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Frank W. Dunham, Jr.
Federal Public Defender

February 25, 2002

ATTORNEY-CLIENT PRIVILEGED

Mr. Zaccarias Moussaoui
c/o Alexandria Detention Center
2001 Mill Road
Alexandria, Virginia 22314

Dear Mr. Moussaoui:

As you know, I have been impressed with your intellect and many of your insights with regard to the predicament you find yourself in. Many of our numerous conversations have been stimulating, at least for me, and despite the grim situation and our obvious cultural and religious differences, not without some humor. I have tried to listen, to learn, to be patient, to try to teach or explain in the areas where I believe I have knowledge superior to yours, to correct your misperceptions which are often not readily apparent, and have tried to reach agreement with you on how to proceed with the conduct of your defense. This has resulted in me spending much more time with you than I would normally spend with a client. Despite my efforts and the efforts of others, on February 14, 2002, you handed me a letter that you characterize as "formal notice" regarding your dissatisfaction with "the way my defense (sic) counsel operate." (A copy of your letter is enclosed as Attachment A for your records.) You then proceeded to identify the specifics with regard to your dissatisfaction.

Looking at the situation from my perspective, there seems a lack of gratitude for the extensive effort being undertaken on your behalf.[1] However, looking at it from your perspective, I

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[1] This is compounded by your failure to trust us up to this point with information critical to your defense. You claim you are innocent of involvement in the planning and execution of the 9/11 attacks on America. If you are truly innocent, your truthful explanations as to why you were taking "big plane" flying lessons and the identification of who it was that was funding your efforts would necessarily be consistent with the innocence you claim and inconsistent with government theories of 9/11 involvement. Even if the explanations are not explanations you want to share with the U. S. Government in open Court, they would help us in many other ways such as focusing investigative efforts and reviewing government evidence for loopholes, weaknesses, and/ or fabrications. The government's discovery in this case will be so massive that no one person will be able to read and digest it all before trial. You will have a trial team searching through the literal haystack provided by the government looking for the proverbial needle–without knowing that it is indeed a needle being looked for. Since you are not able to search through the material yourself given your conditions of confinement, the defense must do this search for you. I know you know this. It is my strong hope that at some point you will see the wisdom in confiding the information which is vital to your defense to counsel.

can understand why such a letter would be written. This letter seeks to not only respond to the specifics raised in your letter in a constructive way, but to also address other matters on which you have requested advice which has not yet been provided.

You have stated your desire to take the witness stand in the case and have inquired as to the consequences of refusing to answer questions logically related to the subject matter of your direct testimony (why you were taking flying lessons and who was paying for them and why). The enclosed memo from Gerry Zerkin (Attachment B) discusses the law on this point. Your reasons for taking flying lessons and the source of funding for those lessons are at the heart of any claim of innocence you might make through your testimony. Given the law, it seems it would be better not to testify at all than to have the jury told that your testimony has to be stricken because you refused to answer questions in this area. Also, not discussed by Mr. Zerkin but a real possibility once you have taken the witness stand and refused to answer proper questions is that the Court could permit the jury to draw adverse inferences from the failure to answer key questions, *i.e.*, that the answers would not be favorable to you. You need to carefully consider all of this before you make a final decision on whether you intend to take the witness stand but refuse to answer questions.

Also, before I begin to discuss the specific complaints in your letter, you should know that I have enclosed the memo we have talked about that addresses in detail what matters the client controls and what matters the attorney controls (Attachment C). In summary, the general rule is that the client controls such things as whether to waive indictment, whether to plead guilty or not guilty, whether to have a jury, whether to take the witness stand in your own defense, and whether to allocute at sentencing. Counsel controls matters of tactics and strategy, but with input from the client. When counsel and the client agree on tactics and strategy, there is no problem. We are striving for that agreement here. But, if there is disagreement, you are free to ask the Court to appoint different counsel for you. Because new counsel would probably see the control issue exactly the way we do and as would the Court, it is extremely doubtful in my opinion that the Court would give you new counsel, especially given the extraordinary efforts current counsel are investing in the case.

