

**REDACTED**

FILED WITH THE  
COURT SECURITY OFFICER  
CSO: *[Signature]*  
DATE: *11/09/2010* 1

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA . Criminal No. 1:10mj97  
vs. . Alexandria, Virginia  
March 4, 2010  
ANTHONY JOSEPH TRACY, . 10:00 a.m.  
Defendant. .  
. . . . .

TRANSCRIPT OF CIPA HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: GORDON D. KROMBERG, AUSA  
JEANINE LINEHAN, AUSA  
United States Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314

FOR THE DEFENDANT: GEREMY C. KAMENS, ESQ.  
Office of Federal Public Defender  
1650 King Street, Suite 500  
Alexandria, VA 22314  
and  
ARJUN GARG, ESQ.  
Kirkland & Ellis LLP  
655 - 15th Street, N.W.  
Washington, D.C. 20005

COURT SECURITY OFFICER: CHRISTINE E. GUNNING

ALSO PRESENT: SA THOMAS EYRE  
SA JOSEPH MITEK

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Fifth Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

(Pages 1 - 38)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

**REDACTED**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(Defendant present.)

THE CLERK: Magistrate Case 1:10-97, United States of America v. Anthony Joseph Tracy. Would counsel please note their appearances for the record.

THE COURT: Ms. Gunning, do you want to check?

MS. LINEHAN: Good morning, Your Honor. Jeanine Linehan for the United States along with Gordon Kromberg and Special Agent Thomas Eyre from Immigration and Customs Enforcement.

THE COURT: All right, good morning.

MR. KAMENS: Good morning, Your Honor. Jeremy Kamens on behalf of Mr. Tracy, who's present. With me as well is an associate from Kirkland & Ellis named Arjun Garg, who has agreed to assist in the representation of Mr. Tracy on a pro bono basis. He has prepared a pro hac vice application. He has also been cleared for participation in this matter.

THE COURT: All right. Ms. Linehan, just for the record, there's a gentleman sitting on your side. Who is that, please?

MS. LINEHAN: Yes, Your Honor. That is Special Agent Joe Mitek. He also has the necessary clearances to participate in today's hearing. He's from the Federal Bureau of Investigation.

THE COURT: From the FBI, all right.

Before we get to the -- I've had this hearing sealed because I believe that at least at the Secret level information

1 may be discussed, and out of an abundance of caution, we have  
2 sealed this hearing.

3           Now, my practice is with a case of this sort where there  
4 is classified information -- and I want the parties to be able to  
5 discuss that because it's relevant in my view to the issue before  
6 us -- is that once the transcript has been -- I will direct that  
7 the transcript be prepared from this hearing. It will be  
8 submitted then to the appropriate intelligence agencies for  
9 classification review, and if it's completely unclassified, then  
10 the transcript will be publicly available, which I think fulfills  
11 our obligation to be an open court.

12           If there are portions of the transcript that are deemed  
13 classified, then a redacted version of the transcript can be made  
14 publicly available, but that's how I will handle at least at this  
15 point any tension that we have between the concept of an open  
16 court system, First Amendment rights of the press and the public  
17 to be aware of what we're doing against the national security  
18 interests of the United States, and unless I hear an objection,  
19 that's how we're going to proceed today and in any other matters,  
20 hearings where there might be classified information.

21           Is there any objection to proceeding that way?

22           MS. LINEHAN: No, Your Honor.

23           THE COURT: Mr. Kamens?

24           MR. KAMENS: We have no objection. As I understand it,  
25 the government may have some reservations about speaking about

1 some classified information that can be conveyed to the defendant.  
2 We would ask that, of course, his presence be an important part  
3 of this proceeding.

4 THE COURT: We'll face that issue when we get to it.

5 MR. KAMENS: Thank you.

6 THE COURT: All right. So that's the first housekeeping  
7 matter. The second matter is because of the nature of this case,  
8 if the case proceeds to indictment, when that happens,  
9 Ms. Linehan, tell the Clerk's Office the case is assigned to this  
10 Court, because there should be, I think, continuity at this point.

11 The third thing is I have from the defense a -- sorry,  
12 from the government a motion to waive speedy trial and to allow an  
13 additional 30-day time period for the government. There has not  
14 been a response from the defense. Is there an objection?

15 MR. KAMENS: There is, Your Honor.

16 THE COURT: And the basis?

17 MR. KAMENS: We received this yesterday. We appreciate  
18 the candor shown by the government in their motion. Essentially,  
19 as I understand it, the government seeks to continue the time for  
20 indictment because they haven't confirmed any information that  
21 they've received from Mr. Tracy. More importantly, they haven't  
22 identified a single Somali at issue in the complaint who has come  
23 to or entered the United States.

24 The government cites a number of provisions from 3161,  
25 specifically the (h)(7), which is the interests of justice

1 provision of the Speedy Trial Act. What they do not cite is  
2 (h)(7)(C), which says, "No continuance under subparagraph (A) of  
3 this paragraph shall be granted because of general congestion of  
4 the court's calendar, or lack of diligent preparation or failure  
5 to obtain available witnesses on the part of the attorney for the  
6 Government," and essentially what the government has alleged in  
7 their motion is that they have not found witnesses to substantiate  
8 their allegations in the complaint, and the Speedy Trial Act  
9 specifically provides that that is not a basis for a continuance  
10 and it does not exclude it.

