Government misconduct derails Moussaoui death penalty case

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After hearing evidence of gross misconduct by a government attorney in the death penalty trial of Al Qaeda supporter Zacarias Moussaoui, a federal judge issued a ruling to bar much of the testimony which the prosecution hoped to introduce into evidence.

Federal District Judge Leonie Brinkema rejected a defense motion to shut down the death penalty trial altogether and sentence Moussaoui to life imprisonment without parole. But in deciding that all testimony concerning aviation security should be stricken, Brinkema dealt a severe blow to an already shaky prosecution case.

The trial was halted Monday after the lead prosecutor, assistant US attorney David J. Novak, informed the court that an attorney for the Federal Aviation Administration had committed multiple violations of Judge Brinkema's instructions on the coaching of witnesses. The attorney, Carla Martin, was reported to Novak by one of the witnesses, Lynne Osmus, the FAA's assistant administrator for security and hazardous materials.

In direct defiance of Brinkema's instructions and normal procedure in a federal criminal case, Martin had discussed the progress of the trial in email exchanges with the witnesses, seven current and former FAA officials, supplying them with transcripts of testimony and her own comments on how the prosecution was handling the case. She also instructed the FAA officials not to talk to Moussaoui's lawyers, while informing the defense team that the FAA witnesses were unwilling to be interviewed.

At a special hearing Tuesday, with the jury not present, the seven FAA officials testified about their contacts with Martin during the previous month. While Judge Brinkema had on February 22 told all attorneys in the case —including Martin, who was in the courtroom at the time—that witnesses should not read about or watch news coverage of the case, she never communicated this to the FAA witnesses. On the contrary, she sent them emails about the day-to-day events of the trial, with transcripts of highlights attached.

The most serious violation came even before Brinkema's order, on February 14, when government lawyers informed the defense that three FAA officials subpoenaed as defense witnesses would not talk to Moussaoui's attorneys. At Tuesday's hearing, the three officials said they had not been informed of the subpoenas or the letter from the government announcing their refusal to speak to the defense. After hearing their accounts, Judge Brinkema said that Martin was responsible for "a baldfaced lie."

Martin herself appeared briefly in the courtroom. An angry Judge Brinkema told her she faced possible civil and criminal contempt charges and read her a version of the Miranda warning. She was then excused so that she could consult her own attorney, who later informed the judge that she would refuse to testify. Officials of the Transportation Security Administration, which includes the FAA, said that Martin no longer worked for the agency.

Some of Martin's emails to the FAA witnesses were highly critical of the prosecution, revealing sharp divisions within the Bush administration over the handling of the Moussaoui case. She denounced the opening statement by the prosecution, delivered March 7, saying that it "has created a credibility gap that the defense can drive a truck through." Her main concern, apparently, was that the argument that a warning from Moussaoui would have prevented the 9/11 attacks was based on exaggerated claims about the ability of the FAA to foil a hijacking.

Martin also called attention to a particularly egregious lie by an FBI witness, special agent Michael Anticev, who appeared as an expert on Al Qaeda. He reiterated the longstanding claim by Bush administration officials—voiced most notably by Bush himself and by Condoleezza Rice—that no one could have anticipated that hijackers would use a jetliner as a weapon. In cross-examination, however, Anticev admitted that the FBI had known of Al Qaeda efforts to fly hijacked planes into the Eiffel Tower and CIA headquarters outside Washington. Martin urged the FAA witnesses not to make a similar mistake, and made suggestions on how their testimony could strengthen the case for a death sentence.

Martin was not an incidental figure in the prosecution team, as some news accounts have suggested. She was a key participant in witness preparation and document searches. Brinkema said, "Her involvement in that portion of the case so taints everything she touched. How can any rational trier of fact rely on any representation she had made?' "

In remarks at the end of Tuesday's hearing, explaining her decision to bar all testimony by the FAA witnesses, Brinkema declared, "I cannot allow that kind of conduct to go without there being serious sanctions. It would likely turn the criminal justice system on its head." She added, "I don't think in the annals of criminal law there has ever been a case with this many significant problems."

