

Kennedy Questions:

Questions for the Honorable John C. Coughenour

1. Do you think that the protections provided by the Classified Information Procedures Act are sufficient to allow for effective prosecution of terrorists without revealing classified information?

I do. The Ressam trial gave me an opportunity to apply the protections of the CIPA in a high profile terrorism case and in my estimation, the Act required the court to take substantial precautions regarding a wide range of material, of varying degrees of sensitivity. While it is not for me to pass judgment on classification decisions, it was clear that the Government is granted a wide berth under the Act for anything that, in its discretion, it deems classifiable.

2. At the hearing, you stated that detaining individuals for preventative reasons without a trial is fundamentally “un-American.” Do you agree that the creation of a “national security court” in which there are lessened procedural protections for suspected terrorists could also pose a serious threat to American values?

Absolutely. The concerns I have about preventative detention are largely identical to those I have about a “national security court” with degraded procedural protections. Perhaps the fundamental tenet of our criminal jurisprudence is the presumption of innocence. The question you pose is whether we remain true to this commitment by presuming innocence with less than the full extent of our criminal process. I think not. When we hold the government to its constitutional obligation of avoiding unreasonable searches and seizures, or apprising suspects of their *Miranda* rights, or furnishing exculpatory material to the defense, we do so because these basic protections have been deemed inseparable from the presumption of innocence itself. Without them, “innocent until proven guilty” is but a platitude, and guilt may be nothing more than a *fait accompli*. When we are told that the threat of terrorism requires that we strike a different balance by withholding procedural protections long deemed necessary for “ordinary” crimes, it is another way of saying that suspected terrorists are presumed to be a little less innocent. Compelling as the need for public safety is and always has been, making this concession would betray our most fundamental of values.

3. Do you think that the creation of a parallel legal system with weakened protections for terrorism suspects would affect the public’s view of the judiciary, as well as the view of America’s judiciary in other countries? Is there a risk that the government would increasingly turn to the parallel track for more and more types of suspects and cases?

First, I think the kind of parallel legal system you suggest would negatively affect the American public’s view of the judiciary. The newly created institutions would be perceived as mere tools of the political branches, and the message we would send as to the current Article III courts is that they offend those other branches at their own peril. Second, based on my work on legal reform in Russia, I think a parallel legal system would irreparably damage the perception of America’s judiciary abroad. Russia, like so many countries today, is struggling to establish an independent judiciary after years of

authoritarian rule. My Russian colleagues marvel at how American courts enjoy the legitimacy they do without being beholden to political influence. The proposal you suggest would be seen for what it is: an abdication of principle for the sake of policy. Finally, I believe that sacrificing our constitutional ideals for the perceived exigencies of the moment would be a precedent that would be difficult to contain. You mention other types of suspects and cases; one might also ask why this practice could not spill out beyond the criminal law realm altogether. Once we decide that the solution to society's most challenging problems is to create new courts, the possible applications are virtually limitless.

4. How long would it take judges, prosecutors and defense attorneys to familiarize themselves with a new set of procedures that do not closely mirror those of either criminal or military courts, and how much of a trial-and-error period can reasonably be expected, particularly since the constitutionality of any such system would be vigorously contested?

Without knowing the exact nature of this new set of procedures, it is difficult to say. Frankly, change, in and of itself, is not the problem. Courts are constantly called upon to adjust to evolving circumstances. Whether it is new legislation from Congress, new interpretations of law or a changing landscape in which the law is applied, courts frequently have to make adjustments. The question you raise is how courts would cope with change of a more fundamental, systemic nature. I think there could be a significant trial-and-error period along with deleterious consequences. I say this not because I lack confidence in our judges, prosecutors and defense attorneys, but because asking those people to part ways with hundreds of years of accumulated experience and institutional knowledge could not be without a cost.

5. Do you think that we run the risk of weakening our existing justice system by creating a less rigorous alternative system?

I do. As I alluded to in Question 3, the first problem would be one of perception. If Congress sends the message that it lacks confidence in the courts we should be prepared for the public to reach the same conclusion. Secondly, I worry about a crossover effect between the parallel institutions you envision. Once we decide that our commitment to certain time-honored values is contingent and negotiable, it is difficult to see how those values could be upheld anywhere with the same rigor again. Institutions may be fractured and balkanized, but principles cannot.