

**Nowacki, John (USAEO)**

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**From:** Goodling, Monica  
**Sent:** Monday, February 05, 2007 9:28 PM  
**To:** Hertling, Richard; Scott-Finan, Nancy; Sampson, Kyle; Elston, Michael (ODAG); Moschella, William; Nowacki, John (USAEO)  
**Subject:** Difficult situations doc for the Hill

**Attachments:** Examples of Difficult Transition Situations.pdf; Examples of Difficult Transition Situations.pdf



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## Examples of Difficult Transition Situations

### **Examples of Districts Where Judges Did Not Exercise Their Court Appointment (Making the Attorney General's Appointment Authority Essential To Keep the Position Filled until a Nominee Is Confirmed)**

1. **Southern District of Florida:** In 2005, a vacancy occurred in the SDFL. The Attorney General appointed Assistant Attorney General of the Civil Rights Division, Alex Acosta, for 120 days. At the end of the term, the Court indicated that they had (years earlier) appointed an individual who later became controversial. As a result, the Court indicated that they would not make an appointment unless the Department turned over its internal employee files and FBI background reports, so that the court could review potential candidates' backgrounds. Because those materials are protected under federal law, the Department declined the request. The court then indicated it would not use its authority at all, and that the Attorney General should make multiple, successive appointments. While the selection, nomination, and confirmation of a new U.S. Attorney was underway, the Attorney General made three 120-day appointments of Mr. Acosta. Ultimately, he was selected, nominated, and confirmed to the position.
2. **Eastern District of Oklahoma:** In 2000-2001, a vacancy occurred in the EDOK. The court refused to exercise the court's authority to make appointments. As a result, the Attorney General appointed Shelly Sperling to three 120-day appointments before Sperling was nominated and confirmed by the Senate (he was appointed by the Attorney General to a fourth 120-day term while the nomination was pending).
3. **In the Western District of Virginia:** In 2001, a vacancy occurred in the WDVA. The court declined to exercise its authority to make an appointment. As a result, the Attorney General made two successive 120-day appointments (two different individuals).

*This problem is not new ...*

4. **The District of Massachusetts.** In 1987, the Attorney General had appointed an interim U.S. Attorney while a nomination was pending before the Senate. The 120-day period expired before the nomination had been reviewed and the court declined to exercise its authority. The Attorney General then made another 120-day appointment. The legitimacy of the second appointment was questioned and was reviewed the U.S. District Court for the District of Massachusetts. The Judge upheld the validity of the second 120-day appointment where the court had declined to make an appointment. See 671 F. Supp. 5 (D. Ma. 1987).

## **Examples Where Judges Discussed Appointing or Attempted to Appoint Unacceptable Candidates:**

### **1. South Dakota:**

In 2005, a vacancy arose in South Dakota. The First Assistant United States Attorney (FAUSA) was elevated to serve as acting United States Attorney under the Vacancies Reform Act (VRA) for 210 days. As that appointment neared an end without a nomination having yet been made, the Attorney General made an interim appointment of the FAUSA for a 120-day term. The Administration continued to work to identify a nominee; however, it eventually became clear that there would not be a nomination and confirmation prior to the expiration of the 120-day appointment.

Near the expiration of the 120-day term, the Department contacted the court and requested that the FAUSA be allowed to serve under a court appointment. However, the court was not willing to re-appoint her. The Department proposed a solution to protect the court from appointing someone about whom they had reservations, which was for the court to refrain from making any appointment (as other district courts have sometimes done), which would allow the Attorney General to give the FAUSA a second successive, 120-day appointment.

The Chief Judge instead indicated that he was thinking about appointing someone other than our career prosecutor. Not only was the court's proposed appointee not a DOJ or even a federal employee, but indeed he had never been a federal prosecutor. As such, he had not been the subject of a thorough background investigation and did not have the necessary security clearances to lead federal prosecution efforts in a post-9/11 world. The Department strongly indicated that it did not believe this was an appropriate individual to lead the office.

The Department then notified the court that the Attorney General intended to ask the FAUSA to resign her 120-day appointment early (without the expiration of the 120-day appointment, the Department did not believe the court's appointment authority was operational). The Department notified the court that since the Attorney General's authority was still in force, he would make a new appointment of another experienced career prosecutor. The Department believed that the Chief Judge indicated his support of this course of action and implemented this plan.