Both Novak and defense counsel Edward McMahon argued for a different penalty for the misconduct. Novak said the excluded witnesses comprised "half the prosecution case," and asked the judge to let them testify, with wider latitude for cross-examination by the defense to reveal any possible effect of the coaching. McMahon asked for an immediate dismissal of the death penalty, pointing out that since four of the witnesses were sought by the defense as well as the prosecution, excluding them would penalize Moussaoui.

Brinkema recessed the trial until Monday to give Justice Department attorneys time to review their options. They are expected to appeal her ruling on the testimony of the FAA officials to the Fourth Circuit Court of Appeals, a largely conservative panel that has overruled a previous decision by Brinkema to sanction the Bush administration for its violation of procedural norms in the Moussaoui case

While there are elements of the bizarre and idiosyncratic in Martin's conduct, her actions cannot simply be dismissed as inexplicable. Her arrogance in ignoring the judge's instructions and what press commentators described as "law school 101" prohibitions against coaching witnesses is not an individual failing, but characteristic of the posture of the Bush administration toward considerations of legal norms and democratic rights.

Martin's actions, while the most flagrant example of misbehavior in the Moussaoui case, were by no means isolated. From the very beginning of the case, the Bush administration has sought to ram through a death sentence regardless of procedural and constitutional obstacles.

Brinkema first sanctioned the government in 2003, after the Bush administration refused to allow Moussaoui or his attorneys to question Al Qaeda operatives held in US custody at undisclosed overseas locations. This testimony was vital to Moussaoui's contention that he was not part of the plot which led to the terrorist attacks of September 11, 2001, but rather was to play a role in a second wave of attacks which never took place.

The judge ruled that the government could not introduce testimony about 9/11 or seek the death penalty if it refused Moussaoui access to this potentially exculpatory testimony. After this decision was overturned by the Fourth Circuit, Moussaoui's attorneys were left only with answers to questions they submitted in writing to the Al Qaeda prisoners, without the opportunity to question the witnesses directly.

After Moussaoui decided to plead guilty to terrorism charges, the court proceeding shifted to the penalty phase. The central difficulty faced by the prosecution in seeking the death penalty was that Moussaoui was arrested in August 2001, a month before the 9/11 attacks, and therefore could not be charged with any direct role in the terrorist actions.

Prosecutors argued a novel theory, that Moussaoui's concealment of his role as an Al Qaeda operative during the month after his arrest had contributed to the success of the 9/11 hijackings and therefore made him subject to the death penalty as a co-participant. Last week Brinkema suggested that the prosecution theory was close to a denial of Moussaoui's Fifth Amendment right against self-incrimination.

This prosecution's line of argument depended heavily on the aviation security witnesses, who were to testify to the procedures that would have been adopted at US airports if Moussaoui had told the FBI of a prospective hijacking plot involving teams of men armed with box cutters.

The prosecution argument was both legally weak and politically risky, because it raised the issue of what the intelligence agencies actually did in response to Moussaoui's arrest. While local FBI officials in Minneapolis pressed for a fuller investigation, citing Moussaoui's expressed desire to fly jumbo jets, and even speculated that he was a potential suicide hijacker, FBI headquarters rejected a request for authorization to examine the suspect's computer hard drive, which later turned out to contain the phone numbers and names of several of the 9/11 hijackers.

CIA headquarters was also informed of Moussaoui's detention on immigration charges, and the curious circumstances of his arrest after enrolling in a Twin Cities flight school, but took no action. CIA Director George Tenet was familiar enough with the case to cite it in meetings after the 9/11 attacks. But again, no action was taken, and Moussaoui remained in the custody of the Immigration and Naturalization Service, on a minor visa-related charge, until after 9/11.

Press coverage of the debacle now facing the Moussaoui prosecution has been virtually silent on this central aspect of the affair. The corporate-controlled media is careful to steer away from any evidence that suggests the Bush administration had sufficient information in its possession to forestall the September 11 attacks. The media seeks to suppress suspicions that the administration deliberately permitted the attacks to go forward—or even facilitated them—in order to provide a suitable pretext for unleashing its program of military aggression in Central Asia and the Middle East.