

Defense reveals government conspiracy to deny John Walker Lindh access to counsel

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Attorneys for John Walker Lindh filed papers last week in the United States District Court for the Eastern District of Virginia documenting the US government's illegal interference with their client's constitutional right to legal counsel. The young man from northern California was captured last November with a group of Taliban fighters in Afghanistan. He faces charges of conspiracy to commit murder and aiding terrorist organizations. His defense team's submission detailed the government's role in preventing him from consulting the lawyer his parents had hired to represent him.

In December, FBI agents extracted a written waiver of Lindh's constitutional rights to remain silent and to consult an attorney, and then interrogated him for two days. They were, however, only able to do so after subjecting Lindh to a week of military interrogation, denying him access to the lawyer who was desperately trying to reach him, lying to him about the availability of legal counsel, and subjecting him to mistreatment bordering on outright torture.

The agents' "summaries" of the FBI interrogation sessions—there are no tapes or transcripts—are believed to form the cornerstone of the prosecution's case. The defense is seeking court orders to force the government to turn over evidence concerning the circumstances under which Lindh supposedly waived his right to remain silent and have legal representation. The evidence can then be used to demonstrate that the waiver and the ensuing statements were not "voluntary." If so, the law would require that they be excluded from the evidence at trial.

The rule that the Fifth Amendment protection against self-incrimination includes the absolute and unfettered right to consult an attorney before submitting to police questioning was established by the landmark decision in *Miranda v. Arizona*. While the Sixth Amendment's provision for the right to counsel in criminal cases does not apply until a criminal case is filed (that occurred five weeks after Lindh's FBI interrogation), the Fifth Amendment's guarantee of the right to remain silent includes the right to consult an attorney before agreeing to make any statements, and to have counsel present during the interrogations themselves.

The *Miranda* decision itself has been under attack by right-wing judges. But in June 2000 a polarized Supreme Court upheld the rule 7-2. [See Ruling upholds Miranda rights: deep divisions on the US Supreme Court]

The defense discovery motion is seeking the release of 33 email transmissions between US Justice Department officials generated from December 7 to 20, 2001. The first half of this two-week span is particularly significant.

On December 7, Lindh's American captors took him from an as yet unknown location near Mazar-i-Sharif to Camp Rhino, where they stripped him naked, shackled and blindfolded him, and then fastened

him to a gurney with duct tape, which in turn was placed inside an unheated metal shipping container. He remained there for three days covered by a single blanket, unable to sleep and suffering from untreated bullet and shrapnel wounds in his leg. He was taken out on December 9 and 10 for the FBI interrogations, and then returned to the container.

Lindh remained at Camp Rhino, housed in the metal container, until he was transferred to the USS Peleliu on December 14, where he finally received surgical treatment for his wounds.

In support of the discovery motion, the defense attorneys submitted letters from Lindh's lawyer to the government as well as those from Lindh's parents to their son, who was among the handful of prisoners to survive the US-led massacre of captured Taliban and Al Qaeda fighters at the Qala-i-Janghi fortress. From November 25 to December 1 more than a thousand young men trapped inside a nineteenth century fortress were slaughtered by Northern Alliance troops under the command of the notorious General Abdul Rashid Dostum, backed by US special forces and an intensive US bombardment. Wounded in the leg, Lindh survived by hiding in a basement. News of the young American prisoner broke on December 2, when CNN obtained a videotape of a hospital bed interview conducted by Robert Pelton.

Lindh's father is a corporate attorney for Pacific Gas & Electric, one of California's largest public utilities. For his son's legal representation, he and Lindh's mother retained James Brosnahan, a senior partner in Morrison & Foerster, one of the world's largest law firms, with 1,000 lawyers in 18 offices worldwide. Brosnahan is highly regarded as a trial lawyer and regularly appears on lists of California's most influential attorneys.

Brosnahan also has a reputation for acting on his principles. Despite the potentially adverse effect on his firm, in 1986 Brosnahan testified in Congress against the appointment of William Rehnquist as chief justice of the United States, explaining that in the 1960s he saw Rehnquist interfere with Latinos attempting to cast their votes in an Arizona election.

Brosnahan later gained national prominence on the staff of Independent Counsel Lawrence Walsh as the lead prosecutor of former Secretary of Defense Caspar Weinberger for Weinberger's role in the Iran-Contra conspiracy. After Brosnahan secured Weinberger's indictment, then-President George H.W. Bush, the father of the current president, issued a lame-duck pardon.

Lindh's parents had every reason to believe they had retained a lawyer with sufficient clout to reach their son and provide him with top-flight legal advice. On December 3, Brosnahan faxed a letter to Secretary of State Colin Powell, Attorney General John Ashcroft, Secretary of Defense Donald Rumsfeld and CIA Director George

Tenet, introducing himself as Lindh's lawyer, and stating:

"Because he is wounded and has been through emotional turmoil, his parents are most anxious to meet with him. As his lawyer, I am most anxious to meet with him and request that you have an appropriate government official contact me as soon as possible to make suitable arrangements.

