

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

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

**DEFENDANT’S REPLY TO GOVERNMENT’S
MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER
ORDER OF DETENTION AND IMPOSE CONDITIONS OF RELEASE**

Pending before the Court is James Hitselberger’s Motion to Reconsider Order of Detention and Impose Conditions of Release filed on December 4, 2012 [Dkt. #12]. On December 12, 2012, the government filed Government’s Memorandum in Opposition to Defendant’s Motion to Reconsider Order of Detention (hereinafter “Gov’t Opp’n”) [Dkt. #14]. In reply, counsel for Mr. Hitselberger respectfully submits the following. Because the evidence demonstrates that there are conditions that will reasonably assure Mr. Hitselberger’s appearance as required, the Bail Reform Act requires the Court to impose conditions of release.

The government claims that Mr. Hitselberger’s motion uses “virtually all of the same facts” presented before Magistrate Judge Robinson and “spins them in a manner that strains credulity.” Gov’t Opp’n at 1. The truth is that prior to the detention hearing before Judge Robinson, Mr. Hitselberger’s counsel had little time to consult with Mr. Hitselberger and was given only the limited exhibits the government chose to present. After the hearing, the government provided counsel with discovery. A review of the government’s own evidenced

demonstrates that it is the government that has “spun” the facts.¹ The government has repeatedly used colorful word choices and exaggeration to mischaracterize the nature of this case and Mr. Hitselberger’s actions, claiming that he was a “fugitive,” who “fled” on “an almost eight-month odyssey,” and “displayed no signs of preparing to leave Europe,” before being “captured.” The truth, as demonstrated by the evidence, is that Mr. Hitselberger was never a fugitive and never fled; was not on any “odyssey”; kept in contact with family, friends and military officials during the six and a half (not eight) months between the time he was told to leave Bahrain and his arrest in Kuwait; planned to return to the United States; and did not need to be “captured.”

First, the government’s characterization of Mr. Hitselberger’s decision to travel as “flight” is not supported by any evidence. All of the evidence demonstrates that Mr. Hitselberger was not hiding or fleeing from anyone. Although he knew he was under investigation when he left Bahrain, the undisputed fact is that he was not under arrest and had no obligation to immediately return to the United States -- in fact there is no indication that law enforcement wanted to speak to him upon his return. Mr. Hitselberger could not be a fugitive or flee when there was nothing to flee from. Moreover, the evidence demonstrates that he was not hiding. Despite the government’s colorful word choices and efforts to impute a nefarious intent, the facts demonstrate

¹Pursuant to the Bail Reform Act, this Court must review Magistrate Judge Robinson’s decision de novo. United States v. Hanson, 613 F. Supp. 2d 85, 88 (D.D.C. 2009) (review of magistrate’s bail determination is de novo); see also United States v. Koenig, 912 F.2d 1190, 1192-93 (9th Cir. 1990) (district court must “makes its own independent determination whether the magistrate’s findings are correct, with no deference”); United States v. Rueben, 974 F.2d 580, 585 (5th Cir. 1992), cert. denied, 507 U.S. 940 (1993) (de novo review); United States v. Tortora, 922 F.2d 880, 883 n.4 (1st Cir. 1990) (same); United States v. Clark, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc) (same); United States v. King, 849 F.2d 485, 489–90 (11th Cir. 1988) (same); United States v. Leon, 766 F.2d 77, 80 (2d Cir. 1985) (same); United States v. Delker, 757 F.2d 1390, 1394–95 (3d Cir. 1985) (same) ; United States v. Maull, 773 F.2d 1479, 1482 (8th Cir. 1985) (en banc) (same).

the following:

1. Before leaving Bahrain, Mr. Hitselberger gave the Naval Criminal Investigation Service (hereinafter "NCIS") investigators his home address and telephone number; the home address and telephone number for his parents; and his two email addresses.
2. Before leaving Bahrain, Mr. Hitselberger asked the NCIS investigators to give him their contact information, so that he could contact them. They refused to provide contact information.
3. Before leaving Bahrain, Mr. Hitselberger was not told that law enforcement required him to return to the United States or wanted to speak to him upon his return.
4. When Mr. Hitselberger decided not to get on his connecting flight in Frankfurt, Germany and instead to rest because he felt ill, he contacted his employer (GLS) to let them know of his decision.²
5. As the government concedes, Mr. Hitselberger communicated with GLS about using his health insurance to obtain medical assistance in Germany. Significantly, the communications demonstrate that he wanted to use his insurance to obtain medical assistance at a U.S. military base in Germany.
6. After talking to the nurse at the Frankfurt airport, Mr. Hitselberger checked into a hotel using his credit card.
7. As he traveled through Europe, Mr. Hitselberger made no effort to hide his identity and used his Passport.³

