

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL NO.</b>
	:	
<b>v.</b>	:	
	:	
<b>JAMES F. HITSELBERGER</b>	:	
	:	
<b>Defendant.</b>	:	

**GOVERNMENT’S MEMORANDUM IN SUPPORT OF DETENTION**

**Introduction**

For almost eight months, the defendant, James Hitselberger, has lived as a fugitive. On April 11, 2012, Hitselberger, who was working as a contract linguist at the Naval Support Activity – Bahrain, was caught removing classified documents from a secure facility. One of these documents contained current and highly sensitive information about the location and activities of U.S. armed forces units in the Middle East, a volatile and dangerous region. Later that same day, agents searching his quarters found another classified document, one that he had altered to remove its classification markings and that also had contained information about troop locations and activities.

Hitselberger’s employer ordered him home. However, when changing planes in Frankfurt, Germany, Hitselberger opted not to make his connection. Instead, he began an almost eight-month odyssey, as he traveled among five different European nations. Despite having no discernible income, Hitselberger was able to support himself, and he even purchased a small property in Michigan from afar. He knew he was under investigation, yet he twice failed to keep flight reservations to return to the United States. It was only after learning last weekend that Hitselberger was traveling to Kuwait to retrieve his belongings from his former employer that the

government was able to revoke his passport and secure the assistance of the Kuwaiti government in expelling him into our custody to face charges on a criminal complaint. The government has since obtained a two-count indictment charging him with violating 18 U.S.C. § 793(e) (unlawful retention of national defense information).

There is every reason to believe that, if given the opportunity, Hitselberger would resume living life on the lam. He has been charged with very serious offenses and is facing the potential of twenty years of incarceration. He speaks multiple foreign languages, has an apparent network of friends and acquaintances overseas, and is adept in adapting to foreign surroundings. As set forth below, the case against Hitselberger is strong. He is quite familiar with the requirements for the proper handling of classified information and knowingly flouted them. Nor, as the government has learned, do the events of this past April represent the sole occasion when Hitselberger has taken and disseminated classified information for his own purposes. In sum, an analysis of the factors set forth in 18 U.S.C. § 3142 lead inescapably to the conclusion that the Court should order that Hitselberger be detained pending trial.

#### **Principles Governing Requests for Detention**

When the government seeks to detain a defendant on the ground that he is a risk of flight pursuant to 18 U.S.C. § 3142(f)(2)(A), the government must demonstrate the defendant's flight risk by a preponderance of the evidence. United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996). Moreover, at a detention hearing the government may present evidence by way of a proffer. United States v. Smith, 79 F.3d 1208, 1209-10 (D.C. Cir. 1996).

Section 3142(g) lists four factors that guide a court's detention decision: (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug; (2) the weight of the evidence against the defendant; (3) the history and

characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. See 18 U.S.C. § 3142(g).

**Factual Proffer of the Evidence Supporting the Charges against Hitselberger and His Risk of Flight**

**A. Hitselberger's Background and His Familiarity with the Restrictions on Handling Classified Information**

Hitselberger attended Georgetown University, graduating sometime around 1980 after studying Arabic and history. He later attended graduate school at the University of Texas. Over time, Hitzelberger became conversant in several languages, including Arabic and Farsi, and he spent extended periods of time living overseas.

From October 2004 to February 2007, Hitselberger worked as a contract linguist for Titan Corporation (Titan), a subsidiary of L3 Communications. He served in Iraq and worked at several forward operating locations, including Fallujah, Al Asad Airbase, Camp Ramadi, and Camp Victory. During this period, he was responsible for translating from Arabic at various checkpoints and worked intimately with the force protection assets at these locations. As part of his job, Hitselberger received a Secret level security clearance and had access to classified materials.<sup>1</sup>

After spending four years renovating and renting properties in the Upper Peninsula of Michigan, in June 2011, Hitselberger accepted a position as a linguist with Global Linguist Solutions (GLS), a government contractor headquartered in Reston, Virginia. Hitselberger was

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<sup>1</sup> Pursuant to by Executive Order No. 13526 (December 29, 2009), there are three levels of classified information: Confidential, Secret, and Top Secret. The designation "Confidential" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause damage to national security; the designation "Secret" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security; and the designation "Top Secret" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. Information is classified by an individual known as an original classification authority (OCA) who has been delegated the power to determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.

assigned to be an Arabic linguist at the Naval Support Activity – Bahrain.<sup>2</sup> Before leaving for Bahrain, Hitselberger went through two weeks of training at GLS’ Reston office. Among other subjects, he received instruction on the proper handling, storage, reproduction, and disposition of classified and sensitive material. *See* Exhibit 1 to this Memorandum (GLS Initial Security Briefing PowerPoint). The training provided an example of classified documents with classification markings located at the top and bottom of the document. *Id.* at 11, 13.

