Defending Dissidents: Reforming the U.S. Criminal Response to Transnational Repression

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Foreign governments breach national borders through physical and digital means to surveil, coerce, harass, kidnap, and kill members of diaspora and exile communities. This phenomenon is known as transnational repression (TNR). No longer an exceptional tool, TNR is becoming a normalized practice used to silence citizens abroad. This tool of global authoritarianism violates host countries' sovereignty and commitments to positive individual rights. Yet, democracies like the United States have been slow to launch a coordinated criminal response.

This Note critiques U.S. federal prosecutors' response in the absence of laws directly criminalizing TNR and proposes a more targeted approach. Part I documents the rise of TNR in the United States, the methods that "Perpetrator States" deploy against U.S. persons, and the detrimental effect TNR has had on U.S. rule of law and constitutional freedoms. Part II reveals how federal prosecutors have relied on 18 U.S.C. § 951—the "espionage lite" statute—to charge agents acting subject to the direction or control of a foreign government. Despite some litigation success in charging Section 951, it has proven to be an inadequate basis to mount a statutory response to TNR. The statute fails to reach key methods of TNR, discourages uniformity in application, endangers certain diplomatic relations, compounds confusion in identifying repression, and fails to express the gravity of the offense. After evaluating these infirmities, Part III argues for adopting a TNR statute that addresses the need to criminalize

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core TNR activity while incorporating elements of a bureaucratic approach. Given the potential unintended effects of overcriminalization, this approach allows penal law to take a real but constrained role in countering TNR.

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INTRODUCTION

In 2019, Saudi Arabian agents exploited their positions at Twitter to access exiles' accounts and non-public data, facilitating their political persecution in Riyadh.[1] In 2022, an assassin armed with an assault rifle lurked outside the Brooklyn residence of an Iranian dissident, under alleged orders from Tehran to kidnap or kill.[2] In 2023, Chinese agents operated out of a secret overseas police station in Manhattan, where they monitored and intimidated critics of the communist regime.[3]

The shadow of autocracy looms large on American soil. Without the benefit of legal protections, those bold enough to oppose repression too often find themselves the target of it. Increasingly, foreign governments breach national borders to silence dissent from journalists, human rights defenders, civil society activists, and political opponents. This phenomenon is known as transnational repression (TNR).[4]

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1. *See* Press Release, U.S. Dep't of Just., Two Former Twitter Employees and a Saudi National Charged as Acting as Illegal Agents of Saudi Arabia (Nov. 7, 2019), https://www.justice.gov/opa/pr/two-former-twitter-employees-and-saudi-national-charged-acting-illegal-agents-saudi-arabia [https://perma.cc/828X-GK4F]; *see also* Press Release, U.S. Dep't of Just., Former Twitter Employee Found Guilty of Acting as an Agent of a Foreign Government and Unlawfully Sharing Twitter User Information (Aug. 10, 2022), https://www.justice.gov/opa/pr/former-twitter-employee-found-guilty-acting-agent-foreign-government-and-unlawfully-sharing [https://perma.cc/7LLF-BXSN] (one defendant has been found guilty at trial; two remain at large).

2. *See* Rachel Pannett, *Man with Assault Rifle Arrested Near Iranian American Writer's Brooklyn Home*, WASH. POST (Aug. 1, 2022), https://www.washingtonpost.com/nation/2022/08/01/iran-journalist-masih-alinejad-ak47-brooklyn/ [https://perma.cc/72JE-AQC5]; *see also* U.S. Dep't of Just., U.S. Attorney Announces Charges and New Arrest in Connection with Assassination Plot Directed from Iran (Jan. 27, 2023), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-charges-and-new-arrest-connection-assassination-plot-directed [https://perma.cc/SYH3-7FH5] (three defendants have been arrested and await trial; the others remain at large).

3. *See* Larry Neumeister & Eric Tucker, *Secret Chinese Police Station in New York Leads to Arrests*, AP NEWS (Apr. 17, 2023), https://apnews.com/article/chinese-government-justice-department-new-york-police-transnational-repression-05624126f8e6cb00cf9ae3cb01767fa1 [https://perma.cc/2WWV-SC8V]; *see also* Press Release, U.S. Dep't of Just., Federal Jury Convicts Three Defendants of Interstate Stalking of Chinese Nationals in the U.S. and Two of Those Defendants for Acting or Conspiring to Act on Behalf of the People's Republic of China (June 20, 2023), https://www.justice.gov/usao-edny/pr/federal-jury-convicts-three-defendants-interstate-stalking-chinese-nationals-us-and [https://perma.cc/Z6AM-4JKG] [hereinafter *Federal Jury Convicts Three Defendants*] (three defendants have pled guilty; three others have been found guilty at trial).

4. Although no universally accepted definition exists, this Note uses the definition from Freedom House, a nongovernmental organization contributing to the research on TNR that has been adopted by government offices and agencies. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106183, AGENCY ACTIONS NEEDED TO ADDRESS HARASSMENT OF DISSIDENTS AND OTHER TACTICS OF TRANSNATIONAL REPRESSION IN THE U.S. 1 (2023).

More than a singular threat to individuals, TNR is a "tool of global authoritarianism."[5] "Perpetrator States"[6] deploy a range of TNR methods, including assassinations, unlawful deportations, renditions, physical and digital threats, and coercion by proxy.[7] Publicly, Perpetrator States flaunt international norms by taking credit for forced disappearances[8] and supporting other regimes' repressive operations.[9] Privately, they mobilize troll farms[10] and covertly surveil dissidents.[11] The visibility and invisibility of these tactics have a chilling effect on political speech in exile communities, begetting self-censorship, isolation, and self-policing.[12] TNR can also impact targets' psychological well-being and financial ability to access overseas bank accounts.[13] Despite

5. YANA GOROKHOVSKAIA ET AL., FREEDOM HOUSE, STILL NOT SAFE: TRANSNATIONAL REPRESSION IN 2022 1 (Apr. 2023). Authoritarianism is a political system that centralizes power into an individual or a small group of individuals constitutionally unaccountable to the public. Authoritarian governments often limit political pluralism and circumvent norms meant to protect political rights and civil liberties. On a global scale, the last decade's trend toward authoritarian governance has come at the expense of democracy. As the power of democracy erodes, so do global checks on abuse of power and protection of human rights. *See generally* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2022: THE GLOBAL EXPANSION OF AUTHORITARIAN RULE 1 (Feb. 2022).

6. TNR is not a tool exclusive to authoritarians. Although States rated "Not Free" by Freedom House conduct most TNR attacks, several democratic states rated "Partly Free" also deploy TNR. To account for this variation, this Note uses a neutral term, "Perpetrator States." *See* NATE SCHENKKAN & ISABEL LINZER, FREEDOM HOUSE, OUT OF SIGHT, NOT OUT OF REACH: THE GLOBAL SCALE AND SCOPE OF TRANSNATIONAL REPRESSION 55 (Feb. 2021).

7. *See id.* at 9–14.

8. *See* Abdi Latif Dahir et al., *How the Hero of 'Hotel Rwanda' Fell into a Vengeful Strongman's Trap*, N.Y. TIMES (Sept. 20, 2021), https://www.nytimes.com/2020/09/18/world/africa/rwanda-paul-rusesabagina.html [https://perma.cc/5GMV-NLEV] (reporting that Rwanda's spy chief "gleefully described" the forced disappearance of Paul Rusesabagina, a U.S. resident and opponent of Rwandan President Paul Kagame).

9. *See* Anton Troianovski & Ivan Nechepurenko, *Belarus Forces Down Plane to Seize Dissident; Europe Sees "State Hijacking,"* N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/23/world/europe/ryanair-belarus.html [https://perma.cc/W79W-5DA5] (reporting that a Russian member of Parliament lauded Belarus's Ryanair hijacking to arrest a journalist as a "brilliant special operation").

10. Troll farms are "professionalized groups that work in a coordinated fashion to post provocative content, often propaganda, to social networks . . . ." Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, MIT TECH. REV. (Sept. 16, 2021), https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election/ [https://perma.cc/EB53-TDZ5].

11. *See, e.g.*, ANASTASYA LLOYD-DAMNJANOVIC, WILSON CTR., A PRELIMINARY STUDY OF PRC POLITICAL INFLUENCE AND INTERFERENCE ACTIVITIES IN AMERICAN HIGHER EDUCATION 3 (2018) (noting the heightened surveillance of Chinese students studying in the United States).

12. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 5.

13. *See id.*

finding refuge in liberal democracies, targets can never entirely escape authoritarianism under the ever-present threat of TNR.[14]

Perpetrator States engender a deep sense of insecurity in their targets and are themselves motivated by insecurity. To these perpetrators, their urge to maintain control over political dissent outweighs the cost of upsetting the international order.[15] In carrying out TNR, Perpetrator States violate the customary principle of state sovereignty and undermine the integrity of democratic institutions.[16] Particularly when deployed against U.S. persons or persons in the United States, TNR imperils rights guaranteed in the Constitution, including freedom of expression and speech. Despite these concerns, countries have been slow to counter TNR within their territory.[17] The United States and the United Kingdom have led the charge in instituting civil penalties, yet the United States has failed to launch a coordinated criminal response.[18]

This Note surveys the U.S. criminal response in the absence of domestic regulation directly criminalizing TNR. It reveals how federal prosecutors have relied on 18 U.S.C. § 951—the "espionage lite" statute—to charge agents acting under the direction or control of a foreign government with TNR-related crimes.[19] Despite some litigation success, prosecutors bring Section 951 charges unevenly and typically as a supplement to other charges.[20] This patchwork prosecutorial approach grants incomplete coverage insufficient to address TNR.[21] Section 951, moreover, fails to express the gravity of conduct made more egregious by foreign government involvement,[22] address overarching foreign policy concerns,[23] and

14. *See* NOURA AL-JIZAWI, ET AL., CITIZEN LAB, PSYCHOLOGICAL AND EMOTIONAL WAR: DIGITAL TRANSNATIONAL REPRESSION IN CANADA 10 (2022) (noting how the threat of TNR "has generated concerns about [victims'] privacy and feelings of insecurity, guilt, fear, uncertainty, mental and emotional distress, and burnout" (internal citations omitted)).

15. *See* YOSSI SHAIN, THE FRONTIER OF LOYALTY: POLITICAL EXILES IN THE AGE OF THE NATION-STATE xiii (Univ. Mich. Press 2005) (1989).

16. *See* U.N. Charter art. 2, 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .").

17. *See* GOROKHOVSKAIA ET AL., *supra* note 5, at 1.

18. *See id.*

19. *See infra* Part II.B.

20. *See infra* Part II.C.2.

21. *See infra* Part II.C.1.

22. *See infra* Part II.C.5.

23. *See infra* Part II.C.3.

aid law enforcement in identification of repressive tools.[24] As such, this Note critiques U.S. federal prosecutors' response without laws directly criminalizing TNR and proposes a more targeted approach.

Part I surveys the broad spectrum of TNR methods deployed worldwide, then narrows in on instances of TNR in the United States, drawing on recent criminal indictments filed in U.S. federal courts. It demonstrates that the rate of TNR has accelerated due to the globalization of activism, the proliferation of repressive technologies, and the general erosion of norms against extraterritorial attacks. It describes how TNR insults the United States' sovereignty and imperils the fundamental freedoms the Constitution protects, and that, therefore, the United States has a deeply rooted interest in guarding against imported repression. Part II surveys the current U.S. prosecutorial approach to TNR. It shows that, in the absence of laws directly criminalizing TNR, prosecutors predominantly draw on 18 U.S.C. § 951 to charge unregistered agents acting under the direction or control of a foreign government. Part II contends that despite Section 951's breadth and flexibility, the statute has its limits: the statute is unable to reach key methods of TNR, encourage a uniform, prosecutorial approach, check prosecutors' degree of discretion in cases implicating larger foreign policy concerns, aid law enforcement in identification of kinetic and non-kinetic methods,[25] or communicate the severity of the conduct. In view of Section 951's infirmities, Part III argues that Congress should adopt a TNR statute aimed at realizing three overarching goals: statutory coverage of core TNR methods, expressive communication of the severity of TNR, and efficient organization of law enforcement's response. To ensure all U.S. persons live in a free and open society, this Note recommends a hybrid approach that criminalizes core methods and reorganizes the current, bureaucratic response to TNR. Given the potential unintended effects of overcriminalization, this hybrid approach allows penal law to operationalize a necessary but constrained response to TNR.

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24. *See infra* Part II.C.4.

25. Kinetic methods physically engage a target and are more visible (e.g., kidnapping or physical intimidation), whereas non-kinetic methods engage a target through cyber or electronic tactics (e.g., digital hacking). *See* Nancy Roberts & Sean F. Everton, *Strategies for Combating Dark Networks*, 12 J. SOC. STRUCTURE 1, 3 (2011).

I. TNR IN THE UNITED STATES

Drawing on recent criminal indictments filed in U.S. federal courts, Part I explores the scope and methods of TNR. This Part focuses on the repressive methodologies to which domestic law enforcement can respond through government investigation, systematic disruption, and eventual prosecution. Although TNR is not a new tool of repression, modern developments have contributed to its rise. Perpetrator States have capitalized on the advent of commercially available spyware[26] and expanded their hacking capabilities at low cost.[27] Additionally, many Perpetrator States have either secured extradition treaties with "Host States"[28]—thereby increasing their access to dissidents overseas—or retroactively justify extrajudicial renditions as counter-terrorism operations. TNR thus imperils the United States' sovereignty and its residents' constitutional rights. If the United States fails to strengthen its response in combating repressive tactics, it risks implicitly endorsing TNR by default.

A. THE METHODS OF TNR

TNR is not a new phenomenon. Documented examples of authoritarian regimes repressing enemies beyond borders abound.[29] Notable examples include the assassination of Russian revolutionary Leon Trotsky in Mexico in 1940,[30] the car-bombing of Chilean diplomat Orlando Letelier in Washington, D.C. in

26. *See* David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Surveillance and Human Rights*, ¶ 6, U.N. Doc. A/HRC/41/35 (May 28, 2019).

27. *See* Noura Aljizawi & Siena Anstis, *The Effects of Digital Transnational Repression and the Responsibility of Host States*, LAWFARE (May 27, 2022, 8:01 AM), https://www.lawfaremedia.org/article/effects-digital-transnational-repression-and-responsibility-host-states [https://perma.cc/YV5M-XNVY].

28. This Note refers to states against which Perpetrator States deploy TNR as "Host States," mirroring the treatment used in Aljizawi & Anstis, *supra* note 27.

29. *See* Yossi Shain, *The War of Governments Against Their Opposition in Exile*, 24 GOV'T & OPPOSITION 341, 341 (1989) (noting that political exiles' activities "have long been a source of unease for governments" dating back to the mid-19th century).

30. *See* Mike Abramowitz & Nate Schenkkan, Opinion, *The Long Arm of The Authoritarian State*, WASH. POST (Feb. 3, 2021), https://www.washingtonpost.com/opinions/2021/02/03/freedom-house-transnational-repression-authoritarian-dissidents/ [https://perma.cc/QQ8C-TBG9].

1976,[31] and the international pursuit of "stray dogs" who politically opposed Libyan leader Muammar Gaddafi in the 1980s.[32] In the past 15 years, the rate of TNR has accelerated.[33] On the global stage, Freedom House—a non-profit at the cutting edge of TNR research—has recorded 854 direct, physical incidents of TNR committed by 38 governments in 91 countries between 2014 and 2022.[34] In the United States, the Federal Bureau of Investigation (FBI) has noted a recent rise in authoritarian efforts "to interfere with freedom of expression and punish dissidents abroad."[35] Among the most prolific perpetrators in the United States are the People's Republic of China (the PRC or China), Iran, Russia, Rwanda, Türkiye, Saudi Arabia, and the United Arab Emirates (UAE).[36]

Freedom House has divided the spectrum of TNR methods into four categories: (1) direct attacks, (2) threats from a distance, (3) co-opting other countries, and (4) mobility controls.[37] These methods' "common thread" is their cross-border nature: all four aim to track down, silence, and repatriate dissidents engaging in transnational advocacy or fleeing repressive regimes.[38] But only the first two are entirely within the purview of U.S. law enforcement. Direct attacks and threats from a distance occur in or affect persons domiciled all over the world,[39] but this Note focuses on their specific impact on persons based in or from the United States. U.S. law enforcement is well-positioned to respond to direct attacks and threats from a distance, and they are

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31. *See* Karen DeYoung et al., '*This Was Not an Accident. This Was a Bomb.*,' WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/sf/national/2016/09/20/this-was-not-an-accident-this-was-a-bomb/ [https://perma.cc/7HFS-6D32].

32. *See* LAURA PITTER, HUM. RTS. WATCH, DELIVERED INTO ENEMY HANDS: US-LED ABUSE AND RENDITION OF OPPONENTS TO GADDAFI'S LIBYA 19 (Sept. 5, 2012).

33. *See* Joe Davidson, Opinion, *U.S. Fails to Combat Nations That Attack Dissidents Abroad, Report Warns*, WASH. POST (Oct. 13, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/10/13/transnational-repression-china-turkey-america-gao/ [https://perma.cc/PSA6-CGGS].

34. *See* GOROKHOVSKAIA, *supra* note 5, at 1.

35. *Worldwide Threats to the Homeland: Hearing Before the H. Comm. on Homeland Security*, 117th Cong. 36 (2022) (statement of Christopher Wray, Dir., Fed. Bureau Investigations); *see also Federal Bureau of Investigation Oversight: Hearing Before the H. Judiciary Comm.*, 118th Cong. 8 (2023) [hereinafter *Judiciary Hearing on Oversight of the FBI*] (statement of Christopher Wray, Dir., Fed. Bureau Investigations).

36. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 11.

37. *See* SCHENKKAN & LINZER, *supra* note 6, at 9.

38. Siena Anstis et al., *Transnational Repression and the Different Faces of Sovereignty*, 95 TEMP. L. REV. 641, 646 (2023).

