

## FACT CHECK ON SLATE'S DAHLIA LITHWICK AND EMILY BAZELON

Dahlia Lithwick and Emily Bazelon, who write for the web magazine “Slate,” have been opining about our case. On CNN recently, Lithwick made two flatly inaccurate statements: 1) that this case involved a written test; and 2) that no African-Americans passed it. We advised Ms. Lithwick of her errors but she did not respond. Ms. Bazelon later went on National Public Radio and compounded Lithwick’s error by suggesting that a problem here was the “written” exam’s failure to test for “judgment” and “leadership” skills needed to command others in emergencies. Had Ms. Bazelon read the record, she would understand that a written exam is not designed to measure those attributes. It was the second phase of the examination process (which Bazelon either didn’t know about or ignored) that focused entirely on judgment, tactical and leadership skills.

Here are the undisputed record facts which Ms. Lithwick and Ms. Bazelon omit in their commentary. Our case involved a dual-phase examination process for two different command positions. For each, the first phase involved a written job knowledge exam which tested for just that – the substantive knowledge one needs to hold a command position. The second phase, which took place on a separate day, involved a comprehensive scenario-based assessment process in which candidates were measured for their judgment, leadership skills and ability to competently and effectively lead others in emergency situations. Candidates were evaluated by a group of 30 fire service professionals (holding high rank in their respective agencies, including that of fire chief, deputy chief and battalion chief). These experts were recruited from around the country, with input and recommendations from minority organizations. The city ensured that none had ties to New Haven or to any candidate, thus avoiding any cronyism and other improper favoritism. (A failure to do that in the past resulted in serious allegations regarding the integrity of the results and consequent public scandal).

This assessor pool was in fact dominated by minorities even though the majority of test-takers were white. White candidates were thus significantly (and deliberately) under-represented in the pool of experts charged with evaluating them. The city admitted the ratings were fair and accurate and that there was no basis on which to impugn the integrity of these assessors. Thus, this phase tested for those very qualities that Ms. Bazelon irresponsibly stated were ignored in this testing process.

Lithwick misstated the facts again in asserting that no African Americans passed the exam. A total of 15 minorities passed. New Haven sought to fill a very small number of vacancies. Not only did African Americans pass but three scored high enough to qualify for promotion to Lieutenant in 2004. Two Hispanics qualified for immediate promotion to Captain as well, with only 8 vacancies. While the district court confined its analysis to what *appeared* to be the case (according to the defendants) when the scores were first reviewed, the record (including defendants’ reluctant concessions in their Rule 56 filings in the district court) shows that the assertion that no blacks were eligible for any of the vacancies is flatly wrong, yet it continues in the rhetoric that falsely suggests these test results were an anomaly. One of the black candidates deprived of promotion submitted

an affidavit to the district court expressing his disapproval of the city's actions. Anyone who read the filings in the Supreme Court would know that, and better understand our legal arguments that Title VII was used here as a pretext for crude racial politics and intentional discrimination, and misconstrued to require raw racial quotas.

As was the case with Ms. Lithwick, our advisement to Ms. Bazelon regarding her errors met with no response. Thus, take anything from Slate with a grain of Salt.

For a good example of commentary based on a responsible study of the record and briefs in this case, [read Stuart Taylor's recent piece in the National Journal.](#)

### **FACT CHECK ON NEW HAVEN COUNSEL VICTOR BOLDEN**

We responded to like errors published by New Haven's new Acting Corporation Counsel Victor Bolden in a recent New Haven Register Forum. [Our response to Mr. Bolden is here.](#)