A DAY AFTER MARIA BUTINA ARGUES INFLUENCE OPERATIONS SHOULDN'T BE CHARGED AS SPYING, PLEA NEGOTIATIONS START

As a number of people reported, on Friday, the government and Maria Butina got the court to delay her case by two weeks so they can try to resolve it, suggesting they're in plea negotiations.

> In support of this motion, the parties state that they continue to engage, as they did prior to yesterday's defense filing, in negotiations regarding a potential resolution of this matter and that those negotiations would be potentially hindered by simultaneously engaging in motions practice. The parties further agree that to make the best and most efficient use of the Court's time and resources to decide any motions in the event those negotiations are unsuccessful, it would be prudent to continue the upcoming hearing and its accompanying motions schedule for approximately two weeks.

As part of that delay, Butina withdrew a motion submitted on Thursday without prejudice (meaning she can resubmit it if plea talks fail). The motion asked the court to declare 18 USC 951 (which is what the US government charges foreign spies with) unconstitutional as applied to influence operations.

The motion lays out a bunch of hypothetical cases with vague parallels to Butina's to lay

out the danger of using 951 to prosecute those conducting influence operations. Some are farcical, in which a thoughtful grandmother takes on the role that Aleksandr Torshin does in Butina's operation.

> An unregistered, lonely grandson from an unpopular, provincial country accepts the advice of his grandmother about how to make friends. She thoughtfully directs him to go to prayer groups and same-interest meetups to meet people with common interests. He violates section 951 if the grandmother is a foreign official, even though the grandmother provided such direction while visiting the United States on holiday.

A non-hypothetical comparison, however, is more apt, arguing convincingly that an Israeli influence tour might be prosecuted if Israelis were treated with the suspicion Russians currently are.

> Consider recent events regarding Israeli soldiers touring cities across the United States for the 11th Israeli Soldiers Tour to speak at venues, including college campuses, to raise awareness of the realities of their service.10 Sponsored by StandWithUs, an Israel advocacy group funded and supported by hasbara organizations and the Israeli government, these soldiers travel the United States to conduct influence operations intended to pacify U.S. views, change foreign policy, and put a human face on the Israeli military. Is there any doubt that such unregistered agents could be charged under the same interpretation of section 951 used against Maria— for operating in the United States as "agents" of Israel when directed to go to U.S. schools and then brief their IDF11 military commanders on their reception in the

> United States? Is there any doubt that they wouldn't be? The point is not that such activities are improper. They are not. However, they are precisely the kind of educational exchanges and necessary uninhibited marketplace of ideas that are sought and encouraged when foreign students and visitors like Maria are admitted to U.S. universities.

The motion ultimately argues that before using 951 against an influence operation the statute should have the kind of limits that exist in the FARA statute.

> To resolve the constitutional problem presented by the statute's broad application, this court should—at least as to political activities—narrow the sweep of section 951 so that it aligns more closely with the constitutional safeguards recognized by Congress in the Foreign Agent Registration Act (known as "FARA").
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> Worse, as for cases involving 'political activities,' it allows the government to pursue harsher penalties with additional restraints on individual liberty, compare 18 U.S.C. § 951 (10 years imprisonment) with 22 U.S.C. § 618 (5 years imprisonment), without enduring the additional cost of satisfying higher burdens of proof, see 22 U.S.C. §§ 611(o) and 618(a) (authorizing prosecution only for "willful" violations and specific kinds of "political activities"), thus circumventing the inherent check on government overreaching that the Fifth Amendment Due Process Clause was designed to instill. If left unchecked, federal investigators and prosecutors will have strong incentives to prosecute political activity cases under section 951 instead of FARA, so they can reap the law-enforcement benefits of section

> 951's penalties without paying the price of higher burdens of proof.
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> To avoid that distortion, this court should consider the catch-all, sweeping application of section 951 when applied to political activities, in comparison with the statutory restraints of FARA as applied to the same, in assessing whether section 951 exposes Maria to the risk of arbitrary enforcement. Such an approach would provide an accurate answer to the doctrinal question at hand: whether section 951 is constitutionally deficient (and/or in need of a limiting construction) because it "confers on police a virtually unrestrained power to arrest and charge persons with a violation" thereby permitting "policemen, prosecutors, and juries to pursue their personal predilections." Kolender, 461 U.S. at 358.

It's a fair argument, at least in this case. Back in August, I did two posts pointing out there was little difference between what Paul Manafort was accused of in his DC case and Maria Butina was accused of.

It's unclear whether the plea negotiations are a response to this motion or not. Some of the evidence against Butina described thus far suggests her operation has the approval of Putin himself (though the Israeli StandWithUs tour is the kind of thing Bibi Netanyahu likely loves). But other evidence — such as a claim she's coordinating with FSB (which, after all, is the closest analogue to the FBI) appears sketchy. So while it's possible that Butina is a privately funded spy running an influence operation on behalf of the Russian government, it's also true that to prove that, the government may have to share more classified information than they care to. And while I'm skeptical the constitutional challenge to 951 would work (in part because courts are loathe to tamper with national

security law, in part because the claim that Butina chose to come to the US as a student does seem to have been chosen with the influence operation in mind), the government probably wants to retain their ability to use it with clearcut spies engaging in influence operations.

So I could imagine the government might be willing to settle this with either a FARA plea (which would further reinforce the FARA regime Mueller has introduced) or a visa fraud charge, particularly if Butina were willing to implicate Paul Erickson and other Americans who had helped her efforts.