

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

UNITED STATES OF AMERICA :
 :
 v. : **12-CR-231 (RC)**
 :
JAMES HITSELBERGER :

**MOTION TO RECONSIDER
ORDER OF DETENTION AND IMPOSE CONDITIONS OF RELEASE**

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully moves this Honorable Court to reconsider the Order of Detention issued by the Honorable Deborah A. Robinson on October 26, 2012,¹ and impose conditions of release. In the Government’s Memorandum in Support of Detention [Dkt. #11] (herein after “Gov’t Memorandum”) submitted prior to the detention hearing and again at the hearing, the government portrayed Mr. Hitselberger as a “fugitive,” who “fled” from law enforcement for months preceding his arrest. The facts demonstrate that Mr. Hitselberger was not a fugitive, cooperated with law enforcement in the investigation of his conduct, left contact information with investigating authorities, and was in contact with his former employer and at least one military official during the months preceding his arrest. He was never told that law enforcement agents required him to return to the United States, and he did not “flee” from law enforcement. He is not a risk of flight,

¹ Judge Robinson ordered Mr. Hitselberger held without bond following the detention hearing on October 31, 2012, and issued a Memorandum of Findings of Fact and Statement of Reasons in Support of Order of Detention on November 5, 2012 (hereinafter “Memorandum of Findings”) [Dkt. #8].

and for this reason, the Court should impose reasonable conditions of release. In support of this motion, counsel submits the following.

Factual Background

Mr. Hitselberger is charged with two counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e). He is 56 years old and has never before been charged with or convicted of a criminal offense.

Mr. Hitselberger developed an interest in foreign languages while studying Russian in high school. After graduating from high school, he studied Arabic in Libya and in Iran prior to the Iranian revolution. He then studied history and Arabic at Georgetown University, and attended graduate school at the University of Texas in Austin. After graduate school, he worked at the Brookings Institute for approximately eight years. He is fluent in Arabic, Farsi and Russian. He has worked as a Department of Defense civilian contract linguist for a number of years, including in Iraq during 1994 and again from 2005 to 2007. Working in Iraq, particularly while stationed in Fallujah, between 2005 and 2007 was very stressful. Afterwards, Mr. Hitselberger took time off from working as an interpreter and renovated houses in the Upper Peninsula of Michigan. In June 2011, he took a position as a linguist with Global Linguist Solutions.

The charges in this matter arose out of an incident that occurred in Bahrain, where Mr. Hitselberger was working as a contract interpreter for the U.S. Navy (Naval Support Activity - Bahrain). According to the discovery provided by the government, on April 11, 2012, Mr. Hitselberger was stopped leaving a secured facility with two classified documents in his backpack. Officers of the Naval Criminal Investigative Service (“NCIS”) searched

Mr. Hitselberger's room in Bahrain and allegedly recovered a single page of another classified document.²

According to NCIS reports, after he was stopped leaving the facility on April 11th and Navy officials retrieved two documents from his backpack, Mr. Hitselberger was initially permitted to go on his way, but was soon called back to the secured facility to speak to NCIS investigators. According to an NCIS report, Mr. Hitselberger "appeared emotionally distraught" and was "weeping and sobbing" when speaking of his relationships with fellow employees and an instance when he was not invited to a party. With regard to the documents, he recognized he made a mistake, but denied intentional wrong-doing. Following the interview, he was assigned to a new room on the base and permitted to leave the NCIS offices for the evening. At the request of the investigators, the following day, he again met with NCIS investigators and answered their questions. As the government submits, the interviews of Mr. Hitselberger on April 11th and 12th were consensual, and Mr. Hitselberger was not in custody. As noted in an NCIS report, at the conclusion of the second interview, the NCIS agents asked Mr. Hitselberger for a mailing address where they could send his personal property after he left the base.

² The government also alleges that Mr. Hitselberger sent classified documents to the Hoover Institution at Stanford University, one in February 2012 and two in 2005. The government has provided undersigned counsel with statements made by employees of the Hoover Institution, explaining that the Hoover Institution is a one of a kind archive founded by Herbert Hoover during World War I. Its mission is to preserve historical documents. Hoover accepts and receives documents from numerous individuals, including senior government officials. Because Hoover often receives classified documents, a government-sanctioned secured facility has been established within the archives to permit Hoover to store these documents. According to the statements provided to counsel, Hoover does not return classified documents even when the archives receives them without government authorization.

Mr. Hitselberger provided his address in Ontonagon, Michigan, along with the telephone number for his home and his gmail email address. He also provided a Yahoo! email address.

