



## Ep. 21: Are You A Foreign Agent?

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*The Maria Butina case cast a spotlight on once-obscure laws known as 18 USC Section 951, and the Foreign Agent Registration Act, or FARA. The government has revived these laws to target political actors, foreign propagandists, or influencers acting here in the United States without prior notice. The Fourth Circuit recently had something to say about it.*

**Alfred Carry:**

I'm **Alfred Carry**, an attorney in the Government and Internal Investigations group here at McGlinchey. And I'm joined today by my colleague **Bob Driscoll**, who's Co-Chair of the same practice group and a former Deputy Assistant Attorney General at the Justice Department.

I wanted to do this podcast because we represented Maria Butina. You might remember Maria as the young woman from Russia who pleaded guilty to conspiring to act as a foreign agent and openly advocated for closer connections between her homeland and the U.S. She's actually found herself back in the news in response to this popular podcast called "[Spy Affair](#)." In any event, her case cast a spotlight on these once obscure laws known as 18 USC Section 951, and the Foreign Agent Registration Act, FARA for short. The government has revived these laws to target political actors, foreign propagandists, or influencers acting here in the United States without prior notice. The Fourth Circuit recently had something to say about it.

So let me get you in here, Bob, and ask you, who is a foreign agent?

**Bob Driscoll:**

Thank you, Alfred, that question is easier asked than answered. So let me start with the statutes in question. Section 951 of the Criminal Code is a statute barring foreign agents from operating in the United States without registering with the Attorney General. And a "foreign agent" in that statute is defined very, very broadly. It essentially means anyone who is in the United States who is operating under the direction or control (so it's the disjunctive, either one) of a foreign government or foreign official (again so it's either one). Essentially it leaves it there, and so for years, there's been lots of ambiguity about what that means. I think the history of the statute is pretty clear, that it was designed in order to allow the government to pick up foreign agents, meaning foreign

intelligence officers, in the United States before they commit any crimes. So if you found a foreign agent, you could arrest them under this statute before they stole the plans to the nuclear sub.

So that's one definition of a foreign agent, and that's been very broad and ambiguous for a long time. There's also a foreign agent definition under FARA, the Foreign Agent Registrations Act, which more people may be familiar because it's gotten a lot of press lately. FARA is the statute that essentially governs foreign propaganda in the U.S. And it's designed to prohibit – it doesn't prohibit speech, because you can't do that in this country under the First Amendment – but it's designed to prohibit kind of unexplained speech, or speech that is funded by a foreign government, and is therefore effectively propaganda. And so what you have to do is if you're doing public relations work or lobbying work, affecting U.S. public opinion or U.S. government actions, on behalf of a foreign government, you have to register with the Attorney General. FARA is generally enforced civilly.

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There are criminal violations of FARA, but it must be a willful violation. Practically speaking, willful violations are very hard to prove, because the statute is long, it is complicated, it is enormous. There are gigantic exceptions, which if you think about it for a minute, you would know there would have to be for legitimate business practices and law firms and things like that, or else everyone working on behalf of international business would have to register, and that's not, clearly, the case. So FARA has a more narrow, I would say, definition of a foreign agent, with lots of exceptions in it. But 951 has a very broad definition of a foreign agent.

**Alfred Carry:**

To be clear, 951 still has a registration requirement too, right?

**Bob Driscoll:**

It does. It's essentially never used, as far as we can tell. It just essentially says that you're operating without notifying the Attorney General. And the question is, of course, who would, if you're really a foreign agent? And so there's not an intake system or anything like that. With FARA, as opposed to 951, there's an entire FARA Unit at the Department of Justice. And you can go to their website, and there's forms you need to file, and there are opinion letters that they've issued about who needs to file. You can even consult with them on a no-name basis about whether you need to file on behalf of a specific entity or not.

So for FARA registration, it's a kind of well-developed system. There are lawyers that specialize in that area and can deal with it. Under 951, the working assumption was always that the lack of registration was essentially a predicate act in order to pick up the agent more than it was the expected. You know, I don't think the government is ever

expecting that an agent from North Korea who's here on a covert mission is going to swing by 950 Pennsylvania Avenue and drop something off for the Attorney General on his way in, and let the government know what he's doing. That is kind of the main difference between the two.

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There's also disparate penalties. Like I said, 951 is a very serious statute. It's a 10 year felony, meaning it's a 10 year maximum, depending on your criminal history or other factors. Obviously in any event, a substantial jail term would be probable with a statute that severe.

FARA has both civil and criminal provisions. And so I think it kind of probably has a little bit less teeth, because it's been generally enforced civilly. You'll see, a lot of times there'll be a resolution where someone amends a FARA filing, after the government points it out. You know, there can be fines, and there could be a criminal violation. But again, the criminal violation would have to be willful. And we'll talk later [about], there's massive incentive for the government not to bother trying to prove that, because there's almost no circumstance in which they would be bringing that case if they could just bring a 951 case and not have that same requirement.

