly differentiate affirmative action from quotas; and *agree*
- 3) request that the Supreme Court remand the case to gather the facts necessary to determine whether the University of California's program actually operates as a rigid quota. *?*

THE WHITE HOUSE

WASHINGTON

September 6, 1977

FILE

MEMORANDUM FOR HAMILTON JORDAN

FROM: STU EIZENSTAT *Stu*

SUBJECT: The Bakke Case

This is going to be a very tough issue. While I think that legally the Justice Department position against the University is correct, I have become convinced from telephone calls from blacks and liberals that they will treat our position as a retreat from all affirmative action programs.

This dilemma is the reason I have recommended the case be remanded, which means the Administration would not have to take a formal position against or for Bakke. Rather, we could limit our position to a general discussion of affirmative action (which we support) and quotas (which we oppose).

I would like to speak with you about the case at your convenience.

THE WHITE HOUSE
WASHINGTON

September 10, 1977

Stu Eizenstat

The attached was returned in
the President's outbox. It is
forwarded to you for appropriate
handling.

Rick Hutcheson

cc: Hamilton Jordan
Bunny Mitchell
Frank Moore

RE: LETTER FROM BLACK CAUCUS
ON BAKKE

THE PRESIDENT HAS SAID.
Congressional Black Caucus

306 House Annex
Washington, D.C. 20515
202-225-1691

Parren J. Mitchell, Md., Chairperson
Shirley Chisholm, N.Y., Vice-Chairperson
Cardiss Collins, Ill., Treasurer
Ronald V. Dellums, Calif., Secretary

September 9, 1977

Yvonne B. Burke, Calif.,
William Clay, Mo.
John Conyers, Mich.
Charles Diggs, Mich.
Walter E. Fauntroy, D.C.
Harold Ford, Tenn.
Augustus Hawkins, Calif.
Barbara Jordan, Texas
Ralph Metcalfe, Ill.
Robert N.C. Nix, Pa.
Charles Rangel, N.Y.
Louis Stokes, Ohio

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Reports indicate that the government will file an amicus curiae brief in support of Allan Bakke in the case of The University of California v. Allan Bakke. We understand that that brief takes the position that the University of California acted in an unconstitutional and discriminatory manner in its establishment of a special admissions program to benefit "economically and socially disadvantaged" applicants to its medical school. We strongly oppose this position apparently taken by the government. This position is not only contrary to the relevant civil rights law, but will also have the effect of irretrievably undermining the affirmative action programs of public and private entities.

We urge the Administration to reconsider and reverse its reported decision to support Allan Bakke's position in this case. As indicated in the memorandum left with you at our meeting on Wednesday, we believe that future generations would come to regard a government brief supporting Bakke's position in the way the nation would now view a government brief in support of segregation in Brown v. The Board of Education. A government brief opposing affirmative action programs would be a statement to the black community indicating the government's reversal of its commitment to civil rights in this country.

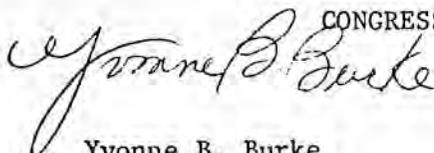
In April, the Congressional Black Caucus wrote to the Attorney General asking for an amicus brief in support of the University of California's position in this case. Six months ago, when the Supreme Court decided to grant certiorari in the Bakke case, a delegation of concerned minority citizens asked the Justice Department to intervene on behalf of the University. It was their feeling that the real parties at interest -- minority Americans who stand to lose most from a policy of retrenchment -- had never been adequately represented in the litigation. Now, without the opportunity for those groups and for the Caucus to review and question the arguments in this reported brief, the Justice Department is apparently ready to immediately file a brief against our interests.