11 We ask that the Court deny their motion and require them  
12 to indict by Monday or within 30 days. If Monday is the 31st day,  
13 there may be an issue about whether the 30th day falls on a  
14 Sunday, whether that includes the following Monday, given that the  
15 statute says within 30 days.

16 However, be that as it may, we ask that the Court deny  
17 the government's motion.

18 THE COURT: All right. Ms. Linehan?

19 MS. LINEHAN: Certainly Your Honor has seen what we laid  
20 out in our motion. I would add to that in response to Mr. Kamens  
21 this isn't a situation where the government has not been diligent.  
22 This is an unusual situation where the government was forced to be  
23 in a reactive mode on January 18 to statements, voluminous  
24 statements made by the defendant.

25 In other words, Your Honor, this isn't a lack of

1 preparation on behalf of the government in waiting until January  
2 18 to investigate something. This was the defendant's actions in  
3 returning to the U.S. and giving admissions of participating or  
4 running a visa fraud business, and it was those statements from  
5 that point forward that the government began to investigate and  
6 certainly arrested the defendant, moved with alacrity to get the  
7 defendant brought before the magistrate judge by virtue of the  
8 complaint.

9           It's the defendant who indicated that there are 271 or  
10 272 Somalis that he assisted to get into this country through the  
11 use of fraudulent documents that he obtained for them. Since that  
12 time, since the government was made aware of that through the  
13 defendant's confession, the government has done an extraordinary  
14 amount of investigation, with over 15 subpoenas sent out,  
15 approximately, Your Honor, and please don't hold me to the correct  
16 number, but I believe 12 search warrants of various e-mail  
17 accounts and cell phones, and collateral leads to other  
18 investigative entities throughout the world.

19           There have been around-the-clock attempts to locate  
20 individuals through certain methods, and we are working tirelessly  
21 to corroborate some of what the defendant has said. So I would  
22 respectfully disagree with Mr. Kamens' assertion that the  
23 government has not been diligent.

24           This is extraordinary in the way that the defendant  
25 himself told us that there are 272 Somalis in this country by

1 virtue of his fraud, and in order to corroborate his statements,  
2 we are working to find those people, and we need additional time  
3 to get the results of those subpoenas, to get the results of those  
4 search warrants, and we don't believe that it's from lack of  
5 diligence.

6 In addition to that, Your Honor, there was this issue of  
7 the snow closure. We lost approximately a week in our 30-day  
8 period of time to indict as a result of the unusual snow closure.

9 THE COURT: All right. Is it your representation to the  
10 Court that before January 18, 2010, this man was not under  
11 criminal investigation? Are you able to tell the Court that?

12 MS. LINEHAN: As fairly as I can put that, I can tell  
13 the Court that a federal agent was aware of the defendant's  
14 activities as a result of e-mail traffic, that the defendant made  
15 certain statements about the business he was conducting related to  
16 these smuggling efforts, that that law enforcement agent  
17 communicated to the defendant that he should not do that and  
18 should return to the U.S. immediately to meet with that agent.

19 So I can say that the federal government was aware of  
20 what the defendant was representing that he was doing in Kenya,  
21 but at that point, a criminal investigation into that conduct had  
22 not been initiated.

23 THE COURT: And roughly how far before January of 2010  
24 was that information coming to the government's attention?

25 MS. LINEHAN: If I could consult for one minute, Your

1 Honor?

2           Your Honor, it's my understanding that that written  
3 communication was by e-mail in July of 2009 but was not read by  
4 that agent until September.

5           THE COURT: Well, is this the agent who was handling the  
6 defendant?

7           MS. LINEHAN: That's correct.

8           THE COURT: So, I mean, this is not even classified,  
9 because the defendant told Pretrial Services, and their report's  
10 not been classified, that he was working for the Department of  
11 Defense in that time period.

12           MS. LINEHAN: Well, Your Honor, the agent I'm referring  
13 to --

14           THE COURT: -- is not from the Department of Defense?

15           MS. LINEHAN: Right. It was an ICE agent that the  
16 defendant was working with for a period of time before he began  
17 some other work. So I'm referring to an ICE agent, that the  
18 communication was between the defendant and an ICE agent about  
19 his, his smuggling efforts, that he had started a travel business  
20 and that he was smuggling people into the U.S. through Cuba, South  
21 America, Mexico, and so forth.

22           THE COURT: Well, then the government had been on notice  
23 that there was potential criminal activity going on here and could  
24 very well have started that investigation at that time period.

25           MS. LINEHAN: Agreed. What we're asking Your Honor is



1 that you understand that the Eastern District of Virginia and the  
2 ICE agents working from January 18 forward, when we encountered  
3 the defendant and he provided confirmation of the previous e-mail  
4 back in July and additional information, failed a polygraph test  
5 about things that were of national security interest, that at that  
6 moment, all of the authorities collectively agreed that the  
7 defendant should be complainant, and we moved forward from that  
8 part.

9 THE COURT: All right. Given, No. 1, what is an almost  
10 established practice in this jurisdiction that the Public  
11 Defender's Office, I don't think I've ever seen them object in the  
12 past to a brief request -- a request for a brief extension of the  
13 time in which to indict, in fact, I frequently get second  
14 requests, secondly, this is an unusual case, the Court will take  
15 judicial notice of the fact that Somali in particular is one of  
16 those hot button nations that may pose, particularly people coming  
17 into this country illegally, unique national security concerns  
18 which the Court feels have to be addressed carefully.

