

DEALING AWAY CIVILIAN LAW

In her piece on Holder's efforts to uphold the rule of law last week, Jane Mayer explained that Rahm Emanuel opposed the idea of civilian trials for the 9/11 plotters because it would piss off Lindsey Graham.

Emanuel, who is not a lawyer, opposed Holder's position on the 9/11 cases. He argued that the Administration needed the support of key Republicans to help close Guantánamo, and that a fight over Khalid Sheikh Mohammed could alienate them. "There was a lot of drama," the informed source said. Emanuel was particularly concerned with placating Lindsey Graham, the Republican senator from South Carolina, who was a leading proponent of military commissions, and who had helped Obama on other issues, such as the confirmation of Supreme Court Justice Sonia Sotomayor. **"Rahm felt very, very strongly that it was a mistake to prosecute the 9/11 people in the federal courts, and that it was picking an unnecessary fight with the military-commission people,"** the informed source said. "Rahm had a good relationship with Graham, and believed Graham when he said that if you don't prosecute these people in military commissions I won't support the closing of Guantánamo. . . . Rahm said, 'If we don't have Graham, we can't close Guantánamo, and it's on Eric!' "

At Emanuel's urging, Holder spoke with Graham several times. But they could not reach an agreement. Graham told me, "It was a nonstarter for me. There's a place for the courts, but not for the mastermind of 9/11." He said, **"On balance, I think it would be better to close Guantánamo, but it would be better**

to keep it open than to give these guys civilian trials." Graham, who served as a judge advocate general in the military reserves, vowed that he would do all he could as a legislator to stop the trials. "The President's advisers have served him poorly here," he said. "I like Eric, but at the end of the day Eric made the decision." Last week, Graham introduced a bill in the Senate to cut off funding for criminal trials related to 9/11. [my emphasis]

Josh Gerstein has two pieces (one, two)—elaborating on the WaPo's piece this morning—describing the degree to which the Administration may well be in the process of dealing away civilian trials in exchange for Lindsey Graham's love (and with it, a means to close Gitmo, Rahm believes).

Josh has the full quote of something Holder said to the WaPo, which seems to show Holder setting up a rationale for using military commissions.

WaPo: When you talk about the symbolic nature of such a trial, both to al Qaeda and maybe as importantly to the allies and to the nation having gone through what it has gone through for 10 years — 8 years, is it eroded somewhat if this trial winds up happening on a military base or in a federal prison complex instead of a federal courthouse?

AG: No, I don't think so. I think that at the end of the day whether, wherever this case is tried, whatever forum, what **we have to ensure is that it is done in as transparent a way as possible with as close as is possible adherence to the rules that we traditionally use in criminal cases.** And if we do that, I'm not sure that the location or even ultimately the forum is going to be as important as what it is the world sees when whoever it is stands up and says I

represent the United States, what the world sees in that proceeding.

WaPo: Is that an opening to say this may not be an article III court trial after all?

AG: I expect it's going to be in article III court but what I'm saying is that if for whatever reason, I don't know what it would be, but **if for whatever reason it ended up as a military commission trial, given the reformed status of those military commissions, I think that we could have a trial that would be, that would stand up to the test** that I was talking about before, in terms of transparency, adherence to the traditions that we have a nation. I continue to think though that this case, to bring the strongest case, there are reasons why you want to bring it in an article III setting. [my emphasis]

And against the background of Holder seeming to cede on the issue of civilian trials, Josh describes Lindsey Graham meeting with Rahm on this issue.

Sen. Lindsey Graham (R-S.C.) has told colleagues that he's negotiating with the White House over legislation aimed at heading off the possibility of civilian criminal trials for suspects in the Sept. 11 attacks, according to congressional sources.

Graham met White House chief of staff Rahm Emanuel last week to discuss the issue, sources said.

[snip]

Several leaders of groups who favor civilian trials said they were aware that Graham was in discussions with the White House about a legislative proposal that would effectively force the Sept.

11 suspects into military courts by barring civilian trials. The proposal failed on a 54-45 vote in November, but Graham and other senators held a news conference last week vowing to introduce the measure again in the near future.

So among all the other reporting on Rahm's central position on issues best left to the Attorney General, it appears he's trying to craft a deal with Lindsey Graham on where and how to try Khalid Sheikh Mohammed.

Remind me. Didn't Rove and the Bush White House get in trouble for this kind of tampering with DOJ issues?