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Fridman also pointed out one or two other examples to Elston and told him that he did not agree with McDonald. Fridman said that while Elston did not state whether he would allow the candidates to be interviewed, Elston indicated he understood Fridman's concerns and expressed general agreement that candidates with excellent law school academic records should be interviewed. However, Fridman said he did not know how Elston voted on individual candidates or which candidates were cleared for interviews following Elston's review because Elston made the final decision on each candidate and communicated that decision directly to OARM.

Fridman said that in May 2007 he spoke with Elston in connection with the Department's response to a letter from Senators Edward Kennedy and Richard Durbin questioning whether political affiliations were used as a basis to deselect candidates in the Honors Program and SLIP hiring process. Fridman said that Elston mentioned that, during the Screening Committee's review, Elston had generally agreed with Fridman's recommendations on candidates over McDonald's recommendations. Fridman said that Elston told him that McDonald "knows in her own mind" what she did in reviewing applications, but Elston generally voted with Fridman in most cases.

During our interview of Fridman, we showed him several applications of candidates from top law schools with outstanding academic records who were deselected. Although Fridman said he could not specifically recall individual candidates, he explained whether he would have voted yes or no for a candidate based on the candidate's academic record and other credentials.

We asked Fridman to review a sample of approximately 50 applications of deselected candidates who had outstanding academic records. Fridman said that he would have voted yes on each of the

candidates. Fridman repeatedly expressed surprise that candidates for whom he voted yes, based on their grades, law school, and class rank, were in fact deselected. Fridman said that based on our informing him that these candidates had been deselected by the Screening Committee, Elston must have sided with McDonald in deselected these candidates. At the end of the interview, Fridman stated:

I'm still kind of reeling from the résumés that you . . . showed me . . . people from Harvard, Yale, Stanford who were deselected. There were a lot of them. And I am shocked and very disappointed about that. . . . I didn't know that this was going on. I thought that this was being conducted in good faith. I was conducting my reviews in good faith and making my recommendations based on merits and what I thought were the people [who] were going to be the most qualified candidates for the Department. And I'm sickened by this. And I'm not happy that I'm associated with this.

### **3. Esther Slater McDonald**

McDonald declined to be interviewed during our investigation. When we first contacted her in September 2007 for an interview, she was a Counsel to the Associate Attorney General. She initially agreed to a tentative date for her interview, but she later asked us to postpone the interview while she retained counsel. We agreed. After McDonald retained an attorney, and after allowing time for the attorney to familiarize himself with the matter, a new date for the interview was set, October 25, 2007. However, at 5:15 p.m. on October 24, McDonald's attorney e-mailed our investigators to advise them that his client was canceling the interview. The attorney added that McDonald was no longer employed by the Department.

We learned that McDonald had resigned from the Department, effective October 24. On the evening of October 23, she had told her supervisor, Acting Associate Attorney General Katsas, that the next day would be her last day at the Department. Katsas said that her resignation came as a surprise to him.

After her sudden departure from the Department, we renewed our request to McDonald's attorney to interview her. Through her attorney, she again declined. Accordingly, we have had to rely on the testimony of others, particularly Fridman and Elston, as well as the limited written record, to describe and assess McDonald's actions in reviewing applications.



**a. Assignment to the Screening Committee**

McDonald graduated from law school in May 2003. Following a judicial clerkship, she joined a Washington, D.C., law firm as an associate. On June 13, 2006, a partner at the law firm e-mailed Monica Goodling to recommend McDonald for a position at the Department. Goodling interviewed McDonald later that week.

McDonald was hired as a political appointee as Counsel to Acting Associate Attorney General Mercer and began work on September 5, 2006. Her duties as Counsel included assisting with oversight of the grant issuing components of the Department, the Antitrust Division, and the Executive Office for U.S. Trustees. She was also assigned by Mercer to work on the Honors Program/SLIP Screening Committee after she had been at the Department only a few weeks.

No one we interviewed (including Elston, Fridman, and Mercer) said they gave McDonald any instructions on how to conduct her review of Honors Program and SLIP applications. In a letter to OPR and OIG investigators in which he reiterated McDonald's unwillingness to be interviewed, McDonald's attorney stated that she was given no instructions on how to conduct the review, "except for limited high level statements." The primary guidance she was given, her attorney wrote, was "to consider whether they would faithfully defend and uphold the Constitution and zealously execute the laws of the United States and the policies of the administration as they may apply to matters within the jurisdiction of the Department of Justice." McDonald's attorney did not name the source of this guidance, and he declined to allow McDonald to be questioned about this issue. Her attorney also refused our request to provide the name of the person or persons providing this guidance. Therefore, we were unable to determine what, if any, guidance or specific instructions McDonald received and from whom.<sup>51</sup>

**b. McDonald's Review Process**

As noted above, both Fridman and Elston reported that McDonald conducted Internet searches on the candidates using Google

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<sup>51</sup> In his letter to us, McDonald's attorney also alleged that "at no time did anyone inform her that her considerations or evaluations were inappropriate." However, we discovered an e-mail McDonald sent from her Department computer on October 25, 2006, that, while unrelated to the Honors Program and SLIP review, indicates that McDonald was aware of Department hiring policies for career attorney positions. In the e-mail, McDonald told a friend who had sent her his résumé that "since you want career positions, there's not much I can do apart from recommending you because there are legal constraints on career hiring to ensure that it's not political."

and MySpace. Our search of McDonald's Internet activities on her Department computer during October and November 2006 confirmed that she conducted searches on many of the candidates' names. We were able to determine that, among other things, McDonald searched for organizations to which candidates belonged, read blogs by or about candidates, and searched Westlaw, school websites, and school newspapers for articles by or about candidates.<sup>52</sup>

Elston and Fridman both remembered McDonald circling items on candidates' applications and writing remarks about those items, including employment or affiliations with organizations, judges, law school professors, and legislators who could be considered liberal. While the Screening Committee normally did not discuss candidates through e-mail, Fridman and Elston recalled an e-mail exchange we found, dated November 29, in which the Committee discussed a request by ATF to add additional SLIP candidates. Both Fridman and Elston stated that the comments McDonald made in the November 29 e-mail were consistent with the types of comments McDonald had written on other applications as she reviewed the Honors Program and SLIP candidates.

In the November 29 e-mail, McDonald wrote that three of the eight candidates were "Unacceptable" based on her objections to the candidates' ideological affiliations. She objected to one candidate on the basis of the organizations he belonged to and to statements in his essay that she considered "leftist." She wrote in the e-mail:

Poverty & Race Research Council actively works to extend racial discrimination through increased affirmative action and, while there, [the candidate] helped draft document arguing that federal law requires recipients of federal funding to seek actively to discriminate in favor of minorities (racial, language, and health) rather than merely to treat all applicants equally; Greenaction is an extreme organization founded by Greenpeace members and promoting civil disobedience and engaging in violence in protests, and the organization adheres to the Principles of Environmental Justice, which are positively ridiculous

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<sup>52</sup> Through our review of her Internet searches, we were unable to reconstruct exactly what information McDonald found about a particular candidate. Although we could determine what websites McDonald visited after searching for a specific name, we were not always able to determine what page or portion of the websites she read. In addition, information that was present on the Internet at the time McDonald was conducting searches could have been removed or altered before we attempted to replicate her searches.

(e.g., recognizing ‘our spiritual interdependence to the sacredness of our Mother Earth’ and ‘oppos[ing] military occupation, repression and exploitation of lands, peoples and cultures, and other life forms’); [the candidate] also is/was a member of Greenpeace; [the candidate’s] essay is filled with leftist commentary and buzz words like ‘environmental justice’ and ‘social justice.’

In the e-mail, McDonald noted that she deemed another candidate unacceptable because the candidate was “active in ACS.” Fridman said that he believed McDonald was referring to the American Constitution Society, an organization that was intended to be a “progressive” counterpart to the more conservative Federalist Society. However, we determined that this candidate’s application did not mention his membership in the American Constitution Society or ACS. Fridman said he believed that McDonald must have obtained this information from the Internet.

