

# ENHANCING THE FOREIGN AGENTS REGISTRATION ACT OF 1938

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## HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTEENTH CONGRESS SECOND SESSION

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TUESDAY, APRIL 5, 2022

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## ENHANCING THE FOREIGN AGENTS REGISTRATION ACT OF 1938

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**Tuesday, April 5, 2022**

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,  
AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

*Washington, DC*

The Subcommittee met, pursuant to call, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

*Members present:* Representatives Nadler, Cohen, Raskin, Ross, Johnson of Georgia, Garcia, Jackson Lee, Jordan, and Johnson of Louisiana.

*Staff present:* John Doty, Senior Advisor and Deputy Staff Director; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Jordan Dashow, Professional Staff Member; Cierra Fontenot, Chief Clerk; Gabriel Barnett, Staff Assistant; Merrick Nelson, Digital Director; James Park, Chief Counsel for Constitution; Matt Morgan, Counsel for Constitution; Agbeko Petty, Counsel for Constitution; Will Emmons, Professional Staff Member/Legislative Aide for Constitution; Katy Rother, Minority Deputy General Counsel and Parliamentarian; Betsy Ferguson, Minority Senior Counsel; Caroline Nabity, Minority Senior Counsel; James Lesinski, Minority Senior Counsel; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. [Presiding.] The Committee on Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

Welcome to today's hearing on enhancing the Foreign Agents Registration Act of 1938.

I remind Members we have an email address if you want to have exhibits, motions, et cetera, at our hearing today. If you would like to submit those materials, send them to the address there, and we will distribute them.

Finally, I would ask all Members and Witnesses to mute your microphones when you are not speaking. This will prevent feedback and other technical issues. Obviously, you may unmute yourself

anytime you seek recognition; otherwise, you will not be able to gain recognition.

I will recognize myself for an opening statement.

At an historical moment when America once again finds itself in a global struggle against anti-democratic adversaries abroad, it is right that the Subcommittee examine one of the tools that Congress intended to protect us from undue influence in our nation's policymaking process—the Foreign Agents Registration Act of 1938.

Congress passed, and President Franklin Roosevelt signed, FARA, as it is known, into law in response to concern about Nazi Germany's efforts to spread propaganda and influence political discourse in the United States in the years leading up to the Second World War. So, Russia is not unique in this; they are much like Nazi Germany. Congress later amended the statute in the 1960s and 1990s to confront new circumstances. Indeed, the last time any component of the House Judiciary Committee held a hearing specifically focused on FARA was in 1991.

Under FARA, “an agent of a foreign principal” that is engaged in certain activities on behalf of that country within the United States—such as political activities, acting as an information service, or representing interests before any U.S. government agency or official—must file a registration statement with the Department of Justice within 10 days of becoming an agent and file supplements detailing their activities with the Department of Justice every six months.

Registrants are also required to disclose copies of information/materials that the registrant believes will be, or intends to be, disseminated or circulated among two or more persons on the foreign principal's behalf. Registrants must also label those materials to indicate they are being disseminated by an agent of a foreign principal and to keep records of the registrant's activities for three years following the end of their agent status.

FARA defines the term “agent of a foreign principal” and “foreign principal” very broadly. For example, foreign principal means not just a foreign government or a foreign political party, but includes any person outside the United States, unless the person is a U.S. citizen or an entity organized under U.S. law that has its principal places of business in the United States.

Finally, FARA contains a number of exemptions, including one for those who are registered under the Lobbying Disclosure Act, or the LDA, in connection with the agent's representation of foreign principals who are not a foreign government or a political party.

For decades, the Department of Justice initiated few FARA enforcement actions, pursuing only a handful of prosecutions under the act's criminal provisions and a few attempts at seeking objective relief, the only civil remedy currently available under the act.

Since 2017, the Department of Justice has admirably increased the resources and intentions devoted to enforcing this law, including hiring additional staff dedicated to civil enforcement. The result has been a 50 percent increase in registrations today compared to 2016.

Some high-profile FARA-related charges included those against former Trump Campaign Manager Paul Manafort for failing to reg-

ister under FARA for his work in representing former Ukrainian President and Soviet Russia's friend, Victor Yanukovich, and Ukraine's pro-Russia Party of Regions as well, as well as charges against former National Security Advisor Michael Flynn for making materially false statements of documents that he filed, pursuant to FARA, for his work in representing the Turkish government.

While the Department of Justice's increased efforts at FARA enforcement have clearly reinvigorated the act, there main areas where the act itself could be strengthened and better targeted. I note, also, the Department is currently engaged in the preliminary stages of a FARA-related rulemaking process.

Since 2016, many Members of Congress have introduced FARA-related measures, focused mostly on enhancing enforcement. Our own distinguished Subcommittee Ranking Member and outstanding servant to his community, for which he got a great deal of money recently, Mike Johnson, the Ranking Member, sponsored a bill a few years ago that contained some ideas of what we might be able to support.

The Subcommittee should consider enforcement enhancement measures like eliminating or curtailing FARA's LDA exemption, the lobbyist exemption providing for civil penalties to encourage more civil enforcement by the Department of Justice and updated standards for making FARA materials publicly available.

H.R. 1, the For the People Act of 2021, which passed the House, amends FARA to provide civil penalties and additional resources to the Department of Justice to enforce the act, among many other portions of the law.

Importantly, FARA is a transparency measure. It does not, and cannot constitutionally, prohibit speech, even by foreign principals, and shouldn't. In taking this balanced approach, Congress recognized that in meeting our desire to confront foreign influence in our political process, we should not erode our own constitutional values. Registration and notice are okay in transparency.

In keeping with this loyalty to our own values as we seek to enhance FARA, we should keep in mind some potential unintended consequences of stronger enforcement and ask whether a sharper targeting of FARA may be necessary to achieve the act's aims without compromising our civil liberties or diverting attention away from FARA's primary concerns.

I thank our Witnesses for being here. I look forward to their testimony.

I would now like to recognize the distinguished Ranking Member from the city of Shreveport, home of the Independence Bowl, Mr. Johnson, for his opening statement.

Mr. JOHNSON of Louisiana. Thank you for that, Mr. Chair.

I do want to thank our Witnesses for being here this morning.

The Foreign Agents Registration Act, or FARA for folks watching at home, as mentioned, is a decades old law that has been pushed to the forefront of politics in the courts in recent years. The point of FARA is simple. If you engage in certain activities on behalf of a foreign principal, you are supposed to register with the Department of Justice. The purpose of this law is very simple. We need to inform the American public when people working for foreign

companies or governments intend to influence our government, the U.S. government officials, or the American people.

It is a very important statute that ensures transparency in our system, and as such, violations of FARA carry stiff penalties, up to a \$250,000 fine for each violation and up to five years in prison.

For decades, FARA was only known to DC insiders really. The Department of Justice focused on promoting voluntary compliance with the law, rather than prosecuting violations. One Washington, DC, lawyer who represents clients in FARA matters remarked that, before 2016, FARA was, “a backwater of American law—and a very still backwater at that,” with just seven prosecutions between the years 1966 and 2016, just seven cases.

That all changed after 2016, and a lot of people scratch their heads and wonder why. Well, desperate to find any law that President Trump and his aides could have broken during the 2016 election, Special Counsel Robert Mueller and his team turned to FARA. They dusted it off. He and politically-biased FBI officials sought to push FARA to its limits. Why? To advance their partisan investigations and take down anybody related to President Trump.

The FBI used to fail to register under FARA during investigations to pressure George Papadopoulos, Michael Flynn, Paul Manafort, and Carter Page. On April 28th, 2020, the FBI and the DOJ even used a failure to register under FARA to justify a raid on Rudy Giuliani’s apartment and his law offices in New York City.

Of course, now that President Trump has left office, the FBI again has little interest in enforcing FARA. If that is not evidence of political bias in the depths of government, I don’t know what it is, especially since there is ample evidence now that, during the Obama administration—listen to this; hey, everybody turn on the news—Hunter Biden attempted to influence his father, then-Vice President Joe Biden, by promoting the interests of foreign companies. Full stop. This evidence can be found in Hunter Biden’s laptop, which we now know the FBI has had in its possession since December 2019, nearly two and a half years, but has seemingly done nothing with it at all.

My colleague, Congressman Matt Gaetz, also introduced the laptop into the Congressional Record of the House Judiciary Committee, this Committee, just last week. I certainly hope the majority staff doesn’t delay the sharing of its contents with the American people.

Everybody has a right to know that the son of the Vice President used his political influence to benefit, among many other companies, CEFC China Energy Company, a Chinese conglomerate whose chair had links to the Chinese Communist Party. It wasn’t as if Hunter had no idea, he was potentially breaking the law over his dealings with the Chinese corporation. Listen to this: On May 1st, 2017, he texted his friend and business associate, Tony Bobulinski, writing, “We don’t want to have to register as foreign agents.”

He goes on to suggest that they set up a shell corporation to, presumably, shield their involvement and allow the Chinese company to do business with the U.S. government without raising flags. Mr. Bobulinski has since publicly stated that then-Vice President Joe Biden knew exactly what Hunter’s business dealings with China were, as he discussed them with him directly.

An email from Hunter's laptop, dated May 13th, 2017, even contains a discussion of, quote, "remuneration packages" for a deal with CEFC China Energy Company, including equity splits of, quote, "20 for H," and, "10 held by H for the Big Guy." According to Bobulinski, the "Big Guy" is a nickname Hunter commonly used to refer to his father. The laptop also has evidence of possible FARA violations from Hunter Biden's involvements in Ukraine, Kazakhstan, and Sri Lanka, just to name a few.

In summation, Hunter Biden appears to have arranged meetings with U.S. officials and engaged in other representational activities on behalf of his foreign business connections. Based on my reading of FARA, and anybody else who looks this up, failing to register such behavior is clearly a violation of the law.

However, the DOJ and FBI have so far failed to utilize the same hard-ball tactics they used against President Trump's aides to get answers from the current President's son. To date, zero charges have been filed and FARA has not been used as a pretext to conduct any pre-dawn raid of Hunter Biden's residence, as was done to Mr. Giuliani.

Once again, the political bias of our country's top law enforcement bodies is rearing its head. The double standard continues to erode the American people's faith in our institutions, and this is a dangerous, dangerous road to be on.

Mr. Chair, I look forward to further discussing this issue with our Witnesses today, and I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

I want to mention that they also prosecuted Mr. Greg Craig, who was a favorite on the Democratic side.

I want you to know, because of your testimony, I have instructed Mr. Greengrass to get us the computer after he gets us the unredacted Mueller report, the final information on the Kennedy assassination, and as much as he can get on the death of Marilyn Monroe.

Mr. JOHNSON of Louisiana. Listen, with respect, Mr. Chair, you can mock that, but this has been duly entered into the record of this Committee. There is no reason to delay it, and the American people are demanding to know the contents of that laptop. I think this Committee has an obligation under the law, and the rules of the Committee, to get that done.

Mr. COHEN. I agree with you. We are going to get those other three things, too.

Mr. Nadler, you are recognized.

Chair NADLER. Thank you, Mr. Chair.

I, too, wish to thank our Witnesses for appearing today.

Today's hearing on the Foreign Agents Registration Act of 1938, often referred to by its acronym FARA, is an important opportunity for Members to learn about the origins and development of the act and to consider potential enhancements. Although FARA has been on the books for decades, the statute remains relatively obscure to Members in the public.

As Chair Cohen noted, it has been over 30 years since the House Judiciary Committee last held a hearing on FARA. Then-Representative Dan Glickman, who was invited to testify at that hear-

ing, remarked at the time that FARA is, “either widely misunderstood, ignored, poorly written, not enforced, or all of the above.”

While I would add that FARA is an important tool for government transparency and would note that the Justice Department has taken steps to improve enforcement of the act in recent years, the gist of Representative Glickman’s statement, arguably, still applies today.

Passed by Congress in 1938 to combat the influence of Nazi propaganda, FARA is a public disclosure law that generally requires an “agent of a foreign principal” engaged in certain covered activities on behalf of a foreign principal to register with the Department of Justice.

In the 1960s, Congress amended FARA to reorient the statute away from exposing sources of foreign propaganda towards concerns regarding efforts by foreign interests to influence U.S. policy through lobbying.

For decades, however, FARA went relatively underenforced by the Justice Department. A 2016 Office of Inspector General report noted that the Department brought only seven criminal FARA cases between 1966 and 2015.

The Justice Department has recently stepped up FARA enforcement since the 2016 presidential election and the Special Counsel’s prosecution of several individuals, including former Trump Campaign Manager Paul Manafort and former National Security Advisor Michael Flynn for charges related to FARA violations stemming from political activities they engaged in on behalf of foreign governments.

This increased enforcement appears to have had an effect. According to one Justice Department official’s post to the website Just Security, the number of FARA registrants has increased by 50 percent since 2016.

This past December, the Department also published an Advance Notice of Proposed Rulemaking seeking public comment on potential changes to modernize FARA’s implementing regulations, including clarifying the scope of certain exemptions and updated various definitions. I applaud the Justice Department’s recent efforts to increase FARA enforcement.

At a time when we see democracy literally under Russian attack abroad in Ukraine, and foreign government attempts to influence or undermine the democracy at home, it is important to shine a light on efforts by foreign governments to shape U.S. policymaking.

I also think it is important to keep in mind, as we consider proposals to enhance FARA’s transparency mechanisms, that while hidden efforts by foreign governments to influence U.S. policymaking and the public have a corrupting effect on our democracy, the underlying activities FARA regulates are constitutionally protected.

That is why Congress, even as war clouds began to gather over Europe in the 1930s, chose transparency as the means to combat foreign influence in our democracy. It is also why I am opposed to proposals to grant the Justice Department the authority to issue Civil Investigative Demands, also known as CIDs, in the FARA context. My fear is that such type of administrative subpoena authority, which, by definition, lacks judicial involvement, may be

used as an end run around Fourth Amendment protections and potentially erode other constitutional rights.

While CID authority always raises civil liberties concerns, this authority is particularly troubling in the FARA context because the statute regulates constitutionally protected activities. Moreover, because FARA lacks robust civil penalties, most recent FARA proceedings have been criminal in nature. As of the publication of the 2016 OIG report, the Department had not sought civil injunctive relief under FARA since 1991.

These factors, which are particular to the FARA context, taken together, heighten the risk that granting CID authority will erode civil liberties over time. Indeed, as we will hear from one of our Witnesses today, as it is, nonprofit organizations across the political spectrum have raised concerns of FARA's sweeping scope, which may create unintended consequences and burden constitutionally-protected activities Congress, arguably, sought to exempt from the statute. It may permit future administrations too much discretion to use FARA's breadth to selectively investigate or prosecute organizations whose viewpoints the government disfavors. Any discussion of how to enhance FARA's enforcement and public transparency mechanisms would not be complete without also considering the potential consequences and concerns raised by the nonprofit sector.

Lastly, I would like to express my desire for today's discussion to remain focused on legal and policy considerations. We have already heard from Members who they think should be investigated for FARA violations. We are not here today to discuss the details of any potential case or individual. Instead, it is my hope that, amidst the potential temptation to score partisan political points, it is not lost on us that there appears to be general bipartisan support for FARA, and that there may be areas of bipartisan agreement on how to improve the act. I look forward to hearing from our Witnesses on potential avenues for reform.

With that, I thank Chair Cohen for holding a hearing on this important subject, and I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler.

I now recognize the Ranking Member of the Committee, Mr. Jordan from Ohio, for as much time as he now consumes.

Mr. JORDAN. Thank you, Mr. Chair.

On October 22nd, 2020, just two weeks before the most important election we have, election for President of the United States, then-candidate Biden said, regarding his son's dealings with foreign companies, "Nothing was unethical. My son has not made money from Chinese business interests." Now, there are 4.8 million reasons why that statement was not accurate.

How do we know? How do we know that statement was not accurate? *The Washington Post* told us so last week. Not Mike Johnson, not President Trump, not Republicans—*The Washington Post* told us this last week. They did two stories last Wednesday, one at 11:00 a.m. and one at 11:04 a.m., two eight-page stories four minutes apart, confirming what we already knew: The laptop was real; the eyewitness was real; the emails were real. The only thing fake 18 months ago in the runup to the Presidential election was the news. I find that amazing—two eight-page stories four minutes

apart saying the laptop is accurate; all the emails are accurate, saying this from *The Washington Post*, when for 18 months they said, “No, no, no, it was Russian disinformation.”

When we think about what happened in the runup to the most important election we have, big media, big tech, and Democrats all colluded to bury that story, something I think the American people would have liked to have known a little something about, as they went to the polls to elect the Commander-in-Chief.

Oh, they were joined—it wasn’t just big tech, big media, and Democrats telling us something that wasn’t true—they were joined by 51 former intelligence officials who told us it was Russian disinformation.

Now, think about this. This is funny how this story has changed. First, it wasn’t his laptop. Then, it was, “Oh, yeah, it was his laptop, but it was Russian disinformation.” Then, it was, “No, it wasn’t Russian disinformation, but Joe Biden wasn’t involved.” Now, it was, “Oh, yeah, Joe was involved, but he did nothing wrong.” It is amazing how that has all changed in 18 months.

So, I look forward to hearing from our Witnesses and figuring out what we can do with the Foreign Agents Registration Act of 1938. It probably does need some changes, something done to it. The title of today’s hearing is “Enhancing FARA, the Foreign Agents Registration Act of 1938.” How about we just figure out a way to apply it consistently?

As the Ranking Member said in his opening statement, this has been used—just about anyone who was involved in the Trump campaign had it used against them to get information and do a prosecution, do the whole Mueller investigation, which found out there was no collusion. We have obviously had collusion here.

Maybe it does need to be applied at least in a consistent fashion to Hunter Biden. We know Hunter Biden took millions of dollars from the wife of the mayor of Moscow. We know he took millions of dollars from energy companies in Ukraine, and millions of dollars from companies in China with ties to the Chinese Communist Party, including, as the Ranking Member mentioned, CEFC, which paid him \$4.8 million in one year’s time.

Should Hunter Biden have registered under this act? Why didn’t he register under this act? Why is the Department of Justice being inconsistent? At least that is what it seems, when, as the Ranking Member said, “only seven people were prosecuted between 1966 and 2016,” and then, shazam, they started using it against everyone associated with President Trump’s campaign, it seemed.

So, this is important. The Chair of the Committee just said we are not here today to discuss individuals, but I do think the American people would like to know the truth about this story and why it was kept from them—kept from we, the people—prior to, as I said before, the most important election we have in this nation. That is important information, and I hope we can begin to dig into that.

This Committee should dig into that. We should be all about making sure the American people get the truth, and not have, as I said before, big tech, big media, Democrats, and 51 former intel officials, tell us something in the runup to the election that was not accurate.

With that, I yield back.

Mr. COHEN. Thank you, Mr. Jordan.

Our Witnesses are here. We welcome you and thank you for participating.

I will introduce each of the Witnesses before their testimony. Therefore, you might remember who they are.

You get five minutes. There is a light system in front of you. Green means you are on, and you have somewhere between one and four minutes. Then, it turns yellow. That means you are down to your last minute. When it turns red, that means you should be finished.

Your full testimony will be entered into record, although five minutes is what you are limited to in testimonial.

I will give verbal notice on the minutes remaining today as well.

Before proceeding with the testimony, I would like to remind all our witnesses that you are under oath to tell the truth, and if you don't, you will be, could be cited with a violation of section 1001 of title 18 of the U.S. Code.

Our first Witness is Mr. Jacob Straus. "Doctor" it says there. I guess he is a doctor. He is a specialist on the Congress and the government in the Finance Division of the Congressional Research Service, one of our most esteemed branches. He works on lobbying; ethics; commemorations, including monuments and memorials, and congressional advisory commissions. Dr. Straus received his M.A. and Ph.D. in political science from the University of Florida and his B.A. from the University of Maryland.

Dr. Straus, you are recognized for five minutes.

#### **STATEMENT OF JACOB R. STRAUS**

Dr. STRAUS. Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee, on behalf of the Congressional Research Service, thank you for the opportunity to appear today.

My testimony focuses on two areas: The history of the Foreign Agents Registration Act, or FARA, and legislative proposals to amend the law.

Concern over foreign influence in American politics dates to the Revolutionary War and the Continental Congress' alliance with France. President George Washington addressed foreign influence in his 1796 farewell address writing that, "history and experience prove that foreign influence is one of the most baneful foes of republican government."

In the early days of the Republic, several incidents brought concerns about foreign influence to prominence. In 1808, for example, the House of Representatives authorized an investigation into allegations that General of the Army James Wilkinson was a Spanish agent. General Wilkinson was, ultimately, acquitted, but governmental interest in the potential influence of foreign governments and actors on American public policy remained for much of the next century.

The idea of regulating foreign influence dates to at least the early 1900s, when the first pieces of legislation aimed at directly addressing the real or perceived possibility of foreign influence in American politics were introduced. These measures, generally,

would have required the registration of individuals or groups seeking to influence public policy or promote propaganda.

With the rise of Nazism in the 1930s in Germany, concern about foreign propaganda influence grew. In 1934, the House created the Special Committee on Un-American Activities to investigate foreign propaganda and influence. Chaired by future Speaker of the House John McCormack, the Special Committee investigated the scope of foreign influence activities in the United States and the spread of subversive propaganda that originated from foreign countries.

In 1937, Representative McCormack introduced the bill that would become FARA, and on June 8, 1938, President Franklin D. Roosevelt signed it into law. As enacted, FARA sought, as described by the Department of Justice, to, “combat the spread of hidden foreign influence in American politics.”

Specifically, FARA responded to foreign influence concerns by creating a system designed “to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.”

Over the years, Congress has substantially amended FARA on several occasions, most notably, in 1942, 1966, and in 1995. Today, the Department of Justice administers FARA. The law, as amended, generally focuses on individuals conducting advocacy or public relations work on behalf of foreign principals within the United States. These agents of a foreign principal are required to register with DOJ and provide information about their business and foreign principals they represent. For each foreign principal, a foreign agent must periodically disclose to DOJ copies of contracts, details of the financial relationship, advocacy and public relations activities, and informational materials.

In recent years, various Members of Congress have introduced a number of measures to amend FARA. A CRS review of these bills identified several trends. Broadly, these bills proposed to provide civil investigative demand authority to DOJ; change the penalties that could be imposed for noncompliance; repeal or modify exemptions to FARA; modify the administration of FARA by DOJ; amend FARA registration and disclosure requirements, and public access to documents; alter the requirements for labeling of informational materials; restrict certain former officials, including Members of Congress, from acting as foreign agents, and require reporting to Congress and the DOJ on FARA implementation, administration, and enforcement.

In closing, the Foreign Agents Registration Act is more than 80 years old and primarily focuses on foreign agents engaged in advocacy activities in the United States. Congressional proposals recently introduced to amend FARA include a range of options. CRS is available to discuss these provisions further.

Thank you again for the opportunity to testify. I look forward to your questions.

[The statement of Dr. Straus follows:]



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**TESTIMONY**

Statement of

**Jacob R. Straus**  
Specialist on the Congress

Before

Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
U.S. House of Representatives

Hearing on

## **“Enhancing the Foreign Agents Registration Act of 1938”**

April 5, 2022

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7-5700

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Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee, on behalf of the Congressional Research Service thank you for this opportunity to discuss current legislative proposals to amend the Foreign Agents Registration Act (FARA).

My testimony focuses on two areas: (1) background on the Foreign Agents Registration Act, including past amendments to FARA; and (2) a discussion of recent legislative proposals to amend FARA. The discussion of recent legislation focuses on several policy proposals included in multiple introduced measures. These include proposals to provide civil investigative demand authority to the Department of Justice (DOJ); increase penalties for noncompliance; repeal or modify certain statutory exemptions to FARA; change how DOJ administers FARA; amend registration and disclosure requirements; enhance public access to FARA registration statements; change labeling requirements for informational materials; and require federal agencies to report to Congress on FARA administration and enforcement.

This written statement is drawn in part from other CRS products, including CRS Report R46435, *Foreign Agents Registration Act (FARA): Background and Issues for Congress*, by Jacob R. Straus. Accordingly, my statement summarizes and expands key portions of the Report, and addresses the legislative proposals introduced in recent Congresses.

## Background on the Foreign Agents Registration Act

On June 8, 1938, President Franklin D. Roosevelt signed FARA into law.<sup>1</sup> The law sought to “combat the spread of hidden foreign influence ... in American politics,”<sup>2</sup> by “shining ‘the spotlight of pitiless publicity’ on such propaganda.”<sup>3</sup> Specifically, FARA responded to foreign influence concerns by creating a system designed “to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.”<sup>4</sup>

Today, the DOJ administers FARA through its National Security Division’s FARA Unit. The law “requires certain agents of foreign principals who are engaged in political activities or other activities specified under the statute to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities.”<sup>5</sup> By its express terms, FARA “neither prohibits representation of foreign interests in the United States nor prevents dissemination of foreign propaganda.”<sup>6</sup> Instead, the act provides for public disclosure of such activities,<sup>7</sup> and requires that registrants label certain informational materials with a “conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal.”<sup>8</sup>

<sup>1</sup> P.L. 75-583, 52 Stat. 631 (1938).

<sup>2</sup> U.S. Department of Justice, Office of Public Affairs, “Department of Justice Posts Advisory Opinions on FARA.Gov Website,” press release, June 8, 2018, at <https://www.justice.gov/opa/pr/departments-justice-posts-advisory-opinions-faragov-website>.

<sup>3</sup> U.S. Congress, House Committee on the Judiciary, *Foreign Propaganda*, report to accompany H.R. 1591, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., July 28, 1937, H.Rept. 75-1381 (Washington: GPO, 1937), p. 2.

<sup>4</sup> *Viereck v. United States*, 318 U.S. 236, 241 (1943). See also, U.S. Congress, House Committee on the Judiciary, *Lobbying Disclosure Act of 1995*, report to accompany H.R. 2564, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., November 14, 1995, H.Rept. 104-339, part 1 (Washington: GPO, 1995), pp. 5-8.

<sup>5</sup> U.S. Department of Justice, “Foreign Agents Registration Act,” at <https://www.justice.gov/nsd-fara>.

<sup>6</sup> Philip J. Perry, “Recently Proposed Reforms to the Foreign Agents Registration Act,” *Cornell International Law Journal*, vol. 23, no. 1 (Winter 1990), p. 133.

<sup>7</sup> U.S. Congress, House Committee on the Judiciary, *Foreign Propaganda*, report to accompany H.R. 1591, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., July 30, 1937, H.Rept. 75-1381 (Washington: GPO, 1937), p. 2.

<sup>8</sup> 22 U.S.C. §614(b). DOJ currently maintains an online, publicly accessible database of FARA filings. The database can be

## Foreign Influence Concerns: Founding to World War II

During the Revolutionary War, the Continental Congress had entered into an alliance with France to help the colonies defeat the British.<sup>9</sup> After the war, the Framers of the Constitution debated how best to guard against foreign influence on offices of the United States.<sup>10</sup> The result was the Foreign Emoluments Clause, a specific provision against a federal officer's acceptance of an emolument, office, or title granted by a foreign state without the consent of Congress.<sup>11</sup>

President George Washington also addressed foreign influence. In his 1796 farewell address, President Washington wrote:

Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens) the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.<sup>12</sup>

After Washington's address, foreign influence continued to be an issue for the government. In the early days of the republic, several incidents brought the role of foreign influence to prominence. In 1808, for example, the House of Representatives agreed to a resolution creating a committee to investigate allegations that General James Wilkinson, General of the Army, was a Spanish agent.<sup>13</sup> Although General Wilkinson was ultimately acquitted,<sup>14</sup> the ongoing interest by foreign governments to influence American public policy was perceived as a continuing threat for much of the next century.<sup>15</sup>

accessed at <https://efile.fara.gov/ords/fara/f?p=1381:1:760783791264:::>

<sup>9</sup> For example, see C.H. Van Tyne, "Influence which Determined the French Government to Make the Treaty with America, 1778," *The American Historical Review*, vol. 21, no. 3 (April 1916), pp. 528-541; C.H. Van Tyne, "French Aid Before the Alliance of 1778," *The American Historical Review*, vol. 31, no. 1 (October 1925), pp. 20-40; and Orville T. Murphy, "The Battle of Germantown and the Franco-American Alliance of 1778," *The Pennsylvania Magazine of History and Biography*, vol. 82, no. 1 (January 1958), pp. 55-64.

<sup>10</sup> Gouverneur Morris, among others, expressed this concern on July 5, 1787, during discussions about the Constitution. The *Records of the Federal Convention of 1787* reports the following about Morris's remarks: "How far foreign powers would be ready to take part in the confusions he would not say. Threats that they will be invited have it seems been thrown out. He drew the melancholy picture of foreign intrusions as exhibited in the History of Germany, and urged it as a standing lesson to other nations." *Records of the Federal Convention of 1787*, edited by Max Farrand, vol. 1 (New Haven: Yale University Press, 1911), p. 530, at [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(fr001157\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(fr001157))).

<sup>11</sup> U.S. Constitution, Article I, section 9, clause 8. For more information on the Emoluments Clause, see "Foreign Emoluments Clause," in CRS Report R45992, *The Emoluments Clauses and the Presidency: Background and Recent Developments*, by Michael A. Foster and Kevin J. Hickey; and CRS In Focus IF11086, *The Emoluments Clauses of the U.S. Constitution*, by Kevin J. Hickey and Michael A. Foster.

<sup>12</sup> U.S. Senate, United States Senate Historical Office, *Washington's Farewell Address to the People of the United States*, S.Pub. 115-5 (Washington: GPO, 2017), pp. 20-21, at [https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons\\_Farewell\\_Address.pdf#page=24](https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf#page=24).

<sup>13</sup> "General Wilkinson," House debate, *Annals of the Congress of the United States*, vol. 18 (January 18, 1808), pp. 1461-1462. President James Madison gave General Wilkinson back his commission on February 14, 1812. In explaining why General Wilkinson was being recommissioned, President Madison wrote "that although there are instances in the Court, as well as in the conduct of the Officer on trial, which are evidently and justly objectionable, his acquittal of the several charges agst [sic] him is approved, and his sword is accordingly ordered to be restored." Andro Linklater, *An Artist in Treason: The Extraordinary Double Life of General James Wilkinson* (New York: Walker Publishing Company, 2009), p. 294.

<sup>14</sup> Thomas Robson Hay, "Some Reflections on the Career of General James Wilkinson," *The Mississippi Valley Historical Review*, vol. 21, no. 4 (March 1935), p. 486.

<sup>15</sup> "Non-Intervention," *Congressional Globe* vol. 21 (January 19, 1852), p. 298. For example, as early as 1852, a joint resolution was introduced to reaffirm "that governments are instituted among men to secure the inalienable rights of life, liberty, and the pursuits of happiness" and resolved that the government "will perseveringly adhere to, as a principle of international action, the advice given by Washington in his Farewell Address: ... 'Against the insidious wiles of foreign influence.'"

The idea of regulating foreign influence dates to at least the early 1900s, when the first pieces of legislation aimed at directly addressing the real or perceived possibility of foreign influence in American politics were introduced. These measures generally would have required the registration of individuals or groups seeking to influence public policy or promote propaganda. Some measures would have banned certain classes of individuals from acting as foreign agents.<sup>16</sup> Laws that address foreign influence have generally favored transparency in order to “preserve in this country the freedom of speech and freedom of the press.”<sup>17</sup>

### Foreign Agents Registration Act of 1938

With the rise of Nazism in 1930s Germany, concern about foreign propaganda and influence grew in the United States.<sup>18</sup> To address the growing threat of propaganda, in 1934 the House of Representatives created the Special Committee on Un-American Activities.<sup>19</sup> The special committee was instructed to conduct an

investigation of (1) the extent, character, and objects of Nazi propaganda activities in the United States, (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.<sup>20</sup>

After a thorough investigation, in 1935, the special committee made several recommendations. These included enacting legislation to require representatives of foreign governments, political parties, or companies to register with the government; restricting the length of stay in the United States of foreigners engaged in propaganda activities; and prohibiting individuals from advocating for “the overthrow or destruction by force and violence of the Government of the United States.”<sup>21</sup>

In the 75<sup>th</sup> Congress (1937-1938), Representative John McCormack, former chair of the special committee, introduced the bill (H.R. 1591) that would become FARA.<sup>22</sup> As summarized by the House Judiciary Committee, the bill, as introduced, would have required “all persons who are in the United States for political propaganda purposes ... to register with the State Department and to supply information about their political propaganda activities, their employers, and the terms of their contracts.”<sup>23</sup>

<sup>16</sup> For example, in 1917 (65<sup>th</sup> Congress), three measures were introduced in the House. These measures would have required the filing of certain information by groups and individuals seeking to influence legislation or public opinion (H.R. 5287); prohibited the making of untrue statements under oath to influence the passage or defeat of measures that dealt with a foreign nation (H.R. 2585); and restricted aliens from acting as foreign agents without notification to and consent from the U.S. government (H.R. 2583). The House did not consider any of these measures.

<sup>17</sup> Testimony of Carl J. Austrian, American-Jewish Committee, in U.S. Congress, House Committee on the Judiciary, Subcommittee No. 1, *To Require the Registration of Certain Persons Employed by Agencies To Disseminate Propaganda in the U.S.*, hearing on H.R. 1591, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., June 16, 1937, unpublished (Washington: GPO, 1937), p. 28.

<sup>18</sup> U.S. Congress, Special Committee on Un-American Activities, *Investigation of Nazi and Other Propaganda*, 74<sup>th</sup> Cong., 1<sup>st</sup> sess., February 15, H.Rept. 153 (Washington: GPO, 1935), p. 2.

<sup>19</sup> H.Res. 198 (73<sup>rd</sup> Congress), agreed to March 20, 1934.

<sup>20</sup> H.Res. 198 (73<sup>rd</sup> Congress).

<sup>21</sup> U.S. Congress, Special Committee on Un-American Activities, *Investigation of Nazi and Other Propaganda*, 74<sup>th</sup> Cong., 1<sup>st</sup> sess., February 15, H.Rept. 153 (Washington: GPO, 1935), p. 25. See also 54 Stat. 670 and 18 U.S.C. §2385.