Mr. Hitselberger was then permitted to return to his originally assigned room and pack a bag for his impending departure from Bahrain. According to NCIS reports, Mr. Hitselberger was told that his company, Global Linguistic Services, had arranged for a ticket for him to leave Bahrain, return to the United States and “out-process” from the company due to the security violation -- in other words, he was being fired. Mr. Hitselberger was provided with an airline ticket to return to the United States, via Frankfurt, Germany, and was taken to the airport, where he boarded an airplane.

Military officials told Mr. Hitselberger only that he had to leave Bahrain and would no longer be employed by Global Linguistic Services. Although he was told that his company would formally “out-process” him when he returned to the United States, he was not told that he was required to return to the United States, and he was not told that NCIS or any other law enforcement agency had any need to speak to him further at that time. While it was clear that NCIS thought he had committed a serious security violation and intended to investigate him further, he was not told that he would be charged with a criminal offense or even that NCIS investigators thought that he had committed a criminal offense. Mr. Hitselberger was not asked to stay in contact with NCIS or any other law enforcement officials.

After leaving Bahrain, Mr. Hitselberger’s flight stopped in Frankfurt, Germany. Because he felt ill and unable to travel, he decided not to continue on the flight. Instead, he notified his employer that he was not continuing on the flight and checked himself into a hotel in Germany. Over the next six months, he traveled to a number of European countries, including Albania and

the United Kingdom. He did so using his U.S. passport and never tried to conceal his identity or location.

As NCIS reports confirm, during this time period, Mr. Hitselberger stayed in contact with his former employer and his family and friends, and on at least two occasions, emailed one of the U.S. Army officials who stopped him leaving the secured facility on April 11th. He regularly checked the email account addresses that he had given the NCIS investigators on April 12th. He expected that if law enforcement officials wanted to contact him, they would do so through the contact information he gave NCIS or through his former employer. No law enforcement official ever tried to contact him through the email addresses he provided and continued to check.

Instead, on August 6, 2012, the government filed a sealed complaint charging Mr. Hitselberger with one count of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e). Mr. Hitselberger was not notified that the complaint was filed or that he was wanted in the United States. Although, as reflected in NCIS reports, the government had Mr. Hitselberger's email contact information and knew that his employer, as well as the U.S. Army official, were able to contact Mr. Hitselberger, no government agent ever contacted Mr. Hitselberger or asked him to return to the United States to answer to the charges. Because the complaint was sealed, Mr. Hitselberger had no way of knowing he had been charged.

As at least one NCIS report confirms, while traveling in Europe, Mr. Hitselberger was "in frequent contact" with his former employer and wanted to obtain his personal belongings that he left behind in Bahrain. In late September 2012, Mr. Hitselberger was notified by his former employer that if he traveled to Kuwait, he could pick up the possessions at a U.S. military base there. He was told that he would have to be escorted onto the base to retrieve his property.

Mr. Hitselberger had no fear of going to the military base in Kuwait to retrieve his belongings and voluntarily traveled to Kuwait to do so, because he was not hiding from U.S. officials or anyone else. When he arrived in Kuwait, his passport was confiscated and he was arrested. Until then, he did not know he was charged with a criminal offense.

Argument

Consistent with the presumption of innocence and the Eighth Amendment prohibition against excessive bail, the Bail Reform Act of 1984 provides that a defendant should be released pending trial on personal recognizance or “subject to the least restrictive further condition, or combination of conditions that . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(b) and (c)(1)(B). The Supreme Court has explained: “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755 (1987); see also United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) (“Detention until trial is relatively difficult to impose.”). As a general rule, courts should refuse to release defendants on bail “[o]nly in rare circumstances,” and “only for the strongest of reasons.” United States v. Motamedi, 767 F.2d 1403, 1405, 1407 (9th Cir. 1985) (Kennedy, J.). Any “[d]oubts regarding the propriety of release should be resolved in favor of the defendant.” Id. at 1405.

Pursuant to § 3142(e), a court may order a defendant held without bond pending trial only if the court finds that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” Here, with regard to potential danger to the community, the district court found that

Mr. Hitselberger's alleged "retention of classified documents poses a danger to the community by potentially compromising national security." Memorandum of Findings at 5. The government did not request or argue in support of such a finding. At the detention hearing, the government requested detention solely on the basis of the potential risk of flight. Moreover, the record does not support a finding that Mr. Hitselberger would present a potential danger if released. Judge Robinson's finding refers to the potential danger that the charged conduct posed, but the issue before the Court is future danger, danger while on pretrial release. Mr. Hitselberger no longer has access to any classified information, and therefore, he has no ability to cause the danger Judge Robinson referenced. There is no evidence that he would present a danger to the community if released.

