

SI ¶¶ 2, 26(c). All of the Overt Acts that relate to the APSP defendants describe political speech via published articles, public speeches and political activity. The government does not actually challenge this undeniable fact.¹ Rather, it seeks to mislead the Court by grouping together allegations against other defendants as if they applied to the APSP defendants. *See* ECF No. 172, pp. 9-10. This Court must evaluate this Objection by considering only the allegations against the APSP defendants. We take no position as to whether the allegations against the other co-defendants are protected speech.

Second, as set forth in our Objection, the timing of the FBI raids and subsequent indictment of the APSP defendants provides compelling evidence that this prosecution targets political speech. The homes and offices of the APSP defendants were raided by FBI SWAT teams just a few months after they began speaking out against U.S. involvement in the armed conflict between Russia and Ukraine, despite the fact that the APSP defendants had allegedly become Russian agents seven years earlier, in 2015. The government argues that the suspicious timing of the FBI raids and indictments – after defendants started protesting U.S. involvement in the war in Ukraine – “merely shows” that the APSP defendants produced “numerous publicly available videos” in the spring

¹ In a desperate effort to save this indictment, the government erroneously asserts that the APSP defendants are charged with “conspiring to help lobby to free Russian detainees.” ECF No. 172, p. 10. In support of this invented charge, the government cites Overt Act 43, which describes an electronic message sent by Ionov to defendant Hess in November 2018, requesting assistance before a human rights committee relating to the detention of Russian nationals. But there is no allegation that Hess responded to the message or that the APSP defendants ever assisted Russia before a human rights committee on any issue.

of 2022 which “constituted compelling and easily obtained evidence of the charged crimes.” ECF No. 172, p.10 n.3. But all of the APSP speeches and articles are publicly available. The APSP defendants have been publicly criticizing U.S. interference in Ukraine, and NATO expansion eastwards towards Russia’s border, since at least 2014.² Further, the APSP published the details of its leader’s 2015 trips to Moscow in their own newspaper, the Burning Spear.³ National media outlets also published details of APSP’s participation in the Moscow conferences.⁴ Accordingly, the government’s argument that the APSP defendants’ pro-Russia advocacy was only discoverable in 2022, after they began opposing U.S. involvement in the war in Ukraine, is not credible.

Third, as pointed out in our Objection, prominent Washington D.C. think tanks regularly and openly receive tens of millions of dollars from foreign governments such as Qatar, the United Arab Emirates or Norway, in exchange for advocacy of the donors’

² See, e.g., *Ukraine, Russia, EU, U.S. and the crisis of imperialism*, The Burning Spear, Apr. 20, 2014, <https://theburningspear.com/1279/>.

³ See *A look back at 2015: a year of black resistance, organization and struggle!*, The Burning Spear, <https://theburningspear.com/1707/> (Dec. 30, 2015) (“Moscow, Russia: The Anti-Globalization Movement of Russia invites the African People’s Socialist Party and Chairman Omali Yeshitela to attend the roundtable conference of the Federation of Russian Migrants”); *Chairman Omali Yeshitela speaks for Africa at Moscow world conference*, The Burning Spear, <https://theburningspear.com/1594/> (Nov. 3, 2015).

⁴ See, e.g., *Russia funds Moscow conference for US, EU and Ukraine separatists*, The Guardian, <https://www.theguardian.com/world/2015/sep/20/russia-funds-moscow-conference-us-eu-ukraine-separatists> (Sept. 20, 2015) (reporting that Omali Yeshitela and several separatist groups attended a conference in Moscow organized by the “Anti-Globalist Movement of Russia”).

priorities.⁵ Yet these think tanks are never targeted for prosecution under Section 951.

The government's failure to address this undisputed fact is an implicit admission that it is targeting the APSP defendants because their speech aligns with Russia, a disfavored country. But if you speak on behalf of Qatar, the United Arab Emirates or Norway, you will not be prosecuted under Section 951.

In support of its argument that this prosecution is content-neutral, the government cites *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). See ECF No. 172, p.9. In *Giboney*, Union members picketed a lawful business in violation of State antitrust laws. 336 U.S. at 502. In *Wisconsin v. Mitchell*, the defendant's speech was properly used as evidence that he targeted the victim of his aggravated battery on account of race. 508 U.S. at 489. Neither of these decisions held that the government may target political speech or activism.

This prosecution is unprecedented. Nevertheless, the government argues that defendants' actions in this case "were similar to the actions at issue in prior prosecutions under Section 951." ECF No. 172, p.13. The government cites three prosecutions under Section 951, all involving illegal lobbying. In *United States v. Rafiekian*, 991 F.3d 529 (4th Cir. 2021), the defendant was hired by the Turkish government as an unregistered lobbyist to sway U.S. officials to extradite a Turkish dissident living in Pennsylvania. The government argues that the cases are similar because the defendant in *Rafiekian*

⁵ See *Foreign Powers Buy Influence at Think Tanks*, The N.Y. Times, Sept. 7, 2014, <https://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html>.

published Op-Eds and a “documentary disparaging ... a Turkish dissident in the hopes that he would be extradited to Turkey.” ECF No. 172, p.13. But the unregistered lobbyist in *Rafiekian* was not prosecuted because of the content of his speech; he was prosecuted for committing a crime. The government next cites *United States v. Alshahhi*, which also involves unregistered lobbying. There the defendant was hired by the UAE government to set up a back channel to obtain political influence and non-public information on foreign policy from the Trump Campaign. 2022 WL 2239624 (E.D.N.Y. 2022). Similarly, in the Maria Butina prosecution, the defendant was paid by Russian officials to influence U.S. politicians and failed to register as a lobbyist.

