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*Robert Suro, *Migrants’ False Claims: Fraud on a Huge Scale*, New York Times (November 12, 1989), incorporated as Exhibit 2 to Remarks by Senator Cornyn (TX), 152 Congressional Record 65 p. S4934 (May 23, 2006)..... 34

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World Bank, *Conflict in Somalia: Drivers and Dynamics* (January 2005) 35

* Pursuant to LCrR 47, a case or authority on which counsel chiefly relies.

INTRODUCTION

On June 24, 2011, the Court issued its Opinion and Order denying bond for the defendant, Ali Mohamed Ali. Since that time, Mr. Ali has received a substantial amount of additional evidence that strongly merits revisiting his bond status. The evidence raises troubling questions regarding the government's diligence in its factual proffer and demonstrates the superficiality of the government's claims that Mr. Ali—a former public official in the strongly anti-pirate Republic of Somaliland—conspired with a gang of RPG-wielding pirates. In short, the evidence strongly tips the “weight of the evidence” in Mr. Ali's favor. 18 U.S.C. § 3142(g). It also bolsters numerous other bond factors, by demonstrating Mr. Ali's consistent connection to this country; his history of confronting these charges head-on; his trust and faith in the United States legal system; and his fear of returning to Somalia. Mr. Ali respectfully submits that these new materials show his substantial claims of innocence and corroborate his fervent desire to achieve vindication through this Court, so that he may seek refuge in this country.

Mr. Ali also asks that his bond status be revisited for another reason: fairness under the Due Process Clause. Mr. Ali has now been imprisoned for seven months without an adjudication of guilt because the government, in a curious and aggressive assertion of universal jurisdiction, invited him to this country and arrested him before it was ready to prosecute him. Mr. Ali bears no responsibility for this delay and, conscious of his innocence, has consistently asserted his desire for a speedy trial. Yet he faces seven additional months of incarceration before he will get that chance—perhaps more, as the government still has not produced any classified evidence from the several federal agencies with whom Mr. Ali corresponded. Such prolonged imprisonment resulting from the government's own decisions is unconscionable, and violates Mr. Ali's fundamental due process rights. Mr. Ali therefore respectfully moves this Court for release under appropriate conditions until a trial may be held in this matter.

ARGUMENT

I. THE EXPANDED RECORD FAVORS PRE-TRIAL RELEASE.

The Bail Reform Act, 18 U.S.C. § 3142(f), provides for the reopening of a detention hearing at any time before trial if material information exists that was not known to the movant at the time of the hearing.¹ Since the bond hearing, substantial new material information unknown to Mr. Ali has been uncovered, most of which was in the government's possession during the hearing. This new information paints a consistent picture of Mr. Ali that ought to overwhelm any lingering statutory bias against the "norm" of pretrial release. United States v. Salerno, 481 U.S. 739, 755 (1987).

A. New Material Evidence Supports Defendant's Motion for Bond

1. New Eyewitness Testimony Powerfully Corroborates Mr. Ali's Independence and Courage in Hostage Crises.

Since the bond hearing, counsel for Mr. Ali has interviewed several witnesses who interacted with Mr. Ali in hostage crisis situations before, during, and after the *CEC Future*. The consistency of their testimony powerfully demonstrates that Mr. Ali is a courageous individual who intervened independently and acted at all times for the benefit of the hostages.

a. German Hostage Crisis

In June 2008, a German couple, Jürgen Kantner and Sabine Merz, were abducted from their yacht by pirates and taken to rural Somalia. Ex. 1. The kidnapping of Mr. Kantner and Ms. Merz received significant media attention. Reports indicated that Mr. Kantner had diabetes and was running low on medicines, and the couple's plight was a topic of much discussion and concern among German nationals in Somalia. Id.

¹ Even "in the absence of an express statutory reconsideration provision," district courts "nonetheless possess inherent power to reconsider previous detention orders." United States v. Angiulo, 755 F.2d 969, 972–73 (1st Cir. 1985) (Breyer, J.); see also Wood v. United States, 391 F.2d 981, 984 (D.C. Cir. 1968) ("[T]he judges of the District Court...have a broad discretion to amend the conditions imposed, or to grant release outright.").

(i)

[REDACTED]

(ii) Jurgen Kantner

Jürgen Kantner is one of the German nationals captured by Somali pirates in June 2008. See id. According to Mr. Kantner, he and his wife were taken to rural Somalia after being captured at sea. The pirates asked the couple every day when ransom money would come, but the

couple had no source of funds other than what was on their boat. Id. (¶4). The pirates tried to obtain a ransom by calling members of the couple's families in Germany. When that failed, the pirates became very aggressive toward the couple. It appeared to Mr. Kantner that the younger pirates wanted to simply kill the couple, while the older pirates wanted to hold out. Id.

Mr. Kantner met Mr. Ali when he came to the area where the couple was being held by the pirates. Mr. Ali contacted the German embassy on the couple's behalf and gave the phone to Mr. Kantner. Id. (¶6). That was the first contact between Mr. Kantner and the German authorities. According to Mr. Kantner, Mr. Ali travelled to a nearby town to purchase medicine for Ms. Merz when she became ill, and nursed her back to strength with his son's juice and cookies. Id. (¶8). When the pirates staged a mock execution of Mr. Kantner to torture Ms. Merz, Mr. Ali hugged her and said, "Be strong—we can't let them see us afraid." Id. (¶9).

As on the *CEC Future*, Mr. Ali was treated with a mix of coercion and utilitarian deference by the pirates. The pirates allowed Mr. Ali to intervene, and respected his ability to contact and communicate with the German foreign office. They became distrustful of Mr. Ali, however, and Mr. Kantner describes how the pirates fired shots near Mr. Ali's head and pushed him off a small cliff. Id. (¶9–10). Ultimately, Mr. Ali was abandoned by the pirates when they no longer needed his language ability due to intervention by the president of Puntland. The pirates moved the couple to a new camp in the middle of the night without telling Mr. Ali, and Mr. Ali had to search for the couple's whereabouts. Id. (¶11). After tracking them down, Mr. Ali told the pirates that he intended to stay with the couple and would not leave until they were free. Needless to say, Mr. Ali's actions during the German hostage crisis appear heroic and life-saving, and not those of a pirate conspirator. Mr. Kantner concurs, stating, "I do not believe that Mr. Ali is a pirate or conspired with the pirates. Rather, it is clear to me that Mr. Ali came as an intermediary and intervened to try to help set us free from the pirates." Id. (¶12).

b. CEC Future Crisis(i) Andrey Nozhkin

As captain of the *CEC Future*, Andrey Nozhkin spent nearly seventy days at sea with Mr. Ali. On August 23, 2011, Mr. Nozhkin signed a sworn affidavit describing his experience. Ex. 3. As a general matter, Mr. Nozhkin “take[s] absolutely no position as to whether or not Mr. Ali was a pirate or with the pirates.” Id. (¶ 9).² In terms of what he actually observed, however, Mr. Nozhkin stated that the difference between Mr. Ali and the pirates was “like night and day.” Id. (¶ 8(k)). Mr. Ali spoke of the pirates as his “enemy,” id. (¶ 8(k)), stated that he had “nothing in common with pirates other than language,” id. (¶ 8(b)), and consistently “put himself between the pirates and the crew to protect the crew from mistreatment by the pirates.” Id. (¶ 8(l)). He “gave his mobile phone to crew members on many occasions so they could talk to their families.” Id. “[W]hen the pirates received the ransom and started to distribute it, Mr. Ali stayed completely out of the process.” Id. (¶ 8(i)). Rather, Mr. Ali “remained with the crew on the bridge, separate from the pirates,” “seemed to be in the same position as the crew,” and “the pirates seemed to forget about him.” Id. And after the pirates disembarked, Mr. Nozhkin and the crew presented Ali with “gifts” from “a collection of items we hid from the pirates,” including “a parka with the Clipper Group logo, t-shirts, and possibly caps or gloves.” Id. (¶ 8(j)).

Significantly, Mr. Nozhkin contradicted two of the main allegations put forth by the government to show Mr. Ali’s collusion with the pirates. According to the government’s bond opposition, “upon boarding the ship, Mr. Ali assisted the other pirates in collecting the crew’s passports and matching them to each crew member.” Gov’t Opp. at 5. Mr. Nozhkin and

² Mr. Nozhkin explained that “Ali’s actions seemed to be against the pirates and in favor of the crew, but it is always possible that Ali was a genius actor or that there were hidden motives behind his behavior.” Id.

the ship's Second Engineer, Juri Grigorjev, contradict this chronology:

While the crew was on the bridge, the pirates passed around a bag and forced the crew to place all mobile phones, laptop computers, and passports in the bag. The pirates then checked the identity of the crew members and compared them to the crew list. To the best of my recollection, these events occurred on the first day of the attack before Ali boarded the M/V *CEC Future*. I have consulted with the Second Engineer [Juri Grigorjev] of the M/V *CEC Future*, who was present during these events. He agrees that the pirates confiscated the crew's passports on the first day of the attack while the crew was on the bridge.

Id. (¶ 4). The government also claimed that Mr. Ali "accompanied the two lead pirates to the captain's quarters where they had the captain open the safe and stole money from it – approximately \$2500 – in Mr. Ali's presence." Gov't Opp. at 5. Mr. Nozhkin denied this:

While on board the M/V *CEC Future*, two pirates known as "Omar" and "Taliani" entered my office. They appeared to be the leaders of the pirates. Omar and Taliani forced me to open the Captain's moneybox so they could steal its contents. There were no witnesses to this event other than the two pirate leaders and me. Mr. Ali was not present when this money was stolen.

