An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program

U.S. Department of Justice
Office of the Inspector General

U.S. Department of Justice
Office of Professional Responsibility

June 24, 2008

TABLE OF CONTENTS

INDEX OF CHARTS

I. Introduction

This report describes the Office of the Inspector General's (OIG) and the Office of Professional Responsibility's (OPR) joint investigation concerning whether the political or ideological affiliations of applicants were improperly considered in the selection of candidates for the Attorney General's Honors Program and the Summer Law Intern Program (SLIP) from 2002 to 2006. The Honors Program is a highly competitive hiring program for entry-level attorneys in the Department of Justice (Department or DOJ), while the SLIP is a competitive paid summer internship program in the Department.

Allegations regarding the politicization of the Honors Program and SLIP hiring process received widespread public attention in April 2007 as a result of a letter to Congress anonymously signed by "A Group of Concerned Department of Justice Employees."[1] The OIG and OPR already were jointly investigating issues related to the removal of certain United States Attorneys, and we decided to expand the scope of our investigation to include allegations regarding Honors Program and SLIP hiring.

The OIG/OPR investigation examined Honors Program and SLIP hiring from 2002 to 2006. As explained in more detail in Section II, the hiring process for the Honors Program and SLIP was significantly changed in 2002 when the involvement of political appointees at the Department in the hiring process was greatly expanded.

Our investigation examined: (1) whether Department components used political or ideological affiliations in assessing candidates for the Honors Program and SLIP, and (2) whether the Screening Committee convened each year by the Office of the Deputy Attorney General (ODAG) to review the list of candidates chosen by the various Department components improperly considered political or ideological affiliations in deciding whether to approve interviews of these candidates.

This OIG/OPR investigation was conducted by a team of OIG and OPR attorneys and OIG program analysts. The team interviewed more than 70 individuals who participated in the hiring process, including

[1] The letter claimed that a number of highly qualified candidates who had been selected by career employees to be interviewed for the Honors Program and SLIP were rejected by a Screening Committee chaired by the Chief of Staff to the Deputy Attorney General. The letter stated that most of the candidates rejected by the Committee had Democratic or liberal affiliations.

political appointees, career attorneys, and human resources personnel. The team reviewed thousands of pages of applications, e-mails, and other documents from the components who participated in the Honors Program and SLIP between 2002 and 2006; from the Office of Attorney Recruitment and Management (OARM), which oversees the Honors Program and SLIP; and from the Office of the Attorney General (OAG), the ODAG, and the Office of the Associate Attorney General (OASG). In addition, the team conducted extensive analyses of the applications of those candidates who had been approved or deselected by the ODAG Screening Committees each year to determine whether candidates with apparent liberal or Democratic affiliations on their applications were treated in the same or disparate manner as candidates with neutral, conservative, or Republican affiliations.[2]

This report is divided into four sections. Following this introduction, the second section provides background information on the history of the Honors Program and SLIP, the changes to the hiring process in 2002, the complaints about the hiring process that arose between 2002 and 2006, and the revamping of the process after complaints and public attention in 2007. The second section also discusses the standards that govern the Department in hiring career employees. The third section contains the findings and analysis of the OIG/OPR investigation, focusing first on the hiring decisions made by the components and then on the hiring and deselection decisions made by the ODAG Screening Committees. The fourth section summarizes conclusions reached by the OIG and OPR and our recommendations for improvements to the Honors Program and SLIP hiring process.

[2] In this report, the term "deselected" refers to those candidates the Screening Committees removed from the components' interview lists.

II. Background on Honors Program and Summer Law Intern Program

The Attorney General's Honors Program is the exclusive means by which the Department hires recent law school graduates and judicial law clerks who do not have prior legal experience. The Department's litigating divisions and a few other Department components participate in the Honors Program hiring process, which is overseen by the Department's Office of Attorney Recruitment and Management (OARM).[3] Traditionally, students and judicial clerks apply for the Honors Program in late August or early September, interviews are conducted in October, and offers are extended by the individual components in November. The Honors Program historically has been very competitive, with the Department receiving hundreds more applications than available positions.

While the Honors Program applications are centrally processed by OARM, each component individually hires its own Honors Program attorneys. With few exceptions, all Honors Program positions are permanent.[4] Many component officials told us that they view the Honors Program as an extremely valuable recruiting tool and that many of the Honors Program attorneys spend a significant portion of their legal careers with the Department.

The Summer Law Intern Program is the Department's hiring program for paid summer interns.[5] Law students apply in the fall for summer internships following their second year of law school, or following their third year of law school if they will be entering a judicial clerkship or full-time graduate law program following graduation. Hiring for SLIP positions follows the same general schedule and procedure as the Honors Program, except that SLIP candidates are interviewed by telephone or are hired based on their applications

---

[3] In addition to the Department's litigating divisions, the other Department components that participated in the Honors Program and SLIP hiring process included the Federal Bureau of Prisons (BOP), the Executive Office for Immigration Review (EOIR), the Drug Enforcement Administration (DEA), the Office of Justice Programs (OJP), the U.S. Trustee Program, and several U.S. Attorneys' Offices. We list all the components involved in footnote 10.

[4] The DEA and EOIR offer 1- to 2-year clerkships. The BOP and some U.S. Attorneys' Offices hire Honors Program attorneys for 2-year term appointments that can lead to permanent employment.

[5] Many components also use volunteer student interns. These volunteers do not receive a salary and are not hired as part of the SLIP.

without an interview. Not all Department components who participate in the Honors Program also participate in the SLIP.

A. Changes to Hiring Process Made in 2002

In 2002, the Honors Program and SLIP hiring process was fundamentally changed as a result of recommendations from a Working Group of senior officials from the offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

Prior to that time, the number of Honors Program applications had begun to decline and, according to the members of the Attorney General's Working Group we interviewed, Department leadership wanted to increase both the quantity of applications and the quality of the candidates who were applying. In addition, Working Group members said they were concerned that the Department was not successfully competing with law firms and other employers to attract the highest quality candidates. Because it was the "Attorney General's" Honors Program, Working Group members said that Attorney General Ashcroft wanted to ensure that the program maintained its prestige and attracted the highest quality candidates for all the participating components.

In addition, the Department had been planning to eliminate the paper-based application system for the Honors Program and SLIP and instead require candidates to submit applications electronically using a computerized program called Avue Digital Services (Avue). Using Avue, the Department's components could view applications online and designate the candidates they wanted to interview. The Attorney General's Working Group directed OARM to begin the automated process in the 2002 hiring cycle so that it could implement other changes the Working Group had recommended.

The Attorney General's Working Group also determined that rather than sending career Department attorneys to various locations across the country to conduct regional interviews, all Honors Program candidates would be brought to Washington, D.C., at the Department's expense, for interviews. According to the members of the Working Group we interviewed, this change was intended to allow more Department attorneys, particularly political appointees in leadership positions, to participate in the interview and hiring process. Department officials also told us that they hoped that providing candidates an opportunity to meet senior Department officials in Washington, D.C., would attract more candidates and allow the Department to better compete with law firms for the best candidates.

Therefore, in July 2002 the Attorney General's Working Group directed that component heads appoint someone from their front offices to coordinate Honors Program hiring in their components. Senior Department officials also were encouraged to speak at top law schools to recruit applicants for the Honors Program. In addition, a Screening Committee, composed of several members of the Working Group, reviewed and approved the candidates who the components selected for interviews in the 2002 Honors Program and SLIP.[6]

The changes implemented in 2002 remained in effect until 2006. While the composition of the Screening Committee changed from year to year, in general the components did not know who served on the Screening Committee or what criteria it applied in reviewing candidates. In addition, the Screening Committee gave no reasons or explanations for its decision to deselect a candidate from the list of those to be interviewed.

As discussed in greater detail in Section III, after changes to the candidate screening process were implemented in 2002, a few complaints arose that the hiring process had been politicized. However, OARM officials reported that they received few complaints about the process or the decisions of the Screening Committee during 2003 through 2005. That changed in 2006 when OARM reported that many complaints surfaced after the Screening Committee took weeks, rather than the normal 2 days, to conduct its review, and deselected an unusually large number of seemingly qualified Honors Program and SLIP candidates.

As a result of the complaints and controversy in 2006, the Department changed the hiring process in 2007. Among other changes, the screening function performed by political appointees during the previous 4 years was replaced with a Screening Committee composed of career employees. In Section III, we describe in more detail the changes to the hiring process in 2007 and how it currently operates.

In the sections that follow, we discuss the evidence we found regarding Honors Program and SLIP hiring from 2002 through 2006. We then examine the hiring in 2006 in more detail, because in that year there were many more complaints that political considerations were used in the hiring process.

---

[6] Although the Working Group focused on the Honors Program, many of the changes, such as automated applications and screening of candidates, were implemented for SLIP candidates as well.

First, however, we briefly summarize the legal requirements that apply to hiring for career attorney positions in the Honors Program.

B. Department Hiring Standards

Positions for DOJ attorneys fall into two broad categories: political and career. It is not improper to consider political or ideological affiliations when hiring for DOJ political positions. However, as discussed below, both DOJ policy and civil service law prohibit discrimination in hiring for DOJ career positions on the basis of political affiliations. This prohibition applies to attorneys hired for permanent positions through the Honors Program as well as summer interns hired through the SLIP, because these are considered career positions.

The Department's policy on nondiscrimination is contained in the Code of Federal Regulations, Section 42.1(a) of 28 C.F.R. Part 42, Subpart A, which states:

> It is the policy of the Department of Justice to seek to eliminate discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, **political affiliation**, age, or physical or mental handicap in employment within the Department and to assure equal employment opportunity for all employees and applicants for employment (emphasis added).

While the regulation does not define "political affiliation," courts have considered political affiliation to include "commonality of political purpose, partisan activity, and political support." *See, e.g., Curinga* v. *City of Clairton*, 357 F.3d 305, 311 (3d Cir. 2004).

OARM, the Department component with primary responsibility for overseeing career attorney hiring, states on its website:

> The U.S. Department of Justice is an Equal Opportunity/ Reasonable Accommodation Employer. Except where otherwise provided by law, there will be no discrimination based on color, race, religion, national origin, **politics**, marital status, disability, age, sex, sexual orientation, status as a parent, membership or nonmembership in an employee organization, or personal favoritism (emphasis added).[7]

[7] See www.usdoj.gov/oarm/attvacancies.html.

In addition to Department policies, the *Civil Service Reform Act* (CSRA) prohibits the Department from discriminating in hiring for career positions based on political affiliation. For example, the CSRA states that federal agencies must adopt hiring practices for career employees in which

> selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

5 U.S.C. § 2301(b).

Moreover, the CRSA sets forth a series of merit system principles by which federal agencies are to manage personnel decisions. One principle directly addresses employment discrimination:

> All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to **political affiliation**, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

5 U.S.C. § 2301(b)(2) (emphasis added).

Another section of the CSRA also prohibits the consideration of political affiliation in personnel matters involving career employees. Section 2302(b)(1)(E) prohibits "discriminat[ing] for or against any employee or applicant for employment . . . on the basis of . . . political affiliation, as prohibited under any law, rule, or regulation."[8]

Section 2302(b)(12) of the CSRA makes it unlawful to "take or fail to take any other personnel action if the taking or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit systems principles contained in section 2301 of this title." As noted above, one merit system principle is that "all

[8] Use of political affiliation violates Section 2302(b)(1)(E) only when it also violates some other "law, rule or regulation." We asked the Department's Office of Legal Counsel (OLC) whether 28 C.F.R. § 42.1(a) qualified as a predicate for a violation of section 2302(b)(1)(E). OLC responded that "[o]ur informal conclusion is that 28 C.F.R. § 42.1 (2007) and the First Amendment constitute 'law[s], rule[s] or regulation[s]' that prohibit considering political affiliation in hiring career attorneys to Excepted Service Schedule A positions at DOJ." Career attorneys in the Department are Excepted Service Schedule A positions.

employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation . . . ." 5 U.S.C. § 2301(b)(2).

These policies and laws do not define "political affiliation." Nonetheless, identifying candidates as "liberal" or "conservative" based on the activities or organizations with which they are affiliated can be used as a proxy for political affiliation and thus can violate CSRA's prohibition. As we demonstrate later, some members of the Screening Committee in 2006 used liberal and conservative affiliations as a proxy for political affiliation.

Using ideological affiliation can also create the appearance that candidates are being discriminated against based on political affiliation. In addition, using political or ideological affiliation can violate the requirement that the government use hiring practices for career positions that ensure it identifies qualified applicants through fair and open competition. See 5 U.S.C. §§ 2301(b)(1) – (2).

As a result, Department policy and the CSRA prohibit using political affiliations and may also prohibit using certain ideological affiliations in assessing candidates for the Honors Program and SLIP.

III. Hiring for Honors Program and SLIP from 2002 to 2006

A. Component Selection Process

This section examines whether Department components considered politics or ideology in selecting Honors Program and SLIP candidates to interview and hire. The allegations we received during this investigation that political and ideological affiliations were considered as factors in evaluating candidates largely centered on the decisions of the Screening Committee. We also received complaints that the Civil Rights Division used political considerations in hiring for the Honors Program. In addition, three Department career employees we interviewed said they suspected that, in two separate instances, a political appointee involved in the Criminal Division's hiring process may have taken political and ideological factors into account when making decisions about candidates.

In this section, we summarize the hiring process that different components used in the Honors Program and SLIP and we describe the involvement of political appointees in each component. We also address the concerns raised regarding the Criminal Division's hiring process. The issues concerning the Civil Rights Division's hiring practices are being examined in our separate investigation on the hiring, transfer, and case assignment decisions in the Civil Rights Division. Thus, for purposes of this section, references to "the components" do not include the Civil Rights Division unless otherwise specified.[9]

1. Overview of Processes Used by the Components

We determined that in addition to the Civil Rights Division, 14 components, and 3 U.S. Attorneys' Offices participated in the Honors Program and SLIP between 2002 and 2006.[10] Chart 1 shows the

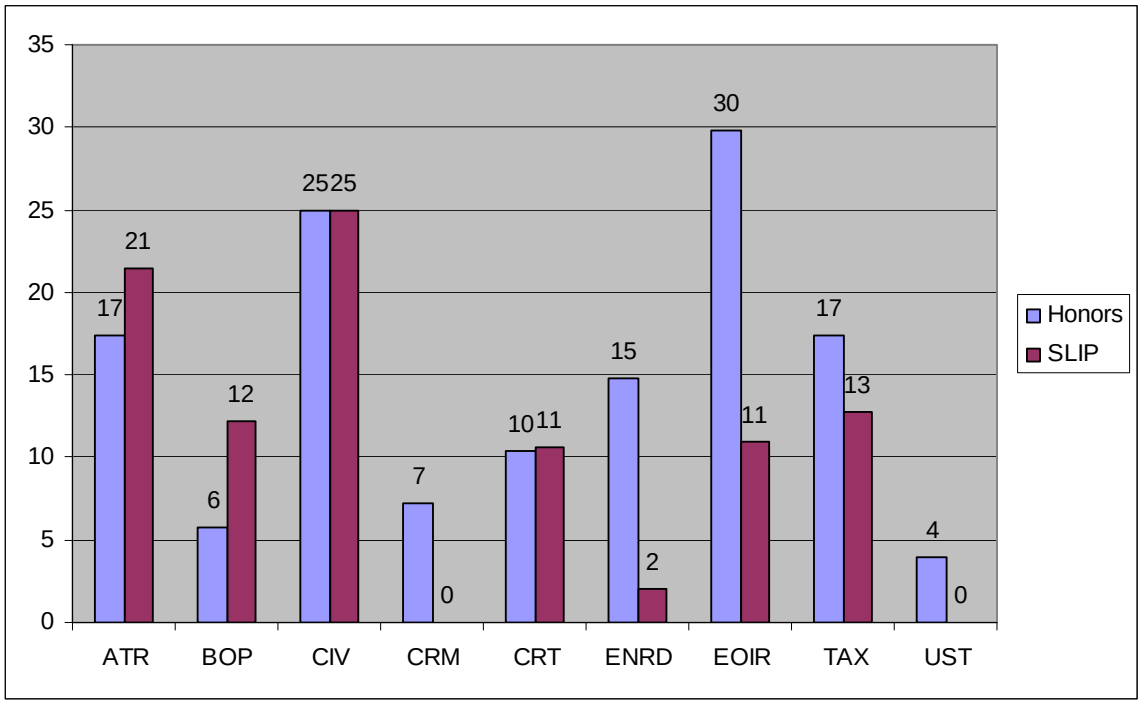
---

[9] The investigation regarding the Civil Rights Division is ongoing. Our findings from that investigation will be contained in a separate report when the investigation is completed. In addition, the OIG and OPR are jointly investigating the removal of various U.S. Attorneys and allegations of politicized hiring decisions by Monica Goodling and others. The results of these investigations, which are also ongoing, will be described in forthcoming reports.

[10] The 15 participating components included the 6 Department litigating divisions – Antitrust, Civil, Civil Rights, Criminal, the Environmental and Natural Resources Division (ENRD), and Tax – and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), BOP, DEA, EOIR, the Office of Information and Privacy, the Office of Intelligence Policy Review, the Office of Justice Programs, the Professional Responsibility Advisory Office (PRAO) and the Executive Office for U.S. Trustees. The (Cont'd.)

average number of Honors Program and SLIP candidates that were hired each year by each of the major components that participated in the Honors Program and SLIP during this period.

Chart 1: Average Number of Honors Program and SLIP Candidates Hired Each Year by Select Components between 2002 and 2006



ATR – Antitrust Division; BOP – Federal Bureau of Prisons; CIV – Civil Division; CRM – Criminal Division; CRT – Civil Rights Division; ENRD – Environmental and Natural Resources Division; EOIR – Executive Office for Immigration Review; TAX – Tax Division; UST – U.S. Trustees.

Each component was responsible for screening applications in the Avue system to identify candidates to interview and for submitting its candidates to OARM for approval by the Screening Committee. After these candidates were approved or deselected by the Screening Committee, each component was responsible for interviewing the candidates and selecting which candidates would receive offers.

---

three U.S. Attorneys' Offices were the Southern District of California, the Western District of Michigan, and the Western District of Texas. As discussed in footnote 4, all Honors Program attorneys were hired for permanent positions with the exception of applicants hired in the BOP, DEA, EOIR, and some U.S. Attorneys' Offices. In addition, the Immigration and Naturalization Services (INS) hired 25 Honors Program attorneys and 7 SLIP interns during the fall 2003 hiring cycle, but did not participate in the Honors Program or SLIP after that because the INS was transferred to the Department of Homeland Security in 2003. Finally, the Office of Legal Counsel and the Office of the Solicitor General each hired only a few SLIP interns each year.

In 2002, after the Attorney General's Working Group had directed that changes be made to the Honors Program screening and interview process, Andrew Hruska, then Senior Counsel to the Deputy Attorney General, met with the component heads of the Department's litigating divisions to explain the new process. He told them that component heads or their immediate front office staff should decide which Honors Program candidates they wanted to interview and to interview every candidate themselves. We found that as a result of this directive, participation by the political leadership of most components in the hiring process increased in 2002, but significantly dropped off after that.

We also determined that, other than the directive by Hruska in 2002 to increase the participation of the political leadership of the components, the components were not given other guidance from the Department on how to conduct their selection process for Honors Program and SLIP hiring. A few components told us that they received guidance from the human resource officers within their components on the hiring process.

We found that, in general, the major criteria considered by the components from 2002 through 2006 included grades, quality of law school, judicial clerkships, law review experience, work experience, and a demonstrated interest in public service. Several of the components' selecting officials told us that they considered it a positive factor when a candidate had a federal clerkship, particularly a federal appellate clerkship. In addition, some components looked for experience that indicated an interest or expertise in the type of law practiced by that component. For example, the Antitrust Division valued a background in economics, ENRD a background in environmental issues, and the Civil Division's Office of Immigration Litigation (OIL) or EOIR a background in immigration law.

The litigating divisions – Antitrust, Civil (with the exception of OIL), Criminal, ENRD, and Tax – told us that they attracted high-quality candidates who attended top-tier law schools or who were highly ranked at their law schools. In contrast, other components such as ATF, BOP, DEA, EOIR, OJP, and PRAO reported that they had more difficulty attracting candidates with top grades or from the top-ranked law schools. As a result, they did not rely solely on academic standing and often placed greater emphasis on factors such as interest and expertise in their components' subject matter. For candidates who made it to the interview stage, the selecting officials said that performance in interviews, writing samples, and references were also considered.