Hitselberger also received training on the labeling of classified documents and the definitions of the three principal categories of classified information: Top Secret, Secret, and Confidential. *Id.* at 12. In addition, Hitselberger received training about where and how classified information could be discussed. *Id.* at 15. This included the requirement that classified information must be discussed in an area authorized for specified classified discussions. *Id.* Moreover, he was instructed that classified information “[m]ust be under the control of an authorized person **OR** stored in a locked security container, vault, secure room, or secure area.” *Id.* *See also* Exhibit 2 to this Memorandum (GLS Comsec Awareness Training PowerPoint).

On June 30, 2011, Hitselberger signed an acknowledgment that he had received the GLS training, and he confirmed on the form that “I also understand I could be subject to action under the espionage statutes of Federal Law with respect to my failure to handle or deliberate mishandling of classified information.” *See* Exhibit 3 to this Memorandum (GLS Security Briefing Certificate Form). On August 27, 2011, he signed a Non-Disclosure Agreement in which, among other things, he acknowledged that “I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a

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<sup>2</sup> Naval Support Activity – Bahrain is located in the Kingdom of Bahrain, just east of Saudi Arabia, and is the home to over 6,000 U.S. military personnel. Several elements of the U.S. armed forces are based there, including the Navy’s Fifth Fleet and the Joint Special Operations Task Force – Gulf Cooperation Council (JSOTF).

foreign nation.” *See* Exhibit 4 to this Memorandum at ¶ 3 (Classified Information Nondisclosure Agreement). Upon completion of the training, Hitselberger received an interim Secret level clearance; it became permanent in January 2012. However, Hitselberger never became an authorized courier of classified information and thus could not handle classified materials outside an approved secure facility.

In September 2011, Hitselberger arrived in Bahrain. He attended yet another security course. *See* Exhibit 5 to this Memorandum (Certificate of Completion and accompanying documents reflecting Hitselberger’s signed acknowledgements). During this course, Hitselberger again received training on the various types of classified information. *See* Exhibit 6 to this Memorandum (2011 Security Awareness Brief PowerPoint). He also was instructed that a security violation occurs whenever a cleared individual, “Remov[es] classified information in order to work on it at home” or “Tak[es] classified information home, ostensibly to work on it at home . . . .” *Id.*

Hitselberger was assigned to work for the JSOTF, Naval Special Warfare Unit Three (NSWU-3). NSWU-3 conducts such missions as unconventional warfare, direct action, combating terrorism, and special reconnaissance. NSWU-3 relied on Hitselberger’s expertise in the Arabic language and sent raw data to him regularly for translation. Through this work, Hitselberger obtained intimate knowledge of sensitive source operations, including the true names and addresses of sources.

During the Fall of 2011, one of Hitselberger’s supervisors, who was assigned to the JSOTF, observed and overheard Hitselberger discussing SECRET//NOFORN// HUMINT classified information at the Naval Support Activity – Bahrain commissary. Such information is classified at the SECRET level, it cannot be shared with foreign nationals (NOFORN), and it

derives from human sources (HUMINT). The discussion was in public in an unauthorized area, which was not suitable for classified discussions. During this incident, Hitselberger talked loudly about the document he had just translated, which he thought was interesting. The supervisor told him to stop, but Hitselberger laughed at him and began talking about it again. The supervisor explained to Hitselberger that he could not talk about this type of information out of the office because it was highly sensitive and classified.

**B. The Events of April 11 and 12, 2012**

On the morning of April 11, 2012, Hitselberger was working with other linguists and two of his JSOTF supervisors in a Restricted Access Area (RAA). This was a structure within Naval Support Activity – Bahrain that was approved for the processing and handling of classified information. There was a cipher lock on its reinforced door.