With regard to flight, Judge Robinson found "a risk of fugitivity." Detention Memorandum at 5. However, it is not enough for the government to prove by a preponderance of the evidence that Mr. Hitselberger is "a risk of fugitivity" or a flight risk in order to hold him without bond. The government "must prove by a preponderance of the evidence that the defendant poses a 'serious' flight risk." See United States v. Jamal, 285 F.Supp.2d 1221, 1228 (D. Ariz. 2003) (quoting 18 U.S.C. § 3142(f)(2)(A) ("a serious risk that such person will flee")), order vacated by, 326 F. Supp. 2d 1006 (D. Ariz. 2003). Moreover, the "[m]ere opportunity for flight is not sufficient grounds for pretrial detention." United States v. Himler, 797 F.2d 156, 161 (3d Cir. 1986). The Bail Reform Act authorizes detention "only upon proof of a *likelihood* of flight." Id. at 160. The "preponderance must, of course, go to the ultimate issue: that no combination of conditions -- either those set out in the Bail Reform Act itself or any others that the magistrate or judge might find useful -- can 'reasonably' assure that the defendant will appear

for trial.” United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996) (internal citations omitted). In this case, there is no reason to believe that Mr. Hitselberger is a “serious” risk or that there are no conditions of release sufficient to assure his appearance in court.

In support of its argument that Mr. Hitselberger is a serious risk of flight, the government characterizes Mr. Hitselberger’s decision to stay in Europe after he was fired from his job as a linguist, rather than return to the United States, as fleeing. Tr. 10/31/2012 at 3. This characterization is inaccurate because he neither fled nor hid from law enforcement officials. Mr. Hitselberger did what he had every right to do -- he decided get off the plane when he felt ill and then decided to travel and visit friends in Europe, rather than return to the United States, where he had no job waiting for him. At that time, he was not charged with a crime or even told that investigators believed he had committed a crime, as opposed to a security violation that would not be charged criminally.³

In support of detention, the government noted that when leaving Bahrain, Mr. Hitselberger was aware that there was an ongoing investigation and that he was “being sent out of the country, back to the United States.” Tr. 10/31/2012 at 3. He was sent out of Bahrain, but he was never told that he was required to return to the United States. While he was told that his employer would “out process” him when he returned to the United States, an employee is not required to report to his employer to be fired. Moreover, the questioning in Bahrain indicated

³ Notably, the simple act of walking out of a classified facility with a classified document is not a crime. Under the circumstances of this case, the unauthorized possession and retaining of a classified document is a crime only if the document contained national defense information. Not all classified information is “national defense information.” See, e.g., United States v. Rosen, 445 F.Supp.2d 602, 620 (E.D.Va. 2006) (information in the public domain contained in classified documents constitutes national defense information only if the public confirmation of accuracy of information in public domain constitutes national defense information).

that the investigators were trying to determine if Mr. Hitselberger was a spy or affiliated with foreign nationals. As the subsequent investigation revealed, he was not and had no intention of disclosing any classified information to foreign nationals. Mr. Hitselberger, therefore, had every reason to believe that he would be cleared of such allegations, and if charges relating to the mishandling of classified documents were filed (as they now have been), he would be notified.⁴

After leaving Bahrain, Mr. Hitselberger's flight stopped in Frankfurt, Germany. He felt ill and decided not to continue on the flight. Significantly, he notified Global Linguistics Solutions that he was not continuing on the flight. Instead, he went to the hotel -- where he used his credit card to rent a hotel room -- and rested. He then went to visit a friend and decided to travel before returning to the United States. As Mr. Hitselberger's letter to a friend (which was intercepted by the government) revealed, Mr. Hitselberger believed that if he stayed abroad for a year, the income he earned overseas would not be taxed by the United States. He traveled throughout Europe for several months using his U.S. passport. He spent several months in Albania, where the cost of living was low and he could learn a new language.

During this time, he did nothing illegal and openly used his legal name, his passport, and the same email addresses he was using before he left Bahrain. He was not hiding. At the detention hearing, the government argued that "the only way we were able to catch him was that

⁴ In its memorandum, the government noted that Mr. Hitselberger knew that search warrants were conducted at two addresses where he had "sent 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," Gov't Memorandum at 9-10, suggesting some nefarious intent. As the government investigation showed, the packages contained dates from Bahrain and Mr. Hitselberger's suggestions all involved cooperating with the FBI, with no obstructive intent. Mr. Hitselberger made no effort to obstruct the government's investigation because he had nothing to hide.

he traveled to Kuwait in order to get his belongings back from his employer.” Tr. 10/31/2012 at 4. This argument suggested that Mr. Hitselberger avoided efforts by law enforcement to reach him. The government never sought to contact Mr. Hitselberger before he went to Kuwait and never asked him to return to the United States to submit to another interview or answer to charges. Mr. Hitselberger was reachable and not hiding from anyone. In fact, the government was able to follow his travels through Europe because he never made any attempt to hide his identity while traveling. He continued to use his two email accounts, the addresses to which he gave NCIS investigators, including sending at least two emails to one of the U.S. Army officials who stopped him leaving the secured facility and allegedly took the classified documents from him. Mr. Hitselberger also continued to contact family, friends and his former employer. He even negotiated the purchase of a small piece of property in Michigan. He then freely traveled to Kuwait to pick up his belongings at a U.S. military base. He committed no crime by using his personal savings to travel, learned another language and visited friends in Europe while he was not employed. His actions were not those of a man trying to hide, and characterizing his travels as “flight” is not accurate where he did nothing to hide from anyone.

The government has noted that Mr. Hitselberger twice scheduled flights to the United States, only to reschedule the flight. He did so with an open ticket that he purchased with the ability to change the reservation at his discretion. The rescheduling of the ticket demonstrates only that he intended to return to the United States at some point, but was not decisive. Again, he was never asked to return to the United States and had no reason to believe that he was not free to travel as he pleased. Significantly, this reservation was in his own name -- he was not hiding from anyone.

At the detention hearing, the government argued that Mr. Hitselberger had the financial means to flee, noting that he lived in Europe for many months without an income and bought property in Michigan during that time period. Mr. Hitselberger is 56 years old and has worked throughout his life. He had modest savings that permitted him to maintain a very frugal lifestyle without working during these months. The government argued that Mr. Hitselberger has financial means, language capabilities and friends overseas, making it easy for him to live there. Mr. Hitselberger, however, now has no means of traveling outside the United States because his passport has been revoked.⁵ The government argued that Mr. Hitselberger could get fraudulent travel documents, but also conceded that he never before used an alias or possessed fraudulent identification documents. Tr. 10/31/2012 at 9, 21. There is absolutely no evidence that he would attempt to obtain such documents -- the government's argument that defendants in unrelated cases have been accused or convicted of producing fraudulent documents is not a basis to detain Mr. Hitselberger.

In Xulam, the D.C. Circuit rejected the government's contention that the defendant -- an immigrant from Turkey who was charged with falsifying information on a passport and who had only been in the country for three years -- should be denied bail because nothing could stop him if he decided to flee. 84 F. 3d at 443. The court explained: "That, of course, is true of every defendant released on conditions; it is also not the standard authorized by law for determining whether pretrial detention is appropriate. Section 3142 speaks of conditions that will

⁵At the detention hearing, government counsel confirmed that Mr. Hitselberger's passport was revoked, but indicated that he was unsure whether or not Mr. Hitselberger could be issued a new passport since the warrant has been quashed with his arrest. However, based on experience in unrelated cases, counsel notes that the government has the ability to, and no doubt has, placed a hold on Mr. Hitselberger's ability to obtain a new passport pending the outcome of this case.

‘reasonably’ assure appearance, not guarantee it.” Id. at 444 (internal citations omitted); see also United States v. Himler, 797 F.2d 156, 162 (3d Cir. 1986) (“Mere opportunity for flight is not sufficient grounds for pretrial detention.”); Motamedi, 767 F.2d at 1408 (revoking detention order for an Iranian citizen accused of illegal arms deals who allegedly had large bank accounts abroad and an ability to return to Iran with impunity).

In its memorandum, the government compared this case to United States v. Anderson, 384 F.Supp.2d 32, 36 (D.D.C. 2005), in which the defendant was detained as a risk of flight, arguing that like in Anderson, Mr. Hitselberger has international contacts and has shown “deceitfulness” or “lack of candor and good faith” in his dealing with the government. Gov’t Memorandum at 16. Mr. Hitselberger has not been deceitful or shown any lack of good faith. The circumstances of Mr. Hitselberger’s case do not compare to Anderson. In Anderson, the defendant was a billionaire charged with an extensive tax evasion scheme and making numerous false and misleading statements over the course of many years. Id. at 36. Prior to his arrest, he used aliases and was in possession of numerous documents relating to the creation of false identities. Id. at 36-37. The court did not find that he simply had the means to flee and avoid prosecution, but that he had the intent to do so. Id. 37. Although Mr. Hitselberger traveled while he was being investigated, he never used an alias or fraudulent identity documents. He traveled in his own name without hiding his actions and without any intent to avoid prosecution. Moreover, his mere denial of intent to possess classified documents outside of the secured facility does not constitute obstruction.

Even assuming that the government could demonstrate that Mr. Hitselberger is a serious flight risk, the government also bears the heavy burden of proving “that no condition or

combination of conditions of release will reasonably assure [the defendant's] appearance at trial.” United States v. Simpkins, 826 F.2d 94, 95 (D.C. Cir. 1987). The D.C. Circuit has made clear: “Section 3142 speaks of conditions that will, ‘reasonably’ assure appearance, not guarantee it.” Xulam, 84 F.3d at 444; see also United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969) (“The law requires reasonable assurance but does not demand absolute certainty.”).

When “determining whether there are conditions of release that will reasonably assure the appearance of the person as required,” a court must consider “the nature and circumstances of the offense charged, including whether the offense is a crime of violence . . . family ties, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings” 18 U.S.C. § 3142(g).

The government characterized Mr. Hitselberger’s alleged crimes as “grave” and notes that there are numerous terrorist organizations in the area around Bahrain.⁶ Gov’t Memorandum at 12. Of course, the disclosure of classified information has the potential to have grave consequences. Importantly, however, Mr. Hitselberger is not accused of disclosing or attempting to disclose any information to any foreign national. He is accused of having unauthorized possession of national defense documents -- that is possessing them outside of the secured facility on the naval base in Bahrain and sending them to the Hoover Institution. Moreover,

⁶ The government argues that the charged offense is “serious within the meaning of § 3142(g)(1).” Government’s Detention Memorandum at 13. All crimes, of course, are “serious.” Unlike crimes of violence and dangerous offenses, the offense charged here -- retaining national defense information -- is not given any special weight under the Bail Reform Act.

despite the government's claims regarding the strength of its case, he has not been convicted of any offense.

The government also notes that the pending charges carry a maximum penalty of ten years for each offense and that the applicable sentencing range under the United States Sentencing Guidelines would be 51 to 63 months, if Mr. Hitselberger is convicted after a trial. Gov't Memorandum at 12-13. Mr. Hitselberger, however, has no prior convictions, and the Guidelines are not mandatory. He is well aware that if he absconds the penalties would be significantly greater. Moreover, he has spent the last six weeks at the D.C. Jail and has learned a very hard lesson on the consequences of violating the law. The potential of being returned to the D.C. Jail will serve as a strong deterrent to any violation of conditions of release.

Mr. Hitselberger has no prior criminal record, no history of drug or alcohol abuse, and no record of failing to appear for court. He was born and raised in the United States. His family, including his parents and brother, live in the United States, and he owns property in Michigan. He also has family in Virginia.

Given that he has never tried to hide his identity or whereabouts, there are conditions that will assure Mr. Hitselberger's appearance as required. Specifically, undersigned counsel has spoken with a representative of the Pretrial Services Agency, who verified that Mr. Hitselberger is eligible for participation in the High Intensity Supervision Program, with electronic monitoring. Mr. Hitselberger has an aunt who lives in Arlington, Virginia. She, along with his other family members, is very supportive of Mr. Hitselberger. She has attended each of his court appearances in this matter, and she would allow Mr. Hitselberger to live with her while this case is pending. Pretrial Services has confirmed that they could monitor Mr. Hitselberger at his aunt's

address. If placed in the High Intensity Supervision Program, Mr. Hitselberger would be required to wear an ankle monitor that would detect any movement outside of his residence (his aunt's home). Pretrial Services would impose a curfew from 10:00 p.m. to 6 a.m., and could monitor any additional curfew the Court chooses to impose. In addition, Mr. Hitselberger would be required to report to his case manager in person, weekly, and to submit to weekly drug tests. Given that Mr. Hitselberger has no passport with which to travel and significant incentive to abide by all conditions of release in order to avoid the D.C. Jail, these conditions are sufficient to assure his appearance as required.

Conclusion

The evidence does not support a finding that Mr. Hitselberger would be a substantial risk of flight or a danger to the community if released. Mr. Hitselberger will comply with conditions of release and has neither the passport necessary nor the will to flee. For these reasons and such other reasons as may appear at a hearing on this motion, the Court should set conditions of release.

Respectfully submitted,

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