

IS A TIE WITH VLADIMIR PUTIN WHAT MAKES MARIIA BUTINA MORE OF A SPY THAN PAUL MANAFORT?

Given my continued obsession with the border between the spying charge (18 USC 951) with which Mariia Butina got charged and the FARA charge (22 USC 611 et seq.) with which Paul Manafort got charged, I find this footnote from the government's opposition to Butina's request for bail of particular interest.

14 The defendant also attempts to rely on the government's search warrant seeking "evidence of a potential violation under FARA." ECF No. 23-1 at 7. As the defendant later acknowledges, *id.* at 15, the search warrants the government obtained for the defendant's residence authorized it to search for potential violations of 18 U.S.C. §§ 371 and 951, as well as 22 U.S.C. § 611 et seq.

It reveals that at the time they searched Butina's residence on April 25, 2018, the FBI had not determined whether they considered her just a sleazy foreign influence peddler or a spy. The government had explained that, in that or a subsequent search they found several pieces of evidence she had ties to the FSB, including a note reflecting a job offer. The search also included access to her devices, which revealed a slew of "taskings" from Aleksandr Torshin, which the government will use (if this ever goes to trial) to prove Butina worked as an agent for the Russian government.

So that may be one of the things that led them to charge her as a spy, rather than just a sleazy influence peddler.

The opposition filing provides more details, however, that may explain the charge.

Pre-meditation: the operation started in 2015

I had noted, here, that one difference between Butina and Manafort likely stemmed from her necessity to lie to get a visa, something the government repeats here.

In 2016, the defendant applied for and was granted an F1 student visa to study at American University in Washington, D.C. On her application, she identified her current employer as “Antares LLC” and described the Russian Official as a previous employer. Nonetheless, once resident in the United States, the defendant continued her efforts at the direction of the Russian Official to establish connections with U.S. Political Party 1 and other U.S. officials and political operatives.

They also defend a claim they made about her current visa, which she obtained to ensure she’d be able to travel back and forth from Russia, another detail the defense had spun to great effect.

The defense asserts, ECF No. 23-1 at 13 n.12 & ECF No. 23-8, that the government made a misrepresentation regarding the type of visa for which the defendant recently applied and implies that it did so intentionally. The government acknowledges the error in its Memorandum in Support of Detention regarding the label it applied to the visa. ECF No. 8 at 8. But the substance of the government’s contention—that the defendant could travel to and from the United States per her new visa’s terms,

but not per the terms of her F-1 visa after her graduation—is true of the Optional and Practical Training visa extension for which the defendant applied. In other words, the “B1/B2” label the government used to describe the visa was incorrect, but its underlying argument was correct.

But this filing also adds further details of how pre-meditated Butina’s plan was, describing a plan she wrote up in March 2015.

Beginning as early as 2015, the defendant wrote a proposal intended for Russian officials laying out her plan to serve as an unofficial agent or representative to promote the political interests of the Russian Federation vis-à-vis the United States.

[snip]

In 2015, the defendant created a document entitled “Description of the Diplomacy Project,” in March 2015, which included a proposal to cultivate political contacts in the United States.

Interestingly, amid a list of Russian officials the FBI has evidence she had contact with, is a phone call she had with Sergey Kislyak in May 2015, when this operation was still in the planning stages.

At the detention hearing on July 18, 2018, defense counsel argued, “There’s no evidence [the defendant has] been in a diplomatic car. There’s no evidence that she’s been to the embassy. There’s no evidence that she’s been in contact with the consulate. ECF No. 12 at 55:21-25. But after the government proffered that it had seen photos of the defendant with the former Russian ambassador to the United States, ECF No. 12 at 58:8-18, counsel admitted that he

was aware of at least one photograph of the defendant with the former Ambassador at “a movie screening hosted by a Russian cultural group in Washington.” Id. at 59:19-21. The government now proffers that it possesses additional photographs of the defendant and the Russian Official with the former Russian ambassador to the United States; that **the defendant’s calendar shows a call with the former ambassador in May 2015;** and that the defendant’s journal reflects her plan to meet with the current Russian ambassador to the United States upon his arrival to the United States. The government also possesses a photograph of the defendant with the Russian ambassador dated October 2017. [my emphasis]

Putin’s personal involvement

Finally, as noted here, this filing provides more evidence of Putin’s involvement (even though one premise of the operation is to suggest some in Russia are planning for a post-Putin future). The filing describes Erickson calling Torshin “Putin’s emissary.”

The government has developed other evidence over the course of the conspiracy that establishes taskings by the Russian Official (whom U.S. Person 1 has referred to as “Putin’s emissary”) and actions within the United States in response to those taskings by the defendant

It describes Erickson pitching Putin’s involvement when arranging for the Russian delegation to the National Prayer Breakfast.

Reaction to the delegation’s presence in America will be relayed DIRECTLY to

President Putin and Foreign Minister Sergey Lavrov (who both had to personally approve the delegation's travel to this event).

And that Putin involvement came at the last minute – the weekend of January 20-21, 2017.

[Erickson] noted, "I was ahead of this in December, but last weekend Putin decided to up his official delegation – if we can accommodate them, we can empower rational insiders that have been cultivated for three years."

Diplomatic attention even beyond propaganda-making

All of which may explain why the Russians have made such an effort to pressure for Butina's release.

Since the detention hearing in this case, the actions of the Russian Federation and its officials toward the defendant have confirmed her relationship with, and value to, her own government. To date, the Russian government has conducted six consular visits with the defendant. It also has passed four diplomatic notes to the U.S. Department of State.² According to the Russian Ministry of Foreign Affairs, Russian Foreign Minister Sergey Lavrov has spoken to the U.S. Secretary of State twice to complain about this prosecution.³ The official Kremlin Twitter account changed its avatar to the defendant's face and started a #FreeMariaButina hashtag. RT, a Russian television network funded by the Russian government, has published numerous articles on its website criticizing this

prosecution and the defendant's detention.⁴ Russia has issued more diplomatic notes on the defendant's behalf in the past month than for any other Russian citizen imprisoned in the United States in the past year. Put simply, the Russian government has given this case much more attention than other cases.

2 Diplomatic notes are used for official correspondence between the U.S. Government and a foreign government. The Department of State serves as the official channel for diplomatic communications between the U.S. government and a foreign government.

3 Press release on Foreign Minister Sergey Lavrov's telephone conversation with US Secretary of State Mike Pompeo, July 21, 2018 available at http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3302434 (last accessed Sept. 7, 2018); Press Release on Foreign Minister Sergey Lavrov's telephone conversation with US Secretary of State Mike Pompeo, August 23, 2018, available at http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3323966 (last accessed September 7, 2018).

4 See, e.g., "Accused 'Russian Agent' Butina moved to another jail, now in 'borderline torture' conditions," RT, August 19, 2018, available at <https://www.rt.com/usa/436301-butinamoved-torture-prison/> (last accessed Sept. 2, 2018); "'A real witch hunt': Moscow says student Butina is being held as 'political prisoner' by US," RT, July 26, 2018, available

Though, of course, some of this is the simple counterpart to what Butina's attorneys complain DOJ is doing: because she's a pretty woman, she makes for good propaganda that Russia can use to accuse the US of abuse. Still – Butina has gotten more reported attention than even Yevgeniy Nikulin, another case the Russian government has shown exceptional interest in.

Spying doesn't require tradecraft

Her lawyers' opposition to a government bid for a gag order repeats, in more dramatic fashion, a claim they had made in their bid for bail: that the government has presented no evidence of traditional tradecraft.

Maria Butina is in a cell, pretrial, 22 hours a day for crimes she did not commit and for government falsehoods and never-tested theories of culpability that have not (and will never) pan out. For all of the government insinuation and media coverage of Hollywood style, spy-novel allegations, in reality this case is bereft of any tradecraft or covert activity whatsoever. There are no dead drops, no brush passes, no secret communication devices, no bags of cash or payoffs, no bribes, no confidential secret information gathering, no espionage type activity, and no agency or agreement to commit crime.

Ultimately, though, the government relies on the elements of the offense, and confirm what I had suggested here – “he mis-states what the materials say about exempting political activity, not least because, per other materials, section 611 can be a subset of a section 951 violation.”

The elements of a violation of 18 U.S.C. § 951 are that (1) the defendant acted in the United States as an agent of a

foreign government; (2) that the defendant failed to notify the Attorney General of the United States that she would be acting in the United States as an agent of a foreign government prior to so acting; and (3) that the defendant acted knowingly, and knew that she had not notified the attorney general.

But neither the USAM nor the Criminal Resource Manual contain any provisions that “specifically exempt[] section 951 from applying to ‘foreign agents engaged in political activities.’” ECF No. 23-1 at 7. Setting aside whether the defendant’s alleged activities are “purely political”—which the government does not concede—the sections of the USAM and Criminal Resource Manual cited by the defendant do not specifically exempt political activity undertaken at the behest of a foreign government or foreign government official from prosecution under 18 U.S.C. § 951. Further, the Inspector General’s Report cited by the defendant, *id.* at 6, n.4, quotes National Security Division officials as stating, “unlike FARA . . . Section 951 can be aimed at political or non-political activities of agents under the control of foreign governments.” U.S. DOJ, Office of the Inspector General, Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act, at ii (Sep. 2016), available at <https://oig.justice.gov/reports/2016/a1624.pdf> (last visited Aug. 26, 2018). More importantly, the USAM “is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” *United States v. Goodwin*, 57 F.3d 815, 818 (9th Cir. 1995) (quoting USAM § 1-1.100); *cf.* *United*

States v. Caceras, 440 U.S. 741, 754 (1979) (IRS manual does not confer any substantive rights on taxpayers but is instead only an internal statement of penalty policy and philosophy). 14

One final thing: this opposition motion makes it clear how pissed Butina and Torshin were when news of the DNC hack broke, knowing it would focus more attention to their own operation.

In July 2016, in a series of revealing communications, the defendant, U.S. Person 1, and the Russian Official expressed concern about how their operation might be affected by news reports that Russia had hacked the emails of the Political Party 2 National Committee. U.S. Person 1 worried that “it complicates the hell out of nearly a year of quiet back-channel diplomacy in establishing links between reformers inside the Kremlin and a putative [Political Party 1] administration (regardless of nominee or president). . . . What a colossal waste of lead time.” The defendant told the Russian Official, “Right now I’m sitting here very quietly after the scandal about our FSB hacking into [Political Party 2’s] emails. My all too blunt attempts to befriend politicians right now will probably be misinterpreted, as you yourself can understand.” The Russian Official responded by telling the defendant, she was “doing the right thing.”

Parallel processing: Not just about Trump

And it describes Butina first latching on to Scott Walker before picking up with Trump.

At some point, she identified a particular candidate (“Political

Candidate 1”), whom she believed to have the best chance of becoming Political Party 1’s nominee for President. On July 14, 2015, the Russian Official requested that the defendant send him a report about Political Candidate 1’s announcement of his candidacy for the Presidency. She did so the next morning. After recounting Political Candidate 1’s speech, the defendant reported that she had a “short personal contact” with Political Candidate 1, with whom she had had previous personal contact, as well as one of his three advisors in matters of international politics. The day prior, the defendant had written to the Russian Official, “Judging from American polls – our bet on [Political Candidate 1] is correct.”

It describes the arc of the operation as an attempt to be well-positioned after the 2016 election.

[Butina] was working as an undeclared agent on behalf of the Russian Federation to position herself and that official to exert Russian influence over U.S. policies towards Russia after the 2016 Presidential election.

All that leads me to believe that the government is beginning to view the Torshin operation as a parallel effort to the election hack one, an effort that had Putin’s direct involvement in.

So it’s not just that the government has decided she has real ties to Russia’s spooks. It’s that the scope of her effort, and the involvement of Putin, raises the stakes for her custody, but also for any attempt to learn how these operations fit together.