**Alfred Carry:**

So the Fourth Circuit case was about this guy named Bijan Rafiekian. He wasn't an intelligence operative, or at least I don't recall there being an allegation of that. But he was found guilty under Section 951 for recruiting Michael Flynn for a Turkish Government influence operation, all at the bidding of the Turkish government. The trial judge set that jury verdict aside, but the Fourth Circuit, on appeal, reinstated the convictions. In its decision, the court grappled like you are with this question of who is a foreign agent. The government argued for a sweeping interpretation of the word "agent." They said a person becomes an agent whenever he's willing to do something the foreign principal requests. Fourth Circuit obviously rejected that view. Do you agree with that decision?

**Bob Driscoll:**

I do. I certainly agree with the rejection of the government's position for sure. I think it's a complicated question as to where you draw these lines. But the government was advocating a view that was essentially probably coextensive with something like the civil treatise. You know, from law school, kind of like, restatement of law of agency, something like that, where it's simply, an agent has to agree to do something for someone else. And there's just a simple principle of, I agree to do this for you, and therefore, I'm acting as your agent. And that's obviously unbelievably broad, because it would cover anything. You know, if I buy you sports tickets, if I fill out a form for you, all kinds of things that would have nothing to do with anything that anyone would be concerned about, for the purposes of the statutes. I'm pleased that the government

rejected, or that the Fourth Circuit rejected the government's broad approach. And I think there's still an open question as to where that line is going to be.

**Alfred Carry:** Is there, like, a rule of thumb or, like, a minimal requirement that qualifies as a foreign agent?

**Bob Driscoll:** Well, the Fourth Circuit talked a little bit about mutuality, that there has to be essentially an agreement between the foreign principal and the agent, even through a third party. It could work through someone else. You can't, kind of insulate yourself just by putting some people in between. So there has to be kind of have a mutuality that you agreed to do it. I guess they were trying to protect against the overbreadth we're talking about – that if you're essentially freelancing on behalf of someone, and you weren't doing it with their assent, and there was no kind of mutuality as to what you were doing, then I think the Fourth Circuit would reject that as being an agent.

**Alfred Carry:** Right. I think there's some really good language from the Fourth Circuit opinion on this point that was, like they said, that they declined to impose the statute on every “wannabe emissary.”

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**Bob Driscoll:** Right. And, you know, it's funny, and Maria's case obviously hearkened back to that. Maria, for those who don't know, she was a student at American [University] who was a Russian national who we represented. Our view certainly was that she wasn't a foreign agent, the government even agreed she was not a trained foreign intelligence agent. This kind of “wannabe emissary” probably, I think, would apply to her as much as to anyone else. You know, unfortunately, this Fourth Circuit decision didn't exist when we were fighting with the government about her case.

I think this would be a good time just to throw in as well, a few facts from the [Bijan] Rafiekian case of just what the background of that was, and how it kind of ended up in the Circuit. Rafiekian worked with Michael Flynn of some fame, former National Security Adviser to President Trump. The Flynn Group was essentially had proposed, there was a proposal on the table to do some work on behalf of the Government of Turkey, with respect to a dissident cleric who was in the United States, and whether or not there would be steps taken to designate him a terrorist or even possibly have him extradited to Turkey for crimes under Turkish law. And Flynn was approached about that, and Rafiekian was approached about that, and they proposed it, and then that never went anywhere theoretically, at least under the name they designated for the project.

But shortly thereafter, and this is circumstantial evidence we'll talk about later, the Flynn Group started to do work for a Dutch company that was set up that had essentially the same interests. It was in order to deal with this Turkish dissident in the US. And they started doing work for the Dutch entity. And Rafiekian was found

eventually under this Fourth Circuit decision — The government charged initially that Rafiekian was an agent of Turkey and had not registered with government that his work was being done, essentially, on behalf of the Turkish Government. As you said, the trial judge, after trial, threw out the case, saying there's insufficient evidence to find that Rafiekian was an agent of the Turkish Government, because when they were forming this contract, there really wasn't much contact with the Turkish Government. It was all working through this Dutch entity. However, before the contract was executed, there was a meeting with the, I think, a Turkish Foreign Minister, a high level Turkish official in New York. And there were discussions with Turkish government. And I think that Fourth Circuit focused on, kind of, the constellation of facts from which the government was able to make a pretty decent case, that, indeed, Rafiekian was acting as an agent for the foreign government. And although they upheld it, or found that he was an agent, I think it shows how ambiguous this whole area is.

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The Fourth Circuit, I think, took a little bit of a sympathetic view to the prosecution of these cases by saying that, you know, no one ever is going to write down these contracts, necessarily, or that these things are, obviously there's going to be steps taken to not do it out in the open. And so you can't expect to have a straight contract like you would in the FARA case or something like that. And so they allowed the government to kind of “lasso,” I think they said, “enough of the stars to form a constellation of facts in which you could prove agency,” and that that's what they did.

That is what the Rafiekian case is about. And if you think about it, I think it really brings into relief for anybody who does work impacting foreign governments or foreign conditions or in foreign policy area. This is a fact pattern that I think most people, two years ago, would have typically thought of as at most of FARA kind of issue. And this 951 situation would probably not have crossed most people's minds. But now the government has been more aggressive in bringing these cases.