<sup>22</sup> “Public Bills and Resolutions,” *Congressional Record*, vol. 81, part 1 (January 5, 1937), p. 34.

<sup>23</sup> U.S. Congress, House Committee on the Judiciary, *Foreign Propaganda*, report to accompany H.R. 1591, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., July 30, 1937, H.Rept. 1381 (Washington: GPO, 1937), p. 2.

During a hearing on foreign influence legislation before a House Judiciary Committee subcommittee, Representative McCormack testified on the need for registration and disclosure legislation. He said:

Now what is the evidence? Naturally you gentlemen would ask the question "What is the evidence; what is the necessity for this?" We found during our investigation that Ivy L. Lee, one of the biggest and most powerful public relations firms [in] this country was indirectly in the employ of the German Government. Now I say indirectly. How was it? They were employed by a Swiss firm, foreign industry, controlled by the German dye industry, and Mr. Lee in his own testimony admitted when he was making his report to his principals that he knew the report was going to the members of the German Government, his reports, he admitted, were strictly political advice, advising as to what kind of speeches the members of the German Government should make for consumption in the United States; advising them on different questions. That will all be shown in the evidence which this subcommittee obtained from him during the short while it was engaged in this investigation.<sup>24</sup>

On June 8, 1938, President Roosevelt signed FARA into law.<sup>25</sup>

As enacted,<sup>26</sup> FARA required certain persons acting on behalf of a foreign principal<sup>27</sup> to register with the government (originally the Secretary of State).<sup>28</sup> Registration under the act was triggered when the person became an "agent of a foreign principal" by acting as "a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney" to a foreign principal.<sup>29</sup> Registration was required to be made "under oath" and include information about the registrant's contact information, contracts "of employment under which such person acts or agrees to act as an agent," compensation under the contract, and foreign principals represented.<sup>30</sup> Recertification was required every six months.<sup>31</sup> The Secretary of State was required to keep records permanently and authorized to prescribe regulations for "public examination and inspection" of those records.<sup>32</sup> The law also carried penalties for willful noncompliance and materially false statements or omissions that included the potential for fines and prison time.<sup>33</sup>

<sup>24</sup> Testimony of Representative John McCormack, in U.S. Congress, House Committee on the Judiciary, Subcommittee No. 1, *To Require the Registration of Certain Persons Employed by Agencies To Disseminate Propaganda in the U.S.*, hearing on H.R. 1591, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., June 16, 1937, unpublished (Washington: GPO, 1937), p. 4.

<sup>25</sup> "Message from the President," *Congressional Record*, vol. 83, part 8 (June 9, 1938), p. 8636. For more information on the debate and legislative process, see "Foreign Propaganda," debate in the House, *Congressional Record*, vol. 81, part 7 (August 3, 1937), pp. 8037-8038; "Dissemination of Propaganda in the United States," debate in the Senate, *Congressional Record*, vol. 83, part 6 (May 17, 1938), pp. 7052-7053; "Registration of Persons Employed to Disseminate Propaganda—Conference Report," *Congressional Record*, vol. 83, part 7 (May 27, 1938), pp. 7619-7620; and "Registration of Certain Persons Disseminating Propaganda," *Congressional Record*, vol. 83, part 7 (June 2, 1938), pp. 8021-8022.

<sup>26</sup> P.L. 75-583, 52 Stat. 631 (1938).

<sup>27</sup> P.L. 75-583, §1(c). FARA originally defined "foreign principal" as "the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization."

<sup>28</sup> P.L. 75-583, §2.

<sup>29</sup> P.L. 75-583, §1(d). FARA originally defined "agent of a foreign principal," in full, to mean "any person who acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal or for any domestic organization subsidized directly or indirectly in whole or in part by a foreign principal. Such term shall not include a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State of the United States, nor a person, other than a public-relations counsel, or publicity agent, performing only private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal."

<sup>30</sup> P.L. 75-583, §2. FARA originally required individuals who were then acting as an agent of a foreign principal to register within 30 days, and individuals who become an agent of a foreign principal after enactment to register "forthwith."

<sup>31</sup> P.L. 75-583, §3.

<sup>32</sup> P.L. 75-583, §4.

<sup>33</sup> P.L. 75-583, §5.

## Amendments to FARA

As enacted, FARA required the registration and disclosure of information by individuals and groups engaged in propaganda activities in the United States on behalf of a foreign principal client. After approximately a year of implementation, the law was amended to make some technical changes to the definition of “foreign principal” and “agent of a foreign principal,” clarify the exemption for accredited or consular officers of a foreign government, and adjust the public availability of records from former foreign agents.<sup>34</sup>

Since the 1939 amendments, Congress has substantially revised FARA on three additional occasions in response to the changing nature of representation of foreign entities in the United States. These changes occurred in 1942, 1966, and 1995.

Broadly, the 1942 Amendments were an effort to capture the information thought necessary to understand foreign propaganda efforts.<sup>35</sup> As enacted, the 1942 amendments<sup>36</sup>

- expanded the definitions of persons who are considered to be foreign principals and foreign agents;
- transferred administration of the law from the Department of State to the DOJ;<sup>37</sup>
- expanded information required in initial registration statements and supplemental disclosures;<sup>38</sup>
- created exemptions for accredited diplomats or consular officers; non-public relations counsels, publicity agents, or information-service employees; officials of recognized foreign governments; diplomatic or consular staff; individuals engaged in bona fide trade, religious, and educational activities; and agents of countries deemed vital to the defense of the United States;<sup>39</sup>
- defined “political propaganda”<sup>40</sup> and required propaganda materials to be labeled appropriately<sup>41</sup> and submitted to the Attorney General and the Library of Congress;<sup>42</sup>
- required preservation of records and allowance for public inspection;<sup>43</sup> and

<sup>34</sup> P.L. 76-319, 53 Stat. 1244 (1939). The 1939 amendments redefined “foreign principal” to include domestic entities funded by foreign principals and expand the definition of “agent of a foreign principal” to include individuals compensated by or under the direction of a foreign principal. U.S. Congress, House Committee on the Judiciary, *Amending the Act Requiring Registration of Agents of Foreign Principals*, report to accompany H.R. 5988, 76<sup>th</sup> Cong., 1<sup>st</sup> sess., May 31, 1939, H.Rept. 711 (Washington: GPO, 1939), pp. 1-2; and U.S. Congress, Senate, Committee on the Judiciary, *Amending the Act Requiring Registration of Agents of Foreign Principals*, report to accompany H.R. 5988, 76<sup>th</sup> Cong., 1<sup>st</sup> sess., July 25, 1939, S.Rept. 902 (Washington: GPO, 1939), pp. 1-2.

<sup>35</sup> Bruce Lannes Smith, “Democratic Control of Propaganda through Registration and Disclosure I,” *Public Opinion Quarterly*, vol. 6, no. 1 (Spring 1942), pp. 27-40; and Bruce Lannes Smith “Democratic Control of Propaganda through Registration and Disclosure II,” *Public Opinion Quarterly*, vol. 7, no. 4 (Winter 1943), pp. 707-719.

<sup>36</sup> P.L. 77-532, 56 Stat. 248 (1942). U.S. Department of Justice, *The Foreign Agents Registration Act of 1938, As Amended and the Rules and Regulations Prescribed by the Attorney General*, Washington, DC, 1942, p. 2. For more information on the 1942 amendments, see CRS Report R46435, *Foreign Agents Registration Act (FARA): Background and Issues for Congress*, by Jacob R. Straus.

<sup>37</sup> P.L. 77-532, §2.

<sup>38</sup> P.L. 77-532, §1(2).

<sup>39</sup> P.L. 77-532, §1(3).

<sup>40</sup> P.L. 77-532, §1(1)(j).

<sup>41</sup> P.L. 77-532, §1(4)(b).

<sup>42</sup> P.L. 77-532, §1(4)(a).

<sup>43</sup> P.L. 77-532, §1(5)-(6).

- established penalties for noncompliance.<sup>44</sup>

Following the 1942 amendments, FARA implementation and enforcement focused on propaganda and the dissemination of information potentially harmful to America's democracy.<sup>45</sup> After World War II, as fears about Nazi propaganda started to wane, the statute reportedly went largely unenforced by the DOJ,<sup>46</sup> with approximately nine FARA cases prosecuted by the department through the early 1960s.<sup>47</sup>

In at least partial response to the role of foreign representatives during the 1962 consideration of the Sugar Act Amendments,<sup>48</sup> Congress began to take an active interest in potentially updating FARA to address lobbying by representatives of foreign governments, with the Senate Foreign Relations Committee authorizing a staff investigation.<sup>49</sup> The result were amendments that shifted the law's focus from propaganda to advocacy activities.<sup>50</sup> As enacted, the 1966 FARA amendments

- expanded several definitions, including the terms "foreign principal" and "agent of a foreign principal," and added definitions for "political activities" and "political consultant";<sup>51</sup>
- clarified exemptions for individuals and companies that are not required to register under the law and provided that the Attorney General can provide for exemptions by regulation;<sup>52</sup>
- specified a registration timeline and the content of registration and disclosure statements, including details of campaign contributions;<sup>53</sup>
- changed the requirements for labeling and filing of political propaganda;<sup>54</sup> and
- vested enforcement authority in the Attorney General and specified maximum fines and jail time for noncompliance.<sup>55</sup>

<sup>44</sup> P.L. 77-532, §1(8).

<sup>45</sup> David L. Simiele, "Disclosure Under the Foreign Agents Registration Act of 1938, as Amended, Note," *Western Reserve Law Review*, vol. 14, issue 3 (June 1963), pp. 579-590.

<sup>46</sup> Francis R. O'Hara, "The Foreign Agents Registration Act-The Spotlight of Pitiless Publicity," *Villanova Law Review*, vol. 10, no. 3 (Spring 1965), p. 441.

<sup>47</sup> O'Hara (1965), p. 441; and "Attorneys under the Foreign Agents Registration Act of 1938," *Harvard Law Review* vol. 78, no. 3 (January 1965), pp. 619-634.

<sup>48</sup> U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, *The Federal Lobbying Disclosure Laws*, 102<sup>nd</sup> Cong., 1<sup>st</sup> sess., June 20, July 16, and September 25, 1991, S.Hrg. 102-377 (Washington: GPO, 1991), p. 487; and Daniel M. Berman and Robert A. Heineman, "Lobbying by Foreign Governments on the Sugar Act Amendments of 1962," *Law and Contemporary Problems*, vol. 26, no. 2 (Spring 1963), p. 416, at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2961&context=lcpl>.

<sup>49</sup> In 1962, the Senate Foreign Relations Committee authorized a staff investigation into "nondiplomatic activities of representatives of foreign governments, and the extent to which such representatives attempt to influence the policies of the United States and affect the national interest." The staff investigation concluded, "...there has been an increasing number of incidents involving attempts by foreign governments, or their agents, to influence the conduct of American foreign policy by techniques outside normal diplomatic channels." U.S. Congress, Senate Committee on Foreign Relations, *Nondiplomatic Activities of Representatives of Foreign Governments*, committee print, 87<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 1962 (Washington: GPO, 1962), p. v.

<sup>50</sup> P.L. 89-486, 80 Stat. 244 (1966). For a detailed history of the 1966 amendment, see CRS Report R46435, *Foreign Agents Registration Act (FARA): Background and Issues for Congress*, by Jacob R. Straus.

<sup>51</sup> P.L. 89-486, §1(1)-(5).

<sup>52</sup> P.L. 89-486, §1(5), §2(7), and §3.

<sup>53</sup> P.L. 89-486, §2.

<sup>54</sup> P.L. 89-486, §4.

<sup>55</sup> P.L. 89-486, §7.

In December 1995, Congress created the Lobbying Disclosure Act (LDA) as a replacement for the Regulation of Lobbying Act of 1946.<sup>56</sup> Although the LDA focused on domestic lobbying, it also contained four FARA amendments. As summarized in a House Judiciary Committee report, the LDA amendments to FARA were as follows:

- (1) FARA is limited to agents of foreign governments and political parties. Lobbyists of foreign corporations, partnerships, associations, and individuals are required to register under the Lobbying Disclosure Act, where applicable, but not under FARA.
- (2) The so-called “U.S. subsidiary exemption” is eliminated from FARA. This Subsection grants an exemption to activities on behalf of a foreign-owned company in the United States that further the bona fide commercial, industrial, or financial interests of the U.S. subsidiary.
- (3) The applicability of the so-called “lawyers’ exemption” is clarified by changing the exemption’s application only to communications with agency officials in the context of those specific instances set out in this amendment. These include judicial proceedings, law enforcement proceedings, and agency proceedings required by statute or regulation to be conducted on the record.
- (4) The term “political propaganda” is eliminated from the Act, and replaced by the term “informational materials.”<sup>57</sup>

In 2007, the Honest Leadership and Open Government Act (HLOGA) further amended FARA.<sup>58</sup> The HLOGA amendments required the Attorney General to develop an electronic filing system and to make the accompanying database available to the public.<sup>59</sup>

In December 2021, the DOJ issued an advance notice of proposed rulemaking to seek public comments on potential clarification, modernization, and amendment to existing FARA regulations.<sup>60</sup> DOJ’s FARA regulations were last amended in 2007.<sup>61</sup>

## Legislative Proposals and Considerations for Congress

In recent years, general interest in FARA arguably has increased.<sup>62</sup> Reflecting that attention, various Members of Congress have introduced multiple measures to amend parts of FARA.<sup>63</sup> A review of these bills reveals several trends. Broadly, these bills propose to:

- provide civil investigative demand authority to DOJ;
- change the penalties that could be imposed for non-compliance;

<sup>56</sup> P.L. 104-65, 109 Stat. 691 (1995); 2 U.S.C. §§1601-1614. For more information on the Lobbying Disclosure Act, see CRS Report R44292, *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*, by Jacob R. Straus.

<sup>57</sup> U.S. Congress, House, Committee on the Judiciary, *Lobbying Disclosure Act of 1995*, report to accompany H.R. 2564, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 104-339, Part 1, November 14, 1995 (Washington: GPO, 1995), p. 21.

<sup>58</sup> P.L. 110-81, §212, 121 Stat. 749 (2007).

<sup>59</sup> P.L. 110-81, §212.

<sup>60</sup> Department of Justice, “Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations,” 86 *Federal Register* 70787, December 13, 2021, at <https://www.federalregister.gov/documents/2021/12/13/2021-26936/clarification-and-modernization-of-foreign-agents-registration-act-fara-implementing-regulations>.

<sup>61</sup> 28 C.F.R. §§5.1–5.1101.

<sup>62</sup> For example, see Justin Wise, “ABA Adopts Resolution Pushing for FARA Overhaul,” *LAW360*, February 14, 2022, at <https://www.law360.com/articles/1464158/aba-adopts-resolution-pushing-for-fara-overhaul>.

<sup>63</sup> CRS conducted a search of Congress.gov from the 111<sup>th</sup> Congress (2009-2010), the first Congress after the enactment of FARA reforms in HLOGA, to the 117<sup>th</sup> Congress (2021-2022, through March 22, 2022) to identify legislation that proposed to amend FARA. Overall, the search returned approximately 170 measures that contained the term “foreign agents registration act.”

- repeal or modify exemptions to FARA;
- modify the administration of FARA by DOJ;
- amend FARA registration and disclosure requirements and public access to documents;
- alter the requirements for labeling of informational materials;
- restrict certain former officials from acting as foreign agents (referred to below as “revolving door” provisions); and
- require DOJ, the DOJ Inspector General (IG), and/or the Government Accountability Office (GAO) to report on FARA’s implementation, administration, and enforcement.

### Civil Investigative Demand (CID) Authority

The Department of Justice reports that since 2007, it has successfully prosecuted 14 FARA cases.<sup>64</sup> Several bills would provide the DOJ with civil investigative demand (CID) authority, to aid the agency in the potential prosecution of FARA cases.<sup>65</sup> CID authority is “a type of subpoena that allows the Department of Justice to obtain documents, require responses to interrogatories, and take depositions.”<sup>66</sup> Drawn from a similar provision in the False Claims Act,<sup>67</sup> CIDs “are effectively administrative subpoenas that the Department [of Justice] may issue to demand documents, interrogatory answers, or moral testimony from any persons with information relevant to an investigation.”<sup>68</sup>

During a 2018 House Judiciary Committee markup of legislation to amend FARA, proponents of providing DOJ CID authority argued, “CID authority ... will make the job easier, it will enhance enforcement of FARA, and it will pursue the underlying objectives of the legislation that has been a part of our law since 1938.”<sup>69</sup> Opponents argued that CID could “raise Fourth Amendment and other constitutional concerns.”<sup>70</sup>

### Penalties

Several bills would change available penalties for FARA non-compliance. Under current law, criminal and civil penalties are potentially available.<sup>71</sup> Several bills propose to enhance available fines for failure

<sup>64</sup> U.S. Department of Justice, “Recent FARA Cases,” at <https://www.justice.gov/nsd-fara/recent-cases>.

<sup>65</sup> For example, see H.R. 2811, H.R. 4170, H.R. 6249, S. 625, and S. 2039 (115<sup>th</sup> Congress); S. 1762 (116<sup>th</sup> Congress); and H.R. 4847 and S. 1724 (117<sup>th</sup> Congress).

<sup>66</sup> Rep. Bob Goodlatte, in U.S. Congress, House, Committee on the Judiciary, *Markup of H.R. 4170, The “Disclosing Foreign Influence Act,”* January 17, 2018, p. 5, at <https://docs.house.gov/meetings/JU/JU00/20180117/106786/HMKP-115-JU00-Transcript-20180117.pdf> [hereinafter, *Markup of H.R. 4170*]. For more information, see CRS Legal Sidebar LSB10060, *House Judiciary to Mark Up H.R. 4170, the Disclosing Foreign Influence Act, and Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2194 (2020).

<sup>67</sup> 31 U.S.C. §§3729-3733. For more information on the False Claims Act, see U.S. Department of Justice, “The False Claims Act,” at <https://www.justice.gov/civil/false-claims-act>; CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle; and CRS Report R40786, *Qui Tam: An Abridged Look at the False Claims Act and Related Federal Statutes*, by Charles Doyle.

<sup>68</sup> Rep. Bob Goodlatte, in *Markup of H.R. 4170*, p. 7.

<sup>69</sup> Rep. Mike Johnson, in *Markup of H.R. 4170*, p. 45.

<sup>70</sup> Rep. Jerrold Nadler, in *Markup of H.R. 4170*, p. 8. The Fourth Amendment protects people against unreasonable searches and seizures by the government. For more information, see CRS *Constitution Annotated*, “Fourth Amendment,” at <https://constitution.congress.gov/browse/amendment-4/>; and United States Courts, “What does the Fourth Amendment Mean?” at <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0>.

<sup>71</sup> 22 U.S.C. §618 and 18 U.S.C. §3571. U.S. Department of Justice, “FARA Enforcement,” at <https://www.justice.gov/nsd-fara/fara-enforcement>.

to file timely or complete registration or supplemental disclosure statements,<sup>72</sup> or failure to remedy a defective filing.<sup>73</sup> Additionally, several proposals would prohibit foreign principals from paying the fines of a person convicted under FARA and would allow the DOJ to use fines to offset enforcement costs.<sup>74</sup>

Historically, Congress has debated the need for increased penalties and fines. For example, in 1977, during debate on a proposed FARA amendment that was not adopted, Senator George McGovern noted that the law included “severe criminal penalties and injunctions—which experience has shown to be time-consuming and on occasion inadequate to the circumstances of today’s world.”<sup>75</sup> Subsequently, a GAO report found that the FARA Unit could be strengthened by “permitting the Unit to assess administrative fines for minor violations, an enforcement tool stronger than letters and quicker than injunctive actions, and ... increasing the existing fines to reflect changed economic conditions.”<sup>76</sup> In 2016, the DOJ IG noted that Federal Bureau of Investigation (FBI) personnel “believe that FARA carries a penalty sufficient enough to serve as a deterrent to both the agent and his foreign principal or to induce the target of an investigation ....”<sup>77</sup> Other observers have disagreed and argued for additional penalties. One 1990 study noted that FARA’s criminal penalties seem to be “rarely use[d] ... because of the difficulty in proving intent” and that “administrators have increasingly relied upon civil remedies.”<sup>78</sup>

## Exemptions

Certain individuals, who might otherwise be considered agents of a foreign principal, are exempt from registering under FARA. FARA includes eight exemptions. They are for (a) diplomatic or consular officers; (b) officials of a foreign government; (c) staff members of diplomatic or consular officers; (d) private and nonpolitical activities and the solicitation of funds; (e) religious, scholastic, or scientific pursuits; (f) defense of foreign government vital to United States defense; (g) legal representation of a disclosed foreign principal before a U.S. court or agency; and (h) filers under the Lobbying Disclosure Act (LDA).<sup>79</sup>

The responsibility to establish whether an exemption might be available to a potential filer “rests upon the person for whose benefit the exemption is claimed.”<sup>80</sup> Therefore, potential filers who fall within one of the exemption categories self-select their exemption and do not notify the DOJ.<sup>81</sup> DOJ has issued

<sup>72</sup> For example, see S. 1762 (116<sup>th</sup> Congress); and H.R. 1419, H.R. 4847, and S. 2093 (117<sup>th</sup> Congress).

<sup>73</sup> For example, see S. 1762 (116<sup>th</sup> Congress), H.R. 1419 and H.R. 4847 (117<sup>th</sup> Congress).

<sup>74</sup> For example, see H.R. 1419, H.R. 4847, and S. 2093 (117<sup>th</sup> Congress).

<sup>75</sup> Sen. George McGovern, “Federal Registration of Foreign Lobbying and Propaganda Act,” remarks in the Senate, *Congressional Record*, vol. 123, part 22 (August 5, 1977), p. S27505.

<sup>76</sup> U.S. Government Accountability Office, *Improvements Needed in the Administration of Foreign Agent Registration*, ID-80-51, July 31, 1980, p. 8, <https://www.gao.gov/products/id-80-51>.

<sup>77</sup> U.S. Department of Justice, Office of the Inspector General, *Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act*, Audit Division 16-24, September 2016, p. 11, at <https://oig.justice.gov/reports/2016/a1624.pdf#page=16> [hereinafter, *DOJ IG 2016 Audit*].

<sup>78</sup> Philip J. Perry, “Recently Proposed Reforms to the Foreign Agents Registration Act,” *Cornell International Law Journal*, vol. 23, no. 1 (Winter 1990), p. 144.

<sup>79</sup> 22 U.S.C. §613. For more information on exemptions to FARA, see “Figure 1. Exemptions to Registration Under the Foreign Agents Registration Act,” in CRS Report R46435, *Foreign Agents Registration Act (FARA): Background and Issues for Congress*, by Jacob R. Straus.

<sup>80</sup> 5 C.F.R. §5.300.

<sup>81</sup> U.S. Department of Justice, “Do I Need to Contact the FARA Unit to Qualify for an Exemption?” *Frequently Asked Questions*, at <https://www.justice.gov/hsd-fara/frequently-asked-questions#16>. Agents of a foreign principal who claim an exemption do not appear in the DOJ’s FARA database. To access filings, see U.S. Department of Justice, “Search Filings,” at <https://efile.fara.gov/ords/f?p=1235:10>.

regulations on exemptions in Title 28 of the *Code of Federal Regulations*, and has issued advisory opinions on several of the exemptions.<sup>82</sup>

Recent proposals have focused primarily on four exemptions: private and nonpolitical activities;<sup>83</sup> religious, scholastic, or scientific pursuits;<sup>84</sup> legal representation of a disclosed foreign principal;<sup>85</sup> and the LDA filer.<sup>86</sup> Those in favor of amending the exemptions often seek to limit opportunities for potential foreign agents to avoid reporting their advocacy activity.<sup>87</sup> They also generally argue that a repeal or limitation of exemptions might serve to increase the number of registrations, could promote transparency,<sup>88</sup> and provide a more accurate count of foreign agents.<sup>89</sup> In evaluating whether to amend FARA's existing exemptions, one consideration might focus on who determines whether an exemption would apply to a prospective registrant.<sup>90</sup>

## Administration

The DOJ National Security Division's FARA Unit administers the law.<sup>91</sup> The FARA Unit receives, reviews, and monitors FARA registration and disclosure statements;<sup>92</sup> performs periodic "formal

<sup>82</sup> 5 C.F.R. §§5.301-307. The DOJ's December 2021 advance notice of proposed rulemaking solicits feedback on amending the regulations on exemptions. See <https://www.federalregister.gov/d/2021-26936/p-26>.

<sup>83</sup> 22 U.S.C. §613(d). Exemptions under this section are also sometimes referred to as the "commercial exemption."

<sup>84</sup> 22 U.S.C. §613(e).

<sup>85</sup> 22 U.S.C. §613(g).

<sup>86</sup> 22 U.S.C. §613(h).

<sup>87</sup> For example, see H.R. 2819 and H.R. 4170 (115<sup>th</sup> Congress); H.R. 5150, §605(b) (116<sup>th</sup> Congress); and H.R. 1535, H.R. 2055, H.R. 3390, H.R. 4792, H.R. 4847, S. 577, S. 687, and S. 1754 (117<sup>th</sup> Congress). Under FARA, the DOJ Inspector General (IG) found that organizations like "think tanks, non-governmental organizations, university and college campus groups, foreign media entities, and grassroots organizations that receive funding and direction from foreign governments ... generally claim that they act independently of foreign control or are not serving a foreign interest and are not required to register." See, *DOJ IG 2016 Audit*, p. iii.

<sup>88</sup> Rep. Mike Johnson, in *Markup of H.R. 4170*, p. 16.

<sup>89</sup> For example, see Project on Government Oversight, *Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short*, December 16, 2014, at <https://www.pogo.org/report/2014/12/loopholes-filing-failures-and-lax-enforcement-how-foreign-agents-registration-act-falls-short/>.

<sup>90</sup> In 1977, during debate on the Federal Registration of Foreign Lobbying and Propaganda Act (S. 2045), Senator George McGovern raised the potential that FARA could be amended to "require foreign agents to clear a claimed exemption with the Department of Justice." See Sen. George McGovern, "Federal Registration of Foreign Lobbying and Propaganda Act," remarks in the Senate, *Congressional Record*, vol. 123, part 22 (August 5, 1977), p. S27505. Under current regulations (28 C.F.R. §5.2), potential registrants are encouraged to ask for an advisory opinion from the DOJ FARA Unit. The DOJ FARA Unit provides copies of recent advisory opinions at <https://www.justice.gov/nsd-fara/advisory-opinions#>.

<sup>91</sup> 22 U.S.C. §§612, 620; 28 C.F.R. §§5.1-5.1101.

<sup>92</sup> *DOJ IG 2016 Audit*, p. 3. Every six months, the Attorney General is required to report to Congress "concerning administration of [FARA] ..., including registrations filed ... and the nature, sources and content of political propaganda disseminated and distributed." The DOJ issued the most recent FARA report in December 2019. The report noted, "[d]uring the six-month period ending December 31, 2019, the Department received 74 new registration statements and terminated 33 registrations. A total of 451 active registrations, representing 716 foreign principles, were on file during the period of July 1, 2019 through December 31, 2019." For more information, see U.S. Department of Justice, Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as amended, for the six months ending December 31, 2019," p. 11, at <https://www.justice.gov/nsd-fara/page/file/1448896/download>.

inspections to assess the adequacy” of filings,<sup>93</sup> and issues advisory opinions.<sup>94</sup> At the time of the DOJ IG audit in 2016, the IG reported that the FARA Unit had eight employees.<sup>95</sup>

Several legislative proposals would provide DOJ with additional administrative and/or enforcement tools. For example, several bills would establish a FARA investigation and enforcement unit within DOJ that could “take appropriate legal action against individuals suspected of violating this Act,” and “coordinate any such legal activities with the United States Attorney for the relevant jurisdiction.”<sup>96</sup> Current proposals do not specify if this would be a different entity than the current DOJ FARA Unit.

Proposed changes to the administration or enforcement of FARA could require additional funding or staffing resources. From an administrative perspective, additional staff might be used to process and review disclosure statements and informational material submissions.<sup>97</sup> From an enforcement perspective,<sup>98</sup> additional staffing or funding could provide the DOJ additional resources for the investigation and potential prosecution of non-compliant foreign agents.<sup>99</sup>

### Disclosure Requirements and Public Accessibility

Most recent FARA proposals do not propose to change the type of information currently required to be disclosed, but rather focus on how often reports are filed and how filings are made publicly accessible. For example, several proposals would amend FARA and require quarterly, rather than semiannual, reports.<sup>100</sup> Proponents believe that quarterly reports would align FARA reporting with LDA reporting, which is already required on a quarterly basis.<sup>101</sup> They also argue that more frequent disclosure would increase transparency and provide additional information for potential DOJ enforcement.<sup>102</sup>

In addition to changing reporting timelines, some legislative proposals would amend FARA to require that DOJ provide registration and disclosure statements in a digitized, searchable format on its FARA website.<sup>103</sup> Currently, FARA filings are electronically available and are searchable by registrant number, registrant name, registration start and end date, status (active or terminated), and when the DOJ received

<sup>93</sup> DOJ IG 2016 Audit, pp. 3, 16.

<sup>94</sup> DOJ IG 2016 Audit, p. 3. For a list of public advisory opinions, see U.S. Department of Justice, “Advisory Opinions,” at <https://www.justice.gov/nsd-fara/advisory-opinions>.

<sup>95</sup> The DOJ IG noted that “during our audit the FARA Unit was comprised of one Unit Chief, who is also an attorney; two staff attorneys; one Supervisory Program Manager; one Intelligence Research Specialist; one Program Specialist; and two Case Management Specialists.” DOJ IG 2016 Audit, p. 3.

<sup>96</sup> H.R. 1419 (117<sup>th</sup> Congress). For other similar provisions, see H.R. 1467 and H.R. 1612 (116<sup>th</sup> Congress).

<sup>97</sup> U.S. General Accounting Office, *Foreign Agent Registration: Justice Needs to Improve Program Administration*, GAO/NSIAD-90-250, July 30, 1990, p. 4, at <https://www.gao.gov/assets/220/213011.pdf#page=5>.

<sup>98</sup> 22 U.S.C. § 618. For a list of enforcement actions by the FARA Unit, see Department of Justice, “Recent FARA Cases,” at <https://www.justice.gov/nsd-fara/recent-cases>.

<sup>99</sup> U.S. General Accounting Office, *Foreign Agent Registration: Justice Needs to Improve Program Administration*, GAO/NSIAD-90-250, July 30, 1990. In 1980, GAO recommended that the DOJ “seek authority to (1) give the Justice Department additional enforcement measures, including administrative subpoena powers, and (2) require individuals to submit written notification of all exemption claims prior to engaging in the representation of a foreign principal.” GAO reported that DOJ has sought these authorities. To date, Congress has not enacted legislation to address these concerns. U.S. General Accounting Office, *Improvements Needed in the Administration of Foreign Agent Registration*, ID-80-51, July 31, 1980, <https://www.gao.gov/assets/140/130020.pdf>.

<sup>100</sup> For example, see S. 2039 and H.R. 4170 (115<sup>th</sup> Congress).

<sup>101</sup> 2 U.S.C. § 1604(a).

<sup>102</sup> Rep. David Cicilline, *Markup of H.R. 4170*, p. 25.

<sup>103</sup> See, for example, H.R. 1566 and H.R. 1, § 7104. (116<sup>th</sup> Congress). For more information on H.R. 1, including its FARA provisions, see CRS In Focus IF11097, *H.R. 1: Overview and Related CRS Products*, coordinated by R. Sam Garrett.

the filing.<sup>104</sup> Other information required on FARA forms is not currently searchable. This includes registrant occupation, salary, or contributions from foreign principals, among others.

### Labeling Informational Materials

FARA requires the disclosure of certain informational materials to the DOJ.<sup>105</sup> Informational materials are “items, in both physical and electronic form, that an agent disseminates in interstate commerce on behalf of a foreign principal.”<sup>106</sup> To distribute such materials in interstate or foreign commerce, the registered agent must label informational materials with a “conspicuous statement,” to identify “that the materials are distributed by the agent on behalf of the foreign principal, and that additional information is on file with the Department of Justice.”<sup>107</sup>

As social media have become a more popular form of communication and information dissemination, questions have arisen about whether social media communications are, or should be, covered as informational materials under FARA.<sup>108</sup> To address this question, several bills have been introduced that would formally define email and social media posts as “informational materials” under FARA.<sup>109</sup> Officially defining social media posts as informational materials would clarify that a foreign agent would be required to provide the DOJ their social media posts along with other informational materials.<sup>110</sup>

### Revolving Door Provisions

Current law requires that certain former executive and legislative branch officials serve a one-year “cooling off” period before performing certain representational or advocacy activities on behalf of foreign governments or foreign political parties.<sup>111</sup> In recent years, reports and studies have evaluated former federal and congressional officials’ use of the “revolving door” to become foreign agents, and some have noted anecdotal examples of individuals who may or may not be in compliance with the law.<sup>112</sup> To address the concern that former federal government officials might not be observing statutory “cooling

<sup>104</sup> U.S. Department of Justice, “Search Filings,” at <https://efile.fara.gov/ords/f?p=1235:10>.

<sup>105</sup> 22 U.S.C. §614.

<sup>106</sup> U.S. Department of Justice, “What are Informational Materials?” *Frequently Asked Questions*, at <https://www.justice.gov/nsd-fara/frequently-asked-questions#44>.

<sup>107</sup> 22 U.S.C. §614(b). For more information on the labeling of informational materials, see “Section 614—Filing and Labeling of Political Propaganda,” in CRS Report R46435, *Foreign Agents Registration Act (FARA): Background and Issues for Congress*, by Jacob R. Straus. For additional regulations on the labeling of informational materials, see 28 C.F.R. §5.402.

