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INTERVIEW WITH EDWARD B. MACMAHON, JR.

Editor's Note

Edward B. MacMahon, Jr. was the lead defense attorney in *United States vs. Moussaoui*. The editorial board of the *Journal of the National Security Forum* spoke with Mr. MacMahon on April 1, 2011, about his experiences representing Moussaoui. An excerpt from that interview is printed below.

Q: How did you come to represent Moussaoui?

A: I was appointed by the Chief Judge of the U.S. District Court for the Eastern District of Virginia. He called me at my office and told me that he had a client for me. He told me I'd work with the public defender's office if that's what I chose to do, and that's how it all started. I had been the Chief Judge's law clerk for sometime before that.

Q: What was your first interaction with Moussaoui like?

A: If I remember correctly, we went downstairs. I had two great co-counsel—and later three—on the case. Frank Dunham, Jerry Zerkin, and Alan Yamamoto. Frank, Jerry, and I went down and met Moussaoui in the holding facility downstairs at the jail right before he was arraigned. He wanted to know who everyone was and why they were appointed. He didn't have our understanding of the American legal system. That's for certain.

Q: What was that conversation like?

A: I don't want to talk about things I discussed with Moussaoui. I still have a privilege. I haven't seen him in years, but he was not hostile. He was certainly inquisitive about what was going to happen, where he was, and who all the people were involved. He spoke English, which made things a lot easier.

Q: At the panel discussion you attended at William Mitchell College

of Law in 2006, you had said trying to ascribe a rational thought to Moussaoui was a challenge. What did you mean by that?

A: I think what I was saying, and it's only been heightened by dealing with other Muslim defendants in these kinds of cases, is that they don't think in the same way that normal American defendants do. Normal American defendants want to know how they get out of prison and avoid a serious sentence, much less a death sentence. Defendants like Moussaoui see these cases from a political prism, so they don't make the same kinds of decisions that a regular defendant does.

Q: How would you characterize your relationship with Moussaoui? Did it change over the course of representing him?

A: Oh sure. Early on, I would go see him in the jail. We'd talk and discuss various things. Eventually, within the space of a year or so, he elected to terminate us as his lawyers and never spoke to us again.

Q: What do you think caused him to do that?

A: It was purely a political statement on his behalf not to cooperate with the American legal system by taking lawyers or having anything really to do with it. He later regretted it. He at least claimed he did. I don't know if he really did or not.

Q: Why do you think he regretted it?

A: He moved to withdraw his plea after the trial. He claimed if he had known he was going to get a fair trial he would have done things differently. But that's just another one of his statements. You can credit that however you want.

Q: Do you think it would have been possible for him to get a fair trial?

A: The only issue that we tried was whether or not he'd be executed. The jury in the Eastern District of Virginia spared his life. I think that surprised him—and a whole lot of other people—that he got that fair of a trial.

Q: What was your state of mind, at the time, knowing you were representing someone so closely associated with 9/11?

A: Well we all knew it was going to be a controversial case, but I wasn't going to shy away from providing him a defense. The truth is nobody here in the court—the staff, the prosecutors, or the victims—ever said a cross word or challenged the patriotism or integrity of any of the people involved in the defense of this case.

Q: What was the biggest strategic challenge that you anticipated in representing Moussaoui?

A: Once he pled guilty, and essentially admitted that he was involved in 9/11 (which I don't think he was, but he admitted to it anyway), we had to come up with a strategy to defend the case. What do you do when your client pleads guilty and puts his head out there to get it chopped off? What are you going to do as a lawyer?

Q: What was your theory in the punishment phase of the case?

A: To tell the jury the truth. That he wasn't involved in 9/11, no matter what he said. He would have been a part of 9/11 if al Qaeda had invited him, but they didn't. And that they shouldn't execute anybody based upon their own lie. There were other issues. There were mental health issues as well. It was a complicated case in that sense.

Q: With all the publicity surrounding the case, how did you remain focused?

A: I didn't pay any attention to the publicity. I tell lawyers that it is a mistake, in a case where there is so much publicity, to worry about anything other than your job as a lawyer. We didn't give TV interviews or anything like that. It helps that the judges down here wouldn't tolerate it if we did. But I don't see that as part of a lawyer's function in a case, to be in press conferences and be a distraction.

Q: Did this experience strengthen or weaken your confidence in

the federal criminal justice system? Can al Qaeda defendants be tried in federal district court?

A: Most certainly they can be tried in federal district court. They have been tried here for years. I don't know anybody that's been involved in these processes that doesn't think they can't have these trials so long as there's the political will to hold them. My belief in the legal system is strengthened in that regard. We had tremendous problems getting evidence out of the CIA. The CIA committed perjury in the Moussaoui case, so in that regard it did not enhance my view of the criminal justice system when it bangs up against the intelligence community.

Q: How did the CIA commit perjury in the Moussaoui case?

A: The CIA submitted false affidavits as to whether they had recordings of the interrogations of enemy witnesses. They said there were none. It later turned out there were only seventy of them. There was a whole criminal investigation of that that just wrapped up recently. The government lied to itself. Nobody was prosecuted but there was an independent prosecutor assigned to the case. I assume they did a full investigation. I have no idea. They never asked me any questions about it. There was also a congressional investigation, where the CIA said the same thing to Congress about the tapes. The CIA actually destroyed the tapes once the subpoena had essentially been issued.

Q: In hindsight, is there anything you would have done differently?

A: No, I don't think so. I think everyone was very fortunate that Moussaoui got life because the reversal of a death penalty in his case would have been certain. It also would have been very expensive, time consuming, and probably would have resulted in another trial that would have put the 9/11 families through another round of stress that they didn't need.

Q: Why would reversal have been certain?

A: Because of the false statements made by the CIA in the case. The U.S. Attorneys withdrew the affidavits after the trial was over. It was plainly material to the case if he had gotten the death

sentence. You can't have a death penalty case in the United States where the government lies to the judge. You can't have that. Even in a terrorist case, I don't think we can have that.

Q: Would you have any further advice to lawyers representing al Qaeda defendants?

A: The most important thing, which isn't my specialty, is patience with the defendants. You have to try to help them understand that you're there to help them. There's such a cultural divide between people of that political or religious persuasion. I'm a Catholic boy. It's hard to find common ground to think of a way to work together. These defendants don't have the same outlook on life as you and I do. It's not a fair comparison by any means. From my experience, these guys—the committed ones—have a belief that their lives are preordained in such a way that if they're in a certain jail or in a certain place, then that's just God's will. Allah's will. It doesn't have anything to do with the lawyers or anything. That type of worldview makes it that much more difficult to represent them because they don't think there's anything you can do for them. Whatever happens to them is what's supposed to happen to them. If they win, they win because it's preordained. If they lose, they lose because it was preordained. There's certainly nothing an American infidel lawyer can do for them.

Q: So it seems as if they use the judicial system as a platform for political statements. Do you agree with that assessment?

A: It certainly has happened before. It also doesn't mean that we shouldn't give them a fair trial. There are lots of people that misuse the judicial process for their own personal reasons or political reasons. It doesn't mean we send them off to Guantanamo or have secret trials.