

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)
)
) Case Number 02-51-M
V.) Judge Sewell
)
)
JOHN PHILLIP WALKER LINDH)

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MEMORANDUM IN SUPPORT OF RELEASE
AND GOVERNMENT'S PROFFER IN SUPPORT OF DETENTION

By each of the critical factors that governs detention, John Phillip Walker Lindh should be detained pending trial. He poses a grave risk of flight and an equally grave danger to the community. Defendant's claims - that Lindh has no history of violence or dangerous conduct, shows no tendency to violence, had no intent to harm anyone and is a safe bet for release to his parents - is entirely belied by the facts alleged in the affidavit, by the indictment now before the Court, and by the additional evidence proffered in this memorandum.

Several preliminary points should be made:

First, Lindh has now been indicted. That indictment charges Lindh with 10 felony counts, including three counts - Conspiracy to Murder U.S. Nationals (Count One), Conspiracy to Provide Material Support & Resources to a Foreign Terrorist Organization (Count Four), and Providing Material Support & Resources to a Foreign Terrorist Organization (Count Five) - that carry a maximum penalty of life in prison. In addition, Count 10, which charges Lindh with Using and Carrying Firearms and Destructive Devices During Crimes of Violence, carries a 30 year mandatory minimum sentence. Thus, any assessment as to the risk of flight posed by release of the defendant must proceed from the recognition that Lindh, if convicted, faces the prospect of spending the rest of his life in prison.

Second, defense counsel devotes much of his argument to criticizing the Government's reliance on the sworn affidavit of an FBI Special Agent. Putting aside the fact that this is the type of evidence that courts rely upon day in and day out to make detention arguments, we now have a grand jury indictment that has been returned in this matter. That indictment reflects a probable cause determination by a federal grand jury on a range of very serious felonious conduct, including several crimes not charged in the Amended Complaint.

Third, Count 10 of the indictment charges Lindh with Using and Carrying a Firearm and Destructive Devices During Crimes of Violence in violation of Title 18 U.S.C. Section 924(c). That makes this a "presumption" case under Title 18 U.S.C. Section 3142(e), which reads in pertinent part as follows: Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed * * * [one of several named offenses including] section 924(c)....

When this "presumption" of detention is coupled with the fact that Lindh is also charged with three potential life offenses, including Conspiracy to Murder U.S. Nationals, there is no question that he cannot rebut the presumption of detention.¹

As further described below, each of the four principal factors to be considered in making the detention determination, see Title 18 U.S.C. Section 3142(g), argue for detention:

Nature and Circumstances of the Offense Charged

Title 18 U.S.C. Section 3142(g) states that the judicial officer shall consider, among other factors, the nature and circumstances of the offense charged, including whether the offense is a crime of violence. Here, Lindh is charged with multiple crimes of violence, specifically, Conspiracy to Murder United States Nationals, Conspiracy to Provide Material Support and Resources to al Qaeda, Providing Material Support and Resources to al Qaeda, Conspiracy to Contribute Services to al Qaeda, Contributing Services to al Qaeda, Conspiracy to Supply Services to the Taliban, and Supplying Services to the Taliban.

The circumstances of the offense also argue for detention: Lindh is accused of leaving his country of birth and citizenship, the United States of America, and joining a foreign terrorist organization, al Qaeda, whose stated goal was to kill Americans.² Toward accomplishing the objectives of al Qaeda, Lindh underwent rigorous training in explosives, weaponry and the other arts of terror, and then took up arms as a front line soldier for al Qaeda. Even after learning of the horrific events of September 11 - and with full knowledge of al Qaeda's and Usama bin Laden's complicity in it and their determination to engage in future acts of terror - Lindh did not flinch from his devotion to al Qaeda's cause. Rather, he continued to man the front lines as an al Qaeda soldier. Even the United States' entry into the war did not cause Lindh to abandon al Qaeda. Rather, along with his fellow al Qaeda members, he continued to serve on the battlefield against the Northern Alliance and its ally, the United States. One can scarcely imagine a more profound betrayal by an American citizen.