The components employed a variety of processes to select candidates for the Honors Program and SLIP. With the exception of the Criminal Division, which we discuss below, and the Civil Rights Division, which will be the subject of a separate report, the witnesses we interviewed from the other components said that they did not observe any evidence that either political officials or career employees involved in the components' part of the hiring process considered political or ideological affiliations in selecting candidates. In addition, our review of documents and e-mails did not reveal any evidence that those components took into account political or ideological affiliations.

We summarize below the selection process used by each of the components and the involvement of political appointees in that process. We discuss the Criminal Division last, including the concerns raised by three Criminal Division employees involved in the selection process.

2. Summary of Processes Used by Individual Components

The Antitrust Division used career attorneys to review applications, and almost all of the Antitrust Division interviewers were career attorneys. An Antitrust Division human resources official told us that the Division was generally aware of a directive that had been sent at some point from the Department to involve political appointees in interviews. However, she said the Division usually included a career employee from the Assistant Attorney General's office rather than a political appointee because the political appointees were too busy to attend the interviews. All Antitrust Divisions employees we interviewed reported that they did not see any signs of political or ideological affiliations being taken into account during the component's review of Honors Program or SLIP applications or during the interview process.

A human resources officer in the Civil Division told us that in 2002, three or four Counsels in the Division's front office who were political appointees and one career employee detailed to the front office reviewed applications and determined who to interview. She said this process was used in response to the directive that the front office should be involved in all aspects of the hiring process. However, she said there were no complaints about the selection process, and the committee appeared to make its selections based on merit.

The Civil Division human resources officer said that the involvement of front office political appointees dropped off significantly after 2002. Several other Civil Division employees confirmed that after 2002 the Civil Division's Honors Program and SLIP hiring process was handled almost entirely by career employees. All Civil Division

employees we interviewed reported that they had not seen any evidence of political or ideological affiliations being taken into account during the component's review of applications or during interviews.

In the Environmental and Natural Resources Division, a committee composed of two senior career attorneys and one political official reviewed the applications and compiled the list of candidates to be interviewed. One ENRD attorney recalled that they were instructed to have a politically appointed official at every interview. The attorney said this was impractical because of the busy schedules of the political officials. The attorney said that after Attorney General Ashcroft's tenure, the interviews were primarily conducted by career employees. He said that the interviewers would meet as a group at the conclusion of all interviews to determine whom to recommend for hiring, and the list would be submitted to the Assistant Attorney General for ENRD for approval. Other witnesses recalled that occasionally the Assistant Attorney General would remove a candidate or two from the list, but these candidates were always near the bottom of the list and the cuts could be explained by lack of merit. All ENRD employees we interviewed reported that they did not see any signs of political or ideological affiliations being taken into account during the component's review of applications or during the component's interview process.

Witnesses from the Tax Division told us that their Division used primarily career employees to screen applications and conduct interviews. After the interviews, the interviewers would meet as a group to determine who would receive offers. According to one witness, usually one political employee participated in this meeting in which candidates were discussed. This witness said this political official only commented upon candidates' academic qualifications and did not appear to take into account the candidates' political or ideological affiliations. All Tax Division employees we interviewed reported that they did not see any evidence of political or ideological affiliations being taken into account during the Division's review of applications or during the Division's interview process.

The witnesses we interviewed from all the non-litigating components reported that they used only career employees to screen and interview candidates. They told us they were not aware of political or ideological affiliations being taken into account in their respective components' selection process.

The three U.S. Attorneys' Offices that participated in the Honors Program and SLIP hired a total of only four candidates from 2002 to 2006. No one alleged that political or ideological affiliations were used as a factor in selecting these candidates.

With regard to the Criminal Division, a Division human resources officer told us that the human resources staff would pick the top 400 Honors Program candidates based on academic standing and then divide those applications among the 7 to 10 career attorneys who were on the hiring committee.[11] Each committee member would individually review approximately 40 applications and pick the top 10 in the group. The recommendations of the committee members formed the list of candidates that the Criminal Division submitted to the Screening Committee for approval to interview.

Teams of Criminal Division political appointees and career employees conducted the interviews. All selecting officials would meet after the interviews to compile a list of the top-tier candidates in rank order, which would be given to a Criminal Division Deputy Assistant Attorney General (DAAG) for approval. Witnesses told us that the various Criminal Division DAAGs did not always follow the rankings on the list and occasionally made offers to candidates who were lower on the list of top-tier candidates or who had been interviewed but had not made the top-tier list.

Three career employees told us they were concerned that on one occasion Deputy Chief of Staff Robert Coughlin, a political official on the hiring committee, may have taken into account candidates' political or ideological affiliations. One career employee wondered whether Coughlin rejected one highly qualified candidate because of the candidate's liberal affiliations. Two other career employees wondered whether Coughlin voted to accept a less qualified candidate because of the candidate's conservative and Republican Party affiliations. The candidate with liberal affiliations was rated highly by the career employees who interviewed him, but he did not receive an offer. Conversely, the candidate with conservative and Republican Party affiliations was not rated highly by the career employees who interviewed him yet received an offer of employment.

The career employees also told us that when they questioned Coughlin about his ranking of candidates during the group meeting in which the candidates were ranked, Coughlin stated that he was basing his recommendation on his reactions to the candidates' interview demeanor and interview skills.

In our interview of him, Coughlin told us he never considered political or ideological affiliations in evaluating Honors Program

[11] The Criminal Division did not participate in the SLIP from 2002 to 2006.

candidates. While Coughlin said he did not recall any details concerning the specific candidate with liberal affiliations, he recalled that he recommended the candidate with conservative affiliations because the candidate had received a strong recommendation from a previous internship with the Criminal Division and not because of the candidate's ideological affiliations.

We reviewed the two candidates' applications and determined both candidates had been ranked as having strong credentials, such as federal appellate clerkships or high grades that indicated the candidates were qualified. In addition, Coughlin's stated reasons to his colleagues and to us for his decisions – the strength of the candidates' performances in interviews and high recommendations from a previous internship with the Department – can be appropriate bases to choose between two otherwise qualified candidates. Further, our other witness interviews and our review of documents and e-mails did not reveal evidence that Coughlin considered political or ideological affiliations when making his recommendations. Accordingly, we did not conclude that Coughlin used inappropriate factors in choosing between the two candidates.

In sum, we found that while the components had slightly different selection processes and criteria for selecting candidates to be forwarded to the Screening Committee, the processes were largely controlled by career employees, particularly after 2002. Moreover, the components considered relevant criteria, including grades, quality of law school, judicial clerkships, law review experience, and work experience, particularly work experience that related to the components' areas of expertise. We did not find evidence indicating that the components considered political or ideological affiliations in selecting candidates. As for the Criminal Division, while concerns were raised by several employees, we did not find sufficient evidence to conclude that political or ideological affiliations were used either to approve or eliminate candidates for the Honors Program.

B. The 2002 Screening Committee

In this section we examine whether the Screening Committees that Department leadership formed each year from 2002 through 2006 considered politics or ideology in approving or deselecting Honors Program and SLIP candidates that the components wanted to interview. We examine in turn the decisions made by each year's Screening Committee, beginning with 2002.

For each year, we provide a summary of our review of documents and witness interviews. We also describe the data analysis we

conducted to determine if there were any patterns in the approval and deselection rates between candidates with differing affiliations on their applications.

1. Process Used by the Screening Committee

We examined the documentary evidence from the Attorney General's Working Group that formulated the changes to the Honors Program and SLIP hiring process in 2002, including what criteria should be used in approving candidates for interviews.[12] E-mails indicated the Working Group suggested a range of factors to evaluate applicants, including considering only applicants who met at least one of the following criteria: ranked within the top 20 percent to 33 percent of the law school class, had a federal judicial clerkship, was a member of a law review, or attended one of the top 10 to 20 law schools identified by *U.S. News and World Report.* However, according to the Working Group members we interviewed, the Working Group did not reach a consensus on what criteria to require the components to use.

We did not find any evidence in the e-mails indicating that the Working Group members considered using political or ideological affiliations as criteria to evaluating the candidates. In addition, all Working Group members we interviewed said that political or ideological affiliations were never discussed as criteria to be used in screening candidates. For example, Christopher Wray, then Principal Associate Deputy Attorney General, said that politics and ideology only arose in the context of the concern of trying to be more inclusive. He said there was a perception that in past administrations the career employees doing the screening may have weeded out candidates because the selecting officials were not "comfortable with their political persuasion." He said the political persuasion he was referring to pertained to candidates who had been in the military or law enforcement, "whether you call that conservative or not."

We also examined the process used by the Screening Committee in 2002 to approve or deselect candidates that the components submitted for interviews. In 2002 the components submitted to the Screening Committee a list of 911 Honors Program applicants they

---

[12] Andrew Hruska, then Senior Counsel to the Deputy Attorney General, described himself as the "scribe" of the Working Group and the point-of-contact for OARM. The other Working Group members were Adam Ciongoli, then Counselor to the Attorney General; Paul Clement, then Principal Deputy Solicitor General; David Higbee, then Deputy Associate Attorney General; Howard Nielson, then Counselor to the Attorney General; and Christopher Wray, then Principal Associate Deputy Attorney General.

wanted to interview. However, OARM said that based on that year's budget, only approximately 600 candidates could be brought to Washington, D.C., to be interviewed. Therefore, the Screening Committee had to pare down the list of nominated Honors Program candidates by approximately one-third.

The components also chose 498 candidates to interview for SLIP positions via telephone. OARM said that because the SLIP candidates were not being brought to Washington for interviews, there was no budgetary reason to limit the number of SLIP interviewees.[13]

Based on e-mails we reviewed and interviews we conducted, we determined that Andrew Hruska, then Senior Counsel to the Deputy Attorney General, and David Higbee, then Deputy Associate Attorney General, participated in the screening process, and that Howard Nielson, then Counselor to the Attorney General, and Adam Ciongoli, then Counselor to the Attorney General, may also have participated in the screening process. We refer to these four individuals as the Screening Committee.

Hruska and Higbee recalled participating in the screening process but could not recall with certainty who else was involved. Nielson said he believed that he may have participated, but said he could not recall with certainty. Ciongoli said he recalled attending an initial meeting where the screening process was discussed, but did not recall participating in the screening itself. According to e-mails, OARM trained Hruska, Higbee, Nielson, and Ciongoli on using the Avue system around the time the Screening Committee conducted its review. All four told us that their involvement with the Honors Program and SLIP was a very small part of their work duties, and because of that and the passage of the time they said they had difficulty recalling with specificity anything about their work on Honors Program and SLIP hiring.

Hruska and Higbee told us they recalled individually reviewing applications rather than meeting as a group to review them. Hruska said he did not recall how the final decisions were made. Higbee said he believed the each screener reviewed the same set of applications and that someone in the Deputy Attorney General's office tallied the votes and made the final decisions.

---

[13] Hruska said he believed there were constraints other than the travel budget that required the number of SLIP candidates to be cut, but he could not recall what those constraints were.

With one exception, our review of e-mails did not disclose evidence that the Committee members discussed political or ideological affiliations in evaluating the candidates. However, in one e-mail exchange Hruska forwarded an application from a candidate from Montana to William Mercer, then U.S. Attorney for the District of Montana. Hruska asked Mercer if this was "someone we want at DOJ?" Mercer responded by e-mail that he was inquiring with a reference the candidate listed whom Mercer knew to find out "the scoop on intellect, personality, etc." Mercer added:

> My initial reaction is that the guy is probably quite liberal. He is clerking for a very activist, ATLA-oriented justice.[14] His law review article appears to favor reintroduction of wolves on federal lands, a very controversial issue here which pits environmentalists against lots of other interests, including virtually all conservative and moderate thinkers.
>
> I know of better candidates through our internship and clerkship programs who have applied to the honors program.

When we questioned Mercer about this e-mail, he said he did not recall being asked about this candidate, although he had a vague recollection of talking to the reference named in the candidate's application about the candidate. Mercer said he probably assumed that Hruska was asking about a candidate for a political appointment such as a special assistant, rather than for the Honors Program. However, Mercer said he could not say why he referred to the Honors Program in his e-mail. He said he understood in 2002 that while the candidates' liberal affiliations would have been legitimate considerations for a political position, they would not have been legitimate considerations for an Honors Program position.[15]

We determined that the Screening Committee deselected 307 Honors Program candidates and approved 604, while it deselected 185 SLIP candidates and approved 313.

Hruska said he recalled that the Committee was pressed for time and that the Committee members had trouble getting the application materials to review either in print or on the computer. He said that it was a more scattered review process and not the complete analysis that he originally had envisioned. Hruska and Higbee said that they used

---

[14] ATLA refers to the American Trial Lawyers Association.

[15] This candidate was deselected by the 2002 Screening Committee.

criteria such as grades, quality of law school, extracurricular activities, and clerkships to evaluate the candidates. Hruska, Higbee, Nielson, and Ciongoli all said they had no reason to believe that anyone considered political or ideological affiliations in screening the candidates.[16]

At the time, some newspaper articles reported concern within the Department about the changes in the Honors Program hiring process.[17] OARM Director Louis DeFalaise said that he was aware of general complaints in 2002 that the process had been taken away from the career employees and transferred to political appointees (with the implication that the changes had politicized the process), although DeFalaise said no one specifically complained to him that political or ideological affiliations were considered in the screening process.

2. 2002 Honors Program and SLIP Data Analysis

We conducted extensive data analysis of the applications of Honors Program and SLIP candidates who were approved or deselected by the Screening Committee in 2002 to detect any patterns in the approval and deselection rates between candidates with differing affiliations. First, we examined the work experience and extracurricular activities of all candidates reviewed by the Screening Committee and compared the deselection rates for candidates who had affiliations with liberal groups on their applications with the deselection rates for candidates who listed affiliations with conservative groups.[18]

---

[16] Our review of the records indicates that at least two components, ENRD and the Civil Division, complained that the Screening Committee had cut quality SLIP candidates without explanation. Hruska said he believed the Committee resolved those complaints, but he could not recall the specifics.

[17] For example, a 2003 *Washington Post* article reported that the Honors Program had been moved "firmly under the control of Attorney General John D. Ashcroft and his senior aides, prompting complaints that the effort is being politicized, according to current and former department officials." Dan Eggen, Justice Dept. Hiring Changes Draw Fire; Law Grads Chosen Based on Politics, Say Critics, *The Washington Post,* Jan. 12, 2003.

[18] We recognize that these determinations are not precise and that categorizing organizations as liberal or conservative can be somewhat subjective. The appendix contains a listing of those organizations we categorized as liberal or conservative in our analysis of the candidates' affiliations. For example, we categorized as "liberal" organizations promoting causes such as choice in abortion issues, gay rights, defense of immigrants, separation of church and state, and privacy rights. Examples of organizations we considered liberal include Earthjustice, the American Civil Liberties Union, Planned Parenthood, Lambda Law Association, and Ayuda. We categorized as "conservative" groups promoting causes such as defense of religious liberty, traditional family values, free enterprise, limited government, and (Cont'd.)

Second, we examined the applications of deselected candidates who met high academic standards to determine if there were any differences in the deselection rates between highly qualified candidates with liberal affiliations on their applications and highly qualified candidates with conservative affiliations.

Third, we separately analyzed the applications for candidates who listed membership in the Federalist Society, a group generally considered to be conservative, and the American Constitution Society, a group generally considered to be liberal, to determine if there were any differences in the deselection rates for candidates who reported an affiliation with either group.[19]

Finally, we examined the candidates' applications to determine whether the candidate listed work experience or membership with a Republican or Democratic politician or organization. We grouped these candidates as "Republican Party affiliated" or "Democratic Party affiliated" and compared the deselection rates between these two groups.

The results of our analysis for the Honors Program and SLIP candidates that were reviewed by the 2002 Screening Committee are discussed in the sections below.

a. 2002 Honors Program Data Analysis

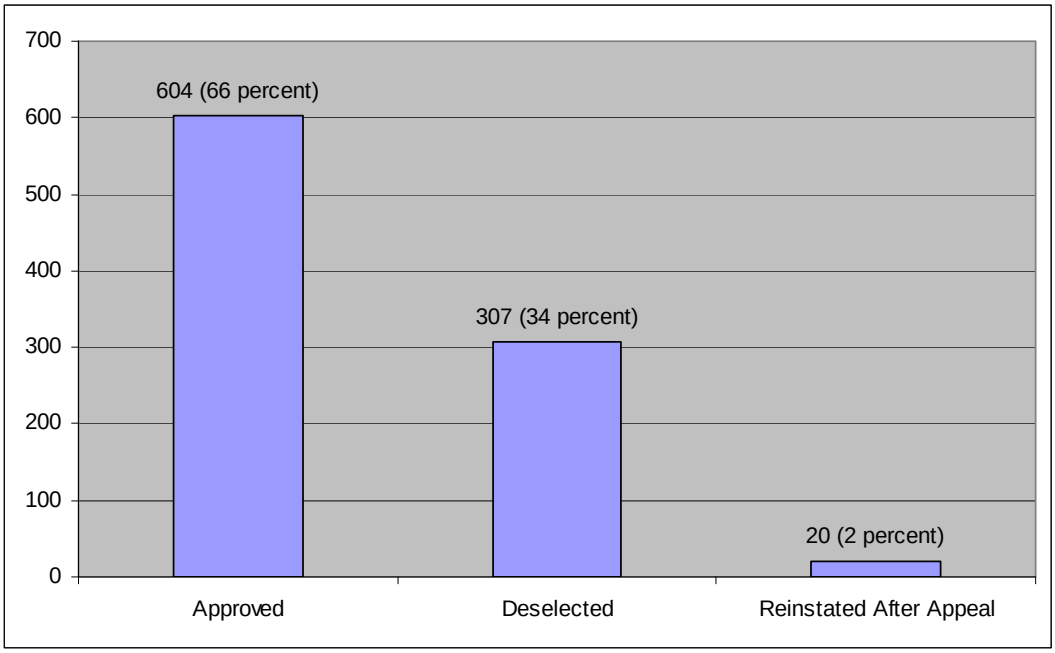
As noted above, OARM stated that the 2002 budget could only support bringing approximately 600 candidates to Washington for interviews. We found that 11 components submitted 911 Honors Program applicant names to the Screening Committee for review, of which 604 (66 percent) were approved and 307 (34 percent) were initially deselected by the Screening Committee. The components subsequently appealed 20 deselected candidates and the Committee agreed that all of those candidates could be interviewed.

---

right to life issues. Examples of groups we considered conservative include the Federalist Society, the Alliance Defense Fund, the Christian Legal Society, and the Family Research Council. In reviewing candidates' applications, we considered a candidate's affiliations to be "neutral" if the organizations listed did not have an apparent liberal or conservative viewpoint, or if the candidate listed affiliations with both liberal and conservative organizations.

[19] According to its website, the Federalist Society for Law and Public Policy Studies is "a group of conservatives and libertarians interested in the current state of the legal order." www.fed-soc.org (accessed May 9, 2008). The American Constitution Society for Law and Policy, according to its website, "is one of the nation's leading progressive legal organizations." www.acslaw.org (accessed May 9, 2008).

Chart 2: 2002 Honors Program Candidate Universe

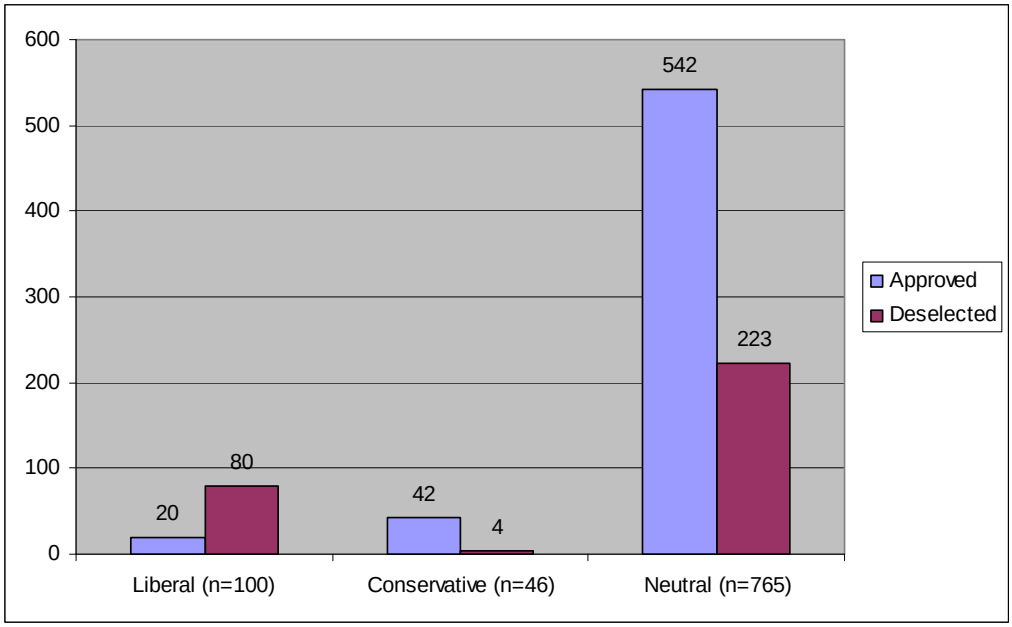


(1) Ideological Affiliations

Based on the results of our analysis of the applications, we found that 100 (11 percent) of the candidates nominated by the components had liberal affiliations, while 46 (5 percent) had conservative affiliations, and 765 (84 percent) had neutral affiliations. Chart 3 shows the approval and deselection rates for candidates grouped by their affiliations.[20]

[20] The appendix contains the listing of affiliations that we categorized as conservative or liberal.

