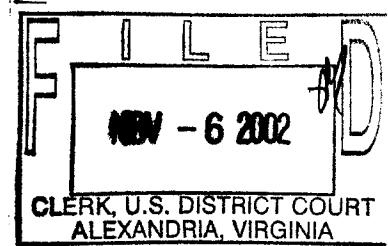


~~UNDER SEAL~~

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



UNITED STATES OF AMERICA)
)
 v.)
)
 JOHN PHILLIP WALKER LINDH)

Criminal No. 02-37-A

~~EX-PARTE and UNDER SEAL~~

Unsealed 5/12/04

ORDER

On March 1, 2002, the government filed an *ex parte* and under seal motion for a protective order, pursuant to Rule 16(d)(1), Fed. R. Crim. P., requesting authorization not to disclose to the defense twenty-seven documents submitted to the Court for an *in camera* review. Specifically, the government argued that such documents were (i) protected by the attorney-client, work-product and deliberative-process privileges and (ii) not subject to disclosure under either Rule 16, Fed. R. Crim. P. or *Brady v. Maryland*, 373 U.S. 83 (1963). By Order dated March 4, 2002, the government was directed to provide to the defense certain specific information concerning each of the twenty-seven *in camera* documents, particularly: (i) the names and positions of the authors and addressees of the documents; (ii) the names and positions of any individuals who received copies of the documents; (iii) the dates of the documents; and (iv) the basis for the objections to production of the documents. *See United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Mar. 4, 2002) (Order). The government was not required to disclose to the defense the contents or subject matter of the twenty-seven documents. *See id.*

The following week, on March 11, 2002, the government submitted six additional documents for *in camera* review and moved for modification of the March 4, 2002 Order, arguing that to provide the defense with the information required by the Court would, in and of itself, cause

disclosure of privileged information. By Order dated March 15, 2002, the government's motion for modification was denied and the government was ordered to comply with the disclosure requirements set forth in the March 4, 2002 Order with respect to the six additional *in camera* documents. *See United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Mar. 15, 2002) (Order). Later that day, the government, in accordance with the March 4 and 15, 2002 Orders, provided a letter to the defense listing each of the thirty-three *in camera* documents, organized by date and time and identified by sender, recipient and those who received copies. Also included in the government's letter were explanatory notes regarding the identities of the senders and recipients of the documents, as well as the government's objections to disclosure of the documents. Following receipt of the government's March 15, 2002 letter, defendant, by counsel, promptly moved to compel production of the thirty-three *in camera* documents, pursuant to Rules 16(a)(1)(A) and 16(a)(1)(C), Fed. R. Crim. P., and *Brady*.

On April 1, 2002, following supplemental briefing and oral argument by the parties, defendant's motion to compel was denied and the government's motion for a protective order was granted. *See United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Apr. 1, 2002) (Order). Because the government's motion focused solely on its request for authorization not to disclose the subject documents to the defense, and because there was no allegation that the documents contained any classified information or sensitive information vital to national security, no separate protective order was issued expressly prohibiting disclosure of the documents to the public by any present or former government employees.¹ Rather, it was the Court's assumption, and surely the government's

¹ Throughout the course of these proceedings, several protective orders issued concerning additional *in camera* documents submitted by the government, including numerous detainee interview reports. Unlike the documents at issue here, these additional *in camera* documents did not

as well, that the government would maintain the confidentiality of these documents within its own organization. In retrospect, this was an inaccurate assumption, as it appears from an extensive investigation conducted by the Department of Justice's Office of the Inspector General (OIG) that a former government employee disclosed, without government authorization, the contents of some of the protected documents to members of the press. Thus, on June 15, 2002, following such unauthorized disclosure, the on-line edition of Newsweek magazine published an article that quoted substantial portions of the thirty-three documents subject to the April 1, 2002 Order.²

While the former government employee who allegedly disclosed the contents of the subject documents to members of the press may have violated some applicable statute or regulation, including a Department of Justice regulation, it appears to the Court that such disclosure does not technically constitute a violation of any Order of this Court, including the April 1, 2002 Order granting the government's motion for a protective order with respect to these documents.

contain any information that the government claimed to be privileged. Rather, the government argued, and the corresponding protective orders reflect, that these additional *in camera* documents either (i) contained unclassified, but sensitive information vital to national security or (ii) did not contain any information required to be disclosed to the defense pursuant to Rule 16, Fed. R. Crim. P., or *Brady*. See *United States v. Lindh*, 198 F. Supp. 2d 739 (E.D. Va. 2002) (granting protective order as to certain unclassified detainee interview reports containing sensitive information vital to national security); see also *United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. April 25, April 26, April 30, May 1 and May 3, 2002) (Orders).

² On June 19, 2002, the government was directed to file a pleading by July 9, 2002 "addressing whether any documents ordered protected by the Court were disclosed by any person bound by an Order of this Court." On July 9, 2002, the government filed a pleading advising the Court that the OIG had been assigned to conduct a thorough and comprehensive investigation of this matter and that the investigation would proceed as expeditiously as possible. Thereafter, on October 11, 2002, the government filed an *ex parte* and under seal pleading advising the Court that OIG's investigation had been complete and had resulted in the conclusion that a former government employee had, without authorization, disclosed the contents of some of the subject documents to Newsweek magazine.

Accordingly, for good cause, and because it appears the government believes that the former government employee violated an order of this Court in disclosing the subject documents to the press, it is hereby **ORDERED** that the government is **DIRECTED** to file an *ex parte*, under seal pleading on or before 5:00 p.m., Tuesday, November 19, 2002, identifying (i) the specific order or orders the government believes were violated by the former government employee, and (ii) the notice the former government employee received of the existence and terms of the order or orders that were allegedly violated.

This Court's interest in this matter focuses only on the integrity of its issued orders. Quite apart from the violation of an order of this Court, the former government employee's disclosure of the subject documents to the press may have violated a Department of Justice regulation or statute, in which event, of course, the government may take whatever steps it deems necessary and appropriate in the circumstances.

The Clerk is directed to file this Order *ex parte* and under seal and to send a copy of this Order only to government counsel.

/S/

T.S. Ellis, III
United States District Judge

Alexandria, VA
November 6, 2002