19 This is not a case in which the government has had a  
20 prolonged opportunity to investigate these particular allegations,  
21 and I can understand and I think it is reasonable to make sure  
22 that the case is adequately investigated. While there is probably  
23 on the defendant's statements alone sufficient probable cause to  
24 get an indictment right now, it's to his benefit as well to make  
25 sure the government really does have its ducks in a row, and a

1 30-day extension, especially because I think it could easily say  
2 that one week of the time period would not be countable -- would  
3 be excludable time anyway because of the crisis in the national  
4 government in terms of the weather, the federal government was  
5 closed for several days, I'm going to grant the motion, but there  
6 won't be any further extensions, and no matter what problems you  
7 hit in your investigation, if you're not ready to indict, then  
8 you'll have to dismiss the complaint.

9 MS. LINEHAN: Understood.

10 THE COURT: So I'm going to grant the order.

11 All right. Now, that leaves as the next matter the  
12 defendant's motion for the Court to reverse Judge Buchanan's  
13 decision.

14 MR. KAMENS: Your Honor, I appreciate the Court's  
15 ruling --

16 THE COURT: Yes.

17 MR. KAMENS: -- and I would note our exception.

18 We would note that the statute itself specifies that no  
19 extension should be granted not just for lack of preparation but  
20 also for the government's failure to identify witnesses. That's  
21 what they've said. The statute excludes it, and so we preserve  
22 our exception.

23 THE COURT: I understand that, but I'm going to overrule  
24 the objection. I think there are extraordinary and exceptional  
25 circumstances here that in the interests of justice justify a

1 brief extension, and as I've said, this type of an extension is so  
2 common in this district that it's surprising to me that there was  
3 any objection. If it were a 90-day or a four- or five-month  
4 extension, I could see the objection, but 30 days is -- and it's  
5 probably only 23 days if you really count it correctly.

6 MR. KAMENS: Well, I will say if our client was not  
7 detained at Alexandria Detention Center, we might have a different  
8 view. However, the government has sought his detention as well,  
9 and that's why we're here.

10 THE COURT: I understand that. And also, I don't know  
11 whether in calculating the time period the time that this motion  
12 has been pending was excluded, in other words, you know, all those  
13 fancy exclusions that apply, I doubt that this is even a full  
14 30-day extension.

15 MS. LINEHAN: It's not. We didn't calculate that, Your  
16 Honor.

17 THE COURT: Yeah, all right. So again, I don't find  
18 that there's going to be any violation of the Speedy Trial Act in  
19 this respect.

20 All right. Now, the next issue is, as we said, the  
21 defendant's motion for release, and I've had a chance to read the  
22 Pretrial Services report, I've read the defendant's memorandum,  
23 and I've read the government's opposition. I have also read and  
24 have with me on the bench the classified document, which is the  
25 defendant's proffer that's been provided to the Court.

1           The proffer itself creates in my mind additional  
2 problems, and that's the classified stuff that's before the Court.

3           Mr. Kamens, you need to tell the Court, what's your  
4 understanding of the full extent of your client's work for the  
5 federal government, time period, and agency? Because there  
6 appears to be some conflicts in the information that I've got  
7 here.

8           MR. KAMENS:

9

10

11

12

13

14

15           Mr. Tracy is married to a Somali woman. They have five  
16 children together. As I understand it, his extended family  
17 resides in Somalia, that is, his in-laws.

18

19

20

21           He stayed there for several months, but then he came  
22 back, and then he returned to Kenya several months thereafter,  
23 residing for a short period of time.

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE COURT: Now, hold on a second. He was arrested in January as well, correct?

MR. KAMENS: I believe his arrest date was February 5.

All of the information that Mr. Tracy provided here about his visa business and how he had heard rumors that individuals were coming into the United States through Cuba, that was all provided with the hope from Mr. Tracy's part that he was providing valuable information that he would receive payment for, not that he was involved in any kind of criminal enterprise.

The allegation here is simply that he was providing Cuban -- helping people to obtain Cuban travel visas to travel to Cuba, that he did not assist anybody to travel directly into the

1 United States, that he didn't help anybody to travel from Cuba  
2 outside of Cuba, but that he had heard rumors about people  
3 traveling from Cuba into the United States, and he felt that it  
4 was valuable information that he wanted to provide to the United  
5 States, and that's why he did so.

6           As I understand it -- and I don't have anything to back  
7 this up -- the FBI was not involved very early on in this case,  
8 that Mr. Tracy, when he returned for his third and final trip to  
9 Kenya, he was kidnapped by people he was later told were Kenyan  
10 police, who were not acting within their lawful authority. They  
11 kidnapped him, took his passport. He was required to make payment  
12 to them.

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

He was told to come back to the United States.

He did so.

1 He was asked to provide a search of his home. He did. He's been  
2 extremely cooperative.

3 And he was arrested on February 5 based upon allegations  
4 that have never before fallen in a published case within the  
5 compass of 1324. In our research, we have not found a single case  
6 in which an individual has been prosecuted for encouraging aliens  
7 to come to the United States based on the facts of facilitating  
8 travel to a third country that's not a border, and there's no  
9 allegation that he was involved in helping people -- or was  
10 involved in the conspiracy to help people come into the United  
11 States after that.