In the November 29 e-mail, in voting no for another candidate McDonald also noted, among other things, that the “essay also states that she wants to work for DOJ to ‘have more of an impact on the judicial system.’ DOJ’s purpose is not to impact the judicial system but to enforce the law . . . .”

In the same e-mail, McDonald found another candidate questionable because of the candidate’s grammar, writing style, and grades, but noted: “In her favor, she refers to wanting to work for DOJ to fulfill her goal of ‘enforcing the law.’ Leftists usually refer to achieving ‘social justice’ or ‘making policy’ or anything else that involves legislating rather than enforcing.”

When we interviewed former Acting Associate Attorney General Mercer about McDonald’s role on the Screening Committee, he said that while he did not have extensive discussions with McDonald about that work, she mentioned at staff meetings that she was spending time on the assignment. He said he recalled her mentioning on one occasion that she had learned information suggesting that the applicant had “a clear disdain” for the Department’s approach to cases and she was discussing this issue with the Screening Committee. Mercer could not recall the specifics but believed “the gist of it was this is a person who believes that we should not have the ability to, you know, control our borders, and get rid of people that are in the country without legal status of being here.”

Mercer said he was not sure of the time frame, but at some point McDonald indicated to him that candidates had been deselected

because of concerns about academic records and sloppiness of applications and, at times, “a concern that they wouldn’t be able to follow DOJ policy based upon what they had written.”

Fridman told us that during the summer of 2007, in discussing our ongoing investigation, McDonald told Fridman that he had nothing to be worried about and that she was the one the OIG was going to be concerned about.

#### **4. Michael Elston**

Elston joined the Department in 1999 as a career Assistant U.S. Attorney, first with the Northern District of Illinois and later with the Eastern District of Virginia.<sup>53</sup> On November 7, 2005, he became the Chief of Staff and Counselor to Deputy Attorney General Paul McNulty. In April 2006, he converted from a career employee to a political appointment. He resigned from the Department in June 2007 and now works at a law firm.

In this section, we provide Elston’s description of the Screening Committee’s processes and his explanation for the decisions that he made when evaluating candidates.

##### **a. Instructions to the Committee**

Elston told us that he initially became involved in the 2006 Screening Committee when Monica Goodling called him and asked him to lead it. He told Goodling he had no previous experience with the Honors Program or SLIP, but Goodling responded that no one who conducted the screening in previous years remained at the Department.

Elston said he did not recall what Goodling said about the purpose of the review and she did not articulate the criteria he should use in screening the applicants. Although Elston was aware that Goodling claimed in her congressional testimony to have told Elston he should identify candidates who appeared to share the Attorney General’s philosophy, he told us he did not recall her telling him that.

Elston said Goodling instructed him to select two additional people to work on the Committee. Elston said he selected Fridman because Fridman had previously impressed Elston and because Fridman did not have as full a plate as some other members of the ODAG staff. Elston also asked Acting Associate Attorney General

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<sup>53</sup> Elston graduated from law school in 1994. He clerked for a federal judge and worked for several years at a law firm before joining the Department in 1999.

Mercer to select a member of his staff to serve on the Committee, and Mercer chose McDonald without any input from Elston. Elston said that when he informed Goodling that McDonald was to be on the Committee, Goodling “seemed pleased that Esther had been picked and said something to the effect ‘well, she’s had experience in this sort of thing.’”

Elston said that OARM Director DeFalaise gave him an outline of the timeline for reviewing candidates, but did not give him any criteria to follow. Elston told us that he was “not aware of there being any criteria for the Honors Program in general, let alone the Department review.”

DeFalaise told us that while he and Elston had generally discussed that the purpose of the screening was to ensure that the candidates merited inclusion in the Honors Program, OARM was supervised by the Deputy Attorney General’s office, and therefore OARM did not direct Elston or his office on how to evaluate candidates.

Elston said that when he asked Fridman to serve on the Committee, he described Fridman’s duties as to “just make sure there aren’t any wackos in the pool, or something like that,” without explaining what he meant by “wackos.” Elston said that he did not give Fridman any further explanation of the criteria for evaluating candidates because Fridman was an AUSA and would know the criteria for a Department lawyer.

Elston said he later learned from Associate Deputy Attorney General Tenpas that Fridman was concerned about Elston’s instruction to screen out “wackos.” Elston told Tenpas that he meant someone who was not qualified. According to Elston, Tenpas later told him that Tenpas had talked to Fridman again, and Fridman’s concerns had been resolved.

We asked Elston whether he instructed Fridman to consider whether a candidate’s views appeared to be consistent with the Attorney General’s policies or to take into account organizations to which a candidate belonged in evaluating whether a candidate might have difficulty enforcing a Department policy. While Elston said he did not specifically recall it, he acknowledged that there “may have been such a discussion.”

Elston said he also had no discussions with McDonald concerning the criteria for evaluating candidates, nor did he ask Mercer or anyone else to pass along such information to McDonald because he did not think the assignment was “that complicated.” Elston said he

was not aware of anyone else giving McDonald guidance about what criteria she should apply when reviewing the applications.

**b. Elston's Knowledge of Criteria Used by Fridman and McDonald**

Elston said he believed Fridman evaluated candidates on the criteria that "anyone would agree is appropriate." He was aware of no evidence that Fridman considered political or ideological affiliations in evaluating candidates.

Elston confirmed that Fridman raised with him early in the review process Fridman's concerns that McDonald was deselecting candidates based on "membership in liberal organizations, or those kind of things," revealed in the candidate's application or from Internet searches she conducted. Elston said he reviewed the applications Fridman noted and saw that McDonald had either circled or written comments about liberal affiliations on the applications and then voted to deselect those candidates.

According to Elston, he instructed Fridman to separate out the applications about which Fridman and McDonald disagreed so that Elston could make the final decision on those candidates. Elston said that he reviewed applications in the "split decision" pile, but that he did not review applications on which Fridman and McDonald agreed. Elston said he could identify the author of the comments on the applications he reviewed because of differences in Fridman's and McDonald's handwriting.

Elston said he typically did not make marks on the applications he reviewed. Rather, he separated them into final "yes" and "no" piles based on his decisions, and he gave the piles to his administrative assistant so she could inform OARM of the Screening Committee's decisions.

Elston said it was apparent to him that, for some percentage of the applications, McDonald rejected candidates based on the liberal affiliations she circled or commented on, and that Fridman did not "vote no for those reasons." Elston said that because he reviewed the applications on a rolling basis, he had "no way of knowing" what percentage of applications in the split pile had been rejected by McDonald based on the candidate's liberal affiliations.

According to Elston, McDonald also wrote comments on the applications throughout the process concerning the liberal affiliations of candidates she rejected. Elston said McDonald circled organizations and, if they were not well-known, made a note on the application.

Elston said he could not recall the names of any of the organizations to which McDonald objected. Elston also recalled McDonald circling a judge's name and commenting that the judge was liberal. In addition, McDonald objected to some candidates' essays, although Elston could not remember the basis of the objections. He said he did not recall whether McDonald commented about articles written by applicants, but said it would not surprise him if she had done that.

Elston said he thought he recalled McDonald indicating it was a negative factor if a candidate had worked for a Democrat.

Elston said McDonald's November 29, 2006, e-mail regarding ATF SLIP candidates was longer and more detailed than the comments she wrote on the applications in the split pile, but the tone and style were similar.

Elston said he was also aware that McDonald conducted Internet searches because he saw printouts of search results attached to some applications. He said he did not direct Fridman or McDonald to conduct the searches, but he did not discourage McDonald from conducting such searches after he discovered she was doing it.

Elston said he could only recall the details of a couple of McDonald's Internet searches. He said they looked like results you would get from a Google search on someone's name. Elston recalled one picture that a candidate had posted on the Internet that showed "poor judgment," but said he could not recall any details.