Around 11:15 a.m., everyone took a break. Hitselberger signed onto his Secret Internet Protocol Router Network (SIPRnet) account, which is located on a secure, Secret level computer system. Two of his supervisors observed him viewing JSOTF Situation Reports (SITREPs), which were classified Secret. They then saw that Hitselberger was printing multiple pages of Secret documents from a Secret printer. They saw Hitselberger take the classified documents from the printer, fold them, and place them into an Arabic-English Dictionary, which he then put into his backpack. Hitselberger proceeded to leave the RAA. As noted above, Hitselberger did not have the requisite authority to remove classified documents from the RAA.

After witnessing the event, one of Hitselberger's supervisors immediately notified their commanding officer. The two of them left the RAA to go after Hitselberger. They stopped him in a public space outside the RAA. They told Hitselberger that they needed to see what was in his bag and asked him to produce the documents he had just printed. Hitselberger first took out

only one classified document from inside the dictionary. When his supervisor asked what else he had, Hitselberger finally surrendered the second classified document.

One of the two documents was that day's JSOTF SITREP (SITREP 104). It has **SECRET//NOFORN** in red, bold type (all capitals) in the header and footer of each page. *See* Exhibit 7 to this Memorandum.<sup>3</sup> On the first page of the document, and continuing on to the second page, is a multi-paragraph portion marked (S//NF). It contains an analyst's assessment of the availability of certain improvised explosive devices in Bahrain. Elsewhere in the document, in portions marked (S), are the schedule for the monthly travel of a high-ranking commander at Naval Support Activity-Bahrain and information about the locations of U.S. armed forces in the region and their activities over the previous twenty-four hours.

The second document was a Navy Central Command (NAVCENT) Regional Analysis dated April 9, 2012. It bears the following header and footer on each page: **SECRET//REL TO USA, FVEY**.<sup>4</sup> *See* Exhibit 8 to this Memorandum. On the third page of the document are five bullet points, marked (S//REL), discussing gaps in U.S. intelligence concerning the situation in Bahrain, which, at the time, was volatile. Original classification authorities from the Navy have reviewed both SITREP 104 and the April 9, 2012, NAVCENT Regional Analysis. These Navy officials have determined that both documents were properly classified and contained national defense information.

Later in the day on April 11, 2012, agents from the Naval Criminal Investigative Service (NCIS) searched Hitselberger's quarters pursuant to a "Command Authorization for Search and Seizure" issued upon a finding of probable cause by the commanding officer of Naval Support

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<sup>3</sup> The government has redacted the classified portions of Exhibit 7 (SITREP 104) as well as the classified portions of the other exhibits that represent the other documents that Hitselberger unlawfully retained.

<sup>4</sup> REL is an abbreviation for "releasable to." FVEY is an abbreviation for a group of allied nations known as the "Five Eyes," which are the United States, the United Kingdom, Canada, Australia, and New Zealand.

Activity – Bahrain.<sup>5</sup> See Exhibit 9 to this Memorandum. On the top of Hitselberger’s desk, they discovered a document that appeared to be classified. The top and bottom of the document had been cut off, effectively removing the classification markings in the header and footer of the document, which concealed its overall classification. See Exhibit 10 to this Memorandum. The page of the document in Hitselberger room still had the individual paragraph classification markings, which revealed the paragraphs of the page were classified at the Confidential level. These paragraphs contained an intelligence analyst’s assessment of the situation in Bahrain, which has experienced recent civil unrest. The agents were able to learn that the document in question was JSOTF SITREP 72 (SITREP 72) from March 8, 2012. This SITREP is five pages long and has **SECRET** in red in the headers and footers.<sup>6</sup> See Exhibit 11 to this Memorandum. Like SITREP 104, it contains highly sensitive information about the location of U.S. forces and their undisclosed activities in the region. An original classification authority from the Navy has reviewed SITREP 72 and has confirmed that the document is properly classified and that it contains national defense information.

On the evening of April 11, 2012, and the afternoon of April 12, 2012, NCIS agents conducted two voluntary, non-custodial interviews of Hitselberger. Although he was not in custody, for each interview, the agents advised Hitselberger of his *Miranda* rights, and he waived them. In both interviews, Hitselberger claimed not to know that the documents he printed were classified, notwithstanding their clear markings. He said he printed the NAVCENT Regional Analysis by mistake, and that his sole purpose was to take the materials to his quarters to read. At one point, Hitselberger denied having received training on classified materials, even though

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<sup>5</sup> Courts have ruled that the use “command authorized” warrants at military facilities satisfies the Fourth Amendment. See, e.g., *United States v. Brown*, 784 F.2d 1033 (10<sup>th</sup> Cir. 1986); *United States v. Banks*, 539 F.2d 14 (9<sup>th</sup> Cir. 1976).