12 The government alleges in their criminal complaint that  
13 they have two individuals that they know the names of that  
14 supposedly are Somali and came to the United States. The initials  
15 are K.A. and D.H. They allege that in the criminal complaint. Is  
16 it that hard to -- if they know the individuals' names, to find  
17 out whether those individuals are in the United States?

18 They allege in a paragraph of the complaint that they've  
19 searched Facebook accounts for individuals who are Mr. Tracy's  
20 contacts, individuals who live in the United States and are  
21 African American. That is one of the important allegations in the  
22 complaint. Is it that hard to find out whether those individuals  
23 are Somalis, traveled to Cuba, are lawfully in the United States?

24 THE COURT: Now you're trying to some degree to reargue  
25 the Speedy Trial Act issue, and I've ruled on that.

1 MR. KAMENS: And I apologize. I'm referring  
2 specifically to the weight of the evidence, which is a  
3 consideration under detention, and I think that the government's  
4 motion for the continuance also bears on the Court's consideration  
5 and evaluation of the weight of the evidence against this man,  
6 which is a consideration under 3142, the strength of the case  
7 against the defendant.

8 THE COURT:

9

10

11

12 MR. KAMENS: With the Court's indulgence -- well, I  
13 won't speculate.

14 MS. LINEHAN: Your Honor, I can speak to that.

15 THE COURT: Yeah.

16 MS. LINEHAN:

17 MR. KAMENS:

18

19 THE COURT: Now, there are what, three trips to Kenya or  
20 two?

21 MR. KAMENS: Three.

22 THE COURT: Is it your position that all of them were  
23 paid for by the United States government?

24 MR. KAMENS:

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

That's not much of a difference.

Mr. Tracy had provided information in the past for which he received money. He went to Kenya this time on the understanding that if he obtained valuable information, he would receive payment, and in this case, he tried to provide valuable information to the government, and they've charged him with a crime, and that's why we're here.

THE COURT: All right. Ms. Linehan?

MS. LINEHAN: Your Honor, just to confirm, the first trip, the defendant was provided with payment as a incentive to travel to Kenya on the first trip, and it was paid for by someone other than ICE. Very early into that first trip, that agency decided the defendant was not valuable to them, so his contact with that agency was very short-lived.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

But he said he was never tasked to do anything, he was never directed to do anything because of his interaction with that other agency. Both of the agencies were well aware that the defendant was someone that was considered at that point to be going rogue, for lack of a better term. When the defendant started his travel business and communicated to the ICE agent that this is what he was doing, the ICE agent said, "You need to come back to the United States, and we need to meet face to face."

The ICE agent never authorized the defendant to create a travel business for the purpose of creating fraudulent documents so that Somalis could get false Cuban visas in Kenya to do this circuitous route to end up in the United States.

Based on our information, the government would disagree that the defendant reported that he had heard rumors that these

1 individuals ended up in the U.S. It's our understanding based on  
2 interviews with the FBI and ICE that the defendant told them  
3 directly that he knew these people were in the U.S., that he knew  
4 that they intended to go to the U.S., and so certainly the  
5 defendant's statements alone are enough, as Your Honor indicated,  
6 for probable cause that he's committed these crimes.

7           Your Honor is aware and has granted graciously our  
8 request for extension so that we can corroborate some of his  
9 admissions, but at this point, Your Honor, we have a guy who's  
10 admitted to assisting approximately 270 Somalians to get into the  
11 United States through the use of fraudulent documents. We  
12 believe --

13           THE COURT: I'm sorry, you do have the initials of two  
14 individuals in the affidavit. Do you actually have at this point  
15 the names of these people?

16           MS. LINEHAN: We believe that we have leads on one, Your  
17 Honor, and the government would disagree with Mr. Kamens that  
18 these are people that are easy to find. As Your Honor knows,  
19 these are people that have used fraudulent documents to get into  
20 either Cuba or the United States through these other countries.

21           So we believe we have a lead on one based on a return of  
22 a search warrant and that one individual might currently be living  
23 in Australia, and so we're trying to confirm that.

24           THE COURT: All right.

25           MS. LINEHAN: Moreover, Your Honor, I believe that based

1 on the Pretrial Services report, based on what you now know  
2 regarding inconsistent information that the defendant and his wife  
3 have offered to the Pretrial Services officer, which really  
4 concerned Judge Buchanan, I mean, this is a woman who's offering  
5 herself as a third-party custodian who originally told the  
6 Pretrial Services officer that he was not living with her. We  
7 have direct evidence that he was living in a boarding house,  
8 because the agents were there and did a consent search of that  
9 boarding house, and we also have his statements that this home  
10 that his wife lives in with their children is a place that she  
11 chose for herself and her children and got him an apartment for  
12 the purpose of his visit.

13 In addition to that, Your Honor, he was never truthful  
14 with Pretrial Services nor was his wife about his other wife in  
15 Kenya. He has indicated in e-mail and in statements to law  
16 enforcement that he would have gone back to Kenya in February had  
17 he had his way.

18 It's the government's belief that he is a significant  
19 risk of flight and that if Your Honor were to bond him out, he  
20 would likely be gone in a day or two.

21 THE COURT: All right. Mr. Kamens?

22 MR. KAMENS: Your Honor, in paragraph 15 of the  
23 affidavit, the government -- the affiant states that he is aware  
24 of the alleged full names of the aliens but is using their  
25 initials in this affidavit.