Chart 3: Affiliations of 2002 Honors Program Candidates



As the chart indicates, the Screening Committee deselected 80 (80 percent) of the 100 applicants with liberal affiliations, 4 (9 percent) of the 46 applicants with conservative affiliations, and 223 (29 percent) of the 765 candidates with neutral affiliations.

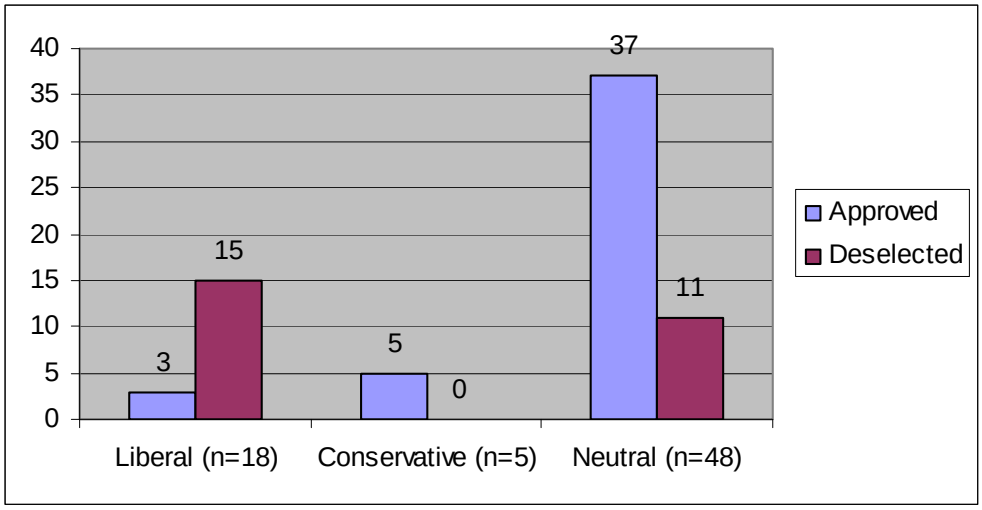
We next examined a subset of deselected candidates who met high academic standards to determine if there were any differences in the deselection rates between highly qualified candidates with liberal affiliations and highly qualified candidates with conservative affiliations. We considered candidates to be highly qualified if they met each of the four criteria that the Working Group had discussed in evaluating applicants:

- Attended a top 20 ranked law school,[21]
- Was in the top 20 percent of the class,
- Had a federal judicial clerkship, and
- Was a member of the law review.

[21] We used the top 20 law schools in 2002 as ranked by *U.S. News and World Report:* Yale, Stanford, Harvard, Columbia, New York University, University of Chicago, University of Michigan, University of California at Berkeley, Duke, University of Pennsylvania, Northwestern, Cornell, Georgetown, University of Texas, University of California at Los Angeles, Vanderbilt, University of Iowa, University of Minnesota, University of Southern California, and Washington and Lee.

There were a total of 71 candidates selected by the components who met all four criteria. Forty-five (63 percent) were approved by the Committee, and 26 (37 percent) were deselected. Chart 4 illustrates the breakdown of approved and deselected applicants who met all of these criteria.

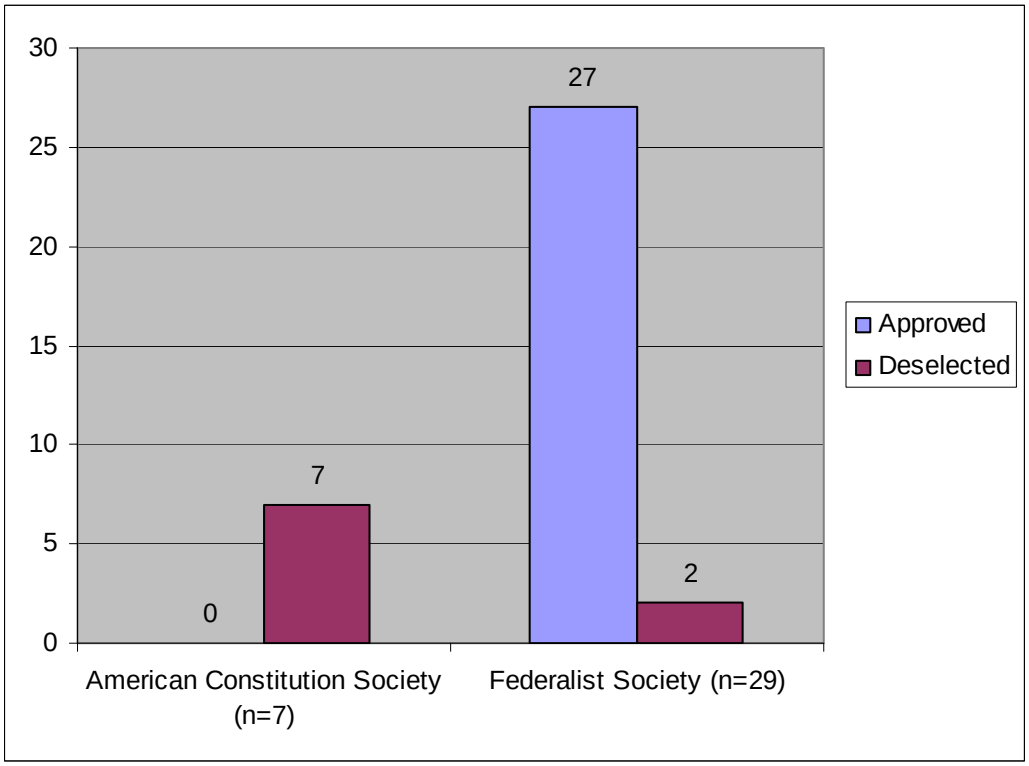
Chart 4: Affiliations of Academically Highly Qualified 2002 Honors Program Candidates



The data indicates that the candidates with liberal affiliations were deselected at a much higher rate (15 out of 18) than candidates with conservative affiliations (0 out of 5) or candidates with neutral affiliations (11 out of 48), even though all candidates met the same criteria.

We also examined membership in the American Constitution Society and Federalist Society to determine if there were any differences in the selection rates for candidates who reported an affiliation with either of these groups. The following chart describes these results.

Chart 5: 2002 Honors Program Candidate Membership in the American Constitution Society and the Federalist Society



We found that all 7 applicants who indicated that they were American Constitution Society members were deselected by the Screening Committee for interviews, while 2 of the 29 applicants who indicated that they were members of the Federalist Society were deselected.[22]

(2) Political Affiliations

We next examined those applications where the candidate indicated he or she worked for a politician or political group. We grouped these as applicants affiliated with the Democratic Party or the Republican Party.[23]

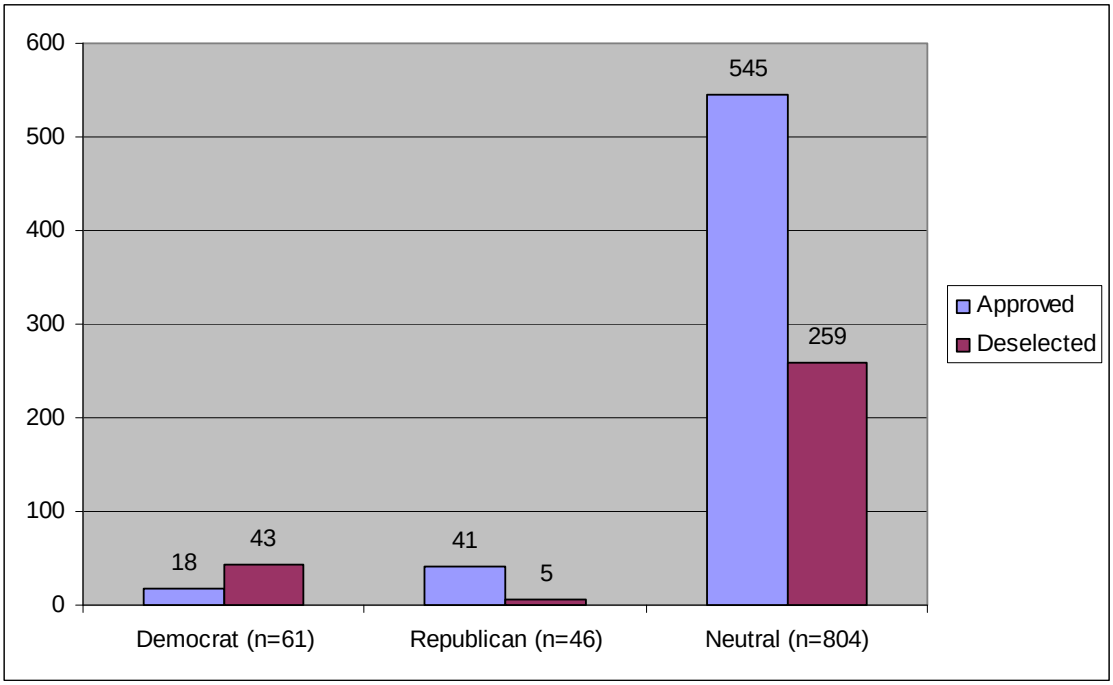
---

[22] One of the two deselected Federalist Society members was subsequently reinstated after appeal.

[23] There were also some cases where the applicants worked for both Democrats and Republicans. We considered these cases to be neutral. In addition, there were instances where we were unable to determine which party the applicant worked for because the information provided on the application was not detailed enough, such as when an applicant stated he worked for the Senate Judiciary Committee without any further specification.

Of the 911 applications reviewed by the Committee, 61 contained information indicating Democratic Party affiliations and 46 contained information indicating Republican Party affiliations. Chart 6 shows the approval and deselection rates for each group.

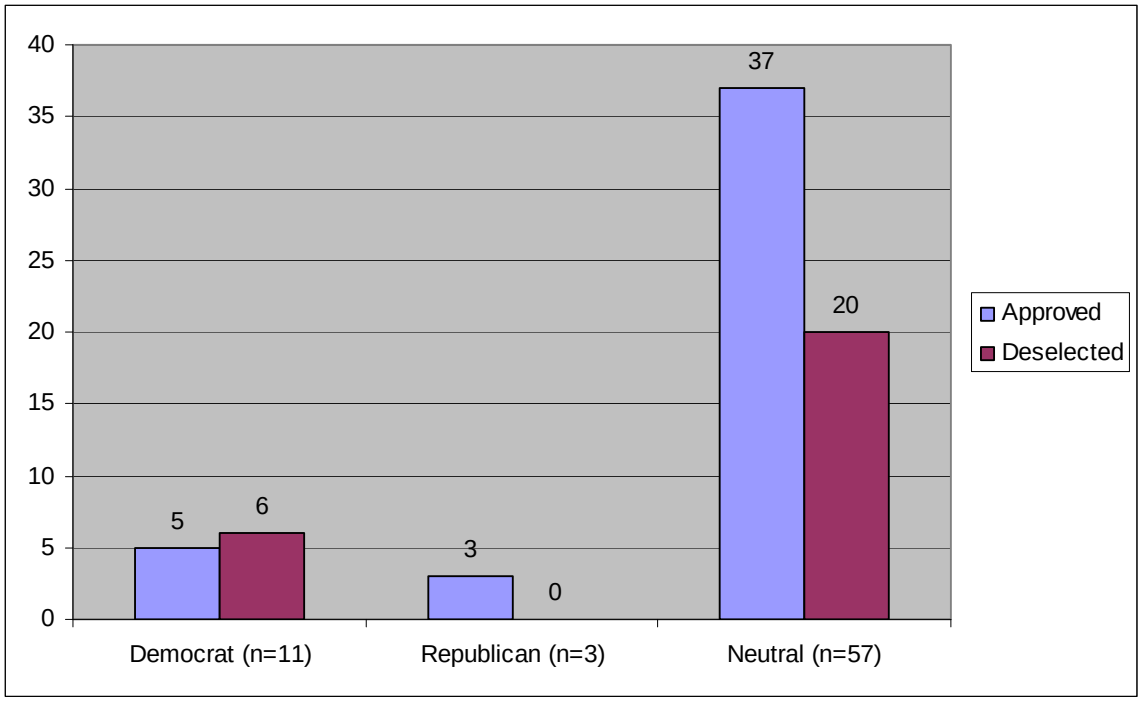
Chart 6: Political Affiliations of 2002 Honors Program Candidates



The proportion of Democratic Party affiliated applicants deselected by the Screening Committee was significantly higher (70 percent, or 43 out of 61) than the proportion of Republican Party affiliated applicants (11 percent, or 5 of 46) or the proportion of neutral affiliated applicants (32 percent, or 259 out of 804) deselected by the Committee.

We also examined the 71 highly qualified candidates (both approved and deselected) who met all of the Screening Committee's criteria and determined that 14 of those candidates indicated an affiliation with the Democratic or Republican Party. Chart 7 shows the approval and deselection proportions for these groups.

Chart 7: Political Affiliations of Academically Highly Qualified 2002 Honors Program Candidates

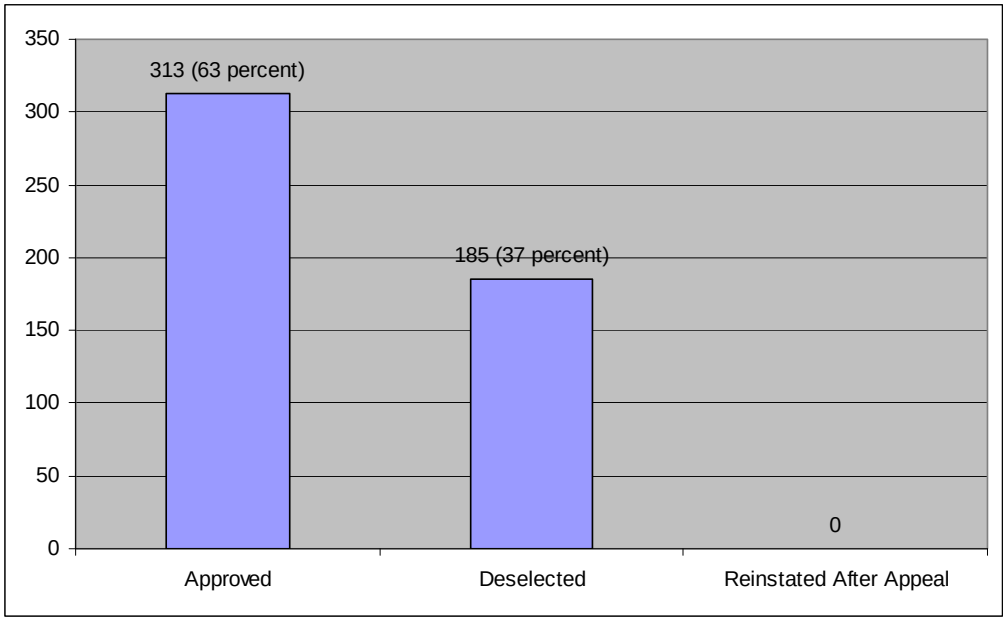


We found that the highly qualified candidates meeting all of the Screening Committee's criteria whose applications reflected Democratic Party affiliations were deselected at a higher rate (54 percent, or 6 out of 11) than highly qualified candidates whose applications reflected Republican Party affiliations (0 percent, or 0 out of 3) or neutral affiliations (35 percent, or 20 out of 57).

b. 2002 SLIP Data Analysis

In 2002, 8 components submitted 498 SLIP applicant names to the Screening Committee for review, of which 313 (63 percent) were approved and 185 (37 percent) were deselected. No component appealed any of the deselected applicants. As discussed above, the components interviewed SLIP candidates by telephone.

Chart 8: 2002 SLIP Candidate Universe

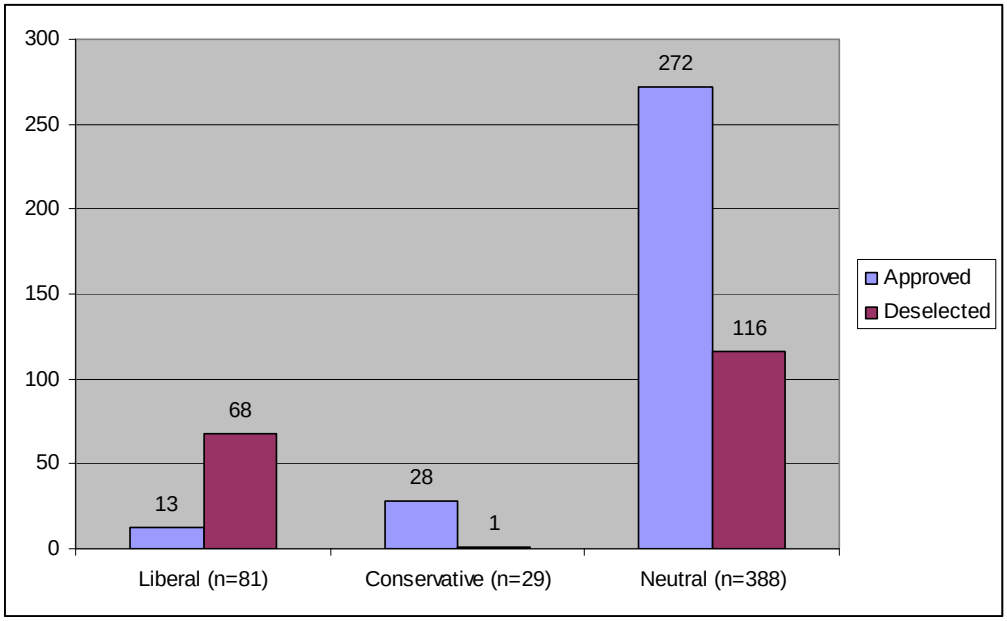


Similar to the analysis conducted with the 2002 Honors Program candidates explained in the previous section, we analyzed the applications and affiliations of the SLIP candidates who had been approved or deselected by the Screening Committee.

(1) Ideological Affiliations

Our analysis of the applications indicated that 81 (16 percent) of the SLIP candidates had liberal affiliations, 29 (6 percent) had conservative affiliations, and 388 (78 percent) had neutral affiliations. Chart 9 shows the approval and deselection rates for candidates grouped by their affiliations.