The FAUSA resigned her position as interim U.S. Attorney and the Attorney General appointed the new interim U.S. Attorney (Steve Mullins). A federal judge executed the oath and copies of the Attorney General's order and the press release were sent to the court for their information. There was no response for over 10 days, when a fax arrived stating that the court had also attempted to appoint the non-DOJ individual as the U.S. Attorney.

This created a situation where two individuals had seemingly been appointed by two different authorities. Defense attorneys indicated their intention to challenge

ongoing investigations and cases. The Department attempted to negotiate a resolution to this very difficult situation, but was unsuccessful. Litigating the situation would have taken months, during which many of the criminal cases and investigations that were underway would have been thrown into confusion and litigation themselves.

Needing to resolve the matter for the sake of the ongoing criminal prosecutions and litigation, after it was clear that negotiations would resolve the matter, the White House Counsel notified the court's purported appointee that even if his court order was valid and effective, then the President was removing him from that office pursuant to Article II of the Constitution and 28 U.S.C. § 541(c). Shortly thereafter, Mr. Mullins resigned his Attorney General appointment and was recess appointed by President Bush to serve as the U.S. Attorney for the District of South Dakota. The Department continued to work with the home-state Senators and identified and nominated a new U.S. Attorney candidate, who was confirmed by the Senate in the summer of 2006.

- 2. Northern District of California:** In 1998, a vacancy resulted in NDCA, a district suffering from numerous challenges. The district court shared the Department's concerns about the state of the office and discussed the possibility of appointing of a non-DOJ employee to take over. The Department found the potential appointment of a non-DOJ employee unacceptable. A confrontation was avoided by the Attorney General's appointment of an experienced prosecutor from Washington, D.C. (Robert Mueller), which occurred with the court's concurrence. Mueller served under an AG appointment for 120 days, after which the district court gave him a court appointment. Eight months later, President Clinton nominated Mueller to fill the position for the rest of his term.

## Voris, Natalie (USAEO)

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**From:** Voris, Natalie (USAEO)  
**Sent:** Thursday, July 06, 2006 1:52 PM  
**To:** Battle, Michael (USAEO)  
**Subject:** RE: FYI

Thanks, Mike. I'll relay this to Monica.

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**From:** Battle, Michael (USAEO)  
**Sent:** Thursday, July 06, 2006 1:46 PM  
**To:** Voris, Natalie (USAEO)  
**Subject:** FW: FYI

N.V. FYI.

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**From:** Cummins, Bud (USAARE)  
**Sent:** Thursday, July 06, 2006 1:06 PM  
**To:** Battle, Michael (USAEO)  
**Subject:** RE: FYI

Mike,

Just so you know in case something comes up, I got a call yesterday from a staffer for a Democrat member of the Arkansas Congressional delegation. I happen to have a better than fair relationship with most of our congressional delegation and know several members of their staffs. Apparently, the White House recently called our sole Republican Congressman (Boozman) and pretty much told him what they are doing with this appointment and how they are going about it. There has been some subsequent talk among other members of the delegation about it and some of them may be chapped about how it was handled.

It wasn't Boozman's office that called me, but I would rather not say who did though it doesn't matter much cause the way it was described to me, several or all of them are aware of it. I was contacted for confirmation that I was being ousted to make room for another appointee, and I politely refused to get into it with them specifically (I neither confirmed nor denied—I wasn't going to lie to him cause I don't do that and especially since the White House is apparently telling it as it happened), but strongly urged them to not raise hell about anything on my account for a number of reasons—most of which you and I have discussed—it's just not in my best interest. He said fine, but that didn't mean they wouldn't want to express dissatisfaction to someone at some point as a matter of principle on their own account, because they don't think it is cricket to do what they think was done and they think it is an insult to the state to have an appointee dealt with as has been done here.

I just wanted to let you know that a) there may be some stink about this down the road; and b) I absolutely did not instigate or provoke it, the information came from elsewhere and I went to great pains to not confirm it specifically, though I honestly imagine he feels like he got his confirmation in light of my failure to deny his proposed account. Anyway, just a heads up for you in case somebody starts a squabble over this. I don't want it coming back on me, especially by someone in DC thinking I am organizing a protest because I am not (I did have to strike a bargain with Jody to keep her mouth shut over this, but as far as I know, she is not talking about it either!).

