

OBAMA ADMINISTRATION FOLLOWS BUSH/CHENEY ON POLITICIZATION OF DOJ

✖ Remember the plaintive cries of Democrats and progressives about the wrongful politicization of the Department of Justice by the Bush/Cheney Administration? Remember the stunning chart Sheldon Whitehouse whipped out at a Senate judiciary hearing on Alberto Gonzales' tenure as AG showing how politicized the hallowed independent prosecutorial discretion of the DOJ had become under Bush, Cheney and Gonzales? The one that Pat Leahy called "the most astounding thing I have seen in 32 years"?

That was in late April of 2007, little more than three years ago. Despite the most fervent hope of a Democratic and progressive base that they were voting to change the wholesale invasion of the prosecutorial discretion by the White House political shop (along with so, so many other things), it appears little has changed. In fact, the invasion of province appears to be being writ larger and more profound. From Jerry Markon in the Washington Post:

Now, the decision on where to hold the high-profile trials of Mohammed and four others accused of being Sept. 11 conspirators has been put on hold and probably will not be made until after November's midterm elections, according to law enforcement, administration and congressional sources. In an unusual twist, the matter has been taken out of the hands of the Justice Department officials who usually make prosecutorial decisions and rests entirely with the White House, the sources said.

"It's a White House call," said one law enforcement official, who spoke on condition of anonymity to discuss internal deliberations. "We're all in the dark."

The delays are tied to the administration's broader difficulties in closing the U.S. military prison at Guantanamo Bay, Cuba – where Mohammed and the other detainees are held – and are unlikely to affect the outcome of a trial that officials vow will be held at some point. But people on all sides of the debate over whether Mohammed should be tried in federal court or before a military commission expressed frustration that nearly nine years after Sept. 11, justice for the attacks seems so elusive.

"It's important that these trials actually take place, and soon," said Jameel Jaffer, director of the national security project at the American Civil Liberties Union, which has long pushed for the trials to be held in federal court. "It's not just that people held for long periods of time in government custody deserve to contest the evidence against them. It's also that these trials are important to the country."

For all the hope and change, nothing has changed. Toying with the root charging and prosecutorial functions and discretion of the Department of Justice as a way to respond to the prevailing political winds is a craven path for the Obama Administration to take. And hanging Attorney General Eric Holder and his Department out to dry in those winds is despicable political and executive cowardice.

So, on this fine Fourth of July, as we celebrate America's independence and reflect on our founding principles, it would be wise to remember, and refresh the recollection of the

Obama Administration, that this is a nation of law, not men. Both the government and court system of the United States are open and operating unfettered by either war, hostility or rebellion. There is no justification, legal or moral, for indefinite detention, failure to charge and try criminals openly and fairly, without tortured evidence, and the other string of hideous denials of due process being occasioned in our name.

It is instructive to reflect back on the wisdom of ancestors past, also confronted with novel legal challenges, and at a time (unlike today) when the literal existence of the United States had been in question from the Civil War, as expressed by the Supreme Court in *Ex Parte Milligan*:

Time has proven the discernment of our ancestors, for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of

government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

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All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty, for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion – if the passions of men are aroused and the restraints of law weakened, if not disregarded – these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

The courts and government of the United States of America are open and unfettered. It is time for the Obama Administration to quit frittering away the American foundation of law to the whims and winds of personal electoral desire and perceived political necessity. There can be no greater show of strength and character than to

demonstrate to the world that we live and die with the principles we were founded with. Put the September 11th defendants on trial where they belong, as criminals in the Article III Federal court of jurisdiction.