The defense would have this Court believe that Walker's participation in military activity was passive, as if he was some sort of camp follower. In statements Walker made to United States military personnel, however, Walker stated that he wanted to be a martyr, that he had fought in the Kabul, Taloqan and Kunduz areas of Afghanistan, that after his unit was informed of the bombing of the Twin Towers and the Pentagon on September 11, 2001, they were ordered to dig bunkers and trenches because the American bombers would soon be arriving.³ When Lindh was questioned about several of the terrorist incidents which had occurred, specifically the bombing of the USS Cole and the September 11 terrorist acts, he stated that incidents like these happen in war. He also stated that he agreed with the bombing of the USS Cole and stated that the Pentagon was a good target.

The Weight of the Evidence

Defense counsel characterizes the evidence against their client as "slim." It is nothing of the sort. The Government's case against Lindh includes numerous statements he made to military personnel, to the FBI, and to the media.⁴ Each of these statements are very incriminating and consistent throughout: they establish conclusively that Lindh was a willing and eager participant in al Qaeda and its goals. They also establish that Lindh was well aware of the fact that after September 11th, the United States entered the military conflict in Afghanistan and that Lindh was now fighting in opposition to both the Northern Alliance and the United States and that it was his intent to commit "Shaheed," in other words, to die while fighting the enemy. Even Lindh's statements to non-government entities are incriminating: On or about December 1, 2001 - after months of service as an al Qaeda soldier and shortly after the QIJ prison uprising in which Johnny Micheal Spann was killed - Lindh told CNN that his experience had been "[e]xactly what I thought it would be."

But it is not just his statements that incriminate Lindh. It is also his presence among his fellow al Qaeda fighters who were taken into custody at the end of November 2001, his refusal to cooperate with U.S. authorities even when questioned alone at the QIJ prison compound, his remaining with his fellow al Qaeda fighters for almost a week after the uprising, and an array of corroborating evidence to support Lindh's statements to the FBI.

Defendant's response to all of this is to claim that Lindh's statements were taken in violation of Miranda and are involuntary. A detention hearing is, of course, neither the time nor the setting in which to

argue the admissibility of Lindh's statements. See, e.g., *United States v. Acosta*, 769 F.Supp. 184, 186 (E.D. Pa. 1991) (suppression objections may not be raised at detention hearing), *United States v. Winson*, 785 F.2d 755, 756-757 (9th cir. 1986) (district court's refusal to allow defendant to delve into validity of arrest and likelihood of success on suppression motion did not violate due process), and *United States v. Pasciuti*, 958 F.2d 361, 1992 WL 51482 at *6 (1 st cir. 1992) (unpublished) (district court not required to turn bail revocation hearing into motion to suppress hearing).

Having said that, the Government does expect that if and when the defendant properly raises the suppression issue, the Government will fully satisfy the Court that the Lindh's statements were both voluntary and in full compliance with *Miranda*. Before leaving this matter, one additional point should be noted. Defense counsel would have this Court believe that the defendant was essentially deprived of food and medicine prior to his FBI interview. That is not true. We proffer to this Court that after the uprising was suppressed and Lindh was recognized as an American and taken into the custody of the United States military, he was given medical treatment, food and water. He was examined and treated regularly by a United States military physician, his wounds were dressed and changed repeatedly, he was administered antibiotics as well as pain killers, and he was even given a tetanus shot. Moreover, contrary to the defendant's claim that he was given minimal food, military records for December 5, 2001 indicate that "[p]atient has been eating three MREs [Meals Ready to Eat] per day with plenty of water" and that his "[s]trength continues to improve."

The History and Characteristics of the Person

Among other factors, Title 18 U.S.C. Section 3142(g)(3)(A) states that the judicial officer shall consider the person's character, family ties, employment, financial resources, and community ties. Each of these factors argue for detention⁵:

* Lindh abandoned his country and his community. He left the United States at the beginning of February 2000 and, despite repeated entreaties from his family to come home, he refused to do so. For example, in a March 1, 2001 email, he told his mother that he was "busy in my studies and I have no intention of interrupting them for any reason in the near future. When I went to Yemen the first time, you demanded my return before I was able to complete my goal of learning Arabic. After returning, I wasted about 9 months in America in which I achieved nothing and forgot much of what I had learned while in Yemen." For another example, in an April 5, 2001 email rejecting another request from his mother for him to come home and visit, he told his mother: "I came here to Pakistan for a specific purpose. I don't intend to leave Pakistan until I finish what I came here for, just as I didn't leave Yemen until I finished what I went there for." At the time of Lindh's detention, he had been gone from the United States for approximately 22 months.