Chart 9: Affiliations of 2002 SLIP Candidates

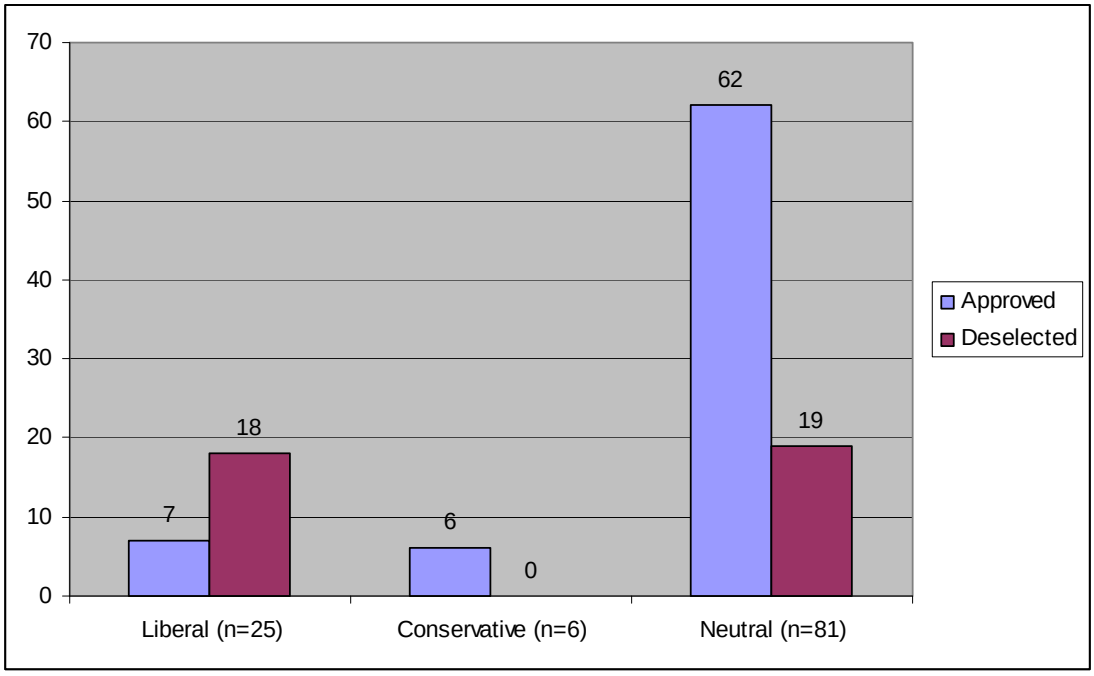


Similar to the Honors Program, the proportion of applicants with liberal affiliations who were deselected by the Committee (68 out of 81, or 84 percent) was significantly higher than that of applicants with conservative affiliations deselected by the Committee (1 out of 29, or 3 percent) and applicants with neutral affiliations who were approved by the Committee (116 out of 388, or 30 percent).

We designated 112 applicants as highly qualified because they met at least three out of the four academic criteria that had been identified by the Working Group as indicative of a qualified candidate.[24] Seventy-five of these applicants were approved (67 percent) by the Screening Committee and 37 (33 percent) were deselected. Chart 10 shows the ideological affiliations of approved and deselected applicants who met at least three of the Committee's criteria.

[24] Because most SLIP applicants are first- or second-year law students, they would not have received judicial clerkships yet. As a result, we examined a subset of candidates who met any three of the Screening Committee's four criteria of quality candidates.

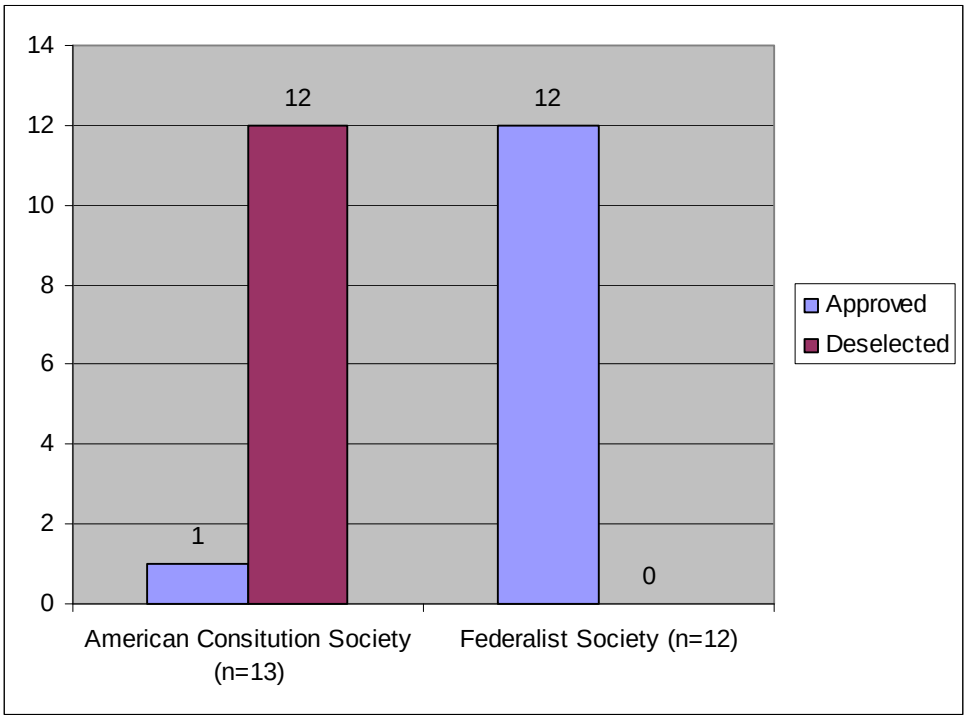
Chart 10: Affiliations of Academically Highly Qualified 2002 SLIP Candidates



Seventy-two percent (18 out of 25) of the applicants with liberal affiliations who met at least 3 of the Committee's academic criteria were deselected, while none of the applicants who indicated a conservative affiliation and met at least 3 of the Committee's criteria were deselected. Twenty-three percent (19 out of 81) of the candidates with neutral affiliations were deselected.

Chart 11 illustrates the difference between the approved and deselected SLIP applicants who listed membership in the American Constitution Society or the Federalist Society.

Chart 11: 2002 SLIP Candidate Membership in the American Constitution Society and the Federalist Society

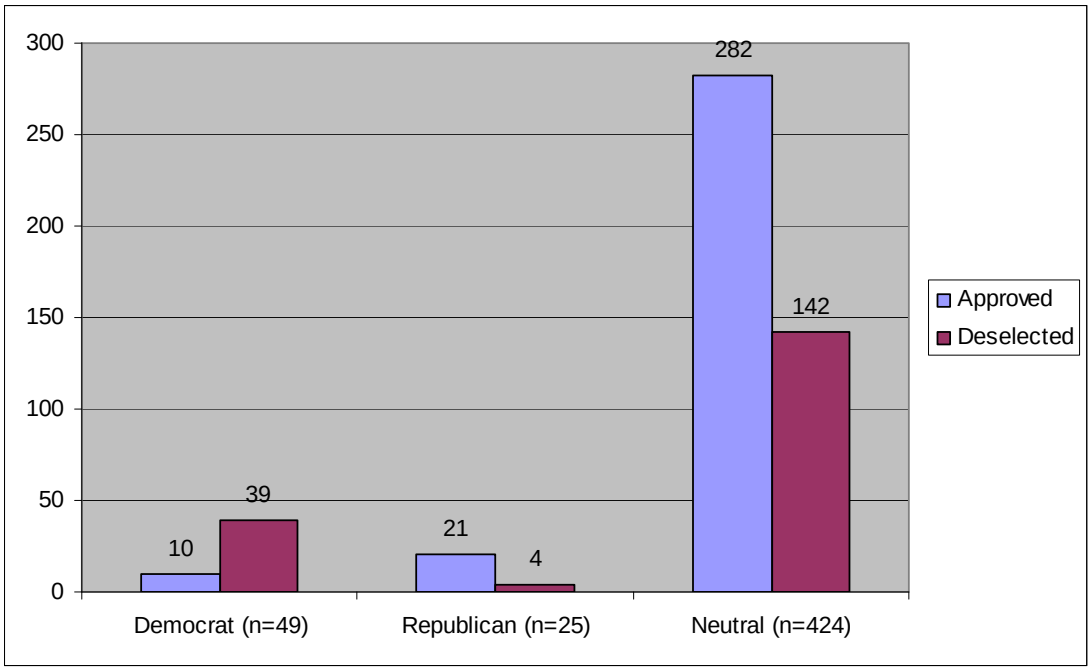


We found that 12 of the 13 applicants (92 percent) whose applications indicated that they were American Constitution Society members were deselected by the Screening Committee for interviews, while none of the applicants who indicated they were Federalist Society members were deselected by the Screening Committee for interviews.

(2) Political Affiliations

We next examined applicants who indicated they worked for a politician or political group. Chart 12 illustrates the breakdown among the approved and deselected applicants who listed a Democratic or Republican Party affiliation on their applications.

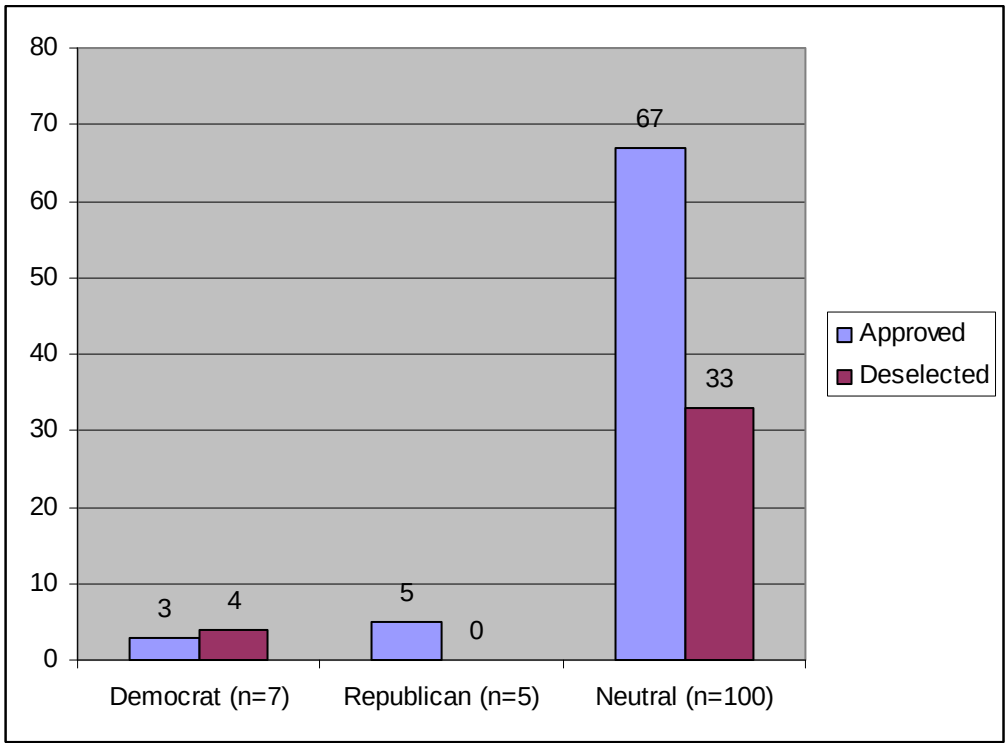
Chart 12: Political Affiliations of 2002 SLIP Candidates



The proportion of Democratic Party affiliated applicants deselected by the Screening Committee was significantly higher (80 percent, or 39 of 49) than the proportion of either Republican Party affiliated applicants (16 percent, or 4 of 25) or neutral candidates (33 percent, or 142 of 424) deselected by the Committee.

We also examined the 112 highly qualified applicants (both approved and deselected) who met at least three out of the four academic criteria and determined that 12 of those candidates indicated an affiliation with the Democratic or Republican Party. Chart 13 shows the approval and deselection proportions for these groups.

Chart 13: Political Affiliations of Academically Highly Qualified 2002 SLIP Candidates



We found that the highly qualified candidates whose applications reflected Democratic Party affiliations were deselected at a higher rate (57 percent, or 4 out of 7) than highly qualified candidates whose applications reflected Republican Party affiliations (0 percent, or 0 out of 5) or neutral affiliations (33 percent, or 33 out of 100).

3. Conclusions on 2002 Honors Program and SLIP Hiring Process

The overall data indicated a pattern of deselecting candidates based on political or ideological affiliations. A disproportionate number of the deselected Honors Program and SLIP candidates had liberal affiliations as compared to the candidates with conservative affiliations. This disproportionate pattern continued to exist when we examined a subset of highly qualified candidates based on their academic performance. Similarly, the pattern was evident when we compared membership in the American Constitution Society versus the Federalist Society. The disproportionate pattern of deselection was also evident when we compared applicants with Democratic Party affiliations versus Republican Party affiliations.

The 2002 Screening Committee did not maintain a record of the basis for its decisions on individual candidates, nor did it provide any explanations to the components at the time as to why specific candidates were deselected. In our interviews with Screening Committee members, conducted in 2007 and 2008, the members stated that they did not use political or ideological affiliations in evaluating candidates and they could not recall the reasons why individual candidates were accepted or deselected.

We recognize that the passage of time has made it difficult for Screening Committee members to recall the basis for their selection or deselection decisions. However, even at the time it made its decisions the Screening Committee provided no information to the components about the deselection decisions or even the criteria the Committee used.

After we conducted our data analysis, we contacted the 2002 Screening Committee members again for their comments on the pattern that the data revealed. Hruska, through his attorney, declined an opportunity to review and comment on the data analysis. The three members who reviewed the data analysis said that they never would have considered political or ideological affiliations in considering candidates for the Honors Program or SLIP. Higbee stated that the data "surprised" him and that he did not feel like it was a reflection of the work that he did. He noted that he did not know who made the final decisions on the applications he reviewed and did not know whether his recommendations were overruled.[25] Nielson said that he was not certain that he participated in the screening process. He also said that he was not in a position to go behind our analysis, but that if he took it at face value, the results were not what the Department had intended and could also indicate that the changes the Working Group implemented were a mistake. Ciongoli stated that he had no recollection of participating in the screening process, so he could not comment on the data analysis.

In sum, 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

[25] Higbee also stated that he was not familiar with the American Constitution Society and what principles it supported.

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.

C. The 2003 to 2005 Screening Committees

Similar to 2002, each fall between 2003 and 2005 the Office of the Deputy Attorney General formed a new Screening Committee of four to five members to review the Honors Program and SLIP candidates who the components selected for interviews. The members were recruited from the Office of the Attorney General, Office of the Deputy Attorney General, and the Office of the Associate Attorney General, with at least one member from the previous year's Committee sitting on the newly formed Committee in 2004 and in 2005.

We determined from our interviews and document review that the process followed by the Screening Committee remained the same between 2003 and 2005.

Each year, the Screening Committee met at least twice, first to review the Honors Program candidates and then to review the SLIP candidates the components wanted to interview. According to the Committee members we interviewed, each year the Committee followed a policy that two Committee members had to vote to deselect a candidate, a policy that was not in place with the 2002 Screening Committee.[26] The Committee members we interviewed said they focused on grades, quality of law school, extracurricular activities such as law review, and work experience, especially clerkships. Matt Zabel, a former Counsel to the Associate Attorney General who served on the Screening Committee in both 2003 and 2004, said that he and others took their screening duty "very seriously" and tried to err on the side of inclusion because "it's a big deal to get in through the Honors Program."

The Committee members we interviewed said they were not aware of any candidates being deselected due to the candidates' political or ideological affiliations. Based on the results of our review of documents and e-mails, we found no evidence that Screening Committee members

[26] We interviewed Matt Zabel, former Counsel to the Associate Attorney General and a Screening Committee member in 2003 and 2004; Theodore Cooperstein, former Counsel to the Deputy Attorney General and a Screening Committee member in 2003 and 2004; and Wendall Taylor, former Counsel for the Deputy Attorney General and a Screening Committee member in 2004 and 2005.

considered political or ideological affiliation in evaluating the candidates from 2003 to 2005.

In addition, we found that the Screening Committee met the tight deadlines established by OARM and made its decisions within a few days.

As described below, we found that each year from 2003 to 2005 the Screening Committee deselected a relatively small number of Honors Program and SLIP candidates. We also analyzed the credentials of these deselected candidates to determine if any trends could be discerned.

1. 2003 Honors Program and SLIP Data Analysis

The 2003 Screening Committee deselected 6 out of 635 Honors Program candidates (1 percent) and 10 out of 553 SLIP candidates (2 percent) who were nominated by the components for interviews. The components did not appeal any of the deselected candidates.

None of the six deselected Honors Program candidates attended a top 20 law school. Three of the six candidates ranked in the bottom half of their respective law school classes, while two candidates ranked in the top 34 to 50 percent of their law school classes and had C grade averages. The remaining deselected candidate did not provide grades on his application and attended a law school *U.S. News and World Report* ranked in the bottom quarter of the top 100 law schools.

Of the 10 deselected SLIP candidates in 2003, only 1 attended a top 20 law school, and that candidate was in the bottom half of his class. Six additional candidates were ranked in the bottom half of their respective law school classes, two of the remaining candidates had grade averages in the C range, and the final candidate had a grade average in the B range at a law school ranked in the bottom half of the top 100 law schools by *U.S. News and World Report.*

We concluded that the deselection of the 6 Honors Program candidates and the 10 deselected SLIP candidates could reasonably be explained by a combination of low class rank, low grades, and attendance at a lower-tier law school.

2. 2004 Honors Program and SLIP Data Analysis

The 2004 Screening Committee deselected 13 out of the 572 Honors Program candidates (2 percent) and 17 out of an undetermined

number of SLIP candidates who were nominated by the components for interviews.[27]

Of the 13 Honors Program candidates deselected in 2004, 9 were ranked in the bottom half of their respective law school classes. The four remaining candidates had grade averages in the C range, with one of those four at a top 20 law school and the other three at schools in the bottom half of the top 100 law schools ranked by *U.S. News and World Report.*

Of the 17 SLIP candidates deselected in 2004, 12 had grade averages in the C range. Three candidates had grades in the B range at schools that were not in the top 20 law schools. The two remaining candidates were at top 10 law schools, one with a low B grade average and the other with a majority of "passes" rather than "honors" marks for grades.

We concluded that the deselections of these candidates could reasonably be explained by a combination of low class rank, low grades, and attendance at a lower-tier law school.

3. 2005 Honors Program and SLIP Data Analysis

The 2005 Screening Committee deselected slightly more candidates than in the previous 2 years: 46 out of 624 Honors Program candidates (7 percent) and 23 out of 433 SLIP candidates (5 percent) nominated by the components for interviews.

Of the 46 Honors Program candidates deselected in 2005, 20 were in the bottom half of their law school classes. Eight candidates were in the top half of their classes but below the top third. Seven of those 8 candidates did not attend a top 20 law school, and the remaining candidate who attended a top 20 law school had a grade average in the low B range. An additional eight of the deselected candidates in 2005 attended law schools that did not provide class ranks, but their applications revealed they had grades primarily in the B, C, "pass" range, or did not provide grades. While 10 deselected Honors Program candidates ranked in either the top 20 percent or the top 33 percent of their law school classes, all 10 of these candidates attended lower-tier law schools.

---

[27] The Department was unable to provide the total number of SLIP candidates components selected in 2004 for interviews. However, the median number of SLIP applications received in 2002, 2003, 2005, and 2006 was 493.

Of the 23 SLIP candidates deselected in 2005, 21 ranked in the lower half of their respective law school classes; another candidate was unranked but listed a C grade average; and the one remaining candidate ranked in the top 20 percent of his law school class at a law school ranked between 40 and 50 with a grade average of 3.48 out of 4.0. This candidate had only neutral affiliations on his application. We did not find the deselection of this 1 candidate out of 23 significant enough to represent a trend of academically qualified candidates being deselected by the Screening Committee.

As was the case in 2003 and 2004, we concluded that the deselection of these candidates could reasonably be explained by a combination of low class rank, low grades, and attendance at a lower-tier law school.

4. Conclusions on the 2003 to 2005 Honors Program and SLIP Hiring Process

We did not find evidence indicating that the Screening Committees from 2003 to 2005 used political or ideological affiliations as a basis either to accept or deselect candidates. First, there is no indication from the documents, e-mails, or witness interviews that the Screening Committee members used ideological or political affiliations to evaluate candidates. Second, the Screening Committee deselected a small percentage of candidates each year, which supports the statement by Zabel that Screening Committee members were reluctant to deselect candidates and only did so if the candidates did not have strong academic credentials. Third, our review of the credentials of the deselected candidates supports the conclusion that the deselection decisions could reasonably be explained on the basis of a combination of low class rank, low grades, and attendance at lower-tier law schools.

D. The 2006 Screening Committee

In contrast to the Screening Committees in 2003 to 2005, the Screening Committee in 2006 deselected many Honors Program and SLIP candidates. These deselections, made without explanation to the components, generated significant controversy within the Department. We therefore discuss the 2006 process in detail. As we describe below, based on the results of our investigation we concluded that two of the three members of the Screening Committee inappropriately considered political and ideological affiliations in the deselection process.

1. The Screening Committee's Decisions

In 2006, the Screening Committee was chaired by Michael Elston, the Deputy Attorney General's Chief of Staff. The other two members

were Daniel Fridman, an Assistant U.S. Attorney (AUSA) from the Southern District of Florida on detail to the Deputy Attorney General's office, and Esther Slater McDonald, a Counsel to the Associate Attorney General. Elston and McDonald were political appointees, and Fridman was a career prosecutor.

a. Honors Program Deselections

On September 29, 2006, 11 components and 1 U.S. Attorney's Office forwarded 602 Honors Program candidates to the Screening Committee for review.[28] According to the schedule established by OARM, the Screening Committee was supposed to provide its list of deselected candidates to OARM by October 3 so that interviews could begin on October 23. According to OARM, adherence to this tight timetable was important to ensure that the Department would not lose the best candidates to other employers. However, the Committee did not meet OARM's deadline and did not provide a final list of deselected candidates until October 11.

