

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

UNITED STATES OF AMERICA	:	CRIMINAL NO. 12-231 (RC)
	:	
v.	:	
	:	
JAMES F. HITSELBERGER,	:	
	:	
Defendant.	:	

**GOVERNMENT’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S
MOTION TO RECONSIDER ORDER OF DETENTION**

Introduction

In his Motion to Reconsider Order of Detention and Impose Conditions of Release (Motion), the defendant, James Hitselberger, takes virtually all of the same facts that were before Magistrate Judge Robinson when she ordered him detained and spins them in a manner that strains credulity. Hitselberger depicts himself, upon being expelled from Bahrain, as an ailing and naïve traveler who opted to take an extended break on the European continent without any inkling that his recently discovered habit of taking classified materials for personal use and dissemination placed in him legal jeopardy. Such a characterization is contrary to the facts, to common sense, and to Hitselberger’s own words in an e-mail (described and quoted from below) to an acquaintance written one month before his capture. Hitselberger fully understood that the government’s investigation of him was a serious matter when was sent home from Bahrain after being caught removing two classified documents from a secure facility and having an altered version of another classified document in his quarters. He nevertheless opted to flee when changing planes in Germany and, until being arrested in Kuwait, displayed no signs of preparing

to leave Europe, where he was outside the reach of American law enforcement. Magistrate Judge Robinson correctly found that Hitselberger presented a risk of flight, and the Court should deny his motion for release.¹

Argument

Hitselberger contends that, because no one in Bahrain told him that he was under investigation for a criminal offense and no one told him he had to return to the United States, he merely believed he may have committed a security violation, but not a crime. Motion at 3-4. The facts, however, reveal that Hitselberger was on notice that his situation was far more grave. First, although he was never under arrest in Bahrain, agents from the Naval Criminal Investigative Service (NCIS), not once, but twice administered *Miranda* warnings to him. The agents also thoroughly searched his quarters – the results of which search Hitselberger was able to observe – and barred him from returning there, except for a brief visit to collect a few belongings. From his interviews with the agents, Hitselberger learned that they had discovered the first page of a yet another classified document he had unlawfully retained, one from which he had removed the classification markings at the top and bottom of the page. Within thirty-six hours of his being caught removing classified materials from a secure facility, the military was expelling him from Bahrain and his employer was terminating him. Any reasonable person in similar circumstances would have concluded that he faced potentially serious consequences upon his return to the United States.

¹ In its opposition to Hitselberger's motion, the government continues to rely on the proffer and arguments it set forth in its Memorandum in Support of Detention (Detention Memorandum) (Docket Entry 11) and the accompanying Exhibits. The one new fact that has come to light since the government filed its memorandum is that it was incorrect in stating that searches of locations in Michigan failed to reveal any classified materials there. *See* Detention Memorandum at 10, n.7. Government counsel has learned that, at one of the Michigan locations, there were materials in Arabic that the Iraqi government had classified "secret" and "extremely secret." The U.S. government treats a foreign government's classified materials in the same manner it treats similar U.S. documents.

But it is not necessary to postulate such a reasonable person. The Court need only read how Hitselberger assessed his situation in an e-mail to an acquaintance in Michigan sent this past September:

I was forcibly detained for 8 hours and then interrogated by the Naval Criminal Investigative Services till one am. They searched my quarters and were concerned about all the Arabic language materials I had.

After another long interrogation and fingerprinting and eye scanning, I was suddenly taken to my quarters which was turned into a shambles. I was then given 40 minutes the next evening to pack up and shower before being taken to the airport. It was strange that one of the NCIS officers insisted that I shower before leaving “because you won’t be able to shower for a while.”

Hopefully the FBI is trying to clear up the mess the NCIS made in Bahrain, but if it has gone so far that they are now interviewing you 6 months later, I am not very optimistic.

See Exhibit 1 to this Memorandum at 2-3.²

Further undercutting Hitselberger’s claim that he had nothing to fear in the United States when he began his prolonged stay in Europe and that he was merely a tourist on the continent are the various pieces of conscious of guilt evidence that are present in the government’s case. In his interviews with the NCIS agents in Bahrain, Hitselberger lied about never having received about classified materials. *See* Exhibits 1-6 to the government’s Detention Memorandum, which are the materials Hitselberger received in the two security courses he attended after being hired by Global Linguistic Solutions (GLS). He also lied about not having seen the classification

² In his motion, Hitselberger suggests that the government intercepted his communications. *See* Motion at 9. That is incorrect. All of the communications from Hitselberger the government has obtained were either provided to it by cooperating individuals or were the fruits of court-authorized search warrants of one of his e-mail accounts. The e-mail which is attached hereto as Exhibit 1 also contains Hitselberger’s characterizations about the conduct of his interviews and the nature of the classified documents he took. Suffice it to say that the government does not agree with those characterizations, but they are not germane to the issue currently before the Court.

markings at the top and bottom of each page of the documents he had printed from the classified computer system and removed from the secure area, when those markings were in all capital letters, in red, and in bold. *See* Exhibits 7 and 8 to the government's Detention Memorandum. With respect to the classified document found in his quarters from which Hitzelberger had cut off the markings portions (*id.* at Exhibit 10), he gave the silly excuse that he did not like having extra paper around, an explanation even he conceded was not very sound.

His lies continued after he landed in Germany, when he advised his employer he could not continue traveling because he felt he might be experiencing a stroke.³ Hitzelberger never checked himself into a hospital, and the government has seen no proof that he ever sought medical treatment, nor has he proffered any. Hitzelberger did make some inquiries with employer about medical insurance while overseas, but such questions are equally consistent with what a person would ask when planning to spend a significant period of time out of the country.