²The government makes light of Mr. Hitselberger's statement that he felt like he was having a stroke, but the evidence demonstrates that Mr. Hitselberger was under a great deal of stress due to his relationship with his coworkers and then his expulsion from Bahrain. His flight from Bahrain was an overnight flight to Germany, and he felt too ill to continue on another overnight flight to the United States from Germany. The government notes that in a email to his friend, Mr. Hitselberger failed to tell her that he felt ill, Gov't Opp'n at 4 n.3, but this fact is insignificant. Mr. Hitselberger simply was too embarrassed to tell his friend of his emotional state. Notably, he did tell her he was not up to another overnight flight.

³The government discounts this fact, noting that many European Union countries do not require a passport. However, the evidence demonstrates that Mr. Hitselberger was using his passport, and several countries, including Albania, required him to present his passport.

8. As he traveled through Europe, Mr. Hitselberger used the same bank account he has used since 1984. See Exhibit 1 (bank records reflecting use of modest savings to travel on modest budget).

9. As he traveled through Europe, Mr. Hitselberger used the same email accounts that he gave to the NCIS investigators.

10. As he traveled through Europe, Mr. Hitselberger repeatedly called, wrote and emailed his family and friends, letting them know where he was and what he was doing. See Exhibit 2 (examples of emails to friend, noting locations and travel plans)⁴; Exhibit 3 (examples of postcards to friends, noting locations and travel plans); Exhibit 4 (NCIS report reviewing Mr. Hitselberger's emails between April and May 2012).

11. As he traveled through Europe, Mr. Hitselberger frequently emailed and called GLS. See Exhibit 5 at 5, para. 5 (government NCIS report noting Mr. Hitselberger was in "frequent" contact with GLS).

12. While in Albania, Mr. Hitselberger emailed Captain Brendan Herring, one of the two military officers who stopped him when he last left the secured facility in Bahrain. Mr. Hitselberger told Captain Herring where he was and asked Captain Herring to help him get in contact with the NCIS investigators. See Exhibit 6 (email from Mr. Hitselberger to friend, describing communications with Captain Herring about retrieving possessions from NCIS).

13. As he traveled through Europe, Mr. Hitselberger frequently posted his location and photographs of where he was on Facebook. As his Facebook records demonstrate, he has 126 "friends" on Facebook, who he regularly notified of his whereabouts. See Exhibit 7 (concurrent postings of photos and locations).

14. When GLS representatives told Mr. Herring he would have to personally go to a U.S. military base in Kuwait to retrieve his belongings that were left in Bahrain and that he would have to give them three weeks notice before he arrived, he gave them notice and

Moreover, the important fact is that he was not trying to hide.

⁴Mr. Hitselberger's family members confirm that there were numerous similar emails in which Mr. Hitselberger described his travels.

voluntarily went to Kuwait to go to the military base. See Exhibit 8 (NCIS report describing communications with GLS).

15. When he went to Kuwait on October 24, 2012, Mr. Hitselberger had an airline reservation for October 31, 2012, to go from Kuwait back to Bahrain to contact NCIS in order to retrieve his computer and other items seized by NCIS. See Exhibit 9 (confirmation for flight from Kuwait to Bahrain); see also Exhibit 6 (describing plan to go to NCIS to retrieve belongings).

These indisputable facts were not the actions of a man who was hiding or “fleeing.” Moreover, despite the government’s claim that he had “displayed no signs of preparing to leave Europe,” Gov’t Opp’n at 1-2, the evidence in the government’s possession demonstrates that he did have a plan to return to the United States. As the government has confirmed, Mr. Hitselberger purchased an airline ticket to return to the United States. He also expressed his intent to return to the United States in his correspondence with his friends. See Exhibit 4 (NCIS report reviewing Mr. Hitselberger emails). In addition, his attempt to purchase property in the United States -- as confirmed by the government -- evidences his intent to return.

The government has noted that many European countries would characterize the charged offenses as political crimes and therefore would refuse any request for extradition, if asked. Even if this is true, as the government notes, Albania (where Mr. Hitselberger spent most of his time) is an exception and would have honored a request for extradition. Moreover, there is no evidence that Mr. Hitselberger knew that some countries do not honor extradition requests for the charged offense – he did not even know that he was or would be charged with this offense.

The government claims that Mr. Hitselberger’s correspondence demonstrates that he was not encouraging his friend to cooperate with the government and the language of the letter “belies” our claim that he was. Gov’t Opp’n at 4. The Court should look to the letter and not

rely on the government's characterization. Mr. Hitselberger told his friend to speak to the FBI, but recommended that he record the meeting – demonstrating only that he wanted the truth to be told without any government twisting of the facts.