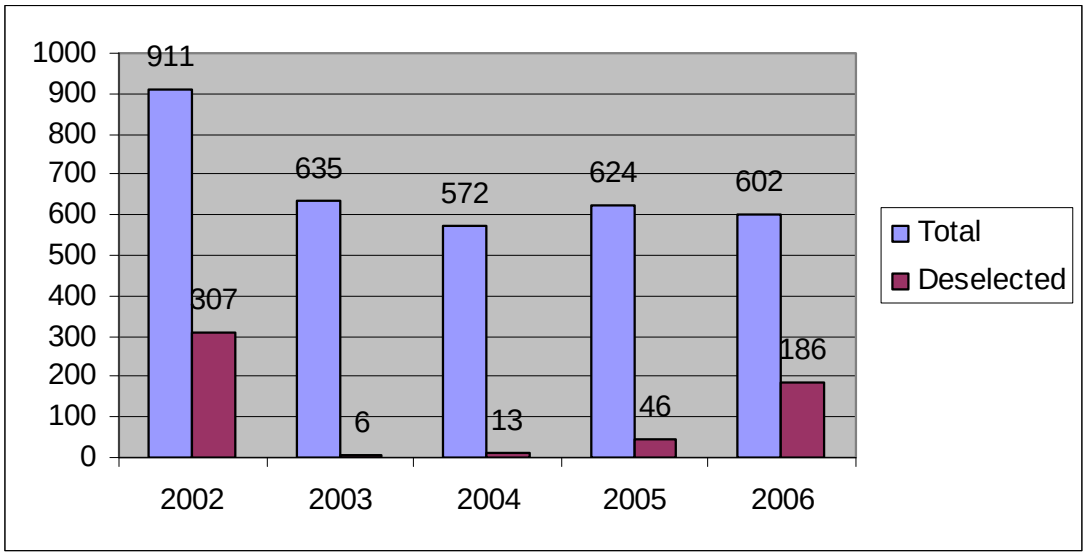
The Screening Committee deselected 186 out of the 602 Honors Program candidates (31 percent). The components were allowed to appeal the Screening Committee's decisions via e-mail to Elston no later than the following day, October 12. The components appealed 32 of the deselections, and 16 were granted.

(1) The Components' Reaction to the Screening Committee's Deselections

As shown in Chart 14, the number of deselected candidates in 2006 was much higher than in most previous years (with the exception of 2002, when a large number of candidates had to be deselected due to budgetary constraints). In 2006, 186 candidates – almost one-third of all Honors Program applicants selected by the components for interviews – were deselected by the Screening Committee. Screening Committees in each of the previous 3 years had deselected no more than 46 candidates, or 7 percent.

[28] The 11 components were the Antitrust Division, the Civil Division, the Civil Rights Division, the Criminal Division, the Environmental and Natural Resources Division, the Tax Division, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Executive Office for Immigration Review, the Office of Justice Programs, the Federal Bureau of Prisons, and the Professional Responsibility Advisory Office.

Chart 14: Honors Program Deselection Rates from 2002 to 2006



As in previous years, the 2006 Screening Committee provided to OARM a list of deselected candidates without explanation. As noted above, the list was unusually large and some components requested an explanation as to why certain candidates had been deselected. Some component officials said they sought an explanation to help them decide whether to appeal the Committee's decision or to simply understand the basis for what appeared to be inexplicable decisions to deselect candidates with high academic qualifications.

Elston generally responded to these requests for explanations by stating that the deselections were made by a committee. While he told us he did not remember the basis for individual deselections, he suggested to the components at the time that poor grades and poor grammar were the reasons for most candidate deselections.

Many component employees involved in the selection process told us they were shocked and upset at the large number of candidates the Screening Committee had deselected. They said the impressive qualifications of many of the deselected candidates, together with no explanation for their deselection, led to widespread speculation that the Screening Committee considered political or ideological affiliations in deselecting candidates.

(2) 2006 Honors Program Data Analysis

We conducted extensive data analysis of the applications of those Honors Program and SLIP candidates who had been approved or deselected by the Screening Committee in 2006 to detect any patterns

in the approval and deselection rates between candidates with differing affiliations. We first examined the applications of all candidates reviewed by the Screening Committee and compared the deselection rates for candidates who had affiliations with liberal groups on their applications with candidates who had affiliations with conservative groups.

Second, we analyzed the applications of deselected candidates who met high academic standards to determine if there were any differences in the deselection rates between highly qualified liberally affiliated candidates and highly qualified conservatively affiliated candidates.

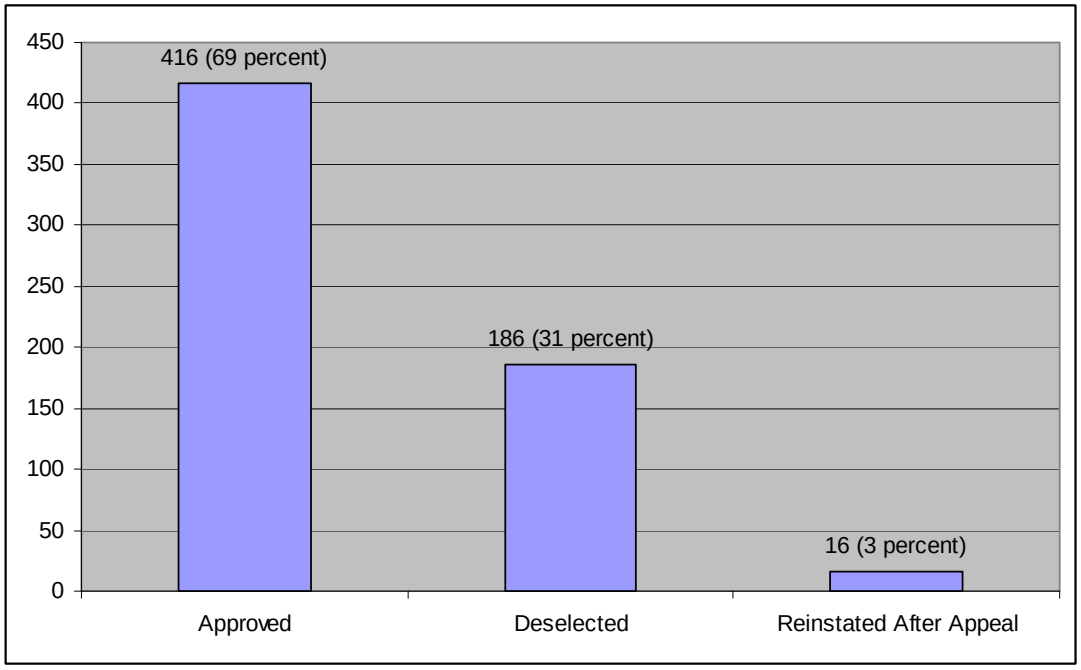
Third, we separately analyzed the applications for membership in the American Constitution Society and the Federalist Society to determine if there were any differences in the selection rates for candidates who reported an affiliation with either of these groups.

Finally, we examined the candidates' applications to determine whether the candidates listed work experience or membership with a Republican or Democratic politician or organization. We grouped these candidates as Republican Party affiliated or Democratic Party affiliated and compared the deselection rates between these two groups.

The results of our analyses for the Honors Program and SLIP candidates reviewed by the 2006 Screening Committee are discussed in the sections below.

As noted, in 2006, 11 components and the U.S. Attorney's Office for the Southern District of California forwarded 602 candidates to the Screening Committee for review. Of those, 416 candidates (69 percent) were approved and 186 (31 percent) were initially deselected by the Screening Committee. The components appealed 32 of the deselections and 16 were reinstated. Chart 15 illustrates the 2006 Honors Program candidate universe.

Chart 15: 2006 Honors Program Candidate Universe



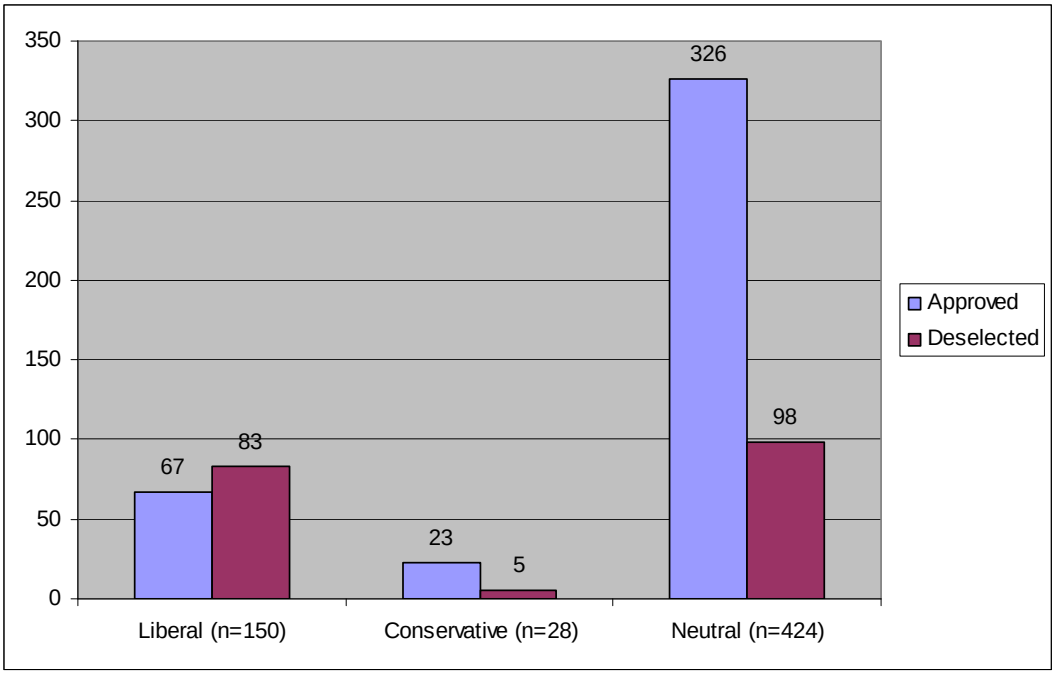
i. Ideological Affiliations

Based on the results of our analysis of the applications, we found that 150 (25 percent) of the candidates nominated by the components had liberal affiliations, while 28 (5 percent) had conservative affiliations, and 424 (70 percent) had neutral ideological affiliations.

Chart 16 shows the approval and deselection rates for candidates grouped by their affiliations.[29]

[29] As noted above in footnote 18, we recognize that these determinations are not precise, and categorizing organizations in these ways is subjective. As also discussed in Section III(G), according to Fridman and Elston, McDonald determined whether candidates had liberal affiliations based in part upon information she found when conducting Internet searches that was not reflected on the candidates' applications. However, because we were unable to reconstruct what information McDonald obtained from the Internet, our analysis of candidates' affiliations is based upon the information in their applications. Each time we present an analysis where the candidates are categorized as having liberal or conservative affiliations, we have also included in the appendix the groups that we relied upon in making these determinations.

Chart 16: Affiliations of 2006 Honors Program Candidates



As the chart shows, candidates whose applications indicated liberal affiliations were deselected at a higher rate (83 out of 150, or 55 percent) than candidates who had conservative affiliations (5 out of 28, or 18 percent) or neutral affiliations (98 out of 424, or 23 percent).

We also examined a subset of deselected candidates who met high academic standards to determine if there were any differences in the deselection rates between highly qualified candidates with liberal affiliations and highly qualified candidates with conservative affiliations.

To identify a subset of highly qualified candidates, we relied on criteria that one of the Screening Committee members, Daniel Fridman, described as an indication that the candidates were so highly qualified that they merited just a quick check before he approved them. Fridman said that if candidates attended a top 20 law school, were in the top 20 percent of their respective classes, or were at a school that did not rank students, he tended to approve them automatically unless they had a C on their transcripts.[30] We refer to these criteria as the "Fridman criteria." These criteria are consistent with Elston's statements to component officials that he was looking for candidates

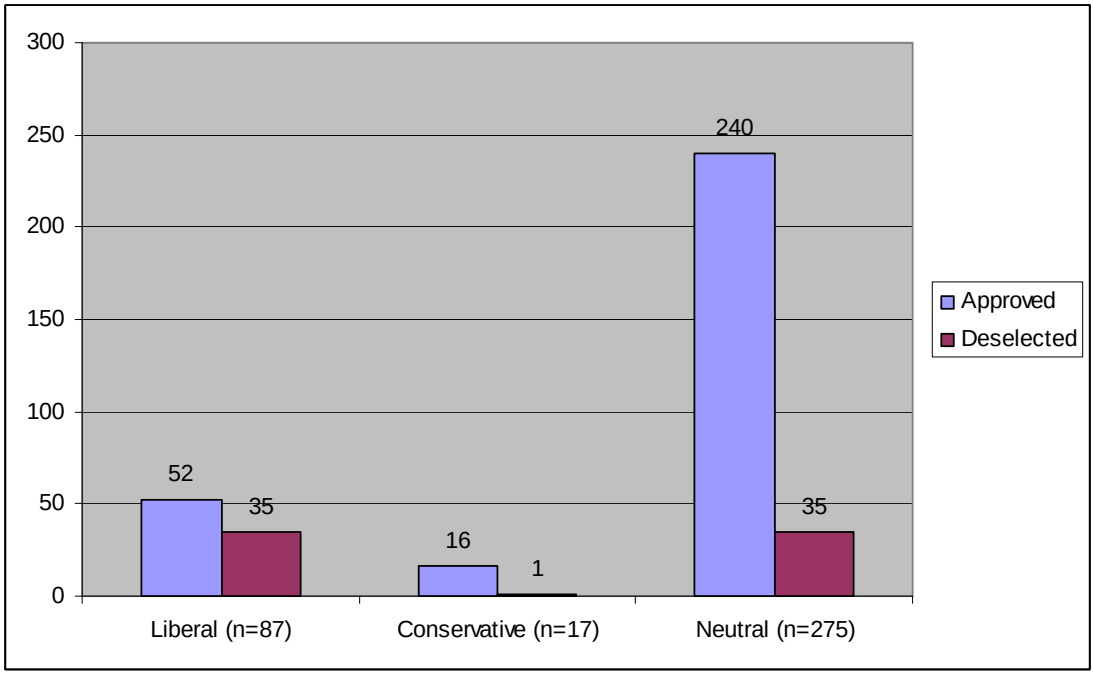
[30] Fridman said that he also frequently approved candidates with lesser academic credentials than those described above, but that he would first look at the essays or at other factors on those candidates' applications before making a determination.

with good grades who attended good law schools. Thus, all candidates meeting the Fridman criteria met academic standards that both Fridman and Elston stated they were looking for.

Therefore, we identified all Honors Program candidates nominated by the components who either attended a top 20 law school, were ranked in the top 20 percent of the class, or attended a law school that did not rank candidates. We then eliminated from that group all candidates who had a grade lower than a B on their transcripts.

Chart 17 shows all candidates (both approved and deselected) who met the Fridman criteria, and compares the deselection rates between candidates of liberal, conservative, and neutral affiliations.

Chart 17: Affiliations of Academically Highly Qualified 2006 Honors Program Candidates

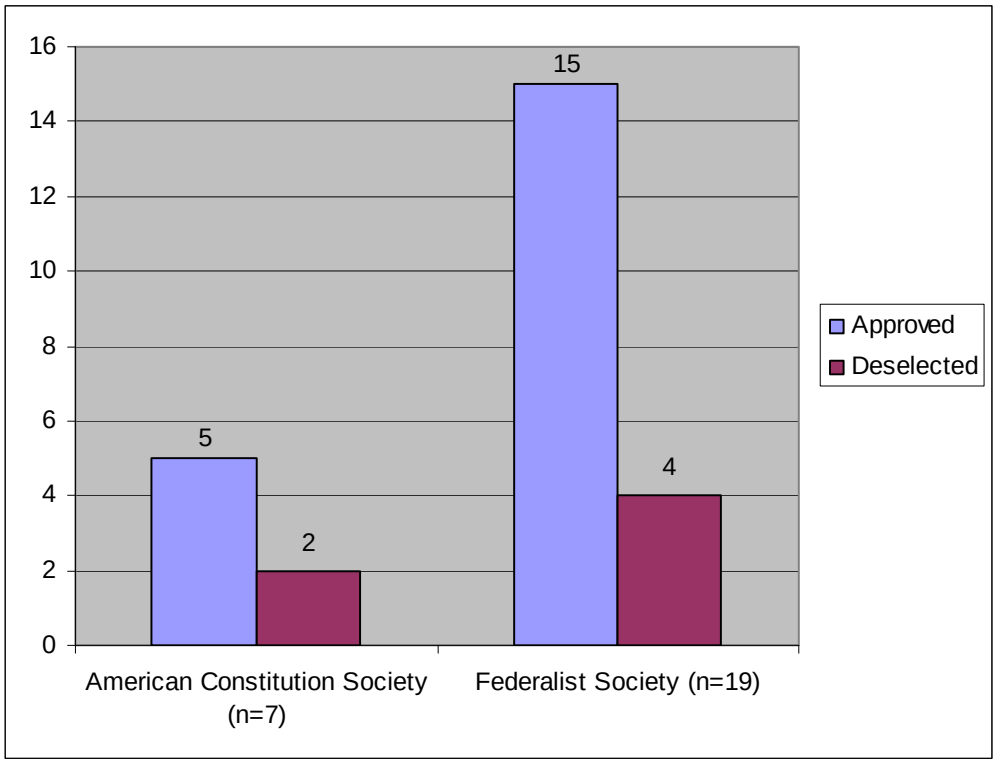


Candidates who met the Fridman academic criteria but whose applications indicated liberal affiliations were deselected at a much higher rate (35 out of 87, or 40 percent) than candidates meeting the criteria who had conservative affiliations (1 out of 17, or 6 percent) or neutral affiliations (35 out of 275, or 13 percent).

We also examined all approved and deselected Honors Program candidate applications for membership in the American Constitution Society and the Federalist Society to determine if there were any differences in the selection rates for candidates who reported an

affiliation with either of these groups.[31] Chart 18 describes these results.

Chart 18: 2006 Honors Program Candidate Membership in the American Constitution Society and the Federalist Society[32]



We found that 5 of the 7 applicants whose applications indicated that they were American Constitution Society members (71 percent) were approved by the Screening Committee, while 15 of the 19 candidates (79 percent) who mentioned that they were members of the Federalist Society were approved by the Screening Committee for interviews. Thus, there was little difference in the selection rates for Honors Program candidates based on their stated affiliation with the American Constitution Society and the Federalist Society.

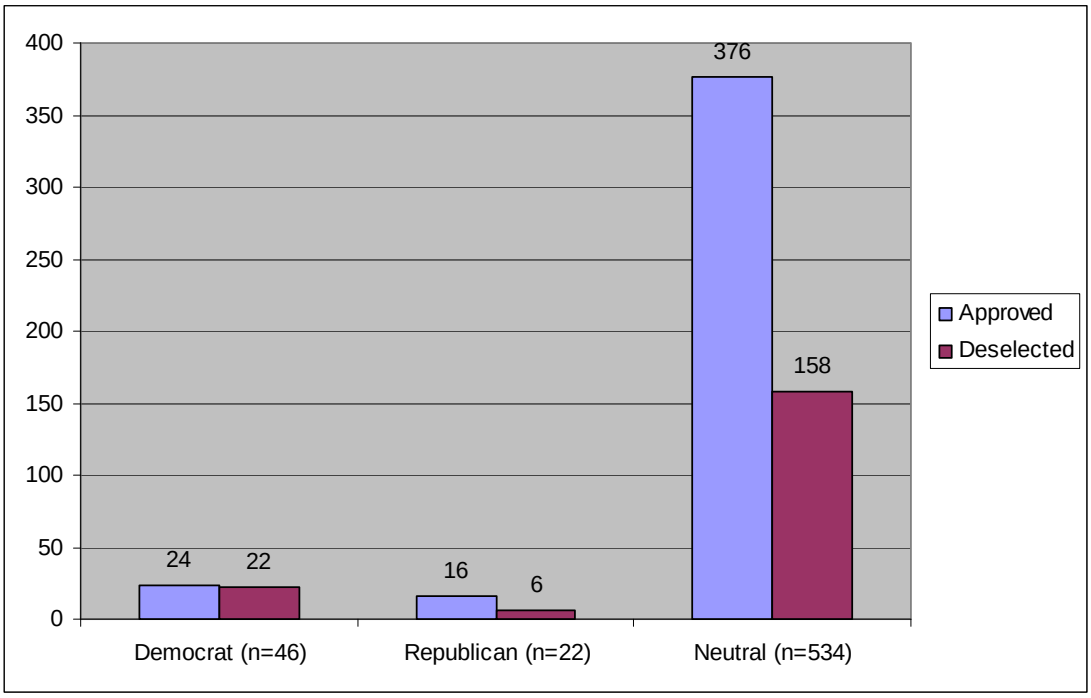
[31] The Federalist Society and the American Constitution Society are described further in footnote 19.