<sup>6</sup> The government has never found the missing four pages of the document. However, it has been able to determine that it was an attachment to an e-mail Hitselberger received on his SIPRNet account on or about March 8, 2012.

he had two such training sessions within the previous nine months. When asked about the document agents found in his quarters with the header and footer removed, he did not admit having taken it or having stored it in the room. However, Hitselberger went on to claim that he cuts around paper because he does not like having extra paper, but then averred that he did not have a good explanation with respect to this document.

**C. Hitselberger's Flight**

As a result of Hitselberger's removal of two classified documents from the RAA and the discovery of a portion of a third classified document in his room, JSOTF requested that GLS replace Hitselberger and send him home. On April 12, 2012, Hitselberger left Bahrain. His flight stopped in Frankfurt, Germany, where he had a four and a half hour layover. Hitselberger never made his connecting flight. He left the airport and went to a town elsewhere in Germany. He had some initial contact with GLS' security manager, who found him to be unforthcoming as to his whereabouts and intentions. Among other things, he told her that he had stopped traveling because he sensed the onset of a stroke.

Through court-authorized pen registers on Hitselberger's e-mail accounts, the government has seen him travel from Germany to Sweden to Malta to Bulgaria and to Albania, and then back to Bulgaria. Hitselberger had a flight reservation to return to the United States in early May, but he did not use it. He had another reservation to fly to Dallas, Texas, on August 6, 2012. He again failed to get on the flight and rescheduled it for later in 2013. Throughout this time, Hitselberger has been aware that the investigation of his activities was continuing and that the Federal Bureau of Investigation (FBI) had become involved. From information acquired through two cooperating sources, the government learned that Hitselberger knew the FBI had conducted searches of locations in Ontonagon, Michigan, to which he had mailed packages from

Bahrain, and that he even had offered suggestions to at least one individual in Michigan as to how to interact with the FBI if agents sought to question him or her.<sup>7</sup>

As described below, Hitselberger had a longstanding relationship with the Archives of the Hoover Institution at Stanford University, where he previously had sent other classified materials to which he had access. On May 16, 2012, after being interviewed by the FBI about Hitselberger having sent the Archives classified materials, the Deputy Archivist at the Hoover Institution advised Hitselberger by e-mail that “[i]n view of the FBI investigation,” it would no longer accept materials from him.<sup>8</sup> See Exhibit 12 to this Memorandum. Hitselberger’s incredible response, while he was still on the run, was as follows:

My apologies. There were classified materials? I am sure they brought unwanted excitement. Yes, there was indeed an incident in Bahrain. I was unable to locate my regular reading glasses that day over a month ago and I did not notice the ‘secret’ designation at the bottom. I was wearing a very narrowed rimmed pair of glasses which enabled me to read only a third of the page. The secret designation was in regular font size. I even brought the document to a sergeant’s attention. He did not say anything about its classification till I was outside the building on base. He knew I had printed it out and put into my bag. When I saw NCIS, it informed me that documents of any classification were forbidden to take. Well, that is news to me. Otherwise I wouldn’t have printed anything during my time there.

*Id.*

**D. Hitselberger’s Previous Illegal Retention and Dissemination of Classified Materials**

When NCIS agents interviewed Hitselberger in Bahrain, he told them that he had established a collection at the Hoover Institution of writings he had acquired during his times in the Middle East. The collection is titled the “James F. Hitselberger Collection, 1977-2012.” Agents visited the Hoover Archives and reviewed the collection. In an area open to the public, the agents found a classified document titled Bahrain Situation Update dated February 13, 2012.

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<sup>7</sup> In executing search warrants at these locations, the government has not found additional classified materials.

<sup>8</sup> The government obtained the foregoing e-mail exchange through a court-authorized search of one of Hitselberger’s e-mail accounts.