Elston recalled another article from the Internet that he believed McDonald had attached to the candidate's application. The article reported that the candidate stated he would have liked to participate in what Elston called "riots" to protest the policies of the World Bank and the World Trade Organization. Elston said that when the Civil Rights Division appealed the deselection of this SLIP candidate, he provided Rena Comisac, the Principal Deputy Assistant Attorney General for the Civil Rights Division, a copy of the article. Comisac later responded that the Civil Rights Division had enough people to interview and would not pursue the appeal.

Elston said the information in the article was something he thought the Civil Rights Division would want to consider and that it would be an appropriate basis upon which to deselect a candidate for an interview. Elston said he did not consider at that time whether the reporter had accurately quoted the candidate in the Internet article, but "today I certainly would."

Elston said he knew the Committee was not meeting its deadlines, due in part to McDonald “spending way too much time on each individual application package.” Elston said that he relayed to Fridman “the need to complete the project quickly” and assumed that Fridman relayed that to McDonald, but said he never spoke to McDonald himself about the delays.

Elston said he was aware that if McDonald used liberal affiliations as proxies for party affiliations to deselect applicants, that would be inappropriate. He said he thought at the time of the review process that at least “the appearance of what [McDonald] was doing was problematic.” However, Elston said he did not raise the issue with McDonald because he “didn’t have evidence that those were her actual bases; she could have just been commenting on things on the résumé,” and he “didn’t have time” to address the issue with her. In addition, Elston said he did not want to accuse McDonald of doing something inappropriate because he speculated that Goodling may have told McDonald to do what she was doing. Elston said that he believed he and Fridman could “blunt the impact” of McDonald’s no votes, although Elston acknowledged that, in retrospect, this approach was not “sufficient.” Elston said he wished he had been “more proactive and more protective of the Department’s reputation.”

### **c. Elston’s Criteria**

When we asked Elston to describe the criteria he applied in reviewing candidates in the split decision group that he reviewed, or in reconsidering candidates when components appealed deselections, he said “there was no specific criteria on any aspect of these applications that I was aware of, or that I employed.” He said that in general he looked for good grades and rankings in the top quarter of their law school class. He did not consider the quality of the law school, and he “made allowances” on grades for those components such as the BOP that were less popular and did not attract the same quality of candidates that other components did.

Elston said he looked at the application as a whole, so that no one criterion would disqualify a candidate. He said that clerkships in general were considered a plus, and federal appellate clerkships, followed by federal district court clerkships, were considered the most valuable. Elston said he did more than just a quality check on the applicants and disqualified candidates for “any host of things,” including their essays.

Elston denied approving or deselecting candidates based on political or ideological affiliations indicated on their applications or



identified through the Internet searches. He said he attempted to do exactly the opposite. However, later in our interview Elston said that he knew the Committee had put a lot of effort into reviewing the applications and he did not want to veto all of McDonald's decisions. He said he often upheld her no vote, but for reasons other than the ones relied on by McDonald. Elston said that, in hindsight, he is concerned that when McDonald voted no on candidates based on their political or liberal affiliations, those candidates received a second review from him and therefore received much higher scrutiny than the candidates that McDonald approved. He conceded "that the process was not as level a playing field as it should have been."

Elston said he was very surprised to learn during our interview of him that close to half of all SLIP applicants initially were deselected. He said he did not know why that happened. Elston also said he did not have any sense of deselection trends because the review was done on a rolling basis.

Elston acknowledged in our interview that when he became aware in the spring of 2007 of the allegations that Goodling had used political affiliations in hiring career immigration judges, "I had in the back of my mind the concern that, that some of those same things were at work in the Honors Program in hindsight." He said he became concerned that "there was political stuff going on," and that the Honors Program and SLIP may have been "Monica-ized."

Elston noted that the Screening Committee's review became a huge problem for the Department and in hindsight he wished he had done things differently, including conducting more of a strict quality check of the applications rather than a fuller review and consulting with the Justice Management Division's General Counsel to get an opinion on whether considering certain factors was consistent with the regulations. Elston stated that he knew there was a problem with the Screening Committee's review, but "it was bigger than I recognized." He also said he was "embarrassed to have been a part of something that has brought so much negative publicity to the Department."

**d. Elston's Explanations on Specific Deselected Candidates**

In addition to asking Elston about the general criteria he used, we showed Elston applications of approximately 50 highly qualified candidates who were deselected and asked him to explain the decisions. These were candidates Fridman said he believed he approved, which indicated that the two negative votes were cast by McDonald and Elston. As an illustration of his answers, we provide Elston's

explanation for how he believed he evaluated several of those candidates.

For example, we asked Elston about a deselected Honors Program candidate who was first in his class at Georgetown Law School, had clerked for a judge on the U.S. District Court for the Southern District of New York, was clerking for a judge on the U.S. Court of Appeals for the Second Circuit, and had been an articles editor on a law journal. He had also worked for a Democratic U.S. Senator and a human rights organization. Elston said he did not recall why this candidate was deselected. He noted that the candidate had written a note about using international law as a tool in constitutional interpretation. Elston explained that if McDonald had read the article and confirmed that the candidate was advocating the use of international law in constitutional interpretation, that would “be of concern.”

We asked Elston about another deselected Honors Program candidate who was enrolled in a joint degree program for law and urban planning at Harvard, served as an articles editor on a law journal, graduated in the top 5 percent of his undergraduate class at Harvard, and had worked on a congressional campaign for a Democrat.<sup>54</sup> Elston said he remembered the applicant because he had “chuckled” at the following portion of his essay:

In high school I thought that I wanted to captain a Green Peace skiff in the North Atlantic. I figured that was what serious environmentalists did, and I wanted to be a serious environmentalist. I decided later that potential martyrdom on the high seas was not for me, and rather than operate at the margins, I would prefer a job in which I could have a less antagonistic and more direct impact.

When asked how he voted on this candidate, Elston said, “A lot of times when I chuckled, I said no.” Elston said he was certain McDonald would have circled items on this application.

I would imagine this is one she felt kind of strongly about. And that would have . . . played into my thinking, as well, [be]cause I didn’t . . . feel comfortable just sort of trashing all the work that was, was being done by Esther and Dan. Would I . . . let it though today? Sure. . . .

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<sup>54</sup> The applicant did not indicate the congressional candidate’s party affiliation on his application, but an Internet search revealed that the candidate was a Democrat.

I couldn't vote . . . with Dan all the time. I mean, if Esther felt very strongly and it came through clearly on a résumé, I gave that weight. . . .

You can review the application package and come away with a, with a conclusion that this is not a person who comes to the Department with [an] . . . evenhanded approach to environmental issues. And . . . I think [in] that case I voted with Esther on it.

We asked Elston about a deselected Honors Program candidate selected by ENRD who was in the top 10 percent of his class at Lewis and Clark University, was an articles editor for an environmental journal, and had worked for Earthjustice and the Northwest Environmental Defense Center.<sup>55</sup> The candidate indicated in his essay a strong interest in working in environmental law, including that he wanted “to serve as part of the team charged with enforcing the world’s most comprehensive environmental laws, and with defending the crucial work of our environmental and resource management agencies.”

Elston commented that while he did not know anything about the organizations that the candidate worked for

the impression I'm left with after a quick look at this is that this is someone who had come to the Environment Division . . . with an agenda, not with an open mind as to the best way to enforce the environment, environmental laws. . . . I had a negative reaction to that. So, I may well have voted with Esther on that one.

We asked Elston about another deselected Honors Program candidate who had graduated from Yale Law School, had been a member of the *Yale Law Journal*, graduated *summa cum laude* with a Bachelor of Arts degree from Yale College, was clerking for a judge on the U.S. Court of Appeals for the Second Circuit, had studied Arabic, and had worked with a human rights organization.