<sup>108</sup> For example, see Joshua R. Fattal, “FARA on Facebook: Modernizing the Foreign Agents Registration Act to Address Propagandists on Social Media,” *New York University Journal of Legislation and Public Policy*, vol. 21, no. 4 (2019), pp. 903-948; and *US v. Concord Management & Consulting LLC* (347 F. Supp. 3d 28 (2018)), p. 49.

<sup>109</sup> For example, see H.R. 281 and S. 625 (115<sup>th</sup> Congress).

<sup>110</sup> Proposed legislation, generally does not address how social media posts might be captured and stored. Currently, if a foreign agent believes that a social media post constitutes informational materials, he or she would capture them as a PDF document and include them in FARA filings. U.S. Department of Justice, “How Do I File Copies of Social Media?” *Frequently Asked Questions*, at <https://www.justice.gov/nsd-fara/frequently-asked-questions#50>.

<sup>111</sup> 18 U.S.C. §207(f). For more information on the revolving door, see CRS Report R45946, *Executive Branch Service and the “Revolving Door” in Cabinet Departments: Background and Issues for Congress*, by Jacob R. Straus.

<sup>112</sup> For example, see Nick Robinson, “The Foreign Agents Registration Act is Broken: Stepping Up Enforcement of FARA Before Reforming the Act is a Recipe for Disaster,” *Foreign Policy*, July 22, 2019, at <https://foreignpolicy.com/2019/07/22/the-foreign-agents-registration-act-is-broken>; Jeffrey Lazarus, Amy McKay, and Lindsey Herbel, “Who Walks Through the Revolving Door?: Examining the Lobbying Activities of Former Members of Congress,” *Interest Groups & Advocacy*, vol. 5, no. 1 (2016), pp. 82-100; and Michael E. Shepard and Hye Young You, “Exit Strategy: Career Concerns and Revolving Doors in Congress,” *American Political Science Review*, vol. 114, no. 1 (February 2020), pp. 270-284.

off” periods, legislation has been introduced to alter restrictions on former Members of Congress, congressional employees, and/or executive branch officials from becoming foreign agents.<sup>113</sup>

Restrictions on covered officials are often designed to discourage them from representing foreign clients within the “cooling off” period specified by the law.<sup>114</sup> Such “cooling off” periods exist for other activities including trade or treaty negotiations, certain representational communications, and attempts to influence governmental decision making in proscribed post-employment periods.<sup>115</sup>

### Reports on FARA Administration, Implementation, and Enforcement

In addition to proposing amendments to various sections of FARA, several bills would also require the Attorney General, the DOJ, the DOJ IG, or GAO to evaluate FARA administration, implementation, and enforcement and make recommendations. Some bills would require reports on specific provisions of FARA. For example, several recent measures would ask the Attorney General or the Comptroller General (GAO) to examine the use of FARA exemptions,<sup>116</sup> including by potential foreign agents for named foreign governments.<sup>117</sup>

Other reporting requirements would mandate a broader examination of FARA administration and enforcement. Broader report proposals would require

- the Attorney General (AG) to analyze the “legal, policy, and procedural challenges to the effective enforcement” and/or create a “comprehensive strategy” to improve FARA enforcement and administration;<sup>118</sup>
- the AG to submit annual reports to Congress on the use of Civil Investigative Demand Authority (CID);<sup>119</sup>
- the DOJ IG to conduct a review of FARA;<sup>120</sup> and
- the Comptroller General to review the comprehensive strategy and/or conduct an audit of the FARA LDA exemption.<sup>121</sup>

Congress commonly requests reports from executive branch agencies or GAO.<sup>122</sup> Often, these reports cover specific areas and the reporting entity makes recommendations for potential legislative, regulatory, or administrative changes.

<sup>113</sup> Some proposals would ban certain employees from becoming foreign agents or propose that they are not entitled to certain post-employment benefits while engaged as a foreign agent (H.R. 3505 (115<sup>th</sup> Congress)). Others would increase the cooling off period from the current 1 year to 10 years or more (H.R. 4343 (112<sup>th</sup> Congress); H.R. 3389 and H.R. 6844 (117<sup>th</sup> Congress)).

<sup>114</sup> For example, see U.S. Congress, Senate Committee on the Judiciary, *Integrity in Post-Employment Act*, report to accompany S. 2334, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., August 12, 1986, S.Rept. 99-396 (Washington: GPO, 1986), pp. 7-11.

<sup>115</sup> 18 U.S.C. 207. For more information on the revolving door, see CRS Report R45946, *Executive Branch Service and the “Revolving Door” in Cabinet Departments: Background and Issues for Congress*, by Jacob R. Straus.

<sup>116</sup> For example, see H.R. 1, §4431 (117<sup>th</sup> Congress), which would require the Comptroller General to “conduct and submit to Congress an assessment of the implications of the exemption provided under the Foreign Agents Registration Act.”

<sup>117</sup> See H.R. 6742, §342, and S. 3652, §341 (117<sup>th</sup> Congress), which would require the Attorney General, in consultation with the Secretary of State, to submit a report to Congress on filings under LDA and FARA of individuals who represent the Russian Federation.

<sup>118</sup> For example, see S. 1762, §5 (116<sup>th</sup> Congress), H.R. 1, §7107; H.R. 337, §4; H.R. 1724, §5; and H.R. 4847, §209(a) (117<sup>th</sup> Congress).

<sup>119</sup> For example, see H.R. 4847, §209(c) and S. 1724, §5(c) (117<sup>th</sup> Congress).

<sup>120</sup> For example, see H.R. 4847, §209(b) and S. 1724, §5(b) (117<sup>th</sup> Congress).

<sup>121</sup> For example, see H.R. 4847, §201 and S. 1724, §§6-7.

<sup>122</sup> For more information on GAO and IG reports and recommendations, see CRS In Focus IF11807, *GAO and Inspector General Recommendations to Agencies: An Introduction*, by Ben Wilhelm.

## Concluding Considerations

In recent years, congressional interest in FARA has increased and numerous measures to amend the statute have been introduced. An analysis of recent legislative proposals reveals several proposed ways to potentially amend FARA. These include proposals to provide civil investigative demand authority to the Department of Justice (DOJ); increase penalties for noncompliance; repeal or modify certain statutory exemptions to FARA; change how DOJ administers FARA; amend registration and disclosure requirements; enhance public access to FARA registration statements; change labeling requirements for informational materials; and require federal agencies to report to Congress on FARA administration and enforcement.

Policymakers may wish to consider the scope of the proposals, the benefits of particular proposals, any potential administrative adjustments that might be necessary to implement modifications to FARA, and the potential costs to changing the law.

Mr. COHEN. Thank you, Doctor.

Our next Witness will be Mr. Dylan Hedtler-Gaudette. He is the Government Affairs Manager at the Project on Government Oversight. In this role, he advocates for more accountable and transparent Federal government through advancement of good government policy reforms. He focuses on issues ranging from lobbying and ethics reform to judicial accountability and congressional oversight. He received his M.S. degree from Northeastern University and his B.A. from the University of Southern Maine.

Mr. Hedtler-Gaudette, you are recognized for five minutes.

#### **STATEMENT OF DYLAN HEDTLER-GAUDETTE**

Mr. HEDTLER-GAUDETTE. Thank you, Chair Cohen, Ranking Member Johnson, and Members of the Committee.

My name is Dylan Hedtler-Gaudette, and I am the government affairs manager at the Project on Government Oversight. I am privileged to be here today.

I want to first start by commending the Committee for holding a hearing on the Foreign Agents Registration Act and ways to improve it. Making much-needed and long-overdue reforms to this law will not only help the Federal government keep a closer eye on the activities of foreign lobbyists and those who advocate on behalf of foreign interests, but it will also demonstrate to the American people that nobody is above the law, which includes politically well-connected K Street operatives.

Shining a bright light onto the sources and activities of foreign lobbying is essential to protecting the integrity of the U.S. political and policymaking processes. The Foreign Agents Registration Act is designed to do just this by requiring robust disclosure and reporting requirements on the part of those who advocate on behalf of foreign interests.

We, as a nation, have been concerned with the potentially corrupting impact of undue foreign influence in domestic affairs since the dawn of the Republic, and today is no different, with the exception of the fact that today's foreign actors have evermore access to more sophisticated and more effective ways of influencing and shaping U.S. policy toward their own ends, which includes having access to a willing cottage industry of mercenary lobbying firms and influence peddlers.

There are a number of flaws in the Foreign Agents Registration Act framework, and I wanted to highlight just a couple of them with you today, and I would like to offer some proposals. I would encourage the Committee to refer to my written testimony, as well as to a supplemental report I have attached to that testimony, to see a more complete range of proposals.

First and foremost, the Department of Justice has not, and continues to not, sufficiently prioritize the enforcement and administration of this law. Back in 2014, the Project on Government Oversight published a comprehensive report in which we laid out a wide number of issues with the Foreign Agents Registration Act. One of our key findings was a systemic pattern of lax enforcement and an overall lack of interest at the highest levels of leadership at the Department of Justice. In 2016, the Inspector General of the Depart-

ment of Justice had its own report in which they found very similar things.

Unfortunately, not much has changed in the intervening years. One way to remedy this problem is to create a dedicated, stand-alone office that is responsible for enforcing and administering the Foreign Agents Registration Act. Right now, those responsibilities are in the hands of an underresourced subcomponent of a subcomponent within the National Security Division, and this simply isn't working.

One other issue we see with the Foreign Agents Registration Act is registration itself. There are a large number of people operating here in DC who should be registered under the Foreign Agents Registration Act, but they aren't. One of the key reasons for this is the existence of a large loophole, the LDA exemption. The LDA exemption allows lobbyists who should otherwise be registered under FARA to avoid doing so by simply registering under the far less restrictive Lobbying Disclosure Act. One keyway Congress can strengthen the law is by closing this loophole.

One other issue we see with the Foreign Agents Registration Act is its overreliance on criminal prosecution as the primary enforcement mechanism. We encourage Congress to create civil monetary penalties as another option in the toolbox that will enhance enforcement of this law at the Department of Justice.

Lastly, I want to raise the issue of the outdated and anachronistic way that the Department of Justice makes available to the public the documents and materials that are filed by registrants. We are 22 years into the 21st century, and it is long overdue for the Department of Justice to overhaul and modernize the way it makes these materials available to the public, which must include adherence to, and compliance with, the latest guidelines and standards related to digital accessibility.

Since I began my testimony with bedrock principles, I want to end in the same way.

Mr. COHEN. You have a full minute to go.

Mr. HEDTLER-GAUDETTE. What's that?

Mr. COHEN. You have about a minute left.

Mr. HEDTLER-GAUDETTE. One minute left or five minutes done? Okay. Okay.

Since I began my testimony with bedrock principles, I want it to end that way, too. We must strengthen the Foreign Agents Registration Act because there are weaknesses in the law that undercut its primary purpose, which is to shed light on the activities of foreign agents. We must also strengthen the law because it is critical to demonstrate to the American people that the rule of law is real and that nobody is above the law, and that includes the wealthy, the well-connected, and the powerful.

Thank you for inviting me to testify today, and I look forward to answering your questions.

[The statement of Mr. Hedtler-Gaudette follows:]



**Testimony of Dylan Hedtler-Gaudette, Government Affairs Manager  
Project On Government Oversight  
before the House Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
on “Enhancing the Foreign Agents Registration Act of 1938”  
April 5, 2022**

Thank you, Chairman Cohen, Ranking Member Johnson, and Members of the subcommittee, for the opportunity to speak with you today about the Foreign Agents Registration Act (FARA)<sup>1</sup> and its importance as an effective transparency mechanism for tracking foreign influence in U.S. politics and policymaking. My name is Dylan Hedtler-Gaudette, and I am the government affairs manager at the Project On Government Oversight.

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. Combating the potentially corrosive effects of undue foreign influence on the political and policymaking processes of the United States is an essential aspect of the broader effort to ensure that American government works first and foremost for the American people.

FARA is an indispensable tool that can be used to shine a light into the murky crevices of lobbying on behalf of foreign interests, and it is for that reason that I am here to urge Congress to enact reforms to strengthen the efficacy of this law.

As far back as the earliest days of the republic, there has been concern about the harmful impact of foreign influence on domestic politics and policy.<sup>2</sup> That concern has persisted, and in some ways grown, in the intervening centuries. In 2014, the Project On Government Oversight published a report on FARA in which we analyzed weaknesses in the law and proposed several remedial recommendations.<sup>3</sup> That report was titled *Loopholes, Filing Failures, and Lax*

<sup>1</sup> Foreign Agents Registration Act of 1938, 22 U.S.C. Section 611-621.

<https://www.law.cornell.edu/uscode/text/22/chapter-11/subchapter-II>.

<sup>2</sup> “Washington’s Farewell Address, 1796,” United States Department of State, <https://2001-2009.state.gov/r/pa/ho/time/nr/14319.htm>.

<sup>3</sup> Ben Freeman and Lydia Dennett, “Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short,” Project On Government Oversight, December 16, 2014.

*Enforcement: How the Foreign Agents Registration Act Falls Short.* Unfortunately, as recent reporting has highlighted, that title remains as appropriate a description of FARA today as it was in 2014.<sup>4</sup> Equally as unfortunate is the Department of Justice's and Congress's lack of action toward resolving these outstanding issues with FARA, making our recommendations from that 2014 report as salient and necessary today as they have ever been.

Beyond protecting the integrity of the U.S. policymaking process by guarding against undue foreign influence and the corrupting impact such influence can have, strengthening and enforcing FARA is a critical step for Congress to take because it speaks to a bedrock principle of American society; namely, the rule of law. When regular citizens see powerful and politically connected individuals getting away with breaking the law, as is the case when FARA violations happen with impunity, the sense of unfairness and the perception of a two-tiered justice system grow and metastasize into a malignant cancer of public distrust.

All of this being said, it is encouraging that several members of Congress, both Democrats and Republicans, including the ranking member of this subcommittee, have introduced FARA reform legislation in recent years. The fact that this very hearing is happening is a positive sign, underscoring that some members of Congress are taking this matter seriously, as the issue deserves. The time for meaningful FARA reform has come, and I am honored to have the opportunity to testify before this subcommittee and offer some recommendations.

#### **Recommendations**

Given the importance of FARA as a key means of both monitoring and countering undue foreign involvement in U.S. domestic and foreign policy, undergirding the law and rendering it stronger and more effective is vital. There are several key reforms that Congress should move forward with that will meaningfully enhance FARA, including:

1. Create a dedicated FARA office within the Department of Justice, rather than continuing to leave FARA enforcement to a "unit" within the National Security Division (NSD). This will help the Justice Department in focusing on and prioritizing FARA enforcement.
2. Close the Lobbying Disclosure Act (LDA) exemption that allows a subset of foreign agents to register under the less rigorous requirements of the LDA where they should appropriately be required to register under FARA.<sup>5</sup> Closing this loophole will more fully capture and monitor foreign lobbying and prevent foreign agents from engaging in such lobbying without appropriate transparency.

<sup>4</sup> <https://www.pogo.org/report/2014/12/loopholes-filing-failures-and-lax-enforcement-how-foreign-agents-registration-act-falls-short/>.

<sup>5</sup> Hailey Fuchs, "How Russian entities are retaining much of their D.C. lobbying influence," *Politico*, March 22, 2022, <https://www.politico.com/news/2022/03/22/russian-entities-lobbying-disclosure-00019221>.

<sup>6</sup> 22 U.S.C. Section 613(l), <https://www.law.cornell.edu/uscode/text/22/613>.

3. Create civil monetary penalties for FARA violations instead of relying solely on criminal proceedings or declaratory injunctions as deterrence mechanisms. Adding a civil monetary option to the accountability framework around FARA will give the Justice Department an effective deterrence and punitive tool that it currently does not have.
4. Require modernized and updated standards for the Department of Justice's public posting of FARA disclosure materials and documents, including meeting key digital accessibility standards such as those issued under Section 508 of the Rehabilitation Act of 1973<sup>6</sup> and the latest Web Content Accessibility Guidelines (WCAG).<sup>7</sup>
5. Avoid extending civil investigative demand (CID) authority to the Department of Justice for use in FARA investigations and proceedings. Though FARA is an important transparency mechanism, it is crucial to avoid expanding its scope too far and increasing the opportunities for potential abuse.

While these five proposals comprise the core of our recommendations, I want to encourage Congress to refer to POGO's 2014 report, which I have included as a supplement to my testimony. In that report, we set forth several more recommendations not listed above, including enhancing the range of required disclosures for FARA registrants and requiring additional proscriptions around foreign agents who make campaign contributions and engage in other political activities related to officials they have lobbied on behalf of foreign principals.<sup>8</sup>

One promising aspect of FARA reform efforts is that there have been proposals offered by a wide range of Members of Congress that include each of these reform ideas. For example, Ranking Member Johnson previously introduced a bill that would close the LDA exemption and require the Department of Justice Inspector General to analyze the department's approach to FARA enforcement.<sup>9</sup> A bipartisan cohort of senators, led by Senators Chuck Grassley (R-IA) and Dianne Feinstein (D-CA) introduced a robust FARA reform bill in 2019 that would also create civil monetary penalties for FARA violations and require DOJ to create a comprehensive FARA strategy to enhance enforcement and compliance.<sup>10</sup> Representative Katie Porter (D-CA) introduced her own comprehensive FARA reform bill last year,<sup>11</sup> and Representatives Abigail Spanberger (D-VA) and John Katko (R-NY) have sponsored a bill that would bring FARA into the 21<sup>st</sup> century by explicitly encompassing social media content under the FARA disclosure framework.<sup>12</sup> Senators Cynthia Lummis (R-WY) and Sheldon Whitehouse (D-RI), along with

<sup>6</sup> Section 508, Rehabilitation Act of 1973, United States Department of Labor,

<https://www.dol.gov/agencies/oasam/regulatory/statutes/section-508-rehabilitation-act-of-1973>.

<sup>7</sup> Web Content Accessibility Guidelines (WCAG) 2.1, W3C, June 5, 2018, <https://www.w3.org/TR/WCAG21/>.

<sup>8</sup> "Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short," 36-37. See footnote 3.

<sup>9</sup> Disclosing Foreign Influence Act, H.R. 4170, 115<sup>th</sup> Cong., (2017), <https://www.congress.gov/bills/115/disclosing-foreign-influence-act>.

<sup>10</sup> Foreign Agents Disclosure and Registration Enhancement Act of 2019, S. 1762, 116<sup>th</sup> Cong., (2019), <https://www.congress.gov/bills/116/foreign-agents-disclosure-and-registration-enhancement-act-of-2019>.

<sup>11</sup> Foreign Political Influence Elimination Act of 2021, H.R. 4847, 117<sup>th</sup> Cong., (2021),

<https://www.congress.gov/bills/117/foreign-political-influence-elimination-act-of-2021>.

<sup>12</sup> Foreign Agent Disclaimer Enhancement Act of 2021, H.R. 337, 117<sup>th</sup> Cong., (2021), <https://www.congress.gov/bills/117/foreign-agent-disclaimer-enhancement-act-of-2021>.

<https://www.congress.gov/bills/117/foreign-agent-disclaimer-enhancement-act-of-2021>.

Representatives Ken Buck (R-CO) and Ro Khanna (D-CA), led a bill in their respective chambers to update and modernize FARA disclosure reporting and public posting, which would align with my fourth recommendation above.<sup>13</sup>

The takeaway here is that Congress has shown substantive, bipartisan interest in reforming FARA, and a general consensus has been achieved in terms of the key reform contours. The next step is to focus congressional attention and energy on moving forward and transforming these commonsense reforms from ideas into codified law.

#### **FARA: A Brief Summary, Then and Now**

Enacted in 1938 by the 75<sup>th</sup> Congress, FARA was originally a response to widespread concern about Nazi Germany's propaganda efforts in the United States.<sup>14</sup> Since its passage, FARA has been amended on several occasions in order to bring the bill up to date and to render it reflective of modern realities, with the last round of FARA reforms coming in 1995 in the context of the original creation of the Lobbying Disclosure Act (LDA).<sup>15</sup> In the intervening 27 years, technology has developed significantly, and foreign actors have engaged in ever more sophisticated efforts to influence U.S. policy, further underscoring the overdue and critical need for a new round of FARA reforms.

Some key areas of concern worth highlighting within FARA are registration rates, compliance with disclosure requirements, and transparency and public access in relation to disclosed informational materials.<sup>16</sup> We note in our 2014 report that there are significant problems with all three of these areas under the FARA framework.<sup>17</sup> Our conclusion was that FARA is riddled with loopholes and undermined by poor enforcement and insufficient transparency processes. These conclusions were largely corroborated by a report issued by the Department of Justice's inspector general in 2016.<sup>18</sup> The inspector general report also highlighted declining rates of FARA registrations and noted how few FARA cases had been pursued by DOJ, citing just seven in the nearly 50 years from 1966 to 2015.<sup>19</sup>

More recent examples of FARA violations that have caused alarm are myriad, ranging from instances stemming from Special Counsel Robert Mueller's investigation into Russia's actions

<sup>13</sup> Foreign Agents Registration Modernization (FARM) Act of 2021, H.R. 5859, 117<sup>th</sup> Cong., (2021), <https://www.congress.gov/bills/117/house-bills/5859/text?r=1&s=1>.

<sup>14</sup> Cynthia Brown, "The Foreign Agents Registration Act (FARA): A Legal Overview," Congressional Research Service, December 4, 2017, [https://crsreports.congress.gov/product/pdf/R/R45037#:~:text=Enacted%20in%201938%20to%20promote,Department%20of%20Justice%20\(DOI\)](https://crsreports.congress.gov/product/pdf/R/R45037#:~:text=Enacted%20in%201938%20to%20promote,Department%20of%20Justice%20(DOI)).

<sup>15</sup> "The Foreign Agents Registration Act (FARA): A Legal Overview," 1-2. See footnote 14.

<sup>16</sup> Jacob R. Straus, "The Foreign Agents Registration Act: An Overview," Congressional Research Service, March 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10499>.

<sup>17</sup> "Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short," Executive Summary. See footnote 3.

<sup>18</sup> Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act, Office of the Inspector General, United States Department of Justice, Executive Summary, September 16, 2016, <https://oig.justice.gov/reports/2016/a1624.pdf>.

<sup>19</sup> Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act, Executive Summary. See footnote 18.

during the 2016 presidential election,<sup>20</sup> to charges of FARA violations against a former Obama administration official (though the individual accused was later acquitted),<sup>21</sup> to recent FARA cases that related to lobbying on behalf of Sri Lanka, China, Malaysia, and other foreign nations.<sup>22</sup> These patterns of opacity, violations, and a disinterest in or inability to hold those who break the law accountable are key reasons why we are proposing the creation of civil monetary penalties and the modernization of the transparency aspects of FARA (the third and fourth recommendations above, respectively).

It is also important to remember that inconsistent and insufficient enforcement of FARA makes it difficult to accurately capture the true extent to which foreign lobbying that should be regulated under FARA isn't being tracked. This is, at its core, a matter of prioritization at the Department of Justice. That is why we are supporting the creation of a dedicated FARA office and the creation of a comprehensive strategy for enforcement. Combining this enhanced focus at the Department of Justice with the closure of a glaring loophole — the LDA exemption — will help more fully and appropriately encompass all of the foreign agents, and activities of those agents, that should be subject to strong transparency strictures.

With this being said, the Department of Justice has taken some encouraging steps over the past few years. These steps, which have contributed to a substantial increase in the number of FARA registrants since 2016, include issuing a notice in December of 2021 of proposed rule-making with the intent of updating FARA regulations and enhancing the department's emphasis on enforcement.<sup>23</sup>

#### **A Note of Caution: Civil Investigative Demand Authority**

While it is vital that Congress enact reforms to modernize and strengthen FARA, and thus shed brighter light on foreign lobbying activities and the influence those activities have on U.S. policy, it is also essential to safeguard the privacy and general due process rights of Americans who may be investigated for potential FARA violations. It is all too easy to envision a scenario in which politically disfavored or marginalized stakeholders become the object of government harassment under the guise of a FARA investigation.

More specifically, Congress must be cautious in granting the Department of Justice civil investigative demand (CID) authority for purposes of FARA investigations. CID is a powerful

<sup>20</sup> Morgan Chalfant and Alex Gangitano, "Mueller fuels foreign lobbying crackdown," *The Hill*, December 31, 2018, <https://thehill.com/business-a-lobbying/business-a-lobbying/423149-mueller-fuels-foreign-lobbying-crackdown>.

<sup>21</sup> Andy Wright and David Peet, "Greg Craig: The Government's Latest Swing at FARA Enforcement and What Comes Next," *Just Security*, October 2, 2019, <https://www.justsecurity.org/66341/greg-craig-the-governments-latest-swing-at-fara-enforcement-what-comes-next/>.

<sup>22</sup> Recent FARA Cases, United States Department of Justice, <https://www.justice.gov/nsd-fara/recent-cases>.

<sup>23</sup> Brandon L. Van Drack and Haydn Forrest, "FARA's Next Big Year," *Just Security*, January 31, 2022, <https://www.justsecurity.org/80024/faras-next-big-year/>; Advanced Notice of Proposed Rulemaking, Federal Register: Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations, United States Department of Justice, December 13, 2021, [https://www.federalregister.gov/documents/2021/12/13/2021-26936/clarification-and-modernization-of-foreign-agents-registration-act-fara-implementing-regulations#:~:text=\(FARA%20or%20the%20Act\)%20was,on%20political%20or%20policy%20matters](https://www.federalregister.gov/documents/2021/12/13/2021-26936/clarification-and-modernization-of-foreign-agents-registration-act-fara-implementing-regulations#:~:text=(FARA%20or%20the%20Act)%20was,on%20political%20or%20policy%20matters).

and expansive tool that has the potential to infringe on fundamental constitutional liberties. The use of CID can lead to invasive requirements for the provision of sensitive private documents and other materials with little in the way of upstream checks and safeguards, such as prerequisite independent judicial authorization.

Between the need to be thoughtful and proactive in protecting the liberties and privacy of Americans in the abstract and the need to avoid the expense and harm of government harassment in more concrete terms, not to mention the ease with which investigations and the tools used can be weaponized, expanding CID authority to the Department of Justice under FARA is fraught with danger. It is for these reasons that, as a matter of constitutional prudence, we oppose expanding CID authority for use in the FARA context.

#### **Conclusion**

FARA is an indispensable transparency instrument for keeping an eye on foreign influence in U.S. policy, and it has longstanding weaknesses that must be addressed. Solving for those weaknesses is relatively straightforward, and there is bipartisan, bicameral interest in a broad set of specific reforms, ranging from closing the LDA exemption, to adding civil monetary penalties, to creating a dedicated FARA office. POGO urges Congress to build on the Justice Department's recent positive steps by enacting statutory reforms that will both improve the law's efficacy and the department's enforcement of it.

This law is essential not only because it limits the potential corrupting effects of foreign influence on the U.S. political and policymaking processes, though it certainly does that. FARA — and the rigorous, fair enforcement of it — is crucial to the rule of law, without which the American system of government falls apart. Nobody is above the law, and that includes politically well-connected foreign agents on K Street.

**Project On Government Oversight**

**Loopholes, Filing Failures, and Lax  
Enforcement:  
How the Foreign Agents Registration  
Act Falls Short**

December 16, 2014

**CREDITS**

**Primary Authors**

Ben Freeman, then-National Security Investigator  
Lydia Dennett, Investigator

**Editorial Team**

Danielle Brian, Executive Director  
Danni Downing, Editor  
David Hilzenrath, Editor in Chief  
Angela Canterbury, then-Director of Public Policy  
Scott Amey, J.D., General Counsel  
Neil Gordon, Investigator

**Fact-Checking Team**

Michael Smallberg, Investigator

**Web and Communications Team**

Joe Newman, Director of Communications  
Pam Rutter, Web Manager  
Andre Francisco, Online Producer

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## EXECUTIVE SUMMARY

The Foreign Agents Registration Act (FARA) requires that all American citizens working to influence U.S. policy on behalf of foreign governments register with the Department of Justice and to disclose information on any and all political activity in which they engaged for foreign clients. This includes filing, within 48 hours, any informational materials disseminated to two or more people.

The Project On Government Oversight examined thousands of these materials spanning four years, as well as additional public records related to the Justice Department's oversight of lobbyists for foreign interests. We found that lobbyists for foreign interests have routinely failed to comply with the law—a failure that prevents journalists and watchdogs from scrutinizing the lobbying activities while foreign interests are trying to influence U.S. policy. We found a pattern of lax enforcement of FARA requirements by the Justice Department. We found that the Justice Department office responsible for administering the law is a record-keeping mess. And we found loopholes in the law that often makes it difficult if not impossible for the government to police compliance or to discipline lobbyists who fail to comply.

Here are some highlights of our investigation:

- We set out to determine the extent to which lobbyists for foreign interests were filing lobbying materials at the Justice Department within the required time frame. Based on a review of filings made in 2012, in those instances where it was possible to answer the question, POGO estimates that almost half—46 percent—were filed late. Fifteen percent were filed more than 30 business days after they were distributed, and 12 percent were filed more than 100 business days after they were distributed.
- In many instances, the Justice Department would be hard pressed to enforce the filing deadline. Based on the records the Department maintains to enforce the law, we found that in more than a quarter (26 percent) of the 2012 filings, it was impossible to determine whether the lobbyists complied. For example, in many cases, the records did not show when the lobbyists disseminated the materials to the targets of their lobbying. In a glaring omission, the law does not require lobbyists to provide that information. Without it, there may be no way for the government or the public to know whether lobbying materials were filed on time.
- Though federal law bars foreign money from U.S. political campaigns, there appears to be a gray area in the law that can let in such money indirectly. POGO found many instances in which members of lobbying firms made political contributions to Members of Congress on the same day that those firms were lobbying the Members of Congress or their legislative staffs on behalf of foreign clients.<sup>1</sup>
- Lobbyists who fail to comply with certain FARA requirements may have little to fear from the Justice Department. “The cornerstone of the Registration Unit’s enforcement

<sup>1</sup> “The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly. It is also unlawful to help foreign nationals violate that ban or to solicit, receive or accept contributions or donations from them.” Federal Election Commission, “Foreign Nationals,” <http://www.fec.gov/pages/brochures/foreign.shtml> (Downloaded May 13, 2013)

efforts is encouraging voluntary compliance,” a Justice Department website says.<sup>2</sup> When lobbyists do not voluntarily comply, the Justice Department rarely uses one of the key tools at its disposal to enforce the law—seeking a court injunction. A representative of the Department’s FARA unit told POGO: “While the FARA statute and regulations authorize the pursuit of formal legal proceedings, such as injunctive remedy options, the FARA Unit [has] not pursued injunctive remedy options recently and has instead utilized other mechanisms to achieve compliance.”<sup>3</sup>

- It appears that some registered foreign agents have been distributing materials but not filing them with the Justice Department. It’s unclear the extent to which that illustrates a lack of compliance with the law or loopholes in the law. In the process of researching this report, POGO noticed that many more lobbyists were registering as foreign agents than had filed informational materials that we could locate at the FARA office. To determine what was happening, we looked at a sampling of questionnaires that the Justice Department requires registered agents to complete every six months. Some checked one box indicating they had distributed materials and another box stating they did not file them with the FARA office.
- The law requires lobbyists for foreign interests to plainly and conspicuously identify themselves as such in any materials distributed in the course of their lobbying—for example, emails, other correspondence, or publications. We found that many documents filed with the Justice Department lack this identification statement; furthermore, many lobbyists admitted that they did not comply with this requirement. More than half (51 percent) of the registrants we examined in a sample from 2010 checked a box on a the semi-annual Justice Department questionnaire saying they had filed informational materials, and checked another box saying they had not met the legal requirement that they identify themselves in those materials as working on behalf of foreign interests.

Toby Moffett, a former Member of Congress from Connecticut who is now Chairman of the Moffett Group and one of its registered lobbyists, told POGO that “Around the edges there’s a lot of loosey-goosey stuff going on. People representing foreign interests and not reporting.”<sup>4</sup>

But even when lobbyists do report to the Justice Department, the information they provide is not easily accessible to the public. Astonishingly, informational materials are not available online, despite the fact that the Justice Department has an electronic filing system. Instead, these documents are kept in an office at the Justice Department that is only open for four hours each weekday. Hard copies of the documents are kept in folders that are often disorganized and susceptible to misfiling. This archaic system undermines the intended transparency of the law.

When lobbyists for foreign interests do not follow the law, when the U.S. government fails to enforce it, and when the Justice Department makes it difficult for the American people to access records to which they are legally entitled, the public is left in the dark. To bring more transparency to this opaque realm, POGO has made four years of informational materials

<sup>2</sup> Department of Justice, “FARA Frequently Asked Questions: Are There Criminal Penalties for Violating the Act?” <http://www.fara.gov/fara-faq.html#7> (Downloaded May 13, 2013)

<sup>3</sup> Dean Boyd, spokesman for the Department of Justice, email message to Lydia Dennett, then-POGO Research Associate, “FW: Question on FARA Enforcement,” May 20, 2013.

<sup>4</sup> Neil Gordon, telephone interview with Toby Moffett, September 19, 2014.

available for the first time online with our Foreign Influence Database, allowing the public to see how lobbyists attempt to influence American policies on behalf of their foreign clients.