*See* Exhibit 13 to this Memorandum. It is officially classified as **SECRET//REL ACGU**.<sup>9</sup> Like the NAVCENT Regional Analysis found in Hitselberger's backpack, it has a section that discusses gaps in U.S. intelligence with respect to the political situation in Bahrain. A Navy original classification authority has reviewed these portions of the Bahrain Situation Update and has determined that these paragraphs are properly classified at the Secret level and that they contain national defense information. A second document, containing a series of bullet points marked **S//REL TO USA,MCFI** and dating from Hitselberger's time in Iraq, was also found in the portion of the collection accessible to the public.<sup>10</sup> *See* Exhibit 14 to this Memorandum.

There are individuals at the Hoover Institution who have security clearances. In a secure, non-public area of the Archives, agents also discovered two other documents marked **SECRET**. These materials dated from Hitselberger's time in Iraq with Titan. There was also correspondence between Hitselberger and the former Associate Archivist for Collection for the Hoover Archives, concerning one of the documents, a March 23, 2005, Intelligence Information Report. Hitselberger advised the former Associate Archivist that the document was classified and that its declassification date was March 23, 2015. Although he had no authority to take or disseminate such a classified report, Hitselberger nonetheless stated, "Regardless of the case, this material seems to warrant archival preservation. I will leave the matter up to you to determine when researchers can have access to these items, as I am fully confident that your institution balances national security concerns with the need of researchers for original source material."<sup>11</sup> *See* Exhibit 15 to this Memorandum.

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<sup>9</sup> "ACGU" means that the document is releasable to Australia, Canada, Great Britain, and the United States.

<sup>10</sup> "MCFI" is an abbreviation for Multinational Coalition Forces Iraq.

<sup>11</sup> The Associate Archivist advised Hitselberger that the document was being placed in the Archives' vault. *See* Exhibit 16 to this Memorandum.

### **Argument**

Under the factors set forth in 18 U.S.C. § 3142(g), the government has demonstrated by substantially more than a preponderance of the evidence that the defendant is a flight risk.

#### **A. The Nature and Circumstances of the Offense**

Through his repeated actions in putting at risk information properly classified as Secret, Hitselberger has threatened to inflict serious damage to the national security, as defined in Executive Order 13526. When he was at the Naval Support Activity – Bahrain, Hitselberger was in a part of the world where U.S. forces face multiple threats. A hostile power – Iran – is a little more than a hundred miles across the Persian Gulf. Groups dedicated to inflicting casualties on Americans wherever they may be found – Al Qaeda in the Arabian Peninsula, Al Qaeda in Iraq, and Hezbollah, to name just a few – operate in the region. To reveal the monthly schedule of a high ranking commander at the base or the current locations and activities of specific U.S. military units around the Middle East – which were among the items of classified information in the two SITREPs Hitselberger took from the RAA – could be devastating to these individuals. However, these were the sorts of harms that Hitselberger was tempting when he made the decision to take classified information to places where it should never be and to use it for his own selfish purposes. His crimes are grave.

Congress has recognized the seriousness of compromising the security of classified information by creating a ten-year penalty for such offenses. *See* 18 U.S.C. § 793. It has further demonstrated the significance of these crimes by extending the statute of limitations to ten years. *See* Statutory Note to 18 U.S.C. § 792<sup>12</sup>. Hitselberger has been indicted on two counts of violating § 793(e) and thus faces twenty years of incarceration. The base offense level for

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<sup>12</sup> Congress set forth the statute of limitations for 18 U.S.C. §§ 793 and 794 in Section 19 of the Internal Security Act of 1950, 64 Stat. 1005. However, this Act, while still in force, has never been codified in the United States Code.

Hitselberger's offense is set forth in § 2M3.3(a)(2) of the Guidelines and is 24. Hitselberger has no known prior convictions, which results in a recommended sentencing range of 51 to 63 months. That is a substantial period of time for a first time offender.

The crime here is serious within the meaning of § 3142(g)(1) even though it is not a crime of violence or terrorism, a narcotics offense, or a crime involving a firearm or minor victim. By its express terms, § 3142(g)(1) focuses on "the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device." 18 U.S.C. § 3142(g)(1) (emphasis added). By its use of the word "including" in the language quoted above, Congress intended that the question of whether a defendant's conduct falls into one of the categories identified in the statute be simply one of the measures – but not the sole measure – of the seriousness of the charged crime.