39. *See* SCHENKKAN & LINZER, *supra* note 6, at 9.

responsible for the safety of U.S. persons and persons in the United States. As such, this Note focuses on optimizing U.S. law enforcement's approach to combating the first two methods of TNR against U.S. persons and persons in the United States. The latter two methods—co-option[40] and mobility controls[41]—extend beyond the scope of this Note because they exploit vulnerabilities in systems external to the United States. Because U.S. law enforcement cannot act outside its domestic mandate, diplomatic coordination is a strong option for curbing the impact of co-option and mobility controls.[42]

Under the first method of direct attacks, agents of Perpetrator States engage in physical altercations with individuals located abroad, employing tactics such as harassment, intimidation, assault, kidnapping, enforced disappearance, and extraordinary rendition.[43] These visible methods are a byproduct of complex and

40. Through co-option, Perpetrator States manipulate other countries' institutions to detain, deport, or transfer targets for rendition. This often includes legal requests for extradition or submissions for "national security information" in an asylum case that either work to transfer the dissident to the Perpetrator State or undermine the dissident's confidence in the Host State's democratic institutions. A common tool of exploitation is INTERPOL's Red Notice system, which allows domestic law enforcement agencies to request the extradition of a wanted national. *See id.* For instance, American businessman Bill Browder famously became the target of Russian President Vladimir Putin, who prosecuted him in absentia and sought to add him to INTERPOL's Red Notice list. *See generally* BILL BROWDER, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, AND ONE MAN'S FIGHT FOR JUSTICE (2015). In the United States, the U.S. Department of State (DOS) has purview over extradition and INTERPOL requests; thus, this Note does not consider the law enforcement response to co-option.

41. With mobility controls, Perpetrator States restrict targets' and their associates' ability to travel through passport revocation, denial of consular services, and falsely recording passports as lost or stolen, often detaining people in transit. *See* SCHENKKAN & LINZER, *supra* note 6, at 9, 12–13. Hong Kong, for example, issued baseless arrest warrants for exiled pro-democracy activists in 2020, some of whom resided in the United States. These activities effectively barred these exiles from traveling to Hong Kong or any country that signed an extradition treaty with Hong Kong or the PRC. *See Hong Kong: Warrants Aim at Activists Abroad*, HUM. RTS. WATCH (July 4, 2023, 9:00 AM), https://www.hrw.org/news/2023/07/04/hong-kong-warrants-aim-activists-abroad [https://perma.cc/T69X-QGDB]. Given that consular rights and privileges fall under the DOS' domain, this Note does not reach law enforcement's response to mobility controls.

42. *See* SCHENKKAN & LINZER, *supra* note 6, at 10–13.

43. *See id.* at 9–10. Enforced disappearance refers to the arrest, detention, or abduction of individuals by agents of a state or non-state actors, who secretly hold the individuals without legal process, deny their whereabouts, or conceal their fate. *See* G.A. Res. 47/133, International Convention for the Protection of All Persons from Enforced Disappearance, art. 2 (Dec. 23, 2006). Extraordinary or forced rendition is "the governmental transfer without legal process of a person to another country where it is more likely than not he will be tortured." Aziz Z. Huq, *Extraordinary Rendition and the Wages of Hypocrisy*, 23 WORLD POL'Y J. 25, 25 (2006).

coordinated coercive activities against exiles.[44] For instance, the Department of Justice (DOJ) disrupted two plots against women's rights activist Masih Alinejad, a U.S. citizen of Iranian origin.[45] In 2020 and 2021, Iranian intelligence officials surveilled Alinejad in New York City and plotted to kidnap her for rendition back to Iran, where her future would be uncertain at best.[46] The defendants leveraged U.S. businesses and institutions in furtherance of this conspiracy, including employing private investigators to surveil the victim,[47] procuring financial services to launder money,[48] and finding military-grade speedboat providers who could effectuate a maritime evacuation to Venezuela.[49] Although the FBI thwarted and charged the original plot in *United States v. Farahani, et al.*, the Iranian government persisted. One year later, the DOJ unsealed *United States v. Amirov, et al.*, charging members of an Eastern European criminal organization hired to assassinate Alinejad in her Brooklyn residence.[50] And a year after that, a DOJ complaint exposed a third Iranian-backed plot to locate and kill Alinejad.[51] Iranian intelligence has continued to attempt to use direct attacks to curb Alinejad's free speech and international advocacy on U.S. soil.[52]

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44. *See* SCHENKKAN & LINZER, *supra* note 6, at 10.

45. *See* Press Release, U.S. Dep't of Just., Iranian Intelligence Officials Indicted on Kidnapping Conspiracy Charges (July 13, 2021), https://www.justice.gov/opa/pr/iranian-intelligence-officials-indicted-kidnapping-conspiracy-charges [https://perma.cc/D5KG-R6EF]; *see also* Press Release, U.S. Dep't of Just., Justice Department Announces Charges and New Arrest in Connection with Assassination Plot Directed from Iran (Jan. 27, 2023), https://www.justice.gov/opa/pr/justice-department-announces-charges-and-new-arrest-connection-assassination-plot-directed [https://perma.cc/HR7Z-RVG8] [hereinafter *Charges and New Arrest*].

46. *See Charges and New Arrest*, *supra* note 45; *see also* Sealed Superseding Indictment at 3, United States v. Farahani, No. 21-CR-430 (S.D.N.Y. July 13, 2021), ECF No. 14.

47. *See* Sealed Superseding Indictment at 3, *Farahani,* No. 21-CR-430 (S.D.N.Y. July 13, 2021), ECF No. 14.

48. *See id.*

49. *See id.* Venezuela's de facto government has friendly relations with Iran, thereby easing the extradition process. *See id.* at 4.

50. *See* Sealed Superseding Indictment at 1–2, United States v. Amirov, No. 22-CR-438 (S.D.N.Y. May 23, 2023), ECF No. 36. For the latest indictment, see United States v. Amirov, No. 22-CR-438 (S.D.N.Y. Oct. 17, 2024), ECF No. 80.

51. *See* Complaint, United States v. Shakeri, No. 24-MJ-3904 (S.D.N.Y. Nov. 8, 2024), ECF No. 1.

52. *See Charges and New Arrest*, *supra* note 45; *see also* Press Release, U.S. Dep't of Just., U.S. Attorney Announces Murder-For-Hire and Related Charges Against IRGC Asset and Two Local Operatives (Nov. 7, 2024), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-murder-hire-and-related-charges-against-irgc-asset-and-two-local [https://perma.cc/2BC4-BRHJ].

By contrast, through threats from a distance, agents of Perpetrator States do not physically leave their territory to repress individuals abroad; instead, they resort to digital means or coercion by proxy.[53] Using digital means, agents of Perpetrator States issue online threats and surveil dissidents' activities.[54] Their ability to undertake digital repression at scale and obfuscate its origins renders digital TNR particularly pernicious.[55] The PRC ranks as one of the more prolific purveyors of threats from a distance.[56] Through "Operation Foxhunt," the PRC uses digital threats from a distance, such as surveilling targets and sending threatening messages to intimidate and repatriate nationals.[57] Veiled as an anti-corruption campaign against economic fugitives, Operation Foxhunt is, in actuality, a calculated offensive often targeting political dissidents, as well as religious and ethnic minority groups.[58] In response, the DOJ has issued multiple indictments concerning plots arising from Operation Foxhunt. For example, in *United States v. Bai, et al.*, federal prosecutors charged 34 agents based in the PRC.[59] These agents, assigned to the elite police task force, the "912 Special Project Work Group,"[60] created

53. *See* SCHENKKAN & LINZER, *supra* note 6, at 9, 13–14.

54. *See id.* at 14; *see also* OFF. DIR. NAT'L INTEL., NAT'L INTEL. COUNCIL, NICA 2022-22810, DIGITAL REPRESSION GROWING GLOBALLY, THREATENING FREEDOMS 1 (2022) (defining digital repression as the "use of digital information and communication technologies to surveil, manipulate, or coerce individuals or groups to control public debate and prevent challenges to leaders' hold on power").

55. *See* Aljizawi & Anstis, *supra* note 27.

56. *See* YANA GOROKHOVSKAIA & ISABEL LINZER, FREEDOM HOUSE, CHINA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY 15 (2022) ("China conducts the most sophisticated, global, and comprehensive campaign of transnational repression in the world.").

57. *See* Press Release, U.S. Dep't of Just., Man Charged with Transnational Repression Campaign While Acting as an Illegal Agent of the Chinese Government in the United States (Mar. 30, 2022), https://www.justice.gov/opa/pr/man-charged-transnational-repression-campaign-while-acting-illegal-agent-chinese-government [https://perma.cc/6ZZL-B99K].

58. *See* Bertram Lang, *China's Anti-Graft Campaign and International Anti-Corruption Norms: Towards a "New International Anti-Corruption Order"?*, 70 CRIME L. SOC. CHANGE 331, 340–42 (2018). In 2014, the PRC also debuted Operation Skynet to restrict the recovery of fugitives' assets. *See* Noah E. Lipkowitz, *Why Countries Diverge over Extradition Treaties with China: The Executive Power to Extradite in Common and Civil Law Countries*, 59 VA. J. INT'L L. 449, 461 (2019).

59. *See* Complaint and Affidavit in Support of Application for Arrest Warrants at 9–10, United States v. Bai, No. 23-MJ-334 (E.D.N.Y. Apr. 6, 2023), ECF No. 2 [hereinafter Bai Complaint].

60. Press Release, U.S. Dep't of Just., 40 Officers of China's National Police Charged in Transnational Repression Schemes Targeting U.S. Residents (Apr. 17, 2023), https://www.justice.gov/opa/pr/40-officers-china-s-national-police-charged-transnational-repression-schemes-targeting-us [https://perma.cc/L2XA-E2B6].

thousands of fake online personas to target Chinese dissidents.[61] Their "troll farm" prevented persons in the U.S. from exercising free speech in a manner disagreeable to the PRC.[62]

Coercion by proxy, a subset of threats from a distance, is another low-cost tool by which agents of Perpetrator States pressure dissidents' loved ones, who remain domiciled in the Perpetrator State's territory.[63] This method applies extreme psychological pressure on the target without directly contravening another country's legal system, making it less likely to draw international opprobrium.[64] For instance, in *United States v. Sun Hoi Ying*, Chinese customs officials held the target's pregnant daughter against her will by issuing an "exit ban" against her.[65] These PRC officials did not permit her to leave the country until she persuaded her dissident father to return.[66] Threats from a distance are not exclusive to the PRC. Before plotting direct attacks against Alinejad, Iran attempted to use her family to lure her to Türkiye for capture.[67] Iranian officials pressured her sister to condemn and disown Alinejad publicly and sentenced her brother to eight years in prison, allegedly for tipping off Alinejad about its abduction plot.[68]

Agents of Perpetrator States have a broad range of methods to draw on in their repressive toolkit. Indeed, they have done just that, deploying cross-border tactics to silence dissent among populations located in or affiliated with the United States. Although U.S. diplomats may be better positioned to counter methods requiring international solutions, U.S. law enforcement can and should combat the repressive activity occurring within its territory and against its nationals.

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61. *See* Bai Complaint, *supra* note 59.

62. U.S. Dep't of Just., U.S. Attorney Announces Murder-for-Hire and Related Charges, *supra* note 58.

63. *See* SCHENKKAN & LINZER, *supra* note 6, at 13–14.

64. *TNR Watch: Coercion at Home, Pressure Abroad*, FREEDOM HOUSE (Sept. 5, 2023), https://freedomhouse.org/article/TNR-Update/coercion-home-pressure-exiles-abroad [https://perma.cc/4A56-RP5S].

65. Sealed Complaint at 7–9, United States v. Sun Hoi Ying, No. 22-MAG-1711 (S.D.N.Y. Feb. 18, 2022).

66. *See id.*

67. *See* Joel Schectman, *U.S. Charges Four with Plot to Kidnap New York Journalist Critical of Iran*, REUTERS (July 14, 2021, 12:09 PM), https://www.reuters.com/world/us/us-charges-iranian-nationals-with-kidnapping-2021-07-13/ [https://perma.cc/PG9L-9M87].

68. *See Prison Sentences for Relatives of Iranian Journalists*, REPS. WITHOUT BORDERS (July 22, 2020), https://rsf.org/en/prison-sentences-relatives-iranian-journalists [https://perma.cc/QB3J-R6HB].

B. ACCOUNTING FOR THE RISE IN TNR

The increased globalization of activist networks, sophistication of technology, and normalization of cross-border, repressive activity largely account for the recent spike in TNR activity. In the early 2000s, political scientist Yossi Shain identified three factors heightening the risk of TNR: (1) the Perpetrator State's perception of the threat posed by the exile, (2) the available methods for suppressing exiles, and (3) the cost-benefit analysis of resorting to such coercive methods.[69] Although Perpetrator States' goals remain unchanged from the early 2000s—such as uncovering and accessing dissident networks, unearthing information to extort or locate dissidents, and chilling speech antithetical to the Perpetrator State's interests—the conditions from which TNR emerges have evolved.[70] This Note argues that, today, TNR has accelerated due to (1) the globalization of activism, (2) the ease of access to repressive technologies, and (3) the erosion of international norms against extraterritorial violence.[71] These changed conditions, in turn, increase the risks associated with Shain's three factors.

First, the globalization of activist networks has increased Perpetrator States' perception of exiles' threat.[72] As authoritarians come to rely on open borders for economic purposes, such openness simultaneously threatens their regimes.[73] Permitting mass emigrations positively provides access to global economies but negatively undermines state control of overseas citizens' political activity.[74] Trapped by this "illiberal paradox," authoritarians must simultaneously "keep their economies and societies open" to maintain a competitive advantage, but also curb "greater political risks" associated with its emigrant population.[75]

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69. *See* SHAIN, *supra* note 15, at 161–62.

70. *See* SCHENKKAN & LINZER, *supra* note 6, at 5–8.

71. *See id.* at 5.

72. *See id.*

73. *See* Gerasimos Tsourapas, *Global Autocracies: Strategies of Transnational Repression, Legitimation, and Co-Optation in World Politics*, 23 INT'L STUDS. REV. 616, 618–19, 636 (2021).

74. *See* NATE SCHENKKAN ET AL., FREEDOM HOUSE, PERSPECTIVES ON "EVERYDAY" TRANSNATIONAL REPRESSION IN AN AGE OF GLOBALIZATION 1–2 (July 2020).

75. *See* Tsourapas, *supra* note 73, at 636 (discussing an authoritarian state's *ill*iberal paradox). For more on a democratic state's *liberal* paradox, see James F. Hollifield, *The Emerging Migration State*, 38 INT'L MIGRATION REV. 885, 887 (2004) ("[M]igration can be seen as a threat to national security, and it can lead to conflicts within and between states.

Thus, to reassert control over migrants, Perpetrator States draw on long-arm governance tactics like TNR to permeate borders. As a result, political exiles who have found refuge in liberal democracies "cannot fully 'exit' from authoritarianism" after emigration.[76]

Second, Perpetrator States' capacity for TNR has grown through the advent and increasing sophistication of technology.[77] Although digital technologies benefit society by providing a platform for communication, collaboration, and mobilization, they also harm society by exposing users to digital surveillance, hacking attacks, and online harassment.[78] This contradiction reflects the modern reality that "the capacity to connect [in the digital world] has vastly outpaced the ability to secure."[79] Today, the same technology facilitating online collaboration in dissident communities also provides Perpetrator States with the mechanisms to discover and destabilize them.[80]

The private sector monopolizes the development of surveillance technology.[81] In 2016, over 500 private companies developed, marketed, and sold such products to government purchasers.[82] This includes firms like NSO Group, Cytrox, and Candiru, whose technologies have been linked to infamous TNR incidents like the assassination of journalist Jamal Khashoggi.[83] These private

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Hence the liberal paradox: the economic logic of liberalism is one of openness, but the political and legal logic is one of closure.") (citations omitted).

76. Dana M. Moss, *Transnational Repression, Diaspora Mobilization, and the Case of the Arab Spring*, 63 SOC. PROBS. 480, 481 (2016).

77. *See* SCHENKKAN & LINZER, *supra* note 6, at 6.

78. *See* SCHENKKAN ET AL., *supra* note 74, at 5.

79. John Scott-Railton, *Security for the High-Risk User: Separate and Unequal*, INST. ELEC. & ELECS. ENG'RS SEC. & PRIV. (SPECIAL ISSUE) 79, 79 (2016).

80. *See* SCHENKKAN & LINZER, *supra* note 6, at 6.

81. *See* Privacy Int'l, Submission to the UN High Commissioner for Human Rights' Report on the Practical Application of the United Nations Guiding Principles on Business and Human Rights to the Activities of Technology Companies, 5 (Feb. 23, 2022), https://www.privacyinternational.org/sites/default/files/2022-04/2022.02.23%20-%20PI%20Submission%20to%20OHCHR%20Report%20on%20UNGPs%20and%20Tech%20Companies.pdf [https://perma.cc/A9PV-FD75] (observing that "technologies deployed for private purposes [are] being co-opted by public authorities for policing or other surveillance purposes, without following procurement processes nor applying safeguards;" pointing to Amazon Ring's agreement with police forces to grant them access to private surveillance networks as an example); *see also* Kaye, *supra* note 26, at ¶ 6 ("Some States develop targeted surveillance tools within their own agencies and departments, others repurpose existing 'off the shelf' crimeware products and others may purchase sophisticated commercial spyware on the international surveillance market.") (internal citation omitted)).

82. *See* Kaye, *supra* note 26, at ¶ 6.

83. *See* Stephanie Kirchgaessner et al., *Revealed: Leak Uncovers Global Abuse of Cyber-Surveillance Weapon*, GUARDIAN (July 18, 2021, 12:00 PM), https://www.theguardian.com/

sellers operate in an underregulated international marketplace without any fiduciary or general duty to interrogate buyers' motives.[84] They equip buyers with hyper-invasive technologies that can intercept real-time communication and grant access to a device's camera and microphone.[85] Even against the risk of public backlash for using such intrusive technologies,[86] governments remain highly motivated to acquire the latest spyware and stay ahead of the curve.[87] This, in turn, contributes to countries deprioritizing global regulation of the industry.[88]

Expensive spyware is not the only digital means for effectuating TNR.[89] Increasingly, Perpetrator States have refined their basic hacking techniques to target dissidents.[90] Perpetrator States have capitalized on the increased usage of social media platforms to lead coordinated surveillance, harassment, disinformation, doxing, and distributed denial-of-service (DDoS) attacks.[91] For instance, in March 2021, Meta disrupted PRC hackers targeting approximately 500 Uyghurs living abroad—including in the United States—who fled from the threat of forced assimilation and detention in Northwest China.[92] Posing as activists and journalists, these hackers sent Uyghur targets links to malicious websites, some of which resembled Uyghur or Turkish news websites, and upon clicking the links, the sites would infect the targets' devices with

world/2021/jul/18/revealed-leak-uncovers-global-abuse-of-cyber-surveillance-weapon-nso-group-pegasus [https://perma.cc/GAB5-RU5S] (noting the abuse of NSO's hacking spyware, Pegasus).