Elston said he looked for people with Arabic language skills and that he also knew the judge this candidate was clerking for, so he believed he would have been enthusiastic about this candidate. Elston

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<sup>55</sup> The applicant described Earthjustice as “the nation’s leading nonprofit environmental law firm” and the Northwest Environmental Defense Center as a “nonprofit, public interest environmental organization as well as Lewis and Clark Law School’s largest student group.” Its website describes Earthjustice as the successor to the Sierra Club Legal Defense Fund.

could not explain why the candidate was deselected and said he was “starting to get concerned that some ‘yes’ pile [applications] got in the ‘no’ pile.”

We asked Elston about a deselected SLIP candidate who was a student at Harvard Law School, graduated in the top 5 percent of his undergraduate class from the University of California, Berkeley, was an editor on Harvard’s human rights journal, had interned with a city attorney’s office and a state court judge, and had worked for 5 years in marketing before entering law school.

In his essay, the candidate referred to his perception that working for the government would be “work for the people” where “principles forged by experience, prudence and moral obligation” would guide the work. In his last line of the essay, the candidate stated, “It is precisely this ability to have my principles guide my work that inspires me to be a government lawyer.” Elston thought he would have reacted negatively to that last sentence because “I believe that a civil servant enforces the law impartially [and] often times is called upon to set aside his or her own beliefs.” However, Elston stated that he had no recollection of whether he reviewed the application and voted no.

We showed Elston many similar applications of highly qualified applicants with either liberal or Democratic Party affiliations who had been deselected. Elston said he could not recall these applications and could not explain why they had been deselected.

#### **e. Elston’s Decisions on Appeals**

We also questioned Elston about his decisions on the components’ appeals of deselected candidates. As noted above, Elston alone decided the appeals submitted by the components. Elston denied component appeals of 16 of the 32 Honors Program candidates and 13 of the 18 SLIP candidates who had been initially deselected. Because many of the candidates whose appeals were denied had strong academic credentials, we showed Elston some of those candidates’ applications and asked him to explain his decisions. Elston at first said that “for the most part I granted appeals.” However, Elston also stated that he had a “bias against overturning the work that the Screening Committee had done” and accordingly his “bias was to not grant appeals because to do so would undermine the departmental review process.” Elston said he

was not going to automatically reverse decisions that were already made. I felt like there was some burden on them

[the components] to give me a compelling reason to interview them.

We discussed with Elston appeals of specific candidates. For example, we asked Elston why he denied the appeals of two candidates by the Civil Division. One candidate was a student at Harvard Law School, had an undergraduate degree from Princeton University, had worked for Planned Parenthood and a Democratic Senator, and had received high praise for her work during a SLIP internship the previous summer. Another candidate had graduated sixth in his law school class from the University of Alabama, had been a member of the law review, had interned for the Public Defender Service, currently was clerking for a federal judge, and had written a paper on the detention of aliens under the Patriot Act.

Elston's only explanation for deselecting these candidates was that he was "pretty offended" by the Civil Division's appeal, which stated that the Division screeners had taken the responsibility of selecting candidates seriously and "given the care we exercise in making these selections, we would urge some deference to the difficult choices." Elston said he found the appeal offensive because the Division employees were "basically saying we know better" and "you should defer to us." However, Elston could not explain why he accepted other candidates appealed by the Civil Division but denied these two candidates. He noted that his appeal decision e-mail to the Civil Division was sent late at night and added, "I didn't spend a lot of time thinking about them."

Elston recalled that Civil Division AAG Keisler subsequently made a personal appeal in a telephone call on behalf of the candidate who worked for Planned Parenthood, which caused Elston to reverse his decision and reinstate that candidate. Elston said he did not recall Keisler telling him that people were concerned this candidate had been deselected because she worked for Planned Parenthood.

We asked Elston why he denied the request of U.S. Attorney Carol Lam to interview a candidate who graduated in the top third of her class at Stanford Law School, was *summa cum laude* with an undergraduate degree from George Washington University, was clerking for a judge on the U.S. Court of Appeals for the Ninth Circuit, and had previously worked for the Center for the Study of Sexual Minorities in the Military.<sup>56</sup>

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<sup>56</sup> According to its website, the Center for the Study of Sexual Minorities in the Military, which has since changed its name to the Michael D. Palm Center,

(Cont'd.)

Elston said he could not recall the reasons for his decision, but thought he may have struck the candidate based on a reference in her essay that being a federal prosecutor would afford her the opportunity to exercise prosecutorial discretion in deciding what charges were appropriate and whether to offer a plea bargain. Elston said this caused him to conclude that “this is the kind of AUSA that would in my view not necessarily stand up for the law with respect to sentencing and department policy.”

We asked Elston about his denial of the Antitrust Division’s appeal on behalf of a candidate who was in the top 10 percent of his class at the University of Minnesota Law School, was a law review editor, graduated from the Wharton School of Business at the University of Pennsylvania, was clerking for a federal appellate judge, and listed membership in both the Federalist Society and the American Constitution Society with a comment that he was “open-minded to all points of view.” The candidate also noted in his essay that he was capable of defending positions such as the constitutionality of the “President’s NSA’s wiretapping program” even though he “remained personally conflicted” about the program.

Elston said he was “surprised” that he did not grant the appeal and could not recall the reason for his decision. He noted, however, that the dual memberships in the Federalist Society and the American Constitution Society was not the reason. Elston said that he may not have granted the appeal because this candidate was listed fourth among six candidates that the component was appealing and he may have assumed that the component listed the candidates in order of priority. However, Elston could not recall why he granted the appeals of other candidates requested by this component, including one who was fifth on the appeal list, had lower grades, attended a lower-tier law school, and had no political or ideological affiliations on his application.

We asked Elston about an appeal he denied of a candidate who was a student at Georgetown Law School with a 3.08 grade point average, who graduated in the top third of his undergraduate class at Georgetown University, and who had worked for Senator John Kerry’s presidential campaign. The candidate selected the Criminal Division as one of the components he was interested in, stated in his essay that he had “always wanted to be a prosecutor,” explained that his interest had been heightened by his friendship with the victim of a sexual assault

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promotes the interdisciplinary analysis of lesbian, gay, bisexual, transgender, and other marginalized sexual identities in the armed forces. Its work has been cited by those supporting the inclusion of homosexuals in the military.

but that his interest in prosecuting was not “limited to rapists,” and included a paragraph that spoke highly of the role of the U.S. Attorney.

Elston denied that the candidate’s work on the Kerry campaign had any negative effect on his decision. Rather, Elston said that one of the reasons he did not grant the appeal was because other than selecting the Criminal Division as one of the components he was interested in, the applicant “didn’t express an interest in the Criminal Division.” Elston stated that his essay was not sufficient to express an interest in the Criminal Division because the Division “doesn’t prosecute sex offenders” and “does very different things than U.S. Attorneys’ Offices.”<sup>57</sup> Elston also said that his grades were not impressive and that he used too many exclamation points (we found three on the three-page application), which was a “pet peeve” of Elston’s.

We asked Elston why he denied the appeal of a SLIP candidate who was a student at Yale Law School, a member of the *Yale Law Journal*, a Rhodes Scholar, a Truman Scholar, graduated *summa cum laude* from Yale College, interned with the U.S. Attorney’s Office for the Southern District of New York, had researched national security and terrorism issues for Yale Law Professor Bruce Ackerman, and had worked for the Minnesota Advocates for Human Rights, the Coordinating Council for Children in Crisis, and the Legal Services Organization’s Trafficking Clinic.<sup>58</sup> AAG Keisler had sent Elston an e-mail indicating that this candidate was the top priority among all those SLIP candidates that the Civil Division was appealing.

Elston said that this candidate “looks like a perfectly outstanding candidate, although she doesn’t say much in terms of essay that would give us a view as to why she’s interested in public service.” Elston said he could not recall why he did not grant this appeal and that he would have granted it at the time of his interview with us. Elston noted that the date of the e-mail exchange with Keisler discussing this candidate was November 24 and “by this time I was really tired of these things.”