**B. The Weight of the Evidence against Hitselberger**

The evidence against Hitselberger is quite strong.<sup>13</sup> To begin, Hitselberger's superiors caught him red-handed with SITREP 104 and the NAVCENT Regional Analysis secreted in a dictionary in his backpack. Even when confronted, Hitselberger at first demurred before relinquishing the second of the two documents. It is obvious that, if he had not been caught, Hitselberger would have kept the classified materials and done with them as he chose. The altered copy of SITREP 72 that agents found in Hitselberger's quarters and his prior dissemination of classified materials to the Hoover Institution also demonstrate his intent to

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<sup>13</sup> The elements for a violation of 18 U.S.C. § 793(e) are (1) that the defendant had unauthorized possession of documents or writings that (2) related to the national defense and (3) that the defendant willfully retained those documents and writings and failed to deliver them to an officer or employee of the United States who was entitled to receive them.

retain the reports he had removed from the RAA and never return them to an appropriate officer or employee of the United States.

Hitselberger's removal of the headers and footers from SITREP 72 further demonstrates, with respect to that item, his knowledge that the document would attract attention and his intent to conceal his purloining of the sensitive material from others. It likewise reflects Hitselberger's knowledge that the document is classified and contains information whose dissemination could be harmful to the United States.<sup>14</sup> See *United States v. Morison*, 844 F.2d 1057 (4<sup>th</sup> Cir. 1988) (defendant who was convicted of violating 18 U.S.C. § 793 removed headers and footers from satellite imagery before sending it to a prominent naval publication).

The government's case abounds with other consciousness of guilt evidence. First and foremost is Hitselberger's flight. After being questioned twice by NCIS agents and having his room searched, he knew that had done something grievously wrong. Rather than return to the United States and await the results of the government's investigation, Hitselberger chose to walk away from his return flight in Frankfurt, Germany. His explanation to GLS that he stopped traveling because he thought he might be experiencing a stroke is nonsensical and belied by the eight months of peregrinations that ensued. He repeatedly postponed reservations that would have returned him to the United States, and he stayed away from this country fully aware that there was an active investigation into his conduct.

The false statements he made to the interviewing agents in Bahrain also underscore Hitselberger's guilt. It is impossible that he failed, as he claimed, to realize that documents he was printing from a classified system were themselves classified. This excuse is particularly feeble when one looks at the documents and sees that the classification markings are bolded, in

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<sup>14</sup> That Hitselberger may not have been very good at concealing the nature of the document, since paragraph markings remained, does not undercut the evidentiary significance of his effort to hide the most readily visible sign that the document was classified.

red, and in all capital letters.<sup>15</sup> *See* Exhibits 7 and 8. Hitselberger's assertion that he never received training concerning classified information is demonstrably false and particularly galling in light of the incontrovertible evidence that he attended presentations both before leaving for Bahrain and upon his arrival on the types of classified information and on the proper handling and storage of such materials. His excuse for having cut off the top and bottom of the first page of SITREP 72 – that he wanted to reduce the amount of paper he had – is farcical, particularly when what he removed was the portion of the document – which again was in bold, red-faced, capitalized print (*see* Exhibit 11)– that revealed that it was classified.

Finally, there is no question that the classified information in the documents underlying the counts is national defense information. Information about the location and activities of troops and the dangers facing them is classic national defense information. *See Gorin v. United States*, 312 U.S. 19, 28 (1941) (information relating to the national defense is “a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness”); *United States v. Abu Jihaad*, 600 F. Supp. 2d 362 (D. Conn. 2009) (confidential information about the movement of the Fifth Fleet battle group was national defense information), *aff'd* 630 F.3d 102 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1032 (2011).

### **C. The Defendant's Characteristics/Risk of Flight**

In *United States v. Battle*, 59 F. Supp.2d 17, 20 (D.D.C. 1999), Magistrate Judge Facciola, in concluding that a defendant should be held without bond as a risk of flight, observed that “what is past is prologue . . . .” Here, the relevant past is Hitselberger's flight upon being caught unlawfully possessing classified documents and his time as a fugitive, all the while knowing his actions were under scrutiny by the FBI and NCIS.

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<sup>15</sup> Equally fantastic is the claim Hitselberger made to the Deputy Archivist at the Hoover Institution that, on April 11, 2012, he was wearing a type of reading glasses that only permitted him to view one-third of a page and somehow paralyzed his motion so that he would not glance at any other portion of the page. *See* Exhibit 12.