1           We would proffer, if we are allowed to do if the Court  
2 would allow in this de novo hearing, that one of the individuals  
3 is an American citizen and one is an Australian citizen. Neither  
4 of them were smuggled into the United States, and as a general  
5 matter, the defendant denies that he ever assisted or helped any  
6 Somalis to illegally enter the United States.

7           The government continues to repeat that, that there are  
8 confessions to that effect, but he denies it, and so for purposes  
9 of this hearing in evaluating the weight of the evidence, you have  
10 a denial from the defendant, the government says they have a  
11 confession and nothing to corroborate it. Not one Somali at issue  
12 in the complaint has been found to be in the United States.

13           With respect to --

14           THE COURT: Well, I have -- but the affidavit was sworn  
15 to under the penalty of perjury by a law enforcement officer, so  
16 there is an indicia of reliability in that. I have from you  
17 simply a proffer.

18           MR. KAMENS: As the statute allows at this stage. 3142  
19 says the defendant is allowed to proffer, because otherwise,  
20 they're hamstrung at the detention hearing and potentially lose  
21 their right to remain silent at trial.

22           THE COURT: All right. But I'm just saying that's the  
23 status of the evidence at this point.

24           MR. KAMENS: And that's a fair point, but the statute  
25 doesn't provide any presumption of reliability of the affidavit as

1 opposed to a defendant's proffer. Otherwise, the government would  
2 always win in these battles of evidence.

3 We are in a position now at this early stage of this  
4 proceeding to proffer information. I have additional information  
5 I'd like to proffer as well.

6 THE COURT: All right.

7 MR. KAMENS: First, with respect to the defendant's wife  
8 in the United States, I spoke with her this morning. She wants  
9 Mr. Tracy to come back. She told the FBI that on this Sunday,  
10 when she was interviewed by them.

11 Mr. Tracy sent money to her while actually she was  
12 living in Baltimore at that time when he was overseas. He is a  
13 good husband.

14 THE COURT: Well, how much did he send her? I  
15 understand from Pretrial Services she's living on public  
16 assistance.

17 MR. KAMENS: She was unable to say how much money. It  
18 was several hundred dollars, and I believe it was multiple  
19 occasions.

20 When I asked her about whether she is living on  
21 assistance this morning, there may have been a communication  
22 barrier. I said, "Are you, are you living in subsidized housing?"  
23 She didn't seem to agree that she was. Her sister had helped her  
24 pay the rent this month.

25 She may be receiving food aid or welfare, but in terms

1 of her housing, I don't know if it's subsidized housing or not.  
2 In any event, the defendant according to her did help her by  
3 providing money when he was overseas.

4           The defendant has five children, ages 10, 8, 6, 5, and  
5 2. Ms. Lul is not here today, that is, the defendant's wife is  
6 not here today because the youngest is sick. She did appear at  
7 the initial detention hearing.

8           With respect to the wife in Kenya that the government  
9 alludes to, the defendant denies that he has a wife in Kenya. He  
10 admits that he did have an Islamic ceremony with his girlfriend in  
11 Kenya. She is not his lawful wife. He has one wife. She's in  
12 the United States.

13           She is aware of the girlfriend in Kenya. She was upset  
14 about it and jealous, and that is why when Mr. Tracy originally  
15 returned, he was living in a boarding house. However, his wife  
16 wants him to live with her, and she is a suitable third-party  
17 custodian, as is specified in the Pretrial Services report.

18           She does have a landline, and she's willing to provide  
19 electric monitoring if that's something that would be ordered by  
20 the Court, although we don't think it's necessary.

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

That is all we have to proffer, Your Honor. We do have argument.

THE COURT: All right. Was there any other proffer the government wanted to make?

MS. LINEHAN: Regarding the fact that the wife has been on assistance, Your Honor, the defendant did indicate when he was interviewed by two of the agents that he made \$90,000 --

THE COURT: 90?

MS. LINEHAN: \$90,000 --

THE COURT: That's what I thought.

MS. LINEHAN: -- with his Noor Services company in Kenya.

And the wife was unaware when she spoke to Pretrial Services as to what the defendant was doing in Kenya, so certainly if he profited to that extent, if he had an ongoing relationship with his wife and his children, he would have sent an amount more than a couple hundred dollars every now and again.

THE COURT: Mr. Kamens?

MR. KAMENS: Your Honor, he denies that he ever made \$90,000. He was there from April until early January. With the amount of money he --



1 THE COURT: Take a look at the Pretrial Services report.  
2 Doesn't he indicate there that his income was 5 to 6,000 dollars a  
3 month? So that might not be 90,000. I think that would be, what,  
4 72,000 a year. Whatever it is, did I read that correctly?

5 MS. LINEHAN: Yes, Your Honor, he did.

6 THE COURT: Yeah. So whatever that is, that's a  
7 significant amount of money. For someone who is truly attached to  
8 a wife and five children, you would expect that there would be  
9 more than an occasional hundred dollars or so going to that  
10 family.

11 MR. KAMENS: Well, it doesn't specify whether that's  
12 gross or net, Your Honor.

13 THE COURT: Well, we're getting to fine points at this  
14 point. I'm reviewing the decision of the magistrate judge, who  
15 also conducted an extensive hearing on this matter, and you said  
16 that the wife was -- didn't she testify during that hearing, or  
17 she was present in the courtroom?

