

**JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE  
WESTERN DISTRICT OF WASHINGTON**

**APRIL 5, 2011**

**Subcommittee on Crime, Terrorism, and Homeland Security  
Committee on the Judiciary**

**Hearing on using military commissions to try the 9/11 conspirators  
Letter for the Record on behalf of the Constitution Project**

**UNITED STATES DISTRICT COURT**

WESTERN DISTRICT OF WASHINGTON  
UNITED STATES COURT HOUSE  
SEATTLE, WASHINGTON 98101  
(206) 370-8800

JOHN C. COUGHENOUR  
United States District Judge

March 29th, 2011

Dear Members of the Subcommittee on Crime of the House Judiciary Committee,

I am writing in response to a notice of hearing called by Chairman Sensenbrenner to be held on April 5, 2011 on the subject of using military commissions to try the 9/11 conspirators. I request that my letter be made a part of the record for this hearing.

I have earned my stripes on this topic. The case of Ahmed Ressam, aka the Millennium Bomber, involved months of trial, three trips to the Ninth Circuit, and one trip to the Supreme Court. In the years since, I have repeatedly argued that the use of military commissions to try these cases is a mistake. They have been slow and ineffective, resulting in only four convictions—and two of those defendants have already been released. They have the potential to elevate ordinary criminals to the status of symbolic warrior-martyrs. They are vulnerable to appeal and reversal. And they limit the willingness and ability of foreign governments to extradite suspects and provide us with evidence.

Supporters of military commissions point to the supposed problems with traditional Article III courts, but these are empty worries.

First, they tell you that a trial or sentencing in an Article III court is prohibitively expensive. The Marshal's Service informed me after the Ressam Trial that the total cost of security was under \$100,000. A large part of the opposition to Article III trials in the Southern District of New York is the notion that the city would be left with the tab. It is my understanding that the City of Los Angeles and the Los Angeles Police Department did not spend a dollar on security during the Ressam trial.

Second, they say that we cannot risk bringing these dangerous people to jails and prisons in the United States. But we already have hundreds of accused and convicted terrorists being held in federal prisons inside the United States, and there has not been a single instance where national security has been impacted by their presence in our Bureau of Prisons.

Next, they tell you that such trials will give a defendant an opportunity to spout hateful propaganda. But some of the most memorable moments in this conflict, when I have been most proud to be a judge, have been the showdowns between these men and the judges they face. Remember the words of Judge Bill Young, who closed his sentencing of Richard Reid with these words:

See that flag, Mr. Reid? That's the flag of the United States of America. That flag will fly there long after this is all forgotten. That flag still stands for freedom. You know it always will. Custody, Mr. Officer. Stand him down.

Or Judge Cedarbaum, who deflated the empty rhetoric of Faisal Shahzad, the Times Square bomber, with the simple request: "I do hope that you will spend some of the time in prison thinking carefully about whether the Koran wants you to kill lots of people." In a battle of wits, I think our federal judiciary can hold its own.

Fourth, Supporters of military commissions argue that Article III courts cannot protect sensitive information. Well that's just wrong. Authors of a recent report for Human Rights First, both of whom are former Assistant United States Attorneys, were unable to identify a single instance in which the Classified Information Procedures Act was invoked and there was a significant leak of sensitive information as a result of a terrorism prosecution in federal court.

The most distressing of the arguments against Article III trials is the notion that they might result in too many acquittals. Not only is this argument contrary to fact, it's contrary to our values. Since September 11, 2001, of the approximately 591 individuals charged in terrorism-related cases that have been resolved, only 9 were acquitted—a conviction rate between 98 and 99%. What is worse is that with these commissions, we would be creating a separate and unequal system of criminal justice. How would we make the threshold determination of which court system to try these people in? And who would make that determination?

*And why should the object of our criminal justice system be to secure convictions? The rule of law floats belly up when we abandon our constitutional promises the moment we do not like a defendant. A justice system that is designed to guarantee convictions is not worthy of the name. Justice Frankfurter wrote that "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." As Americans, we have been given a priceless heirloom by giants such as Justice Frankfurter. And those giants held on to that heirloom through thin times, times of poverty, and times of fear. What troubles me is that our generation is going to be the one to pawn it.*

Sincerely,

A handwritten signature in black ink, reading "John C. Coughenour". The signature is written in a cursive, flowing style with a large initial "J" and "C".

John C. Coughenour  
United States District Judge  
Western District of Washington