[32] One deselected Honors Program candidate was a member of both the Federalist Society and the American Constitution Society. That candidate was not included in this analysis.

ii. Political Affiliations

We next examined the applications where the candidates indicated work experience with a politician, such as a Member of Congress or a state legislator, or membership in a political organization. We grouped these as candidates affiliated with the Democratic Party or the Republican Party.[33] Chart 19 shows the approval and deselection proportions for these subsets.

Chart 19: Political Affiliations of 2006 Honors Program Candidates



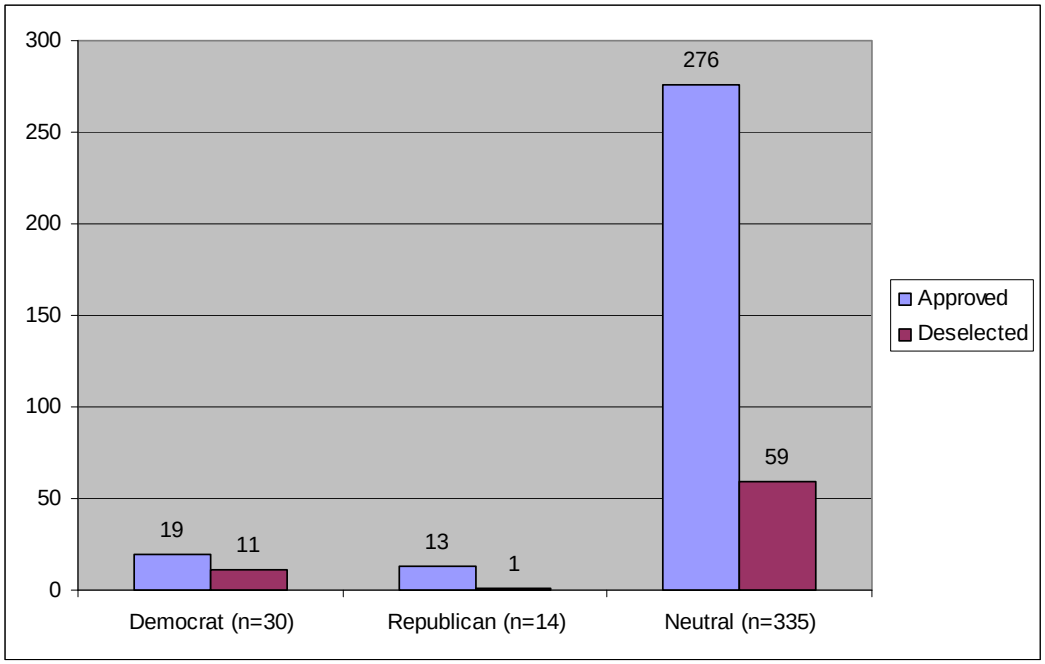
Candidates who had Democratic Party affiliations were deselected at a higher rate (22 out of 46, or 48 percent) than candidates who had Republican Party affiliations (6 out of 22, or 27 percent) or did not show any party affiliations (158 out of 534, or 30 percent).

We also examined the 379 highly qualified candidates (both approved and deselected) who met the Fridman criteria and determined that 45 of those candidates indicated an affiliation with the Democratic

[33] In some cases, candidates worked for both Democrats and Republicans. We considered these candidates to be neutral in affiliation.

or Republican Party. Chart 20 shows the approval and deselection proportions for these groups.[34]

Chart 20: Political Affiliations of Academically Highly Qualified 2006 Honors Program Candidates



Candidates meeting the academic criteria who had Democratic Party affiliations on their applications were deselected at a much higher rate (11 out of 30, or 37 percent) than candidates meeting the criteria who had Republican Party affiliations (1 out of 14, or 7 percent) or no party affiliations (59 out of 335, or 18 percent).

iii. Summary of 2006 Honors Program Data Analysis

Overall, based on the results of our data analysis, we found that Honors Program candidates whose applications reflected liberal affiliations were deselected at more than three times the rate (55 percent) of candidates whose applications reflected conservative affiliations (18 percent) and more than twice the rate of candidates whose applications reflected neutral affiliations (23 percent). We found a similar trend when we examined a subset of highly qualified candidates. Highly qualified candidates meeting the Fridman academic criteria whose applications reflected liberal affiliations were deselected

[34] One academically highly qualified candidate worked for both a Democratic and Republican official. This candidate was counted as neutral in our analysis.

at a substantially higher rate (40 percent) than highly qualified candidates whose applications reflected conservative affiliations (6 percent) or neutral affiliations (13 percent).

In addition, candidates whose applications reflected a Democratic Party affiliation were deselected at a significantly higher rate (48 percent) than candidates whose applications reflected a Republican Party affiliation (27 percent) or who did not show any party affiliations (30 percent). Similarly, highly qualified candidates who had Democratic Party affiliations were deselected at a much higher rate (37 percent) than candidates who had Republican Party affiliations (7 percent) or who did not show any party affiliation (18 percent).

(3) Appeals of Deselected Honors Program Candidates

As noted above, 7 components appealed the deselection of 32 Honors Program candidates to Elston. Elston granted 16 of the appeals, and those candidates were added to the list of interviewees. Eleven additional appeals were withdrawn by the components before Elston acted on them. In this section, we describe the experience encountered by several components in appealing deselected Honors Program candidates.

For example, Carol Lam, U.S. Attorney for the Southern District of California, appealed the deselection of a candidate and pointed out to Elston in an e-mail on October 11 that the candidate had graduated from Stanford Law School with distinction and had a Ninth Circuit Court of Appeals clerkship. Lam told us she speculated that the Committee may have deselected the candidate because the candidate was clerking for a judge who was a Clinton appointee or because she had written an article on gender discrimination in the military. In her e-mail to Elston, Lam asked for an explanation for the deselection.

Elston replied by e-mail that most deselections were for poor grades. He acknowledged, however, that poor grades did not appear to be the issue with this candidate, and he offered to check into the application and let Lam know whether an appeal would be successful. Elston replied later that day: "I have reviewed her application materials, Carol. I do not think an appeal will be successful. If it helps, she was not selected by the other components to which she applied." Lam responded: "Thanks Mike. Just curious, though – I don't see anything unacceptable in her online application that was made available to us. Do the other components see something that I don't?" Elston replied: "Not that I know of, Carol."

The Civil Division also attempted to obtain from Elston the rationale for the deselection of certain candidates with strong academic records before it submitted any appeals. Elston responded to the Civil Division that the "vast majority were cut for poor grades. I cannot speak to the individual applicants you named at this point." However, when the Civil Division pointed out the excellent academic credentials of a deselected candidate who was sixth in his law school class and was currently clerking for a federal judge, Elston responded: "There was a committee (which was not made up of exclusively ODAG staffers) . . . so I am not in a good position to give you reasons others may have had for their decision." This candidate had been an intern with the Public Defender Service and had written a paper on the detention of aliens under the Patriot Act. After this exchange, the Civil Division appealed the deselection of this candidate, along with other candidates. Elston denied the appeal of this candidate without explanation.

Civil Division Principal Deputy Assistant Attorney General (PDAAG) Jeffrey Bucholtz told us that in the absence of any explanation for the deselection of seemingly qualified candidates, employees in the Division speculated that politics was a factor in the Committee's deselection decisions.

Peter Keisler, the Assistant Attorney General for the Civil Division, called Elston after learning that he had denied the appeals of several highly qualified candidates. Keisler said he told Elston something to the effect of:

> [Y]ou should know that there's a lot of people who believe that these deselections are either irrational or so irrational that they are motivated by politics, and that's a problem, you know. Whatever the truth of it is, when this many people in a Department are this unhappy about something, it's going to be an issue.

Keisler gave as an example an appeal of a deselected candidate who had good grades at Harvard Law School, had been a successful summer intern at the Civil Division, and had worked as a paralegal for Planned Parenthood. Elston denied the appeal. Keisler told Elston that "some people had said that the only reason she might have been deselected is that she had on her résumé something like Planned Parenthood or something that would be associated with the abortion issue." According to Keisler, Elston said something like, "well that's not what's going on. What we're doing here is rejecting people because of

academic performance being not up to standards."[35] Following his conversation with Keisler, however, Elston allowed this candidate to be interviewed.

In the Tax Division, following the deselection of eight of its Honors Program candidates, senior Tax Division career employees analyzed the eight deselected candidates and determined that each had attended a top law school or was in the top third of his or her class, and that three of the deselected candidates had some indication on their applications of a liberal political or ideological affiliation. Several Tax Division employees opined in a memorandum to AAG Eileen J. O'Connor that the deselection of these seemingly otherwise qualified candidates presented at least the appearance of discrimination on the basis of political or ideological affiliation.

For example, according to the memorandum, one candidate, a Georgetown University law student with good grades, had previously worked for Senator Christopher Dodd and Representative Patrick Kennedy, both Democrats. Another deselected candidate was the one (described above) about whom Keisler had talked to Elston. As a result of an Internet search Tax Division attorneys conducted, they discovered that this candidate, while an undergraduate, had written for a student newspaper an opinion piece critical of a Bush administration proposal and, while a Harvard Law student, had spoken out against the nomination of Samuel Alito to the Supreme Court. A third deselected candidate, who was in the top 25 percent of her law school class at Boston University, had worked for a variety of legal service groups aimed at assisting indigents and convicts, as well as for a human rights center.[36]

In the Executive Office for Immigration Review, upon learning that a significant number of EOIR's Honors Program candidates had been deselected, Deputy Director Kevin Ohlson reviewed the deselected candidates' applications as well as a few applications of candidates who were approved for interviews. Ohlson told us that it appeared that "individuals at the Department were rejecting any of our candidates who could be construed as . . . left-wing" or who were "perceived, based

---

[35] Elston told us that he did not recall Keisler discussing with him a candidate who had worked for Planned Parenthood, but said it may have been part of a conversation he had with Keisler about the Honors Program and SLIP review process.

[36] No one from the Tax Division questioned Elston about the issues raised in this memorandum. We asked Elston about the deselected candidates discussed in this memorandum, and he said he had no recollection of the recommendations he made regarding these candidates.

on their applications and résumés and so forth, as being more liberal." Ohlson said that he reached this conclusion based on the fact that many of the deselected candidates had had internships with organizations such as Human Rights Watch or the American Civil Liberties Union (ACLU), or had assisted in defending someone held at Guantánamo Bay.[37]

b. SLIP Deselections

The Screening Committee's deselection of SLIP candidates in 2006 created more concern among the components about the basis for the deselection decisions because a higher number of candidates who appeared to be highly qualified were deselected.

Under OARM's original timeline, the Screening Committee was required to submit the names of deselected SLIP candidates to OARM by October 10, with appeals to be decided by October 12. However, the Committee did not begin sending lists of SLIP candidates who were cleared for interviews or deselected until October 31. The Committee continued to send lists to OARM on a rolling basis throughout November, with the last list being sent on November 28, the Tuesday before Thanksgiving. Under a national agreement in place at the time, law firms, judges, and other employers had agreed to hold open offers of employment to law students until December 1.[38]

The components submitted 451 SLIP candidates to the Screening Committee. The Screening Committee approved 249 (55 percent) and deselected 202 (45 percent). This large number of deselections was much greater than in the 3 previous years, when the number of SLIP candidates deselected by the Screening Committee each year ranged between 10 and 23. The only other year in which the deselection rate was anywhere near that of 2006 was 2002, when the Screening Committee deselected 185 out of 498 (37 percent).

---

[37] Another EOIR employee told us that after half of EOIR's candidates were deselected, EOIR employees believed that political considerations played some role in the deselections.

[38] However, law students often accept offers before the December 1 deadline. As the Screening Committee fell behind in screening SLIP candidates, OARM reminded Elston that the Department would lose well-qualified candidates who accepted offers from law firms or other employers.

(1) The Components' Reaction to the Screening Committee's Deselections

According to several witnesses, the components were concerned about the substantial delay in the Screening Committee's review of SLIP candidates, the absence of any explanation for the deselections, and the appearance that political or ideological affiliations may have been taken into account in evaluating candidates.

Rather than being in a position to conduct SLIP interviews and extend offers in late October as OARM originally envisioned, many components could not begin the interview process until late November, when they finally received their lists of approved candidates. Component officials reported to OARM that as the national December 1 deadline for law students to accept offers drew near, more and more students who were contacted for interviews or to whom offers were extended responded that they had already accepted an offer from another employer.[39]

In addition to the delay, the components were concerned and surprised about the large number and high quality of deselected candidates. Because these law students would only work at the Department for a few weeks in the summer, component officials told us they did not expect that the SLIP candidates would receive such stringent scrutiny or that almost half of the candidates chosen by the components would be deselected.

Like the Honors Program, several component hiring officials said that the large number of apparently high quality SLIP candidates who were deselected led them, in the absence of any explanation from the Screening Committee, to suspect that political or ideological affiliations played a role. As a result, several component officials conducted their own analysis to see if they could determine any patterns or trends in the deselections.

For example, in trying to determine why 49 of the 53 SLIP candidates the Antitrust Division had chosen were deselected, Antitrust

[39] Component officials said the rolling nature of the Screening Committee's review also made it difficult for them to decide to whom they should extend offers, since they did not know whether or when additional candidates, who were sometimes higher on their list, would be approved for interviews. Out of necessity, the components began extending offers during early November to cleared candidates without waiting for the completion of the Screening Committee's review. Because most components tried to make offers as soon as possible to whichever candidates were cleared by the Committee, few appeals of deselected SLIP candidates were submitted to Elston.

personnel conducted Internet searches on some of the candidates. They discovered that one, a Harvard Law School student with good grades who had graduated *summa cum laude* in economics from New York University, had worked for Senator Hillary Clinton, while another candidate had a MySpace page on which someone had posted an unflattering cartoon about President Bush and Vice President Cheney. These results, along with the absence of any explanation from the Screening Committee for the large number of deselections, led to speculation in the Antitrust Division that the Committee had considered political affiliations.

Similarly, following deselection of 28 of 74 of the Tax Division's SLIP candidates, a senior Tax Division attorney reviewed all the candidates' applications and wrote in a memorandum analyzing the deselections that she was "unable to identify any legitimate reason the students were deselected." The attorney concluded that all but one candidate who had worked for a Democrat were deselected, while all candidates who listed connections to Republican Members of Congress or the White House were approved. The attorney noted, for example, that in one case,

> a student who was in the top 5% of his class at Cleveland State Law School and who had worked for Congressman Kucinich was deselected, but the Division was permitted to interview another Cleveland State student who was only in the top 20% of the class but whose application did not identify any particular political experience or leanings.

A senior attorney in the Civil Division's Appellate Branch conducted an analysis of the 59 candidates that were deselected out of the 135 candidates that were submitted by the various sections in the Division. The senior attorney wrote that, as the approval and deselections of SLIP candidates trickled out in the fall of 2006,

> a pattern emerged that became impossible to ignore: candidates who had worked for [Democrats] were uniformly rejected, notwithstanding some with outstanding qualifications. In fact, 12 of the 13 candidates on the Civil Division's list who had worked for a democratic senator or representative were rejected. . . . In addition, 4 out of 5 candidates who had worked for democratic state legislators were rejected.

The attorney wrote that "every candidate who had worked for GOP legislators at the state or federal level had been approved."

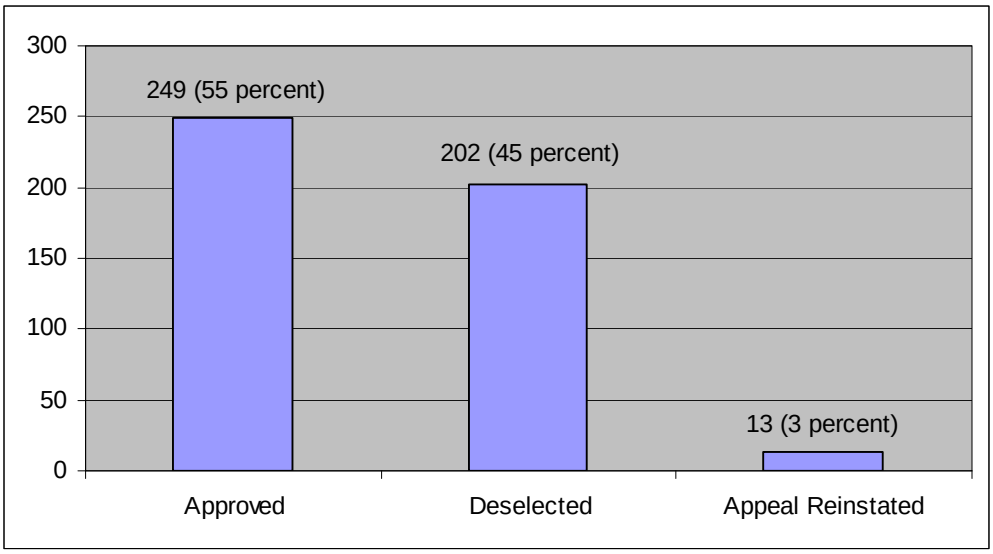
A senior attorney in the Civil Division's Federal Programs Branch likewise conducted an analysis of the 13 candidates out of the 40 nominated by that office who had been deselected. Among them, six were attending Harvard Law School and had either an A or B+ grade average, and two were attending Yale Law School and had previously worked as summer interns for the Criminal Division's Counterterrorism Section. The remaining five deselected students were attending Georgetown, Columbia, Stanford, George Washington, and the University of Pennsylvania law schools, and all had good grades. The senior attorney noted that several of these candidates listed liberal affiliations on their applications. The attorney opined that "what the Deputy [Attorney General]'s office has done with the SLIP program is nothing short of outrageous."

(2) 2006 SLIP Data Analysis

We conducted an analysis of the SLIP data regarding candidates who were approved or deselected by the 2006 ODAG Screening Committee similar to the data analysis we conducted on the Honors Program candidates discussed in Section III(D)(1). We compared deselection rates between candidates with liberal, conservative, and neutral affiliations, and between candidates with Democratic or Republican Party affiliations. The results of that analysis are discussed below.

In 2006, the components forwarded to the Screening Committee 451 SLIP candidates, of whom 249 (55 percent) were approved and 202 (45 percent) were deselected. Eighteen of the 202 deselections were appealed and 13 were granted. Chart 21 illustrates the 2006 SLIP candidate universe.

Chart 21: 2006 SLIP Candidate Universe

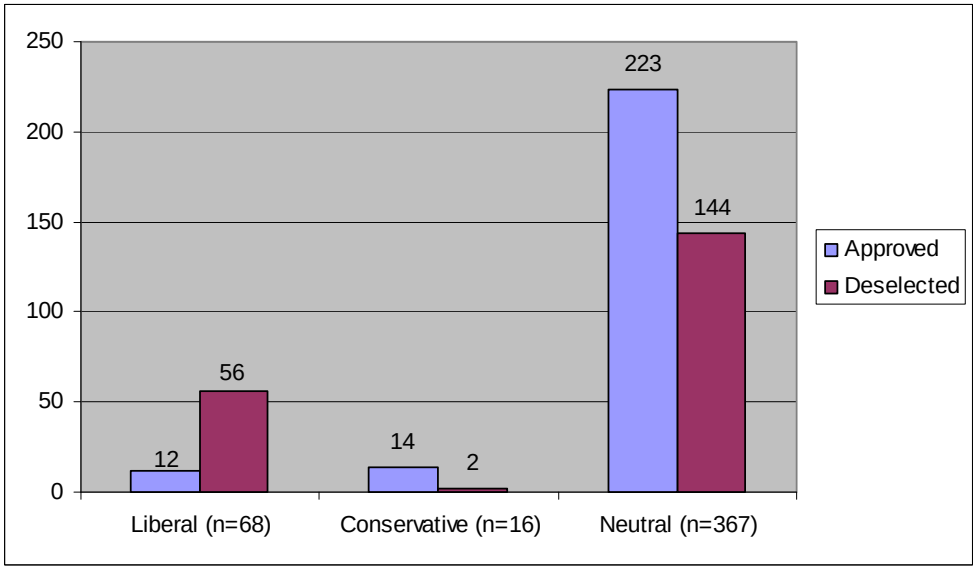


i. Ideological Affiliations

Based on the results of our analysis of the 451 SLIP candidates forwarded to the Screening Committee, we found that 68 (15 percent) listed work experience or activities with a liberal group, 16 (4 percent) listed work experience or activities with a conservative group, and 367 (81 percent) had neutral affiliations listed on their applications.