18 MR. KAMENS: She was present in the courtroom. The  
19 information was proffered.

20 THE COURT: All right.

21 MR. KAMENS: Your Honor, if that is significant to the  
22 Court, then we'd ask the Court to allow her to testify under oath,  
23 and she's prepared to do so. When I spoke with her this  
24 morning -- she doesn't drive. She has to get a ride here. She  
25 was unable to do so because her two-year-old is very sick.

1 However, she is willing to testify and state to the Court all of  
2 the things that I've mentioned and proffered and more, I'm sure.

3 And she provided information to the government this  
4 Sunday. Perhaps they have additional statements from her that  
5 corroborate exactly what she said. But she is willing to be a  
6 third-party custodian, is willing to allow the defendant to reside  
7 with her, and he doesn't have any of the kind of assets that the  
8 government suggests that he does.

9 THE COURT: When the defendant was arrested, was there  
10 anything unique found on his person, amounts of cash?

11 MS. LINEHAN: No, Your Honor. The way it was described  
12 to me by the law enforcement agents that encountered him at JFK,  
13 he came in knowing that he'd be encountered. In other words, he  
14 had nothing on him but what he was wearing and, I believe, a  
15 laptop computer -- not even a laptop computer.

16 So they said it was clear to them that he knew he was  
17 going to be encountered by a large number of law enforcement  
18 individuals and that he had virtually nothing on him, no cash,  
19 nothing.

20 THE COURT: Did he have a suitcase?

21 MS. LINEHAN: A suitcase, yes, but nothing of any  
22 significance. No records, no -- and I've pointed out in the  
23 response that I did to the motion to review the bond determination  
24 that very little items were found in his boarding house where he  
25 was living: his U.S. passport and, I believe, two domestic cell

1 phones.

2 THE COURT: And the passport that was supposedly stolen  
3 or taken, what was the timing of that again?

4 MS. LINEHAN: Your Honor, I believe it was November of  
5 2009. That's what he alleges occurred. We have absolutely no  
6 proof that that happened.

7 THE COURT:

8

9

10 MS. LINEHAN: Yes.

11 THE COURT: All right.

12 All right, I'll hear any arguments, Mr. Kamens, to your  
13 motion.

14 MR. KAMENS: The first two considerations under 3142 for  
15 the Court are the nature of the case and the weight of the  
16 evidence against the defendant. The nature of the case if it  
17 involves firearms or violence or drugs are considerations that  
18 weigh in favor of detention.

19 A case such as this one involving the allegation of  
20 assisting individuals to obtain Cuban travel visas is not the type  
21 of case that would weigh in favor of detention. In particular,  
22 we're not dealing with the production of fraudulent identification  
23 here, either U.S. identification or fake Cuban travel documents  
24 made in the back room somewhere.

25 The allegation is that Mr. Tracy helped individuals

1 obtain a valid Cuban visa using hotel reservations, residence  
2 documents, and flight tickets that were submitted to the Cuban  
3 embassy.

4           So -- and the reason I raise that is that it might be a  
5 different case if an individual had the ability to create travel  
6 documents on their own such that that might suggest to the Court  
7 this is a person who has the ability to fabricate legitimate  
8 travel documents and perhaps leave this area, but that's not the  
9 allegation in this case.

10           With respect to the weight of the evidence, the  
11 government itself says notwithstanding the sworn affidavit of the  
12 agent, they have not corroborated any of the information about  
13 Somalis entering the United States, but let's imagine that they  
14 had, Your Honor. Let's imagine that they found a Somali in the  
15 United States who says, "Yes, I was in Kenya. I used Mr. Tracy's  
16 travel service to obtain travel documents to Cuba, and then I went  
17 to Cuba, and on my own, I then traveled from Cuba to South America  
18 and from South America to Mexico and then into the United States."

19           Would that constitute a violation of the statute? I'd  
20 suggest no. The statute requires encouragement to come into or  
21 enter the United States, and there's not one case that applies the  
22 statute to this type of factual circumstance.

23           That weighs in favor strongly of release in this case,  
24 because we simply do not have another case of this type, and the  
25 allegations are the government doesn't even corroborate the

1 information that it has in the complaint.

2           The other considerations for the Court are the history  
3 and circumstances of the defendant and the seriousness of any  
4 danger, and it's clear that this is not someone, I believe, that  
5 the government would allege is a danger to the community. The  
6 only question is based on his history and circumstances, is there  
7 a risk of flight that cannot be addressed by any condition of  
8 release.

9           We have an individual here who has cooperated with law  
10 enforcement and with ICE since 2002, who has been paid for his  
11 cooperation, a person who has ties, significant ties to this  
12 community, that is, a wife and five children, ages 10, 8, 6, 5,  
13 and 2, and the government's allegation here is that his desire to  
14 flee or inclination to flee is so strong that he would leave this  
15 community and leave his five young children behind forever.

16           There simply is no evidence to suggest that that is so.  
17 There's no evidence to suggest either that he has the ability to  
18 obtain travel documents, of which he has none. His passport was  
19 seized. There is no evidence to suggest that he has the  
20 inclination to flee.

21           The government continues to state that he expressed his  
22 desire to return to Kenya. He told that to the investigators in  
23 this case before his arrest. That's where his company was.

24           He was asked to come back to this country, he did so,  
25 and he expressed a desire to return to Kenya. That's not a reason

1 to believe he would flee. That's a reason to believe that if this  
2 case was never brought, he would return to Kenya, as he is allowed  
3 to do so.

4           Because of the nature of the allegations in this case,  
5 he is determined to stay in this jurisdiction, to fight the  
6 allegations against him, to prove that he has not committed any  
7 crime.

8           And so when the government provides in their, in their  
9 motion that there are no conditions that can reasonably assure his  
10 appearance at future hearings, they really have no factor under  
11 3142 that weighs in their waiver. There is certainly nothing  
12 about the case itself or the weight of the evidence that weighs in  
13 favor of detention.

14           And with respect to his history and characteristics, we  
15 don't have just a regular citizen who has not been involved with  
16 law enforcement before. We have an individual who has worked with  
17 law enforcement providing information and did so in this case and  
18 cooperated when he came back and was asked to come back  
19 voluntarily to this country.

20           Under the circumstances, given his ties to the  
21 community, the availability of a third-party custodian, we believe  
22 that there are conditions that would reasonably assure his  
23 appearance at future hearings and that this is not even a close  
24 case, as I mentioned in our papers. It simply is one in which the  
25 Court can establish conditions of reside with a third-party

1 custodian, restricts travel to this area, be monitored by Pretrial  
2 Services, and sign a personal recognizance bond.

3 This is someone who understands the nature of the  
4 charges against him and wants to fight them, and he wants to stay  
5 here to do that, and he wants to reside with his family, and for  
6 that reason, we believe there are conditions that would reasonably  
7 assure his appearance.

8 THE COURT: Tell me more about this business in Kenya.  
9 How many employees are in the business?

10 MR. KAMENS: With the Court's indulgence?

11 He had two employees, Your Honor. The business was  
12 closed down in November.

13 And just to be clear, he denies that he ever provided  
14 fraudulent documentation to anyone. He did and freely admits that  
15 he helped people to obtain travel documents to many countries,  
16 including Cuba, but the business is not up and running, as I  
17 understand it, at this time. And even the contacts that he  
18 allegedly had at the Cuban embassy have been terminated according  
19 to the complaint, so there's not even an allegation that he could  
20 continue engaging in the behavior that's alleged in the complaint  
21 in this case.

22 THE COURT: And what kind of rent was he paying for the  
23 building, for the office?

24 MR. KAMENS: In Kenya, Your Honor?

25 THE COURT: Yeah.

1 MR. KAMENS: As I understand it, the rent was \$120 a  
2 month, Your Honor.

3 THE COURT: And when did he first open that business?

4 MR. KAMENS: As I understand it, he traveled to Kenya in  
5 April of '09. It took him several weeks, perhaps six weeks to  
6 open a business.

7 THE COURT: Had he ever been involved in a travel  
8 business in the United States?

9 MR. KAMENS: I don't think so. If I can just confirm --

10 THE COURT: I didn't see that in the Pretrial Services  
11 report.

12 MR. KAMENS: No, Your Honor.

13 THE COURT: And what's your understanding of the total  
14 amount of money the defendant has been paid by the U.S. government  
15 to provide information?

16 MR. KAMENS:

17

18

19

20 THE COURT: That's not what he told Pretrial.

21 MR. KAMENS: Well, we're proffering that to the Court.

22 THE COURT: All right. Ms. Linehan?

23 MS. LINEHAN: Your Honor, if I could just direct Your  
24 Honor's attention to two paragraphs in the original affidavit in  
25 support of the complaint, and this is that the affidavit that



1 Agent Eyre swore to, page 3, paragraph 7, Tracy admitted that he  
2 would help the aliens by providing and manufacturing fake  
3 documents that are required to obtain Cuban visas, such as bank  
4 statements reflecting residency in Kenya. These were to get Cuban  
5 visas from the Cuban embassy in Kenya, and the documents required  
6 for that were things that would provide an indicia of residency in  
7 Kenya; in other words, people are returning.

8 He indicated to the FBI and ICE that he manufactured  
9 fake documents to do that for these people, and he charged money  
10 to do that. This wasn't a legitimate travel business. He was  
11 providing fake documents so people could get visas that they  
12 wouldn't have ordinarily been eligible to get.

13 Also, Your Honor, on -- in the affidavit, on page 5,  
14 paragraph No. 16, this paragraph is very relevant -- I'm sorry,  
15 paragraph 14 -- to Your Honor's consideration. It's an e-mail  
16 from Tracy dated January 15, 2010, and it was sent in response to  
17 an e-mail the defendant received. In it he says, "I will be back  
18 in Kenya at the end of February, so contact me then, and I will  
19 assist you, inshalla. I helped a lot of Somalis, and most are  
20 good, but there are some who are bad, and I leave them to Allah."

21 Your Honor, we have no idea who these individuals are  
22 that he assisted. These individuals pose -- possibly pose a risk  
23 of national security to this country.

24 He also, Your Honor, admitted when he spoke to the  
25 agents that he had been approached by Al-Shabaab in Kenya.

1 Although he had denied assisting them, it was that portion of the  
2 polygraph examination that he failed, and I understand that Your  
3 Honor can't take that into consideration. I just offer it to you  
4 in the context of we have no idea who these individuals are.

5           And the reason why these individuals are important, Your  
6 Honor, for your consideration of detention is because if there are  
7 270 of these people in this country that he assisted, it's high  
8 time for paybacks to him, so if he gets out, he potentially has  
9 270 individuals in this country who he assisted through illegal  
10 means who he can reach out to and say, "Time for a payoff. Get  
11 me back to Kenya."

12           In addition to that, Your Honor, he indicated that he  
13 had been approached by pirates. He said -- he stated in an e-mail  
14 that he had been approached by retired pirates.

15           Your Honor, the work at Noor Services that he did  
16 required the use of corrupt embassy employees, two of which he  
17 named, a woman named Consuela and Helen. That demonstrates to the  
18 Court that he has access to corrupt individuals in embassies,  
19 possibly not just the Cuban embassy in Kenya but throughout the  
20 world, because as Your Honor knows, when people begin in this sort  
21 of travel business where they're smuggling, it's vital to their  
22 business to establish contacts throughout the world in different  
23 embassies so that when individuals are fired, you can replace  
24 those individuals and you can have a seamless operation.

25           And, Your Honor, with that, I would rest on the

1 remaining items in my, in my opposition.

2 THE COURT: Mr. Kamens?

3 MR. KAMENS: If I can just make two quick comments, Your  
4 Honor? The e-mail about the pirates was sent to ICE by Mr. Tracy  
5 in an effort to provide information. It's not a reason to hold  
6 him now, nor is the government's statement that they have no idea  
7 who these 270 people are that they allege or fear are in the  
8 United States. It is the government's burden to establish that  
9 Mr. Tracy has committed a violation of the law, and the fact that  
10 they don't know and haven't confirmed that these people exist is a  
11 basis to find that Mr. Tracy should not be held for a criminal  
12 violation.

13 I understand the government's fear about polygraph or  
14 their concern about pirates, but that's not what we're here about.  
15 We're here to determine whether he should be detained because he  
16 allegedly encouraged individuals who the government freely admits  
17 has no idea whether they actually exist into the United States.

18 THE COURT: Well, there's no question if this were at  
19 the trial level, where the standard is proof beyond a reasonable  
20 doubt, that the Court would have to acquit the defendant at this  
21 point, but that's not where we're at. We're at a preliminary  
22 stage in a criminal proceeding where the standard is different.

23 The first standard in terms of the initial complaint in  
24 the charging documents is a standard of probable cause, and I'm  
25 satisfied that the information in the affidavit made under the

1 penalty of perjury is more than sufficient to establish probable  
2 cause to continue holding the defendant for a federal crime.  
3 Whether the government can prove it is a different matter.

4           So the issue then -- I agree with the defense counsel  
5 that this is not an offense which falls under the presumption list  
6 of defenses. This is not considered at this point a crime of  
7 violence. If down the road there are national security ties that  
8 are not yet affirmatively established in the case, that could  
9 totally change that analysis, but for purposes of considering the  
10 bond, the Court will not have a presumption to work with in this  
11 case.

12           And whether there's a risk of violence, again, I don't  
13 think that in this case there's any evidence of that.

14           The real concern that Judge Buchanan certainly had and  
15 that this Court has as well and what frankly has been focused upon  
16 the most is the likelihood of the defendant's not being here for  
17 trial, in other words, the flight risk element, and in this case,  
18 I find that the government has met its burden of establishing that  
19 there is significant evidence of flight risk, and the defendant  
20 has not satisfied the Court with the evidence that's on the record  
21 that he is not a flight risk.

22           The nature of the case involving the preparation of  
23 false documents, be they bank records, driver's license, or  
24 whatever, if you can get your hands on false documents, the  
25 implication is an increased likelihood that a person could get or

1 make false documents for himself which would help him to abscond.

2

3

4

5

6

7

8           He clearly has access to people in consulates who are,  
9 from the evidence in the record so far, who are willing to violate  
10 the law and to accept false documents, and I find that the  
11 inconsistent statements made to Pretrial Services about bona fides  
12 such as sources of income, amounts of income, ties to this area,  
13 are very problematic. I don't find on this record that there are  
14 strong ties at all to Northern Virginia.

15           The argument that the defendant is so tied to his wife  
16 and five children that he would leave, the significant amounts of  
17 time that he was gone for, what, seven or eight months in Kenya  
18 most recently, the evidence that his plan was to go back to Kenya,  
19 that does not show the kind of strong family ties that would  
20 normally be considered reliable.

21           Given those factors, I find that Judge Buchanan did not  
22 err as a matter of law nor was she incorrect in her fact finding,  
23 and the Court is going to deny the motion for release, and the  
24 bond will stay in place.

25           I believe that that concludes the proceeding. As I

1 said, we'll have this transcript reviewed, and to the extent that  
2 it is, if at all it's classified, we'll have a redacted transcript  
3 made available. All right?

4 Anything further in this case? No?

5 MR. KAMENS: Nothing further, Your Honor.

6 THE COURT: The defendant is remanded at this time.

7 (Which were all the proceedings  
8 had at this time.)

9

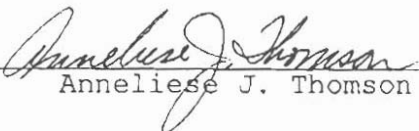
10 CERTIFICATE OF THE REPORTER

11 I certify that the foregoing is a correct transcript of the  
12 record of proceedings in the above-entitled matter.

13

14

15

  
Anneliese J. Thomson

16

17

18

19

20

21

22

23

24

25