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Real American justice comes from real American courts

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.”

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.

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. If they’re convicted, “A punishment of death may be ordered, but executed only by the President,” (New York Post, April 6).

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 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?

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 even 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?

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 that 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. 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?

Is this still America?

Nat Hentoff is a nationally renowned authority on the First Amendment and the Bill of Rights, a member of the Reporters Committee for Freedom of the Press, and the Cato Institute, where he is a senior fellow.

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