## INTRODUCTION

In his farewell address as President, George Washington cautioned the young United States to be “constantly awake” to “the insidious wiles of foreign influence.”<sup>5</sup> Despite this early warning from the first leader of a nation forged from a commitment to self-rule, the foreign influence industry in the United States is thriving. Foreign interests—which are called foreign principals—include foreign governments, “political parties, persons or organizations outside the United States, except U.S. citizens, and any entity organized under the laws of a foreign country or having its principal place of business in a foreign country.”<sup>6</sup> Currently foreign principals employ more than 1,000 American lobbyists and spend nearly half a billion dollars annually trying to influence U.S. policymaking and public opinion.<sup>7</sup>

This industry is regulated by the Foreign Agents Registration Act (FARA), which, along with the revisions to it, is described on a Justice Department website as a “disclosure statute that requires persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities.”<sup>8</sup>

The FARA Registration Unit, housed in the Department of Justice (DOJ), provides the public with access to these disclosures and has made most filings available online, with one notable exception: informational materials.<sup>9</sup> Formerly called political propaganda, these informational materials are the actual documents and other items lobbyists send to the policymakers they’re trying to influence.<sup>10</sup> FARA registrants who distribute material—including emails, letters, and drafts of proposed legislation—on behalf of their foreign client to two or more people are required to file two copies of those informational materials with the Attorney General within 48 hours of distributing it.<sup>11</sup>

With the release of the Foreign Influence Database, the Project On Government Oversight (POGO) is making years of documents from this key set of FARA filings electronically available for the first time. The materials were previously only available in hard copy at the FARA

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<sup>5</sup> Farewell Address of George Washington, President of the United States, to the people of the United States, September 19, 1796. <http://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf> (Downloaded June 6, 2013)

<sup>6</sup> Department of Justice, “FARA Frequently Asked Questions: Are Foreign Government the Only Foreign Principals?” <http://www.fara.gov/fara-faq.html#3> (Downloaded December 1, 2014)

<sup>7</sup> Industry spending figures calculated by POGO in our analysis of FARA Semi-Annual Reports to Congress. Department of Justice, “FARA: Foreign Agents Registration Act,” <http://www.fara.gov/> (Downloaded May 13, 2013) (Hereinafter “FARA: Foreign Agents Registration Act”); Department of Justice, *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as amended, for the six months ending June 30, 2012*. [http://www.fara.gov/reports/SAR\\_JUNE\\_2012.pdf](http://www.fara.gov/reports/SAR_JUNE_2012.pdf) (Downloaded June 6, 2013)

<sup>8</sup> “FARA: Foreign Agents Registration Act”

<sup>9</sup> Department of Justice, “FARA Document Search,” <http://www.fara.gov/search.html> (Downloaded June 6, 2013)

<sup>10</sup> Department of Justice, “FARA Frequently Asked Questions: How Does the Act Work?”

<http://www.fara.gov/fara-faq.html#4> (Downloaded May 13, 2013)

<sup>11</sup> 22 U.S.C. § 614(a); Department of Justice, “FARA Index and Act,” <http://www.fara.gov/indx-act.html> (Downloaded May 13, 2013)

Registration Unit in Washington, DC, which is only open to the public from 11am to 3pm on weekdays.<sup>12</sup> In this digital age it is surprising that these materials could not be read online and are instead stored in file folders, where they are disorganized and susceptible to misfiling. Even those that were electronically filed by the registrants are not available to the public in an electronic format. POGO's database includes informational materials filed in 2009, 2010, 2011, and 2012.<sup>13</sup>

The Foreign Influence Database includes more than 2,000 documents filed by registered firms and individuals working on behalf of foreign principals. The documents have not been redacted and are the exact materials used by registrants to influence the U.S. government or U.S. public opinion on behalf of their foreign clients. Many of the documents are email correspondence between lobbyists and legislative staffers. While these emails can, at times, be fairly innocuous, they show the subtleties of influence-peddling for foreign principals, illustrating connections between the policymaker and the lobbying firm or the foreign interest it is representing. The database includes draft statements for the Congressional Record, proposed legislation, and even scripts for congressional hearings, all distributed by the agents of foreign principals.<sup>14</sup>

In short, the database allows users to see how lobbyists, in their own words, attempt to wield influence on behalf of their foreign clients.

The difficulties in obtaining FARA documents are nothing new. The Center for Public Integrity has repeatedly called out the FARA office for its "Byzantine operation" and reluctance to provide electronic versions of its documents.<sup>15</sup> In addition to POGO, other organizations have created resources that can help stakeholders analyze foreign lobbying. Sunlight Foundation and ProPublica created "ForeignLobbying.org," which has since evolved into Sunlight Foundation's "Foreign Influence Explorer."<sup>16</sup> That database contains records the FARA office has already put online, but makes it possible to access them in simpler, more intuitive, and more useful ways.

Other resources previously available to the public on foreign lobbying include the FARA.gov and Ethics.gov websites, which host documents such as registration statements and yearly contracts between lobbyists and their foreign clients.<sup>17</sup> POGO's Foreign Influence Database

<sup>12</sup> Department of Justice, "FARA Contact Information," <http://www.fara.gov/contact.html>

<sup>13</sup> POGO began its research in 2011, but determined that both time and resource constraints mandated a limited scope. We decided that the most recent information would be the most relevant, so focused on 2012, 2011, 2010, and 2009. Some files from 2008 were also included. POGO may continue to update the database periodically. It is important to note that not all informational materials are included in POGO's Foreign Influence Database. Some filings were in formats not readily scanned. Thus, the Database does not include CDs, clothing, videos, books, magazines, or tourism pamphlets or brochures. A list of all the informational materials filed from 2009 to 2012 that are not included in POGO's Database can be found at <http://www.pogoarchives.org/m/fara/non-scanned-docs.pdf>

<sup>14</sup> To get their perspective, POGO attempted to contact lobbying firms or lobbyists named in this report and parties that they lobbied. Many did not respond to our requests and some declined to comment. Where comments were relevant to this report, we included them.

<sup>15</sup> The Center for Public Integrity, "Timely, effective and fair? Justice Department makes a valuable public database all but inaccessible," September 13, 2005. <http://www.publicintegrity.org/2005/09/13/6559/timely-effective-and-fair> (Downloaded December 2, 2014)

<sup>16</sup> Sunlight Foundation, "Foreign Influence Explorer," <http://foreigninfluenceexplorer.com/> (Downloaded December 2, 2014)

<sup>17</sup> "FARA: Foreign Agents Registration Act"

complements this work by providing users with access to the materials used in the attempts to sway policymakers' decisions and public opinion. The materials provide insights into the dealings between foreign principals, their lobbyists, and policymakers, a level of lobbying transparency that was previously unavailable.

## BACKGROUND

While the law now requires those working in the foreign influence industry to disclose many of their activities,<sup>18</sup> this was not always the case. Despite George Washington's concerns, there was no public law regarding transparency of foreign influence until Congress passed FARA in 1938.<sup>19</sup>

At the time, Congress was concerned about propaganda circulated in the U.S. by the Nazi Party and other foreign interests. The House Un-American Activities Committee—later known for its anti-Communist witch hunts—had found “incontrovertible evidence...that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied...with funds and other materials to foster un-American activities.” The Committee urged Congress to pass a law requiring more disclosure of propaganda activities “so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our form of government.”<sup>20</sup>

While the Act originally focused on propagandists, amendments in 1966 expanded FARA to focus more heavily on defending the U.S. government's decision-making process.<sup>21</sup> Among other things, they required anyone engaging in political activities, not just propaganda distribution, on behalf of a foreign principal to register with the U.S. government. The amendments also banned all foreign nationals from making political contributions.

Lobbyists working on behalf of foreign clients occupy a significant, but often overlooked, portion of the U.S. lobbying marketplace.

<sup>18</sup> According to the FARA Registration Unit, the Act requires disclosure of a “relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities.” “FARA: Foreign Agents Registration Act”; In addition, registrants must disclose the name of all advocates working on behalf of a foreign client; all political contributions made by registered foreign agents; all political activity conducted during their work for a foreign client; and all informational materials distributed on behalf of a foreign client. Department of Justice, “FARA Reports to Congress.” <http://www.fara.gov/annualrpts.html> (Downloaded May 13, 2013) (hereinafter “FARA Reports to Congress”)

<sup>19</sup> “FARA: Foreign Agents Registration Act”

<sup>20</sup> Ava Marion Plakins, “Heat Not Light: The Foreign Agents Registration Act After *Meese v. Keene*,” *Fordham International Law Journal*, Vol. 11, Issue 1, 1987, pp. 190-191. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1174&context=ilj> (Downloaded August 1, 2013)

<sup>21</sup> Department of Justice, Criminal Resource Manual 2062, “Foreign Agents Registration Act Enforcement.” [http://www.justice.gov/usao/cousa/foia\\_reading\\_room/usam/title9/crm02062.htm](http://www.justice.gov/usao/cousa/foia_reading_room/usam/title9/crm02062.htm) (Downloaded May 13, 2013) (Hereinafter “Foreign Agents Registration Act Enforcement”)

Foreign principals spend about half a billion dollars annually. From 2009 to 2012 foreign principals spent about \$2 billion on lobbying in the U.S.<sup>22</sup> In comparison, domestic lobbying clients spent about \$14 billion lobbying the federal government over the same time period.<sup>23</sup>

The foreign influence industry is notably different from other advocacy. For instance, foreign influence is just that—foreign. It does not stem from the interests of U.S. citizens, and any positive impact it has on them is purely coincidental. While lobbyists, in general, are even less popular than the remarkably unpopular Congress,<sup>24</sup> lobbyists working for even the narrowest of domestic interests represent at least some U.S. voters. However, those representing foreign clients are putting foreign interests and goals first, regardless of any benefit—or harm—that might result for U.S. citizens.

The rules for lobbyists representing foreign interests differ from those for lobbyists representing domestic interests in an important way: FARA's disclosure requirements require a significantly higher level of detail. The law that governs disclosures by lobbyists for domestic interests, the Lobbying Disclosure Act of 1995 (LDA), requires lobbyists to report only an up-to-date list of clients, who they contacted, the issue they are lobbying on including specific bill numbers or executive orders, and a "good faith estimate" of expenses the lobbyists incurred while working for their clients.<sup>25</sup> The FARA requires all of this and more, such as:

- The materials they distribute to the targets of their lobbying
- Copies of their contracts with their foreign clients
- Semiannual "Supplemental Statements" which contain, among many other things, any political contributions they've made

However, there are also major gaps in the FARA requirements. The Supplemental Statements do not require registrants to provide the names of the recipients of informational materials or the dates the materials were sent. The registrants are also not explicitly required to provide specific information about their meetings or contacts with policymakers, such as who they met with or what they discussed, though some registrants choose to provide these details.

Nonetheless, the level of transparency required by FARA, if complied with, has the potential to afford the public the opportunity for many more avenues of oversight than are available under the LDA. For instance, using the FARA data, POGO has been able to document numerous instances of lobbyists making campaign contributions to politicians on the same day they meet with them to discuss matters of interest to a foreign client.<sup>26</sup> Examples of such "same-day contributions" are explored later in this report.

<sup>22</sup> Industry spending figures calculated by POGO during our analysis of FARA Semi-Annual Reports to Congress.

<sup>23</sup> Center for Responsive Politics, "Lobbying Database," <https://www.opensecrets.org/lobby/index.php> (Downloaded December 15, 2014)

<sup>24</sup> Tom Jensen, "Congress less popular than cockroaches, traffic jams," *Public Policy Polling*, January 8, 2013, <http://www.publicpolicypolling.com/main/2013/01/congress-less-popular-than-cockroaches-traffic-jams.html> (Downloaded May 13, 2013)

<sup>25</sup> U.S.C. § 1604, (a)(3)(B)(ii) <http://www.law.cornell.edu/uscode/text/2/1604> (Downloaded December 2, 2014)

<sup>26</sup> For example, *The Foreign Policy Auction*, by former POGO Investigator Ben Freeman, provides numerous additional examples of lobbyists making campaign contributions to politicians on the same day they meet to discuss the lobbyist's foreign client. Ben Freeman, *The Foreign Policy Auction*, CreateSpace Independent Publishing Platform, September 25, 2012.

#### WHAT THE FOREIGN INFLUENCE DATABASE SHOWS

Some of the documents in the Foreign Influence Database reveal how lobbyists working on behalf of foreign governments draft speeches, scripts for hearings, and even proposed legislation.

POGO, as do many other public interest groups, non-profits, and businesses, lobbies Congress and provides these kinds of materials to policymakers as well. The difference is that these lobbyists are not working for the American public's interest; they are working for foreign interests.

For example, The Livingston Group, whose founding partner is former Chairman of the House Appropriations Committee Robert Livingston (R-LA), has represented some controversial foreign clients, including the Government of Egypt during the 2011 Egyptian Revolution.

#### Egypt: A Case Study of Foreign Influence

When the 2011 revolution in Egypt began in January, many Egyptians were clamoring for the United States to shift allegiance from the corrupt Mubarak regime and instead support the revolutionaries. "To those in the United States and in the West who are quoting stability as an excuse for brutality.... You have to change your mentality," Mokhtar Kamel, vice president of the Coalition of Egyptian Organizations in North America, said to a group at the National Press Club just days after the revolution began.<sup>27</sup> "When an oppressed people rises against a tyrant, fighting incredible odds and facing extreme danger, it deserves support," wrote Hassan ElSawaf, an Egyptian and guest blogger for the Council on Foreign Relations.<sup>28</sup>

What Kamel, ElSawaf, and the hundreds of thousands of Egyptians who had taken to the streets in Egypt likely did not know was that lobbyists had been working for the Egyptian government to suppress efforts by U.S. policymakers, such as the one led by Senators Russell Feingold (D-WI) and John McCain (R-AZ), to reprimand Hosni Mubarak and his regime in Egypt, according to FARA records.

Six months before the revolution began, on July 20, 2010, the Senators had introduced Senate Resolution 586, "A resolution supporting democracy, human rights, and civil liberties in Egypt."<sup>29</sup> Thirteen other Senators joined them as co-sponsors.<sup>30</sup> The resolution chastised the

<sup>27</sup> CNN Wire Staff, "Egyptian-American leaders call for U.S. support of 'Lotus Revolution,'" January 28, 2011. [http://articles.cnn.com/2011-01-28/world/egypt.press.club\\_1\\_saad-eddin-ibrahim-egyptian-american-egyptian-people?\\_s=PM:WORLD](http://articles.cnn.com/2011-01-28/world/egypt.press.club_1_saad-eddin-ibrahim-egyptian-american-egyptian-people?_s=PM:WORLD) (Downloaded May 13, 2013)

<sup>28</sup> Hassan ElSawaf, "One Egyptian's Advice to Washington," Steven A. Cook: From the Potomac to the Euphrates, Council on Foreign Relations, May 4, 2011. <http://blogs.cfr.org/cook/2011/05/04/one-egyptians-advice-to-washington/> (Downloaded May 13, 2013)

<sup>29</sup> 111<sup>th</sup> U.S. Congress, "A resolution supporting democracy, human rights, and civil liberties in Egypt" (S. Res. 586), Introduced July 20, 2010, by Senator Russell Feingold. <http://www.gpo.gov/fdsys/pkg/BILLS-111sres586is/pdf/BILLS-111sres586is.pdf> (Downloaded May 14, 2013) (Hereinafter S. Res. 586)

<sup>30</sup> The Library of Congress, THOMAS, "Bill Summary & Status 111th Congress (2009 - 2010) S.RES.586 Cosponsors," <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.RES.586:@.P> (Downloaded August 22, 2013)

Mubarak regime for its harassment, intimidation, detention, and violence against peaceful demonstrators, journalists, human rights activists, and bloggers, and the Mubarak regime's extension of emergency law, which allowed for indefinite detention without cause. The resolution stated, "Political reform in Cairo would significantly enhance the leadership of Egypt throughout the Middle East and Africa and could help ensure constructive political engagement in these regions for years to come."<sup>31</sup> It called upon the Egyptian government to put a halt to its malicious practices and called upon President Obama and then-Secretary of State Hillary Clinton to "help promote human rights and democratic reform, including by providing appropriate funding to international and domestic election observers, as well as to civil society organizations for democracy and governance activities."<sup>32</sup>

Had this resolution passed it might have eased concerns Egyptian revolutionaries had about an initially ambivalent stance from the United States. They would have known beyond a doubt that at least some policymakers in the United States were publicly supporting democracy and human rights in Egypt.

However, The Livingston Group, working on behalf of the Egyptian government, fought to ensure that this resolution remained bottled up in the Senate Committee on Foreign Relations. The firm sent letters written by Livingston to Members of the House and Senate and to Secretary Clinton that condemned the resolution.<sup>33</sup> According to the letters, the firm was writing in response to plans by Senators Feingold and McCain to "hot-line" the resolution in the lame duck session in late 2010. The "hot-line" is a process in the Senate by which measures are expedited for approval. Leadership for the Majority and the Minority send an email to Senate offices, and if there are no objections, the bill is formally offered and advanced by unanimous consent—in other words, without a roll-call vote.

The bill had stagnated since introduction, and the co-sponsors were hoping to push it through before the end of the year and the 111<sup>th</sup> Congress when the bill would die without congressional action (and, as it turns out, just before the revolution began). Livingston's letters asked for opposition to the resolution in Committee and if brought to a Floor vote because, "S. Res. 586 is not conducive to the ongoing, open and frank dialogue on issues related to democracy and human rights undertaken by our Administration and the Egyptian government." (Emphasis in original) One version of the letter noted that Mubarak, who was 82 years old, would be up for reelection the next year and implied that the outcome was uncertain, though it did not mention the fact that Mubarak won the last election with more than 88 percent of the vote.<sup>34</sup> "We can't

<sup>31</sup> S. Res. 586

<sup>32</sup> S. Res. 586

<sup>33</sup> The letters to the Members of Congress do not indicate to which Senators and Representatives they were sent, or how many letters were sent. Letters from Robert Livingston, founding partner of the Livingston Group, L.L.C., to Members of the House and Senate, regarding S. Res. 586, pp. 2-7. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/333053-egypt-the-livingston-group-llc-the-government-of.html> (Hereinafter Letters from Robert Livingston regarding S. Res. 586)

<sup>34</sup> Daniel Williams, "After Egypt's Vote, a Surge of Skepticism," *The Washington Post*, September 11, 2005. <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/10/AR2005091001014.html> (Downloaded August 13, 2013)

say what will happen then. But the Muslim Brotherhood is out there, and any statement of criticism by the US is used against the government,” wrote Livingston.<sup>35</sup>

Neither Robert Livingston nor The Livingston Group responded to multiple requests for comment.

It appears that these letters were filed with the FARA Registration Unit weeks after they were distributed. Livingston apparently sent them, according to the letters, as the Senate “reconvenes for the lame-duck session.”<sup>36</sup> The lame-duck session in 2010 officially began on November 15.<sup>37</sup> The FARA Registration Unit, which date-stamps all documents it receives from registrants, recorded a date of January 31, 2011, on all the letters. This is, of course, more than the legally mandated 48 hours after sending the letters. It is also after the revolution began in Egypt and Tahrir Square was occupied by protesters clamoring for democracy.

A section in FARA, 22 U.S.C. § 614(a), specifies that any foreign agent distributing informational materials “which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof.”<sup>38</sup> Violation of this requirement is punishable “by a fine of not more than \$10,000 or by imprisonment for not more than five years, or both.”<sup>39</sup>

While this might seem like stiff punishment, consider the context of the events that unfolded in Egypt: if outside observers had been made aware of The Livingston Group’s efforts and seen the letters, they might have been able to counter the efforts to undermine the legislation. But The Livingston Group did not file the materials on time. POGO searched civil and criminal filings in PACER, the online index to federal court cases, and found no reference to enforcement action against The Livingston Group or Robert Livingston. As it was, the resolution never made it out of Committee. We will never know whether, had The Livingston Group filed this material on time, the resolution might have had a fighting chance, or if the resolution might even have influenced the course of events.

In representing the firm’s foreign clients, The Livingston Group has also drafted legislative language for proposed use by Members of Congress.

Working on behalf of Muammar Gaddafi’s Libya in 2008, the firm wrote draft language for a committee report and a script for a congressional hearing regarding Libya.<sup>40</sup> The language

<sup>35</sup> Letters from Robert Livingston regarding S. Res. 586

<sup>36</sup> Letters from Robert Livingston regarding S. Res. 586

<sup>37</sup> Richard S. Beth and Jessica Tollestrup, *Lame Duck Sessions of Congress, 1935-2012 (74th-112th Congresses)*, Congressional Research Service, September 19, 2014, p. 27.

<sup>38</sup> <http://www.senate.gov/reference/resources/pdf/RL33677.pdf> (Downloaded December 2, 2014)

<sup>39</sup> 22 U.S.C. § 614(a)

<sup>40</sup> Enforcement and penalties are found in § 618 of the Act. 22 U.S.C. § 618

<sup>40</sup> The Livingston Group, L.L.C., “Draft Report Language Regarding Libya” (Draft), p. 4.

<http://www.pogo.org/tools-and-data/foreign-influence-database/data/608812-scan7338-000.html> (Hereinafter “Draft Report Language Regarding Libya”); The Livingston Group, L.L.C., “Colloquy Regarding Libya” (Draft), p. 5.

<http://www.pogo.org/tools-and-data/foreign-influence-database/data/608812-scan7338-000.html>

praised Libya for normalizing its relations with the Western world, raised alarms about legislation that would potentially increase Libya's liability to victims of the country's terrorist attacks, and urged Congress to take action to allow President George W. Bush to exempt Libya from providing additional restitution. The Draft Report Language Regarding Libya states:

"The Committee recognizes the importance of this issue as a foreign policy and national security issue as indicated by the joint letter of March 18, 2008 from the Secretaries of State, Defense, Energy, and Commerce, and the negative impact that Section 1083 of Public Law 110-181 may have upon achieving a final resolution of this matter and on the larger U.S.-Libya relations. The Committee notes that Libya was removed from the list of State Sponsors of Terrorism in 2006 and believes that the U.S. Government must be equitable in dealing with this new, important strategic partner."<sup>41</sup>

The firm also distributed a draft version of a "Proposed Waiver for Former State Sponsors" of terrorism.<sup>42</sup> On August 4, 2008, the Libyan Claims Resolution Act—which gave Libya immunity from terror-related lawsuits in exchange for a settlement agreement to compensate victims—was signed into law.<sup>43</sup> Although the exact language proposed by The Livingston Group was not included in that law or used by Members of Congress during a hearing or in a report, the final outcome was favorable for the firm's foreign client, the Great Socialist People's Libyan Arab Jamahiriya—the official name of Gaddafi's regime.<sup>44</sup> That legislation paved the way for a deal that required Libya to compensate U.S. victims and, in turn, enabled it to avoid liability in terror-related lawsuits.<sup>45</sup> Some of the families of the victims of the Gaddafi regime—particularly those of UTA Flight 772, which exploded over the Sahara desert and killed 170 people—felt they were cheated by the deal.<sup>46</sup>

As with the domestic variety, not all foreign lobbying efforts pay off. In May 2011, lobbyist Sean King of Park Strategies, LLC sent an email to an aide to Senator John Thune (R-SD) asking if Thune would consider signing a letter urging President Obama to sell F-16 fighter jets to Taiwan. In his email, King dropped the name of his boss—a once prominent Washington politician who had gone through the revolving door: "I work at Park Strategies, a business

<sup>41</sup> "Draft Report Language Regarding Libya"

<sup>42</sup> The Livingston Group, L.L.C., "Proposed Waiver for Former State Sponsors," p. 7. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/608811-scan7339-000.html>

<sup>43</sup> Libyan Claims Resolution Act, Public Law 110-301, U.S. Statutes at Large 2999 (2008): 2999.

<http://www.gpo.gov/fdsys/pkg/PLAW-110publ301/html/PLAW-110publ301.htm> (Downloaded May 21, 2013)

<sup>44</sup> Jennifer K. Elsea, Congressional Research Service, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism*, August 8, 2008, pp. 62-65. <http://www.fas.org/srg/crs/terror/RL31258.pdf> (Downloaded May 21, 2013)

<sup>45</sup> BBC News, "Libya compensates terror victims," October 31, 2008.

<http://news.bbc.co.uk/2/hi/americas/7703110.stm> (Downloaded May 22, 2013); Executive Order no. 13477 –

Settlement of Claims Against Libya, Code of Federal Regulations, October 31, 2008.

<http://www.gpo.gov/fdsys/pkg/WCPD-2008-11-03/pdf/WCPD-2008-11-03-Pg1395-2.pdf> (Downloaded August 1, 2013)

<sup>46</sup> Sophie Quinton, "Qaddafi's Victims Hope for Compensation from Frozen Funds," *National Journal*, September 14, 2011. <http://www.nationaljournal.com/nationalsecurity/qaddafi-s-victims-hope-for-compensation-from-frozen-funds-20110914?print=true> (Downloaded May 22, 2013); Christopher M. Blanchard, Jim Zanotti, Congressional Research Service, *Libya: Background and U.S. Relations*, February 18, 2011, p. 37.

<http://fpc.state.gov/documents/organization/157348.pdf> (Downloaded August 22, 2013)

advisory firm managed by former U.S. Senator Alfonse M. D'Amato of New York," King wrote.<sup>47</sup>

Two days later, King got his answer.

"Our office is going to pass on this letter," Thune aide James E. Long wrote. "Thank you for all the information to help us decide."<sup>48</sup>

Sean King and Park Strategies declined to comment on their work for the Taipei Economic and Cultural Representative Office in the United States.

The documents in POGO's Foreign Influence Database vary as widely as the countries they involve. Some of the foreign money paid to Washington lobbying firms is spent on public relations products such as newsletters and news releases that seem essentially devoid of news and are unlikely to be read by—let alone make much of an impression on—anyone but the sponsors. The biggest mystery about those is why foreign clients would pay for them.

Many of the lobbyists are hired by foreign entities to promote tourism in their country, while others are hired to promote favorable trade deals.

American Palm Oil Council, for instance, is a FARA registrant representing the Malaysian Palm Oil Council. In August 2012, American Palm Oil Council filed a 50-page document filled with articles and advertisements touting the benefits of palm oil. The documents describe palm oil as "The Heart Healthier Choice" and features graphs showing demand for palm oil skyrocketing in several countries.<sup>49</sup> Palm oil is one of the most widely consumed vegetable oils in the world and is used in many kinds of products, from chocolate and crackers to make-up and biodiesel.<sup>50</sup> The

<sup>47</sup> Sean King, email message to Jim Long, legislative assistant to Senator John Thune, "Re: Taiwan F-16 letter," May 23, 2011. [http://www.pogo.org/tools-and-data/foreign-influence-database/data/215732-taiwan\\_park-strategies-llc\\_taipei-economic-amp.html](http://www.pogo.org/tools-and-data/foreign-influence-database/data/215732-taiwan_park-strategies-llc_taipei-economic-amp.html)

<sup>48</sup> Jim Long, email message to Sean King, Park Strategies, "Re: Taiwan F-16 letter," May 25, 2011. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/289779-taiwan-park-strategies-llc-taipei-economic-amp.html>

<sup>49</sup> For FARA filings that include multiple documents, the Project On Government Oversight will cite them by the filing as a whole. The date refers to the FARA office's date stamp from the day they received the filing. Filing by American Palm Oil Council, regarding the Malaysian Palm Oil Council, August 23, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/898513-malaysia-american-palm-oil-council-malaysian.html>

<sup>50</sup> World Wildlife Fund, "Which Everyday Products Contain Palm Oil?" <http://www.worldwildlife.org/pages/which-everyday-products-contain-palm-oil> (Downloaded December 2, 2014)

health effects of palm oil have been debated for decades<sup>51</sup> but it is clear that American Palm Oil Council was promoting a positive image for one of Malaysia's biggest exports.<sup>52</sup>

Lobbyists' promotion of their foreign clients often involves legislation. Then-Senator Daniel Inouye (D-HI) introduced legislation to provide payments to the Pottawatomi Nation in Canada on several occasions. In 2008, his efforts were aided by Native American Rights Fund, which responded to Senator Inouye's office's request for edits to a draft bill to "provide relief to the Pottawatomi Nation in Canada for settlement of certain claims against the United States."<sup>53</sup> Senator Inouye introduced a bill that included those edits verbatim.<sup>54</sup> Lobbyists working for Native American Rights Fund also provided edits to the Senator's introductory statement for the bill. Those edits were incorporated into the Senator's remarks attached to the bill in 2009,<sup>55</sup> and again in nearly identical form in his remarks when the bill was reintroduced in 2011.<sup>56</sup>

This particular FARA filing clearly shows a back-and-forth editing process between Senator Inouye's office and the Native American Rights Fund. On December 8, 2008, one of Senator Inouye's staff members wrote, "attached is the draft bill along with the Senator's draft statement. Could you please take a look at them and let me know if they are good to go." Richard Guest, Staff Attorney for the Native American Rights Fund, said in reply: "The bill is fine as drafted, but I have made a few red-line changes to the draft statement (copy attached).... Please let me know if you have any questions or concerns." He highlighted one change in particular, saying, "This slight change may help us in the Senate Judiciary Committee with their concerns regarding whether this [is] a new appropriation or whether payment will be made by Treasury from existing appropriations already made to the Judgment Fund (31 USC 1304) for the payment of claims against the United States."<sup>57</sup>

<sup>51</sup> Pramod Khosla and K. C. Hayes, "Cholesterolaeic effects of the saturated fatty acids of palm oil," *Food and Nutrition Bulletin*, Vol. 15, Number 2, 1993/1994. <http://www.nzdl.org/gsd/mod?e=d-00000-00---off-0fml2.2--00-0-0-0-10-0-0---0direct-10---4-----0-11--11-cn-50---20-about---00-0-1-00---4-4---0-0-11-11-0ut/Zz-8-10-00&a=d&cl=CL3.66&d=HASHa9c39b1c5658d0c2552d1b.2.3> (Downloaded December 2, 2014); Department of Agriculture, Agricultural Research Service, "Palm Oil Not A Healthy Substitute For Trans Fats, Study Finds," *ScienceDaily*, May 11, 2009. <http://www.sciencedaily.com/releases/2009/05/090502084827.htm> (Downloaded December 2, 2014)

<sup>52</sup> Malaysia External Trade Development Corporation, "Top 10 Major Export Products, 2014," <http://www.matrade.gov.my/en/malaysia-exporters-section/33-trade-statistics/3184-top-10-major-export-products-2014> (Downloaded December 2, 2014)

<sup>53</sup> 111th U.S. Congress, "A bill to provide relief to the Pottawatomi Nation in Canada for settlement of certain claims against the United States," (Draft legislation), Introduced January 6, 2009, by Senator Daniel Inouye, pp. 2-3. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/264891-canada-native-american-rights-fund-pottawatomi.html>

<sup>54</sup> 111th U.S. Congress, "A bill to provide relief to the Pottawatomi Nation in Canada for settlement of certain claims against the United States," (S. 65), Introduced January 6, 2009, by Senator Daniel Inouye. <http://www.gpo.gov/fdsys/pkg/BILLS-111s65is/pdf/BILLS-111s65is.pdf> (Downloaded May 14, 2013)

<sup>55</sup> Statement of Senator Daniel K. Inouye, on the introduction of a bill to provide relief for the Pottawatomi Nation in Canada, pp. 4-9. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/264891-canada-native-american-rights-fund-pottawatomi.html> (Hereinafter Draft Statement of Senator Daniel K. Inouye Provided by the Native American Rights Fund)

<sup>56</sup> Senator Inouye, speaking on the introduction of S. 65, on January 25, 2011, S. 65, 111th U.S. Congress, 1st Session, Congressional Record 128, pt. 2: 46, pp. S173-S174. <http://www.gpo.gov/fdsys/pkg/CREC-2011-01-25/pdf/CREC-2011-01-25-pt1-PgS128-2.pdf#page=46> (Downloaded May 14, 2013) (Hereinafter Senator Inouye speaking on the introduction of S. 65)

<sup>57</sup> Draft Statement of Senator Daniel K. Inouye Provided by the Native American Rights Fund, p. 1.

Guest provided text for Senator Inouye to use in an introductory statement: “The bill I introduce today is to authorize the payment of those funds that the United States has concluded would be ‘fair, just and equitable’ to satisfy this legal claim from amounts appropriated under section 1304 of title 31 of the United States Code.”<sup>58</sup>

When Senator Inouye introduced the bill on January 9, 2009, he did, in fact, use that same exact language.

When he was contacted by POGO, Guest said that that the Native American Rights Fund had been working with Senator Inouye on this legislation before Guest began working at the organization. “Proposed legislation is prepared by lobbyists all the time,” Guest said. “But it’s the legislative counsel’s job to draft the final legislation—they make the final decision.” He added: “It’s not unusual for us to comment back and forth when there’s a new legislative session.”<sup>59</sup>

#### SAME-DAY CONTRIBUTIONS

Foreign lobbyists work for their clients in all kinds of ways, but one of the most common is a face-to-face meeting with a Member or someone on their staff. Sometimes lobbyists make contributions on the same day that they meet with lawmakers on behalf of their foreign clients. These meetings and political contributions must be disclosed in the registrant’s semiannual Supplemental Statements. As observers quoted by Dan Froomkin said in his 2011 *Huffington Post* article on foreign lobbying, the amounts foreign lobbyists donate may not be jaw dropping, but the phenomenon does, at the very least, give the appearance of a *quid pro quo* relationship.<sup>60</sup>

For example, on July 9, 2008, Robert Livingston “had occasion to meet with” Representative Dana Rohrabacher (R-CA) and Ambassador David Welch, Assistant Secretary of State for Near Eastern Affairs, to discuss U.S./Libya relations. The Livingston Group said in a FARA filing.<sup>61</sup> In the same document, Livingston reports making a \$1,000 campaign contribution to Rohrabacher on the same day.<sup>62</sup> This was the only contribution made by anyone at The Livingston Group to Rohrabacher in 2008, and this was the first time in 2008 that Livingston reported contacting Rohrabacher on behalf of any of his foreign clients.

<sup>58</sup> Draft Statement of Senator Daniel K. Inouye Provided by the Native American Rights Fund, p. 1.

<sup>59</sup> Neil Gordon, telephone interview with Richard Guest, October 10, 2014.

<sup>60</sup> Dan Froomkin, “How Foreign Money Can Find Its Way Into Political Campaigns,” *The Huffington Post*, July 18, 2011, [http://www.huffingtonpost.com/2011/07/18/foreign-money-campaign-finance-lobbying\\_n\\_897189.html](http://www.huffingtonpost.com/2011/07/18/foreign-money-campaign-finance-lobbying_n_897189.html) (Downloaded November 19, 2014)

<sup>61</sup> The Livingston Group, L.L.C., “Supplemental Statement,” September 25, 2008, p. 32.

