

Testimony of

The Honorable Glenn. A Fine

July 30, 2008

Statement of Glenn A. Fine

Inspector General, U.S. Department of Justice,

before the

Senate Committee on the Judiciary

concerning

Politicized Hiring at the Department of Justice

July 30, 2008

Mr. Chairman, Senator Specter, and Members of the Committee on the Judiciary:

I appreciate the opportunity to testify at this hearing on politicized hiring at the Department of Justice (Department).

The Office of the Inspector General (OIG) and the Department's Office of Professional Responsibility (OPR) recently issued two reports on our joint investigations of allegations relating to politicized hiring at the Department. The first report, issued on June 24, 2008, examined hiring practices in the Department's Honors Program and Summer Law Intern Program (SLIP). In that report, we determined that Screening Committees used by the Department to screen applications for the Honors and Summer Law Internship Programs inappropriately used political or ideological affiliations to "deselect" candidates in 2006 and in 2002.

This week, on July 28, we issued a second joint report that examined the actions of Monica Goodling, the Department's former White House Liaison, and other staff in the Attorney General's office regarding allegations that they inappropriately used political or ideological affiliations in the hiring process for career Department positions. Our investigation found that Goodling, Kyle Sampson (the former Chief of Staff to the Attorney General), and other staff in the Office of the Attorney General improperly considered political or ideological affiliations in screening candidates for certain career positions at the Department, in violation of federal law and Department policy.

The OIG and OPR are also jointly investigating allegations related to the removal of several United States Attorneys in late 2006, as well as allegations that former Civil Rights Division Acting Assistant Attorney General Bradley Schlozman and others used political or ideological affiliations in hiring and personnel decisions in the Department's Civil Rights Division. Because those investigations are ongoing, I should not comment on them at this time. However, I want to assure the Committee that the OIG and OPR are working very hard on these investigations and will issue our reports as expeditiously as possible when these investigations are complete.

In my testimony today I will summarize the major findings and recommendations from the first two OIG/OPR reports. My statement is organized in three parts. In the first part, I summarize our findings on Honors Program and Summer Law Intern Program hiring. The second part describes the results of the report on allegations of politicized hiring practices by Monica Goodling and others in the Attorney General's office. In the final part, I discuss corrective actions taken by the Department, both before our two reports were issued and also in response to the recommendations contained in the reports.

I. HONORS PROGRAM/SUMMER LAW INTERN PROGRAM REPORT

The report issued on June 24, 2008, provided the results of our investigation of allegations of politicized hiring in the Department's Honors Program and Summer Law Intern Program from 2002 to 2006.

The Attorney General's Honors Program is a highly competitive hiring program for entry-level Department attorneys, and the SLIP is a highly competitive Department program for paid summer internships for law students. The 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. Many of these hires remain with the Department for significant periods of time, some for much of their careers. The Department's litigating divisions and several other Department components participate in the Honors Program hiring process, which is overseen by the Department's Office of Attorney Recruitment and Management.

It is not improper to consider political affiliations when hiring for political positions in the Department. However, positions in the Honors Program and SLIP are career, rather than political, positions. Both Department policy and federal law prohibit discrimination in hiring for career positions on the basis of political affiliations and require the Department to use merit-based hiring practices that identify qualified applicants through fair and open competition.

Prior to 2002, career employees within each Department component decided which applicants to interview and select for both the Honors Program and SLIP. However, under a new system implemented by the Attorney General in 2002, a Screening Committee generally comprised 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 addition, the political appointees in each Department component were encouraged to become more involved in the hiring process to select these candidates.

As part of our investigation of whether political and ideological affiliations were improperly considered in the hiring process for the Honors Program and SLIP, the OIG and OPR interviewed more than 70 individuals who participated in the Honors Program hiring process. We also reviewed thousands of pages of e-mails and other documents related to the Honors Program and SLIP hiring process from 2002 through 2006. In addition, we examined the applications of candidates who had been approved or deselected by the Screening Committees each of those years to determine whether candidates with apparent political or ideological affiliations on their applications were treated differently.

The evidence showed that the Screening Committees in 2002 and 2006 improperly deselected candidates for interviews based on political and ideological affiliations. The data analysis we conducted for 2002 demonstrated that candidates with Democratic Party and liberal affiliations apparent on their applications were deselected at a significantly higher rate than applicants with Republican Party, conservative, or neutral affiliations. This pattern continued when we compared a subset of academically highly qualified candidates who met each of the following criteria: attendance at a top 20 law school, ranked in the top 20 percent of their class, membership on the law review, and a judicial clerkship. In sum, while we were unable to prove that any specific members of the 2002 Screening Committee intentionally made deselections based on prohibited factors, and each member denied doing so, 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 Committees made few deselections, and we concluded that these few deselection decisions could reasonably be explained on the basis of candidates' low class rank, low grades, and attendance at a lower-tier law school.

However, we found that in 2006 the Screening Committee inappropriately used political and ideological affiliations to deselect a significant number of candidates. We determined that a significantly higher percentage of the deselected Honors Program and SLIP candidates had liberal affiliations as compared to candidates with conservative affiliations. This pattern was also apparent when we compared applicants with Democratic Party affiliations versus Republican Party affiliations for both Honors Program and SLIP candidates. The pattern was also apparent when we examined a subset of candidates who were highly qualified academically.

In addition, the documentary evidence and our witness interviews support the conclusion that two members of the 2006 Screening Committee, Esther Slater McDonald, then Counsel to the Associate Attorney General, and Michael Elston, then Chief of Staff to the Deputy Attorney General, considered political or ideological affiliations 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. The third member of the 2006 Screening Committee, Daniel Fridman, who was a career Assistant United States Attorney on detail to the Office of the Deputy Attorney General, appropriately raised concerns that political or ideological affiliations were being used by McDonald to both his supervisor and to Elston.

However, Elston, the head of the 2006 Screening 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.

For example, we found that McDonald and Elston deselected an 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, and was clerking for a judge on the U.S. Court of Appeals for the Second Circuit. This candidate had also worked for a Democratic U.S. Senator and a human rights organization.

In another example, McDonald and Elston deselected a SLIP candidate from Yale Law School who was a member of the Yale Law Journal, a Rhodes Scholar, graduated summa cum laude from Yale College, and had interned with the U.S. Attorney's Office for the Southern District of New York. This candidate also had worked for organizations promoting civil liberties and human rights.

In sum, we concluded that many qualified candidates were deselected by the Screening Committee in 2006 because of their perceived political or ideological affiliations. We concluded that McDonald's and Elston's actions constituted misconduct and violated Department policy and federal law that prohibits discrimination in hiring for career positions based on political or ideological affiliations.

It is important to note that our report did not conclude that candidates who made it through the Screening Committee were unqualified, as some have suggested after our report was issued. The candidates who the Screening Committee allowed to be interviewed - those with conservative, neutral, or liberal affiliations on their applications - generally appeared from their resumes to have appropriate qualifications to be considered for the Honors Programs. It is therefore unfair to suggest that candidates

selected in 2002 or 2006 were unqualified. Yet, it is true that many candidates who were deselected by Elston and McDonald also had sufficient qualifications for the program and were unfairly denied the opportunity to interview for a position with the Department on the basis of their political or ideological affiliations.

At the Department component level, we found that the processes individual components used from 2002 through 2006 for proposing candidates to the Screening Committee appeared to be merit based. We did not find evidence that components employed inappropriate criteria such as political or ideological affiliations to select candidates to be interviewed for the Honors Program or SLIP. However, our findings about the components did not include the Civil Rights Division, which, as discussed above, will be covered in a separate report.

Finally, 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, 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. Several Department 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. Certain career employees, particularly in the Tax Division and the Civil Division, also raised concerns about the hiring process and deserve credit for doing so. By contrast, we believe that others in the Department did not sufficiently address complaints about the deselections.

II. POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE ATTORNEY GENERAL'S OFFICE

The report released on July 28 described the results of our joint investigation into allegations of politicized hiring at the Department by Monica Goodling and other staff in the Office of the Attorney General.

Our investigation examined allegations that Goodling, who held several positions at the Department including the White House Liaison in the Office of the Attorney General, inappropriately considered political or ideological affiliations in the selection and hiring of certain Assistant United States Attorneys (AUSAs) and career attorneys in the Department. We also investigated whether Goodling and her predecessors as White House Liaison, Jan Williams and Susan Richmond, considered political or ideological affiliations when selecting candidates for details of career attorneys to Department offices. In addition, we investigated allegations that Sampson, the Office of the Inspector General, former Chief of Staff to the Attorney General, Goodling, and her predecessors as White House Liaison inappropriately considered political or ideological affiliations in selecting immigration judges, which are career positions.

Finally, we investigated allegations that Goodling discriminated against a career Department attorney who had applied for several temporary details on the basis of her rumored sexual orientation.

Based on our investigation, we concluded that Goodling violated federal law and Department policy, and committed misconduct, by improperly considering political or ideological affiliations in screening candidates for certain career positions at the Department.

For example, in one instance the interim U.S. Attorney in the District of Columbia sought approval from Goodling to hire an AUSA for a vacant position. Goodling responded that the candidate gave her pause because, judging from his résumé, he appeared to be a "liberal Democrat." Goodling also said she was reluctant to approve the request because the Republicans had lost control of Congress after the November 2006 elections, and she expected that Republican congressional staff might be interested in applying for AUSA positions in Washington. Eventually, after the interim U.S. Attorney complained to Sampson about Goodling's response, the U.S. Attorney was allowed to hire the AUSA.

In addition, we determined that Goodling often used political or ideological affiliations to select or reject career attorney candidates for temporary details to Department offices. Goodling's use of political considerations in connection with these details was particularly damaging to the Department because it resulted in high-quality candidates for important details being rejected in favor of less-qualified candidates. For example, an experienced career terrorism prosecutor was rejected by Goodling for a detail to EOUSA to work on counterterrorism issues because of his wife's political affiliations. Instead, EOUSA had to select a more junior attorney who lacked any experience in counterterrorism issues and who EOUSA officials believed was not qualified for the position.

We also determined that in several instances Goodling and Susan Richmond, one of her predecessors as the Department's White House Liaison, opposed on the basis of political affiliation the extensions of details for career Department attorneys working in the Office of the Deputy Attorney General, even though these candidates had the full support of the Deputy Attorney General and his staff.

While some temporary detail assignments to certain high-level Department offices may be of a "confidential, policy-determining, policy-making, or policy-advocating character" and thus possibly exempt from the civil service restriction on considering political affiliations in hiring, we concluded that some of the detailee positions at issue in this report were clearly not included within the scope of this exception and that it was improper for Goodling to consider political or ideological affiliations when hiring for those positions.

We found that the most systematic use of improper political or ideological affiliations in screening candidates for career positions occurred in the selection of immigration judges, who are career

employees who work in the Department's Executive Office for Immigration Review (EOIR). In the fall of 2003 and the spring of 2004, Sampson created and implemented a new process for selecting immigration judges which ensured that all candidates for these positions were selected by staff in the Office of the Attorney General rather than by EOIR officials, which had been the usual practice up until that time.

Sampson told us that he implemented this new process because he believed that immigration judges were not subject to civil service laws based on advice he received from an EOIR official and from the Department's Office of Legal Counsel. However, we did not find evidence to support Sampson's claim that the EOIR official or the Office of Legal Counsel provided such advice to Sampson.

Under the process implemented by Sampson and followed by Williams and Goodling, the principal sources for immigration judge candidates were the White House Offices of Political Affairs and Presidential Personnel. We concluded that Sampson, Williams, and Goodling violated federal law and Department policy by inappropriately considering political or ideological affiliations in evaluating and selecting candidates for immigration judges.

For example, Goodling screened candidates for immigration judges by using a variety of techniques for determining their political affiliations, including researching the candidates' political contributions and voter registration records, and using an Internet search string containing political terms.

Not only did this process violate the law and Department policy, it also caused significant delays in appointing immigration judges. These delays increased the burden on the immigration courts, which already were experiencing an increased workload and a high vacancy rate. EOIR Deputy Director Kevin Ohlson repeatedly requested candidate names to address the growing number of vacancies, with little success. As a result of the delay in providing candidates, the Department was unable to timely fill the large numbers of vacant immigration judge positions.

With regard to another matter, we found that Goodling violated Department policy and federal law, and committed misconduct, when she refused to extend the detail of a career AUSA, and later tried to block the AUSA from obtaining other details, at least in part because of rumors regarding the AUSA's sexual orientation.

We also concluded that Goodling committed misconduct by providing inaccurate information to a Civil Division attorney who was defending a lawsuit brought by an unsuccessful immigration judge candidate. Goodling told the attorney that she did not take political factors into consideration in connection with immigration judge hiring, which was inaccurate.

III. DEPARTMENT ACTIONS TO ADDRESS OIG/OPR RECOMMENDATIONS

Both prior to and since issuance of our reports on politicized hiring, the Department has taken steps to attempt to address problems with its screening and hiring processes for career Department positions. In particular, Attorney General Mukasey has agreed to implement the recommendations in our reports.

The first changes occurred in April 2007, as a result of the widespread complaints from career employees that arose following the 2006 selection process, when the Department revised the process for selecting Honors Program and SLIP candidates by removing the screening conducted by political officials on the Screening Committee and by providing written guidance on the criteria that should be applied. In our June 24 report, we concluded that these changes were appropriate and will help address problems that we found in that investigation. However, we recommended additional changes for the Department to help ensure that political or ideological affiliations are not inappropriately used to evaluate candidates for the Honors Program and SLIP in the future.

For example, we recommended revising both the Department's written guidance for selecting candidates for the Honors Program and SLIP and the Department's Human Resource Order to emphasize that the process for hiring career attorneys must be merit based and also to specify that ideological considerations cannot be used as proxies to discriminate on the basis of political affiliations. We also recommended that the briefing and training materials for Department political appointees should stress that candidates for career positions must 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.

Earlier this month, the Department issued revised versions of its Honors Program and SLIP guidance and of its Human Resource Order that addressed issues raised in our report. The Department also is developing new training materials for officials who participate in the hiring process for the Honors Program and SLIP.

The Department made another change in 2007 in response to allegations about Goodling's inappropriate consideration of political affiliations regarding waiver requests by interim U.S. Attorneys to hire career AUSAs when former Attorney General Gonzales directed that such requests be reviewed by career employees in EOUSA rather than by political appointees in senior Department offices. In addition, we determined that EOUSA has recently ended the practice of reviewing the résumés of such candidates and instead assesses waiver requests based solely on the budgetary status of the U.S. Attorney's Office and the status of the U.S. Attorney's nomination.

With regard to immigration judges, as a result of the civil litigation over the unsuccessful candidacy of an immigration judge applicant, in April 2007 former Attorney General Gonzales approved a new process to fill immigration judge positions which returned the responsibility for evaluating and selecting immigration judges to career officials in EOIR. According to a senior EOIR career official, the process is working more effectively now and political considerations are not being used in the selection of candidates.

With regard to approval of detailees, in response to concerns about Goodling's actions, in July 2007 the Deputy Attorney General was granted the authority to detail attorneys to the Office of the Deputy Attorney General without approval from the Attorney General's Office.

In our report this week, we also recommended that the Department clarify its policies regarding the use of political or ideological affiliations to select career attorney candidates for temporary details within the Department. As discussed in our report, it is unclear which detailee positions are included or excluded from the scope of civil service law, and the Department's existing guidance on this issue is inconsistent. We recommended that the Department clarify the circumstances under which political considerations may and may not be considered when assessing career candidates for details to various Department positions. In response to our report, the Department has agreed to implement this recommendation.

In conclusion, the Department must ensure that the serious problems and misconduct we found in our reports about politicized hiring for career positions in the Department do not recur in the future. I believe that implementation of our recommendations, and vigilance by current and future Department leaders, can help prevent a recurrence of the misconduct and violations of federal law and Department policy that are described in our reports.