*See -
Prepare answer
J*

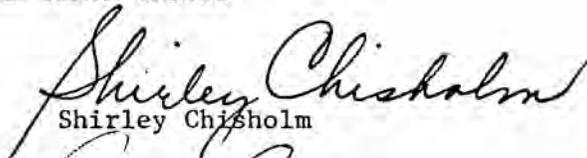
We ask that such filing be delayed to allow for further discussions with appropriate officials on this vital matter. It is imperative that the government file with the Supreme Court a strong and persuasive brief in support of the University of California's position in the Bakke case, particularly since the Federal government brief could be the deciding factor in arguments before the Supreme Court.

Sincerely,

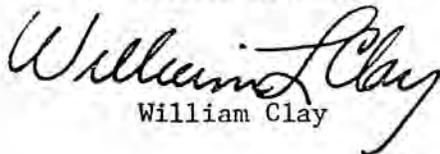
CONGRESSIONAL BLACK CAUCUS



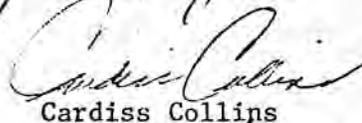
Yvonne B. Burke



Shirley Chisholm



William Clay



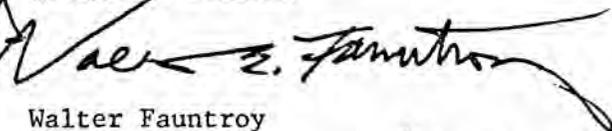
Cardiss Collins



Ronald V. Dellums

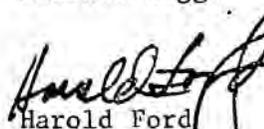
John Conyers





Walter Fauntroy

Charles Diggs



Harold Ford



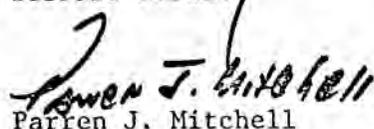
Augustus Hawkins



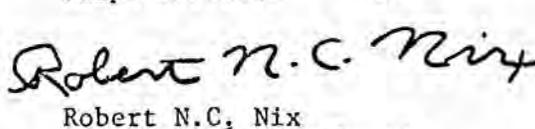
Barbara Jordan



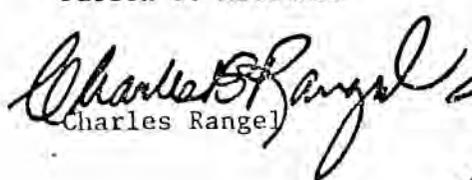
Ralph Metcalfe



Parren J. Mitchell



Robert N.C. Nix



Charles Rangel



Louis Stokes

THE WHITE HOUSE

WASHINGTON

September 10, 1977

MEMORANDUM FOR THE PRESIDENT AND VICE PRESIDENT

FROM: Stu Eizenstat
Bob Lipshutz



RE: Revised Bakke Brief

We have reviewed Justice's revised brief in the Bakke case, which we received last evening. The brief was written prior to the meeting yesterday which established certain principles for handling this case and so does not incorporate these principles.

For the most part the revised brief is the same document which Justice submitted last week, with two important changes. First, there is a new introductory section to the argument which concedes the evidentiary difficulties and says that "too much is unknown about the Medical School's program to allow a confident assessment of its constitutionality" (p. 20). Second, the conclusion is not yet written, and Justice says it is considering four different positions to take on the constitutionality of the University's program, including two which would permit us to avoid passing on the question (see p. 86).

As rewritten, even with the changes mentioned, the brief still poses major problems:

1. Constitutionality of the University's Program.

Although the revised brief, as noted, appears more flexible on this question, apparently Justice is still inclined to "evaluate the Medical School's program as the evidence and record show that it has been applied to respondent" (p. 21), although the brief notes that as indicated above, "too much is unknown about the Medical School's program to allow a confident assessment of its constitutionality". Given both

the uncertain nature of the evidence and the political realities, we continue strongly to believe that we should avoid taking a position on any aspect of the constitutionality of the University's program. By insisting on taking a position on its constitutionality, the Justice brief gets itself -- and the Administration -- in trouble.