<http://www.fara.gov/docs/5356-Supplemental-Statement-20080925-7.pdf> (Downloaded January 28, 2014) (Hereinafter Livingston Group Supplemental Statement September 2008)

<sup>62</sup> Livingston Group Supplemental Statement September 2008, p. 81.

While Livingston may be one of the most well-known advocates for foreign governments,<sup>63</sup> he's just one of many foreign lobbyists who have made "same day contributions."

In 2009, Cristina E. Antelo was working for DLA Piper, and, like Livingston, made contributions to legislators on the same day she met with them to discuss the agenda of a foreign client, the United Arab Emirates (UAE). In fact, Antelo reported making contributions to three legislators on the same day she contacted them on behalf of her client.

The UAE was hoping to push through a controversial deal that would bring nuclear materials to the country.<sup>64</sup> While the so-called 123 Agreement was designed to supply the UAE with civilian nuclear materials,<sup>65</sup> many lawmakers were reluctant to back the deal given the country's location in the volatile Middle East.<sup>66</sup> The emirate Dubai was once a transit hub for A.Q. Khan's nuclear proliferation network.<sup>67</sup>

During a two-week period in February 2009, Antelo, on behalf of the UAE, contacted and made campaign contributions to three policymakers on the same day, according to disclosures filed with the FARA office.<sup>68</sup> Representative Robert Wexler (D-FL) received \$100, Representative Ciro Rodríguez (D-TX) received \$200, and Senator Kirsten Gillibrand (D-NY) received \$100.

Antelo wasn't the only DLA Piper lobbyist representing a foreign client who reported making a contribution to a Member of Congress on the same day the lobbyist contacted the Member or the Member's staff. On just one day, New Year's Eve 2007, four DLA Piper lobbyists representing foreign clients made contributions to then-Senator Hillary Clinton (D-NY),<sup>69</sup> whose office the firm had called that day on behalf of a foreign client. The total amount they contributed on that day was \$4,250.<sup>70</sup>

<sup>63</sup> Anupama Narayanswamy and Luke Rosiak, Sunlight Foundation; Jennifer LaFleur, ProPublica, "Opening the Window on Foreign Lobbying," ProPublica, August 18, 2009. <http://www.propublica.org/article/opening-the-window-on-foreign-lobbying-718> (Downloaded January 29, 2014); Jonathan Tilove, "Former Rep. Bob Livingston has been a top lobbyist for Egypt in Washington," *The Times-Picayune*, February 2, 2011. [http://www.nola.com/politics/index.ssf/2011/02/former\\_rep\\_bob\\_livingston\\_has.html](http://www.nola.com/politics/index.ssf/2011/02/former_rep_bob_livingston_has.html) (Downloaded January 29, 2014)

<sup>64</sup> DLA Piper LLP (U.S.), "Supplemental Statement," March 30, 2009, p. 77. <http://www.fara.gov/docs/3712-Supplemental-Statement-20090330-8.pdf> (Downloaded January 29, 2014) (Hereinafter DLA Piper Supplemental Statement March 20, 2009)

<sup>65</sup> Christopher M. Blanchard and Paul K. Kerr, Congressional Research Service, *The United Arab Emirates Nuclear Program and Proposed U.S. Nuclear Cooperation*, December 20, 2010, p. 5. <http://www.fas.org/sgp/crs/mideast/R40344.pdf> (Downloaded January 29, 2014)

<sup>66</sup> 111th U.S. Congress "Limitation on Nuclear Cooperation with the United Arab Emirates Act of 2009" (H.R.364), Introduced January 9, 2009, by Representative Ileana Ros-Lehtinen. <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.364:@:PP> (Downloaded January 29, 2014)

<sup>67</sup> A.Q. Khan, "A.Q. Khan's Thirteen-Page Confession," FoxNews.com. <http://www.foxnews.com/world/2011/09/15/aq-khans-thirteen-page-confession/> (Downloaded January 29, 2014)

<sup>68</sup> DLA Piper Supplemental Statement March 20, 2009, p. 60, p. 69.

<sup>69</sup> DLA Piper, LLP, "Supplemental Statement," April 14, 2009, pp. 104-108. <http://www.fara.gov/docs/3712-Supplemental-Statement-20080414-6.pdf> (Downloaded January 29, 2014) (Hereinafter DLA Piper Supplemental Statement April 14, 2009)

<sup>70</sup> DLA Piper Supplemental Statement April 14, 2009, p. 49.

This correlation between contributions and contacts was similar at several other firms during this same time period. For example, according to filings at the FARA office:

- William Hecht, founder of Hecht, Spencer & Associates, met with Senator Tom Coburn (R-OK) on September 24, 2008, on behalf of Japan and made a \$500 contribution to the Senator that same day. Hecht also met with Senator Norm Coleman (R-MN) on September 24 to discuss U.S.-Japan relations and made a \$1,000 contribution to him on the same day.<sup>71</sup>
- Ainsley Gill, managing partner of Ainsley Gill & Associates, met with Representative Bennie Thompson's (D-MS) chief of staff on October 4, 2007, to discuss non-NATO ally member status for Trinidad and Tobago. That same day he donated \$1,000 to the Representative.<sup>72</sup>
- Paul Ryberg, partner at Ryberg and Smith, made just one contribution in the six-month period ending on July 31, 2008, according to FARA records. That \$500 contribution went to Representative Charlie Rangel (D-NY) on the same day that Ryberg met with the Representative to discuss Mauritius, an island nation in the Indian Ocean.<sup>73</sup>
- Jordan C. Paul, then Director of Government Affairs at The Moroccan-American Center for Policy,<sup>74</sup> made a \$1,000 contribution to Representative Lincoln Diaz-Balart (R-FL) on February 26, 2008. That same day, he met with Diaz-Balart to discuss U.S.-Morocco bilateral relations and Western Sahara.<sup>75</sup>

#### Systemic Foreign Influence

These specific cases illustrate the larger connection between campaign contributions and the access and influence of these firms. Based on data disclosed to the FARA office, payments from foreign clients to American lobbyists totaled about half a billion dollars annually from 2009 to 2012.<sup>76</sup> Lobbyists representing domestic interests reported receiving about \$14 billion from their clients over the same time period,<sup>77</sup> while lobbyists for foreign interests reported receiving about \$2 billion from their clients over those four years.<sup>78</sup>

<sup>71</sup> Hecht, Spencer & Associates, Inc., "Supplemental Statement," March 26, 2009, p. 7, p.14.

<http://www.fara.gov/docs/5451-Supplemental-Statement-20090326-8.pdf> (Downloaded January 29, 2014)

<sup>72</sup> Ainsley Gill & Associates, LLC, "Supplemental Statement," April 3, 2008, p. 7, p. 28.

<http://www.fara.gov/docs/5600-Supplemental-Statement-20080403-6.pdf> (Downloaded January 29, 2014)

<sup>73</sup> Ryberg and Smith, L.L.C., "Supplemental Statement," August 21, 2009, p. 7, p. 15.

<http://www.fara.gov/docs/5570-Supplemental-Statement-20080821-7.pdf> (Downloaded January 29, 2014); [111th U.S. Congress](http://www.congress.gov/111/h.r.1737), "In the matter of Representative Charles B. Rangel" (H.R. 1737), Introduced November 29, 2010, by Representative Zoe Lofgren. <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.res.01737>; (Downloaded January 29, 2014)

<sup>74</sup> Moroccan-American Center for Policy, Inc., "Supplemental Statement," June 4, 2007, p. 2.

<http://www.fara.gov/docs/5648-Supplemental-Statement-20070604-5.pdf> (Downloaded January 29, 2014)

<sup>75</sup> Moroccan-American Center for Policy, Inc., "Supplemental Statement," May 30, 2008, pp. 14-15.

<http://www.fara.gov/docs/5648-Supplemental-Statement-20080530-8.pdf> (Downloaded January 29, 2014)

<sup>76</sup> Industry spending figures calculated by POGO during our analysis of FARA Semi-Annual Reports to Congress.

<sup>77</sup> "Lobbying Database"

<sup>78</sup> "FARA Reports to Congress"

The agents of foreign principals have reported millions of dollars in political contributions annually.<sup>79</sup> Much of this money found its way to policymakers the lobbyists had contacted on behalf of foreign governments.

DLA Piper, once again, exemplifies this close connection between contacts and contributions. Over a two-year period, from late 2007 to late 2009, about 120 legislative offices were both contacted by and received contributions from lobbyists representing DLA Piper's foreign clients. Members of Congress received more than twice as much campaign money from DLA Piper lobbyists representing the firm's foreign clients if their office was contacted on behalf of one or more of the firm's foreign clients.

Additionally, more than half of the approximately 120 congressional offices that were both contacted and whose Member received contributions from a DLA Piper lobbyist representing a foreign client received their contribution within a month of being contacted.

#### ***Quid Pro Quo or Coincidence?***

While these interactions may seem like *quid pro quo*, legislators and legislative staff members contacted by POGO pointed to other explanations.

Lanier Avant, a spokesman for Representative Thompson, told POGO that the contribution didn't impact the Representative's stance, and that the timing was likely coincidental.

"Most of the Congressman's DC fundraisers—like those of all Members—invariably occur on days when Congress is in session, which is also when most meetings take place," Avant said.<sup>80</sup>

These sentiments were echoed by Tara Setmayer, Communications Director for Representative Rohrabacher. When asked about Rohrabacher reportedly receiving a campaign contribution from Livingston on the same day the two met to discuss Libya, Setmayer said their office had no record of a meeting on the date in question. She said their records "show that Congressman Rohrabacher was scheduled to attend a fundraising event that evening which Congressman Livingston may have attended."<sup>81</sup>

Representative Wexler, who received a contribution from Antelo the same day he met with her, told POGO he didn't remember meeting her and wasn't aware she made a contribution. "It's

<sup>79</sup> For instance, in 2008 the agents of foreign principals reported making \$4.3 million in political contributions. Anupama Narayanswamy and Luke Rosiak, Sunlight Foundation; Jennifer LaFleur, ProPublica, "Adding it up: The Top Players in Foreign Agent Lobbying," Sunlight Foundation, August 18, 2009. <http://sunlightfoundation.com/blog/2009/08/18/adding-it-top-players-foreign-agent-lobbying/> (Downloaded December 2, 2014)

<sup>80</sup> Lydia Dennett, phone interview with Lanier Avant, Chief of Staff for Representative Thompson, December 4, 2014.

<sup>81</sup> Comment to Ben Freeman, Investigator at the Project On Government Oversight, by Tara Setmayer, Communications Director for Representative Rohrabacher.

almost impossible to know all your contributors,” Wexler said. “Most campaigns have tens, or hundreds, of thousands of contributions.”<sup>82</sup>

Wexler, who has since left Congress and is now president of the S. Daniel Abraham Center for Middle East Peace,<sup>83</sup> said his campaign always followed the contribution reporting laws, but noted that “It’s probably a fairly regular thing for lobbyists to give to representatives they’ve talked to.”<sup>84</sup>

#### **Foreign Money and the Law**

Making campaign contributions on behalf of foreign governments would be illegal—the Federal Election Campaign Act prohibits foreign nationals from contributing to federal, state, or local U.S. political campaigns either directly or indirectly—but same-day contributions in and of themselves are not necessarily evidence of indirect contributions.<sup>85</sup> The semiannual Supplemental Statements the lobbyists file explicitly state that the contributions are “from your own funds and on your own behalf.”<sup>86</sup> Furthermore it is often unclear if the Members of Congress or their staff members who meet with the foreign lobbyists on these issues know about the contributions.

The Federal Election Commission has clarified the prohibition on foreign national contributions, explaining that a contribution cannot be accepted if the recipient is “aware of facts that would lead a reasonable person to inquire whether the source of the funds solicited, accepted, or received is a foreign national.”<sup>87</sup>

Which begs the question: would a “reasonable person” inquire about the source of a contribution coming from a lobbyist working on behalf of a foreign interest?<sup>88</sup>

#### **LAX COMPLIANCE WITH AND ENFORCEMENT OF FARA**

The Livingston Group’s representation of Egypt provides an example of how lobbyists for foreign principals attempt to influence U.S. policy, but it is also an example of a much larger pattern of lax compliance with and enforcement of FARA.

<sup>82</sup> Lydia Dennett, email message to Nathaniel Sobel, Director of Research at the S. Daniel Abraham Center for Middle East Peace, “Re: SPAM-LOW: Mr. Wexler’s Comment to POGO,” December 9, 2014. (Hereinafter Mr. Wexler’s Comment to POGO)

<sup>83</sup> S. Daniel Abraham, Center For Middle East Peace, “Robert Wexler,” <http://centerpeace.org/robert-wexler/> (Downloaded January 29, 2014)

<sup>84</sup> Mr. Wexler’s Comment to POGO

<sup>85</sup> “Foreign Nationals”

<sup>86</sup> Department of Justice, Supplemental Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, p. 7, [http://www.fara.gov/forms/2011/OMB\\_1124\\_0002.pdf](http://www.fara.gov/forms/2011/OMB_1124_0002.pdf) (Downloaded August 13, 2013)

<sup>87</sup> Prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals, U.S.C 441e §110.20. <http://www.gpo.gov/fdsys/pkg/CFR-2013-title11-vol1/pdf/CFR-2013-title11-vol1-sec110-20.pdf> (Downloaded January 29, 2014)

<sup>88</sup> A spokesman for the FEC declined to comment on how federal regulations apply to such scenarios.

### Compliance

While many of the documents in POGO's Foreign Influence Database demonstrate a disquieting, but legal, level of foreign influence over U.S. policy, we are aware of this influence only because these documents were filed with the FARA Registration Unit.

There is likely much more activity that we can't be aware of. Many firms file informational materials late, don't properly label them, don't file informational materials at all, or don't even register under FARA.

When it comes to filing informational materials late, the statute sets strict deadlines. FARA requires that registrants file informational materials distributed, or intended for distribution, to two or more people "not later than forty-eight hours after the beginning of the transmittal thereof."<sup>89</sup> But it's difficult if not impossible to enforce that regulation if the FARA office doesn't know on what date the materials were distributed.

Prior to the enactment of the Lobbying Disclosure Act of 1995, FARA required registrants to provide the DOJ with a Dissemination Report whenever they filed copies of informational materials. A Dissemination Report was "a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal."<sup>90</sup> Section 9 of the Lobbying Disclosure Act eliminated this requirement.<sup>91</sup> Now FARA registrants do not have to disclose the date informational materials were distributed or the names of the recipients when they file those materials with the DOJ. This makes it virtually impossible to determine the extent of late filing and just how often the law is broken.

In addition, late filing can defeat the openness that is supposed to be afforded by these filings. When information is filed weeks or months after being distributed, the issues it addresses may have already been settled. Thus, the value of knowing what information is being disseminated decreases as the length of time after dissemination increases. Transparency must be timely if public discourse is to truly benefit from it.

To determine whether materials were filed on time, one must know two dates: the date they were distributed to their intended recipients, such as Members of Congress, and the date the materials were filed with the FARA office. Accordingly, POGO attempted to record two dates for each informational material in the Foreign Influence Database. The first is the oldest date on which the materials were transmitted, such as an email's "sent" date. The second is the date stamp placed on the materials when they were first received by the FARA Registration Unit. Unfortunately, many of the materials filed at the FARA office do not have a clearly discernible transmitted date.

<sup>89</sup> Registration of Foreign Propagandists, U.S. C. 22 (2009), § 614. <http://www.gpo.gov/fdsys/pkg/USCODE-2009-title22/pdf/USCODE-2009-title22-chap11-subchapII.pdf> (Downloaded May 14, 2013); "FARA Index and Act"

<sup>90</sup> Filing and labeling of political propaganda, U.S. C. 22 (1994), § 614. <http://www.gpo.gov/fdsys/pkg/USCODE-1994-title22/pdf/USCODE-1994-title22-chap11-subchapII-sec614.pdf> (Downloaded December 3, 2014)

<sup>91</sup> Lobbying Disclosure Act of 1995, U.S.C. 26 § 1604 <http://www.law.cornell.edu/uscode/text/26/chapter-26> (Downloaded December 3, 2014)

For example, in February 2012, FARA registrant Sorini Samet & Associates LLC filed informational material disseminated on behalf of the Republic of the Philippines Department of Trade & Industry. The document touts the benefits of the Save Our Industries Act, including “increasing U.S. exports,” “strengthening the U.S.-Philippine relationship,” and “rejuvenating the Philippine apparel industry.” However, there are no dates included on the document, making it impossible to determine when it was sent to policymakers.<sup>92</sup>

This lack of clarity is far from uncommon. The Moffett Group filed what appear to be three documents on behalf of its client, the Government of Morocco, on March 16, 2012. The documents are titled, “Morocco is Committed to a Strong Bilateral Relationship with the United States,” “Morocco’s Regional Leadership,” and “Morocco is Irreversibly Committed to Democratic Reform and Good Governance.” While the topics vary, the format of each document is the same: a bulleted list of facts and “2012” printed in the heading. This is the only indication of when these documents may have been distributed—it is impossible to know for certain if this filing was late or on time.<sup>93</sup>

To further complicate matters, the FARA regulations do not explain how the 48-hour deadline is tracked by the Justice Department. Some documents are filed electronically, generating an automatic time and date stamp. But for those that are mailed or hand delivered, the FARA office manually date stamps them as received, which can happen days or even weeks after the registrants actually filed them. (For instance, if documents are filed on a day the FARA office is not open—a weekend or holiday—they would not be date stamped on that day.<sup>94</sup>) Due to the lack of solid dates for distribution and filing at the FARA office, the Justice Department cannot adequately enforce the 48-hour statutory deadline.

To determine the extent of late filing, POGO analyzed a subset of the documents in the database, all those filed in 2012. Our analysis excluded weekends and holidays when calculating the number of late filings in 2012 on the basis that it would have been impossible to determine if they were filed on time or not. The Foreign Influence Database contains 372 filings from 2012. In 275 of those filings (about 74 percent), POGO was able to discern the date on which the informational materials were distributed and the date on which the materials arrived at the FARA office. (In 103 of those 275 filings, POGO had to consult other resources, such as the semiannual Supplemental Statements filed with the FARA office, in order to determine the date of distribution by the registrant.) Of the 275 filings, POGO’s analysis found that 127 were filed with DOJ more than two business days after the date of transmission; 42 of the 127 were filed more than 30 business days later; and 33 were filed more than 100 business days later.

Sometimes informational materials are time sensitive, relating directly to the current political climate, so the dates can be important. Some registrants choose to volunteer this information, but

<sup>92</sup> Filing by Sorini, Samet & Associates, LLC, regarding the Philippines Department of Trade & Industry, February 13, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/900422-philippines-sorini-samet-amp-associates-llc.html>

<sup>93</sup> Filing by Moffett Group, LLC, regarding the Embassy of the Government of Morocco, March 16, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/900387-morocco-moffet-group-government-of-morocco-03-16.html>

<sup>94</sup> The Lobbying Disclosure Act addresses this more clearly in its regulations, stating: “If the deadline falls on a weekend or holiday, the report is due the following business day.” U.S.C. 26 § 1604.

many do not. POGO found that for 26 percent of the 2012 filings it was impossible to determine if they were filed on time. In more than a third (38 percent) of the others, POGO was able to figure out the dissemination date only by consulting additional resources, including documents that were posted months after the lobbying materials themselves were filed.

It is also unclear in some cases when a filing was actually received by the FARA office. For instance, on July 30, 2012, David M. Spooner of Squire Sanders Public Advocacy, LLC sent an email on behalf of a free-trade office in Nicaragua with a proposed question for Senator Johnny Isakson (R-GA) to ask at a hearing the following day. "I'm confident that the below question wouldn't ruffle any feathers amongst the textile industry or apparel brands and retailers," Spooner wrote. "To be extra safe, I've worded the question so that Sen. Isakson himself wouldn't be taking a position."<sup>95</sup> In a cover letter dated July 31, 2012—within the 48-hour deadline—Spooner forwarded his proposed hearing question and related correspondence to DOJ. But the FARA unit didn't manually stamp the materials until August 16, making it hard for the public to determine when the filing actually arrived.<sup>96</sup>

Spooner declined to comment for this report.

A similar example is a press release filed by Qorvis Communications in August 2012. The press release's cover letter, as well as the automatic date from the fax machine, indicates that it was sent to the FARA office on August 15. The official date stamp by the FARA office states it was received on August 22, a full week later.<sup>97</sup> While POGO's methodology would normally consider this a late filing, we concluded that, for this report, examples like this should not be included in the final count of documents filed late as it is unclear exactly when the FARA office received the document.

In other cases it was clear that a lag of a few days by the FARA office would not significantly affect the late filing calculations. For example, a July 2012 filing by FARA registrant Office of the Turkish Republic of Northern Cyprus includes four documents dated between December 13, 2011, and March 1, 2012.<sup>98</sup> The cover sheet states that these documents were sent to the FARA office on July 17, 2012. But once again the FARA date stamp records a later date—July 27, 2012, ten days later. However, because this filing was over 100 days late, regardless of the exact date it was received by the FARA office, it was counted in POGO's final tally of late filings.

<sup>95</sup> Senator Isakson does not appear to have asked the question; it does not show up in a transcript of the hearing. Senate Committee on Foreign Relations Subcommittee on Western Hemisphere, Peace Corps, and Global Narcotics Affairs, "Doing Business in Latin America: Positive Trends But Serious Challenges," July 31, 2012.

<http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76694/pdf/CHRG-112shrg76694.pdf> (Downloaded December 3, 2014); Filing by Squire Sanders Public Advocacy, LLC, regarding the Government of Nicaragua Corporacion-de Zonas Francas, August 16, 2012, p. 2. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/900391-nicaragua-squire-sanders-public-advocacy.html> (Hereinafter August 16, 2012, Filing by Squire Sanders Public Advocacy, LLC)

<sup>96</sup> August 16, 2012, Filing by Squire Sanders Public Advocacy, LLC, p. 1.

<sup>97</sup> Filing by Qorvis Communications, LLC, regarding Marca Pais - Imagen de Mexico, August 22, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/900327-mexico-qorvis-communication-marca-pais-imagen-de.html>

<sup>98</sup> Filing by Office of the Turkish Republic of Northern Cyprus, regarding the Government of the Republic of Turkey, July 27, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/900504-turkey-office-of-the-turkist-rpublic-of.html>

In addition to the occasional delay in hand-stamping documents, it seems that registrants can run into other difficulties when trying to file their informational materials with the FARA office. The cover letter of an August 2012 filing by FARA registrant National Strategies, LLC states that the document was sent to the FARA office on August 28 with a handwritten caveat: “Retrying transmission after several ‘Busy’ occurrences at: 8/27/12 18:07, 18:42 8/28/12 7:39.”<sup>99</sup>

In other cases, it is abundantly clear that a document has been filed weeks or even months late.

For example, in a press release dated April 19, 2012, the Embassy of Bahrain announced that “more than 50 D.C.-area diplomats and foreign policy experts joined Bahrain’s Ambassador to the United States...for a documentary screening and a discussion on recent developments and reforms in Bahrain.”<sup>100</sup> The previous year, as Arab Spring uprisings erupted throughout the Middle East, Bahraini security forces fired on protestors in the nation’s capital who were calling for political and economic reforms. Following the crackdown, which killed several protestors, the government launched a number of initiatives to quell any further unrest, including establishing an inquiry commission and a 300-person delegation to address political, economic, and social issues.<sup>101</sup> Qorvis Communications distributed the April 2012 press release on behalf of the Bahraini Embassy, according to a supplemental statement filed with DOJ,<sup>102</sup> but did not file the actual press release until October 31, 2012—six months after the 48-hour deadline had passed.<sup>103</sup>

In other cases registrants admit that they simply forgot to file their informational materials. In 2011 and 2012, FARA registrant Ogilvy Public Relations Worldwide distributed several press releases on behalf of the Mexico Ministry of Tourism. But it didn’t file the releases with DOJ until a year later, in July 2012. The firm said it “failed to file within 48 hours this informational material pursuant to the FARA statute and is taking all appropriate action to prevent this from reoccurring,” according to a note attached to the filing.<sup>104</sup>

The problems in the FARA system go beyond timely filing. The communications group BLJ Worldwide filed a document in August 2011 on behalf of its client Ali Taslimi, an individual working in support of Iraq Camp Ashraf prisoners.<sup>105</sup> The document appears to be a dinner party

<sup>99</sup> Filing by National Strategies, LLC, regarding Bidzina Ivanishvili, August 29, 2012, p. 23.

<https://www.documentcloud.org/documents/777725-georgia-national-strategies-llc-bidzina.html>

<sup>100</sup> Filing by Qorvis Communications, LLC, regarding the Embassy of the Kingdom of Bahrain, October 31, 2012, p. 23. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/723390-bahrain-qorvis-kingdom-of-bahrain-10-31-12.html> (Hereinafter October 31, 2012, Filing by Qorvis Communications)

<sup>101</sup> Kenneth Katzman, Specialist in Middle Eastern Affairs, Congressional Research Service, *Bahrain: Reform, Security, and U.S. Policy*, October 3, 2014, p. 8. <http://fas.org/srg/crs/mideast/95-1013.pdf> (Downloaded December 3, 2014)

<sup>102</sup> Qorvis Communications, LLC, “Supplemental Statement,” September 30, 2012. <http://www.fara.gov/docs/5483-Supplemental-Statement-20121130-15.pdf> (Downloaded December 3, 2014)

<sup>103</sup> October 31, 2012, Filing by Qorvis Communications.

<sup>104</sup> Filing by Ogilvy Public Relations Worldwide, regarding the Mexico Ministry of Tourism, August 10, 2012, p. 2. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/785169-mexico-ogilvy-public-relations-worldwide.html>

<sup>105</sup> A representative of BLJ Worldwide, who declined to speak on the record, told POGO that this letter was a mistaken filing as Ali Taslimi is an American citizen and that an internal error at BLJ Worldwide resulted in the

invitation touting the expected attendance of a former senior State Department official as well as prominent journalists such as Susan Chira from *The New York Times*. However, the invitation did not disclose that the host was working on behalf of a paying client, as required under FARA. Invitees to the dinner party may not have been aware that BLJ Worldwide signed a \$40,000, two-month contract with its client for engaging in advocacy activities.<sup>106</sup> Indeed, one of the guests told POGO they had no idea the host was working for a foreign interest—and, until the party began, had no knowledge of the host's policy agenda. The guest spoke on condition of anonymity.

Additionally, the document filed with the FARA office did not identify the person or persons to whom the invitation was addressed. This seemed like a glaring omission, so POGO contacted the FARA office to find out if this information is required. We found that the Justice Department itself seems to be unclear about whether BLJ Worldwide was required to disclose the names of the invitees. POGO spoke to a representative of the FARA Registration Unit about this exact document and he confirmed that, based on the document, BLJ Worldwide should have included the names.<sup>107</sup> One week later POGO contacted Marc Raimondi, Public Affairs Specialist at the Department of Justice, asking whether registrants need to disclose to whom the materials were sent and on what date. POGO provided the document filed by BLJ worldwide as well as the previous response from the Registration Unit, and requested clarification. Raimondi's response, though vague and confusing, suggests that this information is not, in fact, required by the law:

"The term informational materials includes any oral, visual, graphic, written, or pictorial information or matter of any kind, including that published by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or any means or instrumentality of interstate or foreign commerce or otherwise. Informational materials disseminated by an agent of a foreign principal as part of an activity in itself exempt from registration, or an activity which by itself would not require registration, need not be filed pursuant to Section 4(b) of the Act. If the content of material disseminated is not considered 'political activity,' a disclaimer is not required. Currently, pursuant to Section 614 of FARA, registrants are required to file copies of informational materials with DOJ. Specific information regarding individual recipients of what was formerly called 'political propaganda' was never required to be provided on the Dissemination Report form unless the recipient was sent 100 or more copies of the propaganda. Specific information regarding 'political activity' as defined in Section 611(o) of FARA is required to be disclosed in Item 12 of the supplemental statement. Please note that if the activity is not considered 'political activity' as defined, specific information regarding the activity is not required to be reported in Item 12 of the statement."<sup>108</sup>

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filing. Filing by Brown Lloyd James (BLJ Worldwide), regarding Ali Taslimi (for Iraq Camp Ashraf prisoners), August 16, 2011. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/287059-iraq-brown-lloyd-james-ali-taslimi-for-iraq-camp.html> (Hereinafter August 16, 2011, Filing by BLJ Worldwide regarding Ali Taslimi)

<sup>106</sup> August 16, 2011, Filing by BLJ Worldwide regarding Ali Taslimi; BLJ Worldwide, "Peter Brown, Chairman & CEO," [http://www.bljworldwide.com/About\\_Us/Peter\\_Brown](http://www.bljworldwide.com/About_Us/Peter_Brown) (Downloaded December 3, 2014); Brown Lloyd James, "Exhibit A to Registration Statement," July 27, 2011. <http://www.fara.gov/docs/5875-Exhibit-AB-20110727-29.pdf> (Downloaded December 3, 2014)

<sup>107</sup> Neil Gordon, phone interview with Alex Mudd, FARA Registration Unit, September 26, 2014.

<sup>108</sup> The Justice Department provided these comments based on the document itself and presumably without knowledge of the BLJ representative's assertion that the filing was unnecessary and made in error. However, the way BLJ handled the filing demonstrates how the firm dealt with the matter when they thought the filing was

The document filed by BLJ Worldwide serves to demonstrate another common problem. In addition to having to meet time requirements in filing, registrants distributing materials are also required under 22 U.S.C., § 614(b), also referred to as Section 4(b), to include "Identification Statements" with those materials. These statements are supposed to be "a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal, and that additional information is on file with the Department of Justice, Washington, District of Columbia."<sup>109</sup> In collecting documents for its Foreign Influence Database, POGO found that many of the documents filed under FARA do not include these statements or any mention of the fact that the registrant is working on behalf of a foreign entity.

For example, a press release was distributed by lobbying group Manatt, Phelps & Phillips in January 2010 on behalf of the Government of the Dominican Republic. The release was published by Business Wire and Reuters, but neither version includes the required identification statement, nor does the copy filed with the FARA office almost two months later.<sup>110</sup>

The identification statement is also missing from documents filed by Fleishman-Hillard, Inc., on behalf of the Government of the Republic of Turkey. The filing contains an official press statement responding to the attack on the U.S. Embassy in Benghazi in September 2012 as well as a *New York Times* letter to the editor written by the former Turkish Ambassador.<sup>111</sup> It is unclear if the documents were written by Fleishman-Hillard or merely distributed by the firm, but either way the document gives no indication that Fleishman-Hillard was working on behalf of the Government of Turkey.

A document filed in March 2011 by Hedges Strategies, a then-FARA registrant working on behalf of the Embassy of Sri Lanka, also lacks the required identification statement. The filing contains a hodgepodge of fact sheets, bulleted lists, and truncated articles from outlets like National Geographic, *The New York Times*, and Bloomberg.<sup>112</sup> The required identification statement does not appear on any of the filing's 11 pages.

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required. Marc Raimondi, Public Affairs Specialist for the Department of Justice, email message to Lydia Dennett, POGO Investigator, "FARA Response," October 15, 2014.  
<sup>109</sup> 22 U.S.C. § 614(b)

<sup>110</sup> Filing by Manatt, Phelps & Phillips, regarding the Government of the Dominican Republic, March 3, 2010. [http://www.pogo.org/tools-and-data/foreign-influence-database/data/217309-dominican-republic\\_manatt-phelps-amp.html](http://www.pogo.org/tools-and-data/foreign-influence-database/data/217309-dominican-republic_manatt-phelps-amp.html); Business Wire, "Vicini to Donate Significant Aid to Haiti," January 17, 2010. <http://www.businesswire.com/news/home/20100117005051/en/Vicini-Donate-Significant-Aid-Haiti#.VHzqJNLF-4I> (Downloaded December 3, 2014); Business Wire 2010, "Vicini to Donate Significant Aid to Haiti," Reuters.com, January 17, 2010. <http://www.reuters.com/article/2010/01/17/idUS63345+17-Jan-2010+BW20100117> (Downloaded December 3, 2014)

<sup>111</sup> Filing by Fleishman-Hillard, Inc., regarding the Government of the Republic of Turkey, December 21, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/900501-turkey-fleishman-hillard-republic-of-turkey-12.html>; Namik Tan, "Letter to the Editor: Turkey and Rights," *The New York Times*, July 27, 2012. [http://www.nytimes.com/2012/07/28/opinion/turkey-and-rights.html?\\_r=0](http://www.nytimes.com/2012/07/28/opinion/turkey-and-rights.html?_r=0) (Downloaded December 3, 2014); Republic of Turkey, Ministry of Foreign Affairs, "Press Release Regarding The Terrorist Attack To The U.S. Mission In Benghazi," September 12, 2012. <http://budapest.emb.mfa.gov.tr/ShowAnnouncement.aspx?ID=162262> (Downloaded December 3, 2014)

<sup>112</sup> Filing by Hedges Strategies, regarding the Embassy of Sri Lanka, March 2, 2011. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/289654-sri-lanka-hedges-strategies-embassy-of-sri-lanka.html>

Occasionally registrants will provide incomplete or partial identification statements on their informational materials. For instance, FARA registrant Ketchum Inc., maintains a Twitter account for its client, the Russian Federation. The @thinkRUSSIA Twitter bio states: “News, analysis and commentary on developments in Russia managed by Ketchum on behalf of the Russian Federation.”<sup>113</sup> However, the statement does not include the required stipulation that additional information is available at the Department of Justice, and it is unclear how this required disclosure could be conveyed within the space of a Twitter bio let alone each individual tweet.