It is also possible to infer consciousness of guilt from the suggestions Hitzelberger gave his acquaintance in Michigan about how to interact with any FBI agents who might approach him. Although Hitzelberger argues that he encouraged the friend to cooperate with the FBI (Motion at 9, n. 4), his actual words belie that claim:

Be aware that anything you say goes on the record and that you are liable to go to court to support what you say. See if they will give you a record of the questions in writing or a record of the conversation with you. But realize too that you are just an individual and that you do not have the resources of the federal government. Chances are that whatever you say will be classified and that even if you wanted a record of your conversation, it will not be given to you for legal/liability reasons.. Remember, when you talk with a government investigator, they usually will begin with some small talk to make you feel at ease and tell you it is all voluntary. However, they quickly go down the road from there. You probably will spend a good two or three hours. It could easily be four or five. You

³ Notably in the September e-mail to his friend in Michigan, Hitzelberger claimed he interrupted his voyage home in Germany merely because "I was tired from the overnight flight and did not want to fly a second night in a row." *See* Exhibit 1 to this Memorandum at 3.

might want to use the conference room at the township building. Or you might establish parameters of time and state your right to end the meeting if you are getting tired. You might ask whether you could be held legally liable for what you say and whether your statements enjoy any sort of legal protection. Could the government prosecute you for anything you say? See if you get an absolute guarantee. If the questioning lasts longer that [sic] you hope, remember that the meeting is voluntary. You might ask whether he is recording you. I know from experience in bahrain that they will not ask your permission to record or video you. I wonder why the Marquette office is being so persistent with you.

And, of course, i don't think you should give this letter to the government to become an additional record.

See Exhibit 1 to this memorandum at 3.

Hitselberger also contends that his e-mail communications from Europe with his employer and with a former military supervisor demonstrate his innocent mindset. Motion at 5-6. The government has analyzed the data it has from pen registers and search warrants concerning Hitselberger's use of his e-mail accounts between April 13, 2012, and his capture. There were 23 e-mails between Hitselberger and representatives from GLS during his first ten days in Europe. These e-mails focused on the employer trying to get information on Hitselberger's health (about which Hitselberger provided little information), and Hitselberger's seeking information on how to retrieve his belongings from Kuwait. Significantly, Hitselberger never said he was planning to stay in Europe to take advantage of the tax benefits afforded expatriate U.S. citizens, as he now contends (Motion at 9).⁴ Hitselberger also communicated three times with his former supervisor between April 28 and May 2, 2012, and five times between June 20, 2012, and June 30, 2012. These e-mails, too, dealt with Hitselberger's inquiries concerning how he could reclaim his property. He said nothing about this offense or

⁴ Of course, as of September, Hitselberger had been out of the country long enough to reap any tax benefits, but he still had no plans to return.

wanting to return to the United States. Moreover, there were also significant periods of time when Hitselberger had no contact with these individuals, and he had only two contacts with his employer between July 3 and August 26, 2012. Toward the end of September, Hitselberger began exchanging e-mails with GLS about traveling to Kuwait to retrieve his belongings. The government was aware of these communications.

Hitselberger also makes much of the fact that he traveled openly on his passport. Motion at 4-5. However, he assumes an ability on the part of the government to establish an international dragnet that does not reflect reality. With one exception (Albania), each of the countries Hitselberger visited is a member of the European Union. *See* http://europa.eu/about-eu/countries/index_en.htm. Of these, all but Bulgaria are so-called Schengen nations, which do not require passports for travel from within the European Union. *See* http://europa.eu/youreurope/citizens/travel/entry-exit/non-eu-family/index_en.htm. Thus, as Hitselberger likely knew, his travels were usually as undetectable as they would be when traveling within the 50 United States.

More importantly, as the government represented at the detention hearing, other nations view the statute under which Hitselberger has been charged – 18 U.S.C. § 793 – as a political offense. *See* Detention Transcript, Exhibit 2 to this memorandum, at 4. Accordingly, the government was unable to get a Red Notice from Interpol – which would have alerted foreign law enforcement to the existence of an arrest warrant – and would have been unable to seek extradition even if a foreign partner agreed to arrest Hitselberger.

Last, Hitselberger takes the government to task for not simply contacting him and advising him that he needed to return to the United States to respond to these charges. Motion at

5, 10. In light all of the evidence described above and in the government's detention memorandum that indicated that Hitselberger was avoiding potential prosecution, it certainly was a reasonable law enforcement judgment not to inform Hitselberger of the charges. Agents traveled to Dallas, Texas, on August 6, 2012, when Hitselberger was due to arrive and was in Custom and Border Protection's database as a ticketed passenger on a flight from Germany. He changed his reservation at the last minute and postponed his flight indefinitely into 2013. All indications were that, if informed of the charge, Hitselberger would remain outside the reach of U.S. law enforcement.

Conclusion

For the foregoing reasons, the Court should deny the defendant's motion to reconsider.

Respectfully submitted,

RONALD C. MACHEN JR.
UNITED STATES ATTORNEY

_____/s/_____
JAY I. BRATT
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
(202) 252-7789
Illinois Bar No. 6187361
jay.bratt2@usdoj.gov

MONA N. SAHAF
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
(202) 252-7080
D.C. Bar 497854
mona.sahaf@usdoj.gov

DEBORAH CURTIS
Trial Attorney
Counterespionage Section
National Security Division
U.S. Department of Justice
600 E Street, NW, 10th Floor
Washington, D.C. 20530
(202) 233-2113
deborah.curtis@usdoj.gov

Certificate of Service

I, Jay I. Bratt, certify that I served a copy of the foregoing Government's Memorandum in Opposition to Motion to Reconsider Order of Detention by ECF on Mary Petras, Esq., counsel for defendant, this 12th day of December, 2012.

_____/s/_____
Jay I. Bratt