84. *See* Aljizawi & Anstis, *supra* note 27.

85. *See id.*

86. *See* STEVEN FELDSTEIN & BRIAN KOT, CARNEGIE ENDOWMENT FOR INT'L PEACE, WHY DOES THE GLOBAL SPYWARE INDUSTRY CONTINUE TO THRIVE? TRENDS, EXPLANATIONS, AND RESPONSES 19 (2023) ("Bahrain, Morocco, and the UAE have faced extensive criticism for deploying spyware against government critics and journalists.").

87. And this curve is significant. Between 2011 and 2023, the Carnegie Endowment for International Peace reported that "at least [74] governments contracted with commercial firms to obtain spyware or digital forensics technology . . . ." *See id.* at 1.

88. *See id.* at 6.

89. *See* Aljizawi & Anstis, *supra* note 27 ("[T]he proliferation of surveillance tools means that states do not necessarily need access to expensive tools like Pegasus spyware. Instead, they can engage in more basic forms of hacking . . . .").

90. *See id.*

91. In DDoS attacks, Perpetrator States flood dissidents' online channels until their servers lag and malfunction. DDoS attacks are low cost and difficult to distinguish from regular traffic activity, making it an attractive methodology of digital TNR. *See id.*

92. *See* Ellen Nakashima, *Facebook Disrupts China-Based Hackers It Says Spied on Uyghur Muslim Dissidents and Journalists Living Outside China, Including in the U.S.*, WASH. POST (Mar. 24, 2021, 2:00 PM), https://www.washingtonpost.com/national-security/china-espionage-uyghurs-facebook/2021/03/24/7f2978d2-8c38-11eb-a6bd-0eb91c03305a_story.html (on file with the *Columbia Journal of Law & Social Problems*).

malware.[93] Although private companies like Meta have monitored this kind of online behavior in the past,[94] their prevention efforts are not foolproof, and Americans have little faith that these companies can protect their online privacy.[95] The lack of comprehensive U.S. regulation on data privacy compounds online vulnerability.[96] Responsibility for digital hygiene is delegated to private companies or individuals rather being protected by the government,[97] meaning that any lapses in safeguarding user data—either by companies or individuals—can expose users to transnational threats.

Third, as TNR becomes more normalized, the international costs of resorting to TNR decline, and more countries are then willing to resort to these coercive methods.[98] To ensure a smooth extradition process of their political dissidents, some Perpetrator States have prioritized entering extradition treaties with other countries, including democracies.[99] By formalizing friendly relations through legitimate channels, Perpetrator States can extradite targets lawfully at no reputational cost.[100] Extradition may be not automatic upon treaty ratification—countries must

93. *See id.*

94. Meta recently replaced its third-party fact-checking program with a Community Notes model, shifting content moderation from employees to users. *See* Joel Kaplan, *More Speech and Fewer Mistakes*, META (Jan. 7, 2025), https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/ (on file with the *Columbia Journal of Law & Social Problems*).

95. *See* Michelle Faverio, *Key Findings about Americans and Data Privacy*, PEW RSCH. CTR. (Oct. 18, 2023), https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/ [https://perma.cc/2AVU-YV8N] ("Some 77% of Americans have little or no trust in leaders of social media companies to publicly admit mistakes and take responsibility for data misuse. They are no more optimistic about the government reining them in: 71% have little to no trust that tech leaders will be held accountable for their missteps.").

96. *See* Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), https://www.cfr.org/report/reforming-us-approach-data-protection [https://perma.cc/2NN7-A6WJ] (noting the United States' lack of comprehensive legal approach to data privacy creates "contradictory protections").

97. *See* YANA GOROKHOVSKAIA & ISABEL LINZER, FREEDOM HOUSE, DEFENDING DEMOCRACY IN EXILE 26 (June 2022).

98. *See* SCHENKKAN & LINZER, *supra* note 6, at 7.

99. *See id.* at 17 ("China has proven particularly adept at using its geopolitical and economic clout to provoke foreign governments in countries as diverse as India, Thailand, Serbia, Malaysia, Egypt, Kazakhstan, the United Arab Emirates, [Türkiye], and Nepal to use their own security forces to detain—and in some cases deport to China—CCP critics, members of targeted ethnic or religious minorities, and refugees.").

100. *See* Rachel Brewster, *Reputation in International Relations and International Law Theory*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 524, 527 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) ("Because reputation is thought to be relevant to a state's future set of potential cooperative ventures, the loss of reputation can deter states from violating international agreements.").

also review individual requests for legitimacy—but extradition agreements normalize friendly relations between contracting states and streamline the process.[101] Additionally, dissidents hiding in contracting states are under greater stress of discovery, keenly aware that the Perpetrator State could bring fraudulent charges against them to facilitate their repatriation. Consider, for instance, the PRC, which has sought to expand its network of formal extradition treaties in furtherance of Operation Foxhunt.[102] It has recently signed treaties with France, Italy, and Australia and begun negotiations with New Zealand and Canada.[103] Although these countries must vet the appropriateness of the extradition requests, their willingness to formalize extradition treaties with the PRC reflect their increased willingness to legitimize the PRC's claims.[104]

If extradition negotiations break down, Perpetrator States default to TNR as an extrajudicial strategy to target exiled communities. Today, international norms against extraterritorial assassination are eroding.[105] Autocracies like Saudi Arabia and Iran engage in brazen efforts to assassinate prominent advocates.[106] Notwithstanding a few instances of individual sanctions and criminal indictments, these countries have faced minimal diplomatic repercussions, which have had the "second-order effect of making extraterritorial assassination less unthinkable."[107] Without consequences, Perpetrator States are emboldened to engage in TNR.

To further legitimize their actions, Perpetrator States capitalize on the international community's concern for terrorism

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101. *See* SCHENKKAN & LINZER, *supra* note 6, at 11.

102. *See* ANDREW HARTNETT ET AL., U.S.-CHINA ECON. & SEC. REV. COMM., CHINA'S GLOBAL POLICE STATE: BACKGROUND AND U.S. POLICY IMPLICATIONS 3 (2023) ("China is also using extradition treaties and its membership in multilateral law enforcement platforms to carry out transnational repression.").

103. *See* THOMAS EDER ET AL., MERICS CHINA MONITOR, CHINA'S GLOBAL LAW ENFORCEMENT DRIVE: THE NEED FOR A EUROPEAN RESPONSE 4 (2017). Canada and Australia are two of the most common destinations for China's fugitives. *See* Lipkowitz, *supra* note 58, at 463.

104. *See* SCHENKKAN & LINZER, *supra* note 6, at 17; *see also* Lipkowitz, *supra* note 58, at 480–81.

105. *See* Nathan Kohlenberg, *Does the US Response to India's Alleged Extraterritorial Assassination Schemes Signal Impunity?*, JUST SEC. (Jan. 10, 2024), https://www.justsecurity.org/91136/does-the-us-response-to-indias-alleged-extraterritorial-assassination-schemes-signal-impunity/ [https://perma.cc/E2ZL-PATQ].

106. *See id.*

107. *Id.*

and abuse this label. Over 50% of Perpetrator States opportunistically characterize targets as terrorist or extremist threats.[108] Because there is no international standard for terrorism, the term "terrorist" is ripe for abuse.[109] Its ambiguity contributes to its misappropriation, even against political exiles. Perpetrator States sometimes even cite U.S. and Israeli examples of extrajudicial enforcement in the War on Terror and the Gaza Strip, defending aggressive, extraterritorial actions as necessary counterterrorism operations.[110] Although Perpetrator States' claims of "terrorism" are tenuous and often fraudulent, the fear that the label inspires provides Perpetrator States with a powerful justification for hunting down their targets.

These current conditions—increasing globalization, technology, and norm-sliding—aggravate the inherent risks associated with living as a dissident abroad. And the very conditions that can build global alliances amongst dissident communities can also tear them down, providing Perpetrator States with the means to uncover and stifle dissent. In an atmosphere ripe for change and challenge, Perpetrator States seem to be a step ahead, committing TNR at an alarming rate.

C. THE U.S. INTEREST IN DEFENDING AGAINST TNR

In formulating its response, the United States must consider what is at stake when Perpetrator States resort to TNR. At its core, TNR is an affront to state sovereignty. As U.S. law has long recognized, states have the "right to exercise, to the exclusion of any other [s]tate, the functions of a [s]tate."[111] Under a Westphalian concept of sovereignty,[112] the Host State wields

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108. *See* GOROKHOVSKAIA & LINZER, DEFENDING DEMOCRACY, *supra* note 97, at 11 n.43 (noting that "389 of 734 cases involved accusations of terrorism and/or extremism"). Perpetrator States leverage accusations of terrorism retroactively and proactively. Retroactively, Perpetrator States justify their actions abroad as counterterrorism measures. Proactively, Perpetrator States secure the Host State's cooperation to target certain dissident populations. For instance, Ankara and Beijing signed an extradition treaty in 2017 that could facilitate the repatriation of Uyghurs if they are charged with terrorism. *See id.* at 6, 9, 11.

109. *See* Ben Saul, *Defining Terrorism in International Law*, NYU L. GLOBALEX, Nov./Dec. 2021, https://www.nyulawglobal.org/globalex/Defining_Terrorism_International_Law.html [https://perma.cc/BK3C-8PWG].

110. *See* SCHENKKAN & LINZER, *supra* note 6, at 7 n.19.

111. Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

112. The Peace of Westphalia refers to a historical event transformed into a conceptualization of the international system. Westphalian systems center on the

"exclusive power or jurisdiction over territory and population, fettered only by the requirements of international law."[113] The Host State retains the principal authority to respond when a citizen contravenes domestic policy.[114] When a citizen breaches domestic law outside the state's territory, the state must navigate legitimate channels to exercise its enforcement jurisdiction.[115]

States have long asserted a basis for extraterritorial enforcement jurisdiction through five principles: (1) territoriality, involving crimes impacting the domestic territory; (2) nationality, involving crimes committed by its nationals; (3) passive personality, involving crimes committed against its nationals; (4) protection, involving crimes impacting national interests; and (5) universality, involving crimes universally condemned.[116] Alone, these principles are insufficient in legitimizing extraterritorial enforcement. The Host State's consent is the necessary factor.[117] TNR is an illegitimate exercise of a government's extraterritorial enforcement power.

When a Perpetrator State commits TNR, it violates two key tenets of extraterritorial enforcement: consent and intent. Regarding consent, the Perpetrator State operates in the Host State's territory without the Host State's agreement. Regarding

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"supremacy of state sovereignty, territoriality, and nonintervention, to the exclusion of other meanings." Sebastian Schmidt, *To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations*, 55 INT'L STUDS. Q. 601, 601 (2011).

113. Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 261 (2001).

114. *See* Schmidt, *supra* note 112, at 614.

115. Deriving from the Westphalian concept of sovereignty, enforcement jurisdiction affords domestic law enforcement to "operate within its territory . . . in the absence of the authorisation of other states or a special permissive rule under international law." Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 195 (2014).

116. *See* CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW: AN ABBREVIATED SKETCH 3 (2023).

117. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 402(2) (AM. L. INST. 2015) ("A state may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state."); *see also* William S. Dodge, *Recent Developments in the United States: Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PRIV. INT'L L. 143, 162 (2016). As Chief Justice Marshall remarked in *Schooner Exchange v. M'Faddon*:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. 11 U.S. (7 Cranch) 116, 136 (1812).

intent, the Perpetrator State is primarily motivated to quash dissent rather than respond to crime committed by its nationals, which would be covered under the nationality principle; however, no principle of extraterritorial enforcement jurisdiction legitimizes a state's intent to disrupt cross-border dissent.[118] A Perpetrator State may try to defend its actions as an extension of its extraterritorial enforcement power,[119] yet these methods are illegitimate without the Host State's consent and the appropriate intent.[120]

Whether digital TNR violates a Host State's sovereignty—without an agent of the Perpetrator State physically entering the Host State's territory—determines if it can similarly be considered an illegitimate use of extraterritorial enforcement power.[121] The United States should adopt a broader conception of sovereignty. So long as the Perpetrator State's activity targets and impacts U.S. residents without the United States' consent, it violates the United States' domestic rule of law. The United States must actively treat TNR—including digital methods—as violative of its sovereignty, or it risks implicitly permitting the exercise of TNR.

Just as TNR violates state sovereignty, it imperils the status of "individual sovereignty"—the human rights and fundamental freedom of every individual.[122] In the United States, individual sovereignty is rooted in the rights protected by the U.S. Constitution. Respect for freedom of expression is a bedrock American principle arising from the First Amendment.[123] The Supreme Court has recognized its obligation to "guard against undue hindrances to political conversations."[124] In view of the

118. *See* Anstis, *supra* note 38, at 652.

119. TNR "concerns the exercise of state violence outside [the] territorial border and the implicit assertion . . . that it can control individual[s] anywhere it pleases. In that sense, we can perhaps conceive of [TNR as] . . . an act of enforcement jurisdiction." Anstis, *supra* note 38, at 652–53 (citations omitted).

120. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 402(2) (AM. L. INST. 2015).

121. *See generally* Asaf Lubin, *The Prohibition on Extraterritorial Enforcement Jurisdiction in the Datasphere*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW 339 (Austen Parrish & Cedric Ryngaert eds., 2023) (arguing that the principles of state sovereignty are incompatible with modern cyber enforcement efforts).

122. *See* Anstis, *supra* note 38, at 657 (citing Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST (Sept. 16, 1999), https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty [https://perma.cc/9ALN-VBHM]).

123. *See The Threat of Transnational Repression from China and the U.S. Response: Hearing Before the Joint Cong.-Exec. Comm. on China*, 117th Cong. 22 (2022) [hereinafter *Comm. on China Hearing on the Threat of TNR*] (statement of Hon. Uzra Zeya, Under Sec'y for Civilian Sec., Democracy, and Hum. Rts., U.S. Dep't of State).

124. Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 192 (1999).

First Amendment's overriding purpose "to protect the free discussion of governmental affairs,"[125] the United States has an obligation to defend political dissidents' speech rights. When Perpetrator States use TNR to silence dissent, they undermine the United States' ability to protect these freedoms. Permitting any encroachment endangers the foundations on which U.S. democracy is built.[126]

The United States must reinforce democratic principles to guard against imported repression. This includes taking active and public steps to shine a light on the illicit conduct in the United States, charging those responsible, engaging communities likely to be targeted, and coordinating global efforts to counter anti-democratic forces.[127] Protection must extend to all U.S.-based persons, regardless of their citizenship status.[128] People worldwide "are drawn to the United States by the promise of living in a free and open society that adheres to the rule of law."[129] To realize this promise, the United States must defend and protect the rights guaranteed to all.

II. DOMESTIC PROSECUTIONS OF TNR

Part II of this Note surveys and critiques the U.S. criminal statutory response to the growing threat of TNR. In the absence of laws directly criminalizing TNR, some U.S. Attorney's Offices (USAOs) have begun to charge TNR cases under a patchwork of statutes. Though rarely applied otherwise, 18 U.S.C. § 951 specifically predominates in TNR prosecutions. Congress designed Section 951 to counter the activities of unregistered agents under the direction or control of foreign governments. Section 951 is

125. Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

126. *See* Press Release, U.S. Dep't of Just., Two Arrested and 13 Charged in Three Separate Cases for Alleged Participation in Malign Schemes in the United States on Behalf of the Government of the People's Republic of China (Oct. 24, 2022), https://www.justice.gov/opa/pr/two-arrested-and-13-charged-three-separate-cases-alleged-participation-malign-schemes-united [https://perma.cc/725L-WR2E].

127. *See Written Testimony of Sophie Richardson, Ph.D., CCP Transnational Repression: The Party's Effort to Silence and Coerce Critics Overseas: Hearing Before the H. Select Comm. on the Chinese Communist Party*, 118th Cong. 2–3 (2023); *see also infra* Part II.C.4.

128. The First Amendment and the Due Process Clause under the Fifth Amendment do not "acknowledge[] any distinction between citizens and resident aliens." Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953); *see also* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 385 (2003).

129. *Judiciary Hearing on Oversight of the FBI*, *supra* note 35, at 8.

broad and flexible enough to meet many evolving nation-state threats but still has its expressive and practical limits. This Note argues that Section 951 alone is an inadequate statutory basis to respond to TNR.

A. U.S. GRAND STRATEGY ON TNR

The Biden-Harris administration implemented a whole-of-government approach relying on four key pillars to counter TNR: using available civil and criminal tools to promote accountability; engaging international law enforcement agencies and private sector organizations implicated in the use of repressive methods; developing solutions with targeted communities in the United States and around the world; and mounting a multilateral diplomatic response.[130] Under the first pillar, the United States has deployed new civil tools to counter TNR,[131] like the Khashoggi Visa Ban,[132] the Foreign Operations and Related Programs Appropriations Act,[133] the Global Magnitsky Accountability Act,[134] and former President Biden's Executive Order issuing the Prohibition on Use by the United States Government of Commercial Spyware that Poses Risks to National Security.[135]

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130. *See Comm. on China Hearing on the Threat of TNR*, *supra* note 123, at 6–7 ("To raise awareness globally and prevent these tactics from becoming pervasive in the international system, we need diplomacy. To protect those targeted, we need humanitarian and homeland responses. To pursue accountability for those responsible, we need law enforcement.").