The APSP defendants are not lobbyists. They are activists engaged in political speech and dissent, where “the importance of First Amendment protections is at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

Finally, the government cites *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005), which it still insists held that “publishing articles at the direction of Iraqi intelligence was a legitimate basis” for conviction under Section 951. ECF No. 172, p.16. As explained in our Objection, the articles published by Dumeisi were admissible to show motive and intent; not as substantive evidence of guilt. ECF No. 167, p.12.

It is thus clear and obvious that the government’s decision to target these defendants is related to the content of their speech. It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Accordingly,

this indictment must be dismissed unless the government can show a compelling interest to criminalize the defendants' speech.

B. The Superseding Indictment does not show a Compelling Interest to Criminalize the Political Speech of the APSP Defendants.

The government's argument that its interests in this case "are so substantial as to justify infringement on constitutional rights" must be rejected. ECF No. 172, p.19. In support, the government cites *Haig v. Agee*, 453 U.S. 280, 308 (1981), a case in which the Supreme Court held that the government may revoke the passport of a U.S. citizen living abroad based on "his repeated disclosures of intelligence operations and names of intelligence personnel" which it found posed a direct threat to national security and the personal safety of intelligence officials. In reaching its decision, the Court made clear that Agee's "criticism of the [U.S.] Government" was protected speech and was not a basis to revoke his passport. *Id.* at 309.

The government's citation of *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961), is also unhelpful. ECF No. 172, p.14. In that case, the Supreme Court upheld a registration requirement for members of the Communist party. However, the Court made clear that its ruling was based on Congressional findings that "there exists a world Communist movement, foreign-controlled, which operates to overthrow our existing government by force if need be and to establish in its place a Communist totalitarian dictatorship." *Id.* at 89. There are no comparable findings in this case. Nor does the SI make any allegations that the APSP defendants are violent or dangerous or

that they advocate the violent overthrow of our existing government. Moreover, the requirement that Communists must register with the Attorney General was removed in 1968 and the Subversive Activities Control Board has been disbanded. The decision in *Communist Party of U.S.* does not justify the criminalization or suppression of these defendants' political speech.

Lastly, the government suggests that these defendants are charged with "manipulating ... elections ... in this Country." ECF No. 172, p.19. The indictment contains no allegation that these defendants were involved in any election interference.

II. The Report and Recommendation Overlooks Flaws in the Indictment which Provides no Factual Details to Support the Charge that Defendants were Under Direction or Control of Russia.

The government argues that the SI "adequately pleads" the offense. ECF No. 172, p.6. But it does not address the failure of the indictment to provide a single detail about the nature of the supposed agreement between the APSP and Russia. The SI contains only a vague assertion that, at some point in time after May 2015, the APSP became Russian agents and agreed to publish pro-Russian propaganda. Thus, the government misleads the Court when it asserts that this indictment charges the APSP defendants with "allow[ing] the FSB to hide behind their organization, in order to—in their own words—engage the U.S. and Europe in serious struggle and s[o]w division inside the U.S." ECF No. 172, p.13 (internal quotations omitted; citing Overt Act 18 in the SI).

The allegation that the APSP defendants knowingly joined with Russia to "sow division in the U.S." is untrue. It appears to be based on a summary of Defendant

Yeshitela's trip to Moscow in September 2015, prepared by a member of the APSP who is not a defendant in this case. The government's selective use of excerpts from this memorandum in the SI is highly misleading. The relevant paragraph from this memorandum makes it clear that the APSP was pursuing its own agenda, not Russia's:

In attending the AGM conference, we did so recognizing that the Anti-Globalization Movement of Russia (which more than likely represents a method by which the Russian Government is engaging the U.S. and Europe in serious struggle.) is carrying out its own agenda-to utilize forces inside of the U.S. to sew division inside the U.S. Likewise, our Party is clear that we also have our agenda-to place the question of African self-determination on the world's agenda and to win international allies for our National Liberation Struggle. The success of our first trip, facilitated our ability to embark on our 2nd trip to Russia on September 20, The Worldwide Conference for Self-sufficiency of oppressed people's. Our participation in the Worldwide Conference was qualitatively different as it afforded our Party the ability to speak on a forum of several groups some of who were waging struggles for the rights to control our own destinies among them, the Irish Republican Socialist Party, IRSP a group the Chairman visited in Belfast, Ireland in 1983 and the Catalan Solidarity for Independence Movement, fighting for succession from Spain, and who recently won the election in Spain.

The full paragraph cited above has a very different meaning than the excerpts that appear in the indictment. We have not yet received any Grand Jury transcripts. If they show that the government used false or misleading evidence to obtain the indictment, the APSP defendants may have an additional ground to seek dismissal. *See, e.g., United States v. Fountain*, 840 F.2d 509, 513-14 (7th Cir. 1988).

WHEREFORE, based upon the foregoing, the Defendant, PENNY HESS, respectfully moves this Honorable Court to reject the Magistrate Judge's Report and Recommendation and to grant her Motion to Dismiss the Indictment.

DATED this 1st of March, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2024, a true and correct copy of the foregoing was furnished by using the CM/ECF system with the Clerk of the Court, which will send notice of the electronic filing to:

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