On the other hand, some registrants are to be commended for clearly and consistently including these statements on their informational materials. For example, Park Strategies, LLC’s Sean King has sent and filed countless emails on behalf of the Taipei Economic and Cultural Representative Office in the United States. These emails typically include the identification statement right at the top, often before the email’s greeting, and follow the letter of the law exactly: “This material is distributed by Park Strategies, LLC on behalf of the Taipei Economic and Cultural Representative Office in the United States. Additional information is available at the Department of Justice, Washington, D.C.” Almost as often, King included a similar statement in the body of the email: “As you already know, Park Strategies, LLC, Senator D’Amato and I are registered with the U.S. Department of Justice, under the Foreign Agents Registration Act, as agents on behalf of our client, the Taipei Economic and Cultural Representative Office (TECRO) in the United States.”<sup>114</sup>

FARA registrants are also required to file semiannual Supplemental Statements detailing the work they’ve done on behalf of their foreign clients, including any political activity or funds exchanged. Registrants are required to report whether or not they included the identification statements on distributed informational materials. FARA Supplemental Statements ask respondents, “Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?”<sup>115</sup> Surprisingly, respondents often answer “No,” even when they answer “Yes” to the question asking if they disseminated any informational materials.

POGO analyzed all the Supplemental Statements filed during the first six months of 2010 and found that 53 of the 103 registrants had reported filing informational materials and had, in answer to the label question, reported that they had not properly labeled their informational materials.<sup>116</sup> POGO’s analysis of all years covered in its database found a similar phenomenon throughout.

<sup>113</sup> Ketchum Inc., “thinkRussia,” <https://twitter.com/thinkRUSSIA> (Downloaded 3, 2014)

<sup>114</sup> Sean King, email message to Justin Stokes, Chief of Staff for Representative Richard Hanna, “Re: News on TSMC/Rep. Owens’ trip,” January 5, 2012. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/324684-documents-289778-taiwan-park-strategies-llc.html>

<sup>115</sup> Department of Justice, “Supplemental Statement,” p. 8. [http://www.fara.gov/forms/2011/OMB\\_1124\\_0002.pdf](http://www.fara.gov/forms/2011/OMB_1124_0002.pdf) (Downloaded August 13, 2013)

<sup>116</sup> POGO chose this period randomly, to illustrate a pattern seen across all time periods covered in the Foreign Influence Database.

V - INFORMATIONAL MATERIALS	
16. During this 6 month reporting period, did you prepare, disseminate or cause to be disseminated any informational materials? <sup>117</sup>	
Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
IF YES, RESPOND TO THE REMAINING ITEMS IN SECTION V.	
22. Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period?	
Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
23. Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?	
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>

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POGO also analyzed a subset of semiannual Supplemental Statements submitted by FARA registrants who did not file informational materials in the time period. We found examples of registrants who answered "Yes" to disseminating informational materials in the last six months but "No" to the question on the very same page asking: "Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period?" For example, both the Transitional National Council of Libya and the Colombian Coffee Federation, Inc, reported distributing informational materials without filing them with the Justice Department.

V - INFORMATIONAL MATERIALS	
16. (a) During this 6 month reporting period, did you prepare, disseminate or cause to be disseminated any informational materials? <sup>117</sup>	
Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
If Yes, go to Item 17.	
(b) If you answered No to Item 16(a), do you disseminate any material in connection with your registration?	
Yes <input type="checkbox"/>	No <input type="checkbox"/>
If Yes, please forward the materials disseminated during the six month period to the Registration Unit for review.	
22. Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period?	
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
23. Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?	
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>

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It appears that FARA regulations have loopholes that may exempt some registrants from filing such materials. For instance, if materials are distributed as part of an activity that in itself is

<sup>117</sup> China National Tourist Office, "Supplemental Statement," January 13, 2010. <http://www.fara.gov/docs/3318-Supplemental-Statement-20100113-10.pdf> (Downloaded December 3, 2014)

<sup>118</sup> Transitional National Council of Libya, "Supplemental Statement," November 29, 2011. <http://www.fara.gov/docs/6035-Supplemental-Statement-20111129-1.pdf> (Downloaded December 3, 2014)

exempt from registration, as defined in § 613 of the FARA Exemptions, then the materials need not be filed.<sup>119</sup> But these exemptions are wide ranging and could even allow for a certain amount of personal interpretation.

For example, § 613(d) states that lobbyists working on activities that further the trade or commerce of a foreign principal are not required to register. Other subsections exempt lobbyists from registering if they are providing legal representation for a foreign principal or furthering religious, academic, scientific, or artistic pursuits. But perhaps the most problematic exemption is § 613(f), which can exempt lobbyists from registering if they meet the following criteria: 1) They represent the “government of a foreign country the defense of which the President deems vital to the defense of the United States”; 2) They are promoting policies that are not intended to conflict with any existing U.S. domestic or foreign policies; and 3) Communications they distribute are “believed” by them “to be truthful and accurate.” This appears to be a loophole wide open for interpretation.<sup>120</sup>

Another loophole: the Supplemental Statements requires lobbyists to detail their political activities, but the form does not specify that they must list any meetings conducted with policymakers, who they spoke to, the dates of the meetings, the issue discussed, or the clients they were representing. While some registrants provide this information, others do not.

Another loophole: registrants are only required to file informational materials if they are distributed to two or more people. However, if a lobbyist sends an email or letter to one pivotal legislator, such as the Speaker of the House or the Senate Majority Leader, the lobbyist would not have to file that material.

These loopholes damage the intended transparency of the law, as do violations of the FARA filing guidelines for informational materials. However, these firms and individuals did, at least, register with the Justice Department. There have been publicized examples of lobbyists representing foreign clients, and engaging in political activity on behalf of those clients, who never registered with the DOJ. In April 2012, a number of firms were hired by Bidzina Ivanishvili, who would become the Prime Minister of Georgia a few months later, to lobby on his behalf. These lobbying firms registered under the much less stringent LDA instead of under the FARA.<sup>121</sup>

A lobbyist and former Member of Congress told POGO that some lobbyists for foreign interests are overly casual about their compliance with the law. “Around the edges there’s a lot of loosey-goosey stuff going on. People representing foreign interests and not reporting,”<sup>122</sup> said Toby Moffett, Chairman of the Moffett Group and a former Representative of Connecticut.

<sup>119</sup> 22 U.S.C. § 613

<sup>120</sup> 22 U.S.C. § 613(f)

<sup>121</sup> Anna Palmer, “Georgian billionaire storms K Street,” *Politico*, April 12, 2012.

[http://www.politico.com/news/stories/0412/75054\\_Page2.html](http://www.politico.com/news/stories/0412/75054_Page2.html) (Downloaded May 13, 2013); National Strategies, LLC, “Lobbying Report, Mr. Bidzina Ivanishvili,” April 20, 2012.

<http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=f9c9a196-b619-4a6c-a0b2-a5015040c80c&filingTypeID=51> (Downloaded August 13, 2013)

<sup>122</sup> Neil Gordon, telephone interview with Toby Moffett, September 19, 2014.

In 2014, *The Washington Free Beacon* reported that a public relations firm called MCSquared was doing promotion work for the Government of Ecuador<sup>123</sup> without registering under FARA.<sup>124</sup> MCSquared employee Jean Paul Borja told POGO that the firm was not aware it was supposed to register with the DOJ and “it was an oversight on our part.”<sup>125</sup> Borja told POGO that MCSquared represented the Government of Ecuador for one year beginning in April 2013 and that the FARA office contacted it in June 2014 to discuss what documentation the firm needed to provide, but never pursued enforcement action. On August 3, 2014, MCSquared registered under FARA.<sup>126</sup>

In another example, *The New York Times* recently reported that foreign governments were paying Washington think tanks to advance their interests. Yet that the think tanks, which included the Brookings Institution, the Center for Strategic and International Studies, and the Center for Global Development, had not disclosed their arrangements to the FARA office at the DOJ and did not appear to be complying with FARA requirements.<sup>127</sup> The *Times* asked the Center for Global Development, which specializes in issues affecting the developing world, for comment: “‘Yikes,’ said Todd Moss, the chief operating officer at the Center for Global Development, after being shown dozens of pages of emails between his organization and the government of Norway, which detail how his group would lobby the White House and Congress on behalf of the Norway government. ‘We will absolutely seek counsel on this.’”<sup>128</sup>

Some Members of Congress have taken initial steps toward fixing this problem.

Shortly after *The New York Times* article was published, Representative Jackie Speier (D-CA) proposed to amend the rules of the House of Representatives to require those who testify before committees to disclose any funds received from foreign governments.<sup>129</sup> Less than a month later, Representative Frank Wolf (R-VA) sent a letter to the Attorney General expressing his concern that foreign agents may be trying to circumvent the law and requesting that the FARA office review its guidelines.<sup>130</sup>

<sup>123</sup> MCSquared PR Inc., “Protest Against Chevron’s Contamination in Ecuador’s Amazon Rainforest,” May 26, 2014, [http://www.csrwire.com/press\\_releases/37096-Protest-Against-Chevron-s-Contamination-in-Ecuador-s-Amazon-Rainforest](http://www.csrwire.com/press_releases/37096-Protest-Against-Chevron-s-Contamination-in-Ecuador-s-Amazon-Rainforest) (Downloaded December 3, 2014)

<sup>124</sup> Lachlan Markay, “PR Firm’s Undisclosed Work for Ecuadorian Government Raises Legal Questions,” *The Washington Free Beacon*, June 17, 2014, <http://freebeacon.com/issues/pr-firms-undisclosed-work-for-ecuadorian-government-raises-legal-questions/> (December 3, 2014)

<sup>125</sup> Neil Gordon, telephone interview with Jean Paul Borja, September 29, 2014.

<sup>126</sup> MCSquared PR Inc., “Registration Statement,” August 3, 2014, <http://www.fara.gov/docs/6231-Registration-Statement-20140703-1.pdf> (Downloaded December 9, 2014)

<sup>127</sup> Eric Lipton, Brooke Williams, and Nicholas Confessore, “Foreign Powers Buy Influence at Think Tanks,” *The New York Times*, December 6, 2014, [http://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html?\\_r=3#story-continues-2](http://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html?_r=3#story-continues-2) (Downloaded December 3, 2014) (Hereinafter “Foreign Powers Buy Influence at Think Tanks”)

<sup>128</sup> “Foreign Powers Buy Influence at Think Tanks”

<sup>129</sup> Eric Lipton, “Proposal Would Require Think Tanks to Disclose Funding by Foreign Governments,” *The New York Times*, September 17, 2014, [http://www.nytimes.com/2014/09/18/us/politics/house-proposal-would-require-think-tanks-to-disclose-foreign-funding.html?\\_r=3](http://www.nytimes.com/2014/09/18/us/politics/house-proposal-would-require-think-tanks-to-disclose-foreign-funding.html?_r=3) (Downloaded December 3, 2014)

<sup>130</sup> Letter from Representative Frank R. Wolf to the Honorable Eric H. Holder, Attorney General, regarding think tanks accepting donation from foreign governments, October 8, 2014, p. 1. <http://s3.documentcloud.org/documents/1311564/wolf.pdf> (Downloaded December 3, 2014)

Another effort came in the form of a provision in the Fiscal Year 2015 House Commerce, Justice, Science, and Related Agencies Appropriations Bill that would provide almost \$1 million to the DOJ Office of Inspector General to review the FARA office: “The report should take into account FARA filing trends and foreign government tactics to engage in public advocacy in the United States while avoiding FARA registration. The report shall recommend administrative or legislative options for the improvement of FARA enforcement.”<sup>131</sup>

### **Enforcement**

Criminal and civil enforcement of FARA, particularly the regulations regarding informational materials, have been minimal in the recent past. First, the DOJ needs to know whether or not a violation of FARA has taken place. The primary method on which the Enforcement Unit depends is “voluntary compliance,” according to the FARA office’s website<sup>132</sup>:

“The cornerstone of the Registration Unit’s enforcement efforts is encouraging voluntary compliance. This includes the essentially administrative function of providing registration forms, with copies of the Act, Rules, Regulations, and guidelines for responses to the firms and individuals registered under the Act, as well as the members of the public, press and bar who write or call to request them. It also includes the more proactive outreach to the primarily professional communities (law, advertising, political and public relations) from which the majority of agents are drawn, as well as informing and educating prosecutors, and interested Departments and Agencies regarding the Act.”<sup>133</sup>

If entities or individuals are unsure about needing to register or about any other aspect of FARA, they can submit an advisory opinion request, which allows the DOJ to let the requesters know if they are in compliance.<sup>134</sup> The obvious weakness in this process is that it relies on voluntary actions by the regulated.

Should entities or individuals who were supposed to register fail to do so, or, once registered, should they violate the FARA statute or regulations, the Registration Unit has a number of options available to try to hold them accountable. One is to send an administrative resolution letter to check compliance, which is the most commonly exercised option.<sup>135</sup> An administrative resolution is a “letter advising the person of the existence of FARA and the possible obligations thereunder.”<sup>136</sup>

<sup>131</sup> House Committee on Appropriations, Report on the Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2015, 113th Congress, 2014. <http://appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2015-cjs.pdf> (Downloaded December 3, 2014)

<sup>132</sup> Department of Justice “FARA Frequently Asked Questions: Are There Criminal Penalties for Violating the Act?” <http://www.fara.gov/fara-faq.html#7> (Downloaded May 13, 2013)

<sup>133</sup> “Foreign Agents Registration Act Enforcement”

<sup>134</sup> Administration and Enforcement of Foreign Agents Registration Act of 1938, As Amended

<sup>135</sup> “Foreign Agents Registration Act Enforcement”

<sup>136</sup> “Foreign Agents Registration Act Enforcement”

The FARA Registration Unit can also conduct compliance inspections.<sup>137</sup> These inspections cover every aspect of a registrant's relationship with a foreign principal including financial records, contracts and, "all correspondence, memoranda, cables, telegrams, teletype messages, and other written communications to and from all foreign principals and all other persons, relating to the registrant's activities on behalf of, or in the interest of any of his foreign principals."<sup>138</sup> From 2000 to 2004 the FARA office conducted a scant 8 audits and from 2004 to 2007 no audits were conducted at all.<sup>139</sup> The FARA office told POGO it has inspected 107 registrants since 2000, of which 99 were performed between 2008 and 2014. The FARA office said it now conducts an average of 12 to 15 inspections annually.<sup>140</sup>

When the DOJ finds that an agent of a foreign principal has violated any aspect of the law or regulations, the Attorney General may request a U.S. district court order preventing the agent from continuing to represent the foreign principal either temporarily or permanently. The Attorney General may also request "an order requiring compliance with any appropriate provision of the subchapter or regulation thereunder."<sup>141</sup> Essentially this means that the FARA office can request a district court to order registrants to obey a law they should already be obeying. Furthermore, "the district court shall have jurisdiction and authority to issue a temporary or permanent injunction, restraining order or such other order which it may deem proper."<sup>142</sup>

FARA has specific penalties for foreign agents who fail to register correctly with the DOJ. The Attorney General can notify the registrant and suspend said registrant for 10 days or more until a fully compliant statement is submitted.<sup>143</sup>

POGO asked the FARA Registration Unit about its use of the court injunction enforcement option and Dean Boyd, a spokesman for the DOJ, said, "While the FARA statute and regulations authorize the pursuit of formal legal proceedings, such as injunctive remedy options, the FARA Unit [has] not pursued injunctive remedy options recently and has instead utilized other mechanisms to achieve compliance."<sup>144</sup> The other mechanisms described by Boyd include inspections and correspondence with registrants, and working with them to amend any incorrect registrations.<sup>145</sup>

<sup>137</sup> 22 U.S.C. § 615

<sup>138</sup> 22 U.S.C. § 615

<sup>139</sup> Jake Weins, "Justice Department Records Show Dramatic Rise in FARA Enforcement," November 16, 2011.

<http://www.pogo.org/blog/2011/11/justice-department-records-show-dramatic-rise-in-fara-enforcement.html>

<sup>140</sup> FARA Registration Unit Staff Member, email message to Lydia Dennett, POGO Investigator, "RE: Questions Regarding the Foreign Agents Registration Act," September 23, 2014.

<sup>141</sup> 22 U.S.C. § 618(f)

<sup>142</sup> 22 U.S.C. § 618(f)

<sup>143</sup> 22 U.S.C. § 618(g)

<sup>144</sup> Dean Boyd, spokesman for the Department of Justice, email message to Lydia Dennett, then-POGO Research Associate, "FW: Question on FARA Enforcement," May 20, 2013.

<sup>145</sup> The Office of Public Affairs at the Department of Justice confirmed that Dean Boyd's May 2013 statement remains accurate. Marc Raimondi, Public Affairs Specialist for the Department of Justice, email message to Lydia Dennett, POGO Investigator, "FARA Response," October 7, 2014. (Hereinafter Marc Raimondi October 7, 2014 email message to Lydia Dennett)

The only other penalties available for FARA enforcement are criminal; there aren't lesser civil fines for the DOJ to levy against law-breakers. As Jihad Atieh, then-editor-in-chief of the *University of Pennsylvania Journal of International Law*, pointed out in 2010, the higher burden of proof for criminal cases "is a major disincentive for enforcement because the DOJ must convince a grand jury to indict, collect enough evidence to satisfy the higher burden of proof, face a jury who is often skeptical of sending someone to jail simply for not registering, and prove the FARA's current *mens rea* of intent to fraudulently file."<sup>146</sup>

When POGO asked the FARA office about specific enforcement of violations involving informational materials, a spokesman for the DOJ's Office of Public Affairs stated: "...please note that we are unable to respond to all of your questions because, in accordance with long standing Departmental policy, the Department does not comment on the existence or nonexistence of an investigation or enforcement action, nor does the Department comment on specific registrations under FARA."<sup>147</sup>

In recent years the media has reported on some unregistered lobbyists for foreign entities facing penalties for their failure to register under FARA. In 2010, former Representative Mark Delo Siljander (R-MI) and his co-defendant Abdel Azim El-Siddig pleaded guilty to charges that they operated as unregistered foreign agents in the U.S. while attempting to get the Islamic American Relief Agency removed from a list of charities suspected of having terrorist ties.<sup>148</sup> Both defendants were sentenced to a year and a day in prison. In 2014, Prince Asiel Ben Israel pleaded guilty to failing to register under FARA for his lobbying efforts on behalf of Zimbabwe's President Robert Mugabe. According to the *Chicago Tribune*, Ben Israel and his co-defendant, C. Gregory Turner, were to be paid \$3.4 million for working to lift economic sanctions against President Robert Mugabe and other top Zimbabwean officials. Ben Israel will spend up to 16 months in prison; Turner was acquitted of charges related to failing to register under FARA.<sup>149</sup>

A significant weakness in FARA is that there aren't civil fines or investigative tools that the DOJ can easily use to punish lobbyists who frequently submit late or incomplete filings, who don't file if they should have, or who don't register if they should have. In 1987, the then-Senator John Heinz (R-PA) tried to amend the FARA to incorporate civil fines and investigations,<sup>150</sup> and a number of others have tried since then,<sup>151</sup> but Congress has yet to enact these reforms.

<sup>146</sup> Jihad Atieh, "Foreign Agents: Updating FARA To Protect American Democracy," *University of Pennsylvania Journal of International Law*, Vol. 31, Issue 4, November 17, 2010, pp. 1082-1083. <https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Atieh31U.Pa.J.Int%27IL.1051%282010%29.pdf> (Downloaded May 16, 2013)

<sup>147</sup> Marc Raimondi October 7, 2014, email message to Lydia Dennett.

<sup>148</sup> Representative Mark Delo Siljander pleaded guilty to violating the FARA registration requirement, while Abdel Azim El-Siddig pleaded guilty to conspiring with Siljander to violate FARA. John Bebow, Department of Justice, "Former Congressman Pleads Guilty To Obstructing Justice, Acting As Unregistered Foreign Agent," July 7, 2010. [http://www.fara.gov/docs/siljander\\_press\\_070710.pdf](http://www.fara.gov/docs/siljander_press_070710.pdf) (Downloaded May 13, 2013)

<sup>149</sup> Jason Meisner, "Activist gets prison time in Zimbabwe-lobbying case," *The Chicago Tribune*, August 21, 2014. <http://www.chicagotribune.com/news/local/breaking/chi-south-side-activist-gets-7-months-in-prison--20140821-story.html> (Downloaded December 3, 2014)

<sup>150</sup> For a full discussion of Senator Heinz's multiple attempts to reform FARA, see Philip J. Perry, "Recently Proposed Reforms to the Foreign Agents Registration Act," *Cornell International Law Journal*, Vol. 23, Issue 133, 1990.

## CONCLUSION

POGO's Foreign Influence Database provides a cache of documents that were previously unavailable electronically. These documents allow lobbyists, public relations professionals, and other agents of foreign principals to explain in their own words precisely how they're working to promote foreign interests in the United States. These FARA registrants draft speeches, scripts, and even legislative proposals. Now documents from 2009 through 2012 are electronically available to the public via an easily searchable database.

While the documents provide an unprecedented level of transparency into the world of foreign lobbying, what they don't do is also compelling. Countless documents in the database do not conform to the requirements of the FARA statute. Furthermore, it's next to impossible to determine if the 573 U.S. firms, corporations, and individuals registered with FARA between 2009 and 2012 filed every document they distributed, or to tell who didn't register or file documents, but should have.

While registrants' compliance with FARA appears to be inadequate from our review, the DOJ's enforcement also appears lax. Enforcing FARA is not just an administrative matter; as stated repeatedly in the statute, it's required in order to have "due regard for the national security and the public interest."<sup>152</sup>

The DOJ must use the enforcement power it has to ensure that registrants, and those who don't register, comply with all aspects of the law—including, and perhaps especially, those aspects that involve informational materials. Merely relying on "voluntary compliance" allows for rampant rule-breaking in the timely filing and labeling of informational materials.

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<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/cint123&div=13&id=&page=>  
(Downloaded May 16, 2013)

<sup>151</sup> The most recent congressional proponent of incorporating civil penalties into FARA is Representative Marcy Kaptur (D-OH), who in 2009, 2011, and 2013 introduced the "Ethics in Foreign Lobbying Act," which would require FARA violators "to pay a civil penalty in an amount not less than \$2,000 or more than \$5,000 for each violation committed." 113th U.S. Congress, Ethics in Foreign Lobbying Act of 2013 (H.R. 195), Introduced January 4, 2013, by Representative Marcy Kaptur. <http://www.govtrack.us/congress/bills/113/hr195/text> (Downloaded May 16, 2013)

<sup>152</sup> 22 U.S.C. § 612

## RECOMMENDATIONS

It is clear that much greater enforcement of FARA is needed—including better tools for enforcement. POGO recommends the following to maximize the transparency and accountability afforded by the Act.

### **Increase oversight and enforce FARA**

The DOJ should conduct more audits, use all tools available to ensure better compliance, and strictly enforce the law when violations are found. When incomplete, inaccurate, or late filings are submitted, the DOJ should use its authority to suspend the foreign agent from lobbying. If necessary, the DOJ should seek court orders to prevent foreign agents from lobbying when they violate the law.

### **Incorporate civil fines into FARA**

Congress should amend FARA to give the DOJ the authority to levy civil fines to punish offenders who do not properly label their FARA filings, who file late, who don't file if they should have, or who don't register if they should have. These penalties should increase with the severity and number of infractions.

### **Require registrants to provide additional information when filing informational materials**

When FARA registrants file informational materials, they should be required to clearly state the original recipients of the documents and the original date of distribution. This additional information will significantly increase the transparency of foreign lobbying actions, which was the original goal of the Act. Furthermore, disclosure of the original date of distribution will enable the Justice Department to accurately determine how many registrants are violating the requirement to file informational materials within 48 hours.

### **Require electronic filing of informational materials**

The Justice Department should require FARA registrants to file all paper informational materials electronically to eliminate any possible confusion regarding the date of filing. The automatic date stamp generated by the electronic filing will allow the Justice Department and the public to determine the extent to which registrants file their materials within the 48-hour deadline.

**Make all informational materials electronically available**

The FARA Registration Unit must provide free online access to all informational materials. The Registration Unit has begun accepting informational materials electronically, so posting these submissions to the FARA website would require minimal effort and would dramatically increase transparency.

**Clarify the reporting requirements of Question 12 on the Supplemental Statements**

The Justice Department's Supplemental Statement form requires lobbyists to detail their political activities on behalf of their foreign clients when answering Question 12. But it does not specify that the lobbyists must list any meetings conducted with policymakers, who they met with, the dates of the meetings, or the issue discussed. This language should be added to the existing requirements for disclosures in Question 12, which states the registrant must: "identify each such foreign principal and describe in full detail all such political activity, indicating, among other things, the relations, interests and policies sought to be influenced and the means employed to achieve this purpose."

**Require disclosure when foreign agents lobby politicians on behalf of foreign clients and contribute to those politicians' campaigns**

When lobbyists both communicate with government officials, candidates for public office or their staffs on behalf of foreign clients and contribute money to the policymaker's campaign fund, and when the contact and contribution fall within six months of each other, the lobbyists should be required to file timely disclosures that identify the overlap of each such contact and contribution. These disclosures should be made within 10 business days of the contribution or lobbying contact, whichever comes second. This heightened campaign finance disclosure requirement reflects the fact that lobbying on behalf of foreign clients is inherently different from lobbying on behalf of domestic interests.

**Require the filing of all informational materials regardless of number of recipients**

Registrants should be required to file informational materials if they are distributed to any person. If a lobbyist sends an email or letter to one pivotal legislator, such as a Committee chairman or someone working on a specific foreign policy, the lobbyist would not currently have to file that material. This law should be expanded to include documents sent to a single recipient.

**Expand Office of Inspector General mandate to specify a review of informational materials compliance**

The House Committee on Appropriations included a provision in the Fiscal Year 2015 House Commerce, Justice, Science, and Related Agencies Appropriations Bill that would provide almost \$1 million to the DOJ Office of Inspector General to review the FARA office. While the House members specifically requested a report on FARA registration, they should expand the review to also investigate violations of the informational materials regulations.

Mr. COHEN. Thank you, sir.

Our next Witness is Jonathan Turley. He is the Maurice C. Shapiro and J.B. Professor of Public Interest Law and Director of the Environmental Law Advocacy Center; Executive Director, Project for Older Prisoners, at GW Law School. He has written more than three dozen academic articles that have appeared in a variety of leading law journals and served as counsel in several notable cases over the last two decades. He has served as a consultant at Homeland Security on constitutional issues and is a frequent Witness before this Committee and others in the House and the Senate, particularly on some tort reform legislation. He received his J.D. from Northwestern, not Northeastern, and his B.A. from the University of Chicago.

You are recognized for five minutes.

#### STATEMENT OF JONATHAN TURLEY

Mr. TURLEY. Thank you, Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee. It is a great honor to appear before you today to talk about the reforms on FARA.

It is also a particular honor to appear with my esteemed fellow Witnesses. I have tremendous respect for all three of these Witnesses. I commend the majority in calling them here today. We have a great deal of shared views in terms of FARA, its possible reforms, and its potential dangers that Chair Nadler discussed earlier.

I come to this as someone from the free speech community that has a rather robust view of free speech. I have been called a free speech purist. That used to be a compliment. I have a certain resistance to registration systems because of the dangers the Chair Nadler apply laid out.

FARA, for that reason, has been a subject of great concern in the civil liberties community for a long time. The concern is not with the degree of prosecutions. The degree of prosecutions remains relatively low. The concern is that it can be used to secure warrant, conduct searches, seize material, including confidential material, under a statute that is ambiguously worded and, also, in my view, inconsistently applied.

As the Members of this Committee know, FARA has been replicated in some countries, like Russia, which cite to our own law as a justification for their crackdown on NGOs, journalists, and dissenters. That level of abuse is capable in any country, including our own. Indeed, FARA has been used for abusive applications in the past.

We should not forget that FARA was created in the 1930s as something of an anti-free-speech measure. The motivations were good. It was intended to combat fascist propaganda, but it was designed to stigmatize people that had views that were called un-American. That type of origin, obviously, raises a lasting concern among the civil liberties community.

Now, in terms of its actual use, as has already been pointed out, it has been rather modest. Indeed, even in World War II, we only had a couple of dozen figures that were prosecuted. We only had eight individuals that were prosecuted between 2016—I'm sorry—

1966 and 2015. On the civil enforcement side, we only had 17. That has gone largely dormant since then.

We have an uptick, a shift towards criminal prosecutions. That is what concerns me about the changing of FARA. We are sort of in the third incarnation of this statute. I would encourage the Committee not to go back to its origins in terms of speech-control mechanism, a way of stigmatizing what is viewed as un-American speech, even if that is done under the guise of disinformation.

If it is transparency that is being sought in lobbying, you can achieve that with some well-reasoned reforms. In 1966, in the sort of second incarnation of the act, the Congress sort of moved towards that transparency model. For that reason, I have suggested four areas that, in my view, would warrant clarification.

That includes—and this may seem rather trite—but it includes clarifying the purpose of FARA. It is not clear what the purpose is. We need to understand, if this the third incarnation, what FARA's purpose is today.

I also suggest clarifying the line between criminal and civil enforcement. The Department of Justice has laid out sweeping discretion. That is a difference between five years in prison and a retroactive registering under the act. It is considerable, and the Congress should look at it. I have suggested clarifying key terms that I believe are, as some of my colleagues have noted, ambiguous and dangerous.

Finally, I specifically raise the clarifying of the legal exemption. It is still an exemption that is heavily laden with these terms that can have wildly different applications between different cases.

My greatest concern I started with and I will end with. I hope this Congress does not return to the original purpose of FARA and does not return to the use of the statute to combat un-American statements or viewpoints.

There has been an array of statutes passed since 1938 that allows Congress to return to a more civil administrative approach to FARA. There is no political agenda that you will see among the Witnesses today. We are in agreement on many of these points. I echo the Chair's view; I think that is a wonderful opportunity for us to come together on this statute.

[The statement of Mr. Turley follows:]

**Statement for the Record  
Jonathan Turley**

**J.B. and Maurice C. Shapiro Professor of Public Interest Law  
The George Washington University Law School**

*“Enhancing the Foreign Agents Registration Act of 1938”*

**Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
United States House of Representatives**

**April 5, 2022**

Chairman Cohen, Ranking Member Johnson, members of the Subcommittee, thank you for inviting me to testify today on the enhancement of the Foreign Agents Registration Act of 1938.<sup>1</sup> I have written about FARA for years from a constitutional perspective. I am honored to appear with my fellow witnesses today and I believe that we share many of the same concerns over such registration laws. Indeed, I am hopeful that, despite the many political divisions today, this is a subject upon which there can be civil discourse and bipartisan agreement.

I come to statutes like FARA from the perspective of someone with a robust view of free speech. My academic writings admittedly advance an approach to free speech that resists public or private speech controls, as well as forms of compelled speech and registration.<sup>2</sup> I also come to this discussion as a practicing criminal defense and constitutional law attorney, who has successfully challenged vague or unconstitutional legislation.<sup>3</sup> Finally, I have written on FARA and concerns over its expanding use in criminal prosecutions.<sup>4</sup>

<sup>1</sup> 22 U.S.C. §§ 611-621 (2020).

<sup>2</sup> See, e.g., Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 *Harvard Journal of Law and Public Policy* (2021); Jonathan Turley, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*, 100 *Boston University Law Review* 2179 (2020); Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 *Emory L. J.* 1905 (2015); *Registering Publicus: The Supreme Court and Right to Anonymity*, 2002 *Supreme Court Review* 57-83. Many of my columns on free speech are available on my Res Ipsa blog ([www.jonathanturley.org](http://www.jonathanturley.org)).

<sup>3</sup> In addition to various cases challenging the application of federal laws on free speech grounds, I was lead counsel in litigation that struck down federal and state laws. On the federal level, I was the lead counsel in the Elizabeth Morgan case that led to the striking down of the Elizabeth Morgan Act. *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003).

<sup>4</sup> See, e.g., Jonathan Turley, *National Enquirer Publisher Asked Justice Department if it Should Register as Foreign Agent*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Feb. 12, 2019; Jonathan Turley, *Mueller's Deal: Tony Podesta Could Be The Greatest Beneficiary in the Gates Plea Bargain*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Feb. 24, 2018; Jonathan Turley, *Mueller Stretches the Law in Calling Manafort's Own Lawyer as Witness*, The Hill, Nov. 3, 2017. Other columns can be found at [www.jonathanturley.org](http://www.jonathanturley.org).

We have seen a significant shift in the use of FARA in recent years as the basis for searches as well as criminal charges. For civil libertarians, the greatest concern is not the number of actual prosecutions, which remains relatively low. Rather, it is the potential use of the ambiguous elements of the Act to secure warrants and to seize material from attorneys, journalists, firms, and public interest groups that is so concerning. At the same time, we have seen foreign countries use their own FARA laws to crackdown upon public interest groups and journalists. I discuss a few areas where Congress should bring added clarity to FARA to focus on the core purpose of this law while avoiding areas raising significant constitutional and privilege concerns.

FARA began in the 1930s to combat the rise of Nazi sympathizers and propaganda. It was framed as a way to curtail “un-American” speech. In the hearing on the legislation, the purpose was based on

“[i]ncontrovertible evidence . . . that there are many persons in the United States representing foreign governments or foreign political groups who are supplied by such foreign agencies with funds and other materials to foster un-American activities and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.”<sup>5</sup>

The purpose of the registration was expressly meant to create a stigma by tagging certain people and groups as not just foreign agents but also to label their views as un-American. The Act continues to impose a stigmatizing label for those who work with foreign interests. FARA declares that such individuals and firms must include a “conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal” and leave it to the Attorney General on “what constitutes a conspicuous statement for the purposes of this subsection.”<sup>6</sup> In addition to the stigma, FARA imposes reporting costs as well as the potential loss of federal funds.<sup>7</sup>

FARA had relatively limited use in World War II, though a couple dozen figures were prosecuted.<sup>8</sup> However, it soon entered a period of prosecutorial dormancy. Only eight individuals were prosecuted between 1966 and 2015.<sup>9</sup> Even in terms of civil enforcement, FARA was something of a sleeper statute with only seventeen cases during that period.<sup>10</sup> There has been an obvious uptick of investigations and prosecutions under FARA in high-profile cases. Those cases have refocused attention on the broad scope of the statute and how it can be used opportunistically or even politically by prosecutors.

<sup>5</sup> *Foreign Agents Registration Act of 1938: Hearing on H.R. 1591*, 75th Cong. 8021.