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<sup>57</sup> We note that Elston’s statement that the Criminal Division does not prosecute sex offenders is incorrect. The Child Exploitation and Obscenity Section of the Criminal Division prosecutes violations of federal law related to producing, distributing, receiving, or possessing child pornography, transporting women or children interstate for the purpose of engaging in criminal sexual activity, and traveling interstate or internationally to sexually abuse children. In addition, this Section has jurisdiction to prosecute cases of child sexual abuse on federal and Indian lands.

<sup>58</sup> Professor Ackerman published a book in the spring of 2006 entitled, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*.

We also asked Elston about a SLIP candidate who was a third-year student at Yale Law School, had secured a clerkship on the U.S. Court of Appeals for the Ninth Circuit for the fall of 2007, had a master's degree in history from Harvard University, graduated *cum laude* from Yale College, had successfully served as a SLIP with the Department, and had a security clearance. The candidate's application also stated that she had worked for a Democratic Congressman and had worked at the Yale Lowenstein Human Rights Clinic on human rights issues "arising from the war on terror." Elston was unable to say why the candidate was deselected. Elston said he remembered being moved in a positive way by the personal essay the candidate had written about some difficulties in her childhood. However, Elston said he found this candidate's essay "a little bit troublesome" because she said she wanted to work at the Department where she would "be able to consider both the needs of my client and also what is best for my country." Elston said that "line attorneys in the Department of Justice don't get to indulge themselves [by] deciding for themselves what's best for the country." Nevertheless, Elston said he did not think that statement in the essay would constitute a reason to disqualify somebody with an outstanding record and an otherwise great essay.

We asked Elston why he denied the appeal of a SLIP candidate who was a student at Stanford Law School, an editor on the Stanford Journal of International Law, President of the Stanford International Human Rights Association, and had graduated *summa cum laude* from Northwestern University. Elston said there was nothing familiar to him about the application so he could not explain why he did not approve it. However, on reading the applicant's essay when we showed it to him, Elston said that he had a negative reaction to her statement that working for the Department would stimulate her conscience as well as her brain and allow her to work on cases that she cared about. Elston stated:

[T]hose kinds of things [in essays] strike me as being, as being an indication that this person views it all right to put their own judgment about what's right and wrong ahead of what the law, or, or policy requires. . . . But it's just not the job of a line career attorney to, you know, decide in a metaphorical sense what's right and wrong.

Elston said he took those kinds of considerations into account when reviewing the substance of applicants' essays. He said that an attorney's "job is to follow the policies of the Department even if you disagree with them. And so, that's the kind of person that I'm looking for when I'm looking for a line Assistant."



## **H. Conclusions on 2006 Honors Program and SLIP Hiring Process**

The evidence in our investigation – including the documentary evidence, the testimony of witnesses, and the analysis of the applications of candidates who were selected for interviews and who were deselected by the 2006 Screening Committee – supports the conclusion that political or ideological affiliations were used to deselect candidates from the Honors Program and SLIP.

As discussed below, we concluded that while Fridman did not use political or ideological affiliations in his evaluation of candidates, the evidence indicates that both McDonald and Elston did. As a result, many qualified candidates were deselected by the Screening Committee because of their perceived political or ideological affiliations.

First, with regard to Fridman, we found him to be credible in his explanation of how he conducted his review of candidate applications and in describing what factors he considered. Fridman also took reasonable steps to notify his supervisors that improper criteria may have been applied in the Honors Program and SLIP review process. Fridman was uncomfortable with the instructions he was given by Elston, and he discussed them with Tenpas, his first line supervisor. Tenpas advised him to apply only criteria he believed were appropriate and to seek further clarification from Elston, which Fridman did. When Fridman observed McDonald applying what he believed were inappropriate criteria, he brought his concern to Elston's attention, even pointing out specific examples. Elston assured Fridman that he agreed with him and that he need not worry about McDonald because Elston would cast the deciding vote. We believe that Fridman acted appropriately under the circumstances.

The evidence demonstrates that, by contrast, McDonald used inappropriate criteria in her evaluations. The November 29, 2006, e-mail from McDonald to Elston and Fridman opining on ATF SLIP candidates is direct evidence that McDonald inappropriately evaluated candidates based on the candidates' political or ideological affiliations. McDonald wrote that she voted against candidates because their essays used "leftist commentary and buzz words" such as "environmental justice," "social justice," "making policy," or "anything else that involves legislating rather than enforcing." She also expressed disapproval of candidates' affiliations with liberal organizations such as the American Constitution Society, the Poverty and Race Research Action Council, Greenpeace, and Greenaction. Her remarks in the e-mail about "leftist commentary" suggested that this was not an isolated incident or the first time she had applied these criteria. Moreover, Fridman and Elston

both told us that McDonald's comments in the November 29 e-mail were consistent with other comments she made in her review of Honors Program and SLIP applications.

Fridman also told us that McDonald circled items and expressed concern about applications that indicated a candidate had worked for a judge, law professor, or legislator she considered liberal, was a member of or had worked for a liberal organization, or expressed views in a law review article that were not entirely consistent with positions taken by the current administration. Elston also acknowledged that McDonald appeared to have considered political or ideological affiliations in her review of applications.

We do not know what, if any, instructions McDonald was given about how to judge the candidates.<sup>59</sup> No one acknowledged instructing her or knew who did. We concluded that the Department's handling of such an important assignment as screening for Honors Program and SLIP hiring to be deficient. First, the Department assigned a new and inexperienced attorney to perform this important function. McDonald had been at the Department less than a month when she received this assignment and was only 3 years out of law school. Second, we found no evidence that Mercer, Elston, or anyone else gave her any instructions about how to perform the screening or what criteria should and should not be used. Third, when Elston, the head of the Committee, was informed by Fridman that McDonald appeared to be making recommendations based on political or ideological affiliations, Elston did not discuss this with her or instruct her that this was inappropriate.

Based on the results of our investigation, we concluded that McDonald committed misconduct and violated Department policies and civil service law by considering political or ideological affiliations in assessing Honors Program and SLIP candidates.

However, we believe the most significant misconduct was committed by Elston, the head of the Screening Committee. Elston failed to take appropriate action when he learned that McDonald was routinely deselecting candidates on the basis of what she perceived to be the candidates' liberal affiliations. We also concluded that Elston

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<sup>59</sup> However, we found evidence that McDonald knew that using political and ideological affiliation was inappropriate, but did it anyway. As noted above, in an e-mail dated October 25, 2006, unrelated to the Honors Program and SLIP, McDonald advised a friend applying for a career position with the Department "there's not much I can do apart from recommending you because there are legal constraints on career hiring to ensure that it's not political."

deselected some candidates – and allowed the deselection of others – based on impermissible considerations.

As the leader of the Screening Committee, Elston should have ensured that the Committee members used appropriate criteria in making decisions, in accord with federal law and Department policy. Yet, he did not discuss with Fridman and McDonald the proper criteria for evaluating candidates. Elston provided only cursory and vague instructions to Fridman (such as eliminate “wackos and wack jobs”). Elston’s additional instruction to Fridman that they wanted to hire candidates who were supportive of or who had views consistent with the Attorney General’s views on law enforcement was also deficient because such an ambiguous criterion easily could be used to identify and deselect those who held ideological views that differed from the administration’s. Elston failed to provide any instruction to McDonald, who was a junior attorney new to the Department. Moreover, after he became aware early in the screening process that McDonald was rejecting candidates based upon what she perceived to be their liberal affiliations, he did not discuss that impropriety with her.<sup>60</sup>

Elston told us that he decided not to talk to McDonald about the criteria she was using because even if she was rejecting candidates based on their liberal affiliations, he and Fridman could overrule her. Elston admitted, however, that he frequently gave deference to McDonald’s decisions because he could not always vote against her “and trash the work of the Screening Committee.” Elston also stated that he wished he had been “more proactive and more protective of the Department’s reputation.”