**Alfred Carry:** Why didn't the government bring a FARA case in the Rafiekian matter? Could they?

**Bob Driscoll:** They could have. They had problems with their FARA case. We can speculate on some of them, but one of the problems they had was that they hired counsel. They hired qualified, you know, excellent counsel, I think Covington and Burling, you know Rob Kellner, to advise them on whether or not to do a FARA filing. And then there was a factual dispute as to whether they gave Covington the accurate facts as to what the engagement was about. And so once you're down that road where you've got a complicated statute, you hired outside legal counsel, you're looking into it, and it's kind of a “he said, she said” on the facts, I think, frankly, it just became a lot easier for the government to say, you know, why bother trying to prove a FARA case? Nine fifty-one,

as we talked about at the beginning, is much simpler statute, and so why bother with dealing with that willfulness issue of FARA?

**Alfred Carry:** That's the willfulness issue that you're talking about?

**Bob Driscoll:** Yeah.

**Alfred Carry:** Let me ask you a hypothetical question. I think that you mentioned it a second ago. But say you knowingly buy airplane tickets for a foreign official? Is there exposure there?

**Bob Driscoll:** This is a great question. And I'll be a little bit of a lawyer by answering it two ways.

**Alfred Carry:** I would expect nothing less.

**Bob Driscoll:** My practical answer is no, there's not. You're not going to get prosecuted for it. Unless the foreign official is Kim Jong-un or someone like that. But the legal, the "law school" answer is yes, that transaction would meet all the elements of 951. And that you would be acting as an agent in the United States on behalf of a foreign official, and if you hadn't registered with the government, they could do it. Which is why I think there is a real question in terms of vagueness of that statute, which you know, someday, by some defendant could be ripe for challenge. So I think theoretically, there is, but practically there wouldn't be.

**Alfred Carry:** What if you don't know the person you're buying the airplane tickets for is a foreign official?

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*The question would be if you were working with an intermediary for the foreign official, and it could be inferred that you must have known that, I think there could be a problem.*

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**Bob Driscoll:** If you really didn't know, again, I think as a practical matter, you probably wouldn't be prosecuted, and you could establish that. This is where it gets a little dicey, because of a couple of matters. One is that 951 is what is referred to as a "general intent statute," where you don't have to even be aware that the statute exists to violate it. It's not a "specific intent statute," where you have to essentially know what you're doing is illegal.

That's one problem that you have with 951. The second one is you have this issue of intermediaries that the Fourth Circuit brought up. The question would be if you were working with an intermediary for the foreign official, and it could be inferred that you must have known that, I think there could be a problem. The hypothetical plane tickets makes life easy from a practical perspective, but I think that – it reminds me a lot, frankly, to kind of cross legal areas. It reminds me a little bit of, foreign trade cases run into this issue a lot, in terms of the "end user" doctrine.

You can sell something to somebody who is themselves not prohibited or not on the OFAC list, but you have to take reasonable steps to get a certification as to who the end user of the product will be. So if you sell it to Fred's Trading Company of Dubai, you're not allowed to just say, well, Fred's not on the list. I'm going to send them the tomahawk missiles. You have to ask Fred, who is this eventually going to be in the hands of, and can I run that person through an OFAC list? I think similarly in this, with the Fourth Circuit intermediary concept, it's kind of a similar concept of, you're not going to be protected simply by inserting somebody between you and the foreign principal. And I think one of the things people are wary of just factually is, whenever you start seeing new corporations get set up specifically for the transaction, you kind of have to ask yourself why that is.

**Alfred Carry:** So the Fourth Circuit answered some questions. Do you see any unanswered questions that still need to be resolved with respect to the statute?

**Bob Driscoll:** I think there's, and we're harkening back a little bit here to Maria's case that we dealt with, when we looked at the statute pretty closely. I think there's still a red light First Amendment problem with this statute. And I compare 951 to FARA again, in that that the complicated nature of FARA – for all everyone complains about the complications. It's complicated because Congress, when they passed FARA, had a recognition that this was a statute that had the potential to impinge upon speech. And even foreign nationals in the U.S. have the right to free speech, and have the right to petition the government, have the right to do everything else that we all do under the Constitution. So you can't just prohibit people from doing this saying that, “well, you're not from this country, so you can't speak on these issues.” That would create a massive First Amendment problem. And so FARA has tons of exceptions and carve outs in order to protect First Amendment activity by simply requiring that certain kinds of speech, disclose their source of funding and things like that, so that the U.S. public is not unwittingly the subject of propaganda. Though I think 951 has none of those restrictions, and so I think that there needs to be some either judicial or legislative fix to that at some point.

**Alfred Carry:** Thanks, Bob. This has been a really good discussion today. I've enjoyed it. And thanks to our listeners for tuning in.

**Bob Driscoll:** Thanks, everybody.

*Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at [podcast@mcglinchey.com](mailto:podcast@mcglinchey.com). For additional resources on this topic, please visit [mcglinchey.com](http://mcglinchey.com). On behalf of the law firm that brings you more, we hope you'll join U.S. next time.*



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