<sup>6</sup> 22 U.S.C. §614(b); see also *Viereck v. United States*, 318 U.S. 236, 241 (1943) (noting that FARA was intended “to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.”).

<sup>7</sup> For example, under the Economic Aid Act, a firm, corporation, or individual registered under FARA may be ineligible to receive funds under the Paycheck Protection Program (PPP).

<sup>8</sup> U.S. Dep’t of Just., U.S. Attorneys’ Manual: Crim. Manual § 2062 (2018).

<sup>9</sup> See generally Off. of the Inspector Gen., U.S. Dep’t of Just., Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act 2 (2016).

<sup>10</sup> *Foreign Agents Registration Act Enforcement*, Criminal Resource Manual, U.S. Attorneys’ Manual (2018).

I have long expressed discomfort over the free speech and associational dangers that arise from the use of ambiguous terms in FARA and other laws. The Act's key terms are defined in exceptionally broad terms in forcing the registration of "agents of a foreign principal."<sup>11</sup> While a "foreign principal" conjures up images of foreign governments or foreign agencies, it also covers foreign-based companies, nonprofits, and individuals, including Americans living in foreign countries. A "foreign agent" is defined as

"(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection."<sup>12</sup>

Even with exemptions, that definition can cover a wide array of activities common to lawyers, academics, and others with global clients. Indeed, with the increasing globalization of law and business, FARA is now a continual concern for professionals in determining whether contracts or services cross any of these ill-defined lines. The four covered activities include not just the representation of a foreign principal with any government official or agency but also engaging in "political activities for or in the interests" and acting as public relations counsel, information-service employee, or political consultant. The political activities language highlights the fluid meaning in these critical terms. The government can allege a violation if someone is engaging in any activity that

"the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."<sup>13</sup>

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<sup>11</sup> 22 U.S.C. § 611.

<sup>12</sup> Id. at §611 (c).

<sup>13</sup> Id. at §611 (d).

It is hard to imagine any contact with a government official in Washington that would not meet such criteria.<sup>14</sup>

As noted, there are express exemptions for diplomats,<sup>15</sup> commercial activities,<sup>16</sup> lawyers,<sup>17</sup> academics,<sup>18</sup> and others. However, these exceptions are laced with terms that, again, largely leave compliance in the eye of the prosecutorial beholder. Take the exception for lawyers. It covers lawyers who are representing foreign interests “in the course of judicial proceedings [and related inquiries or investigations].”<sup>19</sup> Yet, lawyers are often enlisted to address matters that are not in court or squarely before an agency. They seek to avoid potential actions or try to put their clients in the best regulatory position. Moreover, as discussed below, the Justice Department has adopted a broad interpretation of this rule that requires law firms to register due to their representation unconnected to any judicial or administrative proceeding or claim, including advising an embassy.<sup>20</sup> The FARA regulations clarify that “attempts to influence or persuade” agency personnel or officials include any work that can be characterized as attempts to influence or persuade “with reference to formatting, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.”<sup>21</sup> That includes such acts as “sharing memorandum prepared by [US firm] with [foreign country]’s lobbyists and public relations firm regarding pending legislation in the House of Representatives,” “drafting, at the request of the Embassy, potential responses to media inquiries to be delivered by the Embassy about litigation in which [U.S. firm] was counsel of record,” and “providing the Embassy with written arguments against passage of resolution in House of Representatives.”<sup>22</sup>

The exemption for journalism has also been criticized as ill-defined. In 2017, the government required RT TV America and Sputnik to register as foreign agents.<sup>23</sup> The move raised great concerns over free press protections. It is true that these media outlets are funded by the Russian government. However, many such media organizations from BBC to NPR receive considerable public funding. Authoritarian countries have recognized FARA laws as a perfect vehicle for chilling speech and punishing dissents or journalists. A good example can be found in Russia where journalistic organization and Non-Government Organizations (NGOs) are labeled as foreign agents.<sup>24</sup> The Russian law was modeled on FARA and used to crackdown on dissent.

<sup>14</sup> Even an exception for news gathering organizations only applies for those media outlets deemed to be operating “by virtue of any bona fide news or journalistic activities” and meet certain ownership criteria. *Id.* at §611 (d).

<sup>15</sup> 22 U.S.C. § 613(a).

<sup>16</sup> 22 U.S.C. § 613(d)(1).

<sup>17</sup> 22 U.S.C. § 613(g).

<sup>18</sup> 22 U.S.C. § 613(e).

<sup>19</sup> 22 U.S.C. § 613(g).

<sup>20</sup> Letter from Brandon L. Van Grack, Chief, FARA Registration Unit, U.S. Dep’t of Just., (Apr. 21, 2020), <https://www.justice.gov/nsd-fara/page/file/1287671/download>

<sup>21</sup> 28 C.F.R. § 5.306(a).

<sup>22</sup> *Id.*

<sup>23</sup> Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, *The Hill*, Nov. 17, 2017.

<sup>24</sup> See generally Samuel Rebo, *FARA in Focus: What About Russia’s Foreign Agent Tell Us About America’s*, 12 J. Nat’l Security L. & Pol’y 277 (2022); Nick Robinson, “Foreign Agents” in an Interconnected World: FARA and the Weaponization of Transparency, 69 Duke L.J. 1075 (2020).

The use of FARA laws by countries like Russia have been roundly condemned. However, all these laws, including the law in this country, are capable of such abuse. Indeed, FARA was used against the civil rights leader W.E.B. Du Bois in 1951.<sup>25</sup> Despite its extremely limited use, the Justice Department used FARA to target Du Bois for disseminating anti-war literature on behalf of a French not-for-profit organization. Du Bois was 83 at the time. Notably, Du Bois was the chairman of the Peace Information Center (PIC), an antiwar and nuclear nonproliferation organization. PIC circulated the Stockholm Appeal, a petition conceived by Nobel laureate and chemist Frédéric Joliot-Curie. Joliot-Curie was also a communist but his petition was signed by such figures as Marc Chagall, Thomas Mann, and Pablo Picasso.<sup>26</sup> It was also signed by 2.5 million American citizens. It is also worth noting that PIC was headquartered in New York, but the Justice Department declared it to be a foreign agent without any foundation.

It was clear that the government primarily wanted to tag DuBois as a communist and add the stigma of being a foreign agent. Even after he prevailed, “the trial and the publicity around it ruined his career. He was left scrabbling to earn enough money just to buy groceries.”<sup>27</sup> The government continued the persecution of Du Bois by taking away his passport.

FARA definitions are so general that any moderately creative prosecutor could sufficiently allege a possible violation for a wide array of advocates, lawyers, and others with international clients. That is all that is required to secure a search warrant to gain access to potentially privileged or sensitive information. Since a covered person has only 10 days to register after such a contact,<sup>28</sup> it is easy to trip the wire as an unregistered agent under the law. Moreover, the Justice Department exercises broad discretion in determining whether a violation is intentional or unintentional – the difference between a potential five-year prison sentence and a simply retroactive registration.<sup>29</sup> It has used that discretion to shift from its long-treatment of FARA as an administrative procedure to great criminal enforcement.<sup>30</sup>

A 2019 letter from the Justice Department shows how broad both the discretion and the interpretation of FARA has become.<sup>31</sup> A church asked if it had to register as a foreign agent because foreign members had requested the printing of banners for a public march. A foreign foundation and its members were considered “foreign principals” and the church an agent engaged in political activities covered by the Act. Likewise, public interest organizations have been required to register as foreign agents, including the National Wildlife Federation (NWF).<sup>32</sup> The NWF merely accepted a grant from the Norwegian government to fight the destruction of the rainforest in countries like Brazil. It noted that “in its interactions with U.S. government officials, [U.S. organization] has nothing to do with formulating, adopting, or changing the

<sup>25</sup> Andrew Lanham, *When W.E.B. DuBois Was UnAmerican*, Boston Review, Jan. 13, 2017.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 22 U.S.C. § 612(a).

<sup>29</sup> Jacob R. Straus, Cong. Rsch. Serv., *Foreign Agents Registration Act: An Overview 2* (2019).

<sup>30</sup> Straus, *supra*, at 2.

<sup>31</sup> Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, Nov. 19, 2019, available at <https://www.justice.gov/nsd-fara/page/file/1232921/download>.

<sup>32</sup> Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, March 13, 2020, available at <https://www.justice.gov/nsd-fara/page/file/1287616/download>.

domestic or foreign policies of the United States.”<sup>33</sup> However, the Justice Department still declared that these are covered “political activities” because organizing against the destruction of rainforests in other countries could still “influence ... the public within the United States “with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.”<sup>34</sup>

There has never been an examination of what FARA registration has accomplished beyond tagging individuals, companies, or firms as foreign agents. Even more specific objections like combatting “disinformation” by forcing the registration of foreign media has done little in reducing such distribution. Rather, it has allowed countries like Russian and China to tell its citizens that the compelled registration of media and NGOs is consistent with what is done by the United States.

My recommendation is for this Committee to focus on four primary areas for reform.

*Clarifying the Purpose of FARA.* Any enhancement of FARA should begin with a clear understanding of what FARA is meant to achieve. I am not speaking of the functional act of registering foreign agents, but rather, why such registration is needed. That question can inform the necessary scope of FARA as well as the necessity of criminal prosecutions to enforce it.

Given the costs to core rights and the use of registration laws by authoritarian countries, Congress should clearly define what we are trying to achieve in FARA in its current or any amended form. We are hopefully beyond our past desire to register people with “un-American” viewpoints or associations. Moreover, if the law is meant to curtail free speech (even in the guise of “disinformation”), it would invite challenge as facially unconstitutional or unconstitutional “as-applied.” In articulating a new purpose, Congress should avoid unnecessary or superfluous overlap with other laws. FARA is not needed to combat espionage or fraud given the ample statutory protections against those crimes. It is not needed for the regulation of elections given our extensive election laws and regulations. It is not needed to monitor foreign contributions or funding in higher education.<sup>35</sup> Finally, any court or agency is free to (and often does) ask for counsel or advocates to identify their clients. In court and congressional proceedings, for example, client identity is commonly sought for participants. Indeed, the recent indictment of Michael Sussmann shows that 18 U.S.C. 1001 is sufficient to deter those who would hide their clients.<sup>36</sup> Finally, the Lobbying Disclosure Act (LDA) not only forces disclosures on clients and interests but can be the basis of an exemption under FARA.

The 1942 amendments continued the purpose of FARA to combat un-American speech or speech deemed propaganda.<sup>37</sup> It expanded the scope and required both greater identification and disclosures from covered parties. The 1966 amendments represented a shift from the original design of speech regulation to a new purpose of transparency in the lobbying of the government.<sup>38</sup> As the D.C. Circuit stated:

“Over the years, FARA’s focus has gradually shifted from Congress’ original concern about the political propagandist or subversive seeking to overthrow the Government to the now familiar situation of lobbyists, lawyers, and public relations consultants pursuing

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Higher Education Act, 20 U.S.C. § 1011f.

<sup>36</sup> Indictment, *United States v. Sussmann*, Sept. 9, 2021, available at <https://www.justice.gov/sco/press-release/file/1433511/download>.

<sup>37</sup> 6 P.L. 77-532, 56 Stat. 248 (1942).

<sup>38</sup> See, e.g., U.S. Congress, Senate Committee on Foreign Relations, *Nondiplomatic Activities of Representatives of Foreign Governments*, 87th Cong., 2nd sess., July 1962.

the less radical goal of ‘influencing [Government] policies to the satisfaction [sic] of [their] particular client.’ But as its focus has changed, the core notion of FARA has remained the same, namely that government officials and the public generally should be able to identify those who act on behalf of a foreign principal.”<sup>39</sup>

This resulted however in a further expansion of the scope of the law.

The rationale shift in 1966 continued with the enactment of the LDA.<sup>40</sup> Replacing the Regulation of Lobbying Act of 1946, the LDA legislation included FARA amendments, including key exemptions. It allowed lobbyists for foreign corporations, associations, and partnerships to register under LDA rather than FARA. That avoided the stigmatizing label of being a foreign agent.<sup>41</sup> It also included the legal exemptions discussed below.

The greatest mistake would be a return to the anti-free speech origins of FARA under the guise of combating “disinformation.” Not only does FARA not materially impact the dissemination of information, the use of the law as a cudgel for those espousing foreign political agendas will raise even greater constitutional concerns. The “enhancement” of FARA as a vehicle for speech controls and sanctions would come at a time when free speech is under unprecedented attacks here and abroad.<sup>42</sup>

The law continues to sweep broadly and continues to impact free speech values. Indeed, many want it to sweep even more broadly. If the purpose is to identify foreign clients seeking legislative or regulatory changes, FARA could achieve that goal without the ever-expanding range of covered parties. Registration can still be required under LDA without the stigma (or the criminal enforcement) of registration under FARA as foreign agents. Likewise, for those who are arguing for the expansion of FARA, they should consider whether the same added transparency would not be achieved through the LDA without the stigma imposed under FARA. It could also legislatively correct and narrow the interpretations issued by the Justice Department. It could also strengthen exemptions for public interest, journalistic, and advocacy groups.

*Clarifying the Line Between Criminal and Civil Enforcement.* One area that should be a priority for congressional review is the increasingly unintelligible line between civil and criminal enforcement. FARA has been used to trigger criminal investigatory powers, including searches targeting lawyers. More importantly, some figures have been allowed to retroactively register (which has been the norm) while others have been subject to indictments.<sup>43</sup> After ramping up prosecutions in the last decade, the Justice Department has created precedent for the criminalization of what were previously treated as administrative violations. From Paul Manafort to the current investigation of Hunter Biden, there remain questions as to whether Justice Department will operate under a single, coherent, and predictable standard. The Justice Department cannot simply repeat the mantra of prosecutorial discretion. This is an area that demands a bright line not only so covered parties can be confident on their legal obligations, but also so the public is assured that prosecutions are driven by legal, not political, considerations.

There have been calls for the enhancement of civil powers for the Justice Department to investigate potential FARA violations. That includes giving the Department civil investigative

<sup>39</sup> *United States v. McGoff*, 831 F.2d 1071, 1073-74 (D.C. Cir. 1987) (citing S. Rep. No. 143, 89th Cong., 1st Sess. 4 (1965)).

<sup>40</sup> P.L. 104-65, 109 Stat. 691 (1995).

<sup>41</sup> U.S. Congress, House, Committee on the Judiciary, *Lobbying Disclosure Act of 1995*, H.R. 2564, 104th Cong., 1st Sess., H. Rep. 104-339, November 14, 1995.

<sup>42</sup> See generally Turley, *Harm and Hegemony*, *supra*.

<sup>43</sup> See Jonathan Turley, *Mueller’s Deal: Tony Podesta Could Be The Greatest Beneficiary in the Gates Plea Bargain*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Feb. 24, 2018.

demand (CID) authority to allow for administrative demands or subpoenas. If Congress wants to expand such civil authority and investigative powers, it should consider narrowing the criminal penalties. To the extent that FARA is a transparency or information forcing law, that can be achieved through administrative measures without the expanded use of the criminal process.

*Clarifying Key Terms.* As discussed above, FARA has suffered from a type of statutory mission creep as the Justice Department took ambiguous terms and used that ambiguity to steadily expand the scope of the Act. Congress can bring greater clarity and purpose to the Act by narrowing the threshold terms. For example, “foreign principal” can be narrowed to focus on foreign governments, foreign political parties, and surrogates that are largely funded by either foreign government or parties.<sup>44</sup> That would still leave groups and individuals who are closely associated with foreign interests. However, as noted above, other statutes also apply to such transactions and associations to address specific risks. This includes, but is not limited to, the disclosure provisions of Lobbying Disclosure Act.<sup>45</sup> Notably, the exemption for LDA registration, does not include representatives “where a foreign government or foreign political party is the principal beneficiary.”<sup>46</sup> Moreover, by narrowing this term, some of the most problematic (and potentially unconstitutional) applications of the Act can be avoided.

The identification of a “foreign agent” is left fluid with the inclusion of undefined terms. For example, an organization can be designated a foreign agent simply because it acted on a “request” from a foreign principal. Thus, a church or public interest group may be deemed a foreign agent if they act on the request of the Ukrainian government in the opposition to the Russian invasion. Moreover, those groups which received any grants or monies from foreign sources are left unsure when such money closes the line of receiving funds “in major part” from a foreign source. The statute and regulations do not define how that line is drawn. Is it a measure of the amount or the percentage of the budget of the organization? There is a significant level of uncertainty when an organization risks the stigma of being labeled a foreign agent.

The language on the exemptions for political activities could also be clarified to require a direct nexus to the interests of the foreign principal. Specifically, the type of interpretation subjected the NWF to registration should be eliminated. A good place to start is with the 2019 opinion where the Department rejected an exemption for a firm working with an international religious organization on a conference to “bring together the world’s religious leaders to agree on measures to overcome important social challenges.” It was still considered a covered activity because a foreign government’s ministry funded the firm’s work and the conference and the underlying social issues “could also be in the public interests of a foreign government.”<sup>47</sup>

*Clarifying the Legal Exemption.* Recent controversies have focused on the use of FARA to investigate, search, or to charge attorneys ranging from Paul Manafort to Rudy Giuliani<sup>48</sup> to

<sup>44</sup> Congress previously considered such a narrowing of this term in 1993. *See* S. Rep. No. 103-37 (1993).

<sup>45</sup> 2 U.S.C. § 1601.

<sup>46</sup> 28 C.F.R. § 5.307.

<sup>47</sup> Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, Nov. 12, 2019, available at <https://www.justice.gov/nsd-fara/page/file/1234516/download>.

<sup>48</sup> Erica Orden, *How Federal Prosecutors are Pursuing Rudy Giuliani*, CNN, May 22, 2021.

Victoria Toensing<sup>49</sup> to Hunter Biden.<sup>50</sup> We still do not have all the facts on many of these investigations, but they raise the long-standing questions of where the line is drawn in terms of the exemption. That confusion is evident in the statutory language and conflicting agency interpretations given to legal representational questions.

Recently, the Justice Department withdrew an advisory opinion from December 2019. The earlier interpretation imposes a narrow scope on the legal exemption that declared that attorneys would still have to register if they planned to “provide factual responses to media inquiries about the litigation, issue press releases containing facts regarding the litigation, and engage in press conferences regarding [the case].” The opinion ignores that lawyers often field media inquiries and have a duty to ethically represent their clients inside and outside of courtroom or committee rooms. To its credit, the Justice Department rescinded the order and clarified that responding to media inquiries does not trigger the need for registration.<sup>51</sup> However, the resulting statement preserved the maddening ambiguity of the exemption itself:

“The legal exemption is triggered once a person, qualified to practice law, engages or agrees to engage in the legal representation of a disclosed foreign principal before any court or agency of the Government of the United States. The exemption is not triggered by an agreement to provide legal representation to further political activities, as defined by FARA, to influence or persuade agency personnel or officials, other than in the course of either judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; or other agency proceedings required by law to be conducted on the record. The scope of the exemption, once triggered, may include an attorney’s activities outside those proceedings so long as those activities do not go beyond the bounds of normal legal representation of a client within the scope of that matter.”<sup>52</sup>

Consider that language if you are trying to comply with federal law. You are not required to register “so long as those activities do not go beyond the bounds of normal legal representation of a client within the scope of that matter.” The Justice Department reserves to itself to determine what is within “the bounds of normal legal representation.” Moreover, it is not clear what will be defined as “within the scope of that matter.” A “matter” often involves both immediate actions as well as potential actions involving a client.

In fairness to the Justice Department, the line between legal advocacy and lobbying is often murky. Both the Manafort and Biden controversies show how attorneys will often be used for efforts that seem more political than legal, including tasks that can legitimately be described as outside the “normal scope” of legal representation. Yet, the firms often perform atypical functions in response to collateral questions in maintaining client relationships. There is an obvious need to register as a lobbyist when you are seeking benefits or changes from agencies or

<sup>49</sup> Oliver O’Connell, *FBI Searches Home of Giuliani-Connected Lawyer in Relation to Ukraine Dealings*, The Independent, Apr. 28, 2021.

<sup>50</sup> Jerry Dunleavy, *DOJ Investigating Hunter Biden for Lobbying Violations*, Washington Examiner, March 16, 2022.

<sup>51</sup> Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, Jan. 5, 2020, available at <https://www.justice.gov/nsd-fara/page/file/1351401/download>.

<sup>52</sup> *Id.* at 1-2.

officials. The question is why a lawyer or firm should be compelled to file as a foreign agent when offering advice or assistance to a client.

Even the scope of the allowable media work by lawyers as an unregistered party is cloaked in ambiguity. The Justice Department states:

“While responding to media inquiries about litigation typically fall within the scope of the exemption, the proposed activities entail more proactive media engagement that are more akin to a public relations campaign aimed at promoting the litigation and the political objectives of the [US organization]. Such activities, within the context of the litigation, appear beyond the bounds of normal legal representation.”<sup>53</sup>

Again, what constitutes “proactive media engagement” is largely left to the discretion of the Department. Good attorneys will often anticipate controversies and seek to defuse them on behalf of their clients. That includes trying to emphasize positive elements of a client’s position or work. Given the free speech and free press concerns over such rules, there should be greater clarity and accommodation for media interactions for counsel representing foreign clients.

The common concern among the witnesses today is a promising sign that it is possible to reach a new and bipartisan approach to FARA. This can be accurately described as the third incarnation of FARA. It has gone from an anti-free speech statute to a transparency in lobbying statute. Frankly, my greatest concern is that Congress could revert to the original anti-free speech purpose of the Act under the guise of combatting “disinformation.” Instead, Congress should recognize the array of other statutes enacted since 1938 that force transparency in foreign lobbying and financing in areas ranging from election to education. Given that new context, it is possible to narrow FARA to achieve a more defined and static purpose. That includes shifting back toward an administrative rather than criminal emphasis on enforcement. There is no political agenda behind such reforms. Both parties have had associated figures targeted under the Act. The question is now what we are still trying to achieve under FARA and how we can better to achieve those goals without undermining the constitutional values that define us as a nation.

Thank you for the opportunity to speak with you today. I am happy to answer any questions that you might have at this time.

Jonathan Turley  
Shapiro Professor of Public Interest Law  
George Washington University Law School  
Washington, D.C. 20052  
jturley@law.gwu.edu  
(202) 994-7001

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<sup>53</sup> *Id.*

Mr. COHEN. Thank you, Professor Turley.

The final Witness is Nicholas Robinson. He is a Senior Legal Advisor at the International Center for Not-for-Profit Law, where he manages the organization's U.S. program. Not-for-profit law, that means you don't have to do billable hours, I guess? That is good. That is good.

[Laughter.]

His research and expertise centers on how laws aimed at curtailing foreign influence can impact civil society organizations, the regulation of freedom of assembly, and civic space in a time of rising global authoritarianism. His research has been published in a number of academic journals, including *Duke Law Journal*—but not the *UNC Law Journal* or the *Kansas Law Journal*—and the *Cornell Law Review*. He is regularly quoted and cited in leading news outlets. Prior to joining this group, he was a lecturer and fellow at Yale University, where he taught both human rights and professional responsible. He is a post-doctoral fellow at Harvard Law School. So, he doesn't play favorites. Before that, he worked in India, where he was a clerk at the Indian Supreme Court, a professor at the Jindal Global Law School, and a Senior Fellow at the Center for Policy Research. He received his J.D. from Yale and B.A. from the University of Chicago.

Mr. Robinson, you are recognized for five minutes.

You don't go to anything but the best schools.

#### STATEMENT OF NICK ROBINSON

Mr. ROBINSON. Good morning, Chair Cohen and Ranking Member Johnson, and Members of the Subcommittee.

My name is Nick Robinson. I'm a Senior Legal Advisor at the International Center for Not-For-Profit Law, where we work to create an appropriate legal environment for nonprofits for the U.S. and around the world.

Today, I want to highlight why the Foreign Agents Registration Act needs to be better targeted. After the 2016 presidential election, there was an understandable increase in concern about Russian and Chinese influence in U.S. politics. In response, some policymakers, including the Justice Department, turned to FARA as a potential answer.

To be clear, renewed focus on the act has provided needed transparency around lobbying by foreign governments and has led to important prosecutions. However, as enforcement has ramped up, FARA's notoriously sweeping provisions have also increasingly interfered with the operations of nonprofits, businesses, religious institutions, and others, with limited or no connection to a foreign government, and in a manner that Congress never intended.

Civil society has been raising the alarm. Consider a recent open letter to the Justice Department signed by the ACLU, Americans for Prosperity, the NRDC, and other prominent nonprofits. It warns that, "FARA's overbreadth and vagueness can undermine and chill First Amendment rights to speech and association and the statute has a history of being used to target undesirable expressive conduct."

While the Department has in recent decades prioritized enforcement of the act against lobbyists of foreign governments, the act's

provisions capture a dizzying array of other Americans. For example, a U.S. nonprofit that arranges a public speaking event in Chicago at the request of a visiting Ukrainian pro-democracy advocate, would, arguably, be required to register under the act.

Nor are these concerns merely hypothetical. As the Justice Department has ramped up enforcement, it has demanded that a U.S. church register for putting up banners at the request of foreign congregants who came to Washington, DC, for the March for Life rally, or the Justice Department required the National Wildlife Federation to register because it accepted money from the Norwegian government to work with U.S. multinational corporations on improving sustainability of product supply chains in certain tropical countries.

FARA's overbreadth provides the Justice Department the power to decide who will and will not be a foreign agent, a stigmatizing label that carries extensive reporting requirements and other burdens. Such power is ripe for abuse. For example, during the McCarthy Era, the Justice Department used FARA to prosecute W.E.B. Du Bois, the renown civil rights leader, for disseminating anti-war literature from a French nonprofit.

This overbreadth and vagueness also creates confusion about who needs to register. As I sometimes joke with colleagues, FARA has become a job creation scheme for high-end D.C. law firms. While some can afford such expert counsel, most cannot.

Importantly, having such a broadly worded act undercuts the Justice Department's ability to enforce it. Currently, the Department is distracted by registrants who are not their enforcement priority, and they face the real prospect of the act being challenged on First Amendment grounds, undermining their ability to enforce it against anyone.

I would respectfully urge Congress to take action. While there are many proposals to strengthen enforcement of the act, as my colleague from POGO described, and as Professor Turley also emphasized, the act, though, needs to be better targeted. This should include three key pillars.

First, fix the foreign principal definition. Currently, the act's foreign principal definition makes no distinction whether one is an agent of the Chinese government or one's grandmother in Canada. This simply does not make sense.

Second, clarify the agency definition. One can currently become an agent under the act by acting at the, "request of a foreign principal." However, if I asked 10 different FARA experts what "request" means, they could give me 10 different answers.

Third, better target the act's covered activities. FARA has had success in making visible the lobbying of foreign governments, but its other benefits have been far less clear. Congress should review the broad, often outdated, set of activities that FARA currently covers to make sure that they are tailored to the purpose Congress is trying to accomplish with the act.

Thank you for inviting me today, and I would be happy to answer any of your questions.

[The statement of Mr. Robinson follows:]



www.icnl.org  
nrobinson@icnl.org

## WRITTEN TESTIMONY OF NICK ROBINSON

SENIOR LEGAL ADVISOR AT THE INTERNATIONAL CENTER FOR  
NOT-FOR-PROFIT LAW

BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON THE  
CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

"ENHANCING THE FOREIGN AGENTS REGISTRATION ACT OF 1938"

April 5, 2022

### Introduction

The Foreign Agents Registration Act (FARA) needs to be fixed. After the 2016 Presidential election, there was increased concern about Russian and Chinese influence in U.S. politics. In response, some policymakers, including the Justice Department, understandably turned to FARA as a potential answer. This increased focus on the Act has provided needed transparency around lobbying by foreign governments and political parties and has led to recent high-profile prosecutions. However, FARA's notoriously sweeping provisions have increasingly interfered with the operations of nonprofits, businesses, media, religious institutions, universities, and others with limited or no connection to foreign governments in a manner that Congress never intended and that raises clear First Amendment concerns.

As FARA enforcement has increased, civil society has been raising alarm bells about the Act. For example, a recent open letter to the Justice Department signed by the ACLU, Americans for Prosperity, the NRDC, the Institute for Free Speech, and other prominent nonprofits warned that "FARA's overbreadth and vagueness can undermine and chill First Amendment rights to speech and association and the statute has a history of being used to target undesirable expressive conduct."<sup>1</sup>

While the Justice Department historically prioritized enforcement of the Act against lobbyists for foreign governments, FARA's language is, in fact, dizzyingly broad. Consider the following scenarios that arguably require registration under the Justice Department's current interpretation of FARA:

- A U.S. nonprofit helps set up a public talk in Chicago at the request of a visiting pro-democracy advocate from Ukraine who is speaking on the humanitarian and political situation in the country.

<sup>1</sup> See, Open Letter to Jennifer Kennedy Gellie, Chief FARA Unit (Feb. 11, 2022), available at <https://www.regulations.gov/comment/DOJ-LA-2021-0006-0016>

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- A former member of the U.S. military responds to the request of an Afghan refugee with whom they served in Afghanistan asking them to call their member of Congress about the U.S.'s refugee policy.
- A U.S. journalist writes a story about U.S. COVID policy at the request of their Canadian newspaper that is accessible online by the U.S. public.
- A U.S. volunteer distributes a small amount of funds collected from Canadian citizens who asked that it be used to help with hurricane relief in Florida.

Despite the seeming absurdity of the broad range of covered activity, many concerned about foreign influence have viewed FARA's wide scope as an advantage, allowing the government a relatively free hand to choose who to require to register. However, a combination of increased FARA enforcement, the politicization of FARA, the Justice Department's own advisory opinion system, and disagreement about what should be the Department's enforcement priorities has cast a spotlight on how unsustainable this arrangement actually is. Congress should amend the Act so that it is better targeted to clearly defined goals. Otherwise, it will continue to needlessly burden the public and distract the Justice Department from its traditional enforcement priorities, ultimately undermining enforcement of the Act.

### A Short History of FARA

To understand our current predicament it is useful to briefly examine the history of the Act. FARA was enacted in 1938 to combat Nazi and communist propaganda. While ostensibly a transparency statute, in actuality the Act was used to stigmatize and mire in red tape German propaganda outlets, essentially shutting them down.<sup>2</sup> After World War II, during the McCarthy era, the Justice Department used the statute to prosecute W.E.B. DuBois, the renowned civil rights activist, for disseminating anti-war literature from a French nonprofit. The Justice Department's prosecution was motivated by DuBois' perceived communist sympathies and, although ultimately the charges were dismissed, his reputation never recovered in his lifetime. Following the prosecution of DuBois, FARA prosecutions declined dramatically and by the 1980s FARA was primarily used against lobbyists of foreign governments and political parties, and even for this more limited goal, it was widely seen as being underenforced.

With a rise in concern about foreign influence, the Act has been going through an identity crisis, with disagreement about whether enforcement should focus solely

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<sup>2</sup> For more on the history of FARA and its enforcement, see generally, Nick Robinson, "Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency, 69 DUKE LAW JOURNAL 1075 (2020).

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on foreign government lobbying, or also foreign media networks, Confucius Institutes at universities, foreign funded think tanks, or foreign election influence. The problem is that the Act is both a poor fit for some of these concerns and strikingly sweeping, capturing much other conduct that most people would not think should be registrable.

When there was broad understanding that the Justice Department would focus FARA enforcement on foreign government lobbyists, few of the broad array of Americans potentially affected by the Act gave it much attention. However, as the Department has applied FARA in new areas this has created both uncertainty and spreading consternation.

Consider these registrations under FARA in the past few years:

- In response to a Justice Department advisory opinion, a U.S. church was required to register for printing out banners at the request of foreign congregants who came to Washington D.C. for the March for Life rally because the church was acting as a “publicity agent” under FARA.<sup>3</sup>
- On the basis of a Justice Department advisory opinion, the National Wildlife Federation was required to register because it accepted money from the Norwegian government to work with U.S. multinational corporations on improving sustainability of product supply chains in certain tropical countries and so the Department claimed engaged in “political activities” in the U.S.<sup>4</sup>
- Given increased political focus on FARA, EarthJustice registered for representing Greta Thunberg and other environmental youth activists for filing a petition on climate change before the U.N. Committee on the Rights of the Child, which involved issuing press releases and engaging in other media in the U.S.<sup>5</sup>

These and other registrations and advisory opinions have created uncertainty among many in the public about who needs to register under the Act. Further, with each advisory opinion, the Act, and its startling breadth, have become more widely known, triggering yet more requests for opinions, creating a spiral in which more and more Americans become ensnared in FARA’s web.

<sup>3</sup> U.S. Justice Department Advisory Opinion (Nov. 19, 2019), available at <https://www.justice.gov/nsd-fara/page/file/1232921/download>

<sup>4</sup> U.S. Justice Department Advisory Opinion (March 13, 2020), available at <https://www.justice.gov/nsd-fara/page/file/1287616/download>. See also, National Wildlife Federation comment to Jennifer Kennedy Gellie, FARA Unit Chief (Feb. 10, 2022), available at <https://www.regulations.gov/comment/DOJ-LA-2021-0006-0013>

<sup>5</sup> All FARA filings are publicly searchable at [www.fara.gov](http://www.fara.gov) under “Browse Filings”.



### Understanding FARA's Breadth: Four Major Misperceptions

To appreciate FARA's breadth and vagueness it is useful to consider four common misperceptions about FARA. Under FARA, one must register if a person or organization within the U.S. engages in covered activity under the Act as an agent of a foreign principal. However, "covered activity", "agent", and "foreign principal" are all defined in broad terms, capturing a range of conduct that most who advocate for increased enforcement of the Act likely do not intend to capture.

#### 1. Who is a Foreign Principal?

Some observers believe that FARA is only targeted at the agents of foreign governments. However, a "foreign principal" under the Act includes not only foreign governments or political parties, but also foreign individuals, foundations, nonprofits, companies, and other entities. It even includes U.S. citizens domiciled abroad.<sup>6</sup> In other words, in defining foreign principal, the Act makes no distinction whether one is acting as an agent of the Chinese government or one's grandmother who lives in Canada.

