IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA Plaintiff, vs. Szuhsiung Ho a/k/a Allen Ho, Defendant	**Case No.: 16-CR-00046**

DEFENDANT ALLEN HO'S MOTION TO VACATE ORDER OF DETENTION

Defendant Allen Ho, by and through his undersigned counsel, respectfully moves under 18 U.S.C. § 3145(b) for the Court vacate the Order of Detention and release Dr. Ho with conditions. The government concedes that the offenses with which Dr. Ho is charged do not carry a presumption in favor of detention, as well as that Dr. Ho poses no danger to the community if released. Dr. Ho's new, additional proposed conditions of release, together with a factual analysis under relevant 18 U.S.C. § 3142(g) factors, compels the conclusion that the Court can be more than reasonably assured of Dr. Ho's future appearance.

We respectfully request, therefore, that the detention order be vacated, and that Dr. Ho be admitted to bail, returned to his home in Delaware, and be allowed the necessary opportunity to assist his counsel in preparing his defense.

I. INTRODUCTION

The government presents a novel theory of prosecution against Dr. Ho. Under this theory, Dr. Ho, a U.S. citizen, faces a life sentence for failing to obtain regulatory approval before interacting with commercial, civilian nuclear power plants in China. Although the alleged conduct was indisputably licensable, the government has charged Dr. Ho with violation of a

statute – 42 U.S.C. § 2077 – that has never been used in its more than 50 years of existence prior to this investigation.[1]

This novel prosecution, based on an unprecedented reading of a never-before-used statute, will be contested vigorously by Dr. Ho. While the specific charges against Dr. Ho are unique, there is absolutely nothing unusual about naturalized American citizens, such as Dr. Ho – even Chinese or Taiwanese-Americans – being granted pre-trial release when facing the threat of many decades in prison. Indeed, release in such cases has been routine in federal prosecutions all over the United States. The same should be done here: Dr. Ho should be released pending trial.[2]

II. PROCEDRUAL AND FACTUAL BACKGROUND

A. The Indictment

Count One of the Indictment alleges that Dr. Ho conspired to "directly or indirectly engage or participate in the development or production of any special nuclear material outside the United States" in violation of 42 U.S.C. § 2077(b). ECF No. 3 ¶ 12. Dr. Ho's company, ETI, was in the business of connecting engineering consultants with companies that sought expertise in commercial nuclear power plants. Dr. Ho has no expertise or experience in the

[1] The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2297, "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983). Originally, it was unlawful to "engage in the production of" special nuclear material without license. *See* P.L. 88–489, § 12, 78 Stat. 602 (1964). In 2004, Congress expanded the AEA's reach by making it unlawful to "engage or participate in the development or production of" special nuclear material. 42 U.S.C. § 2077(b) (2004).

[2] The defense incorporates by reference the papers filed in Defendant Allen Ho's Motion For Pretrial Release. *See* ECF Nos. 24, 24-1, 24-4. For the sake of brevity, those facts and arguments are not repeated here in full.

development or production of "special nuclear material."[3] *Id*. Dr. Ho's consulting business focused exclusively on front-end commercial nuclear plant safety and efficiency. The government's theory is, apparently, that Dr. Ho and ETI's service of identifying engineers to fill the technical needs of a Chinese commercial nuclear power plant to operate safely and efficiently constitutes "indirect" participation in the criminal "development or production" of special nuclear material. The government's supposed premise in criminalizing this activity is that when commercial uranium fuel undergoes nuclear fission inside a power plant, an unintended—and indeed unwanted—byproduct is a small amount of plutonium.[4] A power plant's "production" of this byproduct exists in commercial reactors in the United States, just as in France and China and elsewhere. Nothing that Dr. Ho did was intended to affect, nor could have affected, the amount of plutonium or other byproducts present in the spent fuel. It is this attenuated link to "special nuclear material" that has resulted in criminal charges.[5]

B. Bond Proceedings

Dr. Ho was arrested on April 14, 2016, while traveling in the Eastern District of Georgia. Dr. Ho waived his right to have his bond hearing in the Eastern District of Georgia, electing instead to have it in this District. On April 26, Dr. Ho appeared before the Honorable H. Bruce

[3] 42 U.S.C. § 2014(aa) provides that "'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235." Similarly, 10 C.F.R. § 810.3 defines "Special Nuclear Material" as "(1) plutonium, (2) uranium-233, or (3) uranium enriched above 0.711 percent by weight in the isotope uranium-235."

[4] A small amount of the abundant uranium-238 isotope in nuclear fuel is converted to plutonium-239 after an entire fueling cycle.

[5] One of ETI's clients, power company CGNPC, has been charged as a co-defendant. The government alleges that Dr. Ho was employed by CGNPC. In fact, Dr. Ho had a consulting agreement with CGNPC, not an employment agreement. (Dr. Ho had consulting agreements with a number of companies.) Because CGNPC received funding from the Chinese government, the government will contend that Dr. Ho was an "agent" for the Chinese government and advancing that country's interests. This theory is the basis for the 18 U.S.C. § 371 charge in Count Two: conspiracy to act in the U.S. as an unregistered agent of a foreign government.

Guyton, waived a detention hearing at that time, and reserved his right for a hearing at a later date. Judge Guyton ordered Dr. Ho detained.

On June 15, 2016, Dr. Ho appeared for a detention hearing before Judge Guyton. ECF No. 27. The government moved for detention based solely on the alleged risk of Dr. Ho's non-appearance. Order of Detention Pending Trial ("Order"), ECF No. 30 at 2. It is undisputed that that the offenses with which Dr. Ho was charged do not carry any presumption against release (6/14/11 Tr. at 11[6]) and the government has conceded that Dr. Ho poses no danger to the community. Order at 2. The government also conceded that the charges against Dr. Ho have no connection to terrorism. 6/14/16 Tr. at 26.

Dr. Ho sought release with conditions to include passport surrender, a $1 million bond secured by his family's home, and home detention with GPS monitoring, among other standard conditions of intensive pre-trial supervision. *See* ECF No. 24 at 13. The government argued that Dr. Ho should be detained due to the nature of the charges, the potential sentencing exposure, his ties to China, and his financial resources. *See* 6/14/16 Tr. 26–29. After requesting information about the value of Dr. Ho's family home, Judge Guyton took the matter under advisement, and issued an Order of Detention on June 17, 2016. *See* Order. He acknowledged that Dr. Ho was not a danger, but concluded that Dr. Ho presented a flight risk. *See id.* at 2–3 ("[T]he weight of the evidence of the Defendant's dangerousness is low, because the Government has so conceded."). Judge Guyton found that the original conditions proposed by the defense did not sufficiently mitigate his risk of non-appearance. *See id.*

[6] Citations to the transcript of the June 14, 2016 hearing are to "6/14/16 Tr.," followed by the relevant page number.

III. CHANGED CIRCUMSTANCES: $3 MILLION SECURED BOND

The defense is mindful of Judge Guyton's assessment that the original conditions of release were insufficient to assuage the Court's concern regarding non-appearance. Since that time, however, Dr. Ho has been able to procure additional sureties. Dr. Ho's sister-in-law has pledged $1 million for the bond, fully supported by property – her family's home in Northern California.[7] In addition, a childhood friend of Dr. Ho has likewise agreed to pledge $530,000 for Dr. Ho's bond, fully secured by his family's home in Delaware.[8] These sureties, together with Dr. Ho's own $1.5 million family home[9], provide the Court a fully secured $3,000,000 bond.

In addition, the Court should take Dr. Ho's health into consideration. Since the last hearing, Dr. Ho has received a letter from his cardiologist. Exhibit A. The cardiologist identifies Dr. Ho's "substantial and not trivial" chronic heart conditions: Wolff-Parkinson-White syndrome with increased tendencies toward arrhythmias, aortic insufficiency, and prior stenting. *Id*. While Dr. Ho is only on an aspirin regimen, his specialist recommends that Dr. Ho be

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[7] Counsel maintains endorsed surety agreements for the three homes described herein. In the interest of privacy, counsel has not filed the documents as exhibits. The documents are available for inspection or filing upon request.

[8] Dr. Ho's childhood friend, Ming Shao, has no doubt that Dr. Ho will appear as required:

> It is because I know Allen so well that when I learned of these charges against him and that he was being held in jail and needed help, I immediately decided that I would do anything necessary to help Allen. I am willing to pledge my family's home – where we have lived for over 20 years – because I have complete faith that Allen will come to court and face the charges against him. I have known Allen for more than 50 years and our families have been extremely close for more than 20 years. If I did not have complete confidence in his returning to court I would not risk my home. But, because I know him as I do, I know that I have nothing to fear by pledging my family's home to guarantee his appearance in court.

Exhibit B.

[9] Due to anticipated appraised value of Dr. Ho's home, he is able to increase his pledged surety from $1 million to $1.5 million.

subjected to the least stressful environment possible. *Id*. (Incarceration "would certainly increase the potentially life-threatening arrhythmic event or a myocardial infarction.")[10]

IV. ARGUMENT

A. Legal Standards

1. The Bail Reform Act of 1984 favors release.

The Bail Reform Act of 1984 "carefully limits the circumstances under which detention may be sought to the most serious crimes." *United States v. Salerno*, 41 U.S. 739, 747 (1987). The Act is not intended to constitute pre-conviction punishment. *See id.* The Act's presumption, except in case of offenses not charged here, is heavily in favor of release on bail. "Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in favor of release." *United States v. Hammond*, 204 F. Supp. 2d 1157, 1161 (E.D. Wisc. 2002) (citation omitted).

Release may be denied only when there are no conditions that will "reasonably assure" the appearance of the defendant and the safety of the community. 18 U.S.C. § 3142(e). The statute does not require a "guarantee," but instead only a "reasonable" assurance of appearance. *United States v. Hansen*, 108 F. App'x 331, 332 (6th Cir. 2004) (unpublished).

2. Dr. Ho's "ties" to a non-extraditable country does not alter the presumption in favor of release.

The government concedes that Dr. has not been charged with an offense which triggers a rebuttable presumption that no condition or combination of conditions will reasonably assure the person as required. 18 U.S.C. § 3142(e)(3)E). *See* Order, pp. 1-2. The government instead argues that a risk of nonappearance exists in this case simply because Dr. Ho has ties to China, a

[10] Unfortunately, Dr. Ho's cardiologist's concerns that Dr. Ho's incarceration could lead to potentially serious complications due to poor diet and sanitation appear to have proved warranted. Dr. Ho has been suffering from diarrhea and intestinal distress for the past six days, and is weak and losing weight.

country from which the U.S. would be unable to compel extradition. This Circuit, however, disfavors the government's conclusion:

> The bail statute does not, however, require that foreign defendants be detained simply because their return cannot be guaranteed through extradition. "The structure of the [bail] statute mandates every form of release be considered before detention may be imposed. That structure cannot be altered by building a "guarantee" requirement atop the legal criterion erected to evaluate release conditions in individual cases."

Id. (holding that the district court properly "considered the factors enumerated in § 3142(g), and determined there were conditions which would reasonably assure the defendant's appearance at trial" (citation omitted)). In *Hansen*, the defendant had no ties to the U.S. and resided in his home country his whole life; indeed, his only tie to the U.S. was that his son attended a one-year exchange program in the U.S. *See* Order, *U.S. v. Hansen*, No. 04-cr-00091-GLF (S.D. Ohio June 30, 2004), ECF No. 26. The district court found that despite defendant's lack of connection to the U.S., and the apparent weight of the evidence against him on the charged bulk cash smuggling, defendant posed "no greater risk of flight than any other defendant from outside this jurisdiction in any other criminal case." *Id*. His status as foreigner did not tip the scale toward continued detention.

Indeed, even undocumented aliens are considered for release under the Bail Reform Act. *See* 18 U.S.C. § 3142(d) (outlining procedures for temporary detention of an alien and directing court to notify immigration authorities). Deportable aliens are not deemed presumptive flight risks, and courts must analyze the Bail Reform Act in the same manner. *See, e.g., United States v. Adomako*, 150 F. Supp. 2d 1302, 1304 (M.D. Fla. 2001) ("Congress chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings."); *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (8th Cir. 2009) (holding that pretrial

detention based on ICE detainer alone undermines "Congress's carefully crafted detention plan" outlined in the Bail Reform Act and raises Constitutional concerns). Thus, aliens subject to deportation are not per se flight risks. *See, e.g.*, *United States v. Hao Zhang*, 15-CR-00106 (N.D. Cal. July 8, 2015) (resident and citizen of China with immigration detainer hold released pre-trial in a case charging the theft of trade secrets worth $50 million in intended loss.).

Here, Dr. Ho, as an American citizen, should be treated no worse than an undocumented alien, irrespective of the country from which he was naturalized.

3. This Court Analyzes The Issue Of Bail De Novo

This Court conducts a *de novo* review of the record to ensure that the Bail Reform Act's terms and intentions are carried out; it does not defer to the lower court's decision. *See United States v. Marcrum*, 953 F. Supp. 2d 877, 880 (W.D. Tenn. 2013), *aff'd*, No. 13-6008 (6th Cir. Nov. 1, 2013); *United States v. Romans*, No. 00-5456, 2000 WL 658042, at *1 (6th Cir. May 9, 2000) (affirming *de novo* review of the magistrate judge's detention order). Accordingly, the Court must "engage in the same analysis, with the same options . . . as the magistrate judge." *Id.* (citation omitted). Thus, the Court must conduct its own review of the entire record to determine if a defendant must be detained.

B. Dr. Ho poses no unreasonable risk of non-appearance; a mere possibility of flight cannot justify his detention.

The Bail Reform Act lists four factors the Court should consider when determining if conditions exist to reasonably ensure a defendant's appearance: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the danger the defendant poses to any person or the community upon his release. *See* 18 U.S.C. § 3142(g). The defense submits that only factors (1)–(3) are at issue because the government agrees that Dr. Ho is not a danger under

§ 3142(g)(4).[11] The new proposed conditions of release would serve to reasonably ensure Dr. Ho's appearance, and address Judge Guyton's prior finding to the contrary.

1. Nature and circumstances of the offense—(g)(1)

This factor asks whether the offense is a crime of violence, a violation of 18 U.S.C. § 1591 (a federal terrorism crime), or involves a minor victim or controlled substance, firearm, explosive, or destructive device. In short, this factor largely tracks the enumerated offenses in 18 U.S.C. § 3142(f)(1), and is wholly inapplicable to the instant charges. *See, e.g., United States v. Parahams*, 2013 WL 683494, at *4 (N.D. Ind. Feb. 25, 2013).

Even if the Section (g)(1) factor has a place in the bail assessment here, the criminal statutes charged and the sentencing exposure cannot serve to transform this query into a *de facto* presumption for detention. The charges lodged against Dr. Ho do nothing to alter the Bail Reform Act's strong favor for release. The contention that Dr. Ho, a 66-year old American citizen, would be more motivated to flee in this case due solely to the potential sentence does not withstand scrutiny. Given Dr. Ho's relatively advanced age, a conviction on a wide-range of felonies would carry what would *potentially* be a life sentence. But clearly this fact alone cannot justify pretrial detention. Anytime a man of Dr. Ho's age is charged with a garden-variety wire-fraud case – with a 20-year statutory maximum – he is facing a potential life sentence. This fact alone – without any evidence of an intention to flee – does not justify pretrial detention.

Although 42 U.S.C. § 2077(a) carries a potential maximum sentence of life, this is simply the statutory maximum, it is not mandatory. The Guidelines are now advisory. Dr. Ho's sentence, should he be convicted, would be determined by the Court, based on all § 3553

[11] Because the parties agree that Dr. Ho presents no danger, the defense will not bolster the record on this point further. *See* Order at 2 (conceding Dr. Ho is not a danger). The defense respectfully reserves the right to supplement the record, however, if the Court disagrees.

sentencing factors. The fact remains that Dr. Ho firmly maintains his innocence and intends to vigorously contest the allegations against him. Even if Dr. Ho were to be convicted, there is simply no reason to assume that, under the facts of this case, he would invariably receive a life sentence. *See United States v. Oakley*, No. 07-CR-088 (E.D. Tenn. June 2, 2009) (defendant received a six-year sentence for attempting to sell to a foreign nation classified components for a uranium enrichment plant—a facility whose only purpose is to produce special nuclear material). According to the government, "Oakley was a person who betrayed his country in order to line his pockets with money. His theft of ***classified nuclear materials for bombs***, and his attempt to sell them for personal profit at the expense of his country's efforts to protects its nuclear materials, clearly shows that [ ] Oakley was a traitor to his country and had no regard for the safety of others." Dept. of Justice Press Release, June 18, 2009 at https://www.fbi.gov/knoxville/press-releases/2009/kx061809.htm (last visited June 22, 2016) (emphasis added). Oakley, caught red-handed selling components for a uranium enrichment plant to what he believed to be a foreign nation, was sentenced by this Court to six years in prison – a sentence appreciably below the statutory maximum in his case.

Unlike in *Oakley*, Dr. Ho neither transferred nor even had access to Classified Information. Dr. Ho's business was wholly related to standard commercial nuclear power plant mechanics—not nuclear weapons.

2. Weight of the evidence that defendant presents a flight risk—(g)(2)

The weight of the evidence as to the § 3142(g) factors does not favor detention.[12] Until his arrest, Dr. Ho worked (and consequently, resided) primarily in China, and spent a significant portion of the last number of years residing there on a visa. Dr. Ho also has a young son, who is also an American citizen, with whom Dr. Ho lives while he is in China.

The government argues that these ties to China, together with Dr. Ho's financial resources,[13] and no extradition treaty with China are factors that compel detention. Notwithstanding these factors, release is supported by precedent. Courts across the country have concluded that release was warranted in cases involving Chinese-Americans *or even Chinese nationals* accused of what have been broadly alleged as "espionage" offenses, or significant fraud offenses. For example, *all of the following defendants were released*:

- **Chinese national** and employee of Chinese agricultural conglomerate was charged with conspiring to steal trade secrets from U.S. agriculture companies valued at $100 million dollars. Flight risk factors include significant wealth (her husband is a billionaire); her husband and two minor children live and reside in China; her only ties to the U.S. was a U.S. resident brother. *United States v. Mo Yun*, 13-CR-147 (S.D. Iowa) (case dismissed).

- **Chinese national** defendant, a former U.S.C. graduate student charged with stealing semiconductor trade secrets valued at $50 million for a joint venture with Tianjen University. In addition to Chinese citizenship and residency, defendant had a U.S. immigration detainer/hold. *United States v. Hao Zhang*, 15-cr-00106 (N.D. Cal.).

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[12] The weight of evidence against the person "deals with the factors to be considered in determining whether there are conditions which will assure the appearance of the accused and safety of the community," and not the weight of the evidence of defendant's guilt. *United States v. Stone*, 608 F.3d 939, 948 (6th Cir. 2010) (citation omitted).

[13]The government contends that ETI received $3 million over the course of the last seven years. These funds include fees paid by other consulting agreements Dr. Ho had with entities besides CGNPC, including Mitsubishi in Japan. And these funds do not represent either Dr. Ho's earnings or ETI's profit. ETI processed the payments between the contracting companies and the consultants ETI identified. A significant portion of the $3 million ETI received over the past seven years therefore had to be paid to the consultants engaged by ETI, as well as their travel expenses, visa applications, and all taxes and tariffs.

- **Chinese national** and billionaire charged with a bribery scheme that involved sources in China paying the former president of the United Nations General Assembly for assistance in real estate deals and other business interests. *United States v. Ng Lap Seng*, 15-CR706 (S.D.N.Y.).

- **Taiwanese national** and millionaire corporate executive charged in broad, multi-billion dollar price fixing conspiracy of LCD screens worldwide. The government did not seek detention, but noted flight risk factors included his citizenship of Taiwan; multi-millionaire with significant assets; limited ties to the U.S.; and a lack of extradition. *United States v. Hsuan Bin Chen*, 09-CR-110 (N.D. Cal.).

- **Taiwanese national** corporate executive charged in a price fixing conspiracy of auto lights. He had no significant ties to the jurisdiction. The government did not seek detention, but noted flight risk factors included his citizenship of Taiwan; multi-millionaire with significant assets; limited ties to the U.S.; and a lack of extradition. *United States v. Homy Hong-Ming Hsu, 11-CR-488* (N.D. Cal.).

- **Naturalized citizen from China** charged with conspiring to commit unlicensed military weapons brokering by agreeing to send $50 million missile-firing drone and jet fighter engines to China. Defendant faced a 25 year statutory maximum sentence. *United States v. Wenxia Man*, 15-MJ-02664 (S.D. Cal.) (released in arresting district on $150,000 appearance bond over government objection); *id.* 14-CR-60195 (S.D. Fla.) (government dismissed its appeal of release order upon stipulated $250,000 bond, with $100,000 secured;travel permitted between S.D. Cal. and S.D. Fla.).

- **Naturalized citizen from China** and multi-millionaire defendant accused of multi-million dollar securities frauds for the benefit of numerous Chinese companies. Defendant faced a 25 year statutory maximum sentence. *United States v. Benjamin Wey*, 15-CR-611 (S.D.N.Y.).

- **Three naturalized citizens from China** charged with conspiring to steal and stealing trade secrets related to biopharmaceutical products, and using those secrets in China. The government alleged an actual loss amount of up to billions of dollars. One defendant's flight risk factors included family and a business in China; financial resources; defendant's own statements about her intention to move to China; personal connection to Chinese government officials; and a Guidelines sentencing range of life imprisonment. *United States v. Yu Xue, et al.*, 16-CR-00022 (E.D. Pa.).

- **Naturalized citizen from China** and hydrologist with the National Weather service charged with theft of government property, fraud, and making false representations for using a colleague password, and for exchanging emails with an individual in China. Defendant was a naturalized U.S. citizen with ties to China and a history of travel to China. *United States v. Xiafen Chen*, 14-CR-149 (S.D. Ohio) (case dismissed).

- **Naturalized citizen from China** and Temple University professor charged with scheming to defraud a U.S. company by sharing its superconductor technology with China. *United States v. Xiaoxing Xi*, 15-CR-204 (E.D. Pa.) (case dismissed).

In all of these cases, the defendants were accused of serious crimes, had "ties" to China and/or Taiwain, and many had significant assets – and were all admitted to bond without incident. All have appeared as ordered, including Chinese and Taiwanese citizens.

The notion that Dr. Ho, a 66 year-old American, could escape from the United States and make his way to China despite being subjected to electronic monitoring and having no passport defies commonsense, and bears no relationship to Dr. Ho whatsoever. Were Dr. Ho to detach his electronic monitor, pre-trial services and the Marshall's service would be immediately notified. Dr. Ho would be unable to exit the country without a valid passport.[14] There is nothing about Dr. Ho that supports the argument that he is the sort of individual who would fail to submit to court order. The claim, therefore, that no combination of conditions would ***reasonably*** assure Dr. Ho's appearance stands only if the Court credits sheer speculation. *See* 6/14/16 Tr. at 29–30 (the government argued that Dr. Ho could "cut off" an electronic monitoring device affixed to his ankle and flee the country, perhaps aided by Chinese agents who might somehow "slip" Dr. Ho a fake passport in an effort to help him flee this jurisdiction).

But opportunity for flight – even hypothetical and far-fetched – is not the same thing as an inclination to flee. *See Truong Dinh Hung v. United States*, 439 U.S. 1326 (1978) (assessing flight risk in motion for bail pending appeal).[15] In *Hung*, Justice Brennan (on Fourth Circuit assignment) demonstrated that a flight risk analysis must be tied to the individual:

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[14] The government's suggestion that the Chinese government might somehow provide Dr. Ho with fraudulent travel documents (*see* 6/14/16 Tr., p. 29) is pure conjecture. The government has pointed to no evidence that this may occur, nor even that it has ***ever*** occurred in any of the dozens of prosecutions that have been brought by the government against Chinese-Americans. As such, it should be disregarded as baseless.

[15] Although *Hung* was decided prior to the Bail Reform Act of 1984, 18 U.S.C. § 3143(b) changed the operative presumption. *See United States v. Giancola*, 754 F.2d 898, 900–01 (11th Cir. 1985) (citation omitted). Justice Brennan's flight risk analysis is instructive here.

> The question for my "independent determination" is thus whether the evidence justified the courts below in reasonably believing that there is a risk of applicant's flight. In making that determination, I am mindful that "[t]he command of the Eighth Amendment that '[e]xcessive bail shall not be required . . .' at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." Given this constitutional dimension, I have concluded that the reasons relied upon by the courts below do not constitute sufficient "reason to believe that no one or more conditions of release will reasonably assure" that applicant will not flee. The evidence referred to by the Court of Appeals is that applicant maintained contact with the Vietnamese Ambassador in Paris; that he has not established a permanent residence in this country; and that, should applicant flee to Vietnam, the United States would have no means to procure his return. But if these considerations suggest opportunities for flight, they hardly establish any inclination on the part of applicant to flee. And other evidence supports the inference that he is not so inclined. Applicant faithfully complied with the terms of his pretrial bail and affirmed at sentencing his faith in his eventual vindication and his intention not to flee if released on bail. He has resided continuously in this country since 1965, and has extensive ties in the community. He has produced numerous affidavits attesting to his character and to his reliability as a bail risk. He has maintained a close relationship with his sister, a permanent resident of the United States since 1969. The equity in his sister's Los Angeles home constitutes a substantial measure of the security for applicant's bail. In addition, applicant's reply to the memorandum for the United States in opposition informs us that the "American Friends Service Committee and the National Council of Churches have come forward with large sums which are now in the registry of the court in Alexandria."

Id. (footnotes and citations omitted). Notwithstanding the government's conjecture about the ways in which one could, as a theoretical matter, flee or be assisted by a foreign nation to flee the United States, there is nothing ***specific to this defendant*** that ties this allegation to reality. The government's argument on this point relies completely on speculation and conjecture.[16] The government has investigated Dr. Ho for more than two years, and has reviewed more than a

[16] Needless to say, there is nothing in this record that supports the government's theory that China might orchestrate some sort of cross-border rescue of this former citizen of Taiwan. Even if the government's allegations in the Indictment were true, and even if the Court indulged the government's speculation, it is difficult to imagine how a now-publicly revealed "agent" – and by then a wanted fugitive – would be of any use to China. Dr. Ho could not conceivably be of any future use to China if he lost his contacts in the U.S. Given that, the notion that China would risk an international incident with the United States to exfiltrate a U.S. citizen out of the United States defies logic and commonsense.

decade's worth of electronic communications from numerous sources, as well as had a cooperator tape-record conversations with him. It has executed a search warrant on Dr. Ho's home, and has searched all of his electronic devices. And yet it cannot point to any evidence that suggests that Dr. Ho has any intention of fleeing the U.S. or an inclination to defy a court order.

3. History and characteristics—(g)(3)

Dr. Ho is a 66 year-old American citizen and has lived in the United States since 1973. Dr. Ho was born in Taiwan in 1950 and received his undergraduate degree in mechanical engineering in 1971. In 1973, Dr. Ho came to the United States to attend the University of California at Berkeley. After marrying his wife, Anne, in 1974, Dr. Ho received a master's degree in mechanical engineering from Berkeley in 1975. In 1980, Dr. Ho completed his work for a Ph.D. in nuclear engineering from the University of Illinois[17] and, the next year, began work at Westinghouse Electric Co. ("Westinghouse") in Pittsburgh.

At Westinghouse, Dr. Ho was a senior engineer working in the field of thermal-hydraulics analysis for commercial nuclear power plants. In 1983, Dr. Ho and his wife became naturalized American citizens. Dr. Ho continued to work at Westinghouse until 1988, when he left to join Public Service Electric & Gas in Salem, New Jersey as a consulting engineer. Dr. Ho worked in New Jersey for the next eight years, until 1996, when he started his own consulting business, Energy Technology International, Inc. ("ETI"). Dr. Ho and his wife have resided in Wilmington, Delaware since 1988. While (as noted above) Dr. Ho travels and spends significant time in China, his permanent residence is a home in Wilmington that he and Anne purchased in 2010, and where he will live if the Court grants release.

[17] Dr. Ho received his official certificate in May 1982.

Dr. Ho suffers from a heart condition. His physician attests to the danger of confinement to his particular physical condition. Exhibit A.

Dr. Ho has no criminal history, and nothing in his record suggestive of a predilection for failing to comply with court order, let alone the "serious" risk of flight required by law. *See* 18 U.S.C. § 3142(f)(2)(A).

C. Detention is particularly dangerous in gray-area criminal cases.

Pretrial detention poses a unique danger in this case, as the facts raise legitimate issues regarding Dr. Ho's conduct – even if established as alleged in the Indictment – violate Section 2077. The legal issues presented by this unprecedented prosecution will be novel and complex. Whether this prosecution will withstand judicial scrutiny remains to be seen. In any event, the possibility that Dr. Ho will remain incarcerated for many months for a case that cannot be sustained is very real.

Since 2014, the Justice Department has voluntarily dismissed cases against five individuals in high-profile espionage-related cases involving scientists of Chinese descent:

1. *United States v. Xiafen (Sherry) Chen*, 14-CR-149 (S.D. Ohio). A hydrologist with the National Weather service, Ms. Chen was charged with theft, fraud, and making false representations for using a colleague password, and for exchanging emails with an individual in China. The court dismissed the case on the government's motion in March 2015;

2. *United States v. Xiaoxing Xi*, 15-CR204 (E.D. Pa.). A Temple University physics professor was charged with wire fraud for allegedly scheming to defraud a U.S. company by sharing its superconductor technology with China. The government, however, misunderstood key parts of the science behind the professor's work and misunderstood the meaning of emails he had exchanged with people in China. The court dismissed the case on the government's motion in May 2015;

3. *United States v. Mo Yun*, 13-CR-147 (S.D. Iowa). An employee of Chinese agricultural conglomerate was charged with conspiring to steal trade secrets from U.S. agriculture companies valued at $100 million dollars. The government failed to demonstrate that it had sufficient evidence of defendant's participation in a conspiracy. The court dismissed the case on the government's motion in July 2015; and

4. *United States v. Guoqing Cao, et al.*, 13-CR-150 (S.D. Ind.). Two Eli Lilly scientists were charged with theft of trade secrets valued at $50 million and sharing the secrets with a Chinese company. The government, however, misapprehended as trade secrets information that was already in the public domain. The case was dismissed on the government's motion in June 2014.[18]

In each of these highly technical cases that ended in dismissal, the government misinterpreted and oversold the evidence. This case raises no less complex, scientific issues, together with an untested statute.

The government's theory of criminality consists of a chain of inferences one must make in order to link Dr. Ho to a single drop of "special nuclear material." Dr. Ho ought not be subjected to detention while his counsel uncover and present the case deficiencies in full. *See e.g. United States v. Cao, et al.*, Order, 13-150, ECF No. 87 (S.D. Ind. Nov. 8, 2013) (acknowledging that defendants raised "important questions" as to sufficiency of the evidence; "[a]lthough the weight of the evidence is an issue for another day, at this early stage in the proceedings, the defendants have poked sufficient holes in the government's case such that the weight of the evidence is not as strong as it appeared during the previous hearing").

D. Other Relevant Considerations

This is a "complex" case. See ECF No. 31. The government has advised counsel that the discovery in this case will be voluminous and will include approximately 80,000 emails, about half of which are in Mandarin. The emails alone consist of 40 bankers boxes of printed

[18] Tragically, despite the fact that this case was ultimately dismissed by the government, the two Chinese-American scientists in the Eli Lilly case were subjected to more than one year of pre-trial confinement before the district court ultimately agreed to their release. (All of the others were admitted to bond.) Prior to their release to home detention, the now-exonerated scientists were placed on lock-down status in a monitored living facility where they were housed with "hardened state offenders serving sentences of confinement," were "repeatedly pressed by other offenders for money," and witnessed the use of smuggled weapons. *Id.*, ECF No. 91.

material even before translation.[19] It simply will not be possible for counsel to adequately prepare for a trial without the full and complete assistance of Dr. Ho. And it will not be possible for Dr. Ho to analyze the evidence in this case, given the nature and volume, while he is detained in jail. The subject matter of the Indictment is complicated, specialized, and technical in nature. It almost entirely consists of email evidence, the nature and context of which will be the determining factor by which the trier will determine Dr. Ho's innocence or guilt. Understanding the science involved will be critically important, as will carefully reviewing all of the emails to understand what was discussed and the context in which the conversations took place. Dr. Ho's constitutional right to a fair trial will inevitably be compromised if he cannot fully participate in his defense by having full and unfettered access to the evidence against him and the ability to speak and communicate with counsel whenever necessary.

In addition, it cannot be emphasized enough that Dr. Ho is not a young man. He is 66 years old, and, not surprisingly, poorly equipped for dealing with the stress and potential dangers inherent in detention.[20]

If not admitted to bail, Dr. Ho could very easily spend months in jail on charges that are wholly novel and untested, and on evidence that is very likely misunderstood. The likelihood that Dr. Ho may spend extensive time in jail for charges that are ultimately resolved in his favor is too strong to be ignored here.

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[19] One translator estimated that Mandarin to English translations typically result in translated documents that are one third more voluminous than the Chinese original document. Since the English language translations will be the trial evidence, Dr. Ho will need to review both sets of material.

[20] At one facility Dr. Ho was housed in during transport to the E.D. of Tennessee, jailers had to segregate Dr. Ho from the rest of the population when it was learned that inmates were discussing inflicting physical harm to Dr. Ho.

Taken together, the law and the relevant facts mandate pre-trial release. Dr. Ho respectfully seeks the imposition of bail conditions that will permit him to remain in his home with his wife, and permit him to meaningfully participate in his defense of this case.

E. The proposed conditions reasonably assure Dr. Ho's appearance.

The law requires that the government prove a "serious" risk of flight. *See* 18 U.S.C. § 3142(f)(2)(A). Here, the government simply cannot carry its burden of proving that there is ***no*** combination of conditions that would reasonably insure Dr. Ho's presence. *See United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (describing this "dual burden").

Dr. Ho's appearance is reasonably assured through a combination of conditions short of detention. Dr. Ho will agree to post a $3,000,000 bond, secured by his family home in Delaware, together with the family homes of his sister-in-law and a close family friend. Both of these third parties have known Dr. Ho for decades. It is unimaginable that they would be willing to risk their family homes if they had the slightest doubt about Dr. Ho's willingness to return to court.

Dr. Ho's failure to appear for court appearances would result not only in him becoming a fugitive, but also in his wife of more than four decades becoming homeless, his in-laws becoming homeless, and his childhood friend becoming homeless. Dr. Ho would agree to home detention, to wear an electronic bracelet at all times, and to be subject to electronic monitoring, pending the resolution of this case. Dr. Ho agrees that the government can continue to hold his passport and agrees not to attempt to acquire any new passport. Dr. Ho further agrees to any other standard conditions of intensive pre-trial supervision.

V. CONCLUSION

Defendant Allen Ho respectfully requests that there are any number of conditions that the Court can impose such that he can be released pending trial.

Dated: June 29, 2016

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS ALLEN HO

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2016, I caused true and correct copies of the foregoing document and Exhibits A-B to be filed with the Clerk of the Court using the CM/ECF system, and I further certify I will cause a notice of electronic filing to the attorneys of record in this matter to be sent.

/s/ Xochitl Arteaga_____
Xochitl Arteaga