131. To raise the costs of engaging in TNR, the U.S. Government Accountability Office has also suggested resurfacing Section 6 of the Arms Export Control Act—a statutory prohibition on arms transfers contingent on the President determining that a country is engaged in a consistent pattern of intimidation or harassment against individuals in the United States. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 25.

132. In February 2021, Secretary of State Antony J. Blinken announce this policy which allows the DOS to impose visa restrictions on individuals engaged in TNR. *See* Press Statement, Anthony J. Blinken, Sec'y, U.S. Dep't of State, Accountability for the Murder of Jamal Khashoggi (Feb. 26, 2021), https://www.state.gov/accountability-for-the-murder-of-jamal-khashoggi/ [https://perma.cc/36RJ-WRWK].

133. Section 7031(c) "publicly ban[s] kleptocrats and human rights violators from entering the United States." Benjamin Press, *How Congress Can Improve Visa Bans*, JUST SEC. (Oct. 1, 2021), https://www.justsecurity.org/78382/how-congress-can-improve-visa-bans/ [https://perma.cc/43R7-MCKX].

134. This Act authorizes the president to bar visas or impose property sanctions for acting in gross violations of human rights. *See The US Global Magnitsky Act: Questions and Answers*, HUM. RTS. WATCH (Sept. 13, 2017, 10:40 AM), https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act [https://perma.cc/N5GS-7DLD].

135. *See* Exec. Order No. 14093, 88 Fed. Reg. 18957 (Mar. 27, 2023) (prohibiting U.S. government employees from using commercial spyware given the industry's role in silencing dissidents).

Despite developments in civil methods, the United States has been slow to assess and adapt its criminal response. No law defines or criminalizes TNR in the United States.[136] In the absence of direct statutory guidance, law enforcement largely relies on dated espionage statutes that penalize the conduct of unregistered foreign agents.[137] Various governmental and non-governmental organizations have criticized this approach, positing that there remain "gaps in existing law that limit agencies' ability to counter TNR in all its forms and hold Perpetrator governments accountable."[138] The lack of a standard definition for TNR also complicates agencies' ability to track repressive conduct.[139] Despite these concerns, the U.S. government has failed to order "formal department-wide analysis of existing legislation."[140]

B. ANALYZING SECTION 951

Without a purpose-built statute to address TNR, the DOJ charges incidents under a conglomeration of other laws.[141] Among these provisions, the unregistered foreign agent laws under 18

136. *See* YANA GOROKHOVSKAIA & ISABEL LINZER, FREEDOM HOUSE, UNSAFE IN AMERICA: TRANSNATIONAL REPRESSION IN THE UNITED STATES 6 (2022).

137. *See id.* at 8–9.

138. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 18; *see also* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8–9.

139. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 15 (noting that state and local law enforcement's accidental treatment of TNR as "ordinary" crimes contribute to underreporting).

140. *Id.* at 23–24.

141. After conducting searches on Westlaw, LexisNexis, and publicly available information from the DOJ, the following indictments filed between January 2018 through November 2023 charge defendants for TNR-related crimes: United States v. Doostdar, No. 18-CR-255 (D.D.C. Aug. 15, 2019); United States v. Abouammo, No. 19-CR-621 (N.D. Cal. July 28, 2020); United States v. Jin, No. 20-MJ-1103 (E.D.N.Y. Apr. 6, 2023); United States v. Angwang, No. 20-CR-442 (E.D.N.Y. Oct. 13, 2020); United States v. Farahani, No. 21-CR-430 (S.D.N.Y. July 13, 2021); United States v. Jin, No. 21-CR-313 (E.D.N.Y. June 14, 2021); United States v. Rong, No. 21-CR-112 (E.D.N.Y. Oct. 27, 2020); United States v. Hu, No. 21-CR-265 (E.D.N.Y. July 21, 2021); United States v. An, No. 22-CR-460 (E.D.N.Y. Oct. 20, 2022); United States v. He, No. 22-MJ-1265 (E.D.N.Y., Oct. 20, 2022); United States v. Lin, No. 22-CR-710 (D.N.J. Oct. 20, 2022); United States v. Sun, No. 22-MAG-1711 (S.D.N.Y. Feb. 18, 2022); United States v. Churo, No. 22-CR-38 (S.D.N.Y. Jan. 20, 2022); United States v. Liu, 22-CR-311 (E.D.N.Y., Jul 6, 2022); United States v. Lin, No. 22-MJ-251 (E.D.N.Y. Mar. 16, 2022); United States v. Wang, No. 22-CR-230 (E.D.N.Y., May 17, 2022); United States v. Girgis, No. 22-CR-6 (S.D.N.Y. Jan. 6, 2022); United States v. Jianwang, No. 23-CR-316 (E.D.N.Y. Apr. 5, 2023); United States v. Bai, No. 23-MJ-334 (E.D.N.Y. Apr. 6, 2023); United States v. Amirov, No. 22-CR-438 (S.D.N.Y. Oct. 17, 2024); United States v. Chen, 23-MJ-4263 (S.D.N.Y. May 24, 2023); United States v. Wu, No. 23-CR-10005 (D. Mass. Jan. 10, 2023); United States v. Gupta, No. 23-CR-289 (S.D.N.Y. June 30, 2023).

U.S.C. § 951 predominate.[142] Section 951 bars acting on behalf of a foreign principal without prior notification to the Attorney General, and prosecutors have increasingly turned to this statute to meet the emerging national security threats.

1. The Statutory Text of Section 951

Section 951 provides in relevant part:

> (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.[143]

Section 951 "plainly and concretely" identifies violative conduct with "clear and unambiguous" language.[144] An "agent of a foreign government" refers to "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official."[145] 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

142. Of the 23 cases charging incidents of TNR, 14 apply Section 951: *Doostdar*, *Abouammo*, *Angwang*, *Rong*, *Hu*, *An*, *Lin* (No. 22-CR-710), *Sun*, *Liu*, *Wang*, *Girgis*, *Jianwang*, *Chen*, and *Gupta*.

143. 18 U.S.C. § 951.

144. United States v. Michel, 2022 WL 4182342, at *5 (D.D.C. Sept. 13, 2022) (quoting United States v. Duran, 596 F.3d 1283, 1291 (11th Cir. 2010)). Defendant Prakazrel "Pras" Michel was criminally charged with conspiring to launder foreign money to influence American elections and foreign policy at the behest of the Malaysian and PRC governments. *See id.* at **1–3. Among other motions, the defendant moved to dismiss the Section 951 counts on First and Fifth Amendment grounds. *See id.* at *4. As to overbreadth, the *Michel* court clarified that Section 951 "do[es] not penalize *speech*, but rather the lack of registration" to the Attorney General upon being retained as an agent of a foreign government. *Id.* Any facial challenge under the First Amendment thus fails. As to vagueness, Section 951 clearly bars acting on behalf of a foreign government without prior notification to the Attorney General, under Section 951(a), and defines relevant terms at 28 C.F.R. §§ 73.1 *et seq.* Because the statutes gave the defendant fair warning—specifically, that his political advocacy on behalf of a foreign government official was unlawful—any vagueness challenges likewise fail. *See id.* at *6; *see also* United States v. Truong Dinh Hung, 629 F.2d 908, 920 (4th Cir. 1980) (finding Section 951 is not unconstitutionally vague).

145. 18 U.S.C. § 951(d).

the United States."[146] "Foreign officials" includes persons "exercising sovereign de facto or de jure authority."[147]

Among those exempted from Section 951 are duly accredited diplomatic or consular officers under Section 951(d)(1), official representatives of a foreign government under Section 951(d)(2), their non-U.S. citizen staff under Section 951(d)(3), and those engaged in "legal commercial transactions" with a foreign government under Section 951(d)(4).[148] The first three categories of exemptions identify individuals who do not need to register because the U.S. government already has notice of their foreign affiliation.[149]

The fourth category—the legal commercial exemption—excludes any person engaged in a legal and routine commercial transaction from the definition of "agent of a foreign government."[150] A defendant, however, may not cloak his activities under the protective cover of a legal commercial transaction to escape liability.[151] Put simply, a defendant engaged in *any* activity on behalf of a foreign government—like gathering information on U.S. targets—may not avoid registration even if his actions are

146. 18 U.S.C. § 11.

147. Order Denying Defendant's Motion for Judgment of Acquittal (Rule 29) and Motion for New Trial (Rule 33) at 11, United States v. Abouammo, No. 19-CR-621 (N.D. Cal. Dec. 12, 2022), ECF No. 421 (quoting Definition of Terms, 28 C.F.R. § 73.1(b)).

148. *See* 18 U.S.C. § 951(d)(1)–(4).

149. *See* United States v. Chaoqun, 107 F.4th 715, 729 (7th Cir. 2024). For statutory support, see 28 C.F.R. § 73.1(d) ("When used in 18 U.S.C. 951(d)(1), the term *duly accredited* means that the sending State has notified the Department of State of the appointment and arrival of the diplomatic or consular officer involved, and the Department of State has not objected."); *see also id.* § 73.1(e) ("When used in 18 U.S.C. 951(d) (2) and/or (3), the term *officially and publicly acknowledged and sponsored* means that the person described therein has filed with the Secretary of State a fully-executed notification of status with a foreign government; or is a visitor, officially sponsored by a foreign government, whose status is known and whose visit is authorized by an agency of the United States Government; or is an official of a foreign government on a temporary visit to the United States, for the purpose of conducting official business internal to the affairs of that foreign government; or where an agent of a foreign government is acting pursuant to the requirements of a Treaty, Executive Agreement, Memorandum of Understanding, or other understanding to which the United States or an agency of the United States is a party and which instrument specifically establishes another mechanism for notification of visits by agents and the terms of such visits.").

150. 28 C.F.R. § 73.1(f) (defining "legal commercial transaction" as "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").

151. *See Chaoqun*, 107 F.4th at 729 ("[F]oreign agents [cannot] avoid the registration requirement by limiting their actions to those not otherwise prohibited under U.S. law. Such a loophole threatens to swallow the statute whole.").

otherwise legal—like paying a private investigator for surveillance.[152] Some agents may never avail themselves of the legal commercial transaction exemption. This includes agents from Cuba, any other country designated by the President, or agents held accountable under certain sections of the Export Administration Act of 1979.[153] Such a narrow construction of the legal commercial transaction exemption closes potential loopholes while remaining flexible enough to adapt to evolving geopolitical relationships. For instance, an attorney representing a state-owned Belgian company in U.S. federal court need not register under Section 951—she is legitimately engaged in lawful and routine commercial activity.[154] But an attorney representing Cuban interests must register, pursuant to Section 951(e).[155]

To convict under Section 951, the government must show that a defendant "(1) acted (2) at the direction of or under the control of a foreign government, and (3) failed to notify the Attorney General before taking such action."[156] The government may provide proof through direct or indirect evidence during the statute of limitations periods.[157] Despite Section 951's silence on the requisite mens rea, the statute is "properly construed" as requiring the defendant to "have knowledge of their status" as agents.[158] As

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152. *See id.*

153. *See* 18 U.S.C. § 951(e)(2).

154. *See Communist Bloc Intelligence Gathering Activities on Capitol Hill: Hearing on S. 1959 and S. 1963 Before the Subcomm. on Sec. and Terrorism of the S. Comm. on the Judiciary*, 97th Cong. 38 (1982) (statement of Jeffrey H. Smith, Assistant Legal Adviser for L. Enf't & Intel. Affs., U.S. Dep't of State) ("We also believe that the American lawyers who represent foreign governments in American Courts and individuals involved in routine commercial activities should be exempt from the statute."); *see also Chaoqun*, 107 F.4th at 729.

155. *See* United States v. Chaoqun, 107 F.4th 715, 729 (7th Cir. 2024).

156. United States v. Ying Lin, 2018 WL 3416524, at *4 (E.D.N.Y. July 11, 2018). The legal commercial transaction exception qualifies as an affirmative defense, and the prosecution need show the absence of a legal commercial transaction to prove an offense. *See* United States v. Rafiekian, 991 F.3d 529, 555 (4th Cir. 2021); *see also Chaoqun*, 107 F.4th at 731–32 (rejecting defendant's argument that the government must prove the negative of the exception—"that the relationship was not a legal commercial transaction").

157. *See Rafiekian*, 991 F.3d at 545. In a Section 951 case, direct evidence "can be hard to come by. . . . Savvy operatives cover their tracks. So, if the prosecution is to prove that a defendant acted as an 'agent of a foreign government,' it may need to rely on circumstantial evidence and reasonable inferences to make its case.").

158. United States v. Alshahhi, 2022 WL 2239624, at *9 (E.D.N.Y. June 22, 2022), *reconsideration denied*, 2022 WL 3595056 (E.D.N.Y. Aug. 23, 2022). This construction aligns with Rehaif v. United States, where the Court recognized the presumption "traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent

a general intent crime, the defendant need not specifically know that it was illegal for them to act as agents without registering under the law.[159] Whereas the first and third prongs are fairly straightforward, the second prong requires a more intricate showing of proof.

Under the second element, an agency relationship must exist between the agent and a foreign government or official. Notably, Section 951's definition of agency does not wholly comport with the common law's requirement[160] because an agent "must do more than act in parallel with a foreign government's interests or pursue a mutual goal."[161] Instead, an agent "'agrees to operate . . . subject to the *direction or control*' of that government."[162] In proving the agency relationship, the Fourth Circuit has emphasized the necessity of mutuality and agreement. The agreement cannot be one-sided; a foreign government must be "on one end of the line."[163] Likewise, agreements can be informal[164] and do not require remuneration to be the agent's primary motivation.[165] An agreement need not mirror "the employer's control over the workings of an employee;"[166] a lesser degree of direction is sufficient.[167]

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conduct.'" 139 S. Ct. 2191, 2195 (2019) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).

159. *See Alshahhi*, 2022 WL 2239624 at *9 (citing United States v. Bryant, 976 F.3d 165, 172 (2d Cir. 2020)); *see also* United States v. Merrett, 9 F.4th 713, 717 (8th Cir. 2021) ("There was no plain error in failing to require the government to prove that Merrett knew the law.").

160. *See id.* at *4 (citing *Rafiekian*, 991 F.3d at 538). Section 951 reflects the common law's construction of an "agent" to the extent that a person who agrees to "act on [another's] behalf subject to his control,' or at least not 'contrary to [his] directions[,]" is an agent. RESTATEMENT (SECOND) OF AGENCY §§ 1, 14 cmt. a (AM. L. INST. 1958).

161. *Rafiekian*, 991 F.3d at 538.

162. United States v. Rafiekian, 991 F.3d 529, 538 (4th Cir. 2021) (quoting 18 U.S.C. § 951(d)).

163. *Rafiekian*, 991 F.3d at 540.

164. *See* United States v. Butenko, 384 F.2d 554, 565 (3d Cir. 1967), *vacated on other grounds*, 394 U.S. 165 (1969) (defendant could be an agent even without showing a "contractual relationship between himself and the Soviet Union").

165. *See* United States v. Hung, 629 F.2d 908, 912 (4th Cir. 1980). In *Hung*, the defendant's motivations were not financial. Instead, the defendant hoped to "improve relations between the North Vietnamese government and the United States so that he could be reunited with a woman whom he loved who was a prisoner of the North Vietnamese government." *Id.*

166. *Butenko*, 384 F.2d at 565.

167. *See Rafiekian*, 991 F.3d at 540–41 ("[A]n independent contractor may also be an agent—while still retaining significant discretion over the particulars of performance—so long as he 'contracts to act on account of the principal.'") (quoting RESTATEMENT (SECOND) OF AGENCY § 2 (AM. L. INST. 1958)).

For a specific example of agency under Section 951, consider *United States v. Rafiekian*. The government alleged that Bijan Rafiekian, a California resident, violated Section 951 by leveraging former U.S. national security advisory Michael Flynn's lobbying firm, the Flynn Intel Group (FIG), to influence U.S. politicians against Turkish national, Fethullah Gulen, a Turkish dissident and imam living in the United States.[168] Since 2015, the United States has denied multiple extradition requests from Türkiye for Gulen.[169] Working as an agent for a Turkish governmental official, Rafiekian sought to leverage FIG to sway popular opinion against Gulen, making the U.S. government more amenable to approving Türkiye's extradition request.[170] After a jury convicted Rafiekian, the U.S. District Court of the Eastern District of Virginia acquitted him of all charges.[171] Among other issues, the district court faulted the government for failing to prove that Türkiye instructed the defendant "concerning the day-to-day operation[s]," much like an employer-employee relationship.[172] On appeal, the Fourth Circuit reversed.[173] It held that an agency relationship can exist even when an agency operates on "a more hands-off form of 'direction'—as an agent-independent contractor could."[174] Although the government may not have established an agency relationship between the defendant and the Turkish official through direct evidence of calls and messages, circumstantial evidence and reasonable inference would be sufficient in proving the elements of Section 951.[175] And in the present case, Judge Wynn wrote, the government had "lassoed enough stars to reveal a distinct constellation."[176] A rational juror could infer that: (1) the Turkish government was behind the scheme; (2) through a third party, Türkiye communicated general and specified instructions, based on emails and at least one in-person update; (3) over the course of the engagement, the defendant followed all these directions; and

168. *See* Press Release, U.S. Dep't of Just., Fourth Circuit Upholds Jury Conviction in Foreign-Agent Prosecution (Mar. 18, 2021), https://www.justice.gov/opa/pr/fourth-circuit-upholds-jury-conviction-foreign-agent-prosecution [https://perma.cc/RPL7-3GH7].

169. *See id.*

170. *See id.*

171. *See* United States v. Rafiekian, 2019 WL 4647254, at *18 (E.D. Va. Sept. 24, 2019), *rev'd in part, vacated in part*, 991 F.3d 529 (4th Cir. 2021).

172. *See id.* at **10–11, *13.

173. *See* United States v. Rafiekian, 991 F.3d 529, 552 (4th Cir. 2021).

174. *See id.* at 540.

175. *See id.* at 545.

176. *See id.*

all this occurred without notifying the Attorney General.[177] In sum, courts have interpreted agency broadly under Section 951, allowing prosecutors to predicate charges on any action taken at the behest of a foreign government without proper registration.