Hitselberger has demonstrated that he has many of the characteristics of someone who can live outside the United States and outside the reach of its courts for an extended period of time, as he was doing before the government was able to catch him. He speaks multiple foreign languages, is comfortable living abroad (including in less developed countries), and appears to have a network of friends and acquaintances overseas.<sup>16</sup> Hitselberger was able to fund his time in Europe, although he was not earning any income, and have sufficient cash to purchase a small piece of property in Michigan from across the Atlantic Ocean.

In many respects, he shares several characteristics with the defendant in *United States v. Anderson*, 384 F. Supp.2d 38 (D.D.C. 1995), whom Judge Friedman ordered detained as a risk of flight. Like Anderson, Hitselberger “has traveled extensively,” “is fluent in [several languages],” and “has numerous international personal and business contacts.”<sup>17</sup> *Id.* at 36. Similarly, he has a complete lack of ties to the District of Columbia and has shown “deceitfulness (or, at the very least, lack of candor and good faith) in his dealings with the government,” at least as demonstrated in his interviews with the NCIS agents in Bahrain.<sup>18</sup> *Id.* See also *United States v. Townsend*, 897 F.2d 989, 994 (9<sup>th</sup> Cir. 1990) (factors relevant to risk of flight include “the ability to travel internationally, to adapt easily to foreign countries, and to move assets and individuals quickly from one country to another”).

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<sup>16</sup> For his trip to Kuwait to retrieve his belongings, Hitselberger was planning to be the guest of a longtime friend.

<sup>17</sup> The government acknowledges that, unlike Anderson, Hitselberger has not used aliases or shown any interest in learning how to create false identity papers. And, although Hitselberger seems to have sufficient funds at his disposal, the government is not contending that he possesses the vast wealth that Anderson did.

<sup>18</sup> The two locations Hitselberger gave Pretrial Services as where could stay pending trial give the government great pause. Both are rural locations that are unlikely to be suitable for the type of monitoring that a court would find necessary. Ontonagon, Michigan, is on the shores of Lake Superior and at least 100 miles from a federal court in Marquette, Michigan; Coveseville, Virginia, is a small town south of Charlottesville.

It is true that Hitselberger no longer has a valid passport.<sup>19</sup> However, three recent cases from this District should give the Court pause. First, in *United States v. Underwood*, Cr. No.11-261 (ESH), the defendant was initially charged with making false statements in interviews with the FBI concerning his activities as a cleared guard at the construction site for the new U.S. Consulate in Guangzhou, China. The government did not seek detention of Underwood, who otherwise had no ties to this District, and he surrendered his passport. However, an investigation was still ongoing into whether Underwood had tried to pass classified information to the Chinese. On September 21, 2011, he failed to appear at a status hearing. Agents later found a fake suicide note at the hotel at which he had been staying. Approximately ten days later, the FBI caught him in Los Angeles, as he was making his way out of the country. Underwood ultimately pled guilty to attempting to deliver national defense information to a foreign government in violation of 18 U.S.C. § 794.

Second, on the same day as the detention hearing here, the court will be having the initial appearances for fourteen defendants in *United States v. Sanchez-Flores*, Cr. No. 12-228 (EGS) and *United States v. Campos-Sanchez*, Cr. No. 12-229 (EGS). These cases involve the prosecution of two rings that sold fraudulent immigration and employment documents that purported to be issued by the U.S. government or state governments and were often of very high quality. The lesson from these cases is that Hitselberger, like Underwood, has a strong incentive to flee, and fraudulent travel documents are available to those who seek them out.

In sum, Hitselberger's behavior and characteristics demonstrate that he is a significant flight risk.

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<sup>19</sup> The State Department revoked Hitselberger's passport because of the warrant for his arrest based on the criminal complaint. That warrant has now been executed. The government does not know whether there are any further impediments to Hitselberger acquiring a new passport.

**D. Danger to the Community**

Hitselberger has no history of violence. Nor has the government's investigation revealed that he has tried to pass any of the classified information he has acquired to a foreign power.

**Conclusion**

For the foregoing reasons, the Court should grant the government's motion and order that the defendant be detained pending trial.

Respectfully submitted

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**Certificate of Service**

I, Jay I. Bratt, certify that I served a copy of the foregoing Government's Memorandum in Support of Detention by electronic means on Carlos Vanegas, Esq., counsel for defendant, this 30<sup>th</sup> day of October, 2012.

\_\_\_\_\_/s/\_\_\_\_\_  
Jay I. Bratt