You also have a right (which I know you do not recognize) to proceed *pro se* (represent yourself), provided the Court finds you competent to proceed in such manner. However, you would have to make a motion seeking permission to do so, something I understand your religion precludes. Should you decide that your religion permits you to file a motion to proceed *pro se*, the earlier you do so the more likely it will be granted. It is probable that if you were to assert the right, the government would file a motion asking for a competency evaluation at a government mental health facility. I expect that the Court would grant that motion. We would continue to act as your counsel until that study was completed and a competency determination made. I have my doubts as to whether you would be able to represent yourself in a case such as this because the conditions of your confinement effectively preclude your ability to prepare your own defense. Your inability to see classified discovery because you have no clearance and your inability to see all of the non-classified discovery because of how you are being detained and the sheer volume of the material (it is just too much for one person to review it all) are examples of critical preparation

tasks which you are unable to perform and which must be performed by whoever is going to try the case for you.[2] I hope the enclosed memo is clear and to the extent that it is not, please feel free to pursue follow-up questions with me.

If you file a motion requesting permission from the Court to proceed *pro se* and it is granted, the Court may or may not appoint standby counsel. Judge Brinkema would most likely appoint standby counsel, and it would probably be the lawyers you now have–and they would be expected to prepare independently to try the case in the event you changed your mind and suddenly wanted counsel. They would also provide you legal advice to aid in your preparation. They would not, however, be your messengers or your errand boys and they would no longer deal with issues related to the conditions of your confinement because they would no longer be representing you.

Your letter says that on January 30, 2002, you formally dismissed Mr. MacMahon and Mr. Zerkin as your lawyers. As I subsequently advised you, Mr. Zerkin works for me, I run my office, and that Mr. Zerkin would continue to work on your case as long as my office was involved in it. You accepted that with the understanding that the mitigation portion of the case for which Mr. Zerkin is principally responsible would never take precedence over preparation of the defense to the guilt phase of the proceedings. As for Mr. MacMahon, I advised you that you had not fired him since it is not within your prerogative to do so–the Court hired him, so the Court makes the decision on whether or not to fire him after receiving a motion from you requesting this relief. I advised that Mr. MacMahon was obliged to continue to work on your case until the Court relieved him of that responsibility. Rather than take the matter to the Court by motion, you agreed that Mr. MacMahon could continue to work on the case provided that he agreed to take no action that was not agreed to by other counsel in the case. Subsequently, you asked for a letter from Mr. MacMahon to confirm this understanding and one of your recent complaints is that you had not received the letter. A letter from Mr. MacMahon is enclosed herewith as Attachment D. I trust this resolves any dissatisfaction you may have on this issue.

You suggest in your letter that we have an agreement "not to undertake any *move* without [your] consent." (emphasis added). While I disagree with your statement as written, I hope that our apparent disagreement is no more than a matter of semantics. While I did agree to discuss certain actions with you before undertaking them, we never agreed to make "no move" without your consent. Such an agreement would virtually paralyze our ability to function. Every day, all of us on the trial team make necessary but relatively insignificant "moves" relating to your defense. Many have to be made on the spot, without opportunity for consultation. Most are of little importance to overall strategy.

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[2] We would like to remedy the situation of your inability to look at the discovery, including the classified discovery, by filing a motion to compel the government to modify your conditions of confinement to allow you to see discovery material. As we discuss elsewhere in this letter, you object to the filing of any motions on your behalf on religious grounds.