2. The Evolution of Section 951

Section 951 has origins in the Espionage Act of 1917.[178] Before World War I, the DOJ lacked the legal tools to charge hostile nations' non-traditional intelligence activities.[179] This gap allowed nations like Germany to deploy non-kinetic tactics without restriction, including "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."[180] To remedy this deficit, Congress passed the Espionage Act, which "punish[ed] acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States."[181] After a slew of amendments,[182] the Espionage Act broke off into three statutes to form separate registration and notification requirements for agents of foreign governments: 50 U.S.C. § 851, related to persons engaged in espionage, counterespionage, or sabotage services; the Foreign Agent Registration Act (FARA) under 22 U.S.C. § 611 et seq., related to foreign influence activities; and 18 U.S.C. § 951, a "catch-all statute" related to "all conduct taken on behalf of a foreign government."[183] Although all three require that agents notify the Attorney General of their foreign government affiliation,

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177. *See id.* at 547.

178. *See* David Aaron, *18 U.S.C. Section 951 and the Non-Traditional Intelligence Actor Threat from the First World War to the Present Day*, 45 SETON HALL LEGIS. J. 1, 5 (2021).

179. *See id.* at 14.

180. *Id.* (citing David Greenberg, *The Hidden History of the Espionage Act*, SLATE (Dec. 27, 2010, 8:47 AM), https://slate.com/news-and-politics/2010/12/the-real-purpose-of-the-espionage-act.html [https://perma.cc/52HD-KLXB]).

181. Espionage Act, H.R. 291, 65th Cong. (1917) (codified at 18 U.S.C. §§ 793–94).

182. Section 951 was amended in 1983 and 1984 to address sentencing; in 1986 to add subsection (e) listing the Soviet Union, Warsaw Pact nations, and Cuba; in 1994 to remove the Soviet Union and Warsaw Pact nations; and in 1994 to add subsections (b), (c), and (d) and substitute the Attorney General as the official to whom to provide notice. *See* Act of Jan. 12, 1983, Pub. L. No. 97-462 § 6; Act of Oct. 12, 1984 Pub. L. No. 98-473, Title II, Ch. XII, Part G § 1209; Act of Oct. 27, 1986 Pub. L. No. 99-569, Title VII § 703; Act of Sept. 13, 1994, Pub. L. No. 103-322, Title XXXIII § 330016(1)(R).

183. United States v. Duran, 596 F.3d 1283, 1293–95 (11th Cir. 2010).

Section 951 was primarily "designed to deter and punish wrongful conduct."[184]

Courts have declined to find limits on offenses underlying Section 951 charges.[185] Given its broad sweep, Section 951 creates a "plethora of possibilities" in which those "engaged in purportedly legal conduct on behalf of a foreign government could be subjected to prosecution."[186] The statute's breadth has a "special virtue" when responding to new forms of crimes,[187] affording law enforcement flexibility in countering emerging national security threats.[188] Despite this broad basis, prosecutors rarely charge Section 951.[189] When they do, prosecutors invoke Section 951 as an "espionage lite" statute[190] "to prosecute clandestine, espionage-like behavior, information gathering, and procurement of technology on behalf of foreign governments or officials."[191]

TNR presents a new species of conduct predicating Section 951 charges. In addition to the criminal indictments discussed in Part I, the DOJ has recently taken two TNR cases to trial under Section 951.[192] Recent scholars presume that federal prosecutors apply Section 951 and FARA indiscriminately in TNR cases,[193] but between January 2018 and November 2023 prosecutors have never

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184. *Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2017) [hereinafter *Oversight of FARA*] (statement of Adam S. Hickey, Deputy Assistant Att'y Gen., Nat'l Sec. Div., U.S. Dep't of Just.).

185. *See Duran*, 596 F.3d at 1293 ("[T]he activities that fall within [Section] 951's purview have never been expressly or by judicial interpretation limited to those bearing upon national security or even those which by their nature are criminal or inherently wrongful.").

186. *Id.* at 1295. Regardless of whether a classic "spy" undertakes activities within the United States, those who conceal their foreign government affiliations "deprive the United States of information critical to informed decision-making, which in turn lies at the core of autonomy and independence." Aaron, *supra* note 178, at 33.

187. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 771 (1998).

188. *See* Huan-Ting Wu & Daniel B. Olmos, *An Empirical Study of 18 U.S.C. § 951*, 46 AM. J. TRIAL ADVOC. 53, 58 (2022).

189. An empirical study found 49 cases from 1998 to 2020 charging 92 defendants under Section 951. *See id.* at 73.

190. Rebecca Davis O'Brien, *'Espionage Lite' or Deal Making? Prosecutors Struggle to Draw a Line*, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/2022/11/07/nyregion/trump-advisor-thomas-barrack-aquitted-trial.html [https://perma.cc/WQ8H-XC92].

191. *See Oversight of FARA*, *supra* note 184, at 2.

192. *See* United States v. Hu, No. 21-CR-265 (E.D.N.Y. 2021); United States v. Abouammo, No. 19-CR-621 (N.D. Cal. 2019).

193. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8.

resorted to FARA in any TNR case.[194] This may be for two reasons. First, agents can and have avoided liability under FARA by registering their foreign affiliation with the Attorney General and continuing their activity.[195] Although Section 951 includes a registration requirement, it does not pose the same problem. Whereas FARA was designed to ensure transparency, Section 951 was designed to deter criminal conduct and is thereby not limited to the individual's registration status. Second, Section 951 is a better statutory fit for TNR offenses than FARA. While FARA targets persons acting to influence U.S. policy on behalf of "foreign principals," Section 951 targets persons acting at the request of a foreign government.[196] The crux of TNR cases is not foreign policy interference but the foreign government-backing of subversive activity.

C. THE LIMITS OF SECTION 951 IN TNR PROSECUTIONS

Despite its recent application in TNR prosecutions and trials, Section 951 proves to be an imperfect tool to combat TNR. The expansive scope of the statute creates challenges in administration and expressive effect and falls short of addressing crucial methods of TNR. Specifically, Section 951 (1) fails to cover key TNR methodologies, (2) invites uneven enforcement, (3) inheres the potential to compromise diplomatic goals, (4) compounds confusion in identifying tactics, and (5) fails to express the gravity of the offense. To mount an adequate response to TNR, policymakers agree that U.S. law requires revision.[197]

1. Gaps in Coverage

Alone, Section 951 does not reach critical methodologies of TNR, including digital TNR and refugee espionage.[198] With

194. The prosecutor did not charge violations of FARA in any of the cases cited *supra* note 141.

195. For instance, Michelle Martin reported her affiliation with Rwanda to the Attorney General and then continued to collect information on Rusesabagina. Despite complying with FARA, she played a critical role in his forced disappearance. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8.

196. *See* WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11439, FOREIGN AGENTS REGISTRATION ACT (FARA): A LEGAL OVERVIEW 1 (2023).

197. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8.

198. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 2, 22–24 (noting that the FBI found "several gaps in U.S. law related to TNR" after internal analysis of all federal

respect to digital TNR, prosecutors face issues regarding Section 951's geographical scope. Section 951 requires that a foreign agent "act[] in the United States,"[199] which restricts Section 951's reach to cases occurring inside U.S. borders.[200] The exact meaning of "act[ing] in the United States" is vague. Put simply, a court would need to decide whether "a person located *outside* the U.S. who uses the internet to engage in TNR activities with consequences *inside* the U.S. was acting in the U.S. within the meaning of [Section 951]."[201] Because of this extraterritorial bar, prosecutors charge alleged TNR perpetrators under hacking and harassment statutes rather than Section 951.[202]

For instance, in *United States v. Julien Jin*, a China-based executive working at a U.S. company coordinated with the PRC to disrupt anti-communist virtual meetings and provide user information on those attending.[203] Rather than resorting to Section 951, prosecutors charged the defendant with conspiracy to commit interstate harassment and to transfer a means of identification.[204] The geographical limits of Section 951 steer prosecutors to pursue liability under other statutes that address

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indictments between January 2020 and July 2022); *see also* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8–9 (arguing that FARA and Section 951 "do not adequately account for the wide array of tactics that [Perpetrator States] use").

199. 18 U.S.C. § 951(a).

200. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 22.

201. *Id.* at 23 (emphasis added).

202. *See, e.g.*, Complaint and Affidavit in Support of Application for Arrest Warrants at 2–5, United States v. Bai, No. 23-MJ-334 (E.D.N.Y. Apr. 6, 2023), ECF No. 2 (charging two counts of conspiracy to transmit interstate or foreign threats and to commit interstate harassment under 18 U.S.C. § 371); *see also* Complaint and Affidavit in Support of Application for Arrest Warrants at 1–3, United States v. Jin, No. 20-MJ-1103 (E.D.N.Y. Nov. 18, 2020) (charging two counts of conspiracy to commit interstate harassment and to transfer means of identification under 18 U.S.C. § 371). The DOJ has brought 24 cases against 93 foreign nationals for state-linked hacking activity and foreign online influence operations since 2013 through 2019. *See* Tim Maurer & Garret Hinck, Commentary, *What's the Point of Charging Foreign State-Linked Hackers?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 24, 2019), https://carnegieendowment.org/2019/05/24/what-s-point-of-charging-foreign-state-linked-hackers-pub-79230) [https://perma.cc/R6PB-CS5F].

203. *See* Press Release, U.S. Dep't of Just., China-Based Executive at U.S. Telecommunications Company Charged with Disrupting Video Meetings Commemorating Tiananmen Square Massacre (Dec. 18, 2020), https://www.justice.gov/usao-edny/pr/china-based-executive-us-telecommunications-company-charged-disrupting-video-meetings [https://perma.cc/S5LZ-ZJJT].

204. *See* Complaint & Affidavit in Support of Application for an Arrest Warrant, United States v. Jin, No. 20-MJ-1103 (E.D.N.Y Nov. 18, 2020), ECF No. 1. The defendant remains at large, presumed to be in the PRC. *See* Nicole Hong, *Zoom Executive Accused of Disrupting Calls at China's Behest*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2020/12/18/technology/zoom-tiananmen-square.html [https://perma.cc/2EG8-JHSJ].

similar conduct, like interstate harassment, thereby undermining the consistency in the prosecutorial approach to TNR.

The U.S. Government Accountability Office has also expressed concerns that the United States "does not have a statute outlawing the collection of information about individuals on behalf of a foreign power,"[205] also known as "refugee espionage."[206] Refugee espionage can be a preliminary step before Perpetrator States take kinetic action, like kidnapping.[207] But in the United States, espionage law focuses on the protection of national defense information rather than the collection of private information on citizens.[208] Conversely, other countries like Sweden directly criminalize refugee espionage.[209]

Section 951 may be broad enough to cover refugee espionage,[210] but it remains an open question, and the statute's breadth can present "factual or legal hurdles."[211] For example, prosecutors often hesitate to charge U.S.-based private investigators—who do not readily conform with the prototypical notion of a "foreign agent"—with refugee espionage under Section 951. In the *United States v. Hu, et al.* trial[212] and the *Farahani* indictment,[213]

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205. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 22.

206. YANA GOROKHOVSKAIA & ISABEL LINZER, FREEDOM HOUSE, CASE STUDY: SWEDEN 3 (June 2022); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 22.

207. *See* SCHENKKAN & LINZER, *supra* note 6, at 57.

208. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 22 (citing Espionage Act, 18 U.S.C. §§ 793–94).

209. *See* BROTTSBALKEN [BRB] [Penal Code] 19:10b (Swed.) ("A person who, in this country, with intent to benefit a foreign power or equivalent, secretly or using fraudulent or improper means conducts activities whose purpose is to obtain information about the personal circumstances of another person, or is an accomplice . . . is guilty of unlawful intelligence activities against an individual . . . .").

210. *See, e.g.*, United States v. Dumeisi, 424 F.3d 566 (7th Cir. 2005). In *Dumeisi*, federal prosecutors established that the defendant surveilled the Iraqi opposition in the United States and recorded meetings with a prominent opposition figure at the behest of the Iraqi Intelligence Service. 424 F.3d at 570–71, 573, 581. Prosecutors have touted *Dumeisi* as an example of when prosecutors can use Section 951 against individuals not "involved in collecting classified information" but nonetheless "working in this country on behalf of a foreign government." *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 Just.).

211. GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8.

212. *See* Brief in Support of Defendant Michael McMahon's Motion for Discovery and an Evidence Hearing Regarding Prosecutorial Misconduct at 33–34, United States v. Hu, No. 21-CR-265 (E.D.N.Y. Aug. 8, 2022), ECF No. 146-1.

213. *See id.* at 34–35, United States v. Hu, No. 21-CR-265 (E.D.N.Y. Mar. 21, 2022) ("For example, in *United States v. Farahani*, . . . the Government charged . . . an Iranian intelligence official and Iranian intelligent assets . . . . However, no criminal charges were

prosecutors omitted a slew of charges against U.S.-based private investigators operating as proxies of a foreign agent. In general, prosecutors tend to forego charging foreign agents who do not easily cohere with Section 951's traditional definition. Instead, prosecutors charge individuals who are tied to the foreign government through nationality or origin and report directly to that government as quasi-spies.[214] Without legislative differentiation of these distinct roles, prosecutors appear reluctant to charge proxy actors who are aware of the foreign government involvement, central to the plot, but not formally connected to the foreign government.

2. Uneven Application

Statutory breadth is both a bug and a feature of Section 951. Although Section 951's expansiveness allows for flexible application, it also invites uneven enforcement. Prosecutors tend to omit Section 951 charges for violent conduct. For instance, federal prosecutors indicted the *Farahani* defendants who attempted to commit direct attacks with conspiracy to kidnap, conspiracy to violate the International Emergency Economic Powers Act, conspiracy to commit wire and bank fraud, conspiracy to commit money laundering, and structuring, rather than charge Section 951.[215] This may partly reflect the general evidentiary challenges inherent to proving foreign government interference. Evidence may be located overseas, thereby requiring the "abysmally slow" navigation of Treaties on Mutual Legal

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brought against the private investigators in that case, as they have been against Mr. McMahon.").

214. The Government's preference to apply Section 951 against quasi- or actual spies, may, in part, reflect its historical utility as an "espionage lite" statute: just as spies act on behalf of their foreign governments, so, too, do unregistered agents. *See* Eric Lichtblau, *After the War: Secret Agents*, N.Y. TIMES (July 10, 2003), https://www.nytimes.com/2003/07/10/world/after-the-war-secret-agents-publisher-accused-of-abetting-iraqi-cause-in-us.html [https://perma.cc/RJ7J-CF54].

215. *See* Sealed Superseding Indictment, United States v. Farahani, No. 21-CR-430 (S.D.N.Y. July 13, 2021), ECF No. 14; *see also, e.g.*, Indictment, United States v. Churo, No. 22-CR-38 (S.D.N.Y. Jan. 20, 2022), ECF No. 1 (charging conspiracy to commit aircraft piracy, but not Section 951); Sealed Superseding Indictment, United States v. Amirov, No. 22-CR-438 (S.D.N.Y. Oct. 17, 2024), ECF No. 80 (charging conspiracy to commit murder-for-hire and the substantive act, conspiracy to launder money, and unlawful possession of a defaced firearm, but not Section 951); *cf.* Indictment, United States v. Doostdar, No. 18-CR-255 (D.D.C. Aug. 15, 2019), ECF No. 67 (charging Section 951, along with conspiracy, aiding and abetting, violating the International Emergency Economic Powers Act, and violating the Iranian Transactions and Sanctions Regulations).

Assistance in Criminal Matters.[216] Proving espionage-like activities also often involves classified evidence, which introduces potential exposure under the Classified Information Protection Act[217] and the danger of graymail threats.[218] These drawbacks disincentivize federal prosecutors from bringing foreign government interference charges under statutes like Section 951, especially when prosecutors can secure a higher sentence through violent crime charges.[219]

Additionally, federal prosecutors focus enforcement efforts against agents acting on behalf of U.S. adversaries, which may not always include perpetrators of TNR.[220] From 1998 to 2020, 35% of Section 951 charges were linked to the PRC, 23% to Iraq, ten percent to Russia, nine percent to Cuba, and six percent to Iran.[221] In TNR cases between December 2018 and November 2023, prosecutors primarily enforced Section 951 against agents of the PRC.[222] Although Iran, Rwanda, Türkiye, Saudi Arabia, and the UAE also rank amongst the most prolific perpetrators of TNR against U.S.-based persons, agents connected to these countries are notably less likely to be charged.[223] This disproportionate

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216. Jonah Force Hill, *Problematic Alternatives: MLAT Reform for the Digital Age*, HARV. L. SCH. NAT'L SEC. J. (Jan. 28, 2015), https://harvardnsj.org/2015/01/28/problematic-alternatives-mlat-reform-for-the-digital-age/ [https://perma.cc/SC98-2UML].

217. *See* Jonathan M. Lamb, *The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia's Answer to the Fight over Classified Information at Trial*, 36 PEPP. L. REV. 213, 244 (2009) ("[I]n criminal actions involving the CIPA, the government may be subject to a court order compelling production of a classified document. The government may not be willing or able to provide such a sensitive document, ostensibly in the name of national security, and the American people are deprived of the ability to prosecute and convict a criminal defendant . . . .").

218. Graymail threats present the Government with a "disclose or dismiss dilemma." Karen H. Greve, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RSRV. L. REV. 84, 85 (1980). The defendant may pressure "for the release of classified information as a means of forcing the Government to drop the prosecution," or the defendant may attempt to obtain classified information to "prepare and conduct an adequate defense." *Id.* at 85 n.5.

219. Whereas the sentencing maximum for Section 951 is ten years, conspiracy to murder has a maximum term of life. *Compare* 18 U.S.C. § 951(a), *with* 18 U.S.C. § 1117.

220. *See infra* Part II.C.3.

221. *See* Wu & Olmos, *supra* note 188, at 58.

222. *See, e.g.*, *supra* note 142.

223. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 11. In connection with Iran, prosecutors have brought United States v. Doostdar, No. 18-CR-255 (D.D.C. Aug. 15, 2019) and United States v. Amirov, No. 22-CR-438 (S.D.N.Y. Oct. 17, 2024). In connection with Saudi Arabia, prosecutors have brought United States v. Abouammo, No. 19-CR-621 (N.D. Cal. July 28, 2020). In connection with Belarus, prosecutors have brought United States v. Churo, No. 22-CR-38 (S.D.N.Y. Jan. 20, 2022). In connection with Egypt, prosecutors have brought United States v. Girgis, No. 22-CR-6 (S.D.N.Y. Jan. 6, 2022). In connection with

enforcement is reminiscent of prosecutorial efforts under the China Initiative in 2018, which aimed to "identify and prosecute those engaged in trade theft, hacking, and economic espionage."[224] After being criticized by civil society groups for the campaign's propensity for racial profiling, the DOJ abruptly ended the program in 2022.[225] Uneven prosecution of Chinese nationals for TNR-related crimes raises similar concerns of encouraging racial profiling and xenophobia.[226] Although statutory intervention alone may not compel prosecutors to bring charges more evenly against all nationals perpetrating TNR, centralizing oversight of these cases could curb disproportionate enforcement. Through a centralized reporting system, one agency could then track TNR cases and recognize uneven enforcement patterns when certain foreign nationals are routinely and disproportionately targeted for prosecution.

3. Unchecked Discretion in Foreign Policy Prosecutions

Without a statute criminalizing the key methods of TNR and centralizing oversight of enforcement, Congress effectively yields to prosecutorial discretion, which can, at times, run counter to broader U.S. foreign policy goals. Prosecutors will always be engaged in policymaking by virtue of their independence and

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India, prosecutors have brought United States v. Gupta, No. 23-CR-289 (S.D.N.Y. June 30, 2023).

224. *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T OF JUST., NAT'L SEC, DIV., https://www.justice.gov/archives/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related [https://perma.cc/9GG3-498J?type=image] (Nov. 19, 2021).

225. *See* Anton Louthan, *The China Initiative and its Implications for American Universities*, FOREIGN POL'Y RSCH. INST. (Apr. 11, 2022), https://www.fpri.org/article/2022/04/the-china-initiative-and-its-implications-for-american-universities/#_ftn1 [https://perma.cc/WN65-SDR9]. Announcing the China Initiative's discontinuation, Assistant Attorney General Matt Olsen noted that "by grouping cases under the China Initiative rubric, we helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently." Speech, U.S. Dep't of Just., Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats (Feb. 23, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats [https://perma.cc/5CH2-VRYA].

226. Freedom House encourages Congress to draft new TNR legislation "to avoid infringing on fundamental freedoms, encouraging xenophobia, or unduly singling out people engaged in legitimate activities." GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 8.

decentralized command structure, which creates significant criminal and foreign policy questions.[227] The U.S. criminal code is "over-inclusive by design."[228] Congress gives prosecutors autonomy to bring a "broad swath of possible indictments" despite intending to pursue a small percentage of cases, "expect[ing] federal prosecutors to choose their cases to maximize a federal policy interest."[229] Decentralization is another hallmark of the U.S. criminal justice system.[230] Any individual USAO can make an independent decision—with perfunctory sign-off from "Main Justice"—to prosecute a case.[231] This policymaking power is most ripe for abuse when criminal law is unclear. Without codifying a clear TNR statute, Congress effectively abdicates its role in policymaking to federal prosecutors, who are not directly politically accountable.[232]

Congress' abdication is problematic given TNR prosecutions' place in foreign affairs policy. For domestic crimes, federal prosecutors' policymaking tends to be coextensive with territorial boundaries.[233] TNR cases, however, fall under the increasingly common category of "foreign affairs prosecutions," in which "the executive branch engages its prosecutorial power and foreign affairs power at the same time."[234] At its core, TNR prosecution expresses U.S. condemnation of Perpetrator State activity on U.S. soil. This expressive decision can impact U.S. relations with the Perpetrator States authoring these attacks. When the prosecutors' activities at home no longer align with the diplomats' work abroad, there are both negative and positive results.

On the one hand, foreign affairs prosecutions can constitute an undesirable "second arm" of U.S. foreign policy, "unfolding outside of traditional foreign policy checks but then generating diplomatic controversy."[235] For instance, in *United States v. Gupta*, the DOJ

227. *See* Brian Richardson, *The Imperial Prosecutor?*, 59 AM. CRIM. L. REV. 40, 53 (2021).
228. *Id.*
229. *Id.*
230. *See id.* at 82. Federal prosecutors' "authority tends toward monopoly." *Id.* at 52.
231. *See* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV., 340, 386 (2019). Once a prosecutor has decided to charge, "senators, local politicians, even some defendants, believe it would be improper to try to influence a U.S. attorney's decisions directly." JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 108, 204 (1978).
232. *See* Richman, *Federal Criminal Law*, *supra* note 187, at 767.
233. *See* Richardson, *supra* note 227, at 68.
234. Koh, *Foreign Affairs Prosecutions*, *supra* note 231, at 342.
235. *Id.* at 388.

announced charges against an agent of India recruited to contract the killing of U.S.-based Sikh separatist leader Gurpatwant Singh Pannun.[236] Despite reaffirming its commitment to combating TNR, members of Congress expressed concern that the indictment "could severely harm this significant [United States-India] partnership."[237] The events underlying the *Gupta* indictment, though dire to the individual targeted, were ultimately "a drop in a much larger geopolitical strategic bucket"[238] of United States-India relations. At times, the costs of foreign policy blowback may outweigh the benefits of domestic prosecution of TNR cases.

On the other hand, foreign affairs prosecutions promote criminal accountability as the rate of transnational crime accelerates faster than domestic and international institutions can adapt.[239] Transnational and international crime challenge national justice systems, which may not extend jurisdiction over extraterritorial conduct.[240] By addressing a "cross-jurisdictional need to prosecute certain criminal conduct," U.S. foreign affairs prosecutions help close the "impunity gap" that transnational crime creates.[241] Likewise, decisions to prosecute TNR cases generally cohere with U.S. grand strategy on countering nation-state threats.[242] It is no coincidence that most TNR cases are brought against nationals from countries geopolitically hostile to

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236. *See* Press Release, U.S. Dep't of Just., U.S. Attorney Announces Charges in Connection with Foiled Plot to Assassinate U.S. Citizen in New York City (Nov. 29, 2023), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-charges-connection-foiled-plot-assassinate-us-citizen-new-york [https://perma.cc/4TC3-NP92].

237. Murtaza Ali Shah, *Congress Members Say India-US Relations at Risk over Pannun Murder Plot*, THE NEWS (Dec. 16, 2023), https://www.thenews.com.pk/latest/1138902-congress-members-say-india-us-relations-at-risk-over-pannun-murder-plot [https://perma.cc/MKS8-5C9R].

238. Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 766 (2021).

239. *See* Koh, *Foreign Affairs Prosecutions*, *supra* note 231, at 352 (Foreign affairs prosecutions "address one of the central concerns of international criminal law: that global crime metastasizes more rapidly than any domestic or international institution can legally adapt to promote criminal accountability, creating impunity gaps.").

240. For example, in 2008, the United States prosecuted Charles Taylor, Jr., son of the former Liberian president Charles Taylor, for perpetrating torture as head of the Liberian Anti-Terrorism Unit. The prosecution filled a critical impunity gap, given that "no international tribunal existed that had territorial jurisdiction over crimes committed in Liberia before 2002, and . . . prosecution in Liberian courts was unlikely." *Id.* at 352–53.

241. *Id.* at 352.

242. Federal prosecutions of TNR are part of the Biden-Harris Administration's first pillar in combating TNR. *See Comm. on China Hearing on the Threat of TNR*, *supra* note 123, at 6–7.

the United States.[243] Even those cases inapposite to diplomatic agendas, like the *Gupta* indictment, positively ensure individual criminal liability, which better redresses the harm inflicted by the crime.[244]

These normatively negative and positive effects are challenging to balance.[245] Yet, if the legislature is concerned about the impact of TNR on diplomacy, then it must play a greater role in negotiating foreign affairs prosecutions.[246] Reasserting congressional direction is a necessary first step. Through statutory intervention, Congress could direct prosecutors to prioritize certain methods of TNR and centralize TNR prosecutions under one agency. This oversight structure would afford visibility into the charging process while still allowing individual USAOs to bring forth cases encouraging individual criminal liability. If any of the USAOs' charging decisions contravene U.S. grand strategy, U.S. diplomats would have a clear body to approach to interrogate the exigency of the prosecution.

4. Failure to Identify Methods of TNR

Without statutory clarity or clear examples on what TNR looks like today, state and local law enforcement are left wondering how to approach TNR and identify its methodologies.[247] In response, the FBI has begun to disseminate information and mechanisms for reporting incidents of TNR through public websites.[248] Notwithstanding this positive development, local law enforcement has lagged in its outreach efforts to solicit reports of TNR, and confusion about TNR abounds within the ranks.[249] Federal and

243. *See* Richardson, *supra* note 227, at 68.

244. This "harm-based" conception of criminalization emphasizes the "harm perpetrated domestically regardless of the international communicative ramifications." Koh, *Criminalization of Foreign Relations*, *supra* note 238, at 786.

245. There is no clear answer about how foreign affairs prosecutions can "deliver on their promise of criminal accountability, while also mitigating risk to foreign policy and defendant interests." Koh, *Foreign Affairs Prosecutions*, *supra* note 231, at 391.

246. *See id.* at 400.

247. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 15 ("Lack[ing] common understanding about TNR[,] . . . state and local law enforcement . . . sometimes . . . do not recognize a foreign aspect that could indicate it was an act of TNR, according to FBI and DHS officials."); GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 13 ("The absence of effective regulation . . . makes it harder than it should be to distinguish legal activity on behalf of a foreign power or entity from illegal activity . . . .").

248. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 6.

249. *See* FREEDOM INITIATIVE, IN THE SHADOWS OF AUTHORITARIANISM: EGYPTIAN AND SAUDI TRANSNATIONAL REPRESSION IN THE U.S. 10 (2023) ("[M]any local law enforcement

local law enforcement's failure to understand the nature of TNR and the specific type of threats their community faces undermines their ability to mount a response to cross-border repression.

Although federal law enforcement takes on the primary role in TNR prosecutions—given that crimes authored by foreign governments fall under federal jurisdiction—the "localism" innate to the justice system means that the state police will also play a critical role.[250] By virtue of their position within the community, local law enforcement maintains a "virtual monopoly over local knowledge."[251] They are best positioned to keep apprised of news amongst local, diaspora populations and are the first to be notified about threats.[252] In identifying incidents of TNR, tracking statistics, and reaching out to targeted communities, local police are a vital partner to federal law enforcement in combating TNR.

Given local law enforcement's role, their knowledge deficit on TNR is problematic. If authorities fail to resolve this information gap,[253] local law enforcement risks mistaking TNR incidents—like stalking, harassment, and threats—as "ordinary crimes."[254] Any failure to identify TNR creates a ripple effect, which "can be the difference between an unlawful deportation and freedom for a targeted individual."[255] Likewise, local law enforcement's failure to comprehend the scope of the threat undermines their ability to mount an effective response.[256] Outreach to targeted immigrant populations and local community organizations—who gather information on issues affecting their community and serve as intermediates between reluctant individuals and law enforcement—is essential for fostering trust with local law enforcement and building resilience against TNR.[257] Vulnerable groups, however, may not have lawful status in the United States

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departments have not been oriented to the threat of TNR and remain ill-equipped to address it.").

250. William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 665–66 (2002).

251. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 36 CRIME & JUST. 377, 379 (2006).

252. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 15.

253. Although empirically tracking local law enforcement's errors may be challenging, law enforcement itself has acknowledged that it has a problem recognizing instances of TNR. *See id.* at 15–18.

254. GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 6; *see* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 15.

255. GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 12.

256. *See id.* at 6–7, 12–13.

257. *See id.* at 6.

and may hail from countries with corrupt law enforcement.[258] These factors undermine law enforcement's ability to build trust with targeted communities to come forward with information about TNR crimes.[259]

A TNR statute would be better suited than a vague, unregistered foreign agent statute to bridge local law enforcement's knowledge gap. The statute could adopt a bureaucratic approach, devoting more funding to federal and local training programs and creating interagency task forces devoted to combatting TNR.[260] Although this step, by itself, would remedy some of local law enforcement's identification problems, adding an explicit TNR criminal charge provides another advantage: officers would be compelled to prove up the illicit activity through indictments and public trials, further illustrating real-world examples of TNR activity. This demonstration of proof equips local law enforcement with more information about the type of potential conduct predicating TNR prosecutions. A criminal TNR statute would promote sensitivity to the dangers that victims face, which, in turn, would encourage trust between immigrant communities and law enforcement.[261] Individuals without legal status in the United States often face significant immigration obstacles that can lead to fear or distrust of law enforcement; yet, these individuals are also particularly vulnerable to TNR, especially those fleeing authoritarian regimes.[262] Despite this trepidation, it is imperative to build trust and encourage these individuals to report instances of TNR to local police.[263] While comprehensive immigration solutions are beyond the scope of this Note, existing mechanisms, like the U-Visa program, offer victims of crimes a pathway to permanent legal status when they cooperate with the police.[264] These programs could help reduce barriers to reporting and

258. *See id.* at 6–7.

259. *See id.*

260. A bureaucratic approach tries for expression of criminal activity without new penal provisions. For example, in the proposed Domestic Terrorism Prevention Act of 2023, drafters suggest creating a task force, reporting structure, and training program, rather than pass a domestic terrorism criminal statute. *See* S. 1591, 118th Cong. (2023).

261. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 12–13.

262. *See id.* at 15.

263. *See id.* at 35.

264. *See generally* Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7101 (2000); *see Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 2, 2024), https://www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status [https://perma.cc/KC6B-8LZT].

support law enforcements' response, ensuring that local authorities remain informed of acute threats facing their community.[265]

5. Lack of Expressive Effect

More generally, prosecutors' application of Section 951 fails to communicate the danger intrinsic to TNR crimes. An expressive theory of criminal justice understands and justifies punishment as a communicative act.[266] It is an emphatic way of expressing the judgment of guilt, thereby "denouncing the guilty wrong."[267] This expressive dimension of moral condemnation "should be calibrated to the 'amount of harm' generally caused by the criminal event and the 'degree to which people are disposed to commit it.'"[268]

By applying Section 951 to TNR cases, prosecutors fail to attach the appropriate amount of condemnation to state-backed repression.[269] Section 951 only indicates an unregistered agent's nexus with a foreign government—not the nature of the underlying activity. This is because Section 951 broadly criminalizes unregistered activity rather than specific transgressions like harassment or physical attacks.[270] By treating all unregistered activity alike, the statute fails to signal the expressive dimension of punishment,[271] even if it provides a relatively steep maximum sentence of ten years.[272] Although press releases and prison sentences can indicate the gravity of some of the underlying acts, not every case can or will be brought to the

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265. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 7.

266. *See* Daniel Maggen, *Conventions and Convictions: A Valuative Theory of Punishment*, 1 UTAH L. REV. 1, 6 (2020); *see also* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1513 (2016) (construing punishment as the "communicative negation of the message of the crime").

267. John Gardner, *Introduction to* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW xxvii (2d ed., Oxford Univ. Press 2008).

268. Bernard Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between* The Moral Limits of the Criminal Law *and* The Expressive Function of Punishment, 5 BUFF. CRIM. L. REV. 145, 157 (2001) (quoting Feinberg, *supra* note 266, at 423).

269. *Cf. id.* (considering the "expressive element of moral condemnation" a popular theory of criminal punishment).

270. *See supra* Part II.B.

271. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 94 (2008).

272. *See* 18 U.S.C. § 951(a).

media's attention.[273] The criminal charge itself will always serve an expressive function. In part, Section 951's expressive failure reflects how Congress never intended to enforce the statute alone, "at least not as the major weapon of the United States government to combat foreign espionage and influences."[274] It is a "supplemental instrument that catches activities" that the government might not be able to prove under classical espionage statutes.[275]

Section 951's expressive failure introduces disparity between proof and public accountability in TNR cases. Although investigators "suspect[] the target of other, more serious offenses than those charged," the government substitutes an easily proved lesser crime—like Section 951—for a "harder-to-prove real one"[276]—like espionage. This strategy "appears to be both fair and reasonable," allowing prosecutors to save limited resources and shoulder a lighter burden of proof.[277] At the same time, this prosecutorial strategy decreases the transparency of the criminal process and signaling function of the criminal charge.[278] The public "has a strong interest in knowing whether [the defendant] was guilty of any more-than-technical crimes."[279] By avoiding taking on a higher burden of proof, prosecutors deprive the public of the opportunity to learn about illicit nation-state activity in a

273. *See* Jack Goldsmith, *The Puzzle of the GRU Indictment*, LAWFARE (Oct. 21, 2020, 11:12 AM), https://www.lawfaremedia.org/article/puzzle-gru-indictment [https://perma.cc/3YKG-KGK9]. Beyond press releases, name and shame indictments can spotlight actors and foreign governments authoring criminal activity even when apprehension remains unlikely. Although hardly "transform[ative of] the criminal landscape," they are a critical step in giving the public a look at dangers in a "legally rigorous form." David Heckler, *What Is the Point of These Nation-State Indictments?*, LAWFARE (Feb. 8, 2021, 12:21 PM), https://www.lawfaremedia.org/article/what-point-these-nation-state-indictments [https://perma.cc/6DQX-39DS].

274. Wu & Olmos, *supra* note 188, at 60.

275. *Id.* at 76. Between 1998 and 2020, 40% of all cases bringing Section 951 counts also charged espionage-related crimes. *See id.* at 60. In TNR cases between January 2018 and December 2023, prosecutors most commonly brought substantive and conspiracy counts of Section 951 with counts charging aiding and abetting, obstructing justice, false statements, and conspiracy to commit interstate stalking. *See supra* note 141.

276. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: A Message on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 591, 590 (2005).

277. *Id.* at 595. Likewise, the structure of sentencing guidelines allows judges to consider the defendant's entire criminal conduct, "not just the conduct that generated criminal liability," which decreases the gap between crime and punishment. *Id.* at 637 ("Real offense sentencing acts as a kind of subsidy of pretextual charging: Prosecutors can charge crime X and have the defendant sentenced based on crimes X, Y, and Z—even when crime X is fairly small and crimes Y and Z are very large.").

278. *See id.* at 637.

279. *Id.* at 598.

legally rigorous form. If the United States is as committed to countering TNR as it claims,[280] then its charging patterns must express and censure the wrongdoing occurring. By passing a TNR statute, Congress would communicate its legislative agenda in countering TNR, raise pressure on prosecutors to take on a higher burden of proof, and decrease the gap between proof and public accountability.

III. RECOMMENDING A HYBRID STATUTORY APPROACH TO TNR

The United States' inability to signal culpability through criminal sanctions erodes norms condemning extraterritorial repression and leaves open a gap in criminal accountability.[281] Given the infirmities of Section 951, Congress should pass a TNR statute to further three overarching goals: achieving statutory coverage of the core TNR crimes, communicating the severity of overt acts of TNR under a uniform definition, and maximizing the effectiveness of law enforcement's response.[282] In the 2023–24 legislative session, Congress considered two main proposals: the Transnational Repression Policy Act (TRPA)[283] and the Stop Transnational Repression Act (STRA).[284] Individually, these proposed statutes fall short of providing a comprehensive criminal response to TNR. However, by integrating different aspects of the TRPA and STRA's approaches, Congress can enhance law enforcement's ability to combat TNR effectively. Drawing from the bureaucratic elements in the TRPA and STRA and the penal elements in the STRA, this Note recommends a hybrid approach that directly criminalizes certain TNR activity while reorganizing U.S. law enforcement's response. This hybrid approach allows penal law to play a meaningful but narrow role in countering TNR given the potential second-order effects of overcriminalization.

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280. *See supra* Part II.A.

281. *See supra* Part I.C.

282. Some DOJ officials have echoed this call for a TNR statute. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 21–22 (a TNR statute would allow the DOJ to "call attention to the involvement of foreign governments better than it currently does" and "hold perpetrating foreign governments . . . accountable within the international community").

283. *See* Transnational Repression Policy Act, S. 831, 118th Cong. (2023). Representative Christopher Smith, R-N.J., introduced an identical version into the House on May 24, 2023. *See* Transnational Repression Policy Act, H.R. 3654, 118th Cong. (2023).

284. *See* Stop Transnational Repression Act, H.R. 5907, 118th Cong. (2023); *see also* Stop Transnational Repression Act, H.R. 9460, 117th Cong. (2022).

A. PROPOSED TNR STATUTES

Any TNR statute must strike the right balance between penalizing cross-border repression and mitigating the potential risk of government abuse. Two recently proposed federal statutes reflect an increasing awareness of TNR and implicitly recognition of gaps in U.S. law enforcement's approach. But rather than adopting these two statutes, which contain critical, substantive gaps, this Note advocates for a new TNR statute that embraces a hybrid approach, integrating punitive measures from the STRA and administrative safeguards from the TRPA and the STRA.[285]

Sponsored by Senators Jeff Merkley, D-Or., and Marco Rubio, R-Fla., the TRPA would "establish U.S. policy to hold foreign governments and individuals accountable when they stalk, intimidate, or assault people within the United States and [U.S.] citizens in foreign countries."[286] To meet this goal, the TRPA requires the U.S. Department of State (DOS) to provide TNR-specific reporting;[287] prompts the DOD and DOJ to work with civil society and the private sector to better understand how Perpetrator States leverage their platforms for repressive ends;[288] instructs the intelligence community to identify perpetrators of TNR and their methodologies;[289] encourages the U.S. Department

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285. This Note does not directly address the new bipartisan bill that Representative Adam Schiff, D-Cal., introduced the following year—the Transnational Repression Reporting Act of 2024—which would mandate that the Attorney General track and report TNR cases against U.S. citizens or people in the United States. *See* H.R. 9707, 118th Cong. (2024); *see also* Press Release, Adam Schiff, House of Representatives, Schiff Introduces the Bipartisan Transnational Repression Reporting Act to Track Cases of Foreign Repression in the U.S. (Sept. 19, 2024), https://schiff.house.gov/news/press-releases/schiff-introduces-the-bipartisan-transnational-repression-reporting-act-to-track-cases-of-foreign-repression-in-the-us [https://perma.cc/4GDJ-CZQZ]. The substance of the proposal, however, is one of the crucial bureaucratic controls that this Note considers.

This Note also does not directly address the proposal that Representatives August Pfluger, R-Tex., and Seth Magaziner, D-R.I., recently introduced—the Combating Transnational Repression Act of 2024—which would authorize the creation of a TNR office within the U.S. Department of Homeland Security to monitor, analyze, and report on TNR against U.S. citizens or people in the United States. *See* H.R. 7443, 118th Cong. (2024). This Note, however, does engage with broader questions on how to structure effective federal oversight, particularly within the DOJ.

286. *Oregon's Senator Jeff Merkley: Transnational Repression Policy Act*, JEFF MERKLEY: SEN. FOR OR. (Mar. 16, 2024), https://www.merkley.senate.gov/wp-content/uploads/imo/media/doc/transnational_repression_bill_summary.pdf [https://perma.cc/WX2G-4UJV].

287. *See* S. 831, 118th Cong. §§ 4, 5 (2023).

288. *See id.* § 6.

289. *See id.* § 7.

of Homeland Security (DHS) and the DOJ to establish a dedicated tip line for TNR;[290] and enables the president to impose property- and visa-blocking sanctions on individual perpetrators of TNR.[291] The TRPA also requires that the Senate consider updates to U.S. law on "the criminalization of gathering of information about private individuals in diaspora and exile communities" and "the expansion of the definition of foreign agents under FARA and [18 U.S.C. § 951]."[292] While the TRPA considers the bureaucratic measures necessary to combat TNR, it fails to criminalize any cross-border, repressive activity.

Introduced in the House by Congressman Adam Schiff, D-Cal., the STRA seeks to "formally define and criminalize" TNR and "to more actively track and report on instances of [TNR] in the United States and affecting [U.S.] persons."[293] The STRA targets foreign governments, agents of a foreign government, and proxies "acting on behalf of an agent of a foreign government."[294] In its case-in-chief, the government must show that the defendant acted (1) "knowingly,"[295] (2) "for or in the interests of a foreign government,"[296] and (3) within the United States or against a "United States person or person in the United States."[297] The STRA criminalizes a broad range of TNR methodologies occurring domestically and internationally, including digital threats from a distance,[298] coercion by proxy,[299] restraints on the exercise of First Amendment rights,[300] extrajudicial killings,[301] and "any act intended to further the [aforementioned] efforts."[302] The statute provides for extraterritorial jurisdiction,[303] proposes a maximum sentence of ten years,[304] centralizes oversight in the National Security Division of the DOJ,[305] and mandates annual reports to

290. *See id.* § 8.
291. *See id.* § 9.
292. *Id.* § 5(b)(3)(A).
293. H.R. 5907, 118th Cong. § 3 (2023).
294. *Id.* §§ 4(e)(4), 4(e)(1), 4(e)(3).
295. *Id.* § 4(a).
296. *Id.* § 4(e)(4)(B).
297. *Id.* § 4(e)(4)(C).
298. *See id.* § 4(e)(4)(A)(i).
299. *See id.*
300. *See id.* § 4(e)(4)(A)(ii).
301. *See id.* § 4(e)(4)(A)(iii).
302. *Id.* § 4(e)(4)(A)(iv).
303. *See id.* § 4(d).
304. *See id.* § 4(a)–(b).
305. *See id.* § 5.

relevant congressional committees.[306] The STRA arguably offers a more comprehensive approach than the TPRA, both criminalizing TNR and providing organizational oversight of enforcement; nonetheless, the STRA overlooks some bureaucratic elements critical to curbing repression, such as providing nationwide law enforcement training on identifying instances of TNR.[307]

B. RECOMMENDATION TO ADOPT A TNR STATUTE

Any TNR statute must balance the need to punish repressive misconduct against the concern for potential governmental abuse.[308] To meet this goal, a TNR statute should adopt a hybrid approach importing penal elements from the STRA and bureaucratic controls from the TRPA and STRA.

1. Penal Approach to TNR

Drawing in part on the STRA, this Note recommends adopting a criminal approach to TNR that (1) cabins an expansive understanding of TNR methods to curb overcriminalization, (2) provides a broad definition of victim for maximal protection, and (3) includes tripartite delineation of TNR actors to encourage charging clarity. In drafting this statute, Congress must reckon with the potential drawbacks of adopting a TNR criminal statute. In the era of overcriminalization, new statutes may be not only duplicative but also excessively punitive, "outlaw[ing] the same conduct but multiply[ing] the penalties."[309] Besides some geographical limitations,[310] prosecutors can and have successfully

306. *See id.* § 6.

307. *See supra* Part II.C.4.

308. *See* Michael Abramowitz, *Transnational Repression: A Global Threat to Rights and Security*, FREEDOM HOUSE (Dec. 7, 2023), https://freedomhouse.org/article/transnational-repression-global-threat-rights-and-security [https://perma.cc/K33G-8PAV] (suggesting that a new TNR statute "should be narrowly tailored to ensure [U.S.] criminal law can sufficiently address [TNR] without inadvertently criminalizing benign activities or enabling the targeting of individuals simply due to their country of origin").

309. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 720 (2013). As it stands, little positive law governs how criminal law or foreign policy evolves. Congress has broad discretion to expand the federal criminal code without a mandate to interrogate its full effects. *See* Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 64, 71 (Michael Klarman et al. eds., 2012) (recognizing the presence of "an inexhaustible supply of criminal law in the United States").

310. *See supra* Part II.C.2.

applied Section 951 in TNR cases, thereby making overcriminalization a particularly salient concern.[311] Additionally, passing reactionary statutes that have merely "capture[d] the public's attention" may lead to illiberal results.[312] A new TNR statute may empower law enforcement to enter punitive overdrive,[313] mistaking those escaping Perpetrator States for those acting as agents of Perpetrator States. This concern reflects past criticisms of the 2018 China Initiative.[314] Under increased pressure to scrutinize scholars, federal agencies conducted "costly, time-consuming, and abusive investigations and prosecutions of people, particularly Asian American[s], who were not suspected of being PRC or CCP agents."[315] Thus, a reactionary, duplicative, and broad statute criminalizing TNR methods could produce second-order effects that chill other fundamental rights.

First, in view of this concern for overcriminalization, a TNR statute should not criminalize *all* potential tools of TNR; it should only counter those discrete methods central to TNR that Section 951 cannot reach. Instead of the STRA's broad statutory coverage criminalizing an exhaustive list of TNR methods,[316] this Note recommends a narrower approach used in conjunction with a sentencing enhancement covering peripheral conduct. As the STRA demonstrates, broad coverage of TNR methods functions as a double-edged sword. On the one hand, it allows prosecutors to charge all instances of TNR uniformly rather than resort to a patchwork of criminal statutes.[317] It achieves this uniformity in three ways. In one respect, the STRA remedies the geographical limitations of Section 951, which only proscribes "acts [occurring

311. *See supra* Part II.B.2.

312. Richman, *supra* note 187, at 772. Due to increased incidents in the United States and extensive news coverage, public awareness of TNR is at an all-time high. Having hosted multiple hearings on TNR, Congress appears eager to respond. *See, e.g.*, *Judiciary Hearing on Oversight of the FBI*; *The Threat of Transnational Repression from China and the U.S. Response: Hearing Before the Cong.-Exec. Comm'n on China*, 117th Cong. (2022); *Transnational Repression: Authoritarians Targeting Dissenters Abroad: Hearing before the S. Comm. on Foreign Relations*, 118th Cong. (2023).

313. *See* Richman, *supra* note 309, at 65 ("More punitive and broader penal sanctions certainly tend to increase the discretion of police officers and prosecutors.").

314. *See supra* Part II.C.3.

315. *Letter to Congress: Do No Reinstate the China Initiative*, CHINESE FOR AFFIRMATIVE ACTION (Dec. 11, 2023), https://caasf.org/press-release/letter-to-congress-do-not-reinstate-the-china-initiative/ [https://perma.cc/W937-BFRV]; *see also supra* Part II.C.2.

316. *See* H.R. 5907, 118th Cong. § 4(e)(4)(A) (2023).

317. *See supra* Part II.C.5.

with]in the United States."[318] This extraterritorial scope would have benefitted prosecutors in *Julien Jin*, who were unable to signal the PRC's interference through Section 951.[319] Under the STRA, prosecutors can indict digitally repressive acts so long as they impact U.S. nationals or persons in the United States.[320] Next, the STRA may incentivize prosecutors to charge direct attacks by explicitly proscribing extrajudicial killings in its text.[321] Prosecutors currently avoid charging violent conduct under Section 951; however, express Congressional direction to pursue these crimes may encourage prosecutorial enforcement.[322] Finally, the STRA moves beyond proscribing methods of violence against dissidents to framing TNR as a threat to the exercise of their constitutional rights.[323] This express link between TNR and the risk to constitutional protections demonstrates a sensitivity to the impact on victims and a recognition of the fundamental freedoms at stake.

On the other hand, adopting a capacious criminal approach to TNR invites acute dangers, highlighting the need for a statute narrowly tailored to specific TNR methods. Perpetrator States often deploy precursor tactics like refugee espionage and coercion by proxy before graduating to kinetic methods,[324] but allowing law enforcement to intervene prematurely may cause adverse spillover effects on the dissidents themselves. Even if Perpetrator States deploy these two methods, a TNR statute avoids criminalizing methods that potentially create more problems than they resolve. In the refugee espionage context, for example, German law enforcement brochures designed for refugees note the possibility of refugee espionage but "counterproductively identif[y] refugees as a potential source of threats to Germany, rather than as potential

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318. 18 U.S.C. § 951(a).

319. Although the defendants acted as foreign government agents—disrupting dissidents' user accounts on a U.S. technology company's platform at the PRC's behest—prosecutors could not charge Section 951 for acts occurring outside of the United States. *See* Complaint & Affidavit in Support of Application for an Arrest Warrant, United States v. Jin, No. 20-MJ-1103 (E.D.N.Y. Nov. 18, 2020), ECF No. 1.

320. *See* H.R. 5907, 118th Cong. § 4(e)(4)(C)(ii) (2023).

321. *See id.* § 4(e)(4)(A)(iii).

322. *See supra* Part II.C.2.

323. *See* H.R. 5907, 118th Cong. § 4(e)(4)(A)(ii) (criminalizing acts causing a person to "forebear from exercising their First Amendment rights").

324. For example, before resorting to direct attacks, the Iranian government attempted to coerce Alinejad by imprisoning her brother for allegedly fabricated offenses. *See Charges and New Arrest*, *supra* note 45.

victims of foreign repression."[325] Over-emphasizing with the threat of TNR may risk under-emphasizing the concern of misattribution, and vice versa. Although Sweden has found some success in criminalizing and trying refugee espionage,[326] the potential misattribution of the refugee as the perpetrator can outweigh the domestic utility of the charge.

A TNR statute should recognize the limitations of U.S. law enforcement in the kinds of activity they are equipped to counter effectively, and the statute should empower them accordingly. Likewise, there are limits to the kinds of activity U.S. law enforcement can effectively counter, and these limitations should guide what they are statutorily empowered to address. Coercion by proxy presents a distinct challenge to law enforcement, given that coercion may either align with the Perpetrator State's legal system or be beyond the reach of the Host Country.[327] For example, in April and May 2023, Saudi law enforcement arrested family members of 15-year-old U.S. citizen Rakan Nader Aldossari as retaliation for his commercial lawsuit against the Saudi government.[328] A coalition of human rights organizations petitioned the Biden administration to engage in diplomatic negotiations and impose sanctions under the Khashoggi Ban,[329] but no organization has recommended law enforcement intervention likely due to law enforcement's limited capacity to intervene.[330] Thus, diplomats may be better positioned to alleviate the pressure placed on families overseas, whereas law enforcement

325. YANA GOROKHOVSKAIA & ISABEL LINZER, FREEDOM HOUSE, *CASE STUDY: GERMANY* 3 (June 2022).

326. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 4.

327. *See TNR Watch: Coercion at Home, Pressure Abroad*, *supra* note 64.

328. *See Saudi Arabia: Government Retaliates Against U.S. Citizen's Lawsuit by Detaining and Prosecuting Five Family Members in Terrorism Court*, DAWN (July 25, 2023), https://dawnmena.org/saudi-arabia-government-retaliates-against-u-s-citizens-lawsuit-by-detaining-and-prosecuting-five-family-members-in-terrorism-court/ [https://perma.cc/Z9WV-3CQM] [hereinafter *Saudi Arabia: Government Retaliates*]. Aldossari had sued the Saudi government, including Crown Prince Mohammed bin Salman, on his family's behalf for reneging on a contract related to a refinery project in Saint Lucia. *See id.* The Third Circuit dismissed the case for lack of personal jurisdiction. *See* Aldossari *ex rel.* Aldossari v. Ripp, 49 F.4th 236, 262 (3d Cir. 2022).

329. *See Saudi Arabia: Government Retaliates*, *supra* note 328.

330. The Saudi prosecutors referred the detention of the Aldossari family to Saudi's Specialized Criminal Court, which has handed down lengthy sentences on human rights activists and dissidents in recent years. *See id.* According to the family, Saudi authorities have blocked the detainees from meeting with their lawyers and have conditioned their release on Rakan's return to Saudi Arabia. *See id.*

can call attention to and condemn such repressive tactics through prosecutions.

Given the potential illiberal effects flowing from a sweeping criminal TNR statute, this Note recommends adopting an explicit criminal approach tailored to the core acts of TNR: extrajudicial killings and digital threats from a distance. Other more overt methods of TNR—coercion by proxy, acts causing a person to forebear their First Amendment rights, and refugee espionage—should not form a basis to bring additional charges. Rather than serve as the sole basis for TNR charges, these overt methods can serve as evidence of other predicate TNR charges. This approach mirrors how federal prosecutors in *Sun Hoi Ying* used evidence of coercion by proxy (PRC officials' issuance of an exit ban, impeding the movement of the daughter of U.S. target) to reflect overt acts of TNR (specifically, interstate harassment against the U.S. target).[331] Further to this point, this Note recommends adopting the STRA's sentencing enhancement, which could sweep in any attempt, conspiracy, or act in furtherance of TNR.[332] So long as the underlying conduct promotes TNR, a judge would have the discretion to apply an enhanced sentence to overt acts like refugee espionage and coercion by proxy. This enhancement would acknowledge the range of TNR conduct and express the offenses' severity, given that a judge must determine whether the defendant's conduct constituted TNR.[333]

Second, the United States should adopt broad protections for TNR victims regardless of citizenship status. While an overly broad definition of TNR crimes could harm the same people the statute seeks to protect, a broad definition of TNR victims would serve to enhance protections. The STRA reaches activity committed against a "United States person"[334] or a person in the United States.[335] The term "United States person"[336] means "[a]n

331. *See* Sealed Complaint at 7–9, United States v. Sun Hoi Ying, No. 22-MAG-1711 (S.D.N.Y. Feb. 18, 2022).