2. The Proper Legal Standard. The brief argues in various places that all racial classifications -- including all affirmative action programs -- should be subject to "strict scrutiny" or "the most exacting scrutiny" (p. 25) or "special justification" (p. 32) or "searching scrutiny" (p. 35) or "grave suspicion" (p. 37). Yet nowhere does the brief elaborate with any precision how any racial classification can successfully survive such examination. Indeed, if such a rigid standard and burden of proof are created, then even clearly constitutional affirmative action programs would be difficult to justify.

The argument to date has been between those who say that all racial classifications must be strictly scrutinized, and hence are presumptively unconstitutional (Justice), and those who argue that classifications favorable to minorities should be judged on a lenient, rational basis (HEW). We believe that the two approaches can be reconciled in a manner which would protect most reasonable affirmative action programs, with an argument similar to the following:

- 1) any racial classification should be closely evaluated;
- 2) if an affirmative action program is challenged, the institution defending the program must do more than state in conclusory fashion that the program is intended to assist the victims of discrimination; rather the institution has the burden of going forward (not the ultimate burden of proof) and must demonstrate that, in fact, such assistance is necessary and that some resort to minority status is an essential element of the remedial program (in the present case the University could easily make such a showing for blacks and chicanos -- but probably not for Asians);
- 3) once the institution has shown that it has a legitimate purpose in using minority status -- and remedying the effects of discrimination (by either itself or society at large) is probably the only legitimate purpose -- it has discharged its evidentiary obligation;

4) the burden of going forward would then shift to those attacking the program to show that it was designed so that race was the sole factor considered and that other important values -- e.g., qualifications -- were ignored. If the plaintiff could make such a showing -- which would amount to proving that a rigid quota was used -- then the program could not be sustained.

We believe that an intermediate standard along these lines makes both legal and practical sense. It recognizes that resort to race should not be treated lightly, but it does not give the proponent of an affirmative action program an impossible burden (as may be the case if the standard is strict scrutiny).

3. Support for Affirmative Action. The brief still contains no forthright, consistent advocacy of affirmative action programs. It is still internally contradictory on this point, sometimes supportive, sometimes opposed. For example, at p. 53A the brief states that "race is relevant to making admissions decisions," while earlier at p. 41 it argues that "the overriding principle here is that race is deemed irrelevant to informed decisionmaking." These shifts of position occur throughout the brief. It is not a coherent whole.

4. References to Race and to Race or Color Consciousness. While some changes have been made to use "minority status" for "race" and "minority sensitive" for "race" or "color conscious," as we earlier suggested, those provocative terms are still interspersed throughout the brief.

CONCLUSION

The basic points made above are similar to the general principles agreed upon yesterday. In order to incorporate these into the brief, we believe that it must be substantially restructured and rewritten. Further editing will not suffice.

We attach a proposed statement of the position of the U.S. developed by Wade McCree. You will note it largely tracks the statement we developed yesterday after the meeting with the Vice President and the Attorney General.

SUBSTANTIAL REWRITING IS REQUIRED. WE BELIEVE THAT IT IS MUCH PREFERABLE TO TAKE THE ADDITIONAL DAY OR TWO NECESSARY TO FILE AN ADEQUATE BRIEF, THAN TO FILE SOMETHING INADEQUATE ON MONDAY.

Position of the United States As Outlined in the
Proposed Bakke Brief Prepared by the Solicitor General

1) The U.S. strongly supports, encourages and promotes affirmative action programs to help bring disadvantaged minorities into the mainstream of American life in jobs, educational institutions and all walks of life. The court is urged to reverse the sweeping and erroneous interpretation of the equal protection laws by the California State Supreme Court that race may not be considered in affirmative action programs.

2) The U.S. believes that rigid, inflexible racial quotas -- which have the effect of barring people who may have disadvantages similar to those of racial minorities from participation in certain programs solely because of their race -- does not pass constitutional muster.

3) The U.S. is convinced from a review of the sparse record that the Bakke case may be an inadequate vehicle for determining the limits of affirmative action as posed in the administration of the special admissions program of the University of California.

4) In the event the court does not dismiss the writ as having been improvidently granted because of the inadequacy of the record, or remand for additional fact-finding, profound constitutional questions will be posed that vitally involve the interest of the United States. Because of the overriding importance of these questions the United States feels compelled to set out its position favoring vigorous affirmative action and opposing rigid quotas. The disposition of Bakke's individual claim because of the peculiar facts presented by this sparse record, and the failure of the University to contest his claim adequately, affects no interest of the United States. As amicus, therefore, we propose to make no suggestion to the court as to ultimate disposition.

ADMINISTRATIVELY CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

September 16, 1977

Stu Eizenstat

The attached was returned in
the President's outbox. It is
forwarded to you for appropriate
handling.

Rick Hutcheson

cc: The Vice President
Hamilton Jordan
Bob Lipshutz

RE: FINAL DRAFT OF BAKKE BRIEF

THE PRESIDENT HAS SEEN,

THE WHITE HOUSE
WASHINGTON

September 16, 1977

*Stu -
Pursue E
A Gen.
JC*

MEMORANDUM FOR:

THE PRESIDENT
THE VICE PRESIDENT

FROM:

BOB LIPSHUTZ *BL*
STU EIZENSTAT *Stu*

SUBJECT: "Last Draft" of Bakke Brief

The Solicitor General and the Assistant Attorney General for Civil Rights and their staffs have obviously worked very hard on the brief and have produced a fine product. It is a substantial improvement over previous drafts and takes the generally positive thrust toward affirmative action that the Administration should take. We would only raise the following point:

The major problem with the brief -- and one that is easily rectified -- is that the brief nowhere states as a matter of policy the second of the four points in the agreed-upon statement of principles which the President approved -- namely, that, in the words of the Solicitor General's statement, "rigid, inflexible racial quotas -- which have the effect of barring people who may have disadvantages similar to those of racial minorities from participation in certain programs solely because of their race -- do not pass constitutional muster." There are several places in the brief where a simple, affirmative paragraph to this effect could easily be placed, for example on Page 42 or at the end of Page 57.

Such a simple statement is important to give the brief balance and to reaffirm the position the President has always taken. There simply is no direct statement in the brief that we oppose rigid and inflexible quotas based solely on race. In this regard we think that the following sentence on Page 22 should be stricken: "Such a design often will require categorical use of race rather than case by case determinations." The paragraph is sufficiently strong without this sentence and the term "categorical use of race" is unclear and the type of language which might be used out of context.

There are a few other technical matters that we will raise independently with Judge Bell.

cc: The Attorney General

THE WHITE HOUSE
WASHINGTON
September 16, 1977

C
1

MEMORANDUM FOR:

THE PRESIDENT
THE VICE PRESIDENT

FROM:

BOB LIPSHUTZ
STU EIZENSTAT

[Handwritten initials]
Stu

SUBJECT: "Last Draft" of Bakke Brief

There is one additional point which we did not want to mention in the attached memo, which may be circulated to the Justice Department.

The Justice Department brief calls for reversing the California Supreme Court's decision on the law, because the California Court erroneously ruled that minority status cannot be used as a criterion for affirmative action.

As to Bakke himself, the brief recommends that the California judgment (admitting Bakke to medical school) be vacated and that the case be remanded, to build an adequate factual record and apply a correct legal standard.

The fourth of the Solicitor General's principles suggested an additional alternative -- we had also mentioned -- that the Supreme Court vacate its writ of certiorari as improvidently granted. This would mean that the Court simply would not review the case because of the inadequate factual record. It would have the effect of leaving the California judgment in force and thus admitting Bakke -- something you indicated you would like to do, if possible. However, this would mean that the legal standard set out by the California Supreme Court outlawing affirmative action would continue to apply in the State of California and might well be cited as a precedent in other states and conceivably for federal programs as well. In view of this, we believe the Justice Department decision to drop this approach was justified.

What the Justice Department brief now suggests is that Bakke's own situation be reviewed and resolved again by the California Courts using a different legal standard and a better factual record. The federal government would take no position as to whether Bakke should in fact be admitted. We think this is appropriate.

ok

In our view, the facts do not show whether a rigid quota was or was not involved. Although the Davis Medical School's Special Admissions Committee does appear to have recommended only minority applicants, these recommendations were reviewed by the regular Admissions Committee -- and it is unclear whether the regular committee did this on a competitive basis with other applicants.

1

C
/

TO: PRESIDENT CARTER
FROM: HAMILTON JORDAN *H.J.*
RE: BAKKE CASE

I would like to share with you my serious concern about the manner in which we are handling our responsibilities in the Bakke case. If you knew and were aware of the approach that is being taken on your behalf, I don't think that you would be either happy or satisfied.

The Bakke case represents an opportunity for the U. S. Government to make a major policy statement on this particular case and the key issues involved. As non-lawyers, I don't think you or I really understand the implications of that involvement nor the options available to you. A lot of well-intentioned people here and at the Justice Department assume you and I know a hell of a lot more about this than we do. For that reason, I would like to make some observations as a result of discussions with Stu, Judge Bell, Bob Lipshutz

and the Vice-President.

These discussions have raised several questions which should be addressed.

1. Does the Bakke case present the larger issues at stake - which we are being called on to comment - in a clearcut manner? Judge Bell, the Vice-President, Stu and Bob Lipshutz say definitely not. Everyone who is familiar with this case whose political and legal advice you value say that the issues in this case are muddled and confused. Consequently, it would seem to be a very poor case for us to use as the vehicle for the expression of our own views on this very emotional and complex issue.

2. If it is generally agreed that it is a poor case in which to ask the Court to make a major legal decision with far-reaching consequences, it would seem that the strength of our own statement and arguments would be diminished and undermined by the poor vehicle that we have chosen. We should seek some mechanism for the

statement of our views that will have the maximum positive legal result. The "Bakke case" may be a well known case, but it does not represent the best opportunity for us to state the political philosophy of this Administration.

3. Because the Bakke case has taken on tremendous symbolic significance to the minorities of this country, we should realize that they are going to pay little attention to our eloquent language and focus almost exclusively on which side we support in our brief. Neither you nor I have been able to understand the legalisms in this case - how can we expect illiterate and disadvantaged people to understand when they are told by their leaders and the media that, "Carter has ruled against the blacks and Hispanics of the country". Judge Bell - who I love and respect - takes comfort in the fact that the original decision was written by two blacks will make our official involvement on behalf of Bakke more palatable. It will not and will only tend to discredit Days and McCree in their own community.

4. As we are presently headed, we are going to suffer the worst of both worlds. We are going to be held politically responsible for our involvement in a brief that we have had little or no involvement in. Despite your instructions that Stu and Bob "jump into the drafting", the people at Justice have not allowed them to participate. This has created something of an institutional problem which we can solve with Judge Bell. He is probably not even aware of it himself, but his people don't want us involved.

As elected leader of the American people and chief executive of the Executive Branch of the federal government, you not only have a right but a duty to be heard as our involvement in this brief will represent the articulation of your political philosophy on this matter to the court and the American people.

Summary

I would strongly recommend that we take a fresh look

at this whole situation and answer several questions.

- 1) What are the options available to you for involvement in this case?
- 2) Are there other mechanisms for the statement of your political philosophy on this matter?
- 3) If we are involved in the Bakke case as a statement of your political philosophy on this matter, what is the proper role for the White House (i.e. Stu, Bob, and others) in the drafting of the brief?

My own non-legal view is that this is a bad case and a bad time for us to become involved. I don't see why we could not state in our brief that this is a poor case for us to use as the basis for our philosophical judgement on the question of affirmative action and quotas. Consequently, we make no judgment in our brief but simply outline our philosophy without officially supporting either the position of Bakke or the school.

Another option might be a statement to the Court or to the American people that while we are anxious to express ourselves on the subject matter, we will look for another case or better mechanism that more clearly reflects the real issues involved.