"Because he is wounded and, based upon press reports, went for three days without food, I would ask that any further interrogation be stopped, especially if there is any intent to use it in any subsequent legal proceedings."

Receiving no reply, the next day, December 4, Brosnahan wrote again: "His parents and I would like to visit with him as soon as practical and would ask the Defense Department to supply us safe passage to his location.

"I would ask that no further interrogation of my client occur until I have the opportunity to speak with him. As an American citizen, he has the right to counsel and, under all applicable legal authorities, I ask for the right to speak with my client as soon as possible."

Also on December 4, Lindh's father wrote the following note on a Red Cross form for delivery to his son:

"Dear John,

"I hope you recognize my handwriting. Mama and I love you very much and are trying to find out where you are being held. I have retained a lawyer to help you. Please ask the US authorities to allow me, Mama and the lawyer to come visit you as soon as possible. I hope you're feeling OK."

"Love, Papa."

On December 5, still having received no reply, Brosnahan wrote again, urging that "we have a conversation today."

Brosnahan received no response. The military did not allow the Red Cross to deliver the father's note for over a month. The Bush administration not only denied Lindh his right to consult an attorney, it also evinced a lack of common decency, keeping Lindh's parents in the dark about their son's condition and blocking them from comforting their 20-year-old child.

Aside from the interview broadcast on CNN, the only word Lindh's parents received at that time was a brief note Lindh dictated to a Red Cross official on December 3, which was faxed to the parents on December 11.

On December 13, having heard in press reports that FBI agents were interrogating Lindh in Afghanistan, Brosnahan sent his fourth letter. The lawyer wrote: "John has been in custody for twelve days, and the government has known since at least December 4 that he is represented. John should not be asked to waive any rights without having been given access to counsel.

"We respectfully request that the government immediately refrain from further interrogation of John Lindh, inform him that his family and his counsel wish to see him and provide him access to his parents and me. We are prepared to travel to Afghanistan or wherever that access can be provided. I anxiously await your response and your assistance."

Finally, on December 14—the day Lindh was transferred from the metal container at Camp Rhino to medical quarters on the USS Peleliu—Brosnahan received a response to his letters from an attorney for the Department of Defense. It said only the following:

"I can inform you that John Walker is currently in the control of United States armed forces and is being held aboard USS Peleliu in the theater of operations. Our forces have provided him with appropriate medical attention and will continue to treat him humanely,

consistent with the Geneva Convention protections for prisoners of war."

There is not a word of truth in the second sentence. Lindh had been waiting almost two weeks for the necessary surgery to remove the bullet and shrapnel from his leg, and the Geneva Convention prohibits both interrogations and the type of barbaric treatment Lindh received at Camp Rhino. The Defense Department letter, moreover, ignores Brosnahan's request to communicate with Lindh.

Brosnahan continued writing to government officials, vainly seeking access to his client. He finally was allowed to meet with Lindh on the morning of January 25, shortly before Lindh's first court appearance and 54 days after Brosnahan first requested a meeting.

At the January 15 press conference announcing the filing of criminal charges against Lindh, Attorney General John Ashcroft brushed aside concerns over the government's interference with Lindh's right to counsel, stating that "No other individual has a right to impose an attorney on him or to choose an attorney for him." Of course, Ashcroft did not explain that Lindh was not given a choice because the government kept him incommunicado and unable to learn that his parents had retained legal counsel for him.

The next morning, Ashcroft appeared on the "Good Morning America" television program and said, "Walker not only indicated that he didn't want an attorney when informed orally, he indicated, when informed again in writing, that he didn't want an attorney. And he signed a waiver to that effect." Ashcroft did not add that when Lindh earlier asked for an attorney, he was told none was available, and that Lindh suffered through three days of agony and sleep deprivation in the metal container at Camp Rhino before he "indicated he didn't want an attorney."

Another recent defense discovery motion highlights a different problem with the prosecution's case against Lindh. The indictment alleges that Lindh trained as a terrorist at "the al-Farooq training camp." On March 18, however, the *New York Times* published a report based on thousands of documents collected after the fall of the Taliban. According to the military authorities who reviewed the material, the al-Farooq camp did not provide "terrorist" training at all, but rather basic military training for raw recruits such as Lindh who were assigned to the ongoing ground war against the rebel Northern Alliance. Lindh's lawyers are requesting that the documents and the opinions of the military experts be turned over for use as evidence in the case.

The prosecution's response to the defense discovery motions are due this Friday. The trial court has set a hearing on pretrial discovery for Monday, April 1.



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