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SWEET LAND OF LIBERTY

Real justice comes from real courts

Nat Hentoff asks of KSM getting military trial: 'Is this still America?'

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By Nat Hentoff

When President Obama and Eric Holder succumbed to fierce bipartisan resistance to trying Khalid Shaikh Mohammed and four other charged defendants - for the 9/11 massacre of Americans - in our civilian federal court system, they were defied by Michael Daly, a stubbornly independent columnist for the New York Daily News:

"The only right way" to bring them to justice, he wrote, "was with the very system they sought to destroy and so many courageous Americans have died defending. Instead, we ... lost faith in our own courts and laws" (April 5). As Amnesty International reminds us, "Real justice comes from real courts."

On the same day, a lead editorial in the newspaper that employs Michael Daly insisted: "Trying KSM in civilian courts could have been a disaster, given their strict rules of evidence." Evidence extracted by torture is indeed not accepted in our constitutional civilian courts.

Inadvertently, Michael Daly's employers sustain his insistency that this should still be America, even when trying KSM.

The president explained his turnaround by emphasizing that Congress had passed a defense appropriations bill forbidding the use of federal funds to transfer any prisoners from Guantanamo to the United States, including to a civilian court.

Obama, murmuring that this congressional action was unconstitutional, nonetheless signed the bill. That reminded me of then-Sen. Obama's solemn pledge that he would filibuster a Bush-administration measure extending and deepening government electronic surveillance of our personal communications.

Once in the White House, however, Obama, along with his attorney general, have stoutly supported that very law.

In any case, KSM and the others will now be before a judge and jury of military officers in a Guantanamo military tribunal. What I did not know until New York Post reporter Geoff Earle disclosed a rule "buried in a 2010 (Guantanamo military commission) procedural manual" that gives Obama ultimate authority over these very high-level defendants: If they're convicted, "A punishment

of death may be ordered executed only by the president" (New York Post, April 6).

All too obviously, since 9/11, George W. Bush and Barack Obama have scorned the Constitution's mandatory separation of powers. But where in the Constitution of the United States did the founders make our president the chief executioner of a defendant tried in a court far from our shores and - as Michael Daly and a good many other constitutionalists insist - far from our laws?

After all, why did President George W. Bush choose Guantanamo for suspected terrorists ("enemy combatants," he called them) to be imprisoned and tried? Whose rule of law was he avoiding?

How far away can our rule of law be stretched? In what America is becoming, should that depend on whom you elect as president? In this battle over where KSM must be tried, present leaders of both political parties - as did George W. Bush, Donald Rumsfeld and Dick Cheney - chose Guantanamo.

Getting back to KSM's personal future, he has indicated he might - desiring to be a martyr - plead guilty. What then?

Republican Sens. John McCain and Lindsey Graham, as Geoff Earl reports, have an answer. They "have proposed legislation to clarify that defendants like Mohammed could still be executed if they choose to plead guilty and avoid trial."

Yet, the very day after 9/11, President Bush pledged: "We will not allow the enemy to win the war by changing our way of life or restricting our freedoms."

Or by changing our Constitution?

I expect that Osama bin Laden may be watching some of this. Although he gloried in 9/11, he has not succeeded in making us part of his caliphate. But he has, by that atrocity, led some of us to submerge our constitutional roots as Americans.

President Obama has changed the description of what George W. Bush condemned as "enemy combatants" or "unlawful enemy combatants." Under Obama, they are now "unprivileged enemy belligerents." Huh?

(Column continues below)

In view of the military commission's lower standards of admissible testimony and other proof of guilt, the Guantanamo prisoners are still not privileged to have the standard American protections of due process - the core of our system of justice - where not only KSM and his four colleagues are headed but who knows what other suspected terrorists will be sent to Guantanamo, which Obama promised to close.

Using the Bush way of dragnetting such prisoners, in a letter written in the April 6 Wall Street Journal, Keith Allred demanded: "There is no good reason why unlawful combatants should not be tried" by military courts.

Responding, Timothy Lynch of the Cato Institute, where I am a senior fellow, asked (April 11): "Come again? I had thought the purpose of the trial was to determine whether the defendant (actually) was an unlawful combatant, but Mr. Allred seems to have presumed guilt before any defense has been presented." He is joined in this presumption of guilt by many members of

Congress and commentators in all media.

Isn't that also how much of the world regards the American system of justice there? As an inmate held at Guantanamo for years finally concluded, "There's no law here." Do you doubt that James Madison, Thomas Jefferson and Samuel Adams would agree with him that our law is not there?

Next week: But to what extent have our civilian courts already been corrupted by Guantanamo as we look at their failures to respect the fundamental habeas corpus rights finally given to the inmates by the Supreme Court?

Is this still America?