I think a more accurate description of our agreement is that it is a broad understanding where matters or moves of significance (an action which carries with it readily foreseeable potential for prejudice to you) will be discussed with you in advance before they are undertaken. Then, if you disagree with a significant action we propose to take or not take, and it is one we feel compelled to take whether you agree or not, you will have time to seek removal of your counsel before the action is taken.[3] So far, when we have had disagreements, I have deferred to your wishes. This is not because I have agreed to always do so–or because I have always come to agree with your decision after initial disagreement. I have deferred frequently because my views were not so strongly held that it was worth inflicting the harm to our relationship that going against your wishes might entail. My guess is that most of our disagreements will be resolved in this manner. But, make no mistake. If my views on a particular matter are strongly held, and the decision is within the realm of counsel's responsibility, I have not agreed to defer to you in all such instances. All I have agreed to do is inform you in advance with regard to any significant matter of my intent to act contrary to your wishes. The potential for problems, of course, arises in that gray area where the line between significant and insignificant moves is drawn and on which side of that line to place certain "moves." We will just have to work with each other on this because there is no way to make the line a bright one.

Another specific complaint you have is with regard to your assertion that investigators were dispatched to the PANAM school (part of the Minneapolis field investigation) without informing you. First, my recollection is that we had a conversation in which you approved proceeding with investigations within the United States. That conversation, I believe, preceded both the Norman and Minneapolis field investigations. Second, the Minneapolis investigation was discussed with you before investigators were dispatched, while they were there, and after they returned. You never said that we should not be conducting investigations in Minneapolis until your recent letter. Indeed, we have a duty to conduct our own independent and thorough investigation of the facts of the case and were required to conduct a field investigation in Minneapolis even over your objections, but you never objected. I was remiss, however, in not going over the final Minneapolis investigative plan with you before the team departed because you may have been able to provide valuable input beyond what you had already provided. Further, I should have advised you in advance that the team was leaving. I will try to do better in the future.

Still, another of your complaints is that your request for a Muslim lawyer on the defense team has been ignored. We need to break that down in order to address it. It is important to distinguish between the concept of "Muslim lawyer" and the concept of "expert in Islamic law." As to the former, we did not ignore your request, but instead made inquiries with regard to whether there was a Muslim attorney licensed to practice in the United States who was willing to be a member of the defense team in this case. Keep in mind that as an indigent defendant you are not entitled to select your own attorney or demand one of a particular religion. Had we located a

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[3] An ongoing area of disagreement is whether any pre-trial motions should be filed on the date set for doing so. You have imposed a blanked prohibition on religious grounds against the filing of such motions. You have some mistaken belief that the Court will allow you to raise these motions at the time of trial. Please see Mr. Zerkin's memo at Attachment E.

attorney licensed to practice in the United States, there is no guarantee that the Court would have appointed him to the case. Nevertheless, substantial inquiries were made but they were rejected by identifiable candidates. When you were advised of this some time ago, you stated "never mind about that, you'll never find anyone who will do this after September 11." We ceased our efforts in that regard at that point, sharing your conclusion. As a result of your letter, we have resumed the search.

However, if you are talking about an expert in Islamic law who could testify at trial, we have been continuously looking for such a person. The only one we have found so far is Dr. Jon E. Mandeville. (See his letter which is Attachment F.) I understand from conversations subsequent to your letter that you have rejected him for this role.[4] The bottom line is that your requests in this area have not been ignored.

Finally, I have agreed to provide, indeed I have already begun to draft, a document which will be used by you and I to strategize for the trial and by you to follow the trial as it unfolds to assure you that the strategy is being followed. What I have in mind for this document is different, in my mind, from the literal generic description in your letter. Hopefully, this is, again, a mere matter of semantics. Rather than engage in a debate over the generic description of a hypothetical document, let us work together on its creation and define what it should include and the level of detail to which it should descend as we create it. We may have no differences – or we may have significant differences, but let's wait until we have a specific, concrete difference before we begin to disagree.

Very truly yours,

Frank W. Dunham, Jr.
Federal Public Defender

FWD/jlr
Attachments: As Stated

[4] Mandeville may still be able to provide valuable assistance behind the scene in locating a witness that is suitable to you, but we will not be using him as an expert at trial.