

# **An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General**

**Special Report**

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**Office of the Inspector General**

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## **Chapter Six**

### **Evidence and Analysis: Immigration Judge and Board of Immigration Appeals Member Hiring Decisions**

Goodling also admitted in her testimony to Congress that she “took political considerations into account” in soliciting candidates and reviewing candidate résumés for career positions as Department immigration judges (IJs) and Board of Immigration Appeals (BIA) members. Our investigation also revealed that Kyle Sampson and Jan Williams improperly took political and ideological affiliations into account when they were involved in hiring immigration judges.

In the sections below, we first provide background on IJs and BIA members. We discuss the process by which IJs were hired prior to spring 2004 and the changes Sampson initiated when he became Chief of Staff; Sampson’s, Williams’s and Goodling’s sources for obtaining immigration judge candidates and the political affiliation of those candidates; and the problems for the Department’s Executive Office for Immigration Review created by the changes Sampson made to the hiring process for IJs. We then provide our findings and conclusions regarding whether Sampson, Williams, and Goodling violated federal law and Department policy, and committed misconduct, by considering political or ideological affiliations in selecting immigration judges. Finally, we discuss whether Williams provided inaccurate information to us in this investigation related to her role in the hiring of immigration judges, and whether Goodling provided inaccurate information to Department attorneys defending the United States in civil litigation regarding immigration judge hiring.

#### **I. Immigration Judges and Board of Immigration Appeals Members**

##### **A. The Executive Office for Immigration Review**

The Department’s Executive Office for Immigration Review (EOIR) is responsible for conducting immigration court proceedings and appellate review of such proceedings. EOIR is headed by a Director who reports directly to the Deputy Attorney General. The EOIR Director, working with a Deputy Director, has general supervision over the Office of the Chief Immigration Judge (OCIJ), which is responsible for managing immigration courts throughout the nation. In addition, the OCIJ supervises the BIA,

which conducts appellate review of immigration court decisions.<sup>47</sup> At the time of the events discussed in this report, the Director of EOIR was Kevin Rooney and the Deputy Director was Kevin Ohlson. The Director and Deputy Director are career Senior Executive Service (SES) positions. Both Rooney and Ohlson are career Department attorneys.

The OCIJ establishes and implements operating policies for the immigration courts. It is led by a Chief Immigration Judge (CIJ), who is assisted by 11 Assistant CIJs (ACIJs). The CIJ is a career SES position. The ACIJs are all career, Schedule A positions. By definition, Schedule A positions “are not of a confidential or policy-determining character,” which distinguishes them from Schedule C appointments (commonly referred to as “political” appointments).<sup>48</sup>

## **B. Immigration Judges**

An immigration judge is “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review.” 8 U.S.C. § 1101(b)(4). The Office of Personnel Management has categorized career attorney positions as Schedule A. 5 C.F.R. § 213.3102. All IJs are career Schedule A appointees. Consequently, the civil service laws set forth at 5 U.S.C. §§ 2301 and 2302 apply to the appointment of IJs.

IJs are the attorneys within the Department who are responsible for conducting quasi-judicial proceedings relating to exclusion, deportation, removal, and asylum cases. More than 200 IJs preside over immigration courts in all 50 states, the District of Columbia, and Puerto Rico. IJs are required to exercise independent judgment, and their decisions are final unless they are formally appealed to the BIA.

## **C. The Board of Immigration Appeals**

The BIA is composed of 15 Board Members, including the Chairman and Vice Chairman. Board Members are “attorneys appointed by the Attorney General.”<sup>49</sup> The BIA Chair is a career SES position. Under the regulations, the Attorney General “may designate one or two Vice Chairmen to assist the Chairman.”<sup>50</sup> Both Vice Chair positions are career positions, not political appointments. The remainder of the BIA member positions are career Schedule A positions. Thus, the civil service laws set forth at 5 U.S.C. §§ 2301 and 2302, also apply to the appointment of BIA members.

The BIA has jurisdiction to hear appeals from certain decisions rendered by IJs, including decisions in exclusion, deportation, removal, and asylum cases. The decisions of the BIA are binding on IJs unless modified or overruled by the Attorney General. Like IJs, the BIA is directed to exercise its independent judgment in hearing appeals. Certain decisions by the BIA may be appealed to the United States Courts of Appeal.

## **D. Department of Justice Policy**

As noted above, Department policy and civil service laws prohibit discrimination in hiring for career positions. In advertising IJ positions, the Department specifically stated that “there will be no discrimination because of color, race, religion, national origin, **politics**, marital status, disability, age, sex, [or] sexual orientation... (emphasis added).”<sup>51</sup>

## **II. Process for Hiring Immigration Judges**

### **A. The Process Prior to Spring 2004**

The Attorney General has the authority to appoint IJs.<sup>52</sup> See 8 U.S.C. § 1101(b)(4) and 8 C.F.R. § 1.1. However, that authority is normally delegated by the Attorney General to the Deputy Attorney General or to the Associate Attorney General.<sup>53</sup> Since at least the 1980s, the Deputy Attorney General has routinely re-delegated to the Department’s Office of Attorney Recruitment and Management the authority to take final action in matters pertaining to employment for attorneys in pay grades GS-15 and below. The delegations included IJs, who are attorneys compensated at the GS-15 level or below.<sup>54</sup>

Prior to spring 2004 the process for hiring IJs was handled primarily by EOIR. When a position became available, whether through retirement or the creation of new positions, EOIR posted a vacancy announcement identifying the location of the vacancy, the minimum requirements for applicants, and a statement that the Department is an Equal Opportunity Employer that does not discriminate on the basis of, among other things, “politics.” The minimum requirements were that a candidate must be a U.S. citizen, have 7 years of relevant post-bar experience, and have 1 year of experience equivalent to the GS-15 level of federal service.

In addition, the announcements stated that applicants must possess three or more of the following: (1) knowledge of immigration laws and procedures; (2) substantial litigation experience, preferably in a high-volume context; (3) experience handling complex legal issues; (4) experience conducting administrative hearings; and (5) knowledge of judicial practices and procedures.

Within EOIR, the Office of the Chief Immigration Judge had responsibility for the hiring process. Assistant Chief Immigration Judges reviewed the applications and voted on which candidates to interview, and the Chief Immigration Judge reviewed their recommendations and determined who would be interviewed. The interviews were conducted by 3-member panels, including the CIJ, and the CIJ would then choose which candidate to recommend to the EOIR Director. The Director had to approve the recommendation. The evidence we reviewed suggested that prior to Sampson changing the process in 2003, every recommendation was

accepted by the Director. EOIR then prepared and sent paperwork to the ODAG and the OARM for "sign-off" on the new hire. The evidence in our investigation also showed that during this same time period the Director's recommendation was never rejected.

Prior to spring 2004, we found only a few examples of IJs being appointed without having applied in response to vacancy announcements, and sometimes without having been interviewed or processed by EOIR. Such hires were sometimes referred to as having been made pursuant to the Attorney General's "direct appointment" authority, although we found no evidence that any Attorney General (as opposed to the Attorney General's staff) was personally involved in selecting the candidates. The evidence indicates that very few "direct appointments" were made prior to spring 2004. Rather, the vast majority of IJs were hired through the EOIR process detailed above.<sup>55</sup>

No BIA members were hired between October 2001 and April 2007. Consequently, there was no established mechanism for hiring BIA members during the time that Sampson, Williams, and Goodling worked in the OAG. The four most recent BIA members appointed before that time period were "direct" hires, but we found no evidence that the candidates were selected based on political considerations.

## **B. The Office of the Attorney General Considers Changes to the Process**

When Sampson came to the OAG as Counselor to the Attorney General in 2003, he implemented significant changes to the process of hiring IJs.

An internal EOIR e-mail from an ACIJ to the CIJ, dated June 30, 2003, stated that Laura Baxter, a Senior Counsel to the Deputy Attorney General, had recently informed EOIR that "the Dept. is going to take a greater role in IJ hiring." The e-mail noted further that Baxter "emphasized that she wanted us to know that this is coming from the AG [John Ashcroft]." Both EOIR Director Rooney and Deputy Director Ohlson told us that they were not aware of such an initiative at the time.

In October 2003, an exchange of e-mails between Baxter and Sampson, who had just left the White House Counsel's Office to become a Counselor to Attorney General Ashcroft, showed that the White House and the OAG had recently taken an interest in IJ hiring. For example, an October 8, 2003, e-mail from Sampson to Baxter stated that "the White House may recommend" two candidates for IJ positions, and that Sampson wanted to send "folks in the White House" a document detailing a proposed new process for hiring IJs. Attached to the e-mail was a draft document, entitled "Appointment of Immigration Judges." The document stated that, "Many lawyers seeking positions within the Administration, including judgeships, become known to the White House offices of Political Affairs, Presidential Personnel, and Counsel to the President." The document stated that some

lawyers might qualify to be IJs, and that “coordination” was needed to ensure that such lawyers were “informed of the opportunity” to become IJs. The document included a “Proposed Process,” which was substantively identical to the process that became established under Sampson, Williams, and Goodling, and which is quoted below:

- A. EOIR informs DAG (Baxter) of current or upcoming IJ vacancy.
- B. DAG (Baxter) informs OAG (Sampson) of the vacancy.
- C. OAG (Sampson) informs WH OPA..., WH PPO..., and WHCO... of the vacancy and solicits names of possible applicants.
- D. OAG (Sampson) transmits application package to possible applicants; DAG (Baxter) transmits a list of possible applicants recommended by WH to EOIR.
- E. EOIR recommends candidates for AG appointment.
- F. AG appoints.

We found that the proposed process described above essentially mirrored the process that was implemented in 2004 with the exception that the ODAG was removed from meaningful involvement in IJ hiring. Sampson confirmed to us that the “Proposed Process” document corresponded with “how it [IJ hiring] worked during the period of time that I was at the Justice Department.”

We also found that a prior draft of the “Proposed Process” included a provision for EOIR to “vet applications,” but that provision was deleted from the document attached to Sampson’s e-mail.<sup>56</sup> In a separate e-mail to Baxter on October 8, 2003, Sampson stated that he wanted to review the standard “application package” for immigration judge positions before implementing the new process for hiring IJs.

The first example of a direct appointment in which Sampson referred an IJ candidate to EOIR involved an attorney who served as the campaign treasurer for a Republican Senator from New Hampshire. The campaign treasurer had been nominated to the U.S. Tax Court by President Bush in 2001, and Sampson was the person at the White House who was assigned to “shepherd” the candidate through the nomination process. The nomination was not successful, and the candidate was appointed to a political position in the DOJ Tax Division.

In October 2003 the candidate approached an official in the OAG to inquire about IJ positions, and learned that Sampson was in charge of IJ hiring.

Shortly thereafter, the candidate spoke with Sampson by telephone. In January 2004, the candidate learned that he would be interviewed by EOIR

for an IJ position. An EOIR official told us that he learned that the candidate had already been offered a position before he came to EOIR for his interview. The subsequent recommendation from EOIR to appoint the candidate as an IJ was sent to Baxter in the ODAG on February 19, 2004. In an internal Department e-mail dated March 18, 2004 to the Justice Management Division, Department White House Liaison Susan Richmond noted that the candidate would soon be appointed and commented: "could you... advise [the] Sen.... of this? This is the issue he'd been pushing with us." The candidate was appointed as an IJ on April 4, 2004.

### **C. Last Occasion in Which EOIR Played a Role in Selecting Immigration Judges**

In a memorandum to the ODAG dated April 5, 2004, EOIR requested approval of a plan to create a Headquarters Immigration Court, where hearings could be conducted by teleconference, and to hire four IJs to fill the new positions. The memorandum identified four candidates, each of whom had significant experience in immigration law. The evidence shows that each of these candidates was identified and selected by EOIR, with no involvement from the OAG or the White House. However, in an e-mail to the ODAG dated August 2, 2004, Sampson criticized this set of appointments as a "hiccup" in the process, commenting that the OAG should have been "more involved" in selecting the candidates. In the e-mail, Sampson reminded the ODAG that it was important to "inform the AG and obtain his informal concurrence" before processing immigration judge candidates.<sup>57</sup>

In early April 2004, EOIR Director Rooney and Deputy Director Ohlson met with ODAG staff to discuss routine EOIR matters. Sampson attended the meeting. During the meeting, the fact that EOIR was preparing to post an announcement for IJ positions, including a position in Chicago, was discussed. Ohlson told us that Sampson expressed interest in that position, indicating that he might have a candidate for the position. Sampson also asked numerous questions about how IJs were appointed. Ohlson explained to Sampson the standard process through which EOIR posted announcements, screened résumés, interviewed candidates, and selected individuals who were then approved by the ODAG. Ohlson also mentioned the direct appointment avenue for hiring that had been used occasionally in the past.

Ohlson told us that in discussing the Attorney General's direct appointment authority with Sampson, he did not state or suggest to Sampson that direct hires were exempt from civil service laws governing career positions. Both Rooney and Ohlson told us they knew that IJs were career Schedule A positions, that civil service protections covered such positions, and that political affiliation could not be considered in hiring IJs. Sampson told us that he did not recall discussing with Ohlson whether direct appointments were subject to the civil service laws.

At the end of the meeting, Sampson asked to be informed when the ODAG authorized EOIR to advertise for the IJ position in Chicago. Rooney designated Ohlson as the point-of-contact for Sampson for any questions or issues relating to hiring IJs, and Ohlson retained that responsibility throughout the period of time covered by this report. Ohlson said that he kept Rooney apprised of his communications with the OAG.

In an e-mail to Sampson dated April 19, 2004, Ohlson stated that, “[p]er our conversation two weeks ago,” the ODAG had authorized EOIR to advertise for the IJ position in Chicago.<sup>58</sup> The following day, Sampson sent an e-mail to Ohlson stating that an individual from Chicago would be applying for the slot. Sampson also asked to be informed when Ohlson received that candidate’s application. (The hiring of this candidate is discussed in Section III.B.1. below.)