Id. (¶ 5). While he refuted the government's main allegations against Mr. Ali, Mr. Nozhkin provided direct eyewitness testimony corroborating Mr. Ali's main contention—that he was essentially a prisoner of the pirates. According to Mr. Nozhkin: "Toward the end of the negotiations, Ali seemed to lose the trust of the pirates. He was arrested by the pirates and detained in his cabin for several days." Id. (¶ 8(h)). This period of solitary confinement—referred to by the government as "a brief period of tension," Gov't Opp. at 6—demonstrates the control the pirates exercised over Mr. Ali and the context of coercion in which he operated. In fact, in a post-affidavit communication, Mr. Nozhkin confirmed that Mr. Ali became so distraught over his imprisonment on the *CEC Future* that he actually contemplated donning a lifejacket and jumping overboard simply to escape the pirates.³

³ Mr. Nozhkin advised Mr. Ali that the *CEC Future* lifejackets emitted a light visible for 3–4 miles at night. This convinced Mr. Ali not to go through with his plan, since he feared becoming an illuminated bulls-eye for the pirates' target practice were they to discover that he jumped.

(ii) Per Gullestrup

Per Gullestrup is CEO of Clipper Group A/S (“Clipper”). Mr. Gullestrup personally conducted the final two weeks of negotiations for the *CEC Future* and arranged Clipper’s side-payment to Mr. Ali. He also corresponded extensively with Mr. Ali for two years following the crisis. On October 26, 2011, Mr. Gullestrup submitted a new letter for Mr. Ali:

The undersigned, Per Gullestrup, hereby declare that I was involved in negotiating for the release of our vessel M.S. *CEC Future*, which were hijacked by Somali pirates on November 7th, 2008. In this connection I came in to contact with Mr. Ali Mohammed Ali, who was acting as a translator for the pirates, throughout the detention of our vessel. Subsequent to the release of the vessel I stayed in contact with Mr. Ali, who proved very accommodating in assisting us, as shipowners, in dealing with the piracy menace, to the extend [sic] that Mr. Ali agreed to participate in a documentary produced by Danish National TV. He furthermore agreed to talk to various persons representing American authorities.

The TV network Al Jazeera aired the documentary in September 2010 and immediately afterwards Mr. Ali contacted me to advise that he had been detained by Somaliland police, accusing him of piracy. I volunteered to produce a statement outlining our impression of Mr. Ali’s involvement in the negotiation of the release, which I attach to this statement.

Mr. Ali has been very forthcoming in providing information relating to piracy and he brought our attention to the fact that one of the pirates involved in the hijacking of the *CEC Future*, had actually been apprehended by the American authorities.

[REDACTED]

We are extremely supportive of the U.S. government’s efforts to arrest and prosecute those involved in piracy generally; however, for our part, we have no specific desire to see Mr. Ali prosecuted, for reasons⁴ stated in my letter dated September 24, 2010. We are also mindful of the potential chilling effect on legitimate intermediaries, who often assist the victims of piracy or the authorities at great personal peril.

Ex. 4. This letter erases any doubt that Mr. Gullestrup’s letter of September 24, 2010 was

⁴ Those reasons were: (i) reports by the *CEC Future* crew that Mr. Ali was instrumental in securing humane conditions from the pirates; [REDACTED] (iii) Clipper’s conclusion that it had “no reason to believe that Mr. Ali was part of the pirate team that hijacked our vessel”; and (iv) the fact that Mr. Ali at no point asked for any kind of compensation for assisting Clipper in various anti-pirate efforts after the release of the *CEC Future*. Ex. 5.

genuine and not written out of fear “to curry favor with Ali while he was still at large.” Gov’t Opp. at 9. Indeed, it was written for the opposite purpose—to help Mr. Ali stay “at large,” by proving his innocence to Somaliland police investigating the *CEC Future*.

(iii) Roger Coldiron

Capt. Roger Coldiron (ret.) is the former U.S. Defense and Naval Attaché to Denmark. Ex. 5 (¶ 1). Capt. Coldiron also served as the Inspector General for U.S. Navy Forces Europe, and has taught ethics and leadership at the U.S. Naval Academy. Capt. Coldiron was put in touch with Mr. Ali by Mr. Gullestrup, who described Mr. Ali as “very helpful in resolving the [CEC Future] crisis” and stated that Mr. Ali “provided background and insight into the pirates’ operations and mentality following the hijacking, and credibly described threats of violence against him by the pirates.” Id. (¶ 3). Capt. Coldiron and Mr. Ali corresponded for several months in 2009. In their correspondence, Mr. Ali referred to himself as “a consultant” and stated that he “spent a great deal of time with pirates negotiating for them, to get hostages out safe and to acquire understanding of piracy, pirates and their network.” Id. (¶ 8). He described “constructing a website that covers multiple issues in general and piracy in particular,” and offered his knowledge to the United States to fight what he called “organized crime.” Id.

Capt. Coldiron came away from his interactions with Mr. Ali with the sense that he was “a good man interested in peace and justice for Somalia.” Id. (¶ 13). Capt. Coldiron stated that he saw Mr. Ali as a legitimate consultant on piracy issues, and believes Mr. Ali saw himself as such

in connection with the *CEC Future*. Capt. Coldiron particularly noted that Mr. Ali credibly described threats by pirates while onboard the *CEC Future*. [REDACTED]

[REDACTED]

c. The Chandler Crisis

In October 2009, a British couple, Paul and Rachel Chandler, were kidnapped from their yacht by pirates and taken to rural Somalia. The couple's plight received significant international media attention, in part because of the appalling conditions under which they were held. When he heard about the case, Mr. Ali immediately began trying to contact the pirates holding the couple. As he wrote Mr. Gullestrup, "Per, the British couple reminds me of the German couple; they were at wrong place at the wrong time. And that hurts. If at all you have connections, let us combine efforts to achieve their release." Ex. 6. After making contact with the pirates holding the Chandlers, Mr. Ali contacted Francisco Quinones, a crisis management expert to whom he had been introduced by a mutual colleague. Ex. 7. At the time, Mr. Quinones was employed by a crisis response firm whose clients include Fortune 500 companies. Id.

According to Mr. Quinones, the pirates holding the Chandlers were especially difficult to locate. Id. After two months of effort, Mr. Ali established contact with the pirates and wrote Mr. Quinones to ask if he could put him in touch with British representatives negotiating on behalf of the Chandlers. Mr. Quinones asked Mr. Ali what his consultant fees would be for helping to get the Chandlers released, since the two had previously discussed the possibility of working together as consultants for shipping companies in particular hostage crises. Mr. Ali replied that "he was not doing this for money." Id. Rather, "[h]e said the couple needed help and we had to try to do something to help them." Id. According to Mr. Quinones, "This was not the behavior of Somali pirates or criminals, but that of someone who saw an opportunity to offers his services as a facilitator, in this case pro bono, in an area where local authorities are non-existent

or non-cooperative.” Id. Mr. Quinones concluded: “My interactions with Ali, though limited, best describe him as an asset and good contact to have and not a criminal.” Id.

2. New Documents Chronicle Mr. Ali’s Extensive Efforts to Assist Government Authorities and Shipping Companies.

In addition to this powerful eyewitness testimony, the record now includes hundreds of emails meticulously documenting Mr. Ali’s actions before, during, and after the *CEC Future* crisis. These documents reflect a completely consistent account of Mr. Ali as an individual willing to risk his life [REDACTED] to become a recognized expert on piracy, assist piracy’s victims, and obtain legal residency in the United States.

a. New documents show Mr. Ali helping U.S. officials and shipping companies fight piracy before the *CEC Future* crisis.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The expanded record demonstrates that Mr. Ali began recounting observations of piracy [REDACTED] barely seven months after landing in Somalia. Mr. Ali wrote on January 4, 2008: “Right now am in Bosaaso...where there is a continious hjackings, kidnappings and human trafficking. In 3 weeks time, the french and the Argentinians paid 750,000 and 600,000 dollars to free hostages....” Ex. 8. On April 19, 2008, Mr. Ali expressed frustration at what he was observing:

⁵ [REDACTED]

⁶ [REDACTED]

“[H]ijackings of ships and ransom payments is the new trend....[I]t is hap[p]ening very close to my clan territory...and already youths⁷ are talking about what is taking place. Discouraging it is very easy, but need resources, so if you find someone to talk to please let me know.” Ex. 9.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Ali even reached out to shipping companies in his private war against sea bandits. On September 3, 2008, MISC Berhad, a Malaysian shipping giant, announced that it was halting operations in the Gulf of Aden after two of its ships were hijacked. Still moved by his experience with the German couple, Mr. Ali contacted the company and offered “to help you stay on course and never give up on your responsibilities in this business.” Ex. 12. Mr. Ali explained that he “spent 54 days with Somali hijackers and hostages of German descent in the mountains,” and “it was emotional and harsh to see how low can people go for the sake of money.” Id. Mr. Ali warned the company that pirates based in his area were “about to hit the waves in may be 2 days,” and stated that he had “gathered extensive knowledge on how these people work” and could help “deny[] access to hijackers and Somali escorts.” Id.

⁷ As a father, Mr. Ali’s concern regarding the attraction piracy held for Somali youth was deeply personal, and one that pre-dated his visit to Somalia. Weusi Baraka Chapman, a community organizer and former D.C. resident, recalls Mr. Ali expressing frustration at the corrupting influence of pirate wealth on Somali youth as early as March 2007. Ex. 13. Mr. Chapman and Mr. Ali frequently discussed ways to reach these youth with positive messages through music and message-based concerts. Id.

b.

In June 2010, after

eighteen months of continuous communication, Mr. Ali [REDACTED]

[REDACTED] debriefed numerous government officials on the *CEC Future* and piracy in general.

(ii) Clipper Group

Mr. Ali and Mr. Gullestrup had an extraordinary relationship over the two years following the *CEC Future* incident. The relationship began in earnest two weeks after Mr. Ali's return from the *CEC Future*, when Mr. Gullestrup asked Mr. Ali's help to reach pirates holding the M/V *Stolt Strength*.⁸ From there, Mr. Gullestrup and Mr. Ali emailed each other multiple times per day for several months, and became veritable comrades in their mutually personal "battle for the seas." Ex. 33. Mr. Ali sent Mr. Gullestrup numerous papers and emails [REDACTED] [REDACTED] and Mr. Gullestrup expressed praise for Mr. Ali, stating, "you have proven yourself as being a man of integrity and provided us and others with invaluable information in relation to *CEC Future*." Ex. 17.

⁸ The *Stolt Strength* had been hijacked by particularly recalcitrant pirates and risked causing an environmental disaster. Almost immediately after the *CEC Future* crisis, Mr. Gullestrup asked Mr. Ali to try to make contact with the pirates holding the ship to try to broker a deal. Mr. Ali brainstormed with Mr. Gullestrup for months over how to convince the pirates to give up the ship, and even proposed posing as a U.S. naval officer to convince the pirates that their time was up. Ex. 16. Mr. Gullestrup offered Mr. Ali "a commission" for his efforts, but Mr. Ali declined and never sought compensation for assisting Clipper. Ex. 4.

Mr. Ali responded:

It is my pleasure; I owe a lot to the crew on behalf of righteous Somalis...Andrey, the captain is a good man and very professional...a man that never showed any emotions and used his brain with the pirates...he for sure t[a]ught me what leadership means...please pass my utmost respect and greetings to all the crew...and a special one to the Captain...[I] will help you and your organization in any way I could, don't hesitate to ask. *Id.*⁹

9

(iii) Merchant Maritime Warfare Center

In February 2009, Mr. Ali emailed Nick Davis, CEO of Merchant Maritime Warfare Center, a private maritime security and intelligence firm with a specialty in counter-piracy measures. Mr. Ali passionately expressed his desire to help Mr. Davis with his firm's mission: "I salute you for being visionary by having your company in place. Because of my personal experience to piracy I would like to see if we can discuss certain issues pertaining to this line of business." Ex. 21. He concluded, "I spent almost 70 days aboard a ship with the most notorious of all the pirates, thereby gaining information on how they do business." Id.

(iv) Commander Darren Reed, Prosecuting Attorney and Legal Advisor, British Royal Navy

On March 25, 2009, two months after the release of the *CEC Future*, Mr. Ali attended a counter-piracy seminar for regional governments and international actors. While there, Mr. Ali spoke with "a British admiral and his legal commander who advises NATO on legal matters" to pass on information regarding the *Stolt Strength* to the NATO command center in Bahrain. Ex. 22. [REDACTED]

[REDACTED]

[REDACTED]

(v) Council for the European Union

On June 3, 2009, Mr. Ali emailed the Council of the European Union to offer his "services as a consultant to assist the Naval force in the Gulf waters in telling them exactly where to expect pirates, not with precision but at least with what I know about them; what to do when

[REDACTED]

they actually hijack a ship and what to expect if the[y] bluff....” Ex. 24. He explained that he had “literally stayed with [pirates] and saved also their hostages,” stated that “[p]iracy is a new epidemic and needs to be stopped.” Id.

(vi)

(vii) United Nations Monitoring Group for Somalia (UNMG)

Mr. Ali’s relationship with the UNMG extends to February 2008, when Mr. Terlinden introduced Mr. Ali to Gilbert Barthe, a UNMG member. Ex. 26. In their meeting, Mr. Ali volunteered to Mr. Barthe that he had seen suspicious dhows near his coastal home bringing arms to Somalia. Id. Mr. Barthe followed up with Mr. Ali on February 19, 2008, asking, “I wonder if you were able to make new observation since my departure from Hargeisa two weeks ago.” Id.

Id. A few months later, in October 2009, Mr. Ali met with two other members of the UNMG. Ex. 27. He worked closely with the members to help advance their understanding of pirate investors and tactics, based on the information he had gleaned. Ex. 28.

(viii) Federal Bureau of Investigation (FBI)

On April 13, 2010, Mr. Ali was asked by Mr. Gullestrup if he would be willing to be interviewed by the FBI. Mr. Ali replied that he would “talk, cooperate and help him in any way and any fashion.” Ex. 19. An FBI agent contacted Mr. Ali that day, thanked him for agreeing to speak, and stated, “Per Gullestrup speaks very highly of you.” Ex. 29. Mr. Ali replied, “Gentlemen, I have an utmost respect for Per Gullestrup....I will be here to assist in matters of importance to you in general, and that of piracy in particular.” Id.

(ix) U.S. Department of Defense

In June 2010, Mr. Ali met with federal agents he was told represented DHS and the U.S. Department of Defense (DoD). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. New documents show Mr. Ali genuinely strategizing against pirates.

One of the clearest indications that Mr. Ali never would have conspired with pirates comes from his genuine wrestling with the difficult question of how to defeat piracy, even in emails he never knew would become public. That wrestling shows that Mr. Ali was not a criminal seeking to profit from his experience, but a frustrated member of the community opposed to the “piracy menace.” Ex. 4. In April 2009, for example, Mr. Ali decried how piracy was “getting out of hand” and “the pirates are winning the battle of the seas.” Ex. 32. He contacted Mr. Gullestrup and offered “two ideas that would work, pertaining to the gulf piracy and would

like to see if it could be developed it into something that is worth looking at.” Ex. 33. He suggested developing a “maritime security company licensed and operated from Somaliland with a direct help from western countries,” and “using Somaliland court and detention facilities on the part of international community.” *Id.* Mr. Gullestrup engaged with Mr. Ali over his ideas, and even sent him a 44-page report by the Danish Institute for Military Studies regarding Western anti-piracy strategy (hardly information one would send to pirates). Ex. 34.

On May 4, 2009, Mr. Ali emailed his brother to specify four business plans he had for the future, one of which was for “Marine security Management.” Ex. 35. In an email to Mr. Quinones, Mr. Ali offered: “Piracy will loom around for ages to come, mark my words, therefore it is imperative to find ways to improve the 2 or 3 days passage of the gulf from the bab el mandeb¹¹ to Oman....” Ex. 36. On October 12, 2009, Mr. Ali began a piracy-related weblog at the website: www.alphaconsultancy.wordpress.com. Ex. 37. In the blog, Mr. Ali offered his analysis regarding “the root cause of this [piracy] epidemic,” and listed six questions whose answers “would, at least give us an idea of what we are against and our odds of finding a solution.” *Id.* Mr. Ali would later compile his own answers to those questions, which he believed went to the heart of defeating piracy, and sent the answers to Mr. Gullestrup, Mr. Barwick, and representatives of the UNMG.

3. New Documents Show Mr. Ali’s Belief in Due Process of Law and Attitude Toward the U.S. Legal System.

In addition to vindicating Mr. Ali, the expanded record informs several other factors relevant to his bond motion. One of the most directly relevant factors in determining whether a defendant will flee the charges is his or her history of attending rather than fleeing judicial proceedings. 18 U.S.C. § 3142(g)(3). In his bond motion, Mr. Ali pointed to his

¹¹ Bab El Mandeb is a narrow strait between Eretria and Yemen leading into the Gulf of Aden.

persistence over five years in clearing himself through judicial proceedings of an assault charge in Memphis, Tennessee. New documents now show in further detail that Mr. Ali has submitted himself to scrutiny by authorities on several occasions without fear or flight—even in the face of these very allegations.

In September 2010, two hours after a documentary on the *CEC Future* aired in Somalia, Somaliland security forces stormed Mr. Ali's home, ransacked his belongings, and arrested Mr. Ali for being a pirate. Ex. 40. Mr. Ali was released by the deputy chief after explaining the facts of the case, but was advised to prepare to defend himself. Rather than flee Somaliland—a state committed to fighting piracy and the home of a new United Nations prison for pirates, Ex. 46—Mr. Ali contacted Mr. Gullestrup and requested his help documenting his innocence. Ex. 40. Mr. Gullestrup stated that he would be pleased to help Mr. Ali, and sent him his letter dated September 24, 2010. Id. After receiving the letter, Mr. Ali was cleared by Somaliland law enforcement and even became the Somaliland education minister. Ex. 41.

In March 2011, however, Mr. Ali was again detained by Somaliland security agents—this time overnight—and was questioned extensively about his role in the *CEC Future* crisis. Ex. 42. Upon his release, rather than fleeing this scrutiny, Mr. Ali held a press conference to condemn his detention publically. Id. After the press conference, the Chief Commissioner of the Somaliland Police Force, Elmi Roble Furre, stated publically that he had ordered Mr. Ali to be questioned. Id. He stated that there was a “criminal case” against Mr. Ali, and that the police had “asked him the questions we wanted” and would “call him back if we deem it is necessary.” Id. Even after this threat by the national police commissioner, Mr. Ali did not flee Somaliland. He continued his important work in the education ministry, undaunted by the late-night arrest and warnings of a “criminal case” directly related to the *CEC Future*.

Shortly thereafter, Mr. Ali was invited to speak in the United States by a new foundation purportedly interested in funding education projects in Somaliland. Ex. 43. When the foundation told him his visa would be expedited, alarm bells went off for Mr. Ali. He asked for more information from his Somali contact for the trip, Allen University professor Garane Garane, telling him, “[I]t is kind of hard on me, to just hop on a jet and fly to another country. The foundation site doesn’t tell much either. Why am I asking? [B]ecause, bro. Garane, US Visa isn’t simple to acquire and neither that rapid.” Ex. 44. Mr. Ali had reason to be concerned: he had just been detained and questioned regarding the *CEC Future* in the context of a vague “criminal case,” and knew that one of the *CEC Future* pirates had just been prosecuted in the United States. Despite these reservations, however, Mr. Ali did not avoid this country or flee Somaliland. Instead, Mr. Ali packed Mr. Gullestrup’s exculpatory letter in his briefcase¹² and willingly flew to the U.S.—indeed, to the very jurisdiction he knew had prosecuted Mr. Ibrahim.

In all three of the above instances in which Mr. Ali faced or suspected arrest—four counting the Memphis incident—Mr. Ali acted within the confines of the law and without the slightest consciousness of guilt. Even when accused of being a pirate in a republic with a new, U.N.-funded prison for pirates, Ex. 46, Mr. Ali did not attempt to abscond. Nor did he attempt to steer clear of suspected traps, even by the United States. Instead he trusted in his own innocence and in the ability of authorities to ascertain the truth. There is every reason to believe he will continue to do so in this case.

[REDACTED]

[REDACTED]

[REDACTED]

¹² See Ex. 45 (copy of Mr. Gullestrup’s September 24, 2010 letter recovered from Mr. Ali’s briefcase and Bates-stamped “Luggage_000004”).

[REDACTED]

[REDACTED]

4. New Documents Show Mr. Ali's Substantial and Consistent Connection to This Country.

Mr. Ali has lived in this country for most of his adult life. When he travelled to Somalia in 2007, he had every expectation of returning. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. New Documents Corroborate Mr. Ali's Fear of Returning to Somalia

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. New Evidence Enhances Mr. Ali's Already Powerful Community Ties.

Mr. Ali's service as Director-General of Somaliland's Ministry of Education was highlighted to the Court in his first bond motion. New documents produced by the government and new events occurring after the bond hearing now show even further how actively Mr. Ali was involved in advancing a positive civic culture in Somaliland—even apart from his substantial efforts to fight piracy. Shortly after moving to Somaliland, Mr. Ali worked as an interpreter for [REDACTED] research regarding sustainable development and democracy. Ex. 1.

Influenced by this work, Mr. Ali emailed [REDACTED] in May 2008: "[I] am planning to establish a local NGO, one that measures for that occasion, one that really does what is needed for. Development, economic development that is, and governance [sic]." Ex. 55.

In June 2008, Mr. Ali submitted two editorials to regional newspapers, one of which was published in Issue 333 of Somaliland Times. Ex. 57. In the editorial, Mr. Ali took a bold stance against partitioning his community along clan lines, and opposed what he saw as

creeping government corruption. *Id.* He also criticized the Somaliland government for seeking loyalty through propagandistic pomp rather than through grass-roots investments in health, education, drinking water and roads. *Id.* This blunt criticism of the government took considerable courage in Somaliland, where arrests can occur for such small issues as “comments made in Friday sermons....”¹⁵ Mr. Ali’s unwillingness to succumb to self-censorship in such an environment is a tribute to his character and his dogged refusal to settle for a corrupt status quo.

In March 2009, Mr. Ali was nominated for an open seat on Somaliland’s National Elections Commission. Ex. 57. Although he narrowly lost the election, the mere fact that Mr. Ali would seek to become a member of the commission is another profound testament to his courage and commitment to the community. Just five months earlier, in October 2008, coordinated explosions targeting the Elections Commission had killed twenty and injured thirty-seven. USDS Report at 14. Despite this violence, Mr. Ali was committed to the incomparably important work of the commission, which is charged with overseeing presidential elections in Somaliland to ensure the ballots are “free and fair.” *Id.* at 1.

As one might expect from this history, Mr. Ali is not one to settle for corruption. In March 2010, Mr. Gullestrup informed Mr. Ali that Clipper was “supporting Unicef/Save the children in a program to educate young Somalis in Somaliland and Puntland” as part of Clipper’s vision of a “a long term solution” to piracy. Ex. 59. Mr. Ali was touched, and wrote Mr. Gullestrup to express his view of the corruption problems plaguing Somalia:

From the presidential quarters to Water authority pipe fitters in Somalia and Somaliland, greed and insensitivity to the poor....[T]he other day my watchman came in and told me guys from the water authority are cutting off the supply pipe. ...[O]ne of the staff told me, I will send them to fix it but u got to give them some cash for the service. It has been 2 months now that I have been using water

¹⁵ United States Department of State, *Country Reports on Human Rights Practices (Somalia)*, at 7, 2010 WL 1180627 (2010) (“USDS Report”). See also *id.* at 14–15 (“[T]here were instances of violence including murder, harassment, arrest, and detention of journalists in all regions of the country, including... Somaliland. Journalists engaged in rigorous self-censorship to avoid reprisals.”).

tankers to fill my tanks, because I refused to collaborate with their scheme. It is costing me 40 dollars a week...when it used to cost me 10 dol[l]ars the whole month...If at all, in the near future you come across situation where needy are being discussed, let me know I have some ideas that are save. Ideas that focus on objectives such as educating youth but not embezzeling funds. As usual, you showed tollerence [sic] and touched where it hurts, regarding Somali youth....May Allah or God bless you and your family. Id.

Mr. Ali was appointed as Somaliland's education minister in October 2010.

Writing to Mr. Gullestrup after his appointment, Mr. Ali expressed what he saw as the link between his prior work against criminals and his new post: "Education is one of the corner stones of productivity, stability and democracy in any society. And to that, I shall say, educating the youth is very important, for that will have a positive effect on young people who would otherwise be potential criminals." Ex. 41. As detailed his bond motion, Mr. Ali fought for better schools, better teachers, and universal access to education. He often confronted the status quo, demanding accountability from ministers and entrenched foreign aid providers.¹⁶ Just prior to his arrest, Mr. Ali was travelling to the U.S. to speak with donors interested in supporting his ministry. Ex. 43. Characteristic of Mr. Ali, even as he did so, he indicated his intention to challenge the donors with his vision of accountability and local control over educational funding. Id.¹⁷

Just days after the bond hearing, the community to which Mr. Ali contributed so much offered him an impressive show of support. As reported by Somali Public Radio, a demonstration against Mr. Ali's arrest was held in Somaliland on June 22, 2011. Ex. 59. A crowd marched through major streets carrying signs stating, "ALI MOHAMED ALI IS NOT A PIRATE." Id. In true Somaliland form, the signs also emphasized, "WE APPLAUD THE US

¹⁶ As the government notes, Mr. Ali's energetic campaign against complacency in the education ministry generated "complaints." Gov't Bond Opp. at 9. Such complaints should come as no surprise to residents of the District, which recently experienced a short, controversial tenure by its own reform-minded school chancellor.

¹⁷ Mr. Ali's "bold and frank" discussion of corruption by donor organizations caused the putative head of the educational foundation to remark, "I have to say I find Director General Ali's candor a bit surprising but refreshing. Biting the hand that feeds you is a risk. But I agree that the more established an NGO becomes the more it risks losing sight of changing needs." Ex. 43.

AND NATO FOR THEIR COUNTER PIRACY EFFORTS.” Id. Ali Khayre, a member of the elders, stated, “We appreciate and support the U.S. in fighting piracy, however, it is a disgrace to put an innocent man behind bars.” Id. Another elder, Chief Mohamoud Siciid, stated, “Ali M. Ali is a citizen of good character and active in national politics....Ali M. Ali is not a pirate. We urge the U.S. government to let Ali out.” Id. The chief described Mr. Ali as “a man of exceptional quality who is loved by all the people, and the U.S. should restore his reputation.” Id. This demonstration by the strongly anti-pirate Somaliland community, organized without Mr. Ali’s knowledge, is an incredible testament to his standing in the community. Id.

B. The Government Has Not Met Its Burden of Proving that No Combination of Conditions Can Assure Mr. Ali’s Appearance.

1. The Burden of Persuasion is Always on the Government.

Pretrial detention is appropriate only when the government demonstrates that “no condition or combination of conditions” will reasonably assure the defendant’s appearance and the safety of the community. United States v. Hanson, 613 F.Supp. 2d 85, 88 (D.D.C. 2009). While the rebuttable presumption shifts the burden of production to the defendant, the burden of persuasion does not shift and remains at all times with the government. United States v. Stone, 608 F.3d 939, 945–46 (6th Cir. 2010); United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001); United States v. Portes, 786 F.2d 758, 764 (7th Cir. 1985). In meeting that burden, hearsay and uncorroborated proffers by the government are considered with “great care” and given “limited weight.” See United States v. Hammond, 44 F. Supp. 2d 743, 746 (D. Md. 1999).

2. The Government’s Arguments for Detention Fall Far Short

a. The lingering presumption has little factual value for Mr. Ali.

After it is rebutted, the Bail Reform Act’s presumption in favor of pretrial detention “remains as a factor to be considered by the Court amongst others in determining

whether the defendant should be detained.” Ord. at 4 (citing United States v. O’Brien, 895 F.2d 810, 815 (1st Cir. 1990)). It retains this relevance because it “represents Congress’s general factual view about the special flight risks and the special risks of danger to the community presented by defendants who commit the crimes to which it attaches.” United States v. Bess, 678 F. Supp. 929, 934 (D.D.C. 1988) (citing United States v. Jessup, 757 F.2d 378, 389 (1st Cir. 1985)). In other words, as a codification of factual findings by Congress, the presumption may be incorporated into the district court’s factual analysis. See United States v. Hare, 873 F.2d 796, 798–99 (5th Cir. 1989) (A “court may still consider the finding by Congress that drug offenders pose a special risk of flight and dangerousness to society.”). The probative weight of the presumption is not static, but depends on the degree to which the features of the defendant’s case parallel the paradigm of cases contemplated by Congress: “The less those features resemble the congressional paradigm, the less weight the [judge] will likely give to Congress’s concern for flight.” Jessup, 757 F.2d at 387. Where ““special features”” of a case “take it outside ‘the congressional paradigm,’” Congress’s findings (and therefore, the presumption) decrease in relevance and evidentiary value. Stone, 608 F.3d at 945–46 (quoting Jessup, 757 F.2d at 387).

The “congressional paradigm” underlying the rebuttable presumption for hostage taking, 18 U.S.C. § 1203, is unquestionably terrorism. See Gov’t Opp. at 14 (describing hostage taking as “a terrorism offense”). The presumption was created by the Pretrial Detention of Terrorists Act of 2004, passed as title VI, subtitle K (Sec. 6951) of the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), PL 108-458, 118 Stat 3638. As its name implies, the statute reflects Congress’s concern regarding special flight risks posed by terrorists; and the crimes it added—listed in Section 2332b(g)(5)(B)—are commonly associated with terrorists. In passing the IRTPA, Congress found that “international terrorists” are particularly likely to “travel across international borders to raise funds, recruit members, train for operations, escape capture,

communicate, and plan and carry out attacks,” and that “two of the September 11, 2011 hijackers were carrying passports that had been manipulated in a fraudulent manner.” IRTPA § 7204.

These findings reflect Congress’s view that terrorists exhibit a unique penchant for operating across national borders and using fraudulent passports. They do not reflect any congressional findings regarding Somali piracy—a non-political form of sea-robbery with no connection to international travel or fraudulent documents. Moreover, even if an analogy could be drawn between piracy and terrorism generally, it would flounder in the case of Mr. Ali [REDACTED] [REDACTED] See O’Brien, 895 F.2d at 816–17 (unique case of DEA agent charged with drug crimes was not situation “considered by Congress when creating the presumption”). Section 1203’s presumption of detention simply does not reflect any considered judgment by Congress concerning the flight risk of Somali pirates, much less Somali pirate negotiators [REDACTED]

[REDACTED] By any measure, Mr. Ali presents an example of “‘special features’...outside ‘the congressional paradigm.’” Stone, 608 F.3d 939, 945–46 (quoting Jessup, 757 F.2d at 387). Having been rebutted as a matter of production, the statutory presumption is thus of *de minimis* value in the actual factual analysis of whether Mr. Ali poses a flight risk—an analysis for which the government bears the burden of persuasion at all times.

b. The government’s evidence has no “weight.”

Weighing the evidence in June, the Court determined that the issue of “whether [Mr. Ali] was a neutral middleman or an active conspirator remains an open question.” Ord. at 8. The expanded record demonstrates that Mr. Ali was neither a neutral middleman nor an active conspirator on behalf of pirates, however. Rather, the evidence reflects that before, during, and after the *CEC Future* crisis, Mr. Ali actively sought to discourage piracy, courageously intervened to protect victims of piracy [REDACTED] These

copiously documented activities reflect a mindset by Mr. Ali that is fundamentally incompatible with the government's charges.

The government will not be able to escape the fact that the two main witnesses, Captain Nozhkin and Mr. Gullestrup, will testify that they have no reason to believe Mr. Ali is a pirate and are grateful for his protective intervention. Moreover, Mr. Nozhkin's observations match up well with those of Mr. Kantner during the German hostage crisis, which no reasonable person could possibly conclude reflected criminal intent by Mr. Ali. In both instances the pirates used Mr. Ali as an interpreter and negotiator, and thus out of necessity afforded him a level of deference and autonomy. Yet in both instances, the pirates clearly exercised violent control over Mr. Ali, pushing him off a cliff during the German hostage crisis and placing him in confinement onboard the *CEC Future*. In both cases, the pirates discarded Mr. Ali when his usefulness was exhausted, as evidenced by the pirates' abandoning Mr. Ali in dead of night in the German crisis and ignoring him during the ransom distribution in the *CEC Future* crisis. In both cases, Mr. Ali consistently sought to protect the hostages from the pirates. And in both cases, the hostages were extremely grateful for Mr. Ali's intervention. These highly exculpatory parallels are far more relevant than superficial descriptions of "respect" deemed important by the government in its bond opposition. Gov't Opp. at 5.¹⁸

Nor will the government be saved by the audio recordings of the negotiations themselves. The government's failure to appreciate the internal dynamics of the very conspiracy it alleges prevents it from understanding the record, which supports Mr. Ali. Indeed, one of the clearest examples of Mr. Ali's lack of authority is the very November 17, 2008 call the

¹⁸ Mr. Nozhkin's explanation of the pirates' "respect" is highly instructive of the superficiality of such perceptions. According to Mr. Nozhkin, when Mr. Ali spoke with Clipper representatives in English, a crowd of pirates would hover around the phone and "listen very closely...as if trying to catch every word." Ex. 3 (¶ 8(g)). Mr. Nozhkin interpreted this behavior as respect, but it just as likely reflects self-interested, mistrustful thieves highly interested in discerning any numbers from the discussion.

government simplistically cites as evidence that Mr. Ali “bragged...about his role as the pirates’ negotiator and his influence with them.” Gov’t Opp. at 6. Contrary to the government’s characterization of the conversation as some kind of admission of control, Mr. Ali clearly states that when he came on board the ship it was as a “hostage.” Ex. 60. He then describes how the pirate soldiers, though initially distrustful, have become deferential to him due to his ability to invoke the “big guys” on shore, i.e., Omar and Taliani. Id. To his great credit, Mr. Ali explained how he is trying to “take advantage” of this “status” with the pirate soldiers to protect the crew and influence the pirates’ handling of daily issues such as fuel consumption. Id. With regard to ransom negotiations, however, Mr. Ali’s only statement was a recounting of his unsuccessful attempt to convince the “big guys” to reduce their demands. Id. (“I told [the pirate boss] that we have to get out of here, he told me he shares that opinion with the other [pirate boss] that they don’t want go lower.”).

Clearly, Mr. Ali’s temporarily-successful ability to increase his “status” among the low-level soldiers has no bearing on his “influence” over the two “big guys” controlling the ransom discussions—and his safety. Rather, as Mr. Ali emphasized in the November 17, 2008 call cited by the government, if it were up to him, Clipper would not even be in the situation of having to pay money to recover his own illegally seized property. Id. See also Ex. 61 (“I’m not one of them and if someone gives me millions of dollars I will never be one of them. So I’m just here a translator and negotiator and interpreter and I have nothing to do with them.”). In sum, once the recordings as a whole are scrutinized in detail, the picture of Ali that emerges is of a man caught in terrible circumstances, who courageously used his every last wit to gain freedom for himself and the crew, receiving appreciation and gifts from the company in the process.¹⁹

¹⁹ In making this assertion, the defense is mindful of the Court’s conclusion that the audio tapes played by counsel for Mr. Ali at the bond hearing “hardly provide the dramatic support for Mr. Ali’s position that he suggests.” Ord. at 8. However, Mr. Ali requested that his counsel refrain from playing the call described as

Nor will the government be able to establish that Mr. Ali demanded a “ransom.”

The payment to Mr. Ali was sent almost two weeks after the ship and crew had been released, and the bank wire instructions sent by Clipper described the payment as “Consulting fee for Ali.” Ex. 62. Moreover, almost immediately afterwards, Mr. Gullestrup requested Mr. Ali’s assistance in reaching the pirates holding another Danish vessel, the *Stolt Strength*, and promised him that he would make sure that Ali would receive “a commission.”²⁰ (Audiotape). And Mr. Gullestrup is on record as stating that he has no reason to believe that Mr. Ali was a member of the pirates, Ex. 4, a curious statement for someone who supposedly paid a “ransom” to Mr. Ali.

Ultimately, Mr. Ali’s innocent intent will be perfectly framed by two emails from Mr. Ali [REDACTED] which act as perfect bookends to the *CEC Future* hijacking: Mr. Ali’s September 2008 email describing the German hostage crisis, Ex. 10, and his January 2009 email recounting the *CEC Future* crisis, Ex. 14. It would be highly unusual, to say the least, for someone guilty of such heinous crimes as piracy and hostage-taking to take the first opportunity after completing the crimes to gratuitously confess [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] These are not the actions of a pirate conspirator. They are the actions of someone

“dramatic” in his bond motion due to the presence in the courtroom of numerous family members and friends. The call reflects a moment when Mr. Ali believed that “Steven,” the negotiator for Clipper, had put his life in danger at the hands of the pirates, and Mr. Ali’s genuine fear for his life causes him to blurt a string of profanity-laden comments at Steven. The government disingenuously stated that this emotional episode was “most likely a ploy,” Gov’t Bond Opp. at 6 n.2; however, statements by Mr. Nozhkin in its possession— withheld at the time from the defense—corroborate this fear and describe Mr. Ali’s imprisonment by the pirates immediately after this incident.

²⁰ Despite this offer, Mr. Ali never sought compensation of any kind from Mr. Gullestrup for his assistance on the *Stolt Strength* crisis, or any other of the issues on which the two corresponded in their two-year relationship, as Mr. Gullestrup’s September 2010 letter confirms.

brave enough to do the hard and heroic work of investigating pirates on their own turf, so that U.S. and international actors can reap the benefits.

- c. Mr. Ali's alleged misrepresentations to immigration officials are not reflective of any flight risk.
- (i) Misrepresentations made in an effort to remain in the United States are not probative of an intent to flee.

The government places great emphasis on the fact that Mr. Ali allegedly misrepresented himself in past dealings with immigration officials. To be relevant, however, misrepresentations “must, of course, go to the ultimate issue: that no combination of conditions...can reasonably assure that the defendant will appear for trial.” United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996) (finding no risk of flight for foreign defendant charged with fraudulently obtaining an American passport).

Representations made in an effort to remain in the United States do not “go to the ultimate issue” of whether a defendant has an intention to flee the United States. Id. The difference between such immigration-related misrepresentations and other acts of fraud that “go to the ultimate issue” is well-illustrated by the contrast between Xulam and two cases cited by the Court, United States v. Khanu, 370 Fed. App'x. 121, 122 (D.C. Cir. 2010), and United States v. Anderson, 384 F. Supp. 2d 32, 35 (D.D.C. 2005). In Khanu, the D.C. Circuit included the defendant's “extensive financial resources [and] lack of candor regarding the proceeds from three real estate sales” as reasons the defendant was a flight risk. These were not independent factors, however, but elements of a single inquiry by the district court into the defendant's access to “large stockpile of cash.” See United States v. Khanu, 675 F. Supp. 2d 69, 72 (D.D.C. 2009); see also 18 U.S.C. § 3142(g)(3)(A) (listing “financial resources” as a bond factor). In light of the defendant's prior conviction for tax evasion, the Court was “wary of assuming that the amounts of cash that have been disclosed are the only sources of cash available to Defendant,” Khanu, 675 F.

Supp. at 72, and ordered the defendant detained. In finding a risk of flight, however, district court specifically clarified that “it is the fact that Defendant had access to such a large amount of cash” that made other facts “relevant for purposes of determining his risk of flight.” Id. at 72 n.7.

As in Khanu, the defendant’s lack of candor in Anderson occurred in contexts directly relevant to his flight risk. For example, after learning that he was being placed under investigation, Mr. Anderson allegedly transferred millions of dollars in assets overseas to shield them from authorities and plan for a life outside of the United States. 384 F. Supp. 2d at 38. Later, Mr. Anderson lied to this Court to obtain a continuance of a grand jury subpoena, while secretly traveling to the British Virgin Islands to allegedly obstruct the grand jury’s investigation. Id. at 39. After his passport was seized by authorities, Mr. Andersen filed a misleading application for a new one. Id. And Mr. Anderson was alleged to have employed numerous techniques to conduct and conceal business transactions and evade various taxes and fees. Id. at 36. As these examples demonstrate, Mr. Anderson’s “lack of candor” was aimed at protecting hidden sources of assets, interfering with the judicial process, and seeking travel documents; they thus directly contributed to his high flight risk.

In contrast to these cases, the Court in Xulam faced a defendant charged with making misrepresentations in passport applications in order to remain in this country. In ordering pretrial detention, the district court expressly relied on the defendant’s fraudulent misrepresentations in the passport applications. Id. at 442–43. The D.C. Circuit disagreed and held that such misrepresentations do not “alone provide[] a legitimate ground for ordering pretrial detention.” 84 F.3d at 443.²¹ The reason, as suggested by earlier language in the opinion, is that

²¹ The defendant’s alleged misrepresentations in Xulam regarding identity-related documents were substantial. The defendant had allegedly (i) procured a U.S. passport using the name of a deceased person; (ii) twice obtained court-approved name changes for the deceased person; and (iii) twice obtained passports under the new names. Xulam, 84 F.3d at 444–45 (Ginsberg, J., dissenting). Moreover, a search of the defendant’s office revealed a Turkish passport and a Canadian social security card under a fourth name.

such misrepresentations do not “go to the ultimate issue” of flight risk, since they reflect efforts to remain in the country. 84 F.3d at 442.

- (ii) Even if immigration misrepresentations theoretically indicate a flight risk, Mr. Ali’s history does not.

The two main examples of misrepresentations in Mr. Ali’s immigration file cited as troublesome by the Court were: (i) [REDACTED]

[REDACTED] and (ii) Mr. Ali’s submission of a divorce confirmation from 1992.

Ord. at 6. Neither situation is as the government claims. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), Pub.L. 99-603, 100 Stat. 3359. The bill included a general amnesty for unlawful immigrants living continuously in the United States since before January 1, 1982, as well as a more limited amnesty for certain eligible seasonal agricultural workers. *Id.* The passage of IRCA led to 3.1 million amnesty applications by hopeful immigrants,²² and application-processing firms sprang up to capitalize on the demand. [REDACTED]

²² Robert Suro, *Migrants’ False Claims: Fraud on a Huge Scale*, New York Times (November 12, 1989) (“Suro Article”), incorporated as Exhibit 2 to Remarks by Senator Cornyn (TX), 152 Cong. Rec 65 (May 23, 2006) at S4934 (available at <http://www.gpo.gov/fdsys/pkg/CREC-2006-05-23/pdf/CREC-2006-05-23-pt1-PgS4924.pdf>) (last accessed December 4, 2011).

²³ For disreputable firms, filing under the SAW provision was highly advantageous even when the applicant was eligible under the general amnesty provision. Instead of laboriously documenting five years of continuous residence, the firms only needed to document ninety days of farm work between May 1, 1985, and May 1, 1986—a feat easily accomplished through carbon-copy fraudulent affidavits generated by the “cottage industry” that arose in response to the SAW provision. Suro Article at S4934. Since the SAW provision placed the burden on the government to disprove applicants’ eligibility, there was little incentive for the firms to treat applicants individually or otherwise comply with the rules. *Id.* As a result, experts estimate that up to 650,000 of the more than 1.3 million applications filed under the SAW provision were fraudulent. *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The other supposedly fraudulent document filed by Mr. Ali was his divorce confirmation obtained at the specific request of INS. INS determined that the document was fraudulent because the U.S. State Department had advised that: “There is no competent civil authority in Somalia. The government ceased to exist in December of 1990....Any official Somali document that is dated after December 1990 and issued in Mogadishu is fraudulent.” Ex. Ex. 63 (emphasis added). However, throughout Somalia’s brutal civil war, individual sheiks continued to operate religious “courts,” applying clan and Shar’iah principles in basic areas of family—not civil—law.²⁴ These individual sheiks, operating out of their homes with little more than a title and a typewriter, continued to perform marriages and divorces, which require little formality in Somalia.²⁵ The network of “courts” gradually strengthened into the Islamic Courts Union, a major player in the power struggle over Mogadishu and Somalia.²⁶ When INS demanded verification of his divorce in 1997, Mr. Ali did what he was supposed to do—he had his family contact the sheikh responsible for the divorce. See Ex. 64 (containing signature of

²⁴ See World Bank, *Conflict in Somalia: Drivers and Dynamics* at 16 (January 2005), available at <http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf> (last accessed December 4, 2011) (Somalia’s civil war “eroded, but did not destroy, the traditional, clan-based structures that had been used to manage problems and maintain law and order.”).

²⁵ “Street love” marriage ceremonies in Somalia can be conducted in a sheikh’s home and need only “be witnessed by three officials from the Sheikh’s house.” Danish Immigration Service, *Human Rights and Security in Central and Southern Somalia: Joint Danish, Finnish, Norwegian and British Fact-Finding Mission to Nairobi, Kenya*, at 53 (March 2004), available at: <http://www.unhcr.org/refworld/docid/405b2d804.html> (last accessed December 4, 2011).

²⁶ See Cedric Barnes and Harun Hassan, *The Rise and Fall of Mogadishu’s Islamic Courts*, Chatham House Horn of Africa Group, at 2 (April 2007), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/bpsomalia0407.pdf> (last accessed December 4, 2011) (describing “a long-standing network of local Islamic or sharia courts in Mogadishu” that coalesced into “an umbrella organization, popularly known in the Western media as the Islamic Courts Union”).

“Sheikh”). Ultimately, INS’s naïve application of the State Department’s cable concerning civil government records to family law documents created by independent sheiks in the well-documented (proto) ICU ultimately reflects poorly on INS, not Mr. Ali.²⁷

In the end, the government’s reliance on Mr. Ali’s supposed immigration misrepresentations ignores the final word by INS/ICE on Mr. Ali’s trustworthiness: [REDACTED]

[REDACTED] (ii) its granting him “advanced parole” based on “public interest considerations,” allowing him to travel freely without a visa; and (iii) its efforts through its officers and agents to secure Mr. Ali’s legal residency at the June 2007 hearing. These facts are far more probative of Mr. Ali’s character and flight risk than the government’s alleged decades-old misrepresentations.

d. Mr. Ali used his real name in communications with Clipper.

The government relied heavily on Mr. Ali’s alleged use of an “alias” while onboard the *CEC Future*. New faxes conclusively prove that Mr. Ali used his own name when communicating with Clipper, however, and did not try to hide his true identity. Ex. 65. In light of this evidence, Mr. Ali’s brief and involuntary use of a negotiation handle simply cannot compare to the incredible efforts displayed by defendants with a true inclination to flee. See, e.g., Anderson, 384 F.Supp. 2d at 35–38 (describing defendant’s use of multiple identities and identity papers in order to travel incognito, hide assets, and avoid official scrutiny).

e. The government ignored Mr. Ali’s lack of access to funds.

“Financial resources” is an enumerated factor under Section 3142(g). For obvious reasons, access to a “large stockpile of cash,” Khanu, 675 F. Supp. 2d at 72, is an important tool

²⁷Indeed, INS’s demand for a “court-certified divorce decree” was nonsensical if its interpretation of the State Department cable were accurate. The point of the cable was to inform INS that “There are no circumstances under which...applicants can reasonably be expected to recover original documents held by the former government of Somalia.” Ex. 63.

for fleeing criminal charges. See, e.g., Anderson, 384 F. Supp. 2d at 38 (defendant's transfer of \$20 million in assets is indicative of a flight risk). Mr. Ali, by contrast, is indigent. He has no access to funds, whether directly or through family members, much less access to millions of dollars with which to abscond. Just as large financial resources are indicative of flight risk, indigence is counter-indicative of flight risk. By this standard, Mr. Ali is not going anywhere.

f. The government ignored Mr. Ali's substantial community ties.

A defendant's "community ties" are an important factor under the Bail Reform Act, 18 U.S.C. § 3142(g)(3). But as the government acknowledges in the dangerousness context, the term "community" in the Bail Reform Act includes "a community overseas." Gov't Opp. at 13 (quoting United States v. Hir, 517 F.3d 1081, 1086 (9th Cir. 2008)). As the Ninth Circuit wrote: "If a foreigner in the United States cannot refer to his roots in his home country, he is in a prejudiced position when bail is considered." United States v. Townsend, 897 F.2d 989, 995 (9th Cir. 1990) (crediting defendants' substantial ties to Toronto and New Delhi as factors in favor of pretrial release). This is because the factor is properly aimed at assessing whether and to what extent the person has bonded him or herself in a responsible way to the specific community of which he or she is a part—in contrast to the kind of solitary, criminal life compatible with absconding from authority and living a life in hiding or on the run. As one court expressed:

It is an important policy that individuals who avoid criminal involvements, have strong family and other ties to a community, and otherwise develop a socially responsible background can be assured that Courts will credit such matters if they are ever charged with a serious crime. If this were not the case, it would erode one of the supports and incentives for responsible citizenship in our society.

United States v. Brown, 07-cr-20070 (IFL), 2007 WL 2463356 (E.D. Mich. Aug. 30, 2007).

Indeed, any other reading would render the separate and more specific factor, "length of residence in the community," largely superfluous. The government did not contest Mr. Ali's substantial community ties in Somaliland, and the Court did not discuss this factor in its Order. In light of

the new evidence of courageous involvement by Mr. Ali in Somaliland's civic culture, not to mention the profound and spontaneous support demonstrated to Mr. Ali by the community's rally on his behalf on June 23, 2011, this factor punctuates the strong reasons for Mr. Ali's release.

II. FURTHER DETENTION OF MR. ALI WOULD OFFEND DUE PROCESS.

This is not just another bite at the bond apple. A defendant subjected to prolonged pretrial detention is entitled to "a fresh proceeding at which more is required of the government than is mandated by section 3142." United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986) (emphasis added); see also U.S. v. Cos, 2007 WL 1302580, 3 (D.N.M.) (D.N.M., 2007) ("[B]ecause of these due process concerns, to justify an extended detention, the government must prove more than what 18 U.S.C. § 3142 requires to justify an initial detention.") (citing United States v. Cos, 198 F. App'x 727, 732 (10th Cir. 2006)) (emphasis added).

The test for whether pretrial detention violates due process is whether it has "become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." Salerno, 481 U.S. at 748 n. 4. A Court faced with a due process challenge to pretrial detention must therefore "identify the regulatory goals that pretrial detention can be said to serve (in a particular case)" and "make a judgment about whether the length of that detention is excessive in relation to those regulatory goals." United States v. Ailemen, 165 F.R.D. 571, 578 (N.D. Cal. 1996) (parenthesis in original) (emphasis added). Most courts assess three main factors when determining whether the government's regulatory goals have been exceeded: (i) the length of detention that has occurred and the non-speculative nature of future detention; (ii) the extent of the government's responsibility for the delay of the trial; and (iii) the strength of the factors concerning the initial detention decision. See, e.g., Cos, 198 F. App'x at 732; United States v. Hare, 873 F.2d 796, 801 (5th Cir. 1989); United States v. Zannino, 798 F.2d 544, 547 (1st Cir. 1986); Accetturo, 783 F.2d at 388.

A. The Government's Regulatory Interest in Detention is Uniquely Weak.

There are three possible regulatory interests served by pretrial detention:

“(1) protecting the integrity of the trial process (by, for example, preventing a defendant from attempting to intimidate witnesses, jurors, or others involved in the prosecution), (2) preventing danger to the community, and (3) assuring that the defendant is present for trial.” Ailemen, 165 F.R.D. at 595. There can be no serious dispute that Mr. Ali poses no threat to the community or to the integrity of the trial process. Mr. Ali has no criminal record, has worked extensively with law enforcement to protect his communities, and is on good terms with the witnesses in this case, who in any event reside overseas. Thus, the only regulatory interest served by continued detention is to assure Mr. Ali's presence at trial.

Even that limited interest is more attenuated than usual, however. Ordinarily, a state will have multiple “primary” interests in prosecuting a defendant, since most crimes are committed (i) in the prosecuting state; (ii) by a national of that state; and/or (iii) against a national of that state.²⁸ By contrast, the government has no such primary interest in prosecuting Mr. Ali. The crime did not occur in United States and involved no Americans, whether as perpetrators or victims.²⁹ Instead, the only basis for trying Mr. Ali in the United States is universal jurisdiction, the least important basis in terms of national interests. See Report, U.N. Secretary-General, Rule

²⁸ Under customary international law, there are five traditional bases for asserting criminal jurisdiction. United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003). Two of the interests are considered “primary,” since they involve “fundamental concepts of state sovereignty” (territorial jurisdiction) or embody “every state's interest in punishing crimes by or against its nationals abroad” (nationality/ personality jurisdiction). *Report of the Task Force on Extraterritorial Jurisdiction of the IBA Legal Practice Division* at 141–42, 171 (2009) (“IBA Report”), available at <http://tinyurl.com/taskforce-etj-pdf> (last accessed December 4, 2011).

²⁹ Although the indictment states that the cargo on the *CEC Future* belonged to an American corporation, cargo is not a “person” under the hostage-taking statute, 18 U.S.C. § 1203; nor is there any allegation in the complaint that the *CEC Future* attackers robbed the cargo or acted with *animo furandi* (intent to steal) when they detained the cargo. See United States v. Smith, 18 U.S. 153, 5 L. Ed. 57 (1820) (defining piracy to require robbery or forcible depredation with *animo furandi*); Dk. 11 at 2 (¶ 4) (defining object of conspiracy as “to profit and make money by taking and holding for ransom the...cargo of the M/V *CEC Future*.”). There are thus no crimes in the indictment for which the nationality of the cargo is relevant, even if such nationality could support a claim of passive personality—a dubious proposition for a principle historically invoked to protect natural persons.

of *Law and Transitional Justice in Conflict and Post-Conflict Societies* (S/2004/616), at 16 (Aug. 23, 2004) (“SG Report”) (universal jurisdiction is a “reserve tool”).

But even this comparably least important interest is itself attenuated. As a “reserve tool,” universal jurisdiction is intended to be applied only when “the justice system of the country that was home to the violations is unable or unwilling” to investigate. SG Report at 16; see also IBA Report at 171 (“[S]tates with jurisdiction on other bases (such as ...universal...) may only act where the states with primary jurisdiction are unwilling or unable to prosecute.”) (parenthesis in original). Here, the justice system that was home to the crime and the accused, Somaliland, twice investigated and released Mr. Ali. By all measures, Somaliland acted toward Mr. Ali in a way befitting its reputation of being at the forefront of world anti-piracy efforts, to the point of zealously investigating even its own public officials.³⁰ Moreover, the justice system that is home to the corporate victim—Denmark—has also shown a willingness to investigate. Indeed, on February 15, 2011, Clipper filed charges against the *CEC Future* pirates through the Special International Crimes Office in Denmark—with Mr. Ali’s assistance. Under such circumstances, the government’s interest in holding Mr. Ali without trial, already limited, is at its extreme nadir.

B. The Non-Speculative Length of Mr. Ali’s Detention is Significant.

There is no “bright line limit” for pretrial detention that will trigger a due process violation. United States v. Gonzales Claudio, 806 F.2d 334, 340 (2d Cir. 1986) (quotations omitted). However, “the ninety-day period specified in section 3164(b) [of the Speedy Trial Act], representing the considered view of the Congress as to the normal limit on pretrial detention,

³⁰ Germany recently dismissed a criminal complaint for torture filed under universal jurisdiction against several former U.S. public officials, including former CIA Director George Tenet, because the United States had not been shown to be unwilling to investigate the allegations itself. IBA Report at 164. Surely, the government would not contend that due process would allow Germany to lure a Presidential Medal of Freedom recipient to its territory so that it could detain him in a Berlin jail for more than fifteen months, without trial, while it passively awaited evidence for a crime affecting no German nationals, and for which the U.S. was demonstrably willing and able to investigate itself.

provides at least a point of reference in...consideration of the constitutional limit on such detention.” Id. at 340–41.³¹ Courts thus “have no hesitancy” in declaring detention periods as short as four months to raise due process concerns, United States v. Theron, 782 F.2d 1510, 1516–17 (10th Cir.1986), and have declared that detention for six months “without a finding of guilt...is anathema to American ideals of due process,” United States v. Lofranco, 620 F. Supp. 1324, 1326 (N.D.N.Y. 1985).

Mr. Ali has been detained for seven months. Even if the trial were to be held immediately, “a potentially long trial commencing over seven months after detention has already begun raises grave due process concerns for the government to allay.” United States v. Jackson, 823 F.2d 4, 7 (2d Cir. 1987). In reality, however, Mr. Ali faces at least four to seven additional months of detention, based on a March 2012 or June 2012 trial. If he is detained during trial, his total non-speculative period of detention before any adjudication of guilt will be approximately twelve to fifteen months. This length unquestionably raises significant due process concerns. Compare, e.g., United States v. Melendez-Carrion, 790 F.2d 984, 1008 (2d Cir. 1986) (eight-months); Hare, 873 F.2d at 801 (four to ten months); Gonzales Claudio, 806 F.2d at 341 (fourteen months); Lofranco, 620 F. Supp. at 1326 (six months).

C. The Government is Entirely Responsible for the Trial’s Delay.

In assessing this factor, courts “need not determine with precision the amount of pretrial delay attributable to the prosecution, nor assess the extent to which the Government may have been at fault in contributing to the delay. It suffices...to conclude that the Government, even if not deserving of blame, bears a responsibility for a portion of the delay significant enough to add considerable weight to the defendants’ claim that the duration of detention has exceeded

³¹ As the Second Circuit noted, “in debate on the preventive detention provisions of the Bail Reform Act, the Senate was assured that ninety days is the ‘worst case limit,’ 130 Cong. Rec. S941 (statement of Senator Thurmond), and the ‘upper bound’ of pretrial detention, id. at S943 (statement of Senator Laxalt).” Id. at 340.

constitutional limits.” Gonzales Claudio, 806 F.2d at 342–43. Here, the responsibility for trial delay falls squarely on the shoulders of the government. Mr. Ali has consistently asserted his desire for a speedy trial, beginning with the first status conference held on May 4, 2011. The government has consistently sought to delay trial, beginning with the second status conference. It has delayed production of vital materials to the defense, including materials it used in opposing Mr. Ali’s prior bond motion, and has failed to produce a single piece of classified evidence. Worst of all, the government needlessly chose to invite Mr. Ali to this country and orchestrate his arrest before it was ready to try him, forcing him to sit in prison while the government waits for foreign evidence. Under these circumstances, continuing to detain Mr. Ali amounts to punishing him for the government’s lack of foresight and strategic maneuvers.

1. The government has filed multiple request to delay trial despite controlling the timing of Mr. Ali’s arrest.

On May 11, 2011, less than two weeks after Mr. Ali’s arraignment, the United States filed a motion seeking permission to delay trial for up to a year so that it could await final responses to requests under Mutual Legal Assistance Treaties (MLAT) sent on June 1, 2010, April 15, 2011, and May 2, 2011. Dkt. 15 at 2. On August 16, 2011, the government acknowledged an additional MLAT request filed on August 8, 2011. Dkt. 33 at 4 n.4. And on August 19, 2011, the government requested a continuance until February 1, 2012, based in part on its MLAT requests. Clearly, the government was not ready for trial when it arrested Mr. Ali.

There are two ways the government could have avoided detaining Mr. Ali for seven to fourteen months given its putative need for the MLAT evidence. First, the government could have filed these requests much, much earlier. [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

Yet the government did not interview Mr. Gullestrup until April 2010—sixteen months after it learned of this incident—and did not file its first MLAT request until two months later. Moreover, even though the government was active in the arrest, prosecution, and sentencing of Jama Idle Ibrahim between August 27, 2010 and April 7, 2011, the government did not file its second MLAT request until April 15, 2011, days before Mr. Ali's scheduled arrival. Such procrastination should not be a cause for Mr. Ali's incarceration.

The second way the government could have avoided prejudicing Mr. Ali given its need for foreign evidence would have been to simply delay Mr. Ali's arrest until it was ready to bring him to trial. The government has not denied that it orchestrated Mr. Ali's invitation to travel to the United States in April 2011. See Dkt. 33.³² Nor has the government denied that prior to his travel to the United States, Mr. Ali had been in weekly contact with an agent of the United States government and continuously expressed a willingness to meet. Id. Clearly, Mr. Ali's arrest did not have to be rushed to occur in April 2011, and could have been scheduled for whenever the government was prepared to proceed to trial.

2. The government has made no attempt to schedule trial or depositions during periods of witness availability.

The witnesses in this case include sailors who spend long periods at sea. Counsel for Mr. Ali raised the issue of depositions at the June 17, 2011 bond hearing in order to avoid unnecessary schedule-based delays, but counsel for the United States proffered that it expected these witnesses to be available at trial. These witnesses were available for trial or deposition between June and August 2011, but set sail again on August 19, 2011. In opposing the

³² It is a great testament to Mr. Ali's character that the government could think of nothing more enticing to Mr. Ali than the prospect of much-needed funding to educate impoverished children in a war-torn land—hardly the bait one would expect when fishing for pirates.

government's August 19, 2011 motion to delay trial until February 1, 2012, Mr. Ali noted that the witnesses would be available from December 2011 until February 2012, but that having a trial after February 2012 would risk another period of unavailability until June 2012. Dkt. 39 at 3 n.2. The government showed no interest in scheduling a December 2011 or January 2012 trial, despite the risk that the witnesses would return to sea, nor did it seek to preserve their testimony during this period. These failures to act demonstrate a cavalier attitude by the government toward Mr. Ali's prolonged incarceration, and fly in the face of its "obligation," when it moves for pretrial detention, "to arrange for the trial as quickly as possible, using extraordinary means if necessary." Jackson, 823 F.2d at 8.

3. The government has prejudicially delayed producing non-classified evidence and cannot proffer when it will produce classified evidence.

The vast email evidence described above was obtained by the government as early as June 2010—ten months before Mr. Ali was indicted. Yet these documents were not ready for production by the government until July 7, 2011—three weeks after the bond hearing—despite the government's own reliance on the emails during the hearing. Moreover, crucial Brady emails [REDACTED] were not produced by the government until October 2011—four months after the bond hearing—despite Mr. Ali's explanation of [REDACTED] significance the day he was arrested. And the government did not produce highly-relevant Brady material from Captain Nozhkin until November 10, 2011—five months after the bond hearing—despite relying heavily on Mr. Nozhkin's statements in its bond proffer. These delays make a mockery of due process, since they deprived Mr. Ali of access to the very evidence the government used against him in an adversarial proceeding affecting his liberty.

In addition, the government still has not produced any classified evidence. In requesting a seven-month continuance in August 2011, the government relied heavily on the need

for Mr. Ali's counsel to obtain a security clearance to review classified evidence and the prospect of pretrial litigation regarding its use. Dkt. 36 at 3. Yet eight weeks after that clearance was obtained, the government cannot proffer, even generally, when classified evidence will be produced. This ongoing failure to meet its obligations removes any justification for delay based on the clearance process or CIPA litigation procedures, and strongly merits release.

D. The Factors Favoring Initial Detention Have Been Substantially Undermined, and Do Not Justify Continued Incarceration of Mr. Ali.

More is required from the government when it seeks prolonged detention of a defendant than when it merely seeks to hold the defendant for an initial pre-trial period. Accetturo, 783 F.2d at 388. Even without the expanded record, the Court made two findings that place Mr. Ali ahead of virtually every other defendant released under the due process analysis. First, the Court held that the issue of Mr. Ali's guilt or innocence is essentially "an open question." Ord. at 8. Second, the Court held that Mr. Ali "has not demonstrated an interest in fleeing." Ord. at 9. The expanded record further strengthens these findings, demonstrating Mr. Ali's substantial claims of innocence as well as the time, effort, and risk he has undertaken to win the right to stay in this country, his home of twenty-seven years. The factors justifying detention have thus shifted decidedly in Mr. Ali's favor, and cannot support a prolonged period of pretrial detention for which more is required.

CONCLUSION

For the foregoing reasons, Mr. Ali respectfully requests that the Court issue an order setting forth conditions of release. A proposed order of with release conditions is attached.

December 5, 2011

Respectfully submitted,

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