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Attorney Firings: What the White House Wanted to do, But Didn't

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In the coming days, commentators will be scrambling for their thesauruses to find new ways to describe the mounting criticism of Attorney General Gonzales (try "calumny" or "obloquy" for starters). But it's worth lingering on one perhaps the most illuminating aspect of today's news: What the White House wanted to, but didn't, do.

According to [internal White House emails](#), White House Counsel Harriet Miers suggested in early 2005 that all 93 U.S. Attorneys be removed and replaced. We need to know a lot more about the scope and detail of this plan, and critically, its relation to the provision in the March 2006 Patriot Act that allowed the White House to circumvent both legislative and local controls on prosecutorial appointments.

Let me explain why. Back in [early 2005 \[pdf\]](#), as President Bush began his second term of office, most U.S. Attorneys were already his appointees. As one email chain [disclosed yesterday reveals \[pdf\]](#), the White House knew that precisely 77 were Bush II appointees). To be sure, these appointees had been subject to nomination and confirmation by the Senate, as required by Article II of the Constitution. But it had been President Bush who had selected them (just as he selected Carol Lam, David C. Iglesias, Paul K. Charlton, Daniel K. Bogden, and the other recently terminated prosecutors). So why even risk the political contention and fallout of a nationwide purge?

The emails disclosed yesterday are somewhat revealing on this point. They include correspondence from Gonzales chief of staff Kyle Sampson in which he "strongly recommend[s]" the use of the Patriot Act provisions, (page 7 of [this document \[pdf\]](#)) because it would allow the White House to bypass "home-State Senators"--including, it's worth noting, Republicans--and vest more control in the Executive.

But why? This is what the emails say: In the Reagan and Clinton years, U.S. Attorneys were appointed, as per statute, for four years. But after their four years were up, they stayed on as "holdover" appointments until the end of the second presidential term. White House Counsel Harriet Miers wanted to change this: Page 20 of [this document \[pdf\]](#) says as much. That was the point at which discussion began of a more limited purge, in which certain prosecutors would be identified not, seemingly, on the basis of performance strictly understood, but on the basis of performance understood in narrowly partisan terms.

Quite properly, the "strictly partisan" bit is what has been the focus of attention. But that's not all that's of concern here.

As the emails reveal, many of the dismissed U.S. Attorneys could have been dismissed in 2005 as "holdovers." Indeed, changes in the Senate's composition between 2001 and 2005 might well have allowed a different, more political, set of prosecutors to be pushed through. Why then did nothing happen until December 2006?

Nothing happened after an obscure provision was added to the Patriot Act renewal bill in March 2006, a provision that terminated any congressional role in the replacement of U.S. Attorneys, that the White House made its move - the Patriot Act provision. But what connection does that legislative change have to the discussions between Miers, Sampson and others?

It was then-Chairman of the Senate Judiciary Committee, Senator Arlen Specter who technically added the provision expanding executive power. According to [Senator Specter, however](#), the change was requested by a Justice Department official named Brent Tollman. The push for legislative change, that is, came from within the executive branch. And Specter's chief counsel, Michael O'Neill, inserted the provision that Tollman sought into the legislation *without the Senator's knowledge*. (Tollman, incidentally, is presently the US Attorney for Utah. At 36, he is, I am told, one of the youngest U.S. Attorneys ever. And Joe

Conason has asked [pointed questions](#) about O'Neill's background).

Hard questions certainly need to be asked about how partisan politics entered into firing and replacement of prosecutors. But in addition, we need to ask to what extent was that process interwoven with the effort to secure increased presidential power over prosecutorial replacements? This is, as I have [explained elsewhere](#), an executive cares deeply about executive prerogatives far beyond those that law or history would support.

That Tollman is a sitting U.S. Attorney ought not to make him immune from congressional inquiry about his past responsibilities. Both Harriet Miers and Alberto Gonzales too ought properly to know how and why Tollman came to put in his request. And certainly more must be known about why O'Neill inserted this provision without his Senator's knowledge.

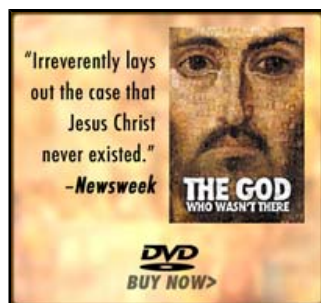
In all this we would do well not to lose sight of Miers' original plan: the firing of all 93 U.S. Attorneys. Note that this remains possible under the law today, with the President still having unfettered control over replacements. And even if the law were changed, a President with an acquiescent Senate could still fire and replace prosecutors for large political gain. And a blanket purge by this or a future President would, ironically, be immune from the charges of political bias that last December's firings provoked.

So the larger and harder question posed today is whether new forms of insulation from political control are needed for prosecutors (and other government lawyers, as I have [explained here](#)). This is no easy task, but at a very minimum, it demands rejection of the simplistic, and ill-conceived, notions of a "unitary executive" that this Administration has long proffered.

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