332. *See* H.R. 5907, 118th Cong. § 4(c) (2023).

333. Similarly, as a viable alternative to codifying a domestic terrorism statute, some scholars have pointed to using a terrorism sentencing enhancement. *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 480 (2014). *But cf.* Note, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, 136 HARV. L. REV. 1914, 1928–33 (2023) (arguing that a terrorism sentencing enhancement "cannot bear the weight of being the primary tool the executive branch uses to respond to domestic terrorism").

334. H.R. 5907, 118th Cong. § 4(e)(4)(C)(ii)(I) (2023).

335. *See id.* § 4(e)(4)(C)(ii)(II).

336. *Id.* § 4(e)(5).

individual who is a citizen or resident of the United States; (B) an entity organized under the laws of . . . or any jurisdiction within the United States; or (C) a person located in the United States."[337] Under this conception of victims, prosecutors would have been able to bring criminal charges for the extrajudicial killing of Jamal Khashoggi, a long-term resident of the United States.[338] The DOS created and imposed visa restrictions under the Khashoggi Ban,[339] but the DOJ had limited options—unable to charge extraterritorial conduct under Section 951[340] or various homicide statutes.[341] An extraterritorial provision in a TNR statute broadly defining a United States person would remedy this infirmity. Such a provision affords equal treatment to all persons regardless of citizenship status, which reflects the reality of many TNR targets who have fled their home country "for the promise of living in a free and open society."[342] To realize this promise, broadly defining "United States persons" commits law enforcement to defending constitutional rights indiscriminately.

Third, a TNR statute should adopt the STRA's approach of textually delineating the perpetrators' varied roles in TNR. Under the STRA, three types of actors contribute to TNR schemes: (1) unregistered foreign government agents,[343] (2) proxies acting on behalf of agents,[344] and (3) foreign governments themselves.[345] Whereas Section 951 only reaches unregistered agents of foreign governments,[346] the STRA expands coverage to foreign government actors and their proxies.[347] This reflects the reality of TNR schemes: foreign governments order agents to commit TNR, and these agents then hire proxies based in the Host State, like

337. 50 U.S.C. § 1708(d)(10).
338. *See* Blinken, *supra* note 132.
339. *See id.*
340. *See* 18 U.S.C. § 951(a).
341. Federal homicide law (18 U.S.C. §§ 1111–22) does not provide for extraterritorial jurisdiction, except for the statute barring the killing of any officer or employee of the United States. *See* 18 U.S.C. § 1114(b) (providing extraterritorial jurisdiction); *see also* 18 U.S.C. § 1111(b) (same, for conduct occurring "[w]ithin the special maritime and territorial jurisdiction of the United States"); 18 U.S.C. § 1119 ("foreign murder of United States national" defined within the meaning of 8 U.S.C. § 1101(a)(22)).
342. *Judiciary Hearing on Oversight of the FBI*, *supra* note 35, at 8 ("To ensure that this promise remains a reality, we must continue to use all of our tools to block authoritarian regimes that seek to extend their tactics of repression beyond their shores.").
343. *See* H.R. 5907, 118th Cong. § 4(a) (2023).
344. *See id.*
345. *See id.*
346. *See* 18 U.S.C. § 951(a).
347. *See* H.R. 5907, 118th Cong. § 4(a) (2023).

private investigators. For example, in the *Ji* case, the government tried three defendants—Michael McMahon, Zheng Congying, and Zhu Yong—for participating in the Operation Foxhunt scheme under Section 951.[348] Zhu had knowingly agreed to work for the PRC to locate victims for forced rendition.[349] Often, Zhu would travel between the United States and the PRC to relay information.[350] Whereas Zhu's connection with the PRC was direct, McMahon's connection was more attenuated. The PRC directed Zhu to hire McMahon as U.S.-based private investigator, given McMahon's current investigative business and former employment with the New York City Police Department.[351] While Zhu—a Chinese national spying for and reporting to the PRC—conformed to the traditional foreign agent role, McMahon—a U.S. national mainly working for the PRC through Zhu—better fits a "proxy" role.[352] With explicit legislative signaling, prosecutors may be more willing to charge U.S.-based private investigators who act as proxies of foreign agents and are central to the fulfillment of TNR schemes.

In practice, the line between a foreign agent and a proxy may be blurry, and so too may the distinction between a foreign agent and a government actor. For instance, in the *Ji* trial, prosecutors also charged two defendants under Section 951: Tu Lan, a PRC prosecutor with the Wuhan Procuratorate, and Hu Ji, a PRC police officer with the Wuhan Public Security Bureau.[353] Under the STRA, prosecutors would need to determine whether government employees Tu and Hu were acting in the capacity of foreign government actors or as foreign agents who "operate[] subject to the direction or control of a foreign government or official."[354] Despite some line-drawing difficulties, this tripartite taxonomy positively encourages specificity in charging decisions which, in

348. *See* Sealed Superseding Indictment, United States v. Hu, No. 21-CR-265 (E.D.N.Y. July 21, 2021), ECF No. 76.

349. *See* The Government's Memorandum of Law Opposing the Defendants' Motions for Judgments of Acquittal and New Trials at 5, United States v. Hu, No. 21-CR-265 (E.D.N.Y. Oct. 5, 2021), ECF No. 286.

350. *See id.*

351. *See Federal Jury Convicts Three Defendants*, *supra* note 3.

352. McMahon attended in-person meetings with a PRC official and Zhu Yong but mainly reported updates to Zhu. *See* Government's Memorandum of Law Opposing Defendants' Motions for Judgments of Acquittal and New Trials at 7, United States v. Hu, No. 21-CR-265 (E.D.N.Y. Oct. 5, 2021), ECF No. 286.

353. *See Federal Jury Convicts Three Defendants*, *supra* note 3.

354. H.R. 5907, 118th Cong. § 4(e)(1) (2023).

turn, could improve a jury's assessment of an individual defendant's guilt. The evidence against McMahon, Zhu, Tu, and Hu varies with their connection to the PRC. Prosecutors can signal this variance by delineating the defendants' roles. Thus, this Note recommends that a TNR statute adopt a tripartite classification of actors.

The STRA serves as a useful starting point, but because its expansive reach may render it a threat to the very refugees it intends to protect, this Note ultimately advocates for a more measured approach in criminalizing TNR. This Note, thus, recommends a criminal TNR statute that is (1) narrowly tailored to TNR methods that law enforcement can adequately address, (2) inclusive in its definition of U.S. victims, and (3) clear in delineating the types of foreign agents acting on behalf of foreign powers. This approach aims to minimize overcriminalization, maximize victim protection, and provide law enforcement with clear guidelines for identifying repressive acts.

2. Beyond Penal Law

Despite curing infirmities under Section 951, codifying a TNR statute may nonetheless increase risks inherent to expanding government power and fail to remedy problems with enforcement.[355] Rather than rely solely on penal law, a TNR statute should also consider bureaucratic components that could aid the efficiency and effectiveness of law enforcement's response.[356] This Note recommends importing certain bureaucratic elements of the TRPA and STRA to (1) provide federal and state training programs to law enforcement, (2) establish a uniform definition of TNR, (3) structure coordination between

355. Domiciled abroad and unlikely to be extradited, foreign agents are often unreachable. For instance, five defendants charged in the *Ji* trial remain at large. *See* Brief in Support of Defendant Michael McMahon's Motion for Discovery and an Evidentiary Hearing Regarding Prosecutorial Misconduct at 1, United States v. Hu, No. 21-CR-265 (E.D.N.Y. Mar. 21, 2022), ECF No. 146. Those whom prosecutors can reach may be low-level actors in an expansive TNR scheme. For instance, high-ranking actors Tu Lan, a PRC prosecutor, and Hu Ji, a PRC police officer, continue to evade prosecution in the *Ji* trial. *See Federal Jury Convicts Three Defendants*, *supra* note 3.

356. Relatedly, some members of Congress have recommended adopting a bureaucratic approach to countering domestic terrorism to avoid the dangers associated with expanding the criminal code. *See* S. 1591, 118th Cong. (2023). However, unlike TNR, domestic terrorism is formally defined and arguably covered under international terrorism under 18 U.S.C. Chapter 113B and hate crime under 18 U.S.C. § 249. *See* The USA PATRIOT Act, H.R. 3162, 107th Cong. (2001); *see also* S. 1591, 118th Cong. (2023).

federal agencies, and (4) require reporting to relevant congressional committees.[357]

First, a TNR statute should provide federal funding for training programs to encourage consistency in law enforcement's identification of and approach to non-kinetic methods.[358] Currently, U.S. criminal law does not define TNR, making it "impossible" for officials to respond sufficiently.[359] Compounding this issue is local law enforcement's lack of understanding about TNR, as they often fail to "recognize a foreign aspect that could indicate [the crime as] . . . an act of TNR."[360] To promote comprehension, a statute should provide training programs to agents encountering perpetrators or victims, including employees of the DHS, the DOJ, the FBI, the DOS, other federal, state, and local law enforcement, and appropriate private sector and community partners.[361] Critically, the FBI should consider how state and urban area fusion centers can shore up local attention about TNR and disseminate actionable intelligence to appropriate agencies.[362]

Second, beyond providing training programs like those suggested in the TRPA,[363] this Note recommends adopting the following uniform definition of TNR, derived from language used in the TRPA and STRA:

> Any activity by a foreign government, or an agent of a foreign government or proxy thereof,[364] involving the transgression of national borders through physical, digital, or analog means to intimidate, silence, coerce, harass, or harm members of

357. *See* Abramowitz, *supra* note 308.

358. *See id.* (recommending "codifying a definition of [TNR and] . . . ensuring government officials . . . receive the training necessary to recognize and respond to the problem").

359. *Id.*

360. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 15.

361. *See* S. 831, 118th Cong. § 6(a)–(b)(2) (2023).

362. Fusion centers "are state-owned and operated centers that serve as focal points in states and major urban areas for the receipt, analysis, gathering and sharing of threat-related information between State, Local, Tribal and Territorial (SLTT), federal and private sector partners." *Fusion Centers*, U.S. DEP'T OF HOMELAND SEC. (Oct. 17, 2022), https://www.dhs.gov/fusion-centers [https://perma.cc/4RJF-683L]. The National Network of Fusion Centers is the hub of the "two-way intelligence and information flow" between the federal government, the SLTT, and private sector partners. *Id.*

363. *See* S. 831, 118th Cong. § 6 (2023).

364. *See* H.R. 5907, 118th Cong. § 4(e)(4) (2023).

> diaspora and exile communities in order to prevent their exercise of internationally recognized human rights.[365]

Alongside the definition, the statute should list the four methods of TNR—direct attacks, threats from a distance like digital threats and coercion by proxy, co-option of other countries, and mobility controls—as exemplars of overt acts[366] and provide specific examples of their use.[367] Finally, the statute should note the elements predicating criminal charges: (1) the activity involves direct attacks or digital threats from a distance,[368] (2) "the activity is engaged in for or in the interests of a foreign government,"[369] and (3) the activity "occurs, in whole or in part, in the United States" or is committed against "a United States person" or "a person in the United States."[370] Clear statutory denotation notifies law enforcement about the full spectrum of TNR and the bases for criminal charges.

Third, a TNR statute should adopt the STRA's approach of centralizing oversight of prosecutions under the DOJ's National Security Division (NSD) and consolidating investigations under the FBI.[371] Any statute must reckon with the vast array of stakeholders working in tandem to combat TNR, including diplomats, assistance agencies, law enforcement, and the intelligence community.[372] Through centralization, Congress can control the criminal response to TNR and offer a clear pathway to reconcile diplomats' and law enforcement's agendas. For example, if decisions in foreign policy prosecutions threaten diplomatic goals, the DOS can approach the NSD rather than negotiate

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365. *See* S. 831, 118th Cong. § 9(a)(4) (2023).
366. *See supra* Part I.A.
367. For instance, S. 831 provides that TNR "can take the form of—(i) extrajudicial killings; (ii) physical assaults and intimidation; (iii) unlawful detentions; (iv) unlawful renditions; (v) unlawful deportations; (vi) unexplained or enforced disappearances; (vii) physical or online surveillance or stalking; (viii) unwarranted passport cancellation or control over other identification documents; (ix) INTERPOL abuse; (x) intimidation by diplomatic personnel, government officials, or proxies; (xi) unlawful asset freezes; (xii) digital threats, such as cyberattacks, targeted surveillance and spyware, online harassment, and intimidation; (xiii) coercion by proxy, such as harassment of, or threats or harm to, family and associates of such private individuals who remain in the country of origin; and (xiv) slander and libel to discredit individuals." S. 831, 118th Cong. § 2(1)(B) (2023).
368. *See supra* Part III.B.2.
369. *See* H.R. 5907 § 4(e)(4)(B).
370. *See id.* § 4(e)(4)(C).
371. *See id.* § 5.
372. *See* S. 831, 118th Cong. § 5 (2023).

charging decisions with individual USAOs. Centralization thus enables Congress to reap the benefits of foreign affairs prosecutions—which promote individual criminal accountability for state-backed activity—and mitigate the disadvantages—such as jeopardizing diplomatic relations.[373]

Fourth, a TNR statute should provide Congress with an evaluation mechanism to regularly reconsider whether federal agencies have properly prioritized efforts to counter TNR.[374] Given agencies' recent struggle to quantify the full extent of TNR,[375] the STRA would require that the DOJ deliver to Congress annual reports providing an overview of TNR in the United States and against U.S. persons abroad,[376] a description of activities "substantially similar" to TNR that do not fall within the STRA's definition,[377] and an account of efforts to disrupt TNR through criminal prosecutions[378] and diplomatic means.[379] Beyond adopting the STRA's reporting structure, this Note recommends that Congress consider whether agencies collecting data are adequately equipped to track TNR offenses. Even under mandatory reporting schemes, agencies may unintentionally undercount TNR offenses, given victims' hesitancy to self-report.[380] Providing a robust reporting mechanism affords Congress a comprehensive assessment of the current threat environment.

Criminalizing TNR on its own will not remedy all the shortcomings inherent to prosecuting TNR and applying Section 951, as issues related to enforcement, oversight, and training are likely to persist. To improve law enforcement's effectiveness, a comprehensive TNR statue must include key bureaucratic elements, such as: (1) allocating federal funds for federal and state law enforcement training programs, (2) establishing a clear, consistent definition of TNR, (3) coordinating federal efforts related to TNR, and (4) implementing mandatory Congressional reporting requirements. This hybrid strategy, blending penal and

373. *See* Koh, *supra* note 231, at 342.

374. *See, e.g.*, Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2023, 8:00 AM), https://www.lawfaremedia.org/article/road-map-congress-address-domestic-terrorism [https://perma.cc/3ZED-KJYN].

375. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 9.

376. *See* H.R. 5907, 118th Cong. § 6(a)(1) (2023).

377. *Id.* § 6(a)(2).

378. *See id.* § 6(a)(3).

379. *See id.* § 6(a)(4); *see also* S. 831, 118th Cong. § 6 (2023).

380. *See* GOROKHOVSKAIA & LINZER, UNSAFE IN AMERICA, *supra* note 136, at 7.

bureaucratic controls, counters cross-border repression while mitigating concerns about potential government overreach.

CONCLUSION

TNR is more than a violation of state sovereignty; it is a threat to human rights and the integrity of U.S. democratic institutions.[381] This Note argues that the criminal statute prosecutors currently rely on, 18 U.S.C. § 951, is an inadequate response to TNR, and it echoes various governmental and non-governmental organizations' calls for a purpose-built statute to define, track, and counter TNR. Now more than ever, democracies like the United States must present a united front against the rising tide of TNR. This need is increasingly salient as backsliding democracies resort to and normalize the use of TNR. Regardless of the Perpetrator States' relations with the United States, law enforcement must hold all agents, proxies, and foreign governments equally accountable under the law. Enacting a TNR statute is the first crucial step toward building an effective criminal response to these corrosive practices. The next step is to ensure that the statute strikes the right balance—redressing the deficiencies in TNR prosecutions, while safeguarding against the risks of an expansive criminal approach.

On February 5, 2025, as this Note was going to press, Attorney General Pam Bondi issued a memorandum directing the DOJ's NSD to limit FARA and Section 951 prosecutions "to instances of alleged conduct similar to more traditional espionage by foreign government actors."[382] Whether the Trump Administration will classify TNR as espionage remains to be seen. But TNR differs significantly from the corporate crimes that the Trump Administration is seeking to immunize from prosecution, which suggests that TNR is unlikely to be an enforcement priority.[383] If anything, the Trump Administration's deprioritization of Section

381. *See* Speech, U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks on Defending the Rule of Law Against Hostile Nation-States (Mar. 28, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-defending-rule-law-against-hostile [https://perma.cc/777W-NJ6L].

382. Memorandum from Pam Bondi, Att'y Gen., to all Dep't of Just. Employees 4 (Feb. 5, 2025), https://www.justice.gov/ag/media/1388541/dl [https://perma.cc/7J6K-9B5B].

383. *See* Ben Penn, *Bondi Diminishes Justice Department White Collar Enforcement*, BLOOMBERG L. (Feb. 5, 2025), https://news.bloomberglaw.com/us-law-week/bondi-scales-back-us-justice-department-white-collar-enforcement (on file with the *Columbia Journal of Law & Social Problems*).

951 prosecution reinforces this Note's call for a statute dedicated to criminalizing TNR.