

PULLING THE PLUG ON THE VIRTUAL JURY: WHY KHALID SHEIKH MOHAMMED SHOULD NOT BE TRIED AT GUANTANAMO BY JURORS SITTING IN NEW YORK CITY

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Most people probably figured that the debate over where to try alleged 9/11 mastermind Khalid Sheikh Mohammed (“KSM”) had ended. Indeed, it has been well over a year since Congress forced Attorney General Eric Holder to reluctantly announce that KSM’s prosecution would be referred to the Department of Defense for trial before a Guantanamo military commission.¹ But a provocative proposal put forth recently by Judge William G. Young of the District of Massachusetts has revitalized one of the most contentious legal debates of the post-9/11 era. In a nutshell, Judge Young proposes that an Article III court try KSM at Guantanamo, but with one major twist: the jury would remain in New York City. As quoted in an article by Andrew Cohen for the *Atlantic*, Judge Young describes his plan as follows:

Why don’t we try him by video conference? He will stay in Guantanamo, a criminal jury will be empaneled in the normal way, in an appropriate way, all crimes save for impeachment should be tried by jury. Trial takes place in Gitmo. Witnesses must go to Gitmo. Judge must go to Gitmo. Our video conference hookup is sophisticated. Jury could see him and every witness but KSM could not see jurors. When all the evidence is over, the lawyers would

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1. See Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 4, 2011), http://www.nytimes.com/2011/04/05/us/05gitmo.html?_r=1. Having been arraigned to much fanfare on murder and terrorism charges, the 9/11 defendants are next scheduled to appear before the military commission on October 15, 2012. See Wells Bennett, *Updated Hearing Schedule in the 9/11 Case*, LAWFARE (Aug. 27, 2012, 2:41 PM), <http://www.lawfareblog.com/2012/08/updated-hearing-schedule-in-the-911-case/>.

come back to New York and give closing arguments. KSM could see the final arguments.²

Stepping back for a moment, it must first be emphasized that KSM and his alleged co-conspirators are not soldiers in any recognized army—they are uncommon criminals. Consequently, Article III courts, in which hundreds of terrorists have been prosecuted since 9/11,³ and not military commissions, remain the proper venue to try these men for their crimes committed against innocent Americans. But since congressional funding restrictions have eliminated the Obama Administration’s ability to transfer KSM to any part of the United States, its territories, or possessions,⁴ the executive has been forced to try KSM before a military commission at Guantanamo, if it was to try him at all.⁵

Judge Young, who presided over the trial of Richard Reid, the so-called “Shoe Bomber,” knows all too well that federal courts are generally the most appropriate forum for trying terrorists. Accordingly, he should be applauded for devising an innovative solution that would seem to permit an Article III court to oversee KSM’s landmark trial without transgressing Congress’s comprehensive funding bans by transferring him to the mainland for prosecution. But Judge Young’s proposal, though well-meaning, would probably do more harm than good. There are at least three reasons why.

First, trying a criminal defendant in an Article III court outside the physical presence of a jury would raise significant Fifth and Sixth Amendment concerns.⁶ The Sixth Amendment provides that any “accused shall enjoy the

2. Andrew Cohen, *Why Not Try Khalid Sheikh Mohammed by Video?*, THE ATLANTIC (July 9, 2012, 11:10 AM), <http://www.theatlantic.com/national/archive/2012/07/why-not-try-khalid-sheikh-mohammed-by-video/259532/>.

3. See David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SEC. L. & POL’Y 1, 14 & n. 47 (2011). Not all of these individuals have been convicted of per se terrorism offenses; some, for example, were ultimately convicted of fraud, perjury, and making false statements. See *id.* at 14 & n.48.

4. See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1566-67 (2011).

5. For a discussion of these funding restrictions and their effect on the venue for KSM’s trial, see Nicolas L. Martinez, Note, *Pinching the President’s Prosecutorial Prerogative: Can Congress Use Its Purse Power to Block Khalid Sheikh Mohammed’s Transfer to the United States?*, 64 STAN. L. REV. 1469, 1474-78 (2012).

6. Were an Article III court to sit at Guantanamo, the criminal defendants tried there should be afforded the same constitutional protections that would exist had their trial been held in the United States. See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); see also *United States v. Tiede*, 86 F.R.D. 227, 260 (U.S. Ct. Berlin 1979) (holding that the Constitution’s protections apply to non-American criminal defendants prosecuted in a U.S. court sitting in Occupied Berlin but presided over by a federal district court judge); Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. ____ (forthcoming) (manuscript at 61) (on file with author) (“[W]herever the government acts, anywhere in the world, it must obey the limits established by the Constitution.” (emphasis omitted)).

right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”⁷ Impaneling the jury in New York City—where two of the hijacked airliners crashed into the World Trade Center—would appear to satisfy the amendment’s vicinage requirement. However, it would be difficult to ensure that the jury could remain sufficiently “impartial” under the circumstances. Because such extraordinary precautions would have been taken, jurors could easily draw the impermissible inference that KSM must be guilty of the crimes alleged. Although federal courts for years have empaneled anonymous juries in the interest of juror safety or integrity,⁸ holding a trial completely outside the physical presence of the jury—with the apparent exception of opening and closing arguments—would be a step too far. Indeed, KSM’s constitutional right to be present at all critical stages of his prosecution⁹ would be jeopardized if, absent his own disorderly conduct and without a proper waiver, he were not permitted to physically attend jury selection¹⁰ and closing arguments.¹¹ A defendant’s opportunity, for instance, to detect subtle indications of undesirable juror bias should not depend on the quality of a video feed or the angle of a camera.

