

# Checks and Balances Isn't Check In, Skew Balance

Albuquerque Journal · 29 Mar 2007 · BY LAURA E. GÓMEZ

Last week the Judiciary Committees of both the U.S. Senate and the House of Representatives voted to issue subpoenas to key White House aides who appear to have been involved in the U.S. Attorney scandal. President Bush responded by scolding legislators for what he termed a “partisan fishing expedition.”



With this move, the president is attempting to equate the actions of the Democratically-controlled Congress with those of the Republicans involved in the ouster of eight U.S. Attorneys across the country. These Republicans include White House aides who (according to prior admissions and e-mail exchanges released last week) lobbied for the firings. Closer to home, they also include Sen. Pete Domenici and Congresswoman Heather Wilson, who may have violated congressional ethics rules by calling, in the month before hotly contested elections, David Iglesias to inquire about ongoing criminal investigations of prominent New Mexico Democrats.

It is unfortunate that the president and his key aides don't recognize the difference between these actions. What makes the interventions of New Mexico's congressional leaders so inappropriate is that their actions undermine the rule of law as it pertains to the criminal justice system.

The Constitution's founders designed a system of government in which they attempted to limit the accumulation of power by any one governmental entity. The hallmarks are what constitutional law teachers refer to as the vertical and the horizontal structure of American government. The vertical structure refers to the division of power between the federal government and the many state governments — which the founders hoped would limit the concentration of power (and potential for abuse of power) in the centralized, federal government. The horizontal structure refers to the division of power among the three branches of the federal government (the executive, legislative, and judicial branches) — an

avenue for limiting the tyranny of any one branch over the others.

The system of federal criminal prosecution implicates all three branches, and, when the rule of law applies, reveals the delicate dance among them so thoughtfully choreographed by the Constitution's framers. The president appoints federal prosecutors in the form of U.S. Attorneys in each federal judicial district. As the defenders of the president and the attorney general have noted since the outset of this scandal, these appointments are inherently political appointments. Presidents almost always appoint U.S. Attorneys of their own political party who have been active members of that party. However, once U.S. Attorneys take office they are expected (and instructed) to leave partisan politics behind.

U.S. Attorneys exist as part of the executive branch, yet they interact extensively with the judicial and legislative branches (as do their state counterparts, county prosecutors). They are charged with deciding whether to file charges that will lead to criminal adjudication in the judicial branch — to plea bargains approved by federal judges and to trials before federal juries and, in cases resulting in conviction, to sentencing by federal judges. The entire system also operates in conjunction with the legislative branch. Until the U.S. Patriot Act, the presidential appointment of U.S. Attorneys had to be approved by the Senate. (Congress repealed that provision of the Patriot Act this week). Federal judges are nominated by the president but also face Senate confirmation. And it is Congress, not judges, that substantially dictates what prison sentence someone convicted in federal court will face under the U.S. Sentencing Guidelines.

It is precisely because of these connections and interactions among the branches of government that the strong norm has evolved in the criminal justice arena that criminal prosecutions should, at a minimum, appear to be shielded from partisan politics. If Americans thought criminal prosecutions were routinely the result of improper political influence, the criminal justice system would lose moral legitimacy. Citizens would not have faith that prosecutions reflected the strength of evidence against an individual (that is, the prosecutor's assessment that there was sufficient evidence to convince a jury that the defendant was guilty beyond a reasonable doubt), or that criminal defendants would receive impartial trials, and even larger numbers of Americans would find ways to wrangle out of jury duty.

Of course these attitudes currently exist (and pollsters tell us they are more prevalent among some segments of our diverse American population than others), but, currently, sufficient numbers of Americans buy into the system to allow it to work: there are rarely mass public protests of prosecutions, verdicts or sentences, and there are sufficient numbers of citizen-jurors. As someone who trains future lawyers, one of the saddest things about the interventions of Sen. Domenici and Congresswoman Wilson is that they further erode our collective faith in the rule of law. Regardless of these legislators' intent, it is the appearance of inappropriate political influence that contributes to the public's cynicism about the legal system.