Chart 22 illustrates these affiliations and shows the approval and deselection rates for candidates grouped by their affiliations.

Chart 22: Affiliations of 2006 SLIP Candidates

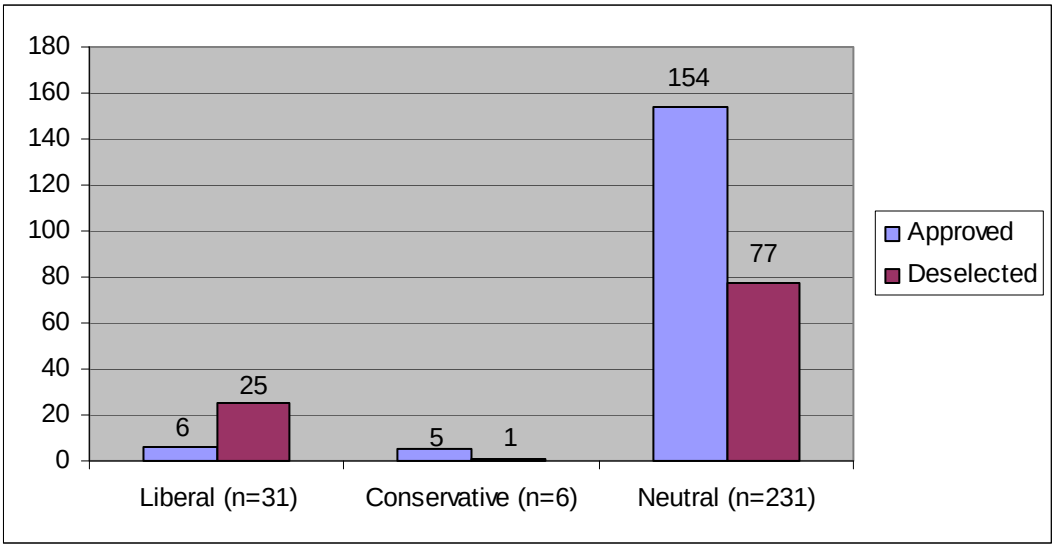


We found SLIP candidates whose applications reflected liberal affiliations were deselected at a much higher rate (82 percent) than SLIP candidates who had conservative affiliations (13 percent) or neutral affiliations (39 percent).

We then examined deselected candidates who met high academic standards to determine if there were any differences in the deselection rates between highly qualified candidates whose applications reflected liberal affiliations and highly qualified candidates whose applications reflected conservative affiliations.[40]

Chart 23 shows the approval and deselection rates for the highly qualified candidates who met the Fridman criteria.

Chart 23: Affiliations of Academically Highly Qualified 2006 SLIP Candidates



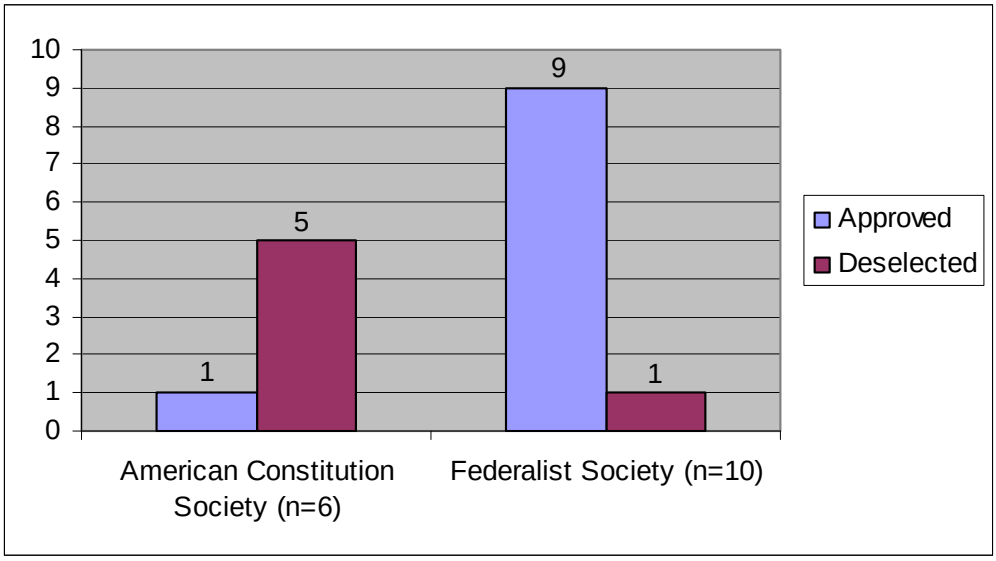
Highly qualified SLIP candidates meeting the Fridman criteria whose applications reflected liberal affiliations were deselected at a rate significantly higher (25 out of 31, or 81 percent) than SLIP candidates meeting the Fridman criteria whose applications reflected conservative affiliations (1 out of 6, or 17 percent) or neutral affiliations (77 out of 231, or 33 percent).

We also examined membership in the American Constitution Society and the Federalist Society to determine whether there were any differences in the deselection rates for candidates who reported an

[40] As described in Section III(D)(1)(a), to identify highly qualified candidates, we relied on the Fridman criteria in this analysis.

affiliation with either of these groups. Chart 24 illustrates these results.

Chart 24: 2006 SLIP Candidate Membership in the American Constitution Society and the Federalist Society

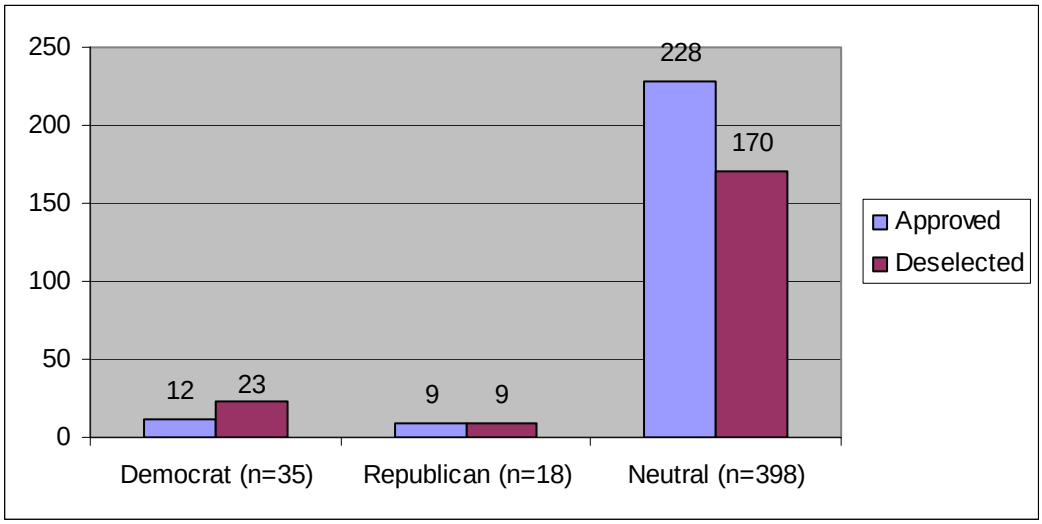


We found that 5 of the 6 applicants (83 percent) whose applications reflected membership in the American Constitution Society were deselected by the Screening Committee, while 1 of the 10 applicants (10 percent) whose application reflected membership in the Federalist Society was deselected.

ii. Political Affiliations

We next examined SLIP applicants whose applications reflected working for a politician or political organization. Chart 25 shows the approval and deselection rates for these subsets.

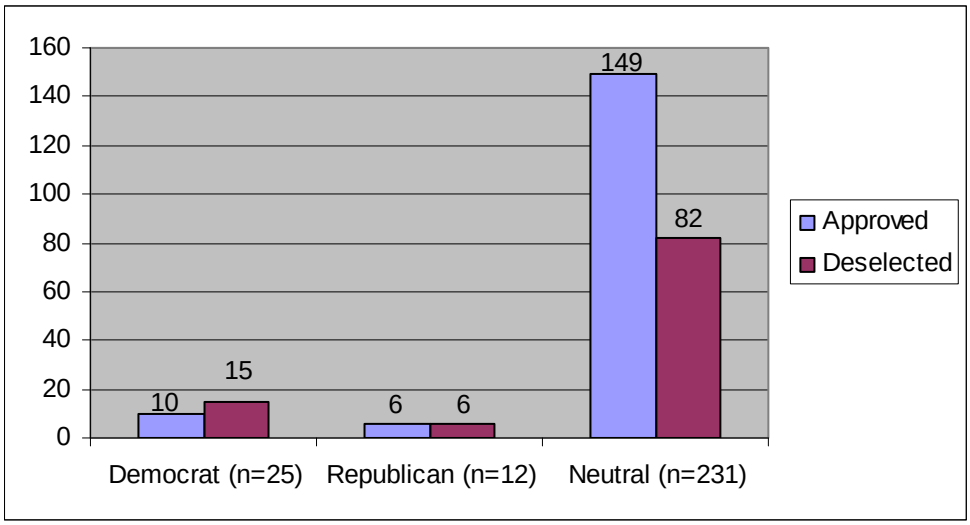
Chart 25: Political Affiliations of 2006 SLIP Candidates



Candidates who had a Democratic Party affiliation were deselected at a slightly higher rate (66 percent, or 23 out of 35) than candidates who had a Republican Party affiliation (50 percent, or 9 out of 18) or candidates with neutral affiliations (43 percent, or 170 out of 398).

Similarly, as demonstrated by Chart 26, we found that the highly qualified candidates meeting the Fridman criteria whose applications reflected Democratic Party affiliations were deselected at a slightly higher rate (60 percent, or 15 out of 25) than the highly qualified candidates whose applications reflected Republican Party affiliations (50 percent, or 6 out of 12) or neutral affiliations (35 percent, or 82 out of 231).

Chart 26: Political Affiliations of Academically Highly Qualified 2006 SLIP Candidates



iii. Summary of 2006 SLIP Data Analysis

Overall, we found that SLIP candidates whose applications reflected liberal affiliations were deselected at a substantially higher rate (82 percent) than SLIP candidates whose applications reflected conservative affiliations (13 percent) or neutral affiliations (39 percent). We also found that in the subset of highly qualified SLIP candidates who met the Fridman criteria, candidates whose applications reflected liberal affiliations were deselected at a higher rate (25 out of 31, or 81 percent) than candidates with conservative affiliations (1 out of 6, or 17 percent) or neutral affiliations (77 out of 231, or 33 percent). We found that 83 percent (5 out of 6) of candidates whose applications reflected membership the American Constitution Society were deselected, while 10 percent (1 out of 10) whose applications reflected membership in the Federalist Society were deselected. In addition, candidates whose applications reflected Democratic Party affiliations were deselected at a slightly higher rate than candidates with Republican Party affiliations.

(3) Appeals of Deselected SLIP Candidates

Given the substantial delay in the Screening Committee's review of SLIP candidates, few appeals were made. Instead, components primarily focused on trying to fill their SLIP positions with whichever cleared candidates were available to them.

However, four components appealed the deselection of 18 SLIP candidates, and 13 were granted. For example, on November 22, when

38 of the Civil Division's SLIP candidates still had not been ruled on by the Screening Committee, AAG Keisler appealed 3 candidates who had been deselected and requested that Elston approve 10 of the remaining candidates about whom the Committee had not yet decided. Keisler said he thought all 13 candidates were academically qualified and should be approved. The 3 appeals of the deselected candidates, including an appeal of a candidate who was a Yale Law School student and a Rhodes Scholar, were denied, and the Screening Committee approved only 6 of the 10 candidates for whom Keisler requested clearance. At the time, Elston gave no explanation for the decisions.

The Civil Rights Division had 24 of its 52 candidates deselected, and appealed 1. That candidate was a student at Harvard Law School with an A- grade average, had interned at the U.S. Attorney's Office in the Eastern District of California, and was strongly recommended by an attorney in the front office of the Civil Rights Division who knew him. Rena Comisac, Principal Deputy Assistant Attorney General for the Civil Rights Division, told us that after the appeal was submitted, Elston informed her that the Screening Committee had found an article on the Internet in which the candidate was quoted as expressing regret that he had not participated in the 1999 World Trade Organization (WTO) protests in Seattle. According to Comisac, Elston said that if the candidate wanted to participate in the Seattle WTO protests, which in Elston's opinion were close to a riot, then the candidate would not hesitate to chain himself to the front steps of the Department if he did not like the way something was being done. Comisac told us that it was clear to her that "any additional appeals would not be productive" and that she decided not to pursue the matter further.

2. Concerns About the Screening Committee Process Raised with the OARM Director

OARM Director DeFalaise told us that during the 2006 deselection process the components were "expressing a lot of unhappiness" about the Screening Committee's deselections. He also said that a few employees raised to him an "implication" that the candidates were "being deselected in these numbers because of political considerations."

In addition, an OARM employee told us that at least twice she went to DeFalaise and asked him to confirm that the lists OARM had received from the 2006 Screening Committee were in fact deselected candidates because a large number of the deselected candidates appeared to be highly qualified. She recalled that one of the candidates she raised to DeFalaise's attention was first in his law school class at Georgetown University, had clerked for a federal district court judge,

and was currently clerking for a Second Circuit judge.[41] DeFalaise told us that he confirmed with Elston's administrative assistant, but not with Elston, that these candidates were supposed to be deselected.

DeFalaise said that after the selection process was completed he may have mentioned to Elston that there was some concern among the components that the process had been politicized, but he never asked Elston directly if Elston had considered political affiliations in evaluating candidates. DeFalaise added that while he never had a "direct discussion" with Elston on this question, Elston "was already saying no" by saying that he was looking at academics, writing skills, and information obtained from the Internet.

DeFalaise also said he did not have discussions about this issue with anyone else in the Department's leadership offices until April 2007, after allegations that the process had been politicized became public. DeFalaise stated that because these were senior Department officials who were involved in the screening, until he had "reason to think that there's been a violation of personnel practices," he took it "on good faith" that the deselections were made "for the right reasons, and for the reasons stated."

3. Concerns About the Screening Committee Process Raised with Elston

Our investigation found that both during and after the Screening Committee's review of Honors Program and SLIP candidates in 2006, various component officials had raised concerns with Elston about the delay and the qualifications of those being deselected, and at least one official questioned whether the Screening Committee had considered political or ideological affiliations in deselecting candidates. For example, as discussed in Section III(D)(1), AAG Keisler told Elston that the deselection of a highly qualified Harvard Law School student who had worked for Planned Parenthood could be perceived as politically motivated.

Tax Division AAG O'Connor told us that she called Elston to express concern about the delay in the SLIP review process and inquire about its cause. O'Connor said Elston stated to her that the components had done a "horrible" job of screening candidates and that he also mentioned finding inappropriate information on the Internet

[41] This candidate also had worked as a law clerk for Senator Russell Feingold, a Democrat, and for Human Rights Watch, but the OARM employee does not recall pointing out the candidate's political or ideological affiliations to DeFalaise at this time.

about candidates components wanted to interview. Elston told us that he did not recall any conversation with O'Connor about the Honors Program and SLIP hiring process.

We found that in a November 30 e-mail to OARM Director DeFalaise, Elston suggested convening a meeting with representatives from each component that participated in the Honors Program and SLIP process "to get input from the components on how, collectively, we can do a better job, and . . . to give them some ideas on how to screen the candidates (checking the web, etc.)." Elston stated in the e-mail that he was particularly unhappy that there were "far too many applicants whose grades did not meet an objectively reasonable definition of an 'honors' student" and that there were many applications that "exhibited stunningly poor grammar and/or spelling."

The meeting was held on December 5, 2006. Representatives from each of the 11 components that participated in the Honors Program and SLIP attended. According to several attendees, Elston opened the meeting on a conciliatory note, apologizing for the delay in screening candidates that year, particularly the SLIP candidates. He then stated that the process had been hindered by the components' failure to adequately screen candidates, and he repeated this assertion throughout the meeting.

According to several attendees, Elston stated that candidates were deselected for one of three reasons: (1) poor grades or class rank; (2) poor writing or grammar, as evidenced by their Avue online applications; and (3) information on the Internet, such as that uncovered through Google searches or on MySpace pages, indicating the candidates were unsuitable for employment with the Department. Elston gave two examples of the type of inappropriate information that the Screening Committee had discovered on the Internet. He said one candidate described himself on a MySpace page as an anarchist; another had disseminated "compromising photos."

When an attorney suggested that the Avue system used for submitting applications online may have been the cause of some of the poor grammar or writing, Elston disagreed.[42] He said the problems that the Screening Committee observed involved fundamentally poor sentence structure, punctuation, and routine grammatical flaws.

[42] Several witnesses told us they found the Avue computerized application system was difficult to operate and could result in typographical or grammatical errors in an application that were not the fault of the applicant. The OIG's own experience in reviewing Avue applications for OIG employment vacancies confirmed this point.

According to the attendees we interviewed, no one at the meeting directly asked whether the Screening Committee had considered politics or ideology in screening candidates. Yet, most told us they did not believe that the meeting had satisfactorily answered their questions and concerns about this issue.

Several attendees told us that while Elston started the meeting with an apology about the delays caused by the Screening Committee's review, his tone quickly became condescending, rude, unprofessional, and hostile when attendees began asking questions about how the Committee made its decisions. Several attendees also said that they did not feel it would be productive to raise more questions due to the confrontational tone that Elston took in response to the questions that were asked. During our interview of Elston, he denied being rude or unprofessional at the meeting.

The attendees said that Elston seemed receptive to some suggestions for change, such as having the Screening Committee only review SLIP candidates if a component wanted to make an offer of permanent employment to the candidate at the end of his or her internship. Elston concluded the meeting by asking attendees to submit their suggestions for improving the hiring process to DeFalaise.

A senior Tax Division attorney told us that the question he really wanted answered at the meeting was whether political considerations played a role in the deselections, but no one asked Elston. The senior attorney said he did not think it was a good idea to ask Elston this question in front of everyone. After the meeting, however, the senior attorney went to Elston's office and told him that he and others were concerned that politics had played a role in the deselections. The senior attorney said Elston assured him "that wasn't the case at all."[43]

The senior attorney said that Elston's denial did not alleviate his concerns. Therefore, he, along with other senior career Tax Division attorneys, drafted the memorandum to Tax Division AAG O'Connor, discussed above in Section III(D)(1), which analyzed the Division's deselected candidates and concluded that political or ideological affiliations may have played a role into the decision to deselect candidates.

[43] Elston told us he did not recall a senior Tax Division attorney coming to his office after the meeting and asking whether political affiliation had been considered in evaluating candidates. Elston said he recalled only that an attorney from the front office of the Tax Division had complained about the delay in reviewing applications.

O'Connor told us that upon receiving the memorandum her reaction was that "the appearance that this created is so harmful, so harmful. I'm – I'm just devastated by the impact and if there were reasons other than the ones that [the memorandum] has laid out here, they've not been made clear to me . . . ."

4. Concerns About the Screening Committee Process Raised with the Acting Associate Attorney General

We also determined that concerns about the hiring process were raised with Acting Associate Attorney General William Mercer. Tax Division AAG O'Connor said that after receiving the memorandum from her employees, she raised with Mercer the concerns that political considerations may have been used by the Screening Committee. She said she told Mercer that "the career people were firmly convinced that . . . political considerations" had been used by the Screening Committee in deselecting candidates. O'Connor also told Mercer that ODAG "needed to communicate whatever the factors were, lessons learned, after-action report, whatever it is, because nobody wants to be in this position ever again." O'Connor said Mercer appeared to share her concern, although she did not know what Mercer did in response.