Similarly, general Fifth Amendment due process concerns would inevitably arise if a criminal trial were to take place almost entirely outside the presence of a jury. While the presentation of remote witness testimony to a jury may be appropriate in certain instances,¹² removing the jury from the vast majority of KSM’s trial would unduly hinder its ability to perform its critical factfinding function. Under Judge Young’s plan, would jurors be able to instantaneously assess the defendant’s or the prosecutor’s reaction to a

7. U.S. CONST. amend. VI.

8. *See, e.g.*, *United States v. Vario*, 943 F.2d 236, 239 (2d Cir. 1991).

9. *See Illinois v. Allen*, 397 U.S. 337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (“The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right . . . to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.”).

10. *See, e.g.*, *United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987) (noting that Federal Rule of Criminal Procedure 43(a), which affords a defendant the explicit right to be present during jury impanelment, “embodies the protections afforded by the sixth amendment confrontation clause, the due process guarantee of the fifth and fourteenth amendments, and the common law right of presence”).

11. *Cf. United States v. Novaton*, 271 F.3d 968, 998 (11th Cir. 2001) (holding that a criminal defendant’s constitutional right to be present under the Confrontation Clause and the Fifth Amendment’s Due Process Clause was violated by conducting portions of his trial, including examination of witnesses and presentation of the parties’ cases-in-chief, while the defendant was absent due to illness and over his protest).

12. *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 857 (1990) (holding that the Confrontation Clause does not categorically prohibit victims of child abuse from testifying against criminal defendants at trial via one-way closed-circuit television).

devastating piece of witness testimony? Could a video feed adequately communicate the unspoken tension in a courtroom that jurors might rely upon to inform their credibility determinations? In light of these questions (and innumerable others), a fair jury trial under our Constitution would seem to require the presence of an actual, rather than a virtual, jury.

A second major concern is that transplanting an Article III court to Guantanamo, without its jury, would risk delegitimizing the use of a federal court to prosecute criminal terrorists. The whole point of trying the alleged 9/11 plotters in federal court is that America's civilian courts, just as they are, remain the proper venue for these terrorist prosecutions. But holding a jury-less trial at Guantanamo—an offshore military base that is already the subject of much domestic and international opprobrium—would send the message that America's "normal" judicial process is not up to the task of handling criminal prosecutions of this gravity, a notion belied by our recent history¹³ and offensive to our rule of law tradition.

Finally, adopting Judge Young's proposal could lead Congress to enact even more stringent legislation precluding the prosecution of alleged terrorists in federal civilian courts. Bearing in mind the caveat that congressional intent is rarely as clear as it may seem, the nation's legislature, by explicitly forbidding the transfer of a named individual (i.e., Khalid Sheikh Mohammed) to the United States, has expressed a desire that KSM not be tried in any court other than a military commission at Guantanamo. Notably, however, recent attempts spearheaded largely by House Republicans to mandate trial by military commissions for any foreign national alleged to have engaged in certain terrorism-related conduct were defeated in conference with the Senate.¹⁴ But the jettisoned House language would only have applied to terrorists captured in the future, which would not have included the already-detained KSM.

13. See Kris, *supra* note 3, at 13-26.

14. Compare National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §§ 1031-46 (as passed by House, May 26, 2011) (containing the mandatory military commission provision in section 1046), with National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1027-34, 125 Stat. 1298, 1562-73 (2011) (omitting the mandatory military commission provision in the final bill). The mandatory military commission provision included in the House version of the 2012 National Defense Authorization Act ("NDAA") was initially introduced as an amendment by Republican Congressman Vern Buchanan of Florida. See Benjamin Wittes, *Legislative Update*, LAWFARE (May 27, 2011, 10:33 AM), <http://www.lawfareblog.com/2011/05/legislative-update/>. Similar language, introduced by Florida Republican Tom Rooney, has also been added to the House's version of the 2013 NDAA. See National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 1088 (as passed by House, May 18, 2012); Robert Chesney, *House Votes to Bar Civilian Trial of Persons Within Scope of Military Commission Jurisdiction*, LAWFARE (May 18, 2012, 5:45 PM), <http://www.lawfareblog.com/2012/05/house-votes-to-bar-civilian-trial-of-persons-within-scope-of-military-commission-jurisdiction/>. It remains to be seen whether this provision will survive in the final bill agreed to by both chambers.

Perhaps unwilling to refight the battles of two years ago, Congress has shown no inclination to retreat from its apparent view that KSM may only be tried by a military commission at Guantanamo. As a result, following through on Judge Young's plan, which could be viewed as an attempt to circumvent the will of Congress, might lead some legislators to harden their stance on civilian trials for alleged terrorists and propose even more disagreeable legislation to that end. This is not to say that creative solutions aimed at fortifying the rule of law in a post-9/11 world should be held hostage to the proclivities of intransigent voting blocs in Congress. Quite the opposite, in fact. But the likely political ramifications of Judge Young's proposal cannot be ignored, especially in an election year when few members of Congress may be willing to spend their political capital defending the need to hold KSM's trial in federal court.

Even though Judge Young's provocative suggestion should not be adopted in its current form, he has moved the conversation in the right direction. Continuing to think imaginatively about ways to preserve our rule of law tradition from external threats is immensely important, particularly in the context of national security crises. For it is when the rule of law can be so easily discarded that it must be most doggedly defended.