

## In Pursuit Of Trump Ally, Feds Rely On 'Espionage Lite' Law

By **Stewart Bishop**

*Law360 (August 10, 2021, 8:37 PM EDT)* -- Federal prosecutors pursuing former Donald Trump adviser and billionaire investor Thomas Barrack for purportedly illegal lobbying on behalf of the United Arab Emirates are deploying the Foreign Agents Registration Act's lesser known cousin, a statute that may be easier to prosecute and packs potentially twice the amount of prison time.

Barrack, 74, is accused of unlawfully working to advance the UAE's interests in the United States during Trump's 2016 presidential campaign and scheming to influence the foreign policy positions of the U.S. during the Trump administration. Barrack served as an adviser to Trump's 2016 campaign and the White House under the former president, as well as chairman of Trump's inaugural committee.

Prosecutors say Barrack, the founder of real estate investment trust Colony Capital Inc., now known as DigitalBridge Group Inc., failed to disclose to the U.S. Attorney General's Office that he was lobbying on the UAE's behalf, in violation of 18 U.S.C. 951.

While sometimes conflated with the Foreign Agents Registration Act of 1938, Section 951 — first enacted in 1948 and often used in the espionage context — differs from FARA in key ways. For one, a FARA violation carries a maximum incarceratory penalty of five years in prison, while conviction on a substantive Section 951 crime can result in a 10-year sentence.

FARA requires the registration and disclosures of agents of foreign principals, who engage directly or indirectly in political activities on behalf of a foreign entity. This can include acting as a foreign entity's public relations counsel, publicity agent, consultant or fundraiser.

While FARA contains a number of exemptions, such as for lawyers in official proceedings; individuals engaged in religious, academic or scientific pursuits; and people engaged in private, nonpolitical activity, Section 951 is narrowly tailored to apply to agents acting at the behest of foreign governments or officials, other than diplomats, with a limited exception for certain legal commercial transactions.

Michael Atkinson of Crowell & Moring LLP, a former inspector general of the intelligence community and acting deputy assistant attorney general of the U.S. Department of Justice's National Security Division, said Section 951 applies when someone is funneling intelligence to foreign officials.

"You're not just trying to influence U.S. foreign or domestic policy, but you're also providing intelligence back to the foreign government," Atkinson said. "And that's what they seem to be going out of their way to say, that [Barrack] advanced the interests of, and provided intelligence to the UAE."

At the heart of the allegations in the indictment of Barrack — as well as former Colony Capital staffer Matthew Grimes, 27, and alleged middleman and UAE national Rashid al Malik, 43 — are claims they worked on behalf of the Emiratis to influence public opinion, obtain foreign policy intelligence, develop a back channel to the Trump campaign and administration, as well as work to increase UAE's influence and promote its foreign policy positions, according to the indictment.

Barrack and Grimes have pled not guilty to the charges. According to prosecutors, al Malik fled the U.S. in 2018, days after being interviewed by the FBI, and has not returned.

Among the many steps Barrack and the others took to advance UAE's interests, prosecutors say, was that in 2016, Barrack inserted pro-UAE language into a stump speech by Trump about U.S. energy policy. Barrack also used his own press appearances to promote UAE's preferred policies, according to prosecutors.

After one media appearance where Barrack repeatedly praised the UAE, Barrack emailed al Malik saying, "I nailed it. .. for the home team," prosecutors say.

One striking aspect of the announcement of charges against Barrack and the others, is that the Department of Justice went out of its way to state its view that Trump was a victim of the alleged misdeeds.

"The conduct alleged in the indictment is nothing short of a betrayal of those officials in the United States, including the former president," Mark Lesko, the acting assistant attorney general of the DOJ's National Security Division, said at the time.

"I do wonder if the [former] president believes that he is a victim of this alleged crime," Atkinson of Crowell & Moring said.

Barrack is, or was at least, a longtime friend of Trump with extensive ties to the Middle East. In a memo seeking his detention that was filed on the day of his arrest, prosecutors called Barrack "an extremely wealthy and powerful individual" with substantial ties to the UAE, Lebanon and the Kingdom of Saudi Arabia, three countries that lack extradition treaties with the U.S. Barrack was later released on a \$250 million bond.

Prosecutors may have chosen to prosecute Barrack and his cohorts under Section 951 — described as "espionage lite" in a report from the DOJ Office of the Inspector General — because it can be an easier case for the government to prove at trial.

In some respects, it's an easier statute to try someone under if you're the government because there are fewer elements to prove, said Thomas J. Spulak, co-head of King & Spalding LLP's government advocacy and public policy practice and former general counsel to the U.S. House of Representatives.

"Section 951 really doesn't get that deep. The activity doesn't have to be political, you have to act as an agent of a government," Spulak told Law360. "At least from the evidence we see, it's easy to see how this individual was acting as an agent of a foreign government. He was asking for advice, asking what can I do, and then going back and then doing that, multiple times. It's easy to see the agency relationship there."

In recent years, Section 951 has been used to prosecute Russian national Maria Butina, who pled out to conspiracy and was sentenced to 18 months in prison over an alleged scheme to create a back channel between the Kremlin and the U.S. government, aided by former GOP operative Paul Erickson.

The statute was also deployed in the prosecution of Iranian-American businessman Bijan Rafiekian, a onetime business associate of short-term National Security Adviser Michael Flynn, who was convicted at trial of acting as an unregistered agent of the Turkish government during the 2016 presidential election. A trial judge later tossed the jury verdict, only to have it reinstated by the Fourth Circuit.

An attorney for Barrack, Matt Herrington of Paul Hastings LLP, told Law360 the oft-repeated notion that a section 951 case is a lighter burden than a FARA case is wrong.

"The government needs to show that there was an agreement to act under the direction and control of a foreign principal," Herrington said. "Mr. Barrack is innocent."

Enforcement of illicit foreign lobbying has increased markedly in the past five years, since the 2016 release by the DOJ inspector general of a scathing report — brought at the direction of Congress — that found the Justice Department lacked a comprehensive FARA enforcement strategy. Prior to the inspector general's report, the DOJ only brought seven criminal FARA cases between 1966 and 2015.

The report also found divergent views among investigators and officials in the National Security Division — which contains the FARA unit within the Counterintelligence and Export Control Section — about the intent of FARA and Section 951.

The timing of the report also coincided with the beginning of Trump's administration and the government's increasing interest in foreign involvement in U.S. affairs, Spulak of King & Spalding said.

"Today, we're in a place where the office is more robust than it's ever been," Spulak said of the FARA unit. "Literally, in terms of staffing the number of people in the office working closely with the FBI to investigate cases and to prosecute."

--Editing by Nicole Bleier and Emily Kokoll.