

**18 U.S.C. SECTION 951 AND THE NON-TRADITIONAL  
INTELLIGENCE ACTOR THREAT FROM THE FIRST WORLD WAR  
TO THE PRESENT DAY**

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This Article includes references to prosecutions that were in progress at the time of submission. Discussion of those cases is limited to the allegations set forth within the publicly available documents cited. All defendants are presumed innocent unless and until convicted. The sole purpose of referring to those cases is to describe prosecutors' charging decisions and the application of the cited statute(s) to the conduct alleged.

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## I. INTRODUCTION

The United States has found itself under a subtle, non-violent attack by a rival foreign government. An unprecedented, sustained, and multi-pronged campaign of activity that does not constitute traditional military force or espionage threatens to exert a stealthy and non-attributable influence upon American attitudes toward international affairs at a moment of global crisis. Our adversary seeks to expand its geographical control and its worldwide influence at the expense of liberal democratic powers. Institutions at the very core of American democracy—the news media, lawfully assembled labor and advocacy organizations, and corporations—are at risk of becoming unwitting tools of this assault.

The adversary similarly seeks to acquire American scientific and technical expertise and to use its economic power to affect American and Western European supply chains. It does so through agents and co-optees who endeavor to procure intellectual property and supplies without revealing the adversary's involvement.

The year is 1915. The adversary that has so effectively identified modes of attack that exploit the inherent openness of democracy and free-market capitalism is Imperial Germany. The United States has detected the German influence campaign. No law exists, however, to support the investigation and disruption of foreign-directed activity that, if successful, could keep the United States out of the Great War and hand victory in Europe to the rising German Empire.

In the twenty-first century, the United States similarly confronts a powerful influence campaign directed by the Russian Federation, which similarly seeks to expand its geographical control and global influence to the detriment of democratic nations. The People's Republic of China (PRC) presents a different threat that also finds precedent in pre-war German activity: acquisition of American scientific and technical knowledge and material. A critical difference today, rooted in the American response to the German campaign a century ago, is the availability of instruments of U.S. criminal law that can deter, punish, and—perhaps most essentially—reveal foreign efforts to subvert American democracy. This Article discusses one of those tools, which dates back to the 1917 enactment of the Espionage Act: Title 18, United States Code, Section 951 (“Section 951”).<sup>1</sup> Current and emerging threats

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<sup>1</sup> Section 951 covers a broader range of activities than the Foreign Agents Registration Act (“FARA”), 22 U.S.C. § 611 *et seq.*, and is less widely understood. FARA and Section 951 are often confused with each other, or erroneously used interchangeably. Although they have overlapping purposes,

to U.S. national security bear striking similarities to the pre-World War I challenges to American socio-political, economic, and technological leadership and independence. Accordingly, the origin and development of Section 951 indicate how the statute may be used to counter twenty-first century threats. Moreover, as noted below, the U.S. Senate has both recognized the “non-traditional” intelligence threat that Russia and China present and indicated an intent to review and update Section 951 and FARA. The background set forth herein provides a foundation for discussion of potential application of the statute and forthcoming proposals to modify it.

This Article examines the scope of conduct that can predicate charges of acting as an agent of a foreign government under Section 951, and explains how the statute has been applied over time to combat foreign governments’ clandestine activities that fall outside of “classic” espionage and sabotage efforts. That history provides a view into the future application of the statute to current and emerging threats. It is critical for practitioners and potential defendants to appreciate that conduct that is otherwise non-criminal, or that would otherwise violate statutes with less significant sentencing exposure, may violate an important national security statute if undertaken in the United States secretly on behalf of a foreign government.

Part II provides historical context for the statute. Part III summarizes how courts and the Department of Justice (DOJ) have interpreted the scope of conduct that Section 951 proscribes, based on judicial opinions and DOJ charging decisions. Part IV describes more recent use of Section 951. Part V discusses how Section 951 can be used in the future to counter continuing and evolving national security threats that rely on misattribution, such as influence operations and misappropriation of American research and intellectual property. Bearing in mind that Section 951 punishes conduct engaged in as an agent of a foreign government, and not a defendant’s mere status as such

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FARA is designed to encourage transparency by foreign principals attempting to influence the U.S. government or public through public speech, political activities, and lobbying through agents in the United States, not to discourage that conduct itself, [while] Section 951 . . . is used to prosecute clandestine, espionage-like behavior, information gathering, and procurement of technology on behalf of foreign governments or officials. Although Section 951 requires notification to the Attorney General, the statute is designed to deter and punish wrongful conduct (namely, engaging in clandestine conduct on behalf of a foreign power).

*Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations*, U.S. Sen. Comm. on the Judiciary 2 (2017) (statement of Adam S. Hickey, Deputy Assistant Att’y Gen., Nat’l Sec. Div., U.S. Dep’t of Justice).

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an agent, the scope of conduct Section 951 can cover is as broad as the plain language of the statute. As cases emerge involving “non-traditional collectors,”<sup>2</sup> such as “researchers in labs, universities, and the defense industrial base”<sup>3</sup> who operate at the direction of foreign governments, the century-old Section 951 can under certain circumstances potentially be used to expose, deter, and punish such actors’ conduct.

## II. BACKGROUND

As described below, the origins of Section 951 trace directly to the emergence of the United States as a global power just over one hundred years ago. European powers engaged in the First World War sought to influence the United States, obtain the benefits of American technology, industry, and commerce, and disrupt activities in the United States that could aid their adversaries.

### A. Statutory Text

Section 951 provides that:

- (a) Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.

A “foreign government” includes “any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.”<sup>4</sup> An “agent of a foreign government” is defined as “an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official,” and excludes accredited diplomatic and

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<sup>2</sup> Non-traditional collectors use “non-traditional methods—both lawful and unlawful—blending things like foreign investments and corporate acquisitions with things like cyber intrusions and espionage by corporate insiders.” Christopher Wray, *Responding Effectively to the Chinese Economic Espionage Threat*, Department of Justice China Initiative Conference, Center for Strategic and International Studies (Jan. 6, 2020) <https://www.fbi.gov/news/speeches/responding-effectively-to-the-chinese-economic-espionage-threat>.

<sup>3</sup> *China’s Non-Traditional Espionage Against the United States: The Threat and Potential Policy Responses*, U.S. Sen Comm. on the Judiciary 8 (2018) (statement of John C. Demers, Assistant Att’y Gen., Nat’l Sec. Div., U.S. Dep’t of Justice).

<sup>4</sup> 18 U.S.C. § 11.

consular officers, officially and publicly acknowledged and sponsored representatives of foreign governments, and their non-U.S. citizen staff.<sup>5</sup>

The definition also excludes individuals engaged solely in legal commercial transactions.<sup>6</sup> A “legal commercial transaction” is “any exchange, transfer, purchase or sale, of any commodity, service or property of any kind, including information or intellectual property, not prohibited by federal or state legislation or implementing regulations.”<sup>7</sup>

By its terms, Section 951 imposes criminal liability for an individual’s actions, not his or her nationality, status, or employer. Moreover, it applies to acts undertaken “in the United States.”<sup>8</sup> A defendant’s agreement to act under the direction or control of a foreign government, and his or her undertaking actions within the United States under such direction or control, are key elements of the crime.<sup>9</sup> The scope of conduct and agency relationship that Section 951 covers are discussed below in the context of the statute’s enactment and amendment.

### *B. Context and Legislative History*

German activities preceding the United States’ entry into the First World War gave rise to Section 951’s predecessor. The statute has since been amended to modify its scope and to transfer responsibility for notification from the State Department to DOJ.<sup>10</sup>

#### 1. Before U.S. Entry into the First World War

When the First World War broke out in Europe, the United States had “substantially no law on the statute books affecting the conduct of the individual except the Treason Statute, which proved well-nigh useless, and the Internment Statute, which affected only alien

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<sup>5</sup> 18 U.S.C. § 951(d)(1)-(3). The Attorney General is required to promulgate regulations establishing notification requirements, and to transmit notifications to the Secretary of State. 18 U.S.C. § 951(b), (c). Regulations implementing Section 951 and providing definitions of terms are set forth at 28 C.F.R. § 73.1-6.

<sup>6</sup> 18 U.S.C. § 951(d)(4).

<sup>7</sup> 28 C.F.R. § 73.1(f). An individual can be prosecuted under Section 951 for legal commercial transactions if the individual engaging in them is an agent of Cuba or any other country the President determines is a threat to the national security interest of the United States, or if the individual has been convicted of espionage- or export control-related crimes. 18 U.S.C. § 951(e)(1)-(2)(a); *see* 28 C.F.R. § 73.2(a).

<sup>8</sup> 18 U.S.C. § 951(a).

<sup>9</sup> For the technical requirements for notification, *see* 28 C.F.R. § 73.3. As a practical matter, there are no reported cases in which a defendant claimed that he or she had, in fact, notified the Attorney General of his or her prospective activities as an agent of a foreign government.

<sup>10</sup> *Infra* Part II(B)(4).

enemies.”<sup>11</sup> The United States lacked sufficient “war statutes.” “[A]lmost no protection against hostile activities” existed, the law offered “inadequate protection against the activity of hostile propagandists,” and “the few statutes aimed to prevent breaches of neutrality were most inadequate.”<sup>12</sup> The United States was so unprepared to defend itself against espionage and similar threats that no federal agency even bore an explicit counterespionage mission.<sup>13</sup>

The United States remained neutral when the war started in 1914, but Europe persistently tested that neutrality. As the Great Powers vied for influence throughout the world, Germany sought to pierce the arms embargo that the United States had imposed on Mexico while Mexico was in a state of civil war.<sup>14</sup> German efforts to form alliances with Mexico and instigate conflict between Mexico and the United States persisted, including clandestine meetings within the United States.<sup>15</sup> Moreover, despite the neutral status of the United States, the combination of British control of sea commerce and continued American overseas trade and investment provided a substantial benefit to the Entente powers allied against Germany and the Austro-Hungarian Empire.<sup>16</sup>

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<sup>11</sup> John Lord O’Brian, *Civil Liberty in War Time*, N.Y. State Bar Ass’n Procs. of the 42nd Ann. Mtg. 275, 277 (1919). John Lord O’Brian served as head of the Department of Justice War Emergency Division from 1917 to 1919. Addressing the New York State Bar Association after the war, he observed with pride that “[n]o other nation came through the struggle with so little disorder and with so little interference with the civil liberty of the individual” and noted that it “was the view of the department . . . that there should be no repression of political agitation unless of a character directly affecting the safety of the state.” *Id.* at 276-77.

<sup>12</sup> *Id.* at 278-79.

<sup>13</sup> MICHAEL J. SULICK, *SPYING IN AMERICA: ESPIONAGE FROM THE REVOLUTIONARY WAR TO THE DAWN OF THE COLD WAR* 111 (2012); see *Brewing and Liquor Interests and German and Bolshevik Propaganda: Report and Hearings S. Res. 307 and S. Res. 436 Before the Subcommittee on the Judiciary*, 65<sup>th</sup> Cong. 1388 (1919) (Testimony of A. Bruce Bielaski, Department of Justice Bureau of Investigation) [hereinafter Bielaski Senate Testimony]. DOJ’s Bureau of Investigation was the forerunner of the Federal Bureau of Investigation (FBI).

<sup>14</sup> This led to low-level armed conflict. In 1914, the United States invaded Veracruz, Mexico in response to a German attempt to ship arms to the Mexican government. BARBARA W. TUCHMAN, *THE ZIMMERMANN TELEGRAM: AMERICA ENTERS THE WAR, 1917-1918*, at 43 (2014). A United States Navy vessel blocked a German ship from reaching port, and armed conflict between American and Mexican forces resulted in casualties on both sides. *Id.* at 46-47.

<sup>15</sup> TUCHMAN, *supra* note 14, at 62-64, 73-74, 83.

<sup>16</sup> JUSTUS D. DOENECKE, *NOTHING LESS THAN WAR: A NEW HISTORY OF AMERICA’S ENTRY INTO WORLD WAR I* 53-57, 64-65, 90-91, 125, 187 (2014); ARTHUR S. LINK, *WILSON: THE STRUGGLE FOR NEUTRALITY, 1914-1915*, at 105 (1960); SULICK, *supra* note 13, at 112; HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES, 1492-PRESENT* 362 (1999); see also Letter from Johann Heinrich von Bernstorff, German Ambassador, to Robert Lansing, Secretary of

Germany targeted transatlantic shipping with U-Boat strikes to mitigate the benefit that the United Kingdom enjoyed from trade with the United States.<sup>17</sup> Tensions between the United States and the belligerent powers increased, and after the German Navy sank the *Lusitania* on May 7, 1915, President Woodrow Wilson tasked the Secret Service with monitoring German diplomatic activities in America.<sup>18</sup>

American, British, and Mexican operatives identified several clandestine German lines of effort within the United States.<sup>19</sup> As a Secret Service counterintelligence success revealed, one such effort involved a network in the United States established to conduct sabotage operations as well as to use economic and social manipulation to advance German war objectives.<sup>20</sup>

Dr. Heinrich Albert, the German commercial attaché, handled the network's finances.<sup>21</sup> One day in July 1915, Albert boarded a New York City subway, accompanied by the editor of *Fatherland*, a pro-German newspaper.<sup>22</sup> After the editor's stop, Albert fell asleep, awoke abruptly at his own stop, and rushed off the train.<sup>23</sup> A Secret Service agent who had been following Albert observed that Albert left his briefcase behind in his haste.<sup>24</sup> The agent recovered the briefcase, which was found to contain documents describing "a sweeping secret campaign, linked to

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State (Aug. 18, 1915), in *Foreign Relations 1915 Supp.*, 928 (Dep't of State, Office of the Historian, 1928) [hereinafter *Bernstorff Aug. 18 Letter*].

<sup>17</sup> SULICK, *supra* note 13, at 112; DOENECKE, *supra* note 16, at 60-64; Michael Warner, *The Kaiser Sows Destruction*, Central Intelligence Agency Center for the Study of Intelligence (June 27, 2008), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no1/article02.html>.

<sup>18</sup> TUCHMAN, *supra* note 14, at 71; SULICK, *supra* note 13, at 112; LINK, *supra* note 16, at 554; U.S. CITIZENSHIP AND IMMIGR. SERV., *WORLD WAR I CENTENNIAL COMMEMORATIVE POSTER SERVICES: THE U.S. SECRET SERVICE DURING THE FIRST WORLD WAR* (2017).

<sup>19</sup> See, e.g., TUCHMAN, *supra* note 14, at 67-79; Bielaski Senate Testimony, *supra* note 13, at 1388-92, 1431-34, 1445-46 (describing examples of German plots).

<sup>20</sup> SULICK, *supra* note 13, at 113.

<sup>21</sup> SULICK, *supra* note 13, at 114-15; 3 *Noted Germans Interned For War In Hunt For Spies*, N.Y. TIMES, July 7, 1917, at 1; *Albert Defends His Propaganda*, N.Y. TIMES, Aug. 20, 1915, at 7; *Government Agents Probe Charge of \$2,000,000-A-Week Propaganda By Germans*, THE EVENING WORLD, Aug. 16, 1915, at 3; *Attaches 'Objectionable'*, N.Y. TIMES, Dec. 4, 1915, at 1.

<sup>22</sup> TUCHMAN, *supra* note 14, at 78.

<sup>23</sup> TUCHMAN, *supra* note 14, at 78.

<sup>24</sup> TUCHMAN *supra* note 14, at 81; SULICK, *supra* note 13, at 114-15. Although cynics might assume that U.S. agents may have been more proactive in acquiring the briefcase, Albert placed an advertisement in the newspaper seeking the return of his "lost" briefcase. See SULICK, *supra* note 13, at 113 (quoting advertisement in *The New York Evening Telegram* July 27, 1915); Ernest Wittenberg, *The Thrifty Spy on the Sixth Avenue El*, AMERICAN HERITAGE (Dec. 1965), <https://www.americanheritage.com/thrifty-spy-sixth-avenue-el>.

high-ranking German officials, of espionage, sabotage, and propaganda.”<sup>25</sup>

Government officials provided the contents of the briefcase to President Wilson and shared them with the *New York World*. News media outlets published the documents with analysis.<sup>26</sup> Meanwhile, British intelligence officers intercepted John J. Archibald, an American newspaper reporter who was carrying correspondence from German and Austro-Hungarian officials in the United States to recipients in their respective countries.<sup>27</sup> That correspondence—some of which was made public and some of which the U.S. Government initially kept confidential after the British provided it—corroborated serious allegations of German violations of American neutrality and clandestine interference in American political, social, and economic affairs.<sup>28</sup> The German government conducted this campaign using commercial transactions and other interactions that concealed German participation.

The German plans included not only schemes for sabotage and potential attacks on the United States, but also efforts to conduct influence operations, prevent the supply of war materiel to the Allies, and obtain technology and supplies for Germany. These latter types of activity did not violate any then-existing criminal law. For example, German agents established the “German Information Bureau” in New

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<sup>25</sup> David Greenberg, *The Hidden History of the Espionage Act*, SLATE, Dec. 27, 2010, <https://slate.com/news-and-politics/2010/12/the-real-purpose-of-the-espionage-act.html>; see also O’Brian, *supra* note 11, at 284 (referring to secret German plans including the recruitment of U.S. citizens to engage in espionage); LINK, *supra* note 16, at 554-55; SULICK, *supra* note 13, at 115.

<sup>26</sup> LINK, *supra* note 16, at 555 & n.8; TUCHMAN, *supra* note 14, at 78-79; DOENECKE, *supra* note 16, at 114; *Lansing Lays German Propaganda Evidence Before President Wilson*, N.Y. TIMES, Aug. 17, 1915, at 1-2 (citing reports that DOJ possessed “a mass of information tending to show that German agents had been working in this country with a view to helping the cause of the Teutonic allies” and including three pages describing various German plots); *How Germany has Worked in U.S. to Shape Opinion, Block the Allies, and Get Munitions for Herself, Told in Secret Agents’ Letters*, N.Y. WORLD, Aug. 15, 1915; see also, e.g., ROSS J. WILSON, *NEW YORK AND THE FIRST WORLD WAR: SHAPING AN AMERICAN CITY* 110 (2014) (describing publication by the *World* of documents detailing German efforts).

<sup>27</sup> TUCHMAN, *supra* note 14, at 79-80, 83; *Germans Sought Aircraft Control, Bielaski Shows*, N.Y. TIMES, Dec. 8, 1918, at 1, 3; *Plot to Tie Up U.S. Munitions Plants Told In Alleged Letter of Austrian Envoy Seized From Capt. Archibald*, WASH. POST, Sept. 5, 1915, at 1; Bielaski Senate Testimony at 1463-84.

<sup>28</sup> Letter from The Ambassador in Great Britain to the Secretary of State (Sep. 3, 1915) *reprinted in* Foreign Relations 1915 Supp. at 936, available at <https://history.state.gov/historicaldocuments/frus1915Supp/d773>; see TUCHMAN, *supra* note 14, at 82, 85; Bielaski Senate Testimony, *supra* note 13, at 1468-84.

York to circulate pro-German news stories.<sup>29</sup> The Bureau was not publicly linked to the German government.<sup>30</sup> Among other tactics, the Bureau operated at least one high-profile American journalist as an agent and planted him in the Hearst media organization as a Berlin correspondent.<sup>31</sup> To the public, the Bureau appeared to be run by an American.<sup>32</sup>

In the spring of 1915, “a syndicate of German American businessmen backed by Berlin” bought the *New York Evening Mail*.<sup>33</sup> This purchase was organized by the German Information Bureau leadership.<sup>34</sup> The group purchased the newspaper through an intermediary to obfuscate its true ownership.<sup>35</sup> This purchase was part of a German effort to control American English-language newspapers to foster anti-war sentiment. As A. Bruce Bielaski, Chief of the DOJ Bureau of Investigation, stated unequivocally to the United States Senate, “it was the purchase by the German Government of a daily newspaper for the purpose of influencing American public opinion.”<sup>36</sup> Nominal American ownership concealed German involvement.

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<sup>29</sup> *Brewing and Liquor Interests and German and Bolshevik Propaganda: Report of the Subcomm. On the Judiciary, Pursuant to S. Res. 307 and 436, 65th Cong. 13* (1919) [hereinafter Overman Report] (referring to organization also as “German Information Service”); Bielaski Senate Testimony, *supra* note 13, at 1389, 1445.

<sup>30</sup> Bielaski Senate Testimony, *supra* note 13, at 1389.

<sup>31</sup> Bielaski Senate Testimony, *supra* note 13, at 1393-94.

<sup>32</sup> Overman Report, *supra* note 29, at 13-14 (“[I]n the early stages of the bureau’s operation publicity was given to the fact that the bureau was ‘conducted by [a known publicity agent],’ at the request of a number of American citizens . . . . That, of course, was done to deceive the public, because the bureau was organized, financed, and directed by the official representatives of Germany.”); Bielaski Senate Testimony, *supra* note 13, at 1389-95 (same; adding that the second head of the Bureau, an American journalist, was a “secret agent of the German Government”); see REINHARD R. DOERRIES, *IMPERIAL CHALLENGE, AMBASSADOR COUNT BERNSTORFF AND GERMAN-AMERICAN RELATIONS, 1908-1917* 41 n.11, 43 (Christa D. Shannon trans., The University of Carolina Press) (1989). The German Ambassador acknowledged German control of the Bureau and did not address the concealment of official German control. Bernstorff Aug. 18 Letter, *supra* note 16, at 930-31.

<sup>33</sup> DOENECKE, *supra* note 16, at 113; see *U.S. Looks Into Spy Propaganda*, N.Y. TIMES, Aug. 16, 1915, at 1, 3; Letter from William Gibbs McAdoo to President Woodrow Wilson (annotated) (July 9, 1917), in *THE PAPERS OF WOODROW WILSON, DIGITAL EDITION* 133 & n.2 (University of Virginia Press, Rotunda, 2017); see *Rumely v. United States*, 293 F. 532, 536 (2d Cir. 1923).

<sup>34</sup> Overman Report, *supra* note 29, at 13.

<sup>35</sup> DOENECKE, *supra* note 16, at 113; DOERRIES, *supra* note 32, at 54; see *Rumely*, 293 F. at 536; Bielaski Senate Testimony, *supra* note 13, at 1454.

<sup>36</sup> Bielaski Senate Testimony, *supra* note 13, at 1455; see *Government Agents Probe Charge of \$2,000,000-A-Week Propaganda By Germans*, *supra* note 21; *Millions for Plots: Von Bernstorff Used Vast Sum to Corrupt Public Opinion*, WASH. POST, July 18, 1918, at 5; DOERRIES, *supra* note 32, at 53 & n.78 (quoting the German Ambassador to the United

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That effort also contemplated controlling the American Press Association, which would give Germany, through Albert, control over a wire service “to spread pro-German news or to suppress anti-German news or to make pro-German propaganda in any other way compatible with the organization.”<sup>37</sup>

Other newspapers, most notably *Fatherland*, received substantial covert funding from Germany and the Austro-Hungarian Empire. *Fatherland* was a reliable mouthpiece for pro-German sentiment about the war and America’s potential entry on behalf of one side or another.<sup>38</sup> The Albert papers revealed that “the German Government [was] the financial backer” of the newspaper, and that *Fatherland* received “a monthly bonus” from Albert.<sup>39</sup> When the German Ambassador responded to the public disclosure, he did not deny the German attempt to control the newspaper’s message—rather, he merely (falsely) claimed that the effort failed.<sup>40</sup> Of particular note, Germany paid *Fatherland* through an intermediary and sought editorial control of the content the newspaper printed.<sup>41</sup> Despite the *Fatherland* editor’s public denials in 1915, his correspondence to Albert suggested that Germany pay the newspaper through a specific attorney, “whose standing as [the editor’s] legal advisor would exempt him from any possible inquiry.”<sup>42</sup> The editor later admitted to receiving substantial funds from Germany and the Austro-Hungarian Empire.<sup>43</sup>

Germany also used clandestine operations to influence American labor and peace movements both to sway public opinion against siding with the Allies (including appeals based on ethnicity and nationality) and to disrupt war-related supply chains.<sup>44</sup> Further seeking to interrupt American sales of munitions and equipment to the Allies, Germany used

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States as writing, “I consider it urgently necessary for the future . . . to bring an English-language newspaper under our control.”).

<sup>37</sup> Bielaski Senate Testimony, *supra* note 13, at 1502-03, Ex. 97.

<sup>38</sup> See DOENECKE, *supra* note 16, at 21, 26, 60, 120; TUCHMAN, *supra* note 14, at 164.

<sup>39</sup> *Government Agents Probe Charge of \$2,000,000-A-Week Propaganda By Germans*, *supra* note 21; see also *U.S. Looks Into Spy Propaganda*, *supra* note 33, at 3.

<sup>40</sup> Bernstorff Aug. 18 Letter, *supra* note 16, at 930.

<sup>41</sup> *U.S. Looks Into Spy Propaganda*, *supra* note 33; Bielaski Senate Testimony, *supra* note 13, at 1430 (citing correspondence); Wittenberg, *supra* note 24.

<sup>42</sup> *U.S. Looks into Spy Propaganda*, *supra* note 33, at 3.

<sup>43</sup> *Vireck Got \$100,000 from the Germans*, N.Y. TIMES, July 26, 1918, at 20; Bielaski Senate Testimony, *supra* note 13, at 1432.

<sup>44</sup> Greenberg, *supra* note 25; *Germans Sought Aircraft Control*, *supra* note 27, at 1, 3; *Gompers Confirms Foreign Tampering*, N.Y. TIMES, Aug. 18, 1915 at 5; *May Involve Embassy Men*, N.Y. TIMES Aug. 17, 1915, at 1, 2; *U.S. Looks into Spy Propaganda*, *supra* note 33; Bielaski Senate Testimony, *supra* note 13, at 1468.

non-attributable means to acquire supplies and intellectual property for the sole purpose of preventing their export.

For example, German agents established the Bridgeport Projectile Company in Connecticut. As noted above, the British Navy dominated the Atlantic, and there was little likelihood that Germany could supply itself by manufacturing munitions in the United States and then shipping them to Europe.<sup>45</sup> Rather, the Germans established the company simply to purchase massive quantities of supplies, such as gunpowder and shell casings, and to store those materials to prevent the Allies from purchasing them.<sup>46</sup> The company would take orders from Allied forces with the intent not to fulfill them.<sup>47</sup> When American newspapers published information about this scheme, German officials admitted and justified their efforts to prevent their enemies from acquiring war materiel.<sup>48</sup> The German establishment of a business on American soil, its contracts with American companies, its removal of raw materials from the U.S. marketplace, and its false promises to deliver on U.S. sales to Allied powers, however, had all masqueraded behind notional American ownership.<sup>49</sup>

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<sup>45</sup> See DOENECKE, *supra* note 16, at 64; *Gompers Confirms Foreign Tampering*, *supra* note 44.

<sup>46</sup> *Government Agents Probe Charge of \$2,000,000-A-Week Propaganda By Germans*, *supra* note 21 (“There also is proof that the German Government is building a large munitions plant in this country for shrapnel and other explosives, and that it has a contract for the entire output of powder of one explosives company. This German company is now negotiating to supply the British and Russian Governments with its product, but without any real purpose to deliver the goods.”); *Idiotic Yankees Told to Hold Their Tongues, Von Papen Writes Wife*, WASH. POST, Sept. 22, 1915, at 3; *Say Arms Plant Controlled by Germany Sought U.S. Army Officers to Inspect Output*, WASH. POST, Aug. 17, 1915, at 2; Wittenberg, *supra* note 24; see Eric Setzekorn, *The Office of Naval Intelligence in World War I: Diverse Threats, Divergent Responses*, Studies in Intelligence Vol. 61, No. 2 (June 2017), at 45, available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol-61-no-2/pdfs/oni-in-ww1.pdf>.

<sup>47</sup> Letter from Franz von Papen, German Military Attaché, the German Ministry of War (Aug. 20, 1915) reprinted in *Foreign Relations 1915 Supp.*, 939-40 (Dep’t of State, Office of the Historian, 1928) [hereinafter *Von Papen Aug. 20 Letter*]; *Gompers Confirms Foreign Tampering*, *supra* note 44; *Germany Hid Secret Plans To Get War Supplies Here*, N.Y. EVENING WORLD, Aug. 17, 1915, at 4, available at <https://chroniclingamerica.loc.gov/lccn/sn83030193/1915-08-17/ed-1/seq-3/>.

<sup>48</sup> *Albert Defends His Propaganda*, N.Y. TIMES, Aug. 20, 1915, at 7; Bernstorff Aug. 18 Letter, *supra* note 16, at 928 (“If we had the means and the opportunity we would buy every munition factory in the United States, if in that way we could keep munitions from the enemy . . .”).

<sup>49</sup> See generally Wittenberg, *supra* note 24; *Germany Controls Only U.S. Source From Which Powder Can Be Had This Year*, *supra* note 46 (“References in the contract indicate the desire of both parties to prevent the identity of actual control from being known . . .”); *Ties Up Only Machinery Adapted to Making of Better Class of Shrapnel*, WASH. POST, Aug. 17, 1915, at 2; *Gompers Confirms Foreign Tampering*, *supra* note 44. The Archibald

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Germany sought to control not only materials and facilities needed to manufacture war supplies, but also intellectual property that could provide a critical advantage in an emerging military technology—specifically, the airplane. In July 1915, the German consul in Chicago wrote to Albert regarding a German plan for the

purchase of the Wright aeroplane factories in Dayton, Ohio, which, in my opinion, hold great possibilities for us. With some \$50,000 we could acquire a control over the whole Wright patents, and thereby over the aeroplane factories in the whole United States, for about one year. We would thereby probably be placed in the position of being able to prevent the greatest part of the export of flying machines from the United States.<sup>50</sup>

The Albert and Archibald papers, which the news media published, provided evidence of this plot.<sup>51</sup> It is unclear how far the plot progressed, but the consul proposed conducting the deal between a

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papers' corroboration of this scheme was disclosed to the public. *Plot to Tie Up U.S. Munition Plants Told In Alleged Letter Of Austrian Envoy Seized From Capt. Archibald*, WASH. POST, Sept. 5, 1915 at 1-2 (citing *New York World* reporting and reprinting of von Papen correspondence); *Germany Hid Secret Plans To Get War Supplies Here*, *supra* note 47 ("American officers are supposed to control the company. . ."); DOERRIES, *supra* note 32, at 141 & n.5 ("Papen and Albert bought up war materials through firms such as the Bridgeport Projectile Company and the Aetna Powder Company, which had been founded particularly for this purpose by straw men, in order to delay shipments to the Allies.") (citations omitted). Overman Report, *supra* note 29, at 8.

As part of the same effort, a German agent obtained a contract to purchase from an American company its entire output of phenol, a potentially toxic compound, which Thomas A. Edison was manufacturing. *Gompers Confirms Foreign Tampering*, *supra* note 44; *Explosive Acid Deal Cost Millions*, WASH. POST, Aug. 17, 1915 at 2; *Agreement By Schweitzer to Buy 1,212,000 Pounds of Carboic Acid*, WASH. POST, Aug. 17, 1915 at 2. The contract had also been predicated on the false assurance that the purchased phenol would be used to produce medicine, and not explosives. *Gompers Confirms Foreign Tampering*, *supra* note 44. Germany similarly attempted to control the supply of chlorine, which was used in the war as a chemical weapon. *U.S. Looks Into Spy Propaganda*, *supra* note 33; *Government Agents Probe Charge of \$2,000,000-A-Week Propaganda By Germans*, *supra* note 21; Bernstorff Aug. 18 Letter, *supra* note 16, at 929. As the soon-to-be former German Military Attaché, Captain Franz von Papen, privately reported in a letter that was among the Archibald papers, once the true ownership of the Bridgeport Projectile Company and the entities purchasing phenol and chlorine were revealed, putative deals were cancelled, which of course reflects the importance of disguising Germany's role. Von Papen Aug. 20 Letter, *supra* note 47.

<sup>50</sup> Bielaski Senate Testimony, *supra* note 13, at 1501, Ex. 95; see *U.S. Looks Into Spy Propaganda*, *supra* note 33; *Germans Sought Aircraft Control*, *supra* note 27, at 1, 3.

<sup>51</sup> *Idiotic Yankees*, *supra* note 46; *Plot to Tie Up U.S. Munition Plants Told In Alleged Letter Of Austrian Envoy Seized From Capt. Archibald*, WASH. POST, Sept. 5, 1915, at 2; *U.S. Looks Into Spy Propaganda*, *supra* note 33; *Germans Sought Aircraft Control*, *supra* note 27; *Germany's Agents Active in Promoting Labor Troubles While Arousing Cotton States To Attack British, It Is Charged*, WASH. POST, Aug. 16, 1915, at 1.

Wright representative and a “local business man.”<sup>52</sup> Internal German correspondence included among the Archibald papers makes clear that the Germans intended to conceal their nexus to the purchase.<sup>53</sup>

American newspapers published numerous stories reprinting and analyzing the Albert papers, but the German Military Attaché provided the most concise and candid assessment. Intended for receipt only by his wife, the Attaché’s postmortem was among the Archibald papers:

I am enclosing you a few newspaper clippings which will amuse you. They unluckily stole from the good Albert in the Elevated a whole thick portfolio . . . and then published the principal part of the contents. . . . In it unfortunately were also a few very important things from my report, such as the buying up of liquid chlorine and something about the Bridgeport Projectile Company, as well as the documents about the buying up of phenol (out of which explosives are made) and the acquisition of the Wright flying machine patents. . . . I always say to these idiotic Yankees that they should shut their mouths, and better still be full of admiration for all that heroism.<sup>54</sup>

The Germans thus had several objectives: propaganda and perception management; exploitation of social and economic divisions in American society; gaining economic control of materials critical to the war effort; and acquisition of American intellectual property.<sup>55</sup>

Evaluating the truth of each allegation is beyond the scope of this Article, as is the question of whether Allied governments engaged in similar conduct to influence American participation in the war. Rather, policymakers’ and the public’s perception of the range of German efforts that today might be considered “non-traditional” intelligence activities—not acts governed by the law of war or the high seas, such as the sinking of American vessels, and not comprising classic espionage with the objective of obtaining government secrets—is important to understanding the national security threats that the Espionage Act and Section 951 were designed to address. To an American public presented with the Albert and Archibald papers, particularly in the context of the deadly U-Boat attacks on the *Lusitania* and *Arabic* in May and August

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<sup>52</sup> *Germans Sought Aircraft Control*, *supra* note 27, at 2 (quoting P. Reiszwitz Letter to Dr. Heinrich Albert).

<sup>53</sup> Von Papen Aug. 20 Letter, *supra* note 47, at 940 (noting that the disclosure was “without importance” because the resolution of a patent dispute mooted the premise of the plan).

<sup>54</sup> Letter from Franz von Papen, German Military Attaché, to Martha von Papen, his wife, *reprinted in* Foreign Relations 1915 Supp., 940-41 (Dep’t of State, Office of the Historian, 1928)

<sup>55</sup> *Id.*; Greenberg, *supra* note 25.

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1915,<sup>56</sup> the “German government now stood convicted of a vast undercover campaign to suborn American opinion and influence American foreign policy.”<sup>57</sup> Having obtained the Albert and Archibald papers, the U.S. Government “was sufficiently informed about the German [campaign] to leave uncertainty only about the actual extent of the activities.”<sup>58</sup>

Most of the German conduct described in Albert’s papers and other sources was not covered by existing criminal law or by statutes specifically designed to counter national security threats.<sup>59</sup> Critically, this included clandestine German efforts to affect American media outlets, which prompted concerns that Germany could surreptitiously influence U.S. opinion about choosing sides in the war. As Attorney General (AG) Thomas Watt Gregory acknowledged at the time, Germany’s efforts to disguise its hand in disseminating pro-German propaganda through purportedly independent media sources did not “justify criminal prosecution against any person named, or give the Department of Justice jurisdiction in the matter under any Federal statute.”<sup>60</sup> Although DOJ “constantly” investigated potential neutrality violations, “nothing had been developed that would warrant Grand Jury proceedings” following the Albert affair.<sup>61</sup>

Against this background, AG Gregory included in the Attorney General’s December 1916 Annual Report to Congress a proposal for

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<sup>56</sup> DOENECKE, note 16, at 70-71, 116.

<sup>57</sup> LINK, *supra* note 16, at 556.

<sup>58</sup> DOERRIES, *supra* note 32, at 143; *see* Bielaski Senate Testimony, *supra* note 13, at 1388 (“During the war we have collected an immense amount of information. Some of it has been in our files for a long time and some of it has only come to us comparatively recently.”).

<sup>59</sup> Contemporary press reports examining German activities that could violate then-extant federal laws cited German efforts to fraudulently procure American passports for German reservists and violations of requirements, enforced by the U.S. Postal Service, that newspapers (such as *Fatherland*) disclose when they have received payment for printing certain content. *See May Involve Embassy Men*, *supra* note 26, at 2. Other German efforts, such as sabotage of factories and ships, could be prosecuted under existing statutes unrelated to national security. *United States v. Rintelen*, 233 F. 793, 794 (S.D.N.Y. 1916). The Sherman Anti-Trust Act also provided a basis to prosecute German attempts to foment labor unrest. *Eight Indicted In Teuton Plots*, N.Y. TIMES, Dec. 29, 1915, at 1.

<sup>60</sup> *Propaganda Inside Law: Department of Justice Finds Nothing to Warrant Federal Action*, N.Y. TIMES, Aug. 20, 1915, at 7; *see also* Warner, *supra* note 17.

<sup>61</sup> *Propaganda Inside Law*, *supra* note 60, at 7. The American cutouts who purchased the *Evening Mail* on behalf of Germany were prosecuted under the October 1917 enactment of the Trading with the Enemy Act for conspiring to defraud the United States Government by concealing debts they owed to Germany in association with the financing of the purchase. *Rumely*, 293 F. at 533-34, 536.

“Changes in Laws Affecting Neutrality and Foreign Relations.” In the introduction of his proposal, AG Gregory stated:

From the experience of this department and of the State Department during the past three years in the administration of law in connection with the relations of this country with Mexico and with the problems arising out of the European war, it has become clear that there is urgent need of a revision of the statute law bearing on our international relations.

Many acts committed in the U.S. in serious violation of its sovereignty and against the peace and safety of its citizens are not now punishable by any Federal criminal law; others are punishable only under unsatisfactory statutes passed in relation to conditions altogether different from those now prevailing.<sup>62</sup>

The Attorney General sought to protect the United States and its citizens, as well as American neutrality and obligations to other nations.<sup>63</sup> The proposal contained seventeen parts, the sixteenth of which eventually became Section 951.<sup>64</sup> In addition to the Attorney General’s introductory rationale for the proposals, each individual proposal was accompanied by a more detailed explanation of need

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<sup>62</sup> 1916 ATT’Y GEN. ANN. REP. at 12.

<sup>63</sup> *Id.* at 13.

<sup>64</sup> The proposal included: (1) prohibiting interference with exports; (2) prohibiting sabotaging or destroying cargo ships; (3) authorizing the U.S. to detain armed vessels or vessels carrying war materiel and prohibiting individuals from sending out armed vessels; (4) authorizing inspection of vessels and prohibiting the use of U.S. ports by vessels involved in violations of law; (5) requiring passport applications to be made under oath and prohibiting the fraudulent procurement of passports; (6) prohibiting fraudulent use or counterfeiting of any U.S. Government seal; (7) enhancing Presidential authority to control the manner of wireless and cable transmissions to belligerent countries and ships on the high seas; (8) enhancing the prohibition against participation in foreign military enterprises against nations with which the U.S. is at peace; (9) authorizing seizure of arms and munitions at war that are being exported; (10) prohibiting breaches of internment of detained foreign military or naval personnel; (11) prohibiting falsely swearing in an affidavit with knowledge that it will be used to influence a foreign government in relation to disputes with the U.S. to defeat any measure of the U.S. in relation to such disputes; (12) prohibiting acquisition or communication of information relating to the national defense obtained through U.S. Government employment, unlawful access, or fraud; (13) prohibiting the minting or printing of currency for insurgents in a foreign country with which the U.S. is at peace; (14) prohibiting conspiracy to injure or destroy overseas property of a foreign country with which the U.S. is at peace; (15) prohibiting falsely pretending to be a diplomatic, consular, or other official of a foreign government; (16) prohibiting aliens other than diplomatic or consular officers from acting in the U.S. as agents of foreign governments without notice to the U.S. Government; and (17) permitting the President to use military and naval forces to enforce U.S. neutrality and obligations under international law. *Id.* at 12-24.

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except for the fourteenth, which prohibited conspiracy to injure or destroy overseas property of a foreign government with which the United States is at peace, and the sixteenth, which evolved into Section 951.<sup>65</sup>

As German submarine warfare against commercial vessels, including U.S. vessels, increased in early 1917, and with Britain's February 1917 disclosure of the Zimmerman Telegram, Congress, at the request of President Woodrow Wilson, declared war on Germany in April 1917.<sup>66</sup>

## 2. Act of June 15, 1917

In June 1917, Congress enacted what is now referred to as the Espionage Act to address various threats to domestic security. The Act of June 15, 1917 was captioned, "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes."<sup>67</sup> The Act contained thirteen titles, roughly tracking or incorporating most of the proposals in the 1916 Attorney General report to Congress.<sup>68</sup> Title VIII, Section 3 (Disturbance of Foreign Relations) contained the precursor to Section 951, and provided that:

Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of

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<sup>65</sup> It is unclear why only these two proposals did not contain an explanation. Even the twelfth proposal (a precursor to 18 U.S.C. § 793, which penalizes unauthorized retention or disclosure of national defense information), the need for which was considered self-evident, was accompanied by a statement that "[t]he necessity of legislation of this nature against spies is obvious. The present statute . . . is incomplete and defective." *Id.* at 19 (citation omitted).

<sup>66</sup> Joint Resolution Declaring that a State of War Exists Between the Imperial German Government and the Government and the People of the United States and Making Provision to Prosecute the Same, Ch. 1, 40 Stat. 1 (1917), *available at* <https://www.loc.gov/law/help/digitized-books/world-war-i-declarations/ww1-gazettes/US-joint-res-declaring-war-against-Germany-2-OCR-SPLIT.pdf>.

<sup>67</sup> Pub. L. 65-24 [hereinafter 1917 Act].

<sup>68</sup> The titles were: (I) Espionage; (II) Vessels in Ports of the United States; (III) Injuring Vessels Engaged in Foreign Commerce; (IV) Interference with Foreign Commerce by Violent Means; (V) Enforcement of Neutrality; (VI) Seizure of Arms and Other Articles Intended for Export; (VII) Certain Exports in Time of War Unlawful; (VIII) Disturbance of Foreign Relations; (IX) Passports; (X) Counterfeiting Government Seal; (XI) Search Warrants [which had been a separate part of the Attorney General's 1916 request]; (XII) Use of Mails; and (XIII) General Provisions.

State shall be fined not more than \$5,000, or imprisoned not more than five years, or both.<sup>69</sup>

According to the House Judiciary Committee, the 1917 Act was “a result of the recommendations of the Department of Justice and the State Department, and these recommendations were made as a result of the experiences of these departments during the past three years in the administration of law in connection with the relations of this country with Mexico and with problems arising out of the European war.”<sup>70</sup> The Committee report contained no specific explanation for the inclusion of Title VIII, Section 3.

A review of two House and two Senate Conference Reports, extensive floor debate over certain provisions in the bill, a two-day House Judiciary Committee Hearing, and testimony by Assistant Attorney General Charles Warren before the House Judiciary Committee reveal no substantive discussion about the precursor to Section 951.<sup>71</sup> Rather, Congress and the hearing witnesses were concerned principally about the First Amendment implications of the espionage provisions and prohibitions against inducing disaffection among soldiers and sailors, as well as food shortages and the impact and constitutionality of export controls.<sup>72</sup> Thus, the only insight into the purpose of Title VIII, Section 3 comes from general introductory statements in the Attorney General’s 1916 report and the House Judiciary Committee, quoted above.<sup>73</sup>

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<sup>69</sup> 1917 Act, Title VIII § 3. This section was codified at Title 22, United States Code, Section 233 and later transferred to Title 22, United States Code, Section 601, before the 1948 reorganization discussed herein. See 22 U.S.C.A. § 233 Historical Notes.

<sup>70</sup> H.R. REP. NO. 65-30 at 9 (Apr. 25, 1917). In its report, the Judiciary Committee devoted about a page to discussing the first five sections of Title I (Espionage), and focused specifically on the breadth of the powers it conferred upon the Executive Branch with respect to limiting speech and expression. *Id.* at 10; see also *Civil Liberty in War Time*, *supra* note 11, at 299–302 (discussing freedom-of-speech concerns regarding Title I of the 1917 Act). The Committee then stated that the remainder of Title I was “self-explanatory,” and that “all the remaining sections of the amended bill are drawn with sufficient clearness to be self-explanatory, and the committee is confident that the House will realize the importance of the passage of each section of the amended bill.” H.R. REP. NO. 65-30 at 10.

<sup>71</sup> See H.R. Conf. Rep. No. 65-69 (June 6, 1917); H.R. Conf. Rep. No. 65-65 (May 29, 1917); S. Conf. Rep. No. 65-44 (June 5, 1917); S. Conf. Rep. No. 65-37 (May 29, 1917); 55 Cong. Rec. 776-2165 (chronicling debate over fourteen days from Apr. 18, 1917 through May 12, 1917); *Espionage and Interference with Neutrality: Hearings Before the Committee on the Judiciary*, House of Representatives (Apr. 9 & 12, 1917); *Hearing and Testimony of Assistant Attorney General Charles Warren Before the Committee on the Judiciary*, House of Representatives (Apr. 10, 1917).

<sup>72</sup> See *supra* note 71.

<sup>73</sup> See 1916 ATT’Y GEN. ANN. REP. at 12; H.R. Rep. 65-30 at 9.

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### 3. 1940 and 1948 Amendments

In 1940, Congress amended the sentencing provision of Title VIII, Section 3, which had been codified at Title 22, United States Code, Section 233 (Disturbance of Foreign Relations), to mandate a prison term and raise the maximum sentence by inserting the language, “shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than \$5,000.” This change was part of a general increase in sentences for violations of the 1917 Act.<sup>74</sup> The House Judiciary Committee emphasized, without reference to any specific section, the importance of the “certainty of punishment” and a desire for “firmer administration of the criminal law, and sterner punishment of . . . convicted criminals.”<sup>75</sup>

In 1948, as part of an overhaul of the United States Code, Congress repealed Title VIII, Section 3, which had been moved to Title 22, United States Code, Section 601, and re-enacted it without substantive changes as Title 18, United States Code, Section 951 within Chapter 45 (Foreign Relations).<sup>76</sup> In effecting this change, Congress stated that “[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 18 . . . in which any particular section is placed, nor by reason of the catchlines used in such title.”<sup>77</sup>

### 4. Cold War-Era Amendments

During the Cold War, Congress considered proposed changes to Section 951 to address perceived shortcomings in the statute, cover new threats, and to clarify the statute’s scope.

#### i. 1982 Legislative Proposal

In 1982, the Senate Judiciary Subcommittee on Security and Terrorism held a hearing on two bills, one of which, Senate Bill 1963, would have substituted the Attorney General for the Secretary of State in Section 951, increased potential punishment for violations of the statute, required the Attorney General to promulgate regulations defining “agent of a foreign government,” and required the Attorney General to transmit to the Secretary of State notifications that DOJ received.<sup>78</sup> Senate Bill 1963 was not enacted, but because it contained

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<sup>74</sup> Pub. L. No. 76-443.

<sup>75</sup> H.R. Rep. 76-1716, at 2 (March 7, 1940).

<sup>76</sup> Pub. L. No. 80-772, 62 Stat. 683 at 743, 862 (June 25, 1948).

<sup>77</sup> *Id.*, 62 Stat. at 862.

<sup>78</sup> *Communist Bloc Intelligence Gathering Activities on Capitol Hill: Hearing on S. 1959 and S. 1963 Before the Subcomm. on Sec. and Terrorism of the Comm. on the Judiciary, 97th Cong., Ser. No. J-97-116 (1982) [hereinafter 1982 SJC Hearing].*

some provisions similar to later amendments to Section 951, Congressional and DOJ discussion of the proposal reflect the aims of those subsequent amendments.

The subcommittee explained that requiring foreign agents to notify the Attorney General instead of the Secretary of State would enable effective enforcement of Section 951, and noted that the statute's "usefulness [had] been demonstrated repeatedly in espionage prosecutions, where its violation is often used as a secondary offense and as an investigative predicate for the FBI."<sup>79</sup> The subcommittee did not discuss the scope of conduct that Section 951 covered.

Witness testimony regarding Senate Bill 1963 focused on sufficiency of notice, interagency communication, and defining "agent of a foreign government."<sup>80</sup> John Martin, then the Chief of DOJ's Internal Security Section,<sup>81</sup> stated in response to questioning that DOJ would generally not prosecute an individual who had notified any U.S. Government department.<sup>82</sup> Citing an example raised earlier in the hearing involving friendly law enforcement or intelligence officers working jointly in the U.S. with American agencies, Martin stated that DOJ's "efforts are to get at those people who are dispatched and carry on secret and clandestine activities. And they usually give notice to no one . . . for practical purposes of enforcing the statute we do not have any notification by hostile intelligence services who are dispatching agents."<sup>83</sup>

#### ii. Amendments to Section 951

Section 951 was amended in 1983, 1984, 1986, 1993, and 1994. The 1983 and 1994 amendments only addressed sentencing.<sup>84</sup> The 1986 amendment added subsection (e), which listed the Soviet Union and Warsaw Pact nations in addition to Cuba.<sup>85</sup> The 1993 amendment removed the Soviet Union and Warsaw Pact nations.<sup>86</sup>

The 1984 amendment added subsections (b), (c), and (d) and substituted the Attorney General for the Secretary of State as the official

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<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.* at 19, 20, 26, 34, 37.

<sup>81</sup> *Id.* at 27. The Internal Security Section was the forerunner of the Counterespionage Section, now the Counterintelligence & Export Control Section.

<sup>82</sup> *Id.*

<sup>83</sup> 1982 SJC Hearing, *supra* note 78, at 27.

<sup>84</sup> Pub. L. No. 103-322, Title XXXIII § 330016(1)(R) (Sept. 13, 1994); Pub. L. No. 97-462 § 6 (Jan. 12, 1983).

<sup>85</sup> Pub. L. No. 99-569, Title VII § 703 (Oct. 27, 1986).

<sup>86</sup> Pub. L. No. 103-199, Title II § 202 (Dec. 17, 1993).

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to whom a foreign agent must provide notice.<sup>87</sup> The 1984 amendments were part of a much larger bill and appeared to be part of a years-long effort to reform federal criminal law.<sup>88</sup>

The 1984 Congressional Reports did not discuss the amendments to Section 951.<sup>89</sup> The 1983 Senate Judiciary Committee report on Senate Bill 1762, which was substantially the same as the 1984 amendment, however, noted that the State Department had never promulgated regulations regarding notification, and that it was awkward for the State Department to administer the statute while engaging in foreign relations.<sup>90</sup> Regarding the new exclusions from the scope of the statute, the Committee stated:

The proposed Act is not intended to cover those individuals in routine commercial matters but is intended to cover individuals who represent foreign governments in political activities that may or may not come within the scope of the Foreign Agent [sic] Registration Act. By excluding from the notification requirement several classes of individuals who are presently covered, the proposal also limits the coverage of the statute by focusing only on those in whom the United States Government has a necessary interest.<sup>91</sup>

This does not appear to evince an intent to limit the application of the statute beyond the exclusions that were added in 1984, but rather to explain the carve-outs. While the statement regarding the commercial transaction exclusion could be read to limit the application of Section 951 to activities that could be considered “political” (which were not defined), it was more likely intended to explain why routine commercial matters were excluded. The statement thus evinces an understanding and intent that Section 951 covers a broader scope of activity than FARA. By enumerating specific exceptions to that scope, the amendment affirmed the otherwise broad sweep of conduct that Section 951 criminalizes if—and only if—undertaken on behalf of a foreign government. Moreover, the other exclusions this amendment added carved out categories of agents for which a notification requirement would consume administrative resources without serving a useful purpose: accredited diplomatic and consular officers, officially

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<sup>87</sup> Pub. L. No. 98-473, Title II, Ch. XII, Part G § 1209 (Oct. 12, 1984).

<sup>88</sup> See, e.g., *Criminal Code Reform Act of 1981*, S. REP. NO. 97-307 (Dec. 22, 1981) (discussing S. 1630, which was not enacted); *Comprehensive Crime Control Act of 1983*, S. REP. NO. 98-225 (Sept. 14, 1983) (discussing S. 1762, which was not enacted).

<sup>89</sup> See generally H.R. REP. NO. 98-1159 (Oct. 10, 1984); H.R. REP. NO. 98-1030 (Sept. 17, 1984).

<sup>90</sup> S. REP. NO. 98-225, at 415.

<sup>91</sup> *Id.*

and publicly acknowledged and sponsored representatives of foreign governments, and their non-U.S. citizen staff. Congress thus appears to have added the exclusions in response to concerns about the undue burdens of enforcing the statute in its previous form.<sup>92</sup>

In sum, the 1984 amendment was not accompanied by any statement of Congressional intent regarding the scope of the statute, beyond the limitations added to the face of the law.

### III. REPORTED CASES RELEVANT TO SCOPE OF CONDUCT

As discussed below, early cases established the breadth of Section 951 and how its focus on agency distinguishes it from core counterespionage statutes. Several later cases more directly addressed the scope of conduct the statute can cover.

In several cases examining Section 951, courts have declined to find limits on the scope of conduct that, when engaged in on behalf of a foreign government, can constitute “acting as an agent of a foreign government.” As the Third Circuit stated in *United States v. Butenko*,<sup>93</sup> a clear case of Soviet information-gathering about U.S. Strategic Air Command systems, “[t]he cases assume that it means one who acts directly or indirectly for the benefit of a foreign government.”<sup>94</sup> No reported cases have found that particular conduct could not be prosecuted under the statute (other than conduct excluded on the face of the statute), as long as the other statutory elements are met. Most reported cases in which courts have found that conduct other than information-gathering violated the statute have involved defendants linked directly to foreign intelligence services, as have those reported cases in which DOJ charged Section 951 for non-information-gathering conduct, although there is no authority indicating such a connection is legally necessary.

#### A. Early Cases

Early prosecutions from the period between the two World Wars illustrate the breadth of conduct that Section 951 covers. In *United States v. Buerk*,<sup>95</sup> the trial court found that the indictment properly charged a defendant for not only “mak[ing] investigations and obtain[ing] information” to report to German officials, but also

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<sup>92</sup> See 1982 SJC Hearing, *supra* note 78, at 4 (referencing State Department concerns “that, given the vast numbers of nondiplomatic individuals . . . the application and enforcement of the act is impractical”).

<sup>93</sup> *United States v. Butenko*, 384 F.2d 554 (3d Cir. 1967).

<sup>94</sup> *Id.* at 566.

<sup>95</sup> *United States v. Buerk*, 38 F. Supp. 409 (E.D. Wis. 1941) (charging 22 U.S.C. § 233).

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“mak[ing] representations and promises to divers and numerous persons, who were then and there skilled laborers, for the purpose of inducing said persons to leave the United States for Germany and reside in Germany and aid the said Government of Germany” from 1937 to 1940.<sup>96</sup> Recruiting a skilled labor force for a country with which the United States was not then at war exemplifies conduct outside traditional “espionage-like” techniques; that conduct was rendered illegal because the defendant acted on behalf of Germany.<sup>97</sup>

Similarly, in *United States v. Heine*,<sup>98</sup> the Second Circuit found that a defendant’s gathering of unclassified information, generally from public sources, about production capacity, output, and locations of American aircraft manufacturers for transmission to Germany before the U.S. entry into the Second World War violated the predecessor to Section 951.<sup>99</sup> The court explicitly found that the defendant did not violate the predecessor to Section 794, which penalizes “core” espionage.<sup>100</sup> The court noted that there was nothing illegal about gathering or sending the information at issue in the case—the critical element in affirming the defendant’s conviction was that he acted “as an agent for the Reich.”<sup>101</sup>

#### B. *United States v. Duran*

*United States v. Duran*<sup>102</sup> provides an example of DOJ’s decision to charge under Section 951 a defendant who did not engage in conduct amounting to traditional espionage, of aggressive DOJ arguments regarding the purpose and scope of Section 951, and of an appellate court’s refusal to find limits on the statute’s application beyond its text based on a careful review of the statute and its history.<sup>103</sup> In *Duran*, the Eleventh Circuit affirmed the defendant’s conviction under Section 951 for his part in the Government of Venezuela’s effort to cover up the “Suitcase Scandal” between Venezuela and Argentina.<sup>104</sup> As background, the scandal developed when a dual citizen of Venezuela and the United States attempted to smuggle \$800,000 into Argentina,

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<sup>96</sup> *Id.* at 410.

<sup>97</sup> *Id.*

<sup>98</sup> *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945).

<sup>99</sup> *Id.* 815-17.

<sup>100</sup> *Id.* at 817 (discussing 50 U.S.C. § 32); *see* 50 U.S.C.A. § 32 Historical Note; 18 U.S.C. § 794.

<sup>101</sup> *Heine*, 151 F.2d at 817.

<sup>102</sup> *United States v. Duran*, 596 F.3d 1283 (11th Cir. 2010).

<sup>103</sup> *Id.* at 1294-96.

<sup>104</sup> *Id.* at 1286.

was caught, and fled to the United States.<sup>105</sup> The news media speculated that the cash was evidence that the Venezuelan and Argentinian governments had been facilitating the transfer of large sums of money from a state-owned Venezuelan energy monopoly to Venezuela's favored candidate in the Argentinian presidential election.<sup>106</sup> The defendant, who was implicated in the scandal because the suspected courier had listed him on a customs form, contacted Venezuela's intelligence agency, the Dirección de los Servicios de Inteligencia y Prevención (DISIP), who informed the defendant that the DISIP would be handling the scandal.<sup>107</sup> The defendant and his brother, a DISIP agent, made a variety of efforts to secure the suspected courier's cooperation in the DISIP-coordinated cover-up, including providing falsified documents and attempting to induce the courier to sign a power of attorney.<sup>108</sup> The defendant was convicted of violating Section 951.<sup>109</sup>

On appeal, the defendant claimed that the statute was vague.<sup>110</sup> The defendant also argued that the statute obliges individuals to notify the Attorney General only of conduct involving espionage or subversive activity and that only an individual engaged in espionage or subversive activity could have knowledge of the notification requirement.<sup>111</sup> Responding to similar vagueness arguments at trial, the Government argued that "[t]he word 'act' has a plain and ordinary meaning and requires no further definition," citing as dictionary definitions "[p]erform an action," "[b]ehave in a certain manner," and "[d]ischarge one's duties."<sup>112</sup>

The Government further emphasized at trial that the criminal conduct underlying Section 951 was not failing to register, but rather acting as an agent of a foreign government without notifying the Attorney General.<sup>113</sup> Notably, addressing the purpose of the statute, the Government argued that:

Congress had good reason for writing the statute as it did. Allowing individuals an unfettered right to act as agents for foreign governments inside the United States, without the knowledge of the Attorney General or his designees, would

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<sup>105</sup> *Id.* at 1287.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Duran*, 596 F.3d. at 1287-88.

<sup>109</sup> *Id.* at 1290.

<sup>110</sup> *Id.* at 1286.

<sup>111</sup> *Id.* at 1291-92.

<sup>112</sup> Government's Opposition to Motion to Dismiss, *United States v. Duran*, 2008 WL 2740392, at \*3 (S.D. Fla. July 7, 2008).

<sup>113</sup> *Id.* at 4.

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allow the United States to become a haven for worldwide espionage and criminal activity, causing direct and indirect harm in this country. *Congress rightly determined that the unique freedoms and protections available on United States soil should not be used by foreign states to advance their own ends, and that, if a foreign state wants its agents to engage in activities on United States soil, United States officials are entitled to know about the presence of these individuals and either bar them or take precautions.*<sup>114</sup>

On appeal, the Government reiterated that of the three components of a Section 951 violation—acting, failing to notify, and serving a foreign government—“the first two are self-evident and require no elaboration,” and “the third is clearly comprehensible to persons of ordinary intelligence and, in any event, is further explicated by its accompanying regulation.”<sup>115</sup> The Government further argued that, since 1917, Section 951 and its predecessors were “always, in pertinent part, directed at subversive activities in the United States other than espionage—that is, [Section 951’s] forbear provision was intended to, and has always outlawed [sic] foreign agents from seeking to interfere in the United States with private, non-governmental entities.”<sup>116</sup>

The Court of Appeals agreed with the Government and, in very clear terms, rejected the idea that Section 951 was confined to activities similar to traditional espionage.<sup>117</sup> It found that “nothing in § 951 is, in the context before us, vague” and that the text of the statute was “clear and unambiguous.”<sup>118</sup> The court agreed that the defendant’s actions, not status, as an agent were subject to the statute.<sup>119</sup>

The Eleventh Circuit further concluded that, based on the plain language of the statute, the legislative history, and case law, the scope of Section 951 was not limited to subversive activity or “espionage-related” conduct.<sup>120</sup> Rather, “the activities that fall within § 951’s purview have never been expressly or by judicial interpretation limited to those bearing upon national security or even those which by their

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<sup>114</sup> *Id.* at 5-6 (emphasis added).

<sup>115</sup> Government’s Reply Brief, *United States v. Duran*, 2009 WL 6338811, at \*31 (Aug. 14, 2009).

<sup>116</sup> *Id.* at \*33, \*35-\*36 (citing as evidence that Section 951 was intended to cover conduct “precisely” such as the defendants’ conduct the facts that other provisions of the 1917 Act, later codified elsewhere in Title 18, prohibit espionage, and that Section 951 is contained within the “Foreign Relations” chapter of Title 18, not the “Espionage” chapter); *but see* Pub. L. No. 80-772, 62 Stat. at 862, discussed in Part II(B)(3), *supra*.

<sup>117</sup> *Duran*, 596 F.3d at 1293.

<sup>118</sup> *Id.* at 1291.

<sup>119</sup> *Id.* at 1293 n.2.

<sup>120</sup> *Id.* at 1293.

nature are criminal or inherently wrongful.”<sup>121</sup> Although the court found that the statute was sufficiently clear on its face to render resort to legislative history unnecessary, the court reviewed the history of the 1917 Act, and noted that “over time, the original 1917 Act broke off into three directions to form three separate registration or notification statutes dealing with agents of foreign governments.”<sup>122</sup> The court then distinguished Section 951 from FARA and 50 U.S.C. § 851, the espionage-specific registration requirement, and determined that Congress intended Section 951 to be a “catchall statute that would cover all conduct taken on behalf of a foreign government.”<sup>123</sup> Accordingly, Section 951 “reaches beyond” both FARA and 50 U.S.C. § 851 classifications to “any affirmative conduct undertaken as an agent of a foreign government.”<sup>124</sup> Thus, the “broad sweep of § 951 creates a plethora of possibilities under which those engaged in purportedly legal conduct on behalf of a foreign government” could be subject to prosecution.<sup>125</sup> In a footnote, however, the court reserved the possibility that government attempts to include purely innocent activity within the scope of Section 951 might raise constitutional concerns.<sup>126</sup>

### C. *United States v. Dumeisi*

The defendant in *United States v. Dumeisi*,<sup>127</sup> who published an Arabic-language newspaper in Illinois, engaged in a combination of information-gathering and other activity on behalf of Iraq.<sup>128</sup> He volunteered to the Iraqi Mission to the United Nations (IMUN) to publish materials or articles it supplied, described his newspaper as “a newspaper for Iraq” while requesting financial support from an Iraqi Intelligence Service (IIS) officer, received equipment and articles from IMUN and IIS personnel, and provided press credentials for then-current and former IIS officers.<sup>129</sup> The defendant also met with members of the IIS, and received at least one cash payment.<sup>130</sup> He also discussed monitoring activities of the Iraqi opposition in the United

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1294 & nn.4-5.

<sup>123</sup> *Duran*, 596 F.3d at 1294-95, 1294 n.6.

<sup>124</sup> *Id.* at 1295.

<sup>125</sup> *Id.* (noting the role of prosecutorial discretion).

<sup>126</sup> *Id.* at 1296 n.9 (“Because Duran’s conduct was not innocent, we need not in this case express an opinion as to the constitutionality of possible applications of § 951 to completely innocent conduct.”).

<sup>127</sup> *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005).

<sup>128</sup> *Id.* at 570, 581.

<sup>129</sup> *Id.* at 570, 571.

<sup>130</sup> *Id.* at 570-71, 581, 582.

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States, gathered information about a prominent opposition figure for the IMUN, surreptitiously recorded a meeting with an opposition figure, and published incendiary articles to provoke Iraqi Opposition members in the United States into revealing themselves.<sup>131</sup>

The court affirmed that the defendant's gathering information for a foreign government violated Section 951.<sup>132</sup> The court also listed as further evidence of a Section 951 violation the defendant receipt from the IIS payments and directions on how to use a human asset, offering to publish articles for the IMUN, receipt of training and tasking to report on opposition activities, weekly telephone conferences with the IMUN to receive instructions, receipt of covert recording equipment, and providing false press credentials to enable IMUN employees to access places where they could not have traveled as diplomats.<sup>133</sup> This demonstrates the court's view that any of these acts could satisfy Section 951.

Notably, in later discussing Dumeisi's conviction in testimony before a House Judiciary subcommittee in 2008, Patrick Rowan, then Principal Deputy Assistant Attorney General of DOJ's National Security Division, described the defendant as having been convicted of "violating [S]ection 951 for his activities *spying on Iraqi dissidents* in the United States for Saddam Hussein."<sup>134</sup> Mr. Rowan continued, "*Dumeisi* is a good example of how we can use 18 U.S.C. Section 951 against somebody who wasn't involved in collecting classified information but was nonetheless working in this country on behalf of a foreign government."<sup>135</sup>

#### D. *United States v. Latchin*

In *United States v. Latchin*,<sup>136</sup> the Seventh Circuit affirmed the defendant's conviction under Section 951 for undertaking activities on behalf of the IIS, even though the court did not determine what the defendant actually did on the IIS's behalf.<sup>137</sup> The defendant had joined the IIS well before moving to the United States, and appeared to have moved to the United States without being aware that he had been

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<sup>131</sup> *Id.* at 570, 571, 573.

<sup>132</sup> *Dumeisi* 424 F.3d at 581.

<sup>133</sup> *Id.* at 581.

<sup>134</sup> *Enforcement of Federal Espionage Laws: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 6 (2008) (testimony of J. Patrick Rowan, Principal Deputy Assistant Att'y Gen., Nat'l Sec. Div., U.S. Dep't of Justice) (emphasis added).

<sup>135</sup> *Id.*

<sup>136</sup> *United States v. Latchin*, 554 F.3d 709 (7th Cir. 2009).

<sup>137</sup> *Id.* at 715.

chosen to be an IIS “sleeper agent.”<sup>138</sup> Still, he traveled to Eastern Europe several times to meet with an IIS handler and received payments from the handler.<sup>139</sup> The court did not require evidence of espionage: “Whether [the defendant] actually spied . . . may be another matter altogether.”<sup>140</sup> Indeed, the court affirmed the defendant’s conviction under Section 951 because there was sufficient circumstantial evidence—receiving money from IIS personnel overseas and placing thirty-nine telephone calls to the IIS second-in-command of the sleeper program—for the jury to conclude that the defendant “took acts of *some kind* on behalf of Iraq” without notifying the Attorney General.<sup>141</sup>

#### IV. ADDITIONAL PROSECUTIONS UNDER SECTION 951

A review of indictments and plea agreements in other cases in which DOJ charged violations of Section 951 in roughly the first ten years of this century reveals that most fall into one of two categories: information-gathering and procurement or sanctions evasion.<sup>142</sup> In addition, most involve defendants who worked with foreign intelligence services.<sup>143</sup>

The defendants in most cases gathered information for foreign governments, primarily China, Russia, Iraq, and Cuba.<sup>144</sup> The defendants in several cases procured or sought to procure technology

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<sup>138</sup> *Id.* at 711.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 715.

<sup>141</sup> *Id.*

<sup>142</sup> Cases involving multiple defendants are referenced as a single case. This analysis does not discuss certain cases under seal or for which records were not available.

<sup>143</sup> *See infra* notes 145, 146.

<sup>144</sup> *United States v. Campa*, 529 F.3d 980 (11th Cir. 2008); *United States v. Bidawid*, No. 2:07-cr-20389 (E.D. Mich. Nov. 19, 2007), ECF No. 3, (Nov. 29, 2007), ECF No. 4 (indictment dismissed due to defendant’s death); *United States v. Chun*, No. 1:16-cr-00518 (S.D.N.Y. Aug. 1, 2016), ECF No. 3, (Jan. 23, 2017), ECF No. 16; *United States v. Al-Awadi*, No. 2:07-cr-20314 (E.D. Mich. Dec. 18, 2007), ECF No. 24; *United States v. Alvarez*, 506 F. Supp. 2d 1285 (S.D. Fla. 2007); *United States v. Ali*, No. 1:06-cr-00292 (E.D. Cal. Jan. 18, 2011), ECF No. 204; *United States v. Aquino*, No. 2:05-cr-00719 (D. N.J. Oct. 6, 2005), ECF No. 16; *United States v. Buryakov*, No. 1:15-cr-00073 (S.D.N.Y. Feb. 9, 2015), ECF No. 10; *United States v. Chapman*, No. 1:10-cr-00598, (S.D.N.Y. July 8, 2010), ECF No. 16; *United States v. Chiu*, No. 8:05-cr-00293, (C.D. Cal. June 6, 2007), ECF No. 584; *United States v. Chung*, 633 F. Supp. 2d 1134 (C.D. Cal. 2009); *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005); *United States v. Gari*, No. 1:01-cr-00810 (S.D. Fla. Sept. 4, 2001), ECF No. 2; *United States v. Kang*, No. 1:08-cr-00210 (E.D. Va. May 28, 2008), ECF No. 43-46; *United States v. Nicholson*, No. 3:09-cr-00040, 2010 U.S. Dist. LEXIS 45126 (D. Or. Apr. 21, 2010), ECF No. 185, 186. These cases are presented solely to demonstrate how facts were alleged to establish violations of Section 951 and/or conspiracy to violate Section 951.

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for foreign governments, evaded sanctions, or both.<sup>145</sup> Of the information-gathering and procurement cases, four also involved other activities such as perception management.<sup>146</sup>

Recent cases often reflect contemporary analogs of the nation-state actions that prompted the enactment of the Espionage Act a century ago. Two defendants are currently charged with obtaining positions at an American social media company to gain inside access to customer information at the direction of a foreign government.<sup>147</sup> Amin Yu, acting as an agent of the PRC, procured items in the United States for use in the PRC's development of autonomous underwater vehicles.<sup>148</sup> Alexander Fishenko used a U.S.-based company to obtain and provide to Russia \$50 million worth of microelectronics and other technology.<sup>149</sup> Russian national Maria Butina agreed to act in the United States under the direction of a Russian government official.<sup>150</sup> Subject to that direction, she "sought to establish unofficial lines of communication with Americans having power and influence . . . for the benefit of the Russian Federation."<sup>151</sup> Evgeny Buryakov acted as an undeclared agent of Russian intelligence and, in that capacity, developed a plan to exert pressure on a union to benefit Russia, attempted to obtain sensitive technical information relating to stock-trading, and conducted other

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<sup>145</sup> See U.S. v. Fishenko, No. 1:12-cr-00626 (E.D.N.Y. Nov. 6, 2014), ECF No. 266; Press Release, Department of Justice Office of Public Affairs, Russian Agent Sentenced to Ten Years for Acting as Unregistered Russian Government Agent and Leading Scheme to Illegally Export Controlled Technology to Russian Military (Jul. 21, 2016) (available at <https://www.justice.gov/opa/pr/russian-agent-sentenced-10-years-acting-unregistered-russian-government-agent-and-leading>); United States v. Huang, No. 3:06-cr-00102, (D. Conn. Apr. 12, 2006), ECF No. 1, (Dec. 11, 2016) ECF No. 41 (guilty plea to 18 U.S.C. § 1001); U.S. v. Moo, No. 1:06-cr-20006 (S.D. Fla 2006), ECF No. 36, (Aug. 1, 2006), ECF No. 122; U.S. v. Sudarshan, No. 1:07-cr-00051 (D.D.C. March 7, 2007), ECF No. 1 (reference made only to factual allegation in indictment); United States v. Shemami, 425 Fed. Appx. 425 (2011). These cases are presented solely to demonstrate how facts were alleged to establish violations of Section 951 and/or conspiracy to violate Section 951.

<sup>146</sup> *Campa*, 529 F.3d at 1002 ("sowing disinformation" on behalf of Cuban intelligence); *Dumeisi*, 424 F.3d at 579 (publishing newspaper articles at the direction of Iraqi intelligence); United States v. Shaaban, 252 Fed. Appx. 744, 745 (7th Cir. 2007) (proposal for U.S.-based TV station funded by Iraqi intelligence); *Duran*, 596 F.3d at 1287-88 (influencing a witness on behalf of Venezuelan intelligence).

<sup>147</sup> See *e.g.*, United States v. Abouammo et. al., No. 3:19-cr-00621 (N.D. Cal. July 28, 2020), ECF No. 53. All defendants are presumed innocent unless and until proven guilty. This case is referenced only to illustrate the assessment that the facts alleged are sufficient to establish the elements of Section 951.

<sup>148</sup> United States v. Yu, No. 6:16-cr-00023 (M.D. Fla. June 10, 2016), ECF No. 39.

<sup>149</sup> U.S. v. Fishenko, No. 1:12-cr-00626 (E.D.N.Y. Nov. 6, 2014), ECF No. 266; see Department of Justice Office of Public Affairs, *supra* note 145.

<sup>150</sup> U.S. v. Butina, No. 1:18-cr-00218 (S.D.N.Y. Dec. 13, 2018) ECF No. 66, at 1.

<sup>151</sup> *Id.* at 2.

collection and influence activities.<sup>152</sup> Jun Wei Yeo acted on behalf of PRC intelligence services “to spot and assess Americans with access to valuable non-public information.”<sup>153</sup> These cases reflect foreign governments’ persistent use of “non-traditional” actors to engage in clandestine efforts to collect information, obtain sensitive technology, and exert unattributed or misattributed influence within the United States. In other words, the same threats that motivated the enactment of the predecessor to Section 951 remain active national security concerns today.<sup>154</sup>

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<sup>152</sup> Press Release, Russian Department of Justice Office of Public Affairs, Russian Banker Sentenced in Manhattan Federal Court to 30 Months in Prison For Conspiring to Work for Russian Intelligence, (May 25, 2016) (available at <https://www.justice.gov/usao-sdny/pr/russian-banker-sentenced-manhattan-federal-court-30-months-prison-conspiring-work>).

<sup>153</sup> *United States v. Yeo*, No. 1:20-cr-00087 (D. D.C. July 24, 2020), ECF No. 9 at 1.

<sup>154</sup> There have been acquittals in prosecutions under Section 951. While juries of course do not provide reasons for acquittals, in one case, *United States v. Fondren*, the trial judge entered an order of acquittal. The order, however, did not address the scope of conduct. The district judge granted the defendant’s motion for acquittal on one count of conspiracy to violate Section 951 and one count of aiding and abetting the violation of Section 951, but the defendant’s jury conviction of unlawful communication of classified information by a government employee (50 U.S.C. § 783(a)) was affirmed on appeal. See *United States v. Fondren*, 417 Fed. Appx. 327, 333 (4th Cir. 2011). The transcript of the district court’s acquittal on the Section 951-related charges reveals that the decision had nothing to do with the scope of conduct the statute covers. Rather, it was based on the defendant’s lack of knowledge that the individual to whom he provided information was an agent of a foreign government during the time covered by the two Section 951-related counts of the indictment. *United States v. Fondren*, No. 1:09-cr-00263, 59-60, 70 (E.D. Va. 2009), ECF No. 110.

In *United States v. Turner*, DOJ charged the defendant with Section 951 and FARA violations based on his involvement in lobbying and public relations on behalf of a foreign government, but the defendant was acquitted at trial of the Section 951 count. *United States v. Turner*, No. 1:13-cr-00572-2, 2014 WL 4699708, at \*8 (N.D. Ill. 2014) ECF No. 38, 212. The defendant was convicted of an export control charge under IEEPA. Similarly, in *United States v. Amirnazmi*, 648 F. Supp. 2d 718 (E.D. Pa. 2009), the defendant was convicted at trial of a charge brought under the International Emergency Economic Powers Act (IEEPA), apparently involving illegal exports to Iran, but was acquitted of violating Section 951.

Finally, in *United States v. Rafiekian*, the trial court examined not the scope of conduct that Section 951 could encompass, but rather the boundaries of an “agency” relationship that would satisfy the statute. *United States v. Rafiekian*, 2019 WL 4647254 (E.D. Va. Sept. 24, 2019), at \*10-12. After a jury found the defendant guilty of violating, *inter alia*, Section 951, the court applied a common-law definition of agency to the statute and found that no rational juror could find such a relationship between the defendant and a foreign government. The court further found insufficient evidence that the defendant operated subject to a foreign government’s “direction and control.” *Id.* at \*13-14. Accordingly, the court granted the defendant’s motion for acquittal. *Id.* at \*1. The Government has appealed that decision. *Id.*, appeal docketed, No. 19-4803 (4th Cir. Oct. 31, 2019); see *Judges May Reinstate Foreign Agent Case Against Flynn Partner*, POLITICO, Dec. 12, 2020, available at

## V. APPLICATION TO CURRENT THREATS

As suggested in the Introduction, the United States confronts twenty-first century threats from Russia and the PRC, among others, that are analogous to the German covert activity that prompted the enactment of the Espionage Act, including the predecessor to Section 951, in the first instance. The United States Intelligence Community formally notified the public of its assessment that:

Russian efforts to influence the 2016 US presidential election represent the most recent expression of Moscow's longstanding desire to undermine the US-led liberal democratic order, but these activities demonstrated a significant escalation in directness, level of activity, and scope of effort compared to previous operations. . . .

Moscow's influence campaign followed a Russian messaging strategy that blends covert intelligence operations—such as cyber activity—with overt efforts by Russian Government agencies, state-funded media, third-party intermediaries, and paid social media users or “trolls.”<sup>155</sup>

Meanwhile, the United States Senate Subcommittee on Investigations under the committee on Homeland Security and Government Affairs, issued a detailed report regarding the PRC's use of programs, collectively referred to as “Talent Plans,” to obtain the benefit of U.S.<sup>156</sup> research and development efforts by recruiting “researchers, scientists, and experts in the public and private sector to provide China with knowledge and intellectual capital in exchange for monetary gain and other benefits.”<sup>157</sup> According to the Subcommittee findings, Talent Plan participants receive specific taskings from the PRC government, including applying knowledge gained from their U.S.-based work to fulfill their Talent Plan contract, recruiting and training additional

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<https://www.politico.com/news/2020/12/12/michael-flynn-foreign-agent-case-444743>.

<sup>155</sup> Intelligence Community Assessment (ICA) 2017-01D (Jan. 6, 2017) (Declassified Version) at ii, *available at* [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

<sup>156</sup> The Talent Plan programs do not exclusively target the United States, but only their operation in the United States is directly relevant to this Article.

<sup>157</sup> U.S. Senate Comm. on Homeland Sec. & Gov't Affairs, Perm. Subcomm. on Investigations, Threats to the U.S. Research Enterprise: China's Talent Recruitment Plans (Nov. 18, 2019) at 1 [hereinafter PSI Report], *available at* Whereas the global ambitions of WWI-era Imperial Germany, consistent with the era, focused on prestige and control of land, the PRC seeks to advance its geopolitical position through, *inter alia*, economic, scientific, and technological superiority. *Id.* at 1-2, 7.

participants, and sponsoring visiting students.<sup>158</sup> To be clear, participation in the Talent Plans is not in and of itself illegal. Recent cases, however, have alleged that recruiters and participants have concealed the support or direction they receive from the PRC.<sup>159</sup> The Senate investigation found that such deception is an intrinsic feature of the Talent Plan programs.<sup>160</sup> Such concealment or deliberate failure to make a required disclosure may constitute precisely the type of covert nation-state conduct that Section 951 is designed to expose, deter, and punish. As several courts have emphasized, a defendant may be convicted under Section 951 for undertaking an act in the United States at the direction or control of a foreign government even if the act itself is not illegal.<sup>161</sup> Rather, concealing the foreign hand that directs and controls the actor constitutes the threat.

The threats of undisclosed foreign influence in American politics and society and of covert foreign engagement in American economic, scientific, and technological activities,<sup>162</sup> remain significant national security challenges. The recent and ongoing prosecutions under Section 951 described above, as well as the trends that DOJ, the FBI, and the Senate have identified as discussed above, reflect the persistent nature of those threats.<sup>163</sup> Recognizing that today's threats are on a continuum

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<sup>158</sup> PSI Report, *supra* note 157, at 27-30.

<sup>159</sup> *United States v. Ye*, No. 1:20-cr-10021 (D. Mass. Jan. 28, 2020), ECF No. 1. *See e.g.*, Press Release, Department of Justice Office of Public Affairs, Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases (Jan. 28, 2020), <https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related> (last visited Oct. 19, 2020). The details contained in the charging documents are allegations. The defendants are presumed innocent unless and until proven guilty beyond a reasonable doubt in a court of law. Pending cases are referenced herein solely to illustrate the application of law to the facts alleged.

<sup>160</sup> PSI Report, *supra* note 157, at 29 (“Some contract provisions reflect an intent to keep the [Talent Plan] members’ work in China secret.”). A more recent report, from the Senate Select Committee on Intelligence, also called for recognition of Russia’s use of non-traditional intelligence actors. Report of the Select Committee on Intelligence, United States Senate, on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Vol. 5: Counterintelligence Threats and Vulnerabilities, at 933-34,

<sup>161</sup> *Latchin*, 554 F.3d at 715; *United States v. Ji*, No. 1:18-cr-00611 (N.D. Ill. Apr. 7, 2020), ECF No. 90, at 2.

<sup>162</sup> It bears emphasizing that foreign participation in many aspects of the American economy and educational system, including scientific and technological research, are entirely appropriate and indeed beneficial. Concealing or failing to make required disclosure of foreign involvement, however, deprives stakeholders in the United States of the knowledge that they are dealing with foreign governments, and thus prevents them from factoring that involvement into their decision-making.

<sup>163</sup> Foreign intelligence activities such as influence operations and theft of information that occur using “cyber” means have generally not been charged under Section 951. Rather, such conduct is more often charged under the Computer Fraud and

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with those that prompted the enactment of Section 951 and to which law enforcement has historically applied the statute is essential to understanding how and when the statute could be applied in the future.

## VI. CONCLUSION

The adversaries of the United States continue to deploy strategies and tactics that prompted the enactment of the Espionage Act, including the predecessor to Section 951, more than one hundred years ago. Those strategies include the use of undisclosed agents to conduct campaigns of interference in American political, social, economic, scientific, and technological leadership and independence. As the history of Section 951 set forth above demonstrates, it is important for legal practitioners and those who act in the United States on behalf of foreign governments to understand the broad scope of conduct that the statute renders illegal if undertaken at the undisclosed direction of a foreign government, regardless of whether the actor is a classic “spy.” Those who conceal their taskings by foreign governments deprive the United States of information critical to informed decision-making, which in turn lies at the core of autonomy and independence. Section 951 will hold them to account.

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Abuse Act and/or as Economic Espionage, Wire Fraud, or related offenses. *See e.g.*, “Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System,” Feb. 16, 2018, *available at* <https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere>; “U.S. Charges Five Chinese Military Hackers For Cyber Espionage Against U.S. Corporations And A Labor Organization For Commercial Advantage,” May 19, 2014, *available at* <https://www.justice.gov/usao-wdpa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and>. Such charging decisions may obviate the need to assess whether an overseas cyber actor “acts in the United States” for the purpose of Section 951, given the ready availability of statutes that offer at least as favorable sentencing potential. *See e.g.*, 18 U.S.C. §§ 1030(b), 1831, 1343.