We also found that near the end of the 2006 Honors Program and SLIP hiring process, Civil Division AAG Keisler spoke with Mercer and advised him that the review process had been problematic and that many people in the Civil Division believed it had been politicized. Keisler told Mercer that, whether or not political affiliations had been considered, the process had gone badly for the Civil Division because it was unable to hire many of the candidates it had selected and should have been allowed to hire. Keisler said he did not want or expect Mercer to take any action at that time. Rather, he wanted Mercer to be aware of the problems the Civil Division had encountered, as well as the general discontent in the Department about how the Honors Program and SLIP hiring process had been handled. However, Keisler told Mercer that, at the appropriate time, he would like to have a meeting of senior Department officials to discuss the next year's hiring process to ensure that the problems they encountered in 2006 would not be repeated. Keisler said that Mercer appeared to be unaware of much of this information but that he seemed to be paying close attention.

In addition, then Principal Deputy Associate Attorney General Gregory Katsas told us that a senior career employee had expressed concerns to him about Honors Program and SLIP candidates with excellent credentials who had been deselected for no apparent reason and that he and his colleagues had received a report from a law school

official that there was a perception of "partisanship and unfairness." Katsas said Keisler also raised with him the concern that good candidates were deselected "without apparent reasons." Katsas said he told Mercer what he had heard from Keisler and the senior career attorney. Katsas said he also told Mercer that the concerns of Keisler and the career attorney appeared to be "serious ones" and that Mercer and he should be "on the lookout" about this issue going forward.

Mercer told us during an interview that he recalled Keisler and O'Connor each separately raising concerns that some excellent candidates had been deselected by the Screening Committee without explanation. He said that Keisler told him that people within the Civil Division believed that very good candidates had been deselected "based upon philosophical concerns." O'Connor told him there was "great frustration" within the Tax Division because the staff had worked hard to come up with some excellent candidates but were not allowed to interview them and they did not "understand the process." Mercer said he also learned from Katsas that a senior career attorney in the Civil Division had expressed concerns that an Honors Program candidate with excellent credentials had been deselected for no apparent reason.

Mercer said he reported to Elston his conversations with Keisler and O'Connor. According to Mercer, Elston stated that the deselections were made because of "sloppiness of applications" or "poor academics." Elston also told Mercer that he had already scheduled the December 5 meeting to gauge what people's concerns were. Elston said he intended to explain the process the Committee had followed so the components would have "a clear understanding of what we did, and what we learned, and what the basis for the strikes were."

Mercer told us that he later learned from Associate Deputy Attorney General David Margolis, a senior career Department official, that the December 5 meeting had not gone well and that a lot of people had left the meeting "disturbed" and "not satisfied."

Elston told us he did not recall any conversations with Mercer in which Mercer reported that he had received complaints that candidates had been evaluated on the basis of political or ideological affiliations.

Mercer said he also had a conversation with Esther Slater McDonald, who worked for him as Counsel in the Associate Attorney General's office and who he assigned to be a member of the 2006 Screening Committee. He said he asked her about the criteria the Committee had used to evaluate candidates. Mercer said McDonald told him the deselections were due to 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 said he never questioned Elston or McDonald further on how the decisions were made because "[t]hat was something that I thought the Committee was responsible for." Mercer said he understood that Elston was in charge of changing the process for hiring Honors Program and SLIP candidates, and Mercer had no further involvement in that process.

E. Initial Proposed Changes to the Honors Program and SLIP Hiring Process

Following the December 5 meeting with Elston, OARM collected and compiled suggestions from the components on ways to improve the Honors Program and SLIP hiring process. Elston told us that given the time and effort the Screening Committee had expended on the 2006 process, he considered recommending that Department-level review be eliminated altogether. Elston said he discussed this suggestion with Monica Goodling, Senior Counsel to the Attorney General, sometime in January 2007, but she disagreed. Elston said Goodling stated that Attorney General Ashcroft had initiated the Department-level review because it was important that the Attorney General have input into his Honors Program. Elston said it was clear to him from Goodling's comments that eliminating Department-level review was not an option.[44]

In consultation with Elston and the components, OARM drafted memoranda proposing changes to the Honors Program and SLIP hiring process. In particular, the memoranda proposed eliminating the Department-level Screening Committee review for all SLIP candidates, except those who received an offer of permanent employment at the end of the summer internship. However, Department-level review would remain for all Honors Program candidates, and components would be informed of the basis for individual deselections to assist them in deciding whether to appeal. Other suggested changes to the process included providing guidance to the components to assist them in selecting highly qualified candidates during their initial candidate selection, allowing components to submit component-specific criteria to sort candidates on the Avue system, and increasing the size of the Department-level Screening Committee to enable quicker review of candidate applications.

[44] Goodling declined to be interviewed by us in connection with our investigations of hiring practices in the Department.

OARM drafted decision memoranda to implement these proposed changes, which were submitted in March 2007 to Deputy Attorney General Paul McNulty for his review and approval. According to Elston, McNulty approved the changes in early April 2007.

On April 9, an anonymous letter was sent to the Chairmen of the House and Senate Judiciary Committees alleging that the Honors Program and SLIP had been politicized. The letter, signed by "A Group of Concerned Department of Justice Employees," complained about the unusually large number of deselected candidates. The letter detailed the December 5 meeting with Elston, alleged that Elston was "offensive to the point of insulting," and failed to give meeting attendees satisfactory answers to their questions. The letter stated:

> When division personnel staff later compared the remaining interviewees with the candidates struck from the list, one common denominator appeared repeatedly: most of those struck from the list had interned for a Hill Democrat, clerked for a Democratic judge, worked for a "liberal" cause or otherwise appeared to have "liberal" leanings. *Summa cum laude* graduates of both Yale and Harvard were rejected for interviews.

In mid-April 2007, several newspapers published articles about the letter.[45]

F. Additional Revisions to the Honors Program and SLIP Hiring Process

The allegations in the April 9 letter were made in the midst of congressional hearings into the firings of U.S. Attorneys and allegations that hiring and personnel decisions at the Department of Justice had been politicized.

McNulty told us that prior to learning of the April 9 letter, he was not aware of Elston's role in the Honors Program and SLIP hiring process and that he had no role himself in the process. McNulty said that upon reading the April 9 letter, he discussed its allegations with Elston. McNulty said Elston did not confirm or deny the allegation that applicants were deselected for political reasons. Rather, Elston said he did not know "why individuals were being scratched from the list." McNulty said Elston led him to believe that Elston was not one of the

[45] See, e.g., Evan Perez, Letter Accuses Justice Officials of "Politicization," *The Wall Street Journal,* Apr. 18, 2007; Dan Eggen, Gonzales to Admit Mistakes in Firings, *The Washington Post,* Apr. 19, 2007.

Committee members who reviewed the applications and instead acted as "sort of a conduit for review" between the other two Committee members (Fridman and McDonald) and OARM. McNulty said he received the impression that Elston decided the appeals.

McNulty said that after consulting with the Attorney General's office, it was quickly decided to refer the allegations in the April 9 letter to OPR and the OIG for investigation. McNulty said that in light of the referral, he did not question Elston further and he excluded Elston from any further involvement with Honors Program or SLIP issues.[46]

Instead, McNulty said he worked directly with OARM Director DeFalaise to revise the Honors Program and SLIP hiring process. McNulty said he believed the changes Elston and DeFalaise had already proposed, and which he had approved in early April, did much to address the concerns that the hiring process could be politicized. However, McNulty said that after discussions with DeFalaise, he decided to create a different structure for conducting the Department-level review.

McNulty said that the "most crucial" reform he wanted to implement was to ensure that the process would be controlled by career employees. McNulty said DeFalaise helped him identify a different structure in which OARM would run a quality review screening process that would be conducted by career employees rather than by political appointees.

The final changes to the Honors Program and SLIP hiring process were issued to Department components in an April 26, 2007, memorandum from DeFalaise. Under the new process, the Screening Committee, which formerly contained primarily political officials, was replaced by an Ad Hoc Working Group of career officials from the major components participating in the Honors Program. The April 26, 2007, memorandum also announced the newly developed Component Review Standards Guidance, which states that only merit-based criteria should be considered by the components and by the Ad Hoc Working Group in selecting candidates.

The guidance instructs component reviewers to pay close attention to a candidate's academic qualifications. Components selecting a candidate with less than an outstanding academic record

---

[46] When we interviewed former Attorney General Alberto Gonzales, he said that he first became aware of complaints related to the Honors Program as a result of the anonymous April 9, 2007, letter. He said that after he became aware of the letter, he contacted Deputy Attorney General McNulty, who said that there were issues with the program and that changes were being made to the hiring process. Gonzales said that he encouraged McNulty to fix the process.

must provide a justification to the Ad Hoc Working Group for the selection based on the candidate's skills, background, experience, or training in a relevant field of the component's practice. The guidance also instructs components to exercise "due caution" when considering web-posted information to ensure correct identification and attribution.

Under the revised procedures, the Ad Hoc Working Group reviews the Honors Program candidates selected by the components to ensure that the selections comply with the guidance and that the number of interviews does not exceed budgetary limitations. The Ad Hoc Working Group also must provide the components with written explanations when the Ad Hoc Working Group identifies candidates as non-compliant with the guidance.

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, OARM must review any funnel offer, which is an Honors Program offer made to a SLIP intern at the conclusion of the SLIP internship, to ensure that the candidate meets the merit standards described in the guidance.

G. Evidence as to Whether 2006 Screening Committee Members Considered Political and Ideological Affiliations

In evaluating whether political or ideological affiliations played a role in the deselection of 2006 Honors Program and SLIP candidates, we investigated how the three members of the Screening Committee conducted their reviews, and we attempted to determine why the Committee deselected specific candidates. In the following sections, we first discuss the limited documentary evidence that exists recording the recommendations and decisions by Committee members. Second, we discuss the explanation that each Committee member provided to us, or that we discovered from other available evidence, concerning how that member conducted his or her review of candidates. Third, we provide our analysis and conclusions regarding whether each member of the Committee used political or ideological affiliations in evaluating and deselecting applicants.

1. Lack of a Written Record

We had difficulty reconstructing the decisions and reasoning of the Committee members with regard to specific candidates because virtually no written record of the Screening Committee members' votes and views remains. The Committee used paper copies of the applications on which Fridman and McDonald made handwritten notations about the applicants, but those documents were destroyed

prior to the initiation of our investigation. Elston's staff assistant told us that her office did not have room to store the hundreds of applications and, because they contained personal information about the applicants, she placed them in the burn box for destruction shortly after the review process was completed in early 2007. The staff assistant said she did not recall consulting Elston or anyone else before destroying the applications.

The only remaining written record of some of the reasoning used by the Screening Committee members is contained in two e-mail chains, one discussing a Civil Division SLIP candidate and the other discussing eight ATF SLIP candidates. The latter e-mail chain, which provides insight into the reasoning of two of the Committee members, is detailed below in Section III(G)(3).

In addition, while we found e-mails in which Elston communicated his decisions on some of the appeals submitted by the components, he typically did not give any reasons for his decisions to grant or deny an appeal.

Given the lack of a written record, our interviews of Fridman and Elston, which we discuss next, provided the best information to determine how and why the Screening Committee made its decisions.[47]

2. Daniel Fridman

a. Instructions to Fridman

Daniel Fridman began his career with the Department in December 2004 when he joined the U.S. Attorney's Office for the Southern District of Florida as an Assistant United States Attorney. In April 2006, Fridman was detailed to the Deputy Attorney General's office in Washington, D.C.[48] Fridman was recruited for the detail by William Mercer, who at the time was the Principal Associate Deputy Attorney General. Mercer remembered Fridman from the Truman Scholars program Fridman had participated in during college. Fridman said while in the Deputy Attorney General's office he was assigned several areas of oversight responsibility, such as health care fraud, immigration enforcement, and child exploitation. He reported directly to Associate Deputy Attorney General Ron Tenpas.

---

[47] As explained in Section III(G)(3) below, McDonald resigned from the Department just before our scheduled interview of her. Because she no longer works for the Department, we could not compel an interview and she declined to be interviewed by us.

[48] Fridman graduated from law school in May 1999. Following a judicial clerkship, he worked in a law firm in Miami, Florida, for 4 years before joining the Department in 2004. In 2008, Fridman left the Department to work for a private law firm.

Fridman had no responsibility for or involvement in hiring prior to September 2006 when Elston assigned him to work on the Screening Committee along with Elston and Esther Slater McDonald. According to Fridman, Elston told Fridman to review the applications for grades, qualifications, credentials, and experience. Fridman also said that Elston told him that his review was to help weed out "wackos or wack jobs." Elston stated that because this was the Attorney General's Honors Program, they wanted to hire candidates who were supportive of or who had views consistent with the Attorney General's views on law enforcement. However, Elston did not explain how Fridman would determine whether a candidate supported the Attorney General's views.

Fridman told us that after his conversation with Elston, he was concerned and uncertain about what he was supposed to do. He did not understand what Elston meant by "wackos or wack jobs," or how he was supposed to identify a candidate who fell within Elston's definition of those terms. Fridman said he had "serious questions" about whether such a review was even appropriate. Because of his concerns, Fridman met with Tenpas and told him that he was unsure whether he understood Elston's request and whether his discomfort with it was an overreaction. Fridman asked Tenpas to speak with Elston to get clarification on the Screening Committee assignment.

Tenpas confirmed that Fridman met with him about the assignment. Tenpas said Fridman reported that Elston had assigned him to review applications of Honors Program candidates and that Fridman was uncertain and a bit concerned about the nature of the assignment. Tenpas understood that Fridman was concerned that Elston may have asked him to review candidates based on their political or ideological views. Tenpas told Fridman he was right to question the assignment because, in Tenpas's experience as an AUSA and as a U.S. Attorney, he had never hired anyone based on political affiliation and he was not aware of others doing so.

According to Fridman, he also asked Tenpas whether, if Tenpas were in Fridman's place, he would review candidates based on political or ideological views, and Tenpas said no. According to Tenpas, he advised Fridman that he should not do anything he was uncomfortable doing because "you never get your integrity back." Tenpas said he also advised Fridman to get clarification from Elston about exactly what he was being asked to do.

Tenpas said that after their conversation, he stopped by Elston's office and told him that Fridman was uncertain and concerned about the Honors Program assignment. Elston expressed frustration that Fridman had not come directly to Elston with his concerns. Elston

assured Tenpas that he would speak with Fridman and clarify the assignment. Tenpas said he did not remember Elston indicating whether he had in fact asked Fridman to consider candidates' political or ideological views in conducting the review.

After his conversation with Tenpas, Fridman met with Elston a second time. Fridman said Elston told him that, when he asked Fridman to weed out "wackos and wack jobs, he meant he wanted us to weed out extremists on either side of the ideological spectrum." Fridman said that he asked for more clarification and that Elston gave him some examples. Fridman told us he could not remember the examples, but said that they were similar to reasoning that if a candidate was a member of the National Rifle Association, that candidate would have difficulty prosecuting gun cases, and on the other hand people who supported the legalization of drugs might have difficulty prosecuting narcotics violations. Fridman said he still did not completely understand the type of review Elston wanted him to conduct, but he told Elston he was comfortable reviewing applications for grades, credentials, and writing ability.

b. Fridman's Review Process

Fridman said that he understood that the review needed to be completed as soon as possible, although he did not understand that the Screening Committee had a firm deadline.[48] Fridman also said that no one explained to him the import of the December 1 deadline for making employment offers. Nor did anyone explain how Screening Committees in previous years had worked or how quickly they had conducted their reviews. Fridman also said he had no understanding of the hiring process for components and was unaware in the fall of 2006 of any complaints by the components that the review process was taking too long.

To conduct the review, Fridman said he and McDonald received identical sets of Honors Program applications. At first, Fridman and McDonald attempted to meet to go over the applications together, but their respective schedules made that difficult. Fridman said that as a result, the practice that evolved was that McDonald reviewed the applications first and that she would circle items on the applications, make notes or write remarks on them, and separate them into three categories: no, yes, and questionable. In addition, he said that

[48] Our review of e-mails found that Fridman received an e-mail from Elston's assistant at the beginning of the review process which set out the deadlines that OARM had imposed.

McDonald also conducted Internet searches to obtain further information about the candidates. Among other things, McDonald ran searches on candidates' names using the Google search engine and checked their MySpace webpages. In some cases, she read law review or other published articles by the candidates.

After McDonald completed her review, she passed her marked-up applications to Fridman. Fridman told us that he first reviewed an application for the candidate's law school and grades. If a candidate attended an Ivy League or other top-tier law school, Fridman generally voted that the candidate should receive an interview unless the applicant had substandard grades, such as a number of Cs on his or her transcript.[49] For students who did not attend one of the top-ranked law schools, Fridman generally only voted yes for those students who ranked in the top third of their classes.[50] He said that if the student was in the top 20 percent of his or her class, he would vote to interview the applicant, regardless of law school. If the student's class rank fell between the top 20 percent and top third of the class, Fridman would give closer scrutiny to the application. If the school was not a top-tier school and did not assign class rank, Fridman would look at the grades listed on the student's transcript. If the student appeared to have a B or better grade average, Fridman would recommend the applicant be interviewed. Fridman also considered as positive factors an applicant's judicial clerkship, master's degree, moot court, or prior internship with DOJ. For candidates whose grades were borderline, Fridman closely scrutinized their writing style.

After Fridman completed his review, he forwarded the marked-up applications to Elston. Fridman separated the applications into three piles: yes – those whom both Fridman and McDonald agreed should receive an interview; no – those whom they both agreed should not receive an interview; and questionable – those about whom Fridman and McDonald disagreed or whose grades were marginal and required closer review.

Fridman said he did not know what Elston did with the three piles or how he screened them. Fridman believed it was apparent to Elston which handwritten comments were his and which were

---

[49] Fridman explained that he considered the top law schools to be the 20 schools ranked highest in *U.S. News and World Report's* ranking of law schools in 2006.

[50] Fridman said he recalled a few exceptions in which a candidate who was not in the top third of the class but who had a particularly compelling life story detailed in the essay portion of the application was considered for an interview.

McDonald's because Fridman's handwriting was much sloppier than McDonald's, and sometimes they used different colored pens.

Fridman said that he and McDonald had discussed how they would review the applications and that he understood that McDonald applied the same criteria as to grades and class rank as he did. However, Fridman learned that McDonald was obtaining additional information about candidates on the Internet when he saw notations by McDonald providing information that was not contained in the candidate's application. When Fridman asked McDonald how she obtained the additional information, she told him she conducted searches on Google and MySpace, and read law review articles written by the applicants. For example, Fridman recalled that one candidate had written a law review article about the detention of individuals at Guantánamo, and McDonald noted on the application that she perceived the applicant's viewpoint to be contrary to the position of the administration. On another application, McDonald noted that she found information on the Internet indicating that a candidate was an "anarchist."

Fridman said McDonald also circled or otherwise identified items on candidates' applications about which she apparently had concern, such as membership in certain organizations like the American Constitution Society, having a clerkship with a judge who was perceived as a liberal, having worked for a liberal Member of Congress, or having worked for a liberal law school professor. Fridman said the general thrust of McDonald's written objections were to people who had an "activist view" of the law or DOJ's role in helping laws to evolve. He said that it appeared from McDonald's notations on the applications that her concerns about candidates' affiliations led McDonald to put their applications in the questionable pile, regardless of whether they had good grades or had attended a top law school.

Fridman said that he considered only the candidate's grades, writing style, personal history as reflected in the essay answers, and work experience. Fridman said he did not know how to weed out the type of "extremists" that Elston had mentioned, so he made no attempt to do so. Fridman said he viewed involvement with organizations as a positive factor, regardless of the political viewpoint of the organizations. Fridman thought judicial clerkships were also a positive factor, regardless of whether the judge was viewed as conservative or liberal. Similarly, Fridman said interning for a Member of Congress was a positive factor, regardless of whether the Member was a Republican or Democrat.

Fridman said he did not discuss with McDonald her written comments objecting to candidates' affiliations. However, he said that at one point early in the review process he took a stack of applications to Elston and told him that he was concerned that candidates who had good credentials might not be granted an interview based on McDonald's assessments. For example, Fridman recalled that one candidate was at the top of his class at Harvard Law School and was fluent in Arabic. McDonald's written notations indicated that she had concerns about the candidate because he was a member of the Council on American Islamic Relations and that she had placed the application in the questionable pile. Fridman said he wrote on the application that this candidate was at the top of his class at Harvard and was exactly the type of person DOJ needed.

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 deselecting 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.[51]

b. McDonald's Review Process

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

[51] 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.[52]

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

[52] 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.[53] 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

[53] 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.[54] 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. . . .

---

[54] 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 though 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.[55] 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

---

[55] 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.[56]

---

[56] 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

---

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."[57] 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.[58] 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."

---

[57] 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.

[58] 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.[59] 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

---

[59] 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.[60]

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

[60] 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.[61] 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

[61] 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 deselecting 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