#### 2. Covered Activity

Many believe FARA only applies to lobbying or electioneering activity. However, the Act covers a much broader array of activities, including:

- Attempting to influence "any section of the public within the United States" on U.S. domestic or foreign policy. "Any section of the public" includes two or more people.<sup>7</sup>
- Disseminating "information" in the U.S. with respect to "facts" of an organization or corporation based in another country.<sup>8</sup>
- Soliciting or disbursing anything of value within the United States.<sup>9</sup>
- "Informing" any other person about the domestic or foreign policies of the United States.<sup>10</sup>
- Disseminating written or visual information "of any kind".<sup>11</sup>

<sup>6</sup> See definition of "foreign principal" at 22 U.S.C. 611(b).

<sup>7</sup> See definition of "political activities" at 22 U.S.C. 611(o).

<sup>8</sup> See definition of "information service employee" at 22 U.S.C. 611(i).

<sup>9</sup> See 22 U.S.C. 611(c)(1)(iii).

<sup>10</sup> See definition of "political consultant" at 22 U.S.C. 611(p). The Justice Department has interpreted down the definition of political consultant in a July 19, 2021 advisory opinion, available at <https://www.justice.gov/nsd-fara/page/file/1431306/download> to also require an agent engage in "political activities", but this interpretation could be changed in the future.

<sup>11</sup> See definition of "publicity agent" at 22 U.S.C. 611(h).

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There are exemptions to registering under the Act. Most notably one does not have to register if one is engaged in “private and nonpolitical activities” in furtherance of “bona fide trade or commerce” or in activities in furtherance of “bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts.”<sup>12</sup> However, this still leaves a broad range of relatively uncontroversial activities as requiring registration under the Act.

Further, there is a longstanding debate about the meaning of “bona fide” for both the commercial exemption and the academic and religious exemption, leading to confusion for even these categories. For example, commercial actors are exempt from FARA for soliciting or disbursing funds for non-political activity in the United States, while the Justice Department provides no guidance exempting charities and other non-commercial actors for the same conduct.

### *3. FARA’s Principal-Agent Relationship*

FARA does not require a principal-agent relationship as commonly understood under caselaw or the Restatement of Agency. The relationship can be far more informal than many appreciate. An entity can be considered an “agent” even if the “agent” acts at the mere “request” of a foreign principal or is financed “in major part” by the foreign principal.<sup>13</sup> Both “request” and “major part” are undefined in the Act. This broad scope has made it difficult for the public to navigate. For example, the Justice Department has issued over 50 advisory opinions on the Act’s “agency” definition alone.<sup>14</sup>

### *4. The Burden Imposed by FARA*

While often thought of as simply a transparency statute, many are wary of registering under the Act because of the significant stigma that it brings. For example, most nonprofits pride themselves on being independent and acting in furtherance of their mission. Registering under FARA implies that not only are they acting under the control of others, but that those they are acting for are some nefarious “foreign” hand that requires providing details of the nonprofit’s activities to the National Security Division of the U.S. Department of Justice.

Registration under the Act comes with significant burdens that can slow or stop nonprofits and others from engaging in beneficial activity. Registering under FARA requires that organizations, and impacted staff, file numerous forms and

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<sup>12</sup> See 22 U.S.C. 613(d).

<sup>13</sup> See 22 U.S.C. 613(c)(1).

<sup>14</sup> See Justice Department, Advisory Opinions, available at <https://www.justice.gov/nsd-fara/advisory-opinions>

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paperwork with the Justice Department, which require continuous updating. Willful failure to comply can lead to criminal penalties of up to five years in jail. The information filed with the Justice Department is then posted publicly and can frequently include sensitive information, including home addresses of the nonprofit's staff.

Many groups who have registered have had to retain outside legal counsel to guide them through the process and they have had to inform their board of directors and funders that they are planning to register. Senior management of organizations frequently have to negotiate with staff who are required to register who understandably fear that registering will bring stigma, an invasion of their privacy, and impact their future employment prospects.

More recently, Congress has linked access to government benefits to not being registered under the Act, meaning that those that do register can potentially lose access to critical government programs and funding.<sup>15</sup> Finally, those engaged in covered activity under FARA must label covered material with a “conspicuous statement” that the materials are distributed by the agent on behalf of a foreign principal.<sup>16</sup>

Given all these consequences of registering under FARA many nonprofit groups and others have simply decided not to engage in beneficial conduct for society out of fear that it may impose a registration burden. If enforcement of the Act is increased without at the same time better targeting the Act this problem will likely only become worse.

### **First Amendment Concerns Raised by FARA**

FARA's overbreadth does not just create substantial burdens and confusion for a wide range of Americans, but it raises significant First Amendment concerns. Given the Act's striking breadth, the Justice Department can potentially pick and choose which of a wide range of Americans potentially ensnared in the Act that it will target for being a “foreign agent”.

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<sup>15</sup> In December 2020 Congress enacted the Economic Aid Act. Under the Act a person or entity was ineligible for the Paycheck Protection Program (PPP), a close to \$1 trillion government initiative, if they registered under FARA. This raises clear First Amendment concerns. Under the unconstitutional conditions doctrine, the government cannot, in general, condition the availability of a government benefit on foregoing the exercise of a constitutional right.

<sup>16</sup> See 22 U.S.C. 614(b).

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Besides concerns about selective enforcement, under the Court's current jurisprudence, the application of FARA's broad and vague provisions trigger at least three types of potential First Amendment issues:

1. Compelled disclosure. In *Americans for Prosperity Foundation v. Bonta* (2021), the U.S. Supreme Court found that when compelled disclosure laws impact the freedom of association of an organization that the underlying law must meet exacting scrutiny, and potentially strict scrutiny. FARA, like the law in question in *Bonta*, compels groups to disclose a wide variety of potentially sensitive information that can undermine their associational rights.

2. Compelled speech. In cases like *National Institute of Family & Life Advocates v. Becerra* (2018), the U.S. Supreme Court has struck down mandatory disclosure requirements that can chill protected speech. In the case of FARA many civil society organizations have refrained from engaging in protected speech covered by FARA because of the Act's stigmatizing labeling requirement that frequently can mischaracterize the relationship between the registrant and the foreign principal.

3. Discrimination against speakers. In *Citizens United v. FEC* (2010), the U.S. Supreme Court found that in the context of political speech the government cannot "impose restrictions on certain disfavored speakers" and explicitly left open the question of whether the federal government could specifically regulate foreign speakers.<sup>17</sup> Under FARA, the speech of "agents of foreign principals" are significantly burdened in an untailored manner, meaning that FARA would likely face significant scrutiny by the Court if challenged for discriminating against certain speakers.

Without a course correction, FARA faces the very real prospect of being challenged for violating the First Amendment's protections for speech and association. While it is unlikely a court would rule the entire Act unconstitutional, the specter of ongoing litigation, which could strike down key parts of the Act, would both create confusion for those trying to comply and hamper the Justice Department's enforcement priorities. A much better path is for Congress to address this brewing crisis now by reforming FARA so as to use the least restrictive means available when it regulates protected First Amendment speech and conduct.<sup>18</sup>

<sup>17</sup> *Citizens United v. FEC*, 558 U.S. 310, 341 (2010).

<sup>18</sup> Notably, this submission does not address other potential serious constitutional challenges to FARA. For example, under 18 U.S.C. 219 it is a crime for a federal public employee to engage in covered activity under the Act in their personal capacity. Under current Justice Department interpretation of FARA if a federal employee printed out a banner at the request of a foreign member of their church coming to Washington D.C. for the March for Life rally the federal employee would need to register. As a result, the federal employee would be terminated from their employment and could face up to two years in prison. Such overly sweeping bans of expressive



### Creating Negative Global Precedent

FARA not only has had adverse impacts for civil society in the United States, it also has had significant negative consequences for U.S. foreign policy interests abroad.

The Act has repeatedly been used to justify similar “foreign agent” type laws in other countries that have been used to target human rights, pro-democracy, and other local activists, as well as limit the ability of U.S. nonprofits to operate in these countries. For example, in 2020 Nicaragua enacted a “foreign agent” law that was in critical parts a verbatim copy of FARA and Sandinista lawmakers pointed directly to FARA when the U.S. State Department and others criticized this law as an attempt to silence voices in civil society.<sup>19</sup> Similarly, when El Salvador’s President introduced a bill modeled on FARA in 2021 to target critics of the government he tweeted that the El Salvadorian bill “is basically the same law that they have in the United States. There it is called: Foreign Agents Registration Act” and he linked directly to the Justice Department’s FARA webpage as a rebuttal to opponents of the proposed law.<sup>20</sup>

These more recent examples are part of a larger pattern. For instance, the Russian government has repeatedly claimed that its notorious “foreign agent” law, also purportedly simply a transparency law, is designed to achieve the same purpose as FARA in the U.S.<sup>21</sup>

In a global battle for democracy, the United States needs to provide a model of how to address foreign influence in a targeted manner. Instead, FARA’s sweeping provisions are providing cover to autocrats to crack down on dissent.

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conduct of federal government employees outside of their employment are unconstitutional under established Supreme Court doctrine as expressed in cases like *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>19</sup> See, ICNL, *FARA’S DOUBLE LIFE ABROAD: HOW FARA IS USED TO JUSTIFY LAWS THAT TARGET CIVIL SOCIETY AROUND THE WORLD* (2021), available at <https://www.icnl.org/wp-content/uploads/FARA-Abroad-05.26.2021.pdf>

<sup>20</sup> Tweet from President Nayib Bukele, Nov. 9, 2021, available at <https://twitter.com/nayibbukele/status/1458254648595386372>

<sup>21</sup> See, *FARA’S DOUBLE LIFE ABROAD*, *supra* note 19.

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### Needed Reform

There is a growing chorus of voices calling on Congress to reform the Act, including a recent ABA taskforce report on FARA.<sup>22</sup> These proposed reforms include not only strengthening enforcement, but also at the same time better targeting the Act.

In considering reform, Congress should ask what types of foreign influence should be targeted by FARA and how the Act can be better tailored so as to achieve that purpose, while minimizing negative impacts on the U.S. public as well as speech and associational rights.

While FARA has provided needed transparency around foreign government lobbying, its other benefits have been far from clear. Congress should learn from this experience and consider targeting the Act so that it is aimed squarely at lobbyists for foreign governments and political parties. In particular, it should consider amending the Act so that:

- Only those who are acting as agents of foreign governments or political parties, or those operating on their behalf, must register under the Act.
- Only those who are in an actual agency relationship, as defined by the Restatement of Agency, must register under the Act.
- Covered activity is limited to lobbying activity of policymakers or other discrete, narrowly tailored, activity that FARA is well designed to target.

If Congress wants to address other foreign influence problems, it should consider targeting those separately. For example, another part of the criminal code, which has been used to prosecute alleged spies, already makes it illegal to act as an undeclared “agent” of a foreign government.<sup>23</sup> Meanwhile, an array of statutes prohibit foreign funding or interference with electioneering activity in the U.S.,<sup>24</sup> the Higher Education Act requires higher educational institutions report gifts or contracts from a foreign source over \$250,000,<sup>25</sup> and the FCC recently required that broadcasters disclose when foreign governments or their representatives lease time on their airwaves.<sup>26</sup> This is not to endorse all these alternative measures or claim they cannot be improved, but rather that addressing foreign influence in U.S. politics requires a nuanced, multi-faceted response.

<sup>22</sup> ABA, REPORT OF THE TASKFORCE ON THE FOREIGN AGENTS REGISTRATION ACT (July 16, 2021), available at <https://www.politico.com/f/?id=0000017c-33cf-dddc-a77e-37df03770000>

<sup>23</sup> See 18 U.S.C. 951.

<sup>24</sup> Such bans include 52 U.S.C. § 30121(a) (2018); Federal Election Campaign Act of 1971, Pub. L. 94-283, 90 Stat. 496. 11 C.F.R. § 110.20(h) (2018).

<sup>25</sup> See Sec. 117 of Higher Education Act of 1965.

<sup>26</sup> <https://www.fcc.gov/document/fccs-foreign-sponsorship-identification-rules-go-effect>

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In the end, Congress should target FARA to better tackle concrete problems of foreign influence in U.S. politics that it is well equipped to address compared to alternative measures.

### Additional Resources:

- The text of the Foreign Agents Registration Act (FARA) and accompanying regulations is available on the Justice Department's [FARA webpage](#)
- [Open Letter](#) signed by ACLU, Americans for Prosperity, NRDC, and other prominent nonprofits warning about First Amendment concerns with FARA (Feb. 2022)
- Nick Robinson, *"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE LAW JOURNAL 1075 (2020)
- Nick Robinson, *Fixing the FARA Mess*, JUST SECURITY (March 16, 2022)
- ICNL, [FARA'S DOUBLE LIFE ABROAD: HOW FARA IS USED TO JUSTIFY LAWS THAT TARGET CIVIL SOCIETY AROUND THE WORLD](#) (2021)
- ICNL Foreign Agents Registration Act [resource page](#).

Mr. COHEN. Thank you, Mr. Robinson.

I am just curious, the lady behind, who are you and who do you represent?

[Inaudible response from audience member.]

You don't work with Mr. Robinson?

[Inaudible response from audience member.]

Oh, because she was nodding the whole time, and I assumed she was part of your team. I wasn't sure.

[Laughter.]

I just didn't know if you were getting good ratings, or whatever it was.

I appreciate your testimony on how we can improve FARA. This is the question portion of our program where I have five minutes, and we will go down the line.

Do you think we should even have FARA? I mean, you don't have a great perspective on it. Do you think it is that what maybe wasn't appropriate even in 1938–1939, but do we need FARA at all?

Mr. ROBINSON. I think this is the question that Congress should be asking.

Mr. COHEN. I am.

[Laughter.]

Mr. ROBINSON. Yes. Congress, as a collective body, asking.

As I said, it has been used most recently for providing transparency around lobbyists for foreign governments. There are some distinctions from the LDA. The LDA could potentially be used this way or the LDA could be amended.

I think what is ironic here, when FARA was passed in 1938, they didn't have lobbyists in mind. There weren't really lobbyists in Washington, DC, in the same way. So, it is really just not tailored, it is not targeted to purpose. That is what it is used to—most people can agree today, or many people on both sides of the aisle think it should be used for lobbyists of foreign governments. Beyond that, it breaks down, and there's many other tools and mechanisms that have been enacted since to target, say, outside election interference or other issues like that of concerns around foreign influence.

Mr. COHEN. My friend, Mr. Johnson, brought up several Republicans who were involved in prosecutions. Mr. Greg Craig was, too, a Democrat. He went to trial, et cetera, but were there errors or areas where maybe he shouldn't have been? Did it go too far in getting Mr. Craig, do you think?

Mr. ROBINSON. So, I'm not an expert on that case. I don't feel comfortable talking to that case, but maybe one of my colleagues—

Mr. COHEN. Thank you.

Well, Professor Turley, do you have any opinion on Mr. Craig's prosecution?

Mr. TURLEY. Well, that's one of those cases. I was concerned with a lot of the cases during that period because, as I say in my testimony, if you take a look at the legal exemption, but not just under the act itself, but, more importantly, obviously, the exemption defined by the Department of Justice, it is extremely ambiguous as to when you trip that wire. I think the Craig case shows that what happened with him could have been applied to others.

You will notice that there was also an investigation of John Podesta. He was allowed to retroactively register. When that happened, I have to tell you, I was looking at those cases going, "Well, all right. What's the distinction here? What's the clear distinction?"

Attorneys need to have some clear line. I want to echo what Mr. Robinson said. It is not just attorneys. Nobody really cares about us in terms of being put in a tough position. This is impacting public interest organizations who also have to make this decision.

When you think that the National Wildlife Federation was told that they have to register as a foreign agent because they are working, advocating against the burning of the rainforest, it should be an alarm for Congress to say, "Look, we need to look at this, as to where these lines are, and have some consistent, coherent approach to who has to register."

Mr. COHEN. Thank you, Professor Turley.

Mr. Hedtler-Gaudette, you have heard Mr. Robinson's discussion about LDAs. What is your response to those who argue that LDA registration provides sufficient transparency for the subset of agents of foreign principals that it covers because they don't represent foreign governments or political parties?

Mr. HEDTLER-GAUDETTE. I think the short answer is, no, I do not believe that the LDA has sufficient transparency, safeguards, and protocols in there, relative to what we should expect of foreign agents or people lobbying on behalf of foreign agents. I think it is perfectly appropriate to have two different systems for people who are lobbying purely domestically and those who are lobbying on behalf of foreign interests. That is in many ways the system we have now.

I agree with my colleagues, though, that there is always—I think it is always a good heuristic in policymaking to be as clear and targeted and tight as possible, especially around key terms here in the Foreign Agents Registration Act. I would not say that we should simply funnel foreign agents into the LDA's framework, because the LDA framework also has quite a few shortcomings and weaknesses. So, I would, as I said in my testimony—and I elaborate a little bit in my written testimony—I would advocate that we actually close the LDA exemption and require all foreign lobbyists to register under the FARA framework, because it has much stronger reporting and transparency and disclosure mechanisms in there. I think that is appropriate. That is as it should be.

Mr. COHEN. Thank you, sir.

I will now yield to Mr. Johnson, the Ranking Member.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

Thank you all, for the Witnesses. Very much appreciate your expertise.

Mr. Turley, I appreciated your testimony about the threats of the Foreign Agents Registration Act being enforced as it may have been originally intended. Many of you mentioned that.

In your written statement, you noted, quote, "FARA began in the 1930s to combat propaganda and was framed as a way to curtail un-American speech." When I read that, I must say that my first thought went directly to Judge Ketanji Brown Johnson. If un-American speech was still unlawful today, I would just note here, there is no way she could be considered as a nominee for the U.S.

Supreme Court. I mean, if you didn't see over the weekend, she testified in her post-hearing written questions for the record, quote, "I do not hold a position on whether individuals possess natural rights." It is unbelievable.

I mean, we can hardly imagine a more un-American position than denying the first self-evident truth of America listed in the Declaration, but I think she is the first SCOTUS nominee to openly hold such a position. I digress.

Okay. Mr. Turley, as I noted earlier, during Special Counsel Robert Mueller's probe, there were at least five indictments of conservatives under FARA, and that represents nearly as many FARA prosecutions in just 18 months as there were in the previous 40 years combined. It would seem these alleged FARA violations were used as either a pretext to investigate those with ties to President Trump or that FARA charges were used to pressure conservative aides in a bid to find a connection between the Trump campaign and Russia. So, no improper connection on the President's part was ever found, obviously, and now, everybody knows that was all just a complete sham.

Here is the question: Based on your research into the issue, and your understanding of the history of FARA, is it fair to say that the law became a highly weaponized tool of the DOJ and FBI against the Trump campaign?

Mr. TURLEY. Well, I do think that the Mueller investigation used FARA, as many prosecutors do, as a cudgel to go after some of these individuals. It is a very handy tool. It is sort of like 18 U.S.C. 1001. If you allege a false statement, you get into a warrant. You were able to do a search. You are able to secure information.

Particularly with FARA, the concern is that—at least with 18 U.S.C. 1001, you have to establish a false statement, and that was involved in the Michael Flynn case—with FARA, these terms are really difficult to track in terms of how they are being interpreted. The Department of Justice itself has withdrawn advisory opinions—well, at least one critical one—as to the definition of some of these terms.

So, suddenly, what was interesting about the Mueller investigation is that many of us were familiar with FARA, but, suddenly, all the lights went on. It seemed like we went from a dead stop to you could throw a stick and hit a FARA violation on every corner in the city.

What really should focus the attention of Congress is not necessarily a questioning of Mueller's investigation, but the consistency of the application of the law, and why, suddenly, we had this emphasis placed on the criminalization and the prosecution under FARA.

I have to say, that was quite a change from what preceded it. Before that happened, FARA was widely known in Washington as largely an administrative process, and the penalty was usually retroactive registration, like what happened with John Podesta.

Mr. JOHNSON of Louisiana. Right. Okay. So, let me get to Hunter Biden now. Have you had a chance to review the documents contained in that laptop, or at least the publicly available reports on those documents?

Mr. TURLEY. I have.

Mr. JOHNSON of Louisiana. As the statute currently stands, do you believe that Hunter Biden's activities on behalf of foreign interests, as evidenced by the documents on the laptop, required him to register under FARA?

Mr. TURLEY. What I think I feel comfortable in saying is I don't want to presuppose anyone's guilt.

Mr. JOHNSON of Louisiana. Sure.

Mr. TURLEY. I guess what I would feel comfortable in saying is that, with Paul Manafort, if you take a look at what he pled guilty to in 2018, there's obviously very strong similarities in the type of activities that were described in that indictment and what we are seeing in the laptop, including the acknowledgment of the possible necessity of registering under FARA. So, if you look at that indictment, that would be a strong basis.

If I were his counsel—quite frankly, I'm a criminal defense attorney—I think most people in my position would tell him that we need to be prepared for a charge here, if Manafort is the standard.

Mr. JOHNSON of Louisiana. The standard.

Mr. TURLEY. I have to say, all we have are these accounts. We don't know what was presented in the grand jury. My understanding is that Hunter Biden has given information to the U.S. Attorney. So, I don't think that we can say with any great certainty that these cases are identical or that a charge is forthcoming. What I am saying is that, if you use the Manafort indictment, this does not look good for Mr. Biden.

Mr. JOHNSON of Louisiana. We all look forward to reviewing that record.

I yield back. I am out of time.

Mr. COHEN. Thank you, Mr. Johnson.

First, I would like to have Mr. Hank Johnson take the chair temporarily. I have got some visitors.

I will recognize Mr. Nadler for five minutes.

Chair NADLER. Thank you, Mr. Chair.

Dr. Straus, in 1938, Congress chose to structure FARA as a transparency and disclosure regime. While clearly concerned about the influence of foreign propaganda at the time, was Congress also concerned about potentially curbing First Amendment protected activities?

Dr. STRAUS. Thank you, Congressman.

So, in my review of the record or my recollection of the record, it was something that was discussed, but I would have to get back to you as to exactly where the discussion came down on the lines in that original passage of the law for 1938. Certainly, based on my recollection of reading the congressional documents, it was something that was discussed during the hearings.

Chair NADLER. Thank you.

Mr. Hedtler-Gaudette—if I have pronounced your name correctly—in your testimony you highlight that FARA's registration exemption for individuals and organizations registered under the Lobbying Disclosure Act is particularly problematic from a public transparency perspective. Can you further explain why it is problematic and what action Congress should take to address it?

Mr. HEDTLER-GAUDETTE. Yes. Thank you. Thank you, Chair Nadler.

The Lobbying Disclosure Act is not a very strong transparency and disclosure framework for people who are engaged in lobbying activities. The Foreign Agents Registration Act is a much stronger mechanism in terms of the actual reporting it requires; what documents and materials that someone who registers has to provide; the timely manner in which they have to provide it.

So, my recommendation there is to close the loophole that allows people who should, otherwise, be registering as foreign agents—or we can call them something else, if we would like to, people lobbying on behalf of foreign interests—they should be lobbying under FARA because they are doing something that is distinctly different that we have a different interest in, and they should not be allowed to register under the less restrictive Lobbying Disclosure Act.

I think part of the problem there is we need additional sunlight and transparency around what could be potential undue foreign influence. Because, at the end of the day, we have to ensure that American policy is, first and foremost, being made on behalf of American people. That is the bedrock guiding principle here, the North Star, if you will, around why these are two separate categories of activities, two separate categories of individuals, and why they require two separate regulatory frameworks.

Chair NADLER. Thank you.

Mr. Robinson, in your testimony, you noted that the definition of “agent of a foreign principal” is overbroad, in particular, because of how it defines the agent-principal relationship. How does FARA’s definition depart from how this relationship is commonly understood in American law? Why is this problematic for the nonprofit sector?

Mr. ROBINSON. Thank you.

That’s right. So, the agency definition is very vague in the law. It is not just vague to us. The Justice Department has issued now over 50 advisory opinions on the agency definition. You must have a high-end law firm to go through to try to make sense of it.

One word that keeps on coming up in the FARA agency definition is if you act at the request, quote, “request” unquote, of a foreign principal, then you can be considered an agent of that foreign principal. Under normal “agency” definitions, it is at the direction and control with consent of both parties. That is what you would find in the restatement of “agency” in case law.

This creates a big problem. So, for example, I was requested today to come to Congress and appear and talk before you. No one thinks that I’m acting as your agent today, right? Or if I request a meeting with one of your staffers, they are not acting as my agent, right? You see this all the time in the nonprofit sector where, say, an organization that works in child trafficking, one of their partners abroad requests, right, that they may be hosting a meeting—

Chair NADLER. I hope you mean against child trafficking.

Mr. ROBINSON. What?

Chair NADLER. I hope you mean against child trafficking.

Mr. ROBINSON. Yes, against child trafficking. Yes. Thank you. For combating child trafficking.

That if they ask request to help set up a public meeting in the U.S. or to distribute some literature, they can be covered by the

act. This has just created a lot of confusion and uncertainty in the nonprofit community.

I don't think the Justice Department is trying to go after the Amnesty Internationals of the world, but the act, as it is written, can clearly capture some of the behavior that nonprofits frequently engage in.

Chair NADLER. Thank you very much. I yield back.

Mr. JOHNSON of Georgia. [Presiding.] Thank you.

The gentleman from Maryland, Mr. Raskin, is recognized for five minutes.

Mr. RASKIN. Mr. Chair, thank you very much.

Before I get into FARA, I think that fairness compels me to answer my friend, Mr. Johnson's, amazing drive-by slam on Judge Jackson for stating the obvious, that she will enforce the Constitution and the Bill of Rights as written, and not invent whatever rights she wants under the rubric of "natural rights" or "natural law"—two phrases which do not appear in our Constitution or in Federal law. Other than Justice Thomas, who ended up having to backtrack from this position, I am not aware of a single Supreme Court Justice who thinks that a judge's personal interpretation of "natural rights" or "natural law" should inform his or her interpretation of the Constitution of the United States.

It was, in fact, the great conservative hero, Robert Bork, who vehemently opposed this idea of even trying to import natural law or natural rights through 14th Amendment due process or through the Ninth Amendment.

So, I think Mr. Johnson may owe Judge Jackson an apology for what he has just said. We put Justices on the Supreme Court to enforce the Constitution of the United States and the laws of land, not their own airy notions of natural law or natural right. I would urge you to rethink that whole thing.

On FARA, I would like to come to Mr. Robinson. I want to go back to something you said about the potentially vast coverage of this statute. I have got a lot of constituents who are Ukrainian Americans. If they talk to Ukrainian family who urge them to come to Congress because of Putin's slaughter in their country, and to urge us in Congress to support the Ukrainian people with jets, for example, or anti-aircraft missiles, would they, arguably, be covered under FARA, such that they would have to register?

Mr. ROBINSON. Yes, I think this is the concern, that under both the language of the act and, also, recent interpretation by the Justice Department, because they have been interpreting that word "request" so broadly, that they are covered under the language of the act. That is just a serious problem.

It also came up, when former military personnel who served with folks in Afghanistan, when they were trying to flee the Taliban, were making similar kinds of requests to Congress. They could also easily get caught up in the language of FARA as well.

Mr. RASKIN. Well, as a nation of immigrants, where people do have family and friends all over the world, I think that is deeply problematic and a ludicrous implication of an existing Federal law.

On the other hand, would you agree that, if Vladimir Putin wants to employ people from his multimillion dollar internet research agency to work to pump his propaganda into the American

system, say, to promote his pro-Russian views, and pays people to do that, either working on internet messages or working on influencing TV celebrities like Tucker Carlson, that people who are directly on the payroll or receiving consultant money from a foreign government, people like that should have to register?

Mr. ROBINSON. Yes—no, so I think this is the question. The way that we have been advocating is to define “foreign principal” as foreign government or political party, or those operating on their behalf, and to redefine the “agency” definition to make it much more acting at the direction and control, so that type of situation. So, I think those are the types of situations where FARA could apply.

Mr. RASKIN. The reason the analogy I want to draw is to our campaign finance laws, where we don’t allow Vladimir Putin or President Xi, or Orban, or any of the authoritarians around the world, or any political parties or governments around the world, to put money into our political system period.

Mr. ROBINSON. Right.

Mr. RASKIN. They are banned. At the very least, if they are paying people to come and lobby here, or to disseminate propaganda, disinformation, in our society, we should know about it. That should be exposed. Do you have any problem with that idea?

Mr. ROBINSON. Yes, I think that is right. I think the challenge on the propaganda side is, how do you distinguish kind of the BBCs of the world from the RT TVs of the world? Right now, FARA doesn’t do a good job of that, and I think that is—

Mr. RASKIN. Yes, but why do you need to distinguish it? If BBC is actually paying people to work as reporters here, that should be disclosed. So, what is the problem with that?

Mr. ROBINSON. Right, and I think, right now, the FCC has just adopted regulations requiring that kind of disclosure. So, I think the question is, what tool should Congress be using for that disclosure?

Mr. JOHNSON of Georgia. The gentleman’s time has expired.

Mr. RASKIN. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. I will now go to the gentlewoman from North Carolina, Ms. Ross, for five minutes.

Ms. ROSS. Thank you very much, Mr. Chair, and thank you for being in the room to help out our Subcommittee.

I also want to thank all the panelists for joining us today.

The Foreign Agents Registration Act is an important tool used to combat foreign influence in the United States. The law promotes government transparency by requiring certain foreign agents of foreign principals who are engaged in political activities to publicly disclose their relationship with foreign principals. The law does not prohibit attempts by agents of a foreign principal to shape political discourse in the United States, but is intended to shed light on who is engaged in such efforts on behalf of foreign principals. By doing so, FARA promotes transparency in the policymaking process by allowing the public to consider the source and the allegiance of the messenger when evaluating the message.

This Committee has not held a hearing on FARA since 1991, when the world’s geopolitical and technological landscape was dramatically different than it is today. There is bipartisan interest in reforming the law to enhance its transparency mechanisms. It is

time that we consider new proposals to modify the law to strengthen its impact and ensure that it is serving its intended purpose.

My first question is for Mr. Hedtler-Gaudette. The effectiveness of FARA is, ultimately, premised on the notion that shedding light on the activities of certain agents of a foreign principal seeking to influence the United States will make the government more accountable to the American public. Based on your organization's research, are the registration statements, supplements, and informational materials filed with the Justice Department accurate, timely filed, and easily accessible to the public?

Mr. HEDTLER-GAUDETTE. Thank you, Congresswoman.

I think in response to your question, I think the short answer is, no, not really. The Department of Justice has come a long way in recent years, though.

As a quick anecdote, back when we published our report in 2014, a couple of our staff members, they spent just like about every day at the FARA unit, which, by the way, it was only open between 12:00 and 4:00 each day. They spent every day there trying to comb through a document that had been filed by a FARA registrant.

At the time—this was 2012; we are talking only 10 years ago, not that long ago—the FARA unit didn't even have a scanner. So, it could not make these things that had been filed with the FARA unit, they could not have them in electronic format, which I think just tells you about the lack of sort of emphasis and prioritization and lack of resources around enforcement.

Now, things have changed a little bit since then and they have gotten a little bit better. They are not yet where they need to be. I mentioned in my opening statement that we are 22 years into the 21st century, but the Department of Justice, at least in the FARA context, has not caught up, and not even come close to catching up. They need to standardize. They need to standardize, and then, they need to harmonize the way things are filed, the way things are posted, the way things are made available to people like me.

By the way, I'm blind, in case you all didn't know. So, I have to use a screen reader to read things on the computer. If you are simply scanning a physical document, all you are scanning is an image. A screen reader cannot read an image. So, what you have is you have a whole crop of people, blind folks and others, completely locked out of the process of being able to access these documents. That is just a small example of how the Department of Justice has not caught up to modern standards around this kind of thing. That hurts and undermines public accessibility broadly.

So, that is a long way of answering your question, Congresswoman, saying we are in need of a comprehensive overhaul and modernization effort at the Department of Justice when it comes to these documents and making them actually transparent and available to the public.

Ms. ROSS. Is there anything specific that Congress can do? Or do you think this is merely just oversight of what an administrative agency does?

Mr. HEDTLER-GAUDETTE. Yes, I think, unfortunately—and this is not specific to the Department of Justice; this is true across the Federal government in all agencies—without prodding and without being required to do so, they will not do things to make their infor-

mational materials more accessible, and they won't do it proactively.

So, I think Congress is in a position where you all have to force the issue in some way here. We have seen that it has taken this long to get to where we are, and where we are is not sufficient. Without congressional action, I fear we will still be waiting another 10 years for the Department of Justice to catch up to where it needs to be.

Mr. JOHNSON of Georgia. The gentlelady's time has expired.

Ms. ROSS. Thank you so much, and I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady.

I will now recognize myself for five minutes.

Thank you to the Witnesses for your appearance today.

Always great to see, Professor Turley. I will start with you with my questions.

Since we have been talking, or you guys have been talking, about the Hunter Biden laptop controversy, you did have an opportunity to read *The Washington Post* articles about the laptop, is that correct?

Mr. TURLEY. Yes, sir.

Mr. JOHNSON of Georgia. You would not disagree with me that *The Washington Post* article found that the verifiable emails on the hard drive were just a small fraction of the data on the hard drive, is that correct?

Mr. TURLEY. Yes, sir.

Mr. JOHNSON of Georgia. The vast majority of the data could not be verified that was on the hard drive, isn't that correct?

Mr. TURLEY. I'm not too sure if that is correct with regard to the grand jury.

Mr. JOHNSON of Georgia. Well, I will take judicial notice myself of the fact that it was a part of the story.

[Laughter.]

Sloppy handling of the hard drive was one of the reasons why they could not verify the vast majority of the data. They found, isn't it correct that they found that data was repeatedly accessed and copied by people other than Hunter Biden over a three-year period?

Mr. TURLEY. Yes, I'm not too sure if that's been clearly established. I think the—

Mr. