Testimony of

# The Honorable John C. Coughenour

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"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"
Opening Comments by Judge John C. Coughenour
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Senator Leahy, distinguished members of the Committee, good morning and thank you for this opportunity to testify about terrorism and the federal courts. It is my firm conviction, informed by 27 years on the federal bench, that the United States Courts, as constituted, are not only an adequate venue for trying suspected terrorists, but also a tremendous asset against terrorism. Indeed, I believe it would be a grave error with lasting consequences for Congress, even with the best of intentions, to create a parallel system of terrorism courts unmoored from the constitutional values that have served us so well for so long. Before I explain how I arrive at this conclusion, I want to emphasize that I have great sympathy for those charged with the awesome responsibility of our national security. What I hope to convey in some small measure with my testimony today is that our leaders in the political branches need not view this as a choice between the existential threat of terrorism and the mere abstractions of a two hundred year old document. They need not mistake reliance on cherished values with complacency toward the new challenges of a dangerous world. After spending the greater part of my career on the federal bench, and having tried a high profile international terrorism case in my courtroom, I think the choice is better understood as follows: Do we want our courts to be viewed as just another tool in the "war on terror," or do we want them to stand as a bulwark against the corrupt ideology upon which terrorism feeds? I believe our choice must be the latter.

Let me begin with the question of competence. Detractors of our current system argue that the federal courts are ill-equipped for the unique challenges posed by terrorism trials. Objections of this kind frequently begin with a false premise. That is, some who argue that the federal courts are not capable of trying suspected terrorists support this view by citing various procedural and evidentiary rules that constrain the prosecutor's ability to bring or prove a case. The threat of terrorism is too great, we are told, to risk an "unsuccessful" prosecution. This assumes that courts exist to advance the prerogatives of law enforcement, and that convictions are the yardstick by which a court's "success" is measured. Such a notion is inconsistent with our constitutional separation of powers, under which courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court in the American sense.

This fallacy aside, the courts' detractors also raise some more legitimate concerns about whether judges have sufficient expertise over the unique subject matter of terrorism trials, and whether the courts can adequately protect the government's interest in preserving classified documents for future intelligence-gathering purposes. These concerns are not insurmountable under the system we have in place. The argument about expertise ignores the fact that judges are generalists. Just as they decide cases ranging from employment discrimination to copyright to bank robbery, they are also capable of negotiating the complexities of a terrorism trial. As for the protection of classified information, courts are guided by the Classified Information Procedures Act, which played a prominent role during the trial of the so-called "Millennium Bomber," Ahmed Ressam, in my courtroom in 2001. While I found the extensive precautions to be more than adequate in that case, I would submit that any shortcoming in the law can and should be addressed by further revision, rather than by undermining the institution of the judiciary itself. I would also add that courts are not insensitive to the compelling needs of the government in criminal cases, and apply existing law and procedure with deference to those needs. As Justice Robert Jackson once wrote, "the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events."

In fact, there is good reason to think that the courts are not only competent, but also uniquely situated to conduct terrorism trials. Their insulation from the political branches, accumulated institutional knowledge, and fidelity to legal precedent ensure that no matter which way the prevailing political winds blow, critical decisions pitting the interests of community safety against individual liberty will be circumspect and legitimate. I worry that with specialized tribunals for suspected terrorists, governed by a separate set of rules and procedures, we would create institutions responsive

to the perceived exigencies of the moment, upsetting the delicate system of checks and balances that deter abuse and promote faith in government. For example, if politically vulnerable actors start redesigning courts, can we say with assurance that popular pressure will not someday demand the admission of hearsay evidence, or statements obtained by harsh interrogation techniques? Might we see the day when counsel for the defendant cannot access information needed to mount a defense, or cannot appear at a defendant's behest without undergoing a background check of undefined scope? Such practices are not without recent historical precedent, and cannot be dismissed as mere paranoia once we peg our judicial institutions to the ebb and flow of public opinion. I also worry that special terrorism courts risk elevating the status of those who target innocent life. As I stated during sentencing of Mr. Ressam in 2001, "we have the resolve in this country to deal with the subject of terrorism, and people who engage in it should be prepared to sacrifice a major portion of their life in confinement." Implicit in my remarks was the message that despite the supposed grandeur of their aims, these people surrender their liberty just like any criminal who has earned society's opprobrium.

At the outset, I stated that the federal courts are not just capable of trying suspected terrorists; they are an asset against terrorism. At a time when our national security is so intimately linked with our ability to forge alliances and secure cooperation from countries that share or aspire to our fundamental values, we can ill afford to send the message that those values are negotiable or contingent. I recently returned from Russia, where I have worked over the past twenty years to promote judicial reform. The topic of this most recent trip was jury trials, and the five day seminar culminated in a mock trial conducted in the military court of Vladivostok. Serving as mock jurors were a group of Russian law students from Far Eastern University, no more than 19 or 20 years old, most with aspirations to be prosecutors in a system struggling to define a role for the courts that is independent from the state. That day, I felt that my ability to confidently share the virtues of our independent judiciary and Constitution with those who represent the future of Russia was more than a personal privilege; it was in our country's own strategic interest. I cannot help but wonder if I will be able to speak with the same authority on future occasions if we lose confidence in the very institutions that made us a model for reform in the first place.

With that, I welcome your questions.