The government argues that Mr. Hitselberger knew how serious the possible charges against him were when he decided to stay in Germany, suggesting he was avoiding prosecution. The defense does not dispute that the actions of the NCIS demonstrated that they took the matter very seriously, but Mr. Hitselberger knew that he was not a spy and fully expected that the investigation would reveal that he was not a spy. His correspondence -- which the government had at the time of the original detention hearing -- demonstrates that he expected he would be cleared of being a spy. See Exhibit 1 to Gov't Opp'n at 3 ("Hopefully the FBI is trying to clear up the mess the NCIS made in Bahrain . . ."). And this is exactly what happened -- the government's investigation revealed that Mr. Hitselberger had no connection to any foreign government. At worst, the government's evidence demonstrates that he took documents to either read outside of the secured facility (but still on the military base) for his own edification or to send to the Hoover Institution.⁵ Despite the government's claims, it is not clear that this was a crime. Mr. Hitselberger is charged with retaining national defense information and not all classified

⁵Mr. Hitselberger previously has provided the Hoover Institution with historical documents. See Exhibit 10 (Online Archive of California description of James F. Hitselberger collection at Hoover Institution). However, the government mischaracterizes the evidence when claiming that Mr. Hitselberger had a "habit" of "disseminating" classified information. Of the 18 manuscript boxes of materials in Mr. Hitselberger's collection at the Hoover Institution, the government claims that three documents had classification markings, two of which were maintained in a government-approved secured facility. Moreover, there is no evidence that Mr. Hitselberger knew these documents were classified (if in fact they remain classified) until the Hoover Institution notified him in May 2012. See Exhibit 4.

information is national defense information.⁶ 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).

The issue before the Court, of course, is not whether or not Mr. Hitselberger committed a crime or whether or not his actions demonstrated a “consciousness of guilt,” as the government now claims. Regardless of the government’s characterization of the charges or Mr. Hitselberger’s actions, the question before the Court is: If he is released, is there a substantial likelihood that Mr. Hitselberger will fail to appear as required? The facts demonstrate that Mr. Hitselberger is not a flight risk. He is 56 years old with no criminal history. He has strong family ties not only to the United States but to the District of Columbia area. His parents were raised in this area and his extended family, including his aunt and cousins, continue to live in the area (in Arlington, Bethesda and Frederick). His parents and brother now live in Wisconsin, but have appeared at several of the hearings in this matter in support of Mr. Hitselberger. His father is a retired physician and his brother is an attorney. His aunt, with whom he will live if released, has appeared at every hearing and is willing to act as a third-party custodian pursuant to 18 U.S.C. § 3142(c)(1)(B)(i). In addition, Mr. Hitselberger’s passport has been revoked and he has no ability to travel.

The D.C. Circuit has very clearly held that in order to detain a defendant pretrial based on

⁶The government’s suggestion that Mr. Hitselberger knew, or even suspected, that he would be prosecuted and therefore was hiding from law enforcement is completely rebutted by the totality of Mr. Hitselberger’s conduct, including his numerous communications, routine banking activity, lack of any attempt to conceal his identity or whereabouts, and voluntary travel to the Kuwait to obtain belongings from a U.S. military base.

a risk of flight, there must be evidence of a likelihood of flight. See United States v. Xulam, 84 F.3d 441, 443 (D.C. Cir. 1996). Mr. Hitselberger's decision to travel is not evidence of a likelihood of flight because (1) that travel occurred when no charges were pending; (2) he never failed to comply with any law enforcement directive; (3) he did not hide his identity and traveled under his own name using his own passport, email accounts, and bank account; (4) he did not hide his location, frequently writing to family, friends his former employer and Captain Herring, and keeping everyone abreast of his whereabouts not only through letters, postcards and emails, but also through frequent posts on Facebook; (5) he voluntarily agreed to go to a U.S. military base in Kuwait to pick up his belongs, demonstrating that he was not hiding or fleeing from U.S. officials; and (6) he planned to travel from Kuwait to Bahrain to retrieve his belongings from the NCIS and purchased a non-refundable ticket for this travel, further demonstrating that he was not hiding from or avoiding investigating authorities.

Conclusion

As the D.C. Circuit has repeatedly held, pretrial detention may be imposed only if there are no other conditions or combination of conditions that will reasonably assure appearance when required. For the foregoing reasons and the reasons set forth in the Motion to Reconsider, release to the High Intensity Supervision Program (with electronic monitoring) will assure Mr. Hitselberger's appearance in Court, and therefore, the Bail Reform Act requires release.

Respectfully submitted,

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/s/

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