* Lindh repeatedly expressed what can only be termed a hostility toward his country of birth and citizenship. In a September 23, 1998 letter to his mother, he suggests that the "two bombings in West Africa" - an apparent reference to the August 1998 East Africa bombings of U.S. embassies in Nairobi and Dar es Salaam - "seem far more likely to have been carried out by the American government than by any Muslims." In an undated letter to his family, which was probably sent in October 1998, he writes: "Although I'm not particularly fond of the idea of returning to America, I do have a four month vacation in about six months. This means that you'll probably be seeing me again before you had expected." In a February 15, 2000 email to his mother, he suggests that she move to England: "I really don't know what your big attachment [sic] to America is all about. What has America ever done for anybody?" In a June 24, 2000 email, he advises members of his family that it was the United States who incited the Gulf war and that Saddam Hussein was "heavily encouraged" by an American official to invade Kuwait. Following the bombing of the USS Cole in October 2000, he sent an email to one or more members of his family, which provoked the following response from his father: "I confess I was taken aback somewhat by your lack of compassion for the Americans, who after all are only young people your own age who happened to have taken a job that involved being on a Navy ship." In a December 3, 2000 email to his mother, he refers to the President of the United States as "your new president" and adds: "I'm glad he's not mine." In a January 8, 2001 email to a family member, he states: "... it doesn't make much difference to me whether the Western media reports on the Muslim world or not, because even if the American public knew the reality of

what occurs here, they wouldn't care enough to do anything about it." In a February 8, 2001 email to his mother, he states that if an Islamic state is ever established in Yemen he would like to build a house there, get married, and establish his headquarters in the mountains. In the same email, he states that while it "may be [a] good option" for him to return to America to visit his family, "I don't really want to see America again...." In the last email he sent to his family before entering the HUM training camp, he discussed family life in Pakistan and said it "really makes me look upon American society with pity."

* Lindh broke off contact with his family in late April 2001. In what appears to be his last email to his mother, dated April 27, 2001, he told his mother he was headed off to "some cold mountainous region." In fact, within just a few days, he was headed off to join the terrorist group, HUM, and then, subsequently, al Qaeda. Lindh's mother tried repeatedly to locate him, without success. Lindh's parents now seek to be entrusted with the responsibility for ensuring that Lindh does not flee and does not pose a danger to the community. Given Lindh's past behavior, however, there is every reason to believe that Lindh cannot be trusted to obey either the orders of this Court or to accept the authority of his parents.

In summary, Lindh has no community ties, his last fixed address was a terrorist training camp in Afghanistan, and he broke off family contact last April. There is nothing in this litany that would suggest that there are any conditions of release that will reasonably assure his appearance in court and the safety of others.

Nature and Seriousness of the Danger Posed by Release

As the indictment alleges, Lindh has sworn his allegiance to jihad. He was committed to being a martyr. He joined a group, al Qaeda, involved in the worst act of terrorism in United States history. Lindh's commitment to his cause can hardly be questioned given his active participation as a front line al Qaeda soldier in Afghanistan.

Almost a year ago, Lindh made his decision to engage in combat on behalf of terrorist organizations. Toward that end, he left his studies and joined the HUM and was trained to engage in violence. When that did not satisfy him, Lindh left the HUM camp to travel to Afghanistan to join another terrorist camp. It was at this camp, and other like it, that the most dangerous criminals in history have been trained to commit the most heinous acts imaginable. Lindh left that camp as a fully trained terrorist fighter, intent on engaging in Jihad even if it meant sacrificing his own life. Having been trained in weaponry and explosives, he took up shoulder weapons and hand grenades, the only purpose of which was to kill.

Lindh was, and remains, an ever present danger to his community and to the citizens of this nation.

WHEREFORE, the Government respectfully requests that the defendant be detained pending trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served by hand the foregoing pleading, this 6th day of February, 2002, on one or more of the following attorneys: James J. Brosnahan, George C. Harris, Tony West, Raj Chatterjee, or William Cummings.

Randy I. Bellows