On August 31, 2004, EOIR recommended to the ODAG six candidates for IJ positions. The candidates had applied to posted vacancies and been screened and interviewed by EOIR. Five of the candidates were appointed as IJs after the ODAG obtained Sampson’s concurrence on the appointments.<sup>59</sup> This represented the last time EOIR selected IJ candidates when the process was controlled by Sampson, Williams, and Goodling.<sup>60</sup> As discussed below, from September 2004 until December 2006, when the IJ hiring process was stopped after the Civil Division expressed concerns about the legality of the process, all other IJs hired were selected by the OAG (with input from the White House, Republican Members of Congress, and Republican groups or individuals).

#### **D. The Office of Legal Counsel**

Sampson testified to Congress, and also told us, that from the time he first became involved in IJ hiring until December 2006 when the issue arose in the *Gonzalez v. Gonzales* litigation, he believed that “direct appointments” of IJs were not subject to civil service laws and that it was appropriate to consider “political criteria” in selecting IJs. Sampson said that his understanding was based on his April 2004 meeting with Rooney and Ohlson, at which they discussed the fact that the Attorney General could make direct appointments, combined with advice he said he received from the Office of Legal Counsel.

As noted above, however, Ohlson said he did not tell Sampson that direct appointments of IJs were exempt from civil service laws. Rooney said he did not recall the discussion, but he told us that he knew civil service laws applied to IJ hiring and that he would have corrected Sampson if Sampson had suggested that direct appointment hires were not covered by the civil service laws.<sup>61</sup>

Similarly, as discussed below, the OLC attorneys Sampson identified to us as the potential sources of the OLC advice stated they have no recollection of

providing such advice to Sampson. In addition, acting OLC AAG Levin and a senior career attorney at OLC said that OLC's normal practice would be to memorialize providing such advice. Neither OLC nor we could find any record of anyone in OLC ever providing such advice to Sampson.

Sampson told us that he received the OLC advice either from AAG Jack Goldsmith or Acting AAG Dan Levin when they headed OLC. Goldsmith served as AAG of OLC from October 3, 2003, until July 17, 2004; Levin headed OLC from July 2004 until February 2005.

As discussed in detail in Section V.F. below, plaintiff Guadalupe Gonzalez filed a lawsuit against the Department alleging that she had been discriminated against based on her gender and national origin when she was not selected for an IJ position in El Paso, Texas.

The Civil Division attorneys handling the *Gonzalez* case interviewed Sampson on December 11, 2006. Sampson explained to them how the direct appointment mechanism for hiring IJs was working, and told them that his sources for candidates were the White House and Members of Congress. He acknowledged to the Civil Division attorneys that the process typically resulted in the selection of Republicans.

In an e-mail from OAG Deputy Chief of Staff Courtney Elwood to Sampson dated December 26, 2006, Elwood attached a request from the Civil Division that IJ hiring be stopped until the Civil Division evaluated whether the "current process used in the selection of immigration judges" violated "Title VII or any other applicable law." Sampson responded in an e-mail later that day: "Query: Are any political appts subject to disparate impact claims? I think not - if I'm right, how can the AG's direct appt for IJs be?"

On January 5, 2007, Elwood forwarded to Sampson another e-mail from the Civil Division advising that IJ hiring should be halted until OLC and the Civil Division resolved whether "the current procedures for selecting/appointing... IJs comport with merit system principles..." Sampson responded the same day: "I'm disturbed.... I got advice from OLC on [the AG's exercise of the direct appointment authority] back in 2003-2004. I've never before thought that the AG's direct appointment authority was required to comport with merit system principles (as I understand them)."

In an e-mail dated January 11, 2007, Elwood advised Sampson that OLC had no record of providing that advice Sampson thought he had received from OLC, and asked if Sampson could "narrow the time frame" for when he thought he received the OLC advice. Sampson responded in an e-mail: "Best guess: Oct 2003 - June 2004."

The following morning, an OLC official spoke with Levin on the telephone. In an e-mail dated January 12, 2007, which was forwarded to Sampson, the official related that Levin "has no recollection whatever of being asked about

IJ or BIA hiring while he was here.” Sampson responded: “when was Jack [Goldsmith] the AAG? I remember sitting on the AAG’s couch... with John Davis of ODAG (he and I had regular meetings with the AAG, as OLC was in each of our portfolios) and discussing it.” After learning the dates of Goldsmith’s tenure at OLC, Sampson wrote another e-mail: “Discussion would have been with Jack in his office.”

The same day, an OLC official sent an e-mail to Goldsmith asking if he recalled “discussing the hiring of Immigration Judges or BIA judges with Kyle Sampson fro the AG’s office?” Goldsmith replied the same day: “No recollection whatsoever.”

When we contacted Goldsmith as part of this investigation, he reiterated that he had no memory of discussing the hiring of IJs with Sampson. Likewise, Davis told us that he had no recollection of such a discussion.

Levin was again contacted by the Department in May 2007 to see if he had any memory of advising Sampson that civil service laws did not apply to IJ appointments. Again, Levin stated that he had no recollection of providing such advice to Sampson. When we interviewed Levin, he reiterated that he had no recollection of discussing IJ hiring with Sampson. Levin also stressed that the issue whether civil service laws applied to IJ hiring was beyond his own expertise, saying, “I don’t have a clue” about the issue. Levin stated that if Sampson had posed such a question, he would not have offered any informal guidance, but rather would have consulted one or both of two senior career attorneys at OLC to get an accurate answer.

Those senior career OLC attorneys confirmed to us that they believed Levin would have come to them with any question about the applicability of civil service laws to IJ hiring, and that the issue was sufficiently arcane so that neither they nor Levin would have offered an informal opinion on the issue. The OLC attorneys added that both Levin and his predecessor, Jack Goldsmith, were very careful in giving legal advice, and that they doubted either would have orally or informally opined on the applicability of civil service laws to IJ hiring without having research conducted on the point.

Levin and the senior career OLC attorneys said they did not recall having been asked to address whether civil service laws applied to IJ hiring. Furthermore, Levin told us that Sampson was very “political” and that Levin’s “radar” would have alerted if Sampson had requested such advice on whether civil service laws applied to hiring for career positions.

We also contacted M. Edward Whelan III, who was Acting AAG at OLC during the August 2003 through October 3, 2003 time frame, covering the period from Sampson’s arrival at the Department to the day Goldsmith became the AAG. Whelan told us that he had no recollection of advising Sampson that civil service laws did not apply to IJ hiring. He added that he would not have offered an oral opinion on such a complicated issue, but would have referred

it to a specific senior OLC attorney (one of the two identified by Levin).

During our investigation, we found a September 3, 2004, e-mail in which Levin asked these two senior OLC attorneys whether the Attorney General had delegated to the ODAG “the authority to appoint immigration judges.” In a follow-up e-mail, Levin also asked whether, if the authority had been delegated, the Attorney General could still exercise the authority “in a particular case or generally.” Levin added in the e-mail: “I assume the delegation does not in any sense divest the AG of the power so he could continue to exercise it without formally undoing any delegation.” In response, one of the OLC attorneys noted that the general delegation in 28 C.F.R. § 0.15 might cover IJs, and observed further: “And yes, the AG retains his authority even though there’s been a delegation.”

However, we found no evidence connecting these September 2004 e-mails to any request from or response to Sampson or anyone else from the OAG. After reviewing the e-mail exchange, neither Levin nor the career OLC attorneys said they could recall who had raised the issue with Levin, or the context of the request. But because the subject matter of Levin’s inquiry addressed the Attorney General’s direct appointment authority, we believe it is possible that Sampson raised the general issue of the Attorney General’s direct appointment authority with Levin in September 2004, and that Levin advised him that the Attorney General had such authority. The e-mails do not, however, address the separate issue of whether the civil service laws applied to the Attorney General’s authority to make direct appointments.

Furthermore, the dates of the e-mails – 11 months after Sampson crafted his process for hiring IJs, and approximately 6 months after the OAG had begun selecting IJ candidates – together with the fact that they do not address whether civil service laws apply to IJ hiring indicate that they are not related to any advice to Sampson that immigration judges were political positions. In addition, as noted above, Sampson thought he received the advice when Goldsmith was still the AAG.

Sampson admitted in his congressional testimony that his recollection about receiving advice from OLC about IJ hiring was “fuzzy,” and that he had no recollection of receiving a written opinion or specific oral advice from OLC. Sampson stated:

I don’t remember OLC’s reaction except I think that I would remember if they had some concern with it.... I don’t remember what OLC said back to me. I just remember thinking in my mind, EOIR had said it this way and OLC doesn’t have any problem with that.

In addition, the October 8, 2003, e-mail from Sampson to Baxter and the attached “Appointment of Immigration Judges” document demonstrate that Sampson had already sought to appoint as IJs persons who were seeking

political positions in the administration, before he could have received the advice he claimed to have received from OLC. Furthermore, according to the attached document, Sampson saw the direct appointment authority as a vehicle for placing attorneys who had “become known to the White House offices of Political Affairs, Presidential Personnel, and Counsel to the President.” Sampson acknowledged to us that, from his own experience in working at the White House, he understood that the White House would recommend attorneys who were Republicans.

In sum, we found that Sampson equated IJ positions with political positions, and Sampson said he assumed the Attorney General could appoint IJs without being bound by the civil service laws governing the hiring of career Department employees. However, we did not find evidence to support Sampson’s claim that he received such advice from OLC.

Nonetheless, as described below, Sampson implemented a hiring process for IJs that treated the positions as political appointments. As a result, Sampson and others improperly considered political or ideological affiliations in selecting IJ candidates.

## **E. The Immigration Judge Appointment Process Implemented by Sampson**

Under Sampson’s process, the OAG exercised control over the selection of IJs. The new process mirrored the “Proposed Process” detailed in Sampson’s December 8, 2003, e-mail to Baxter, except that vacancies were to be communicated directly to the OAG rather than through the ODAG. Compared with the prior system in which EOIR selected IJs from applications received pursuant to vacancy announcements, the most significant change was that direct appointment of candidates recommended by the OAG became the exclusive avenue for IJ hiring.

Under the new process, EOIR was required to notify Sampson – rather than posting a vacancy announcement – when an IJ position became available. Sampson then normally solicited names of candidates from the White House, Republican Members of Congress, or Department political appointees. When Sampson accepted such a recommendation, he forwarded it (sometimes without a résumé) to EOIR for processing. In some instances, the candidate was offered a position as an IJ even before the candidate’s name was sent to EOIR. In virtually every instance, Sampson referred just one candidate for each available position.

EOIR Director Rooney, Deputy Director Ohlson, and others at EOIR told us that the candidate selected by the OAG was a “presumptive hire,” and they understood that the individual was to be hired unless he had “horns” on his head. Ohlson said that “we really [did not] have any choice in the matter,” when the OAG forwarded its candidate.

According to Rooney, Ohlson, and other EOIR staff, if EOIR did not identify reasons why the person should not be hired, it transmitted the paperwork back to the ODAG with a recommendation that the candidate be appointed. The paperwork was routed through Sampson at the OAG to secure his approval prior to the ODAG taking action. We found that the documents showing EOIR's recommendations and the ODAG's approvals had no real significance: the de facto hiring decision was made by Sampson when he initially referred the candidate to EOIR.

In April 2005, Sampson delegated responsibility within the OAG for selecting IJ candidates to the Department's White House Liaison, Jan Williams. That responsibility passed to Monica Goodling in April 2006 when Goodling replaced Williams as White House Liaison. We found that both Williams and Goodling employed the same process that Sampson established: direct appointments remained the exclusive method for hiring IJs, and the identification of candidates by Williams and Goodling remained the functional equivalent of a hiring decision. Sampson continued to have sporadic involvement in IJ selections even after he assigned primary responsibility for this function to the Department's White House Liaison beginning in April 2005.

The evidence indicates that neither Attorney General Ashcroft nor Attorney General Gonzales was involved in selecting individuals to be appointed as IJs. Susan Richmond, the White House Liaison from 2003 until early 2005, also was not involved in IJ hiring.<sup>62</sup> In addition, the evidence indicates that ODAG officials were not involved in selecting individuals to be IJs.

### **III. Sampson's Recommendations to EOIR**

#### **A. Sources for Immigration Judge Candidates**

As noted above, Sampson told us that he thought IJ positions were "political" positions and that it was appropriate to consider political factors in assessing IJ candidates. Sampson did not personally interview or screen the candidates he referred to EOIR. Sampson solicited or received candidates for IJ positions from three sources: (1) the White House Office of Political Affairs, White House Presidential Personnel Office, and Counsel to the President; (2) Republican Members of Congress; and (3) colleagues within the Department who were political appointees. Sampson stated that he did not "put a political screen on resumes," but he conceded that the candidates he received from these sources would already have been screened for political affiliation. Sampson also said that from his own experience at the White House, he knew that the IJ candidates "were solicited from... White House offices that were involved in political hiring," and that consequently the only candidates under consideration were "[R]epublican lawyers." Sampson also noted that "the resumes that they got into [the White House] were people who were [R]epublican job seekers."<sup>63</sup>

The screening done at the White House, whether at the Office of Political Affairs or the Presidential Personnel Office, involved consideration of political affiliations. As discussed above, typically people who wanted to be considered for political positions within the Bush administration submitted to the White House a form entitled "PPO Non-Career Appointment Form." The form required applicants to identify their political party affiliation, their voting address for 2000 and 2004, involvement in the Bush/Cheney campaigns of 2000 and 2004, and a point of contact to verify their involvement in the campaigns. The form also stated that each applicant had to submit a "political and personal resume" before White House clearance could begin.

Scott Jennings, who worked at the White House Office of Political Affairs from October 2005 until October 2007, confirmed to us that IJ appointments were "treated like other political appointments." Jennings said that while he did not know that immigration judges were career positions, he assumed that they were political positions because they were processed through the Attorney General's direct appointment authority.

Consequently, he said, like candidates for political positions, potential IJ candidates were screened at the White House to establish their "political qualifications." The political screening process included searching databases to determine whether the candidate had made monetary contributions to political parties.

In addition, the White House contacted private organizations with Republican affiliations to generate candidates for particular positions. Jennings told us that "when we were looking for lawyers we might call [the] Republican [ ] National Lawyers Association... or... the Federalist Society would send over people." When asked if he ever contacted any group he believed had ties to the Democratic Party for a candidate for any position, Jennings said he had not.

The evidence also showed that Sampson and the OAG solicited and received candidates for IJ positions from various Republican Members of Congress. EOIR Deputy Director Ohlson also recalled that Sampson, Williams, and Goodling referred candidates who had recommendations from congressmen, and that "all of [the Members] were Republicans."

Of the more than 40 IJ candidates forwarded by the OAG to EOIR after Sampson changed the hiring process, we did not find any examples of a candidate who had been recommended by a Democratic Member of Congress. In late 2006, a candidate was recommended by a Democratic Senator from Nevada. Sampson referred the candidate to Goodling, and also explained to the Civil Division attorneys handling the *Gonzalez* litigation that it was an easy way to do a political favor that could be called in at a later date. Goodling forwarded the candidate to EOIR, without comment, after several promptings from Sampson. EOIR did not act on the candidate

because, as discussed above, the concerns raised by the Civil Division in the *Gonzales* litigation led to a halt in IJ hiring.

Sampson also recommended colleagues who were political appointees within the Department, or other persons who held political appointments in the Bush administration, as IJ candidates to EOIR, and who therefore had been vetted by the White House as described above.

Sampson testified that he did not discuss with Attorney Generals Ashcroft or Gonzales his role in identifying IJ candidates. Attorney General Gonzales told us that he did not have any knowledge of the role OAG played in identifying IJ candidates and was not involved in their selection in any way. Our attempts to schedule an interview with former Attorney General Ashcroft were unsuccessful.

## **B. Candidates Provided to EOIR by Sampson**

The following are examples of IJ candidates selected as part of Sampson's process, which demonstrate the manner in which the OAG's control of the direct appointment process worked in practice and the central role played by the White House in selecting candidates.

### **1. Candidate Supported by Karl Rove**

As discussed above, Sampson first discussed the direct appointment authority with EOIR Director Rooney and Deputy Director Ohlson in the April 2004 meeting, and Sampson had a specific candidate in mind. This candidate had previously been nominated to be a judge at the U.S. Tax Court, and Sampson – while at the White House – was assigned to “shepherd” him through the nomination process, which did not succeed.

Sampson said he knew that Karl Rove was a “supporter” of this candidate.<sup>64</sup> On April 20, 2004, Sampson sent an e-mail to Ohlson stating that the candidate “will be applying for the Chicago [IJ] slot.” In an e-mail dated May 17, 2004, Sampson advised Ohlson that the candidate was “submitting an application” and requested that Ohlson keep Sampson “informed [ ] as his application progresses.” On June 14, 2004, after receiving another inquiry from Sampson, Ohlson sent an e-mail to Sampson stating that although hundreds of persons applied in response to the Chicago IJ announcement, “[n]eedless to say [the candidate] made the cut.”

In an e-mail to Sampson dated July 27, 2004, Ohlson advised that the candidate “was determined to be the top candidate for Chicago.” When we asked Ohlson about that assessment, he explained that EOIR was “fully aware of the fact” that the candidate was Sampson's choice, and that awareness affected EOIR's evaluation: “The finger was on the

scale.”

Routine background investigation issues delayed the appointment, and Sampson checked frequently with Ohlson from September 2004 through May 2005 on the candidate’s status. On May 27, 2005, the candidate called the White House to complain to Rove that his appointment to be an IJ had stalled. The complaint was routed through Mike Davis, Tim Griffin, and Sara Taylor at the White House Office of Political Affairs. Davis contacted Jan Williams, then the Department’s White House Liaison, and learned that the candidate’s background investigation had caused the delay. After consulting with Rove, Taylor informed Williams that “we want to push this t[hr]ough.” Later that same day, Williams sent an e-mail to Davis stating that “[S]ampson is going to talk to Karl [Rove] [about the candidate] next week.”

The background investigation process was eventually completed, and the candidate was appointed as an IJ in October 2005.<sup>65</sup>

## **2. Candidates Provided by the White House**

We found that the majority of candidates provided to EOIR by Sampson were from the White House Office of Political Affairs. For example, in September 2004, the Office of Political Affairs provided Sampson with the résumé of a candidate for an IJ position in El Paso, Texas. Sampson instructed EOIR to “reach out to” the candidate, and the candidate was eventually appointed as an IJ.

Also in September 2004, Sampson instructed Ohlson to contact another candidate whose name (unbeknownst to Ohlson) had been provided by the White House Office of Political Affairs for an IJ position in Lancaster, California. The candidate was the Chief of Staff to a Republican Member of Congress from California. That candidate’s résumé reflected his involvement in the Bush/Cheney 2000 campaign. The candidate was formally offered the IJ position, but he did not accept it.

In an e-mail dated March 17, 2005, Sampson sent to EOIR the names and résumés of three candidates for two IJ positions in New York. Sampson had received the three names from the White House Office of Political Affairs.<sup>66</sup> All three were interviewed by EOIR, and on April 25, 2005, EOIR “recommended” the appointment of two of them.<sup>67</sup> On May 4, 2005, Tim Griffin at the White House Office of Political Affairs sent an e-mail to Jan Williams, the Department’s White House Liaison, to ask about the status of the IJ appointments. That same day the appointment of both candidates was approved. One candidate subsequently withdrew from consideration, and the other was appointed as an IJ.

### **3. Recommendations from Republican Members of Congress**

We also found that IJ candidates were provided by various Republican Members of Congress.

On September 16, 2004, Ohlson received a telephone call from Sampson. According to an e-mail written by Ohlson about the conversation, Sampson said that:

Attorney General Ashcroft spoke to Senator [Orrin] Hatch today and agreed to open an immigration court in Salt Lake City.... He said he thinks that Senator Hatch may have a candidate for the new IJ position in SLC.

The candidate was an attorney who had recently worked for Senator Hatch on the Senate Judiciary Committee, and who had previously worked at the Department's Office of Immigration Litigation in the Civil Division.

On October 20, 2004, after receiving a telephone call from Senator Hatch informing him of the IJ position, the candidate sent a letter to EOIR stating his interest in the position. He was interviewed at EOIR on November 10, 2004. On December 7, 2004, EOIR sent the paperwork to the ODAG recommending his appointment and on December 21, 2004, the ODAG signed its approval. However, on January 10, 2005, the candidate sent a letter to EOIR withdrawing himself from consideration citing family reasons. Ohlson relayed the news to Sampson, reminding him that "This was Senator Hatch's candidate." Sampson responded promptly in an e-mail: "Let me see if Sen. Hatch has any other candidates he'd like to recommend. I'll get back to you."

On January 28, 2005, a staff member for Senator Hatch faxed to Sampson the résumé of a federal prosecutor in the United States Attorney's Office for the District of Utah. In an e-mail dated February 4, 2005, Sampson informed Ohlson that "Sen. Hatch has now recommended [the candidate] to serve as an immigration judge in the new Salt Lake City immigration court." Sampson faxed the candidate's résumé to EOIR, and he subsequently was appointed as an IJ.

Another example of a candidate recommended by a Republican Member of Congress occurred when a Republican Senator from Virginia sent a letter to Attorney General Gonzales dated August 5, 2005, recommending a candidate for an IJ position in Arlington, Virginia. Sampson learned of the letter on August 17, 2005, and immediately sent an e-mail to Ohlson asking whether the candidate was "in the queue." Ohlson responded that EOIR did not have the candidate's name. EOIR obtained the candidate's résumé on August

19, and also received a copy of the Senator's letter.

The candidate was a career Department of Justice attorney who had served in the Criminal Division since 1991. The candidate was interviewed by EOIR on September 1, 2005. In an e-mail to OAG White House Liaison Jan Williams on September 21, 2005, Ohlson noted that "Kyle Sampson told us to appoint [the candidate] to the open position in Arlington." The candidate was appointed as an IJ.

#### **4. Candidates Hired Without EOIR Interviews**

We also found several instances in which candidates were offered positions as IJs even before their names had been sent to EOIR. Two are of particular note because they later served as sources of additional IJ candidates when Goodling became the Department's White House Liaison.<sup>68</sup> The first candidate was Garry Malphrus, who had worked with Sampson on the Senate Judiciary Committee where Malphrus served as a staff member to a Republican Senator from South Carolina. He was working at the White House as an Associate Director of the Domestic Policy Council, and his résumé contains numerous references noting his political party affiliation.<sup>69</sup>

Malphrus contacted Sampson in November 2004, expressed interest in an IJ position, and asked Sampson if he could speak with someone to learn what IJs do. In an e-mail to Ohlson on November 18, 2004, Sampson forwarded the request: "Garry Malphrus works on immigration policy at the White House. He is interested in speaking with someone about an IJ appointment – he's primarily in info gathering mode."

Ohlson said that Malphrus came to his office and they spoke for approximately 45 minutes. Ohlson said that it was not an interview; rather, he provided answers to Malphrus's questions.

In an e-mail to the Chief Immigration Judge dated December 6, 2004, Ohlson stated:

This morning I spoke to Kyle Sampson in the AG's office. They would like us to "recommend" the appointment of Garry Malphrus to be an IJ in NYC. As you may recall, Garry (he has two "Rs" in his first name) worked on the Senate Judiciary Committee and now serves in the White House.... As you will also recall, pending this formal "request" from the AG's office... you [have] a "greenlight" to hire him in time to attend the February judicial training.

Malphrus did not submit an application to become an IJ and was never formally interviewed by EOIR. On December 21, 2004, EOIR

transmitted to the ODAG its "recommendation" that Malphrus be appointed an IJ. Malphrus was appointed in March 2005.

Another person appointed to be an IJ who neither submitted an application nor was interviewed by EOIR was Mark Metcalf. Metcalf had been appointed to a political position in the Department's Civil Rights Division in April 2002. His White House PPO personnel form noted that he had worked on the Bush/Cheney 2000 campaign and that his party affiliation was Republican. After a short time, Metcalf was transferred from the Civil Rights Division to the Criminal Division for a few months, and then spent 5 months at the Department of Defense. In January 2005, he returned to the Department as Counsel to the Civil Rights Division AAG, reporting first to AAG Alex Acosta and then to Acting AAG Bradley Schlozman.

Metcalf's résumé includes a variety of Republican party affiliations.

In an e-mail to Sampson dated August 29, 2005, with the subject line reading "mark metcalf," Department White House Liaison Williams wrote: "immigration judge?" Sampson responded the same day: "ok."<sup>70</sup>

Shortly thereafter, Williams told Metcalf "we'd like you to be an immigration judge," and that there was a position available in Orlando, Florida if he was interested. Ohlson sent an e-mail to Williams on September 23, 2005, stating:

The Chief Immigration Judge informs me that a gentleman by the name of Mark Metcalf called the Immigration Court in Orlando this morning. Mr. Metcalf told a judge there that he had been offered an IJ position in Orlando, that he needed to decide by December 1st whether he wanted to take the job, and that he wanted the judge to give him a tour of the court. Neither the judge in Orlando nor the Chief Judge nor I had ever heard of this person.

Ohlson added that he assumed that Metcalf was "being considered by you for a direct appointment."

We determined that even though Metcalf was not interviewed at EOIR, he was appointed as an IJ in February 2006. Metcalf later became a source for recommendations to Monica Goodling for IJ candidates, as discussed in Section V.D. below.

## **5. Other Candidates Selected by Sampson**

In a September 2004 e-mail, Sampson advised Ohlson that he would send EOIR a candidate for an IJ position in Houston. Consequently,

EOIR did not post an announcement for the vacancy. On October 12, 2004, Sampson sent Ohlson the résumé of a candidate, stating that “we’d like for you to consider/reach out to” the candidate for the Houston position.<sup>71</sup> The candidate had served as the Republican Party Chairman for a county in Texas from 1992 until 1998, and published political commentary on the county Republican Party website. Sampson’s computer had a copy of the candidate’s résumé dated October 12, 2004 that included sections entitled “Political Training” and “Political Activities and Honors,” both of which evidenced significant activities on behalf of the Republican Party. The candidate was appointed as an IJ.

In September 2004, Sampson identified another candidate for EOIR to contact for an open IJ position in Louisiana. The candidate’s résumé featured 11 entries detailing activities on behalf of the Republican Party, including “Bush/Cheney Florida Recount Task Force” and “Vice-Chairman of Louisiana Republican State Central Committee.” The candidate was appointed to be an IJ in Louisiana.

On November 1, 2005, Sampson sent an e-mail to Ohlson stating that he had “a very strong candidate that [I] would like you to consider” for immigration judge positions in either Arlington or Falls Church, Virginia, or Baltimore, Maryland (emphasis in the original). An hour later, Sampson sent Ohlson an e-mail containing the résumé of the candidate and a brief message that the candidate “currently serves as Deputy Associate AG. Please reach out to her directly.”

Approximately 20 minutes before Sampson first contacted Ohlson about this candidate, the candidate had sent an e-mail to Sampson stating: “I would like to be considered for any immigration judge openings.” Sampson responded by asking where she would like to work, and she responded Arlington, Falls Church, or Baltimore. Three minutes after receiving that e-mail Sampson had sent the first e-mail to Ohlson promoting the candidate.

The candidate was a political appointee at the Department and had served as a Deputy Associate Attorney General since November of 2003. She had previously served as counsel to two Republican Senators on various Senate committees. After receiving Sampson’s e-mails, Ohlson conferred with EOIR Director Rooney. Approximately 30 minutes after receiving Sampson’s e-mails, Ohlson sent the following e-mail to Chief Immigration Judge Michael Creppy:

Please see the e-mail below from the AG’s Chief of Staff. I conferred with Rooney and we are going to respond by saying that we don’t have any vacancies in Arlington or Baltimore, but we can create a position in [the Falls Church headquarters]. (We really don’t have any choice in

the matter....)

The candidate was interviewed by EOIR, and was appointed as an IJ on January 8, 2006, just over 2 months after the candidate first expressed interest to Sampson in an IJ position.

### **C. Problems Created by the New Hiring Process**

We found that the new process under Sampson for selecting IJs created significant problems because EOIR was not able to fill IJ positions until Sampson provided the candidates. This caused delays in appointing IJs, which increased the burden on the immigration courts that were already experiencing an increased workload. As a result, Ohlson continually requested candidate names from Sampson, and then from Williams and Goodling, to address the growing number of vacancies. Ohlson told us:

I... expressed carefully, diplomatically, to Kyle Sampson and later to Jan Williams the fact that I felt as if these immigration judge positions were not being filled on a timely basis, that we needed to do this much more quickly. I thought the process that we had in the past with the [posted vacancy announcements] permitted us to do it on a timely basis. I didn't know for the most part where they were getting these names from. All I knew was, I had mentioned to them where a position would be.... and it seemed as if it took an awfully long time for them ultimately to supply me with a name.

In several other e-mails to Sampson, Ohlson repeatedly requested candidates to fill vacant IJ positions. In an e-mail to Sampson dated May 23, 2005, Ohlson stated the problem again:

[T]he number of IJ vacancies continues to grow. The fact that so many slots have remained vacant for so long is beginning to have a measurable impact on the Immigration Courts because the pending case backlog is beginning to grow. This unwelcome development is of considerable concern to the Director because of the potential implications for the Department. We would like to be able to fill these IJ slots as quickly as possible.

We found no response to this e-mail.

Ohlson's e-mails did not appear to have any effect in speeding the process for IJ candidates to be selected by OAG. Further, EOIR was not able to fill positions using the "old" method of posting and selecting candidates for vacancies, but rather had to wait for the OAG to select candidates for "direct appointment."

In fact, as we discuss in the next section, the problem became more acute from 2005 to 2006 when Williams and Goodling became the Department's

#### **IV. Williams's Recommendations to EOIR**

In April 2005, Williams became the Department's White House Liaison. Williams, a non-attorney, had worked for the Federalist Society from 1997 to 2001, and then was hired as a staff assistant at the White House Presidential Personnel Office where she worked for Sampson. Williams became a Deputy Associate at that office and held that position until moving to the Department in 2005.

As the Department's White House Liaison, her principal duties were to find and screen candidates for political positions (Schedule C and non-career SES) within the Department, and to handle the logistics of the interviewing process. Williams told us that "except in a handful of cases," the positions she dealt with were all political. She stated further: "I did not have hiring authority. I only developed lists of candidates." During her tenure at the Department she reported to Sampson, who was the OAG Chief of Staff.

Although Sampson continued to have personal involvement in the selection of many IJ candidates, he delegated much of the responsibility – including communications with EOIR – to Williams when she was White House Liaison. We found that Williams followed the selection process Sampson had established, and the IJ candidates she sent to EOIR were still treated as "presumptive hires." When Williams told EOIR to "please consider" candidates, EOIR would recommend the candidates for appointment unless the candidates did something to affirmatively disqualify themselves. During this period, the use of this direct appointment authority continued to be the exclusive avenue for IJ hiring.

Williams stated to us that she did not know that IJ positions were career rather than political positions. She added that she did not discuss with Attorney General Gonzales her role in identifying IJ candidates. Former Attorney General Gonzales told us he did not know how Williams identified IJ candidates.

##### **A. Sources for Immigration Judge Candidates**

Williams stated that when she worked at the White House, Sampson would occasionally call her to get "ideas for immigration judge postings." When she joined the Department, Sampson told her to "contact the White House to get any candidate ideas that they had for immigration judges." She said the Presidential Personnel Office was her principal source for candidates. The documentary evidence also shows that Williams received candidates from the White House Office of Political Affairs.

As noted above, Scott Jennings, who worked at the White House Office of Political Affairs, acknowledged to us that the White House screened candidates for any positions to establish their "political qualifications."

##### **B. Candidates Provided to EOIR by Williams**

## **1. The White House Seeks to Place "Priority Candidates"**

On May 17, 2005, Williams received an e-mail from the White House Office of Political Affairs addressed to White House Liaisons in agencies throughout the executive branch. The e-mail urged the White House Liaisons to "get creative" and find positions for more than 100 "priority candidates" who "have loyally served the President." The White House also sought from each White House Liaison a "pledge of the number of the 108 priority candidates you can place at your agency." In a follow-up e-mail, the White House reiterated that "we simply want to place as many of our Bush loyalists as possible." The context of the e-mails made plain that the positions sought were political, non-career slots. On May 19, 2005, Williams responded: "We pledge 7 slots within 40 days and 40 nights. Let the games begin!"

Part of Williams's efforts to fulfill her pledge involved finding IJ positions for these "priority candidates." An e-mail chain involving Williams and the White House dated May 26, 2005, show various attempts to find candidates for IJ positions who have been "helpful to the President."

For example, the White House reached out to a Republican Congressman, and on June 7, 2005, the Congressman's staff sent an e-mail to the White House recommending a candidate, described as a "great Republican," for an IJ position in New York. On June 15, 2005, the White House forwarded that e-mail to Williams, adding that the candidate was a "long time donor to the local GOP," and that local Republican Party officials would vouch for him. Williams forwarded the candidate's name to EOIR.

EOIR resisted this candidate proposed by the OAG. This was the only time we found that EOIR resisted any OAG candidate. In an e-mail dated December 7, 2005, Ohlson advised Williams that the candidate's conduct during his EOIR interview "causes us to question whether he possesses the appropriate judicial temperament and demeanor to serve as an immigration judge." Ohlson related that the candidate used profanity during the interview, acted abrasively, and when asked what his greatest weakness was, responded "Blondes." Ohlson offered Williams an alternate candidate who was supported by ODAG staff. The OAG did not insist on the White House's candidate, and the alternative candidate was selected.

## **2. Candidates Solicited from a Civil Division Political Appointee**

Williams continued her efforts in June and July 2005 to fulfill her pledge to find positions for the White House priority candidates. In e-mail exchanges between Williams and the White House Office of Political Affairs dating between June 15 and June 21, 2005, Williams

expressed concern about meeting her 40 days/40 nights pledge deadline, and she sought candidates for five IJ positions she identified by specific location. She noted in a separate e-mail that she had already sought candidates from the Federalist Society, but that it had no leads.

On June 21, 2005, Williams sent an e-mail to the White House asking for more IJ candidates: "I am running past my deadline. Please send me names by this Wednesday afternoon. These are great opportunities for good people."

The White House was not able to find candidates for the IJ positions (except the candidate described above who was resisted by EOIR). During the same period, Williams asked a political appointee in the Department's Civil Division, Jonathan Cohn, for recommendations. In an e-mail dated June 15, 2005, Cohn provided seven names. In response, Williams asked one question: "are they like you and me?" Cohn replied that he did not know, but that he knew two of them were "tough on immigration enforcement."<sup>72</sup>

Three weeks later, on July 7, 2005, Williams transmitted to EOIR the names of eight candidates for specific IJ positions. Ohlson responded the same day in an e-mail, noting that one of the named candidates was under investigation by the Department for professional misconduct, and that EOIR could not take any action on another candidate because "we don't know who she is and we don't have any way to contact her." A third candidate was the one EOIR had resisted. That left just five remaining candidates.

On July 28, 2005, Williams e-mailed to EOIR the name of a sixth candidate for another IJ position. Williams received this name from the White House Liaison at the Department of Homeland Security.

The résumés of three of the remaining six candidates showed that they had held career positions with the Department, and their résumés do not contain any overtly political references. The résumé for the fourth candidate contained a reference to being a "Former Edison Township Republican Committee Person."

These four candidates were interviewed by EOIR in August 2005. On September 2, 2005, Sampson requested a copy of the EOIR paperwork to review before clearing the candidates for appointment. All four were appointed as IJs. The fifth candidate was also subsequently appointed as an IJ. The sixth indicated he was not interested in becoming an IJ.

### **3. EOIR Requested Immigration Judges**

EOIR's need for additional IJs to handle the increasing immigration work load continued to grow during Williams's tenure as the Department's White House Liaison. During this period, the OAG still controlled the process for selecting IJs, and direct appointments continued to be the exclusive avenue for IJ hiring. However, Williams was not able to select enough candidates to keep pace with the IJ vacancies and newly created positions. Williams told us that "To be frank, the task of finding immigration judge candidates did not get all of my attention."

We found that, at the time, EOIR reminded her repeatedly that its mission was being compromised by the IJ vacancies. For example, in an e-mail to Williams on July 7, 2005, Ohlson observed that six additional IJ positions would soon be open, and stated: "We really are under tremendous pressure to continue to adjudicate on a timely basis the flood of cases we receive each month, and the only way we can keep up is if we fill immigration judge vacancies in a timely manner."

On July 22, 2005, Ohlson sent another e-mail to Williams stating:

Jan – I know you're busy, but I need to touch base with you to determine the status of the search for immigration judge candidates. As you're aware, DHS enforcement activities are continuing to increase the number of aliens who appear in the immigration courts. The only way that we can adjudicate these cases in a timely manner is if we have a full complement of immigration judges on the bench. However, a number of IJ positions have remained unfilled for many months, and we expect that a considerable number of additional openings will arise in the relatively near future. I am concerned that at some point people on the Hill or in the media will start to ask why we have not been filling these IJ vacancies as part of the Administration's effort to ensure that illegal aliens who pose a danger to us are deported in an expeditious manner. The fact that EOIR has adequate funding to pay for these immigration judges will merely serve to sharpen the debate.

To address the IJ vacancy problem, Ohlson suggested that "in addition to getting names from the White House," it "may be wise to run a nation-wide advertisement soliciting applications for IJ positions." Ohlson assured Williams that the OAG would still be able to choose from among the candidates generated, and asked that she consider this approach.

Ohlson spoke with Williams on July 26, 2005, and she authorized Ohlson to run the nation-wide advertisement he had suggested.

Ohlson sent an e-mail to Williams on July 28 referencing their conversation: "As we discussed, we will submit for your review the list of candidates who apply. Furthermore, any candidates you supply will receive priority treatment." Ohlson told us that he "stressed to [Williams] that this was not undercutting the authority of the [A]ttorney [G]eneral's office and her ability personally to decide who the candidates were going to be. That in fact, this was merely creating a pool of candidates from which she could draw."

After running announcements for IJ candidates, EOIR developed lists of candidates, which it sent to Williams in packets identified by the geographical location of the IJ vacancy. For each location, EOIR forwarded 5 to 10 résumés.

#### **4. Candidates Selected by Williams who had also Applied Through the Vacancy Announcement**

We found that, in practice, résumés sent to Williams by EOIR of candidates who applied in response to the advertisement were ignored unless the candidate enjoyed support from Republican-affiliated sources, and the advertisement did not affect the manner in which the OAG selected IJs.

We found that on one occasion Williams selected a candidate who had submitted a formal application in response to the job posting. However, Williams only selected that candidate for an IJ position after Garry Malphrus (whose appointment we describe above) sent an e-mail to Williams endorsing the candidate.

This candidate's résumé reflected a prior position as Legal Counsel to a Republican Senator from Montana. Williams forwarded the candidate's résumé to Ohlson with the instruction: "for L.A." The candidate subsequently was appointed to be an IJ in Los Angeles.

On another occasion, Malphrus recommended to Williams another candidate who had applied in response to the advertisement. Sampson approved the candidate's appointment, and he was appointed an IJ.

A third candidate who applied in response to the advertisement was also subsequently selected by Williams. However, Williams considered him not because he had responded to the advertisement, but because she had received his name and résumé from the White House. This candidate's résumé included multiple entries that show his political affiliations, such as "Legal Advisor, Bush Florida Recount Team" in 2000; "Bush Delegate to the Republican National Convention" in 2004; "RNC 72-Hour Task Force, Miami" in 2004; "Treasurer, Republican Party of Louisiana, 2000-2002 term." In an e-mail to Ohlson dated

January 24, 2006, Williams wrote that the individual “[i]s my candidate for Miami.” EOIR documents indicate that the candidate was not interviewed at EOIR, but was appointed as an IJ.

## **5. Additional White House Candidates Provided to EOIR**

On March 3, 2006, the White House Office of Political Affairs sent an e-mail to Williams recommending another candidate for a position as an IJ. The attached résumé showed that the candidate served as the “Local Counsel for Republican National Committee,” as well as the “General Counsel to NJ Senate Republican Committee.” The résumé also detailed the candidate’s activities on behalf of various Republican candidates.

On March 14, 2006, Williams sent an e-mail to Ohlson forwarding the candidate’s name and résumé, stating: “Candidate for NJ seat.” Her selection was approved by Sampson, and she was appointed as an IJ.

In March and April 2006 the White House Office of Political Affairs sent to Williams the names of two candidates for IJ positions. One was hired as an IJ in May 2006; the other was offered an IJ position by Williams, but declined the offer.

## **C. The Direct Appointment Process Continued to Affect EOIR**

We found no evidence that the candidates Ohlson sent Williams from the nationwide announcement received any consideration unless the candidate was independently backed by the White House or by political appointees. During this period, Williams selected a handful of candidates, but not nearly enough to fill all the IJ vacancies. Because EOIR was not authorized to process any candidate who had not been approved by the OAG, it was not able to address the shortage of IJs and the increasing immigration caseload. Ohlson continued to bring this problem to Williams’s attention, but to no avail.

For example, in an e-mail dated September 21, 2005, Ohlson advised Williams of numerous IJ vacancies. In another e-mail dated November 14, 2005, Ohlson again asked Williams whether she had reviewed any of the candidate packets EOIR had provided, and reminded her that “productivity in the immigration courts is being affected by these vacancies.” On January 26, 2006, Ohlson advised Williams that additional vacancies were pending, and that more IJs were needed “to address our ever-increasing caseload.” On March 1, 2006, Ohlson sent another e-mail to Williams stating that “we could use your help filling some upcoming IJ vacancies.”

When we interviewed Williams, she stated that it was “incredibly hard to find candidates for immigration judge posts.” She stated further that she repeatedly asked Ohlson whether he had candidates for IJ positions. However, we found that the evidence demonstrated that Williams did not ask

Ohlson whether he had candidates; rather, she asked only if EOIR had vacancies and then she selected the candidates to fill those vacancies. Although she allowed EOIR to post advertisements, she did not consider any of the people whose résumés were forwarded by EOIR unless the candidate's political bona fides were supported by the White House or other political sources. Furthermore, we found that when Ohlson did recommend a specific candidate for an IJ position, Williams did not respond to his suggestion, even after Ohlson reiterated his recommendation in several additional e-mails.

#### **D. Search Terms for Screening Candidates**

As described previously, at some point during the year that she served as the Department's White House Liaison, Williams attended a seminar held at the White House Presidential Personnel Office where she received a document entitled "The Thorough Process of Investigation." The document explained how to conduct searches on Nexis, and included an example of a search string that contained political terms (e.g., "republican," "Bush or Cheney," "Karl Rove," "Howard Dean," "democrat!," "liberal," "abortion or pro-choice") as well as generic terms (e.g., "arrest!," "bankrupt!").

In her interview with us, Williams claimed: "[I] never used the search [string] while I was at the Department." However, as described earlier, when she left the Department in April 2006, Williams sent an e-mail to incoming White House Liaison Goodling that contained a search string, and stated: "This is the lexis nexis search string that I use for AG appointments." The string reads as follows:

[first name of a candidate] and pre/2 [last name of a candidate] w/7 bush or gore or republican! or democrat! or charg! or accus! or criticiz! or blam! or defend! or iran contra or clinton or spotted owl or florida recount or sex! or controvers! or racis! or fraud! or investigat! or bankrupt! or layoff! or downsiz! or PNTR or NAFTA or outsourc! or indict! or enron or kerry or iraq or wmd! or arrest! or intox! or fired or sex! or racis! or intox! or slur! or arrest! or fired or controvers! or abortion! or gay! or homosexual! or gun! or firearm!

When we showed Williams this e-mail and the attached search string, she said she did not recall sending it to Goodling. She also said she did not recognize the search string, and that she did not know where the list of search terms came from. At the end of her interview, we raised the issue again and Williams repeated her assertion that she did not remember using the search string.

The day after her interview, Williams sent us an e-mail stating that she "thought about the research string and have some information that I want to share with you." She wrote that there had been a political vacancy in the

Department's Environment and Natural Resources Division in December 2005, that a law professor was a candidate, and that Sampson asked her to research the law professor's writings. Williams stated that she "called the researcher in the White House Office of Presidential Personnel to get some research tips." Williams said the researcher sent her a "Lexis Nexis research string," and that she edited the string to remove "words like homosexual" and then used it. Williams claimed that she only used the search string that one time, "never ever used it to reach Immigration Judges," and that the string she sent to Goodling did not contain "words like 'homosexual.'"

However, we concluded that Williams's assertions regarding the search string and her use of the tool were not accurate. The string she sent to Goodling via e-mail in April 2006 did contain the terms "homosexual!" and "gay!" Furthermore, the evidence showed she used the search string more than once, and the terms were also included in those searches.

We searched both Williams's e-mails and electronic files saved on her computer, and did not find evidence on her computer that Williams conducted other Internet searches using this search string. However, we obtained information from LexisNexis that Williams used this search string multiple times on 3 days in November and December 2005 and January 2006. Williams used the search string to research 25 people, of whom 23 were candidates for the National Advisory Committee on Violence Against Women. One of the other two candidates was the person Williams referred to in her e-mail to us after we interviewed Williams. We could not determine the identity of the remaining person Williams researched using the search string. None of these people were candidates for IJ or BIA positions. All of the searches Williams conducted contained search terms such as "gay!" and "homosexual!" When we asked Williams about the LexisNexis searches, she stated that she did not recall researching the candidates for the National Advisory Committee on Violence Against Women or using the string search other than the one time discussed above.

## **V. Goodling's Recommendations to EOIR**

In April 2006, Williams left the Department and Goodling replaced her as the Department's White House Liaison.

On April 20, 2006, Sampson sent an e-mail to Ohlson introducing Goodling as "our new White House Liaison – handling all manner of personnel and appointments matters." Sampson stated in the e-mail that Goodling "is the point person in OAG on IJ/BIA appointments," and Sampson reiterated that the direct appointment authority would continue to be the only channel for hiring: "I also want to be sure that we continue to be notified of IJ/BIA vacancies and expected vacancies so that the AG can have an opportunity to feed into the appointment process."

Under Goodling, the OAG continued its control over the hiring of IJs, and all candidates for IJ positions were selected by the OAG for direct appointment.

Goodling followed the same selection process for IJ candidates as Williams, although Goodling took an even more active role in finding and screening candidates. Goodling interviewed candidates and also researched candidates submitted by the White House using the search string provided by Williams. In addition, Goodling discussed IJ positions with various individuals who she was screening for political positions. The IJ candidates forwarded to EOIR by Goodling remained “presumptive hires.”

As noted above, Goodling declined to be interviewed by us. In her congressional testimony, however, Goodling stated that she had been told by Sampson shortly after becoming White House Liaison that it was appropriate to take political factors into consideration in hiring IJs because they were “direct appointments by the Attorney General.” According to Goodling’s written statement to Congress, Sampson told her that the Office of Legal Counsel had advised that “Immigration Judge appointments were not subject to the civil service rules applicable to other career positions.”

In Sampson’s congressional testimony, he stated that he did not remember giving such advice to Goodling when she became White House Liaison. However, Sampson told us that such a conversation would have been consistent with his belief that IJ hiring was not subject to civil service laws. It is clear, however, that the process for selecting IJs that was in place when Goodling became the Department’s White House Liaison, and the process used by Goodling, treated IJ positions as if they were political appointments.

Sampson did not tell Goodling that civil service laws did not apply to hiring BIA members. Rather, Goodling testified that she “assumed” that the rules applicable to IJ hiring “applied to BIA positions as well.”

### **A. Sources for Immigration Judge Candidates**

Under Goodling, the principal source for IJ candidates continued to be the White House, which, as discussed above, conducted its own political screening of candidates before sending them to Goodling. The same day that Sampson sent an e-mail to numerous people in the Department introducing Goodling as the Department’s new White House Liaison, Goodling and Scott Jennings at the White House Office of Political Affairs exchanged e-mails about the White House finding candidates for IJ positions. Another e-mail from Goodling to Jennings on April 24, 2005, asked for candidates for IJ positions in various cities. In an e-mail to Jennings dated August 4, 2006, Goodling asked for IJ candidates for five specific locations. Goodling and Jennings exchanged other similar e-mails about IJs, including one on August 22, 2006, in which Jennings forwarded to Goodling a candidate for an IJ position whose “political credentials” Jennings said had been verified by the White House.

The White House, in turn, solicited candidates for IJ positions from the Republican National Lawyers Association, Republican National

Committeemen, state and local Republican Party officials, the Federalist Society, and prominent Republicans, and provided those candidates to Goodling for consideration.

Goodling considered several candidates recommended by Republican Congressmen. For example, in an April 24, 2006, e-mail to Jennings, Goodling advised that “the Ohio Senators have already put in recommendations” for IJ positions in Cleveland. In addition, Republican Senators from Pennsylvania and Texas provided candidates to Goodling. Republican Members of the House of Representatives also recommended candidates for IJ positions, and the White House forwarded those recommendations to Goodling.<sup>73</sup>

## **B. Political Screening by Goodling**

As described in Chapter Three of this report, Goodling used a variety of techniques for researching the political or ideological affiliations of candidates for political positions. These techniques included using computer websites to research candidates’ political contributions and voter registration records, using variations on the Internet search string that Williams had provided her, and asking questions regarding political affiliation during her interviews and in reference checks. We found that Goodling also used these tools in screening candidates for career IJ positions.

### **1. Candidates Considered for Career and Political Positions**

Goodling acknowledged in her congressional testimony that she asked “political questions” of candidates who were considered for both career and political positions. We found several examples of that occurring with respect to candidates for IJ positions.

One example is the first candidate recommended by Senator Hatch for an IJ position. As detailed above, the candidate withdrew from consideration for that position for family reasons, but in an e-mail to Goodling dated August 23, 2006, Sampson forwarded the candidate’s interest in “a career slot as chief immigration judge in EOIR or as one of any political slots.” When the candidate met with Goodling on September 8, 2006, she asked him to fill out the White House PPO form, where he indicated that he was a Republican and that he voted for President Bush. At the outset of the interview, Goodling told the candidate that he was not being considered for the CIJ position, but she invited him to apply for an IJ position. Only after the candidate indicated that he was not interested in the locations where IJ positions were available did Goodling raise the issue of a possible political position.

Another example relates to a candidate who was referred to Goodling by a speechwriter for Attorney General Gonzales. The candidate was

asked to fill out the White House PPO form online, which he did. According to the candidate, he was interested primarily in non-political positions, such as an IJ position or an AUSA position, but he was also interested in potential political positions. At his interview, Goodling asked the candidate about his political affiliation, his political campaign involvement, who he voted for, to whom he made political contributions, and for the name of a public figure who was "a [candidate's name] Republican." After the candidate answered these questions, Goodling told him that filling IJ positions was a "priority for her." She also indicated that she would talk to certain U.S. Attorneys who were "receptive to her opinions" about obtaining a position for him as an AUSA.<sup>74</sup> The candidate later informed Goodling that he was not interested in an IJ position, and he said Goodling did not follow up on his interest in an AUSA position.

A similar incident occurred with another candidate who filled out a White House PPO form and was interested primarily in political positions. Goodling's notes indicate that she asked him the questions that were asked of all candidates for a political appointment, such as what kind of conservative he was, his favorite Supreme Court Justice, and his views on the death penalty. The candidate told us that it seemed to him that Goodling was working from a "check list." He said that they also discussed abortion and the "conservative religiously affiliated school... very [R]epublican school" that he had attended. One of Goodling's notes from the interview reads: "Cons. On 'god, guns + gays'."

Goodling told the candidate she was looking for IJs. He conveyed to her that he knew "less than zero about immigration law," but that he was "more hawkish" than President Bush about policing the country's borders to keep aliens out. Goodling's notes contain the entry: "Strong on immigration." The candidate's name was not forwarded to EOIR.

## **2. Candidates Provided to EOIR by Goodling**

Goodling stated in her congressional testimony that she "recommended approximately seven people to be interviewed by EOIR for Immigration Judge positions and recommended four individuals to be appointed to the BIA." She admitted that she "took political considerations into account" in "reviewing resumes and soliciting applications" for those positions.

In an e-mail dated July 31, 2006, Goodling instructed Ohlson to "consider the [five] individuals listed" for specified IJ positions. Ohlson replied in an e-mail dated August 2, 2006, that "the Office of the Chief Immigration Judge called [3 of the candidates] to schedule 'interviews' for the week of August 14." Ohlson added that EOIR had no information on the fourth candidate and thus could not contact him.

The fifth candidate was known to EOIR. In the e-mail, Ohlson also identified additional IJ vacancies that needed filling.

When we interviewed Ohlson, he explained why he put the term "interviews" in quotation marks in his e-mail to Goodling:

By the time of August 2006... it had become apparent to me that the interviews were essentially pro forma. And in fact at that point, there were some hires [who were not] interviewed. And so I was trying to signal there that I recognized that fact.<sup>75</sup>

By August 4, 2006, EOIR had been able to locate the fourth candidate and had been instructed by Goodling (in an e-mail of the same date) to contact another candidate for a sixth position. Four of the six candidates referred to EOIR at this time by Goodling had letters of recommendation from Republican Members of Congress, and a fifth was recommended by the White House.

Another example of a candidate recommended by Goodling was a career Department attorney from the Civil Rights Division whose interest in an IJ position was supported by Bradley Schlozman, a political appointee in the Department. Schlozman sent an e-mail dated December 4, 2006, to Goodling endorsing the candidate:

Hey Monica. I had a chance to speak with [the candidate] regarding the IJ position. Let me say at the outset that his views on immigration are virtually identical to my own. And you'd be pleased with my views.... [He] is a guy I know well and 'saw the light' about 10 years ago. I will get his resume for you, but don't be dissuaded by his ACLU work on voting matters from years ago. This is a very different man, and particularly on immigration issues, he is a true member of the team.

Schlozman added that the candidate would be "a great legacy for this Administration/Dept on the IJ court."

Goodling interviewed the candidate in early December 2006, but her file did not contain any notes from the interview. On December 14, 2006, Goodling sent an e-mail instructing EOIR to "consider" the candidate for an IJ position at EOIR Headquarters, directing further that he should be transferred to the immigration court in Charlotte, North Carolina "when that court is ready." However, the candidate was not appointed because the hiring of IJs was stopped when the Civil Division in January 2007 expressed its concerns about the legality of the manner in which the direct appointment authority was implemented.

Another candidate, who was a graduate of Regent University School of Law, Goodling's alma mater, submitted his résumé directly to Goodling in an e-mail dated December 13, 2006. His résumé showed that he had been an intern for the Republican majority on the House Judiciary Committee. The next day, Goodling sent an e-mail instructing EOIR to "consider" him for an IJ position at Tacoma, Washington. The candidate was not appointed because the hiring of IJs was halted in January 2007.

### **C. Increasing Vacancies for Immigration Judges**

The problems for EOIR created by increasing vacancies and an increasing workload continued to worsen during Goodling's tenure as the Department's White House Liaison, due in part to the delays caused by the additional screening that she conducted. In an e-mail to EOIR Director Rooney dated July 25, 2006, Deputy Director Ohlson noted that eight vacancies "have been sitting with Monica (and sitting, and sitting, and...)." Some of those vacancies were addressed in Goodling's referrals on July 31, 2006, described above, but many other vacancies went unaddressed, and Ohlson sent an e-mail to Goodling on August 2, 2006, identifying them.

In a response dated August 4, 2006, Goodling told Ohlson that she would "be happy to see what names you have for some of these other openings." Ohlson immediately forwarded Goodling's e-mail to several Assistant Chief Immigration Judges, stating: "We have a golden opportunity here. Lets provide her with great candidates for the remaining slots as soon as possible." When we interviewed Ohlson, he explained that he saw it as an opportunity to provide Goodling with "outstanding candidates who have immigration [law] backgrounds."

On August 18, 2006, Ohlson sent an e-mail to Goodling advising her that: "we have compiled a binder that contains [résumés] of about ten of the best candidates who applied for immigration judge positions and specifically asked to be assigned to these designated cities. This binder is being sent to you this afternoon." The e-mail stressed that Goodling would retain her authority to select the candidates for appointment: "Once you have identified candidates for these positions, we will interview them immediately."

On September 1, 2006, Ohlson sent another e-mail to Goodling reminding her of vacancies in various cities. Goodling responded the same day that she had been "studying the folks you submitted." Shortly after this e-mail, Ohlson met with Goodling at her office, and Ohlson said she told him that it took time to select IJ candidates because she was conducting "background research on all these candidates." Ohlson said Goodling did not describe to him the kind of research she was conducting.

On September 20, 2006, Ohlson sent another e-mail to Goodling attaching a

document listing IJ vacancies and noting that résumés for additional candidates would be faxed to Goodling later that day. The evidence indicates that Goodling did not select any of the dozens of candidates submitted to her by EOIR in the binder or in this follow-up, and EOIR was thus unable to hire IJs to help address its increasing workload. In an e-mail to an official in the ODAG dated November 15, 2006, Ohlson wrote:

Please see the attached document which I sent to Monica a couple of months ago.... The bottom line is that we have TWENTY-FIVE IJ vacancies that need to be filled. The vast majority of these slots are new positions. However, a couple of the slots... have been vacant since the time Jan Williams was in the AG's office. In September we provided Monica with either specific names for each position, or the resumes of the top five candidates who applied to fill each slot. She has indicated on a couple of occasions that she was on the cusp of naming some people, but....

As noted above, Goodling ultimately selected only two candidates in December 2006.

#### **D. Screening of Candidates by Immigration Judges in Florida**

Goodling also received the names of candidates for IJ positions from IJs Garry Malphrus and Mark Metcalf. As detailed above in Section III.B.4., both Malphrus and Metcalf had been selected and approved by Sampson, and both were appointed IJs without being interviewed by EOIR. Both had strong Republican political affiliations, and both were asked by Goodling to identify candidates for IJ vacancies. Malphrus and Metcalf appear to have coordinated some of their efforts with each other and with another IJ in Florida, Rex Ford.

In an e-mail to Sampson dated April 20, 2006, Malphrus offered "to be of any assistance" to Goodling in identifying IJ candidates for upcoming vacancies. As noted above, Malphrus had performed a similar function for Williams, and he told us that he spoke with Goodling regarding candidates for open positions. In his April 20 e-mail, Malphrus also recommended that IJ Ford be considered for the post of Chief Immigration Judge: "he would be excellent based on his experience, leadership skills, and loyalty." When we interviewed Malphrus, he told us that "loyalty" meant "loyalty to the Bush Administration." The Chief Immigration Judge is a career SES position.

The first candidate Metcalf recommended to Goodling was a candidate who Ford had recommended to him. Metcalf obtained the candidate's résumé from Ford, spoke with the candidate, and then recommended him to Goodling. Goodling, in turn, instructed EOIR to "consider" the candidate, and he was appointed as an IJ.

When we interviewed Malphrus, Metcalf, and Ford, they denied that they considered political affiliations in recommending IJ candidates to Goodling. They also said there was not a concerted effort to identify candidates, although Malphrus admitted that they “had a discussion about it a couple of times.”

In his November 14, 2006, e-mail to Sampson recommending a candidate, Metcalf noted that Malphrus and Ford also supported the candidate. Metcalf added: “our search for solid judges should be ramping up.”

A series of e-mails from Metcalf to Goodling on December 1, 2006, recommended to Goodling six persons for IJ positions. In the first e-mail, Metcalf advised Goodling that all of the candidates “have been vetted here in Miami by Judge Ford.”

The first candidate was a former elected official who was on the Republican Executive Committee of Palm Beach County. Metcalf’s e-mail stated: “Rex Ford highly recommends him. His credentials look very strong to me.” The e-mail attached a separate e-mail from Ford, which stated: “Let Monica know that she can contact... (W’s county Chairman in 2000 and 2004 in Palm Beach County) for any additional information.”

The second candidate was the wife of an IJ who had been assigned to mentor Metcalf. She was an experienced immigration lawyer. Metcalf noted that Judge Ford was familiar with the third candidate. The fourth was a long-time friend of Metcalf’s whose résumé stated that he was a member of the Federalist Society. Metcalf’s e-mail to Goodling stated that: “Judge Ford interviewed him yesterday and endorses his appointment. So do I.” When we asked Metcalf if he interviewed the candidate, Metcalf said “No.” But when asked later what criteria Ford used in reviewing candidates, Metcalf acknowledged that he was present when Ford interviewed the candidate, and stated that “there was never any mention of politics.”

The fifth candidate was a DHS attorney who had only 4 years experience as a lawyer. The public advertisements specified that IJ candidates had to have at least 7 years of legal experience. Metcalf advised that the candidate “has Judge Ford and [a fourth IJ’s] strong support – mine too.” Regarding the sixth candidate, Metcalf stated to Goodling that the candidate was supported by the fourth IJ, who Metcalf represented had been a “former Associate White House Counsel under Reagan.”<sup>76</sup> Goodling’s copy of the résumé contains the handwritten comment: “conservative.”

Metcalf recommended a seventh candidate to Goodling on January 5, 2007, who was vouched for by former Department political appointee.

At his interview with us, Metcalf said he did not recall recommending any other candidates to Goodling. A review of Goodling’s e-mails, however, indicated that Metcalf recommended at least three additional candidates to

Goodling in January 2007, one of whom was also endorsed by Ford. Two were sponsored by the Chairman Emeritus of the Republican Party of Orange County (a fact conveyed to Metcalf and relayed to Goodling). In the e-mail chain that reached Goodling via Metcalf, the Chairman Emeritus described the candidates as “good Republicans.”

#### **E. Candidates Selected by Goodling for Positions on the Board of Immigration Appeals**

Goodling also acknowledged in her congressional testimony that she “took political considerations into account” in connection with recommending four persons to be appointed to career positions on the Board of Immigration Appeals. Goodling testified that she “assumed” that the rules applicable to IJ hiring “applied to BIA positions as well.”

We determined that on August 30, 2006, Goodling asked an attorney at OLC about the legal framework for hiring the Chair and Vice Chair on the BIA. On September 13, 2006, the OLC attorney sent an e-mail to Goodling attaching an “informal” memorandum and advising that OLC would create “a more formal version for future reference that will include the hiring of ordinary IJs and Board members.”<sup>77</sup> The informal memorandum explained that the Chair of the BIA was a career SES position, and that one of the two Vice Chair positions was career SES and the other was a Schedule A career position. The memorandum noted further that the other Board members were Schedule A career positions.

Despite this advice, Goodling subsequently selected candidates for the four vacant BIA positions based on political or ideological considerations. The four candidates she selected for the vacant BIA positions included Garry Malphrus, whose political affiliations are discussed in Section III.B.4. above. A second candidate had support from Department political appointees, one of whom described the candidate in an e-mail to Goodling as “a Republican.”

A third candidate was a career government attorney who contacted Sampson, whom he knew through church contacts, to express his interest in becoming an IJ. After consulting with Goodling, Sampson learned there was an IJ vacancy in one of the locations requested by the candidate (Hartford, Connecticut). Sampson endorsed the candidate as a “very good guy” in an e-mail to Goodling on November 15, 2006. The same day, Goodling forwarded the e-mail chain to Angela Williamson with the brief instruction: “Please vet.” Documents demonstrate that Williamson ran the Nexis search that same day on the candidate.

However, in an e-mail to Sampson on November 27, 2006, the candidate advised that he did not want an IJ position in Hartford for family reasons, and asked if there were IJ positions available in Arlington or Baltimore. Sampson consulted with Goodling, and she reported on December 8, 2006, that there were “no vacancies for IJs in those... locations, but... I’m

checking him out for a BIA spot.”

The candidate interviewed with Goodling on December 18, 2006. Prior to the interview, he was asked to fill out the White House PPO form that sought information about political party affiliation and involvement in the 2000 and 2004 Bush/Cheney campaigns. The candidate completed the form, writing “Republican” and “2004 – 72-Hour Project for Bush/Cheney - New Mexico,” and providing information about his voting address and county. The candidate told us that he believed Goodling had the form in front of her during the interview. He said that Goodling asked him who his favorite Supreme Court Justice was. The candidate also said it was his impression that Goodling used the question “to get at my political views.”

A fourth candidate was a career Department attorney in the Civil Division’s Office of Immigration Litigation who had worked at the White House as the Director of Immigration Security from June 2004 to April 2005. In the fall of 2006, this candidate heard that there would be vacancies on the BIA, and he expressed his interest to Jonathan Cohn, the Department political appointee to whom Jan Williams had turned for IJ candidates (see Section IV.B.2. above). The candidate also asked other political appointees in the Department to recommend him, and he gave his résumé to Rachel Brand, the AAG for the Office of Legal Policy, who in turn contacted Goodling. In an e-mail to Goodling dated August 4, 2006, Brand described the candidate as “completely on the team.”

Goodling and Sampson interviewed the candidate on September 28, 2006, although Sampson was only present for a few minutes of the interview. The candidate told us that Goodling did not ask him any questions about his political affiliations, political campaign activities, or about political contributions.

In an e-mail to OAG Deputy Chief of Staff and Counselor to the Attorney General Courtney Elwood and others dated January 5, 2007, Goodling stated that Attorney General Gonzales had “approved” Malphrus and three other candidates “for appointment to the BIA.”<sup>78</sup> The same day, Elwood (and others, including OLC) received an e-mail from the Civil Division advising that after a “series of discussions” there was “general agreement” that “OLC and [the Civil Division] need to confer regarding whether the current procedures for selecting/appointing Board [of Immigration Appeals] members and/or IJs comport with merit system principles (and are otherwise lawful.)” The e-mail continued: “Until that occurs, the Department should hold off on making any such appointments.” As detailed below, this advice stemmed from concerns developed by the Civil Division in the course of defending the lawsuit, *Gonzalez v. Gonzales* filed by an unsuccessful candidate for an IJ position. The Department followed the Civil Division’s advice, and all hiring of IJs and BIA members was halted. Consequently, the four candidates selected by Goodling were not appointed to the BIA. Later, one of the four was appointed to the BIA under the new hiring process

described below.

EOIR Deputy Director Ohlson told us when Goodling informed him that her four candidates were becoming BIA members, she made it plain that EOIR was not supposed to interview them. He said, "It was much more explicit than with any immigration judge positions."<sup>79</sup>

## **F. The Hiring Freeze**

The hiring freeze resulted from a lawsuit filed on September 30, 2005, by Guadalupe Gonzalez, a career government immigration lawyer and the Chief Counsel for the U.S. Immigration and Customs Enforcement (ICE) in El Paso, Texas. In her suit against the Department, she alleged that she was discriminated against based on her gender and national origin (Hispanic) when she was not selected for an IJ position in November 2004. The two applicants who were hired were ICE attorneys junior to Gonzalez, and one was her direct subordinate. Both persons hired were direct appointments who had been provided to EOIR by Sampson.

The Civil Division attorneys representing the Department in the litigation were in contact with the OAG and ODAG to obtain information about the IJ hiring process. In conducting their factual investigation, the Civil Division attorneys interviewed Sampson on December 11, 2006, to learn about the OAG's involvement in selecting IJs. Sampson explained how the OAG was exercising the direct appointment authority, and how that differed from past practice in which EOIR identified and selected the candidates. Sampson stated further that his sources for candidates were the White House and recommendations from Members of Congress. The Civil Division attorneys' notes reflect that Sampson acknowledged that the process typically resulted in selection of Republicans.

On January 5, 2007, one of the Civil Division attorneys representing the Department in the IJ lawsuit interviewed Goodling. Courtney Elwood of the OAG was present by telephone for part of the interview.<sup>80</sup> According to the Civil Division attorney, Goodling stated that she contacted the White House to get IJ candidates, and that she also received candidate résumés from Members of Congress and from individuals recommending specific people. She stated that she and Angela Williamson were responsible for screening candidates before sending them to EOIR for interviews.

In an e-mail memorializing the interview, which was sent to several Civil Division attorneys on January 7, 2007, the Civil Division attorney stated: "Monica made clear that she does not inquire about or consider political affiliation in generating candidates." Elwood, who was not present for the entire interview, told us that she recalled that Goodling "equivocat[ed]" when asked whether she considered political factors. Elwood stated further that Goodling "tried to dodge [the question] and then maybe was pinned down."

However, the Civil Division attorney told us that he had asked Goodling whether political considerations played a role in IJ hiring, and Goodling replied that they did not. The Civil Division attorney added "I did specifically ask her whether political affiliation was taken into account. She told me no."