Bottom line is that I told them I am fine and plan to be moving on soon. Whatever else happens is entirely their doing. I don't want to get invited out even sooner cause someone perceives that I am game playing cause I am not, so you are now my witness.

Regards,

Bud

The Honorable Bud Cummins.  
United States Attorney  
Eastern District of Arkansas  
425 W. Capitol Avenue, Suite 500  
Little Rock, Arkansas 72201

Dear Mr. Cummins:

Thank you for your service to the Department of Justice as United States Attorney for the Eastern District of Arkansas. I appreciate your leadership, commitment to the Department's law enforcement goals, and dedication to protecting the rights and safety of the citizens of your district.

Your accomplishments as United States Attorney have made a difference to the people of your district and the federal law enforcement community. I commend you for your tireless support for the Department's fight against terrorism and your longstanding commitment to make our communities safe from violent crime. In addition, I am personally appreciative of your thoughtful contributions to the Attorney General's Advisory Committee's subcommittees on Cyber/Intellectual Property and Terrorism/National Security.

Thank you again for a job well done, and please accept my wishes for a rewarding future.

Sincerely,

DRAFT

Alberto R. Gonzales  
Attorney General

EOUSA000000156

The Honorable Paul K. Charlton  
United States Attorney  
District of Arizona  
Two Renaissance Square  
40 North Central Avenue, Suite 1200  
Phoenix, Arizona 85004-4408

Dear Mr. Charlton:

On behalf of the United States Department of Justice, thank you for your service as United States Attorney for the District of Arizona. You have performed a great service to your community and your country.

Your accomplishments as United States Attorney have made a difference to the people of your district and the federal law enforcement community. I commend you for your tireless support for the Department's fight against terrorism and your longstanding commitment to make our communities safe from violent crime. In addition, I am personally appreciative of your diligence as Chair of the Attorney General's Advisory Committee's subcommittee on Border and Immigration Law Enforcement, as well as your contributions to the subcommittee on Native American Issues.

Thank you again for a job well done, and please accept my wishes for a rewarding future.

Sincerely,

DRAFT

Alberto R. Gonzales  
Attorney General

EOUSA000000157

The Honorable John McKay  
United States Attorney  
Western District of Washington  
700 Stewart Street, Suite 5220  
Seattle, Washington 98101-1271

Dear Mr. McKay:

Thank you for your service to the Department of Justice as United States Attorney for the Western District of Washington. I appreciate your leadership, commitment to the Department's law enforcement goals, and dedication to protecting the rights and safety of the citizens of your district.

Your accomplishments as United States Attorney have made a difference to the people of your district and the federal law enforcement community. I commend you for your tireless support for the Department's fight against terrorism and your longstanding commitment to make our communities safe from violent crime. In addition, I am personally appreciative of your diligence as Chair of the Attorney General's Advisory Committee's subcommittee on Regional Law Enforcement Information Sharing Working Group, as well as your contributions to the subcommittee on Border and Immigration Law Enforcement and Cyber/Intellectual Property.

Thank you again for a job well done, and please accept my wishes for a rewarding future..

Sincerely,

DRAFT

Alberto R. Gonzales  
Attorney General

EOUSA000000158

The Honorable Kevin V. Ryan  
United States Attorney  
Northern District of California  
450 Golden Gate Avenue  
Box 36055  
San Francisco, CA 94102

Dear Mr. Ryan:

On behalf of the United States Department of Justice, thank you for your service as United States Attorney for the Northern District of California. You have performed a great service to your community and your country.

Your accomplishments as United States Attorney have made a difference to the people of your district and the federal law enforcement community. I commend you for your tireless support for the Department's fight against terrorism and corporate fraud, as well as your longstanding commitment to make our communities safe from violent crime. In addition, I am personally appreciative of your thoughtful contributions to the Attorney General's Advisory Committee's Subcommittees on Controlled Substances and Asset Forfeiture, Environmental Issues, Terrorism and National Security, and Health Care Fraud.

Please accept my best wishes for a rewarding future. I wish you and your family continued success.

Sincerely,

DRAFT

Alberto R. Gonzales  
Attorney General

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