As explained below, we concluded that Elston violated federal law and Department policy by deselecting candidates based on their liberal affiliations. First, the data analysis indicates that highly qualified candidates with liberal or Democratic Party affiliations were deselected at a much higher rate than highly qualified candidates with conservative or Republican Party affiliations. Second, Elston admitted that he may have deselected candidates in a few instances due to their affiliations with certain liberal causes. Elston also was unable in

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<sup>60</sup> Although Elston stated that he did not know whether McDonald’s no votes were actually based upon the negative comments she was making about the candidates’ liberal affiliations, we found that statement disingenuous. Fridman told Elston that McDonald was doing this, and the notations on the applications, which Elston recognized as McDonald’s handwriting, showed that McDonald was circling and commenting on these groups. Moreover, many of these candidates had stellar credentials, and there was no other apparent reason for McDonald recommending their deselection.

specific cases to give a credible reason as to why highly qualified candidates with liberal or Democratic Party affiliations were deselected.

While Elston generally denied that he considered political or ideological affiliations in evaluating candidates, he admitted when questioned about certain candidates that he considered aspects of those candidates' ideological affiliations in his evaluation. For example, Elston admitted that in two instances he would have voted with McDonald to deselect the candidates based on their affiliations with pro-environment causes because he did not want the candidates coming to the Department "with an agenda" or without "an even-handed approach" to environmental issues.

In addition, Elston consistently was unable to provide credible explanations as to why he denied the appeals of the highly qualified candidates who had liberal or Democratic Party affiliations. His proffered reasons were also inconsistent with other statements he made or actions he took. For example, as discussed above, Elston said he rejected two highly qualified candidates with liberal affiliations because he was offended by the appeals submitted by the Division which he thought showed a lack of deference to the Screening Committee. However, Elston could give no reason why he approved other candidates included in the Division's appeal. Similarly, Elston believed he may have rejected one highly qualified candidate because the candidate was listed fourth among the list of six candidates that the component was appealing and he assumed the component was listing the candidates in order of priority. However, Elston granted the appeal for another candidate who was listed fifth out of the six candidates the component was appealing, had lower grades at a lower-tier school than the candidate who was listed fourth, but who had no affiliations on his application that could be categorized as liberal or conservative.

Similarly, we did not find credible Elston's explanation that he may have denied the appeal of a highly qualified candidate who had worked for the Center for the Study of Sexual Minorities in the Military because he concluded the candidate would not "stand up for the law with respect to sentencing and Department policy" due to the statement in her essay that she would be able to exercise prosecutorial discretion as a federal prosecutor. We also did not credit Elston's other explanation for denying this candidate – that she was not academically qualified because she was in the top third rather than the top quarter of her class at Stanford Law – since it was inconsistent with his actions in approving other candidates from lower-tier law schools with lower grades.

During his interview, Elston also frequently pointed to lines in candidates' essays that may have been a basis for deselecting candidates because he said these statements could be indications that the candidates would improperly follow their own consciences rather than the Department's policies. These included statements such as the candidate wanting to work for the Department because the job would allow the candidate "to consider what is best for my country."

In addition to Elston's failure to provide credible explanations for his actions during his interview, we concluded that Elston was not candid with others in the Department who questioned him during the hiring process about why candidates were being deselected. According to at least 12 witnesses, Elston stated that the candidates were deselected on the basis of grades, grammatical mistakes in writing, or inappropriate information on the Internet. Yet, as our data analysis demonstrated and as Elston reluctantly acknowledged, these reasons could not adequately explain why many candidates were deselected.

Moreover, Elston tried to minimize his role in selecting candidates when he was questioned by others about the Committee's decisions. Elston frequently explained that other Committee members had been responsible for the decisions and described his role as a conduit. However, the evidence demonstrated that he was casting the deciding vote on a significant number of candidates that Fridman had approved and McDonald had rejected.

In sum, we found that Elston was aware that McDonald was rejecting candidates based on her perception of the candidates' political or ideological affiliations and that he failed to intervene, discuss it with her, or stop her from doing so. We also concluded that Elston committed misconduct, and violated federal law and Department policy, when he deselected candidates and denied appeals based on his perception of the political or ideological affiliations of the candidates.

We also concluded that OARM Director DeFalaise did not adequately or timely address the concerns that were brought to his attention concerning the Screening Committee's deselections.<sup>61</sup> As Director of OARM, DeFalaise played a key oversight role in the administration of the Honors Program and SLIP. During the 2006 process, he became aware that an unusually large number of candidates were deselected, that the deselections included highly

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<sup>61</sup> OPR Counsel H. Marshall Jarrett recused himself from the evaluation of DeFalaise's conduct.

qualified candidates, and that some component officials were concerned that political considerations were being taken into account. Although Elston told DeFalaise that the deselections were based on legitimate reasons such as academic qualifications, we believe that DeFalaise had sufficient evidence to, at a minimum, raise concerns about the Screening Committee's criteria or the deselection of particular candidates directly with Elston or discuss those concerns with other senior leaders at the Department.

Finally, we concluded that Acting Associate Attorney General Mercer did not adequately address the concerns that were brought to his attention by several senior Department officials that the Screening Committee's deselections appeared to have been politicized. In his role as Associate Attorney General, Mercer had oversight authority over the Tax Division and Civil Division, as well as other components participating in the Honors Program and SLIP hiring process. In addition, one of his own staff members, McDonald, was a member of the Screening Committee. When Mercer questioned McDonald about the criteria the Screening Committee had applied, McDonald told him that the deselections were based on concerns about academic records, sloppiness of applications, and at times, "a concern that [the applicants] wouldn't be able to follow DOJ policy based upon what they had written."

Mercer also relied on Elston's assurances that the deselections were based on legitimate concerns about academics or the sloppiness of applications without any further inquiry, even though he had been informed by other Department officials that they believed that academically qualified candidates had been deselected. Similarly, Mercer relied on Elston's assurances that Elston would improve the process even though Elston was involved in selections that were alleged to have been politicized. Further, Mercer had learned from Associate Deputy Attorney General David Margolis that the meeting Elston held on improving the process had not gone well and that a lot of people had left the meeting "disturbed" and "not satisfied." We believe that, based on Mercer's oversight authority over the Tax and Civil Divisions and other participating components, he should have pursued the matter further with Elston.

#### **IV. Conclusions and Recommendations**

As our report describes, in 2002 the Honors Program and SLIP hiring process was fundamentally changed by an Attorney General's Working Group to enable the Department's senior leadership to have more input into the selection of candidates. Prior to that time, career employees within each component administered the interview and selection process for the Honors Program and SLIP. In 2002, participation in the process by political officials in the components increased, as directed by the Attorney General's Working Group, but dropped off significantly in subsequent years.

Under the system implemented by the Attorney General's Working Group beginning in 2002, a Screening Committee composed primarily of politically appointed employees from the Department's leadership offices had to approve all Honors Program and SLIP candidates for interviews by the components.

In 2002, many deselections were required because of budget constraints. The data showed that candidates with Democratic Party and liberal affiliations apparent on their applications were deselected at a significantly higher rate than candidates with Republican Party, conservative, or neutral affiliations. This pattern continued to exist when we compared a subset of academically highly qualified candidates from the three groups. However, we found no other evidence that the members of the Screening Committee intentionally considered political or ideological affiliations in making their deselections, and the Committee members all denied doing so. While we were unable to prove that any specific members intentionally made deselections based on these prohibited factors, the data indicated that the Committee considered political or ideological affiliations when deselecting candidates.

During the next 3 years, from 2003 to 2005, the Screening Committee made few deselections, and we found no evidence that deselections were made based on political or ideological affiliations.

However, we found that in 2006 the Screening Committee inappropriately used political and ideological considerations to deselect many candidates. We determined that a disproportionate number of the deselected Honors Program and SLIP candidates had liberal affiliations as compared to the candidates with conservative affiliations. This pattern was also apparent when we examined the data for membership in the liberal American Constitution Society compared to

the conservative Federalist Society for SLIP candidates and when we compared applicants with Democratic Party affiliations versus Republican Party affiliations for both Honors Program and SLIP candidates. The disproportionate pattern was also apparent when we examined candidates who were highly qualified academically.

The documentary evidence and witness interviews also support the conclusion that two members of the 2006 Screening Committee, Esther Slater McDonald and Michael Elston, took political or ideological affiliations into account in deselection of candidates in violation of Department policy and federal law. For example, the evidence showed that McDonald wrote disparaging statements about candidates' liberal and Democratic Party affiliations on the applications she reviewed and that she voted to deselect candidates on that basis.

We also found that Elston, the head of the 2006 Committee, failed to take appropriate action when he learned that McDonald was routinely deselecting candidates on the basis of what she perceived to be the candidates' liberal affiliations. The evidence also showed that Elston himself deselected some candidates – and allowed the deselection of others – based on impermissible considerations. Despite his initial denial in our interview that he did not consider such inappropriate factors, he later admitted in the interview that he may have deselected candidates in a few instances due to their affiliation with certain causes. In addition, Elston was unable to give a credible reason as to why specific highly qualified candidates with liberal or Democratic credentials were deselected.

We concluded that, as a result of the actions of McDonald and Elston, many qualified candidates were deselected by the Screening Committee because of their perceived political or ideological affiliations. We believe that McDonald's and Elston's conduct constituted misconduct and also violated the Department's policies and civil service law that prohibit discrimination in hiring based on political or ideological affiliations.

However, because both McDonald and Elston have resigned from the Department, they are no longer subject to discipline by the Department for their actions. Nevertheless, we recommend that the Department consider the findings in this report should either McDonald or Elston apply in the future for another position with the Department.

With regard to the processes used by components for selecting candidates, we received significant allegations that inappropriate considerations were used in selecting candidates in the Civil Rights Division. The OIG and OPR are jointly investigating various allegations



involving the Civil Rights Division, and we will provide our findings in a separate report when that investigation is concluded.

As to the remaining components, we generally found that the Honors Program and SLIP hiring processes were largely controlled by career employees and were merit based. We did not find evidence to indicate that components employed inappropriate criteria such as political or ideological affiliations to select candidates for the Honors Program or SLIP. While some concerns were raised concerning the Criminal Division's selection of candidates in 2005, we did not find sufficient evidence to conclude that political or ideological affiliations were used to either approve or eliminate candidates for that Division.

In addition, we believe that various employees in the Department deserve credit for raising concerns about the apparent use of political or ideological consideration in the Honors Program and SLIP hiring processes. For example, Daniel Fridman deserves praise for reporting his concerns about the process in 2006 to both his supervisor and Elston and for avoiding the use of improper considerations in his review of candidates for the Honors Program and SLIP. A few DOJ political employees also objected to the apparent use of political or ideological considerations in the hiring process, such as Assistant Attorneys General Peter Keisler and Eileen O'Connor, and they should be credited for raising their concerns. Certain career employees, particularly in the Tax Division and the Civil Division, also pressed concerns about the hiring process. By contrast, we believe that others in the Department, such as Acting Associate Attorney General William Mercer and OARM Director Louis DeFalaise, did not sufficiently address the complaints about the deselections.

As discussed in this report, as a result of the widespread complaints from career employees that arose following the 2006 selection process, in April 2007 the Department changed the process for selecting Honors Program and SLIP candidates. Under the new process, the Screening Committee was replaced by an Ad Hoc Working Group composed of a senior career employee from each of the major Department components that participate in the Honors Program and SLIP. The components and the Ad Hoc Working Group were also directed to follow the Component Review Standards Guidance that notes that only merit-based criteria should be considered in selecting candidates.

Under the current process, the Ad Hoc Working Group reviews the Honors Program candidates selected by the components only to ensure that the components' selections comply with the Component Review Standards Guidance and that the number of interviews does not

exceed budgetary limitations. The Working Group must provide a component with a written explanation of any candidates it identifies as non-compliant with the guidance. In 2007 only 15 candidates were deselected, 14 because of poor academic standing and 1 because of poorly written essays. SLIP candidates are not subject to review by the Ad Hoc Working Group. Instead, OARM randomly monitors SLIP selections for compliance with the guidance.

In addition to the changes made to the Honors Program and SLIP hiring process, beginning in the summer of 2007 the Department began briefing all new political appointees on merit system principles and prohibited personnel practices as part of the official orientation process. Further, Attorney General Mukasey issued a memorandum on March 10, 2008, requiring all political appointees to acknowledge that they have read the Department regulations that hiring must be merit based and that political affiliations cannot be considered.

We believe that these changes to the Honors Program and SLIP hiring process are important changes that can help address many of the problems that we found in our investigation. However, we believe the Department should consider additional changes to help ensure that political or ideological affiliations are not inappropriately used to evaluate candidates for the Honors Program and SLIP in the future.

First, the April 26, 2007, memorandum from the Director of OARM describing changes to the Honors Program and SLIP should be strengthened. The memorandum contains the Component Review Standards Guidance, which provides a description of the merit-based criteria that should be used to evaluate Honors Program and SLIP candidates. However, the memorandum should also explicitly state that political affiliations may not be used as criteria in evaluating candidates and that ideological affiliations cannot be used as a proxy to discriminate on the basis of political affiliation. As we found in this investigation, membership in organizations that are perceived as liberal or conservative can easily be used as a screening device to discriminate on the basis of political affiliation. Moreover, discriminating on the basis of ideological affiliation violates the merit-based principles governing federal employment for career employees, and it undermines confidence in the Department's mission.

In addition, we believe it is important to consistently remind all employees involved in the selection of Honors Program and SLIP candidates that the selections must be merit based without consideration of political affiliations. Thus, we recommend that the Department implement a process to require all employees participating in the selection of Honors Program and SLIP candidates to formally

acknowledge that they have read the Component Review Standards Guidance and will abide by the standards when selecting candidates.

We further recommend that the Department include a provision in its Department of Justice Human Resource Order that emphasizes that the process for hiring career attorneys must be merit based and clarifies both that political affiliations cannot be considered and that ideological considerations cannot be used a proxy to discriminate on the basis of political affiliations.

We also noted that several components that issued their own guidance on hiring failed to include politics on the list of factors, such as race, gender, and age, that cannot be considered in hiring decisions. We recommend that the Department ensure that all components that issue their own guidance on hiring of career employees consistently state that political affiliations cannot be considered and that ideological affiliations cannot be used as a proxy for determining political affiliations.

In addition, we believe that the briefing currently provided to political appointees about the merit system principles can be strengthened. The written briefing for political appointees stresses that candidates cannot be discriminated against on the basis of political affiliation without mentioning ideological affiliations. We believe the briefing and training material should be clarified to note that candidates should be evaluated based on their merits and that ideological affiliations may not be used as a screening device for discriminating on the basis of political affiliations.

Finally, we believe that the Department leaders, as well as the Ad Hoc Working Group, must be vigilant to ensure that political or ideological affiliations are not used to select candidates for the Honors Program or the SLIP. The Honors Program is a critical recruiting tool for the Department to bring in talented new attorneys, many of whom will become long-term public servants. It is important for the Department to have a fair and open competition for these positions and to ensure that the selection for the program is based on non-partisan considerations. While we believe the Department has taken important steps to address issues that arose in the selection of candidates for the Honors Program and SLIP candidates in the past, we believe the Department must ensure that the serious problems we found in Honors Program and SLIP hiring do not recur in the future.

## **APPENDIX**

### **2002 HP Organizations**

#### Liberal Organizations

American Civil Liberties Union  
American Constitution Society  
Amnesty International  
Bisexual, Gay, Lesbian Advocates  
Bisexual Law Student Association  
Capital Area Immigrants' Rights Coalition  
Center for Constitutional Rights  
Chesapeake Bay Foundation  
Coast Alliance  
Committee of Refugees from El Salvador  
Conservation International  
Conservation Law Foundation  
Earthjustice  
Electronic Privacy Information Center  
Environmental Defense Fund  
Environmental Resources Trust  
Florence Immigrant and Refugee Rights Project, Inc.  
Georgetown University Institute for Public Representation  
Georgia Project Center for Democratic Renewal  
Grassroots Environmental Effectiveness Network  
Human Rights Campaign  
Human Rights Watch  
Innocence Project  
International Human Rights Law Group  
Law Students Against the Death Penalty  
Lesbian, Gay, Bisexual, and Transgender Alliance  
Mexican American Legal Defense  
Midwest Environmental Advocates  
NAACP Legal Defense  
National Wildlife Federation  
Natural Resources Defense Council  
Nature Conservancy  
New York University Brennan Center for Justice  
Northwest Environmental Defense Center  
NOW Legal Defense  
Partnership for Civil Justice  
Physicians for Human Rights  
Planned Parenthood

Pridelaw  
Public Citizen  
San Diego Baykeeper  
Santa Monica Mountains Conservancy  
Save Our Wetlands, Inc.  
Sierra Club  
Texas Immigrant and Refugee Coalition

Conservative Organizations

Alliance Defense Fund  
American Center for Law and Justice  
American Family Association Center for Law and Policy  
Blackstone Fellowship  
Center for Faith and Freedom  
Christian Legal Society  
Columbia Coalition for Life  
Defenders of Property Rights  
Federalist Society  
Heritage Foundation  
Leadership Institute  
National Center for Policy Analysis  
Notre Dame/St. Mary's College Right to Life Club  
Thomas More Center for Law and Justice

## **2002 SLIP Organizations**

### Liberal Organizations

American Civil Liberties Union  
Alliance for Justice  
American Constitution Society  
Amnesty International  
Ayuda, Inc.  
Battered Immigrant Women Project  
Campaign to End the Death Penalty  
Capitol Area Immigrants Rights Coalition  
Carr Center for Human Rights  
Center for Reproductive Law and Policy  
Central American Refugee Clinic  
Citizen Works  
Conservation Law Foundation  
Earthjustice  
East Bay Workers' Right Clinic at Boalt Law School  
Electronic Frontier Foundation  
Farmworker Legal Services  
Florence Immigrant and Refugee Rights Project  
Florida Immigrant Advocacy Union  
Friends of Farmworkers, Inc.  
Georgia Equality Project  
Heal the Bay  
Human Rights Watch  
Innocence Project  
International Refugee Center of Oregon  
Lamba Law Association  
Lawyers Committee for Civil Rights  
Massachusetts Law Reform Institute  
Mexican American Legal Defense  
Migrant Legal Action Program, Inc.  
NAACP Legal Defense Fund  
National Center for Law and Economic Justice  
National Consumer Law Center  
National Immigration Project  
National Organization for Women  
Natural Resources Defense Council  
Oceana  
Planned Parenthood  
Potomac Conservancy  
Prisoner's Rights Research Project  
Public Citizen  
Public Justice Center

Public Research Interest Group  
Rocky Mountain Immigrant Advocacy Network  
San Francisco Estuary Project  
Sierra Club  
Students Against Sweatshops  
Texas Immigrant and Refugee Coalition  
Tobacco Products Liability Project  
Washington Lawyers Committee for Civil Rights  
Wildlife Society  
Women Strike for Peace  
Workers' Rights Clinic at UC Hastings College of Law

Conservative Organizations

Alliance Defense Fund  
American Center for Law and Justice  
Campus Crusade for Christ  
Christian Legal Society  
Conservative Political Action Conference  
Defenders of Property Rights  
Federalist Society  
National Center for Policy Analysis  
National Right to Work Committee  
National Taxpayers Union and Foundation  
Oregonians in Action  
Texas Eagle Forum  
Thomas More Legal Society  
Thomas More Pre-Law Society

## **2006 HP Organizations**

### **Liberal Organizations**

American Civil Liberties Union  
American Constitution Society  
Amnesty International  
Asylee Family Rescue Project  
Ayuda, Inc.  
California SLAPP Project  
Capital Area Immigrants' Right Coalition  
Carter Center  
Cascade Resources Advocacy Group  
Catawba Riverkeeper Foundation  
Civil Rights Empowerment Project  
Clean Water Action  
Communities for a Better Environment Conservation Law Foundation  
Death Penalty Clinic at Boalt Hall  
Defenders of Wildlife  
The Earl Carl Institute at the Thurgood Marshall School of Law  
Earthjustice  
East Bay Worker's Rights Clinic  
Environmental Law Institute  
Environmental Defense  
Environmental Human Rights  
Environmental Law Alliance Worldwide  
Equal Justice Initiative  
Farmworker Justice  
Florida Immigrant Advocacy Center  
Gay Men's Health Crisis (Immigration Unit)  
Human Rights First  
Human Rights Law Society  
Human Rights Watch  
Immigrant and Refugee Appellate Center  
Immigrant Law Center of Minnesota  
Immigrant Rights Coalition Refugee and Asylum Committee  
Immigration Equality  
Immigration Legal Resource Center  
Innocence Project  
International Union for the Conservation of Nature  
Law School Civil and Human Rights Clinics and Organizations  
Law School Environmental Law Clinics and Societies  
Law School Immigration Clinics  
Law School Legal Aid Clinics  
Lawyer's Committee for Civil Rights  
Lawyers for Clean Water



Lawyers Without Borders  
Legal Aid Organizations  
Maryland Latino Coalition for Justice  
Midwest Immigrant and Human Rights Center  
Migrant Legal Action Program  
Minnesota Advocates for Human Rights  
Minnesota Center for Environmental Advocacy  
Minnesota Justice Foundation  
National Environmental Trust  
National Law Center on Homelessness and Poverty  
National Wildlife Federation  
Natural Resources Defense Council  
Nature Conservancy  
Northwest Environmental Defense Center  
Northwest Immigrants Rights Project  
NOW Legal Defense and Education Fund  
Oceana  
OUTLaw  
Pittsburgh Refugee and Immigrant Assistance Center  
Planned Parenthood Federation of America, Inc.  
Police Accountability Project  
Political Asylum Project of Austin  
PRAXIS: An Institute for Social Justice  
Public Advocates, Inc.  
Public Defender Service  
Save the Dunes Conservation Fund  
Sierra Club  
Southern Center for Human Rights  
Southern Environmental Law Center  
Texas Civil Rights Project  
UPenn Reproductive Rights Clinic  
Upper Chatahoochee Riverkeeper  
Washington Lawyers Committee for Civil Rights and Urban Affairs  
Women's Initiative for Self-Empowerment  
World Organization for Human Rights  
Youth Advocacy Project

#### Conservative Organizations

Alliance Defense Fund  
Blackstone Legal Fellowship  
Christian Legal Society  
Edmund Burke Society  
Family Research Council  
Federalist Society  
Heritage Foundation

Hudson Institute  
Thomas More Society  
Thomas More Law Center  
Thomas More Scholar  
Washington Legal Foundation

## **2006 SLIP Organizations**

### **Liberal Organizations**

Academy on Human Rights and Humanitarian Law  
American Civil Liberties Union  
Alliance for Justice  
American Constitution Society  
Center for American Progress  
Center for Death Penalty Litigation  
Conservation Law Foundation  
Earthjustice  
Environmental Alliance World Wide  
Environmental Defense Fund  
Environmental Law Society  
Human Rights Campaign  
Human Rights Law Society  
Human Rights Watch  
Immigration Project  
Innocence Project  
International Human Rights Legal Clinic  
Legal Aid Justice Center- Immigration Clinic  
Lowenstein Human Rights Clinic  
NAACP Legal Defense Fund  
National Council of Women's Organizations  
National Law Center on Homelessness and Poverty  
Natural Resources Defense Council  
Planned Parenthood  
Project Renewal, Inc.  
Public Justice Center  
Save Our Springs Alliance  
World Organization for Human Rights USA  
World Wildlife Fund

### **Conservative Organizations**

Alliance Defense Fund  
American Center for Law and Justice  
Christian Legal Society  
Federalist Society  
Heritage Foundation  
Liberty Legal Institute  
Thomas More Legal Society