Numerous memoranda written shortly after the Civil Division interviewed Goodling were circulated among the OAG, OLC, and the Civil Division, and they also reported that Goodling stated that she did not inquire about or consider political affiliation in generating IJ candidates.

As noted above, the day after the Civil Division attorney interviewed Goodling, the Civil Division sent an e-mail to Elwood, OLC, and others expressing concerns that the "current procedures for selecting/appointing Board members and/or IJs" did not comport with "merit system principles."

As a result of the Civil Division's and OLC's legal analyses of the manner in which the direct appointment authority had been exercised, in early January 2007 the Department suspended all hiring of BIA members and of IJs.

## **VI. The Current Process for Hiring Immigration Judges and Board of Immigration Appeals Members**

### **A. Immigration Judges**

On April 2, 2007, Attorney General Gonzales approved a new process to fill immigration judge positions. The new process was the result of consultation among the OAG, ODAG, and EOIR, and was reviewed and approved by OLC, the Justice Management Division (JMD), and OARM. The procedures essentially reversed the Sampson-Williams-Goodling process of direct appointments, and returned most of the screening, evaluation, and selection of candidates to EOIR.

Under the new process, EOIR's Office of the Chief Immigration Judge (OCIJ) reviews applications submitted in response to public announcements for vacancies, and rates each candidate. The OCIJ contacts the candidates with the highest ratings to obtain writing samples and references, and three-member EOIR panels interview all top-tier candidates. The panels consist of two Deputy Chief Immigration Judges or Assistant Chief Immigration Judges and a senior EOIR manager. The panels then create packets for each candidate, including the application materials, résumé, interview summaries, reference summaries, and other information. The packets are reviewed by the EOIR Director (or his designee) and the Chief Immigration Judge, who together select at least three candidates for a vacancy to recommend for final consideration.

A second three-member panel, comprised of the EOIR Director (or his designee), a career SES employee designated by the Deputy Attorney General, and a non-career member of the SES designated by the Deputy Attorney General, then interviews as many of the three candidates as they

believe appropriate. This panel recommends one candidate for the Deputy Attorney General to recommend to the Attorney General for final approval. Both the Deputy Attorney General and the Attorney General can request additional candidates if they do not approve the candidates forwarded to them.

According to Ohlson, who was appointed as Director of EOIR in September 2007, the new process for hiring immigration judges is now working efficiently. He said that since the new process was initiated 13 IJs have been hired, and candidates have been selected, but not yet appointed, for 21 of the remaining 27 vacancies. He said the delay in the appointment of these 21 candidates is due to a new requirement that background investigations be completed before the IJs can be appointed. Ohlson stated that he has seen no evidence of politicized hiring in the new process.

## **B. Board of Immigration Appeals Members**

The revised process for hiring BIA members also requires public advertisements for these positions. Applications for candidates who meet the minimum requirements (e.g., law degree, citizenship, 7 years relevant post-bar legal experience) are reviewed by a three-member panel consisting of the EOIR Director (or his designee), a career SES employee designated by the Deputy Attorney General, and a non-career SES employee designated by the Deputy Attorney General. The panel rates each applicant, conducts reference checks, and interviews top-tier candidates. The panel then recommends to the Deputy Attorney General at least one candidate for each vacancy.

The Deputy Attorney General forwards the name of at least one candidate for each vacancy to the Attorney General. Both the Deputy Attorney General and the Attorney General can request additional candidates if they do not approve the candidates forwarded to them.

According to Ohlson, the new process for hiring BIA members is also working efficiently. He said that since the new process was initiated candidates for five of the seven BIA vacancies have been selected, and are undergoing their background investigations. Ohlson stated that he has seen no evidence of politicized hiring in the new process.

## **VII. Analysis**

The evidence detailed above demonstrates that Kyle Sampson, Jan Williams, and Monica Goodling each violated Department of Justice policy and federal law by considering political or ideological affiliations in soliciting and evaluating candidates for IJs, which are Schedule A career positions, not political appointments. Further, the evidence demonstrates that their violations were not isolated instances but were systematic in nature. The evidence demonstrates further that Goodling violated Department policy and federal law by considering

political or ideological affiliations in selecting candidates for the BIA.

In an e-mail on October 8, 2003, Sampson outlined a new process for hiring IJs that listed the White House as the sole source for generating candidates. We found that Sampson's process, which treated the appointments like political appointments, was implemented in the spring of 2004. Sampson acknowledged that "in the sense that names were solicited from the... White House offices that were involved in political hiring, [we] were only considering essentially Republican lawyers for appointment." Scott Jennings, who worked at the White House Office of Political Affairs, confirmed that IJ appointments were "treated like other political appointments," that the White House's sources for candidates were all Republican, and that candidates were screened for their "political qualifications." Consequently, Sampson's process – used and refined by Williams and then by Goodling – created a pool of candidates who had been selected because of their political or ideological affiliations.

As implemented by Sampson, and followed by Williams and Goodling through the end of 2006, the Attorney General's Office controlled the process for selecting IJs, soliciting candidates, and informing EOIR who was to be hired for each position. Sampson delegated responsibility for IJ hiring when he did not exercise it himself to the Department's White House Liaison (Williams and then Goodling), whose principal responsibilities involved the screening and hiring of political appointees.

Although the White House remained the principal source of IJ candidates throughout this time period, Sampson, Williams, and Goodling also turned to alternate sources, which also yielded candidates who had been screened for their political or ideological affiliations.

The fact that EOIR was occasionally allowed to publish vacancy announcements for IJ vacancies did not change the selection process. The evidence showed that applicants who applied to these public announcements were not considered by the OAG – even when endorsed by EOIR – unless they also were supported by politically affiliated sources.

One of the results of this tightly controlled selection process among Sampson, Williams, and Goodling was that it left numerous IJ vacancies unfilled for long periods of time when they could not find enough candidates, even when EOIR pleaded for more judges and told the OAG repeatedly that EOIR's mission was being compromised by the shortage of IJs. We found that all of the people who applied in response to vacancy announcements for IJs were ignored, even when the OAG could not identify political candidates to fill the open IJ positions.

In the sections that follow, we describe our analysis of the conduct of Sampson, Williams, Goodling, and others who were involved in the selection of IJ and BIA candidates.

## **A. Kyle Sampson**

We concluded that Sampson violated Department policy and federal law, and

committed misconduct, by considering political or ideological affiliations when hiring IJs. Sampson knew that, historically, most IJ hiring was handled by career employees at EOIR. However, he moved that authority from EOIR and placed it in the OAG. Sampson told us that he had understood it was appropriate to consider “political criteria” in selecting IJs. He stated that his understanding was based on a conversation he had with Ohlson in April 2004 about the Attorney General’s direct appointment authority for IJs, combined with advice he claimed to have received from OLC that IJ hiring was not subject to civil service requirements.

However, as detailed above, Ohlson said he did not tell Sampson that direct appointments were exempt from federal civil service laws. Ohlson said he merely noted to Sampson that direct appointments had been used occasionally in the past to appoint IJs. Nor does the evidence support Sampson’s claim that OLC advised him that civil service laws did not apply to the career IJ positions. Neither OLC nor we could find any record of OLC ever providing such advice to Sampson, and the two officials he identified as possible sources of the advice – AAGs Goldsmith and Levin – had no recollection of advising Sampson that civil service laws did not apply to IJ hiring. To the contrary, the evidence showed that neither would have offered legal guidance on this point informally. While it is possible that Sampson mistakenly inferred on his own that civil service laws did not apply to direct appointments by the Attorney General, there is no evidence that he was ever so advised by OLC.

Moreover, as described in the document attached to his October 8, 2003, e-mail, Sampson sought to use the Attorney General’s direct appointment authority to appoint candidates as IJs who had been recommended by the White House and screened using political criteria well before those conversations with OLC and Ohlson supposedly occurred. It is clear from Sampson’s October 8 e-mail that he contemplated using political considerations in IJ hiring at least 6 months before his conversation with Ohlson; at least 9 months before Levin (one of the OLC Assistant Attorney Generals he cited as a possible source of OLC’s legal advice) became the head of OLC in July 2004; and before any conversation he had with Goldsmith (the other OLC Assistant Attorney General cited by Sampson), who did not begin serving in OLC until October 3, 2003, just 5 days before Sampson’s e-mail.<sup>81</sup>

In sum, we concluded that the evidence did not support Sampson’s claim that he was advised by OLC that IJ positions were exempt from federal law governing career civil service positions.

Because the Attorney General’s direct appointment authority to hire IJs is a departure from the usual Department career hiring practices, we considered the possibility that Sampson may have been confused or mistaken about whether civil service laws apply to such hires. Yet, even if Sampson was confused or mistaken in his interpretation of the rules that applied to IJ

hiring, we do not believe that would excuse his actions. His actions, which were carried out over a lengthy period of time and were not based on formal advice from anyone, systematically violated federal law and Department policy and constituted misconduct.

## **B. Jan Williams**

Similarly, Jan Williams violated Department policy and federal law by considering political or ideological affiliations in the appointment of IJs. When Williams became the Department's White House Liaison in April 2005, Sampson delegated to her much of the responsibility for identifying and selecting IJ candidates. Most of Williams's duties involved finding candidates for political appointments, whether Schedule C or non-career SES. Williams stated to us that she did not know that IJs were not political positions. She said that Sampson directed her to contact the White House to obtain candidates for IJ positions. She said that "Mr. Sampson is a lawyer and as Chief of Staff to the Attorney General I assumed that if he had asked me to call someone, it was appropriate for me to do so."

Like Sampson, Williams turned to the White House Office of Political Affairs and the White House Presidential Personnel Office to obtain candidates for IJ positions. As with Sampson's candidates, Williams's selections indicated that Republican Party affiliation was critical to the selection process, even more important than experience with immigration law. When the White House was not able to identify candidates, Williams turned to other Department political appointees and to the Federalist Society, while ignoring the candidates supplied by EOIR, which was becoming increasingly desperate to fill vacancies as the immigration case load continued to grow. When one Department political appointee provided names of potential IJ candidates, Williams responded "are they like you and me?"

We found that Williams used political criteria to screen candidates for IJ positions. However, Williams was not an attorney and was following her supervisor's guidance. Moreover, the politicized system for selecting IJ candidates was already in place when she inherited that responsibility. Under these circumstances, we concluded that she did not commit misconduct in her selection of IJ candidates.

However, we had concerns about the accuracy of Williams's statements to us. Prior to being questioned by us about IJ hiring, Williams read into the record a prepared statement. In that statement, she made numerous representations concerning her role in the hiring of IJs. Many of those representations were inaccurate. Other statements she made in response to our questions were also inaccurate. After the interview, Williams sent us an e-mail that was not accurate, as the evidence detailed below shows.

In her prepared statement, Williams claimed that she had been "open to candidates from all different sources." She also claimed that she would "ask

[EOIR Deputy Director] Ohlson to brainstorm with me about ideas for openings,” and that she “actively considered” applicants who applied in response to the public announcements. The evidence, however, showed that Williams was only open to candidates recommended by the White House or by fellow political appointees. The evidence also showed that Williams did not “actively consider” individuals who applied in response to the public announcements for IJ vacancies. To the contrary, she ignored the packets of applicant résumés forwarded to her by Ohlson from these announcements. We found no evidence that any of those applicants were considered in any way unless they were independently recommended by a source Williams knew to be Republican. Further, we found no evidence that Williams asked to “brainstorm” with Ohlson for ideas on candidates for vacancies, and Ohlson denied that she did. Williams consulted with the White House Office for Political Affairs, and with the Federalist Society, but not with EOIR. Under the process implemented by the OAG, EOIR and Ohlson’s role were confined to processing the presumptive hires who had been selected by Williams, and to pleading with Williams to consider packets of applicant résumés because EOIR was in need of additional IJs to handle a increasing case load.

During our interview of her, Williams elaborated on her claim that she sought candidates from EOIR: “I remember saying ‘Kevin [Ohlson], don’t you have anyone [for an IJ position]?’” and “I remember asking Mr. Ohlson on several occasions, ‘don’t you have any candidates for this post[?]’” Again, as detailed above, we found the exact opposite was true. Williams asked only for the locations of vacancies and then selected the candidates to fill those vacancies. The evidence showed that Ohlson had to plead with Williams for candidates, that Williams did not consider the packets of applicant résumés that Ohlson offered, and that Williams ignored specific candidates recommended by Ohlson.<sup>82</sup>

Williams’s testimony concerning the Nexis search string she provided to Goodling was also inaccurate. As detailed above, at our interview we showed Williams a copy of the e-mail she sent to Goodling on April 10, 2006, in which Williams provided the Internet search string detailed above. In the text accompanying this search string Williams wrote: “This is the lexis nexis search string that I use for AG appointments.” After reviewing the e-mail, Williams told us that she did not recognize the search string and did not remember sending it to Goodling. She stated that she did not know what she meant when she wrote “AG appointments,” but asserted that it did not include IJs. At the end of the interview, we asked her to review the document again. She reaffirmed that she did not remember ever using the search string on any candidate.

In an e-mail Williams sent the day after the interview, she claimed that she used the search on one candidate for a political position in the Environment and Natural Resources Division (ENRD) and that she deleted from the search “words that I thought were not appropriate... taking [out] words like homosexual, religious, and similar social and/or personal ‘buzz words.’”

Williams's explanation is not accurate in several respects. Her claim that she deleted "buzz words" from the single search she acknowledged conducting is contradicted by evidence we received from LexisNexis. That evidence shows that Williams conducted 24 additional searches using the search string, and each time the search included terms such as "homosexual" or the other "buzz words" identified by Williams.

### **C. Monica Goodling**

The evidence demonstrated that Goodling violated Department policy and federal law, and committed misconduct, by considering political or ideological affiliations in the appointment of IJs and BIA members. Goodling admitted in her congressional testimony that she "took political considerations into account" in IJ and BIA hiring. She stated that Sampson had told her that IJ hiring was not subject to civil service laws, and that she "assumed" those laws did not apply to BIA member hiring. The evidence showed that she used political considerations in assessing candidates for both IJ and BIA positions.

As detailed above, our investigation found that she solicited and received résumés for IJ and BIA candidates from the White House, from Republican members of Congress, the Republican National Lawyers Association, the Federalist Society, and from individuals with Republican Party affiliations. We found no evidence that she solicited candidates from any sources she thought had Democratic affiliations.

Goodling also admitted in her congressional testimony that she researched Internet sites to learn whether candidates for IJ positions had made financial contributions to political parties. She admitted further that she conducted computer searches on such candidates. Evidence from our investigation revealed that she used the Nexis search string she had received from Williams to conduct research on IJ candidates. Both Angela Williamson and the OIPL employee who briefly assisted Goodling in late 2006 testified to conducting such searches, and the December 5, 2006 e-mail from Goodling to the OIPL employee contains the entire Williams search string, with a few additional terms added by Goodling. We also found documents that were obtained through the search string, which bore markings showing that the search string had been used. Furthermore, we found that Goodling ran the search string on candidates who had applied in response to the public announcements and whose résumés were forwarded in packets by EOIR.

We also found several instances in which candidates for IJ or BIA positions were asked to fill out the White House PPO form, which sought information about the candidates' political party affiliation and about their activities to support the Bush/Cheney campaigns.

Goodling asserted that she had been advised by Sampson that it was appropriate to take political factors into account in hiring IJs. Even assuming

Goodling received this advice, her conduct showed that she knew that political factors could not be considered in hiring for career IJ positions. First, she told several IJ or BIA candidates that they should not have been asked to complete the White House PPO form that sought information about political affiliation and voting history. Despite that knowledge, Goodling conducted research on IJ candidates to learn the same kind of information covered by the PPO forms. Second, Goodling's claim that she believed it was appropriate to use political considerations in selecting IJs is inconsistent with the statements she made to the Civil Division attorney handling the *Gonzalez v. Gonzales* litigation. She stated to the Civil Division attorney that she did not use political considerations in selecting IJs, a position she reversed in her immunized testimony before Congress. If Goodling actually believed that political considerations were appropriate in IJ hiring, and if she had been told by Sampson that OLC had so advised, it is reasonable to believe that she would have said so to the Civil Division attorney, rather than making such inaccurate statements.

Goodling also acknowledged that Sampson never told her that the civil service laws did not apply to BIA member hiring. Rather, she testified that she "assumed" that to be the case. Even if that assumption was initially justified, and we believe it was not, we determined that Goodling subsequently asked an OLC attorney for an opinion regarding the legal framework for hiring the Chair and Vice Chair of the BIA. She was advised that all BIA positions were either Schedule A career or SES career positions. Yet, despite having received this advice, she followed the same procedures she used in selecting IJ candidates, and considered political or ideological affiliations in recommending four individuals for BIA positions.<sup>83</sup>

Finally, we concluded that Goodling engaged in misconduct by making misrepresentations to the Civil Division attorneys representing the Department in the *Gonzalez v. Gonzales* litigation. An attorney from the Civil Division interviewed Goodling in January 2007 to learn how the OAG had handled the IJ hiring process. In the interview, Goodling told the attorney that she did not take political considerations into account in IJ hiring. The Civil Division attorney's recollection of this point was specific and was corroborated by the memoranda he wrote contemporaneously and circulated within the Department in connection with deliberations about how to handle the lawsuit.

#### **D. EOIR Director and Deputy Director**

We concluded that neither EOIR Director Rooney nor Deputy Director Ohlson violated Department policy or federal law, or engaged in misconduct, with respect to hiring IJs or BIA members.<sup>84</sup> First, we found no evidence that Rooney or Ohlson themselves considered political or ideological affiliations in recommending candidates for IJ positions. Furthermore, we credited their assertions that they did not, in fact, know that the OAG considered political or ideological affiliations in selecting candidates. Rooney and Ohlson also

said they did not know that the White House Office of Political Affairs and the White House Presidential Personnel Office were involved in identifying and screening IJ candidates.<sup>85</sup> We also found that Rooney and Ohlson did not know that the OAG was screening immigration judge candidates to seek conservatives or Republicans.

Nonetheless, we believe that Rooney and Ohlson had sufficient evidence for them to have realized that political or ideological affiliations played a role in the selection process, and we believe that they should have brought this issue to the attention of senior leaders at the Department. They noted to us that the fact that the OAG took control of the IJ and BIA hiring processes was not, in itself, evidence of impropriety, because the Attorney General had the statutory and regulatory authority to make direct appointments for those positions. Moreover, they noted that the quality of the candidates whose résumés reflected Republican or conservative ideological affiliations was not so deficient as to necessarily raise their suspicions. But we believe that several factors – including the high number of candidates whose résumés reflected Republican credentials, the sponsorship of candidates by Republican Members of Congress, the knowledge that the Department’s White House Liaison was involved in selecting and conducting research on the candidates, and EOIR’s inability to get the OAG to consider any applicants identified through public announcements – should have put Rooney and Ohlson on notice of concerns that political or ideological affiliation influenced the selection of candidates for positions that both knew were career positions subject to civil service protections. For example, the episode in which a Senator chose the candidate for a specific IJ position and later was allowed to pick a second candidate when the first withdrew should have raised concerns that career IJ positions were being treated like political U.S. Attorney and Article III federal judge positions, and that political affiliation was potentially influencing the appointment of career Department attorneys.

To their credit Rooney and Ohlson made repeated efforts to persuade the OAG to allow them to post advertisements to attract quality candidates for IJ positions, to persuade the OAG to consider candidates who responded to the advertisements, and to urge the OAG to select more IJs to address the growing case load. We also found evidence that on at least one occasion Ohlson brought to the attention of an ODAG official the problems created by the increasing IJ vacancies when he was not able to get timely action on IJ candidates from Goodling. However, although Rooney and Ohlson took some actions to address the increasing number of IJ vacancies, we concluded that they had enough information about issues of concern in the selection process that they should have brought these issues to the attention of other senior Department officials, such as to senior career officials in the ODAG, or to the Office of the Inspector General or the Office of Professional Responsibility.

## Footnotes

47. 8 C.F.R. § 1003.0(a) (2007).
48. 5 C.F.R. § 213.3101.
49. 8 C.F.R. § 1003.1(a)(2).
50. *Id.*
51. See, e.g., [www.usdoj.gov/oarm/attvacancies.html](http://www.usdoj.gov/oarm/attvacancies.html).
52. This is different from other types of career attorney positions in the Department, such as AUSAs, where the Attorney General does not have statutory authority to directly appoint AUSAs and other career attorneys.
53. See 28 C.F.R. §§ 0.15 and 0.19.
54. In 1996, the IJ pay rates were removed from the General Schedule and now generally exceed the GS-15 level. In practice, final action on IJ hiring (“signing off” on candidates recommended by the EOIR Director) continued to be exercised by ODAG and OARM. In 2006, the regulations were amended to comport with actual practice by authorizing the ODAG to re-delegate authority concerning attorneys with pay grades over GS-15, thus covering all IJs. The hiring of all the IJs whose appointments were approved prior to the amendment was subsequently ratified.
55. We did not find evidence that any “direct appointment” hires prior to 2004 were based on improper political or ideological affiliations.
56. In our interview of Sampson, we showed him these documents. Sampson stated that he did not remember the documents, and that reviewing them did not refresh his recollection. He added that the red-lined version “looks like something I would have drafted,” but said he did not know who edited it.
57. Deputy Attorney General Comey approved the hires of these candidates on April 11, 2004, and they were appointed.
58. This dates the prior conversation between Sampson and Ohlson to on or about April 5, 2004, the same date as the EOIR memorandum to the ODAG detailed above.
59. The remaining candidate was not appointed because issues arose in his background investigation.
60. Three days after the approval package was sent to the ODAG, Ohlson was required to send a copy of the entire package to Sampson.

61. When we asked Rooney about Sampson's claim that he did not have to follow civil service laws for Attorney General direct appointments, Rooney responded: "I can't believe he would say that."
62. Richmond told us that she was not involved in the process of selecting and hiring IJs. An e-mail in March 2005 corroborated Richmond's statement. In response to a query concerning an IJ, Richmond responded: "IJ's [sic] are career appointments... so I don't handle them." Sampson also told us that he did not recall Richmond having any role in IJ selection.
63. One of the people at the White House Presidential Personnel Office from whom Sampson received names of IJ candidates was Jan Williams, who later became the Department's White House Liaison. In the OAG, Williams continued to seek names of candidates from her old office at the White House.
64. The candidate also acknowledged during our interview of him that he had been a friend of Rove's since his youth.
65. This is the only evidence we found of Rove playing a role in the appointment of IJs.
66. An e-mail from Tim Griffin and Annie Mayol in the White House Office of Political Affairs indicates that the candidate names came to them from Governor Pataki of New York. On May 12, 2005, the White House sent a follow-up e-mail to the OAG inquiring about "[the candidate] in particular – Governor Pataki's office just called me."
67. There is no evidence that EOIR opposed the third candidate; rather, there were only two vacancies. This was one of only two occasions we found in which Sampson provided more than one name for a vacancy.
68. In this report, we generally did not name individual IJs. However, we named three IJs who played a role in recommending IJ candidates to Goodling, which we discuss in Section V.D. below.
69. In addition to his position in the Bush White House, Malphrus's résumé included: "Legal Team, Republican National Committee 72-Hour Task Force, 2004"; "Bush-Cheney Florida Recount Team, Miami Legal Group, 2000"; and "Federalist Society."
70. Metcalf told us that Williams had met him in connection with his interest in a political position within the Department. Metcalf stated that he had not previously been interested in an IJ position, although we found evidence contradicting this claim. Susan Richmond, the predecessor to Williams as the Department White House Liaison, told us she recalled that Metcalf approached her to inquire about an IJ position. Documents also show that Metcalf requested assistance from Richmond in May and August of 2004, seeking a new position, although the position is not identified. Sampson also

stated that Metcalf was considered for an IJ position because Metcalf had specifically asked for such a position.

71. At his interview with us, Sampson stated that he might have received this candidate's name from the White House or from a Senator.
72. In a May 2004 e-mail exchange, Cohn had discussed with Williams's predecessor, Susan Richmond, the fact that the EOIR General Counsel position was vacant and expressed concern that it would be a problem if the ODAG "were to clear a lib" for that "significant position." Richmond responded that "we should get Kyle Sampson involved" if there were problems in identifying a suitable candidate. Cohn responded that "the presumptive front-runner is a dem." Richmond forwarded the e-mail chain to Sampson. The EOIR General Counsel is a career position, and use of political party affiliation to screen candidates for that position would violate federal law and Department policy. The position was eventually filled with a career EOIR attorney supported by EOIR Director Rooney.
73. We did not find any evidence of Goodling soliciting or receiving recommendations from Democratic Members of Congress.
74. Goodling did not find a position for the candidate.
75. As discussed above, we also determined that Goodling's "recommendations" had the practical effect of appointing the candidate, which Goodling knew. For example, in an e-mail to Sampson dated August 24, 2006, she referred to an IJ position in Boston that "I filled." At the time, EOIR had not even transmitted the paperwork to the ODAG "recommending" the candidate for appointment.
76. This statement by Metcalf was not accurate. The fourth IJ never worked for the White House Counsel's Office; he had spent his entire career working at EOIR. The fourth IJ told us that he did not support the fifth candidate because he was too inexperienced, and that he said so to Metcalf when Metcalf asked about him. The fourth IJ, who was Metcalf's mentor, also opined that Metcalf's recommendation of the IJ's wife may have been an attempt by Metcalf to curry his favor.
77. The formal OLC memorandum regarding IJ hiring was not completed until March 29, 2007. The formal OLC memorandum on BIA members was not completed until August 8, 2007.
78. Gonzales told us that he had no recollection of approving the four candidates, and no knowledge of how they were selected.
79. Finally, we found that in a separate example of political screening, Goodling contacted Associate Deputy Attorney General David Margolis to inquire about Ohlson, who was being considered for the position of EOIR Director, after Rooney had announced his retirement in February 2007. According to

Margolis, Goodling asked: "As to your friend Kevin Ohlson, can you tell me whether he's a D or an R?" Margolis told us that he told Goodling that Ohlson was a career Department attorney, but that he may have been more "politically attuned" to Republicans than to Democrats.

80. The Civil Division attorney memorialized the interview in contemporaneous notes and in an e-mail he drafted 2 days later.
81. As noted earlier, Whelan, the Acting AAG at OLC prior to Goldsmith's appointment, told us that he (like Goldsmith and Levin) had no recollection of advising Sampson that civil service laws did not apply to IJ hiring.
82. As detailed above, starting in July 2005, Ohlson sent a series of e-mails to Williams stressing the need to fill IJ vacancies because of the "tremendous pressure" of EOIR's growing caseload. In a July 22, 2005, e-mail to Williams, Ohlson repeated this theme, and suggested that Williams authorized a "nation-wide advertisement soliciting applications for IJ positions." He reassured her, however, that the process would only create a pool of applicants, and that Williams would retain her ability to select candidates to be hired. Even so, Williams did not act on the packets of résumé applications Ohlson forwarded to her.
83. We also note that the political screening Goodling conducted on IJ candidates (even candidates provided by the White House) caused significant delays in filling IJ vacancies and significantly contributed to an increasing number of unfilled IJ positions.
84. OPR Counsel H. Marshall Jarrett recused himself from the evaluation of EOIR Director Rooney's and Deputy Director Ohlson's conduct.
85. The evidence showed a few instances in which EOIR was aware that a candidate forwarded by the OAG had been recommended by the White House, but the information provided to EOIR did not indicate that the White House Office of Political Affairs or the White House Presidential Personnel Office had been involved. Both Rooney and Ohlson told us that they thought the candidates supported by the White House had been recommended based on personal connections rather than political affiliations.