

WHITE-COLLAR CRIME

Setbacks Prosecuting Trump Allies Highlight Challenges in Foreign Influence Cases

The recent acquittal in the Eastern District of New York of Thomas Barrack, a longtime friend and ally of former President Donald Trump, who was accused of acting as an unlawful agent of the UAE to influence Trump's decision-making, is only the latest example of the DOJ's difficulties successfully prosecuting cases of non-traditional foreign influence in U.S. affairs. DOJ has also faced repeated setbacks in its prosecution in the Eastern District of Virginia of Bijan Rafiekian, former business partner of Trump's National Security Advisor Michael Flynn, accused of acting as an illegal agent of the Turkish government in an effort to obtain the extradition of a Turkish dissident. Both Barrack and Rafiekian were charged under §951 of the U.S. Criminal Code, which has roots in the Espionage Act



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of 1917, and broadly prohibits agents of foreign governments from acting in the United States without first notifying the Attorney General. Despite the statute's broad language, the DOJ has faced significant hurdles in pursuing §951 prosecutions outside the traditional espionage context, and particularly where the alleged foreign agent's activity involves ostensibly legitimate international business dealings.

Revelations of broad-ranging Russian efforts to influence the 2016 presidential election, which resulted in criminal charges against multiple Russian intelligence officers brought by special counsel Robert Mueller, focused attention on criminal laws designed to prohibit the activities of foreign agents in the United States. DOJ officials

initially touted one such law, the Foreign Agents Registration Act (FARA), 22 U.S.C. §611 et seq., which makes it illegal to act as an agent of a foreign principal by engaging in political activities in the United States without prior registration. DOJ used FARA to prosecute former Trump campaign chair Paul Manafort and Trump fundraiser Elliott Broidy, and in its unsuccessful prosecution of former Obama White House Counsel Gregory Craig for his alleged lobbying efforts on behalf of Ukraine stemming from his private practice legal work. Recent prosecutions, however, have relied on §951. These troubled cases raise caution flags for future DOJ criminal prosecutions of non-traditional foreign influence cases.

Section 951

Section 951 criminalizes "act[ing] in the United States as agent of a foreign government without prior notification to the Attorney General." 18 U.S.C. §951(a). Section 951 encompasses any activity by an "agent of a foreign government," which is defined

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as “an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official.” The statute excludes from its reach diplomatic officers and publicly acknowledged officials, and, significantly, also has an exception for any “person engaged in a legal commercial transaction.” Id. §951(d)(1)-(4). A “legal commercial transaction” is defined as “any exchange, transfer, purchase or sale, of any commodity, service or property of any kind” not prohibited by law, 28 C.F.R. 73.1(f). This exception has recently been interpreted to encompass routine and “strict commercial relationship[s] with the foreign nation,” meaning that individuals engaged in business transactions that just happen to involve representatives of foreign governments do not need to notify the Attorney General. See *United States v. Ji Chaoqun*, 18 CR 611, Dkt. No. 368 (N.D. Ill. Sept. 22, 2022).

Unlike FARA, §951 does not contain an express willfulness requirement. Rather, criminal liability turns only on whether an individual knowingly acted as an agent of a foreign government. A finding of liability under §951 may result in a term of imprisonment up to 10 years, versus FARA’s maximum five-year term. Another crucial difference in the statutes is FARA applies to four defined categories of covered activities by an agent of a foreign *principal*, focusing on the political realm, while §951

encompasses all activity by an agent of a foreign *government*.

The precursor to §951 is contained in the Espionage Act of 1917 which Congress enacted to protect the United States against German spies during World War I. In 1948, Congress repealed §951’s precursor and re-enacted the statute without substantive changes as Title 18, U.S.C. §951.

Early cases involving §951 charges established the statute’s broad reach, holding that there were no limits on the scope of conduct eligible for criminal liability, so long as one is acting as an agent. These cases emphasized that §951’s element of agency differentiated it from “core” espionage statutes, which focus on conduct. Courts repeatedly have concluded that §951 is not limited to traditional espionage-like conduct such as stealing and transmitting government secrets. See, e.g., *United States v. Duran*, 596 F.3d 1283 (11th Cir. 2010); *United States v. Dumeisi*, 596 F.3d 566 (7th Cir. 2005); *United States v. Alshahhi*, 2022 WL 2239624 (E.D.N.Y. June 22, 2022). In fact, most §951 indictments target general, non-secret information gathering, while other cases involve procuring or seeking to procure technology for foreign governments or evading sanctions.

Section 951 Enforcement

Despite the statute’s broad language and application, successful §951 prosecutions in recent years have targeted traditional

“spy-like” activity, typically involving foreign intelligence services. For example, in September 2022, a jury in federal court in Chicago convicted Chinese national Ji Chaoqun, who had come to the United States to study electrical engineering, of swearing an oath of allegiance to a Chinese spy agency and providing a Chinese intelligence officer with biographical information on certain individuals working as engineers and scientists in the United States for possible recruitment as part of a larger effort to obtain access to advanced aerospace and satellite technologies being developed by American companies.

In successful foreign influence prosecutions under §951 where DOJ has targeted defendants without presenting evidence of connection to a foreign intelligence service or attempts to gain access to classified information, the DOJ has nonetheless presented significant evidence that the individual knowingly acted as an agent of a foreign government to infiltrate American politics. One example that garnered considerable media attention is the case of Russian national Maria Butina. Butina drafted something called the “Diplomacy Project” which documented a plot to establish unofficial lines of communication with high powered U.S. conservatives to facilitate relationships with the Republican party in order to advance Russian interests in the United States government.

Butina requested \$125,000 from a Russian billionaire to attend conferences and facilitate meetings in furtherance of her plot. Court filings referenced evidence that Butina's main backer in Russia was former top Central Bank official Aleksandr Torshin, and Butina was fully aware that he reported to senior officials in the Russian government. Following a guilty plea in federal district court in Washington, D.C., Butina was sentenced to 18 months in prison. Upon her release she was deported back to Russia where she now has a seat in Parliament.

As the DOJ's focus on targeting foreign influence in American politics has increased, so has its application of §951 to "non-traditional" actors, such as Butina. Prosecutions using the statute in this hazy context of influencing an outcome in the U.S. government, however, have faced significant difficulties where the alleged misconduct arises in the context of potential or ongoing business dealings. The recent acquittal of Thomas Barrack, and the running legal battle over Rafiekian's conviction highlight these difficulties.

'United States v. Thomas Barrack'

In July 2021, Thomas Barrack was charged in federal district court in Brooklyn in a seven-count indictment alleging that between April 2016 and April 2018, Barrack, Barrack's former colleague, Matthew Grimes, and

United Arab Emirates (UAE) citizen, Rashid Al-Malik, acted as unlawful agents of the UAE in violation of §951 by influencing the foreign policy positions of Trump in the 2016 election, the U.S. government in the selection of the incoming administration, and seeking to influence the American public in favor of the UAE. Barrack was also charged with obstruction of justice and making false statements to the federal law enforcement agents. In May 2022, the government filed a superseding indictment adding two more counts for making false statements.

Barrack served as an informal advisor to both the Trump campaign and U.S. government officials on issues related to foreign policy in the Middle East, and also chaired Trump's inaugural committee. At the same time, Barrack served as the Executive Chairman of a global investment management firm, Colony Capital, where Grimes was employed. Barrack and Grimes were in frequent contact with Al-Malik during the relevant period. Barrack was alleged to have taken numerous steps, directly and through Grimes and Al-Malik, to advance the interests of the UAE.

Barrack and Grimes went to trial before Hon. Brian Cogan of the Eastern District of New York, commencing on Sept. 19, 2022. Al-Malik remains at large. At trial, prosecutors showed hundreds of text messages and emails between Barrack, Grimes, and Al-Malik that involved sharing

draft speeches, position papers, and op-eds with senior UAE officials for purposes of seeking feedback on these drafts, which defendants did, as well as talking points favorable to the UAE. Prosecutors argued that the evidence also showed Barrack acted to promote the candidacy of an individual favorable to UAE senior officials, provided Al-Malik with non-public information about the views of United States government officials, and advised Trump against a proposed summit that disfavored the UAE. Prosecutors also claimed that Barrack sought hundreds of millions of dollars in investments from the UAE government at the same time he was lobbying for the Trump administration.

Barrack and Grimes' attorneys contested that the defendants ever acted under the direction and control of the UAE, and instead argued that their communications were a part of routine business transactions, which included courting UAE leaders to raise money. Barrack testified in his own defense, acknowledging that he hoped his ties to Trump would encourage UAE officials to invest in his company, but he denied ever agreeing to exchange political access. He also denied knowing that Al-Malik was secretly operating in the United States as an agent to the UAE, as prosecutors had alleged.

After a six-week trial, the jury acquitted Barrack and Grimes

on all counts, finding that the government's evidence was insufficient to prove that defendants knowingly acted under the direction and control of the UAE government.

'United States v. Bijan Rafiekian'

Prior to the Barrack prosecution, the DOJ brought FARA and §951 charges against former national security adviser, Michael Flynn, and his business associates, Bijan Rafiekian and Ekim Alptekin, for allegedly acting as illegal agents of the Turkish government in the United States to engage in various political and other activities intended to influence the U.S. government to extradite Fethullah Gulen, a Turkish dissident living in the United States, which the DOJ had been resisting. While working for Flynn's company, Flynn Intel Group, Rafiekian allegedly arranged a \$600,000 contract with a Dutch company for a project which was actually directed by the Turkish government, to produce research, generate publicity, and lobby officials in advancement of Gulen's extradition. As part of an ill-fated agreement to cooperate with Mueller's investigation, Flynn ended up pleading guilty in December 2017 to a separate indictment for making false statements to the FBI regarding a discussion he had with Russia's ambassador, which allowed him to avoid charges related to Turkish influence. Rafiekian proceeded to trial before U.S.

District Judge Anthony Trenga in Alexandria, Virginia on charges of conspiring to file a materially false document under FARA and a substantive violation of §951.

In July 2019, a jury found Rafiekian guilty on both charges, but shortly thereafter the district court granted Rafiekian's motion for acquittal. The government appealed, and the U.S. Court of Appeals for the Fourth Circuit reversed and vacated the decision below. On remand, the district court determined that a new trial was required because insufficient evidence was introduced to support a finding that Rafiekian knew he was acting as an agent of the Turkish government. The district court explained that the link between Rafiekian and the Turkish government was too attenuated, with only circumstantial evidence leading to weak inferences that Rafiekian actually knew the true identity of the client company. The government did not present evidence of any calls or emails between Rafiekian and known Turkish government agents, or any bank records showing funds flowing between the two. Further, the court emphasized the government's overly broad interpretation of §951, and that working in parallel with a foreign government, or even coordinating business activities with a foreign government, is insufficient to establish agency. See *United States v. Rafiekian*, No. 18 CR 457, Dkt. No. 412 (E.D. Va. March 25, 2022). The

government's appeal of this ruling is currently pending.

Conclusion

In its recent stepped-up enforcement efforts against foreign influence in American politics, the DOJ has faced some high-profile setbacks when it has sought to use the broad reach of 18 U.S.C. §951 to pursue conduct outside the context of traditional espionage. Juries and courts have rejected such prosecutions when legitimate business dealings provide an alternative explanation for an individual's foreign activities. The Barrack and Rafiekian cases suggest that the DOJ may want to reconsider its approach regarding future criminal prosecutions of non-traditional foreign influence cases, particularly in circumstances that raise questions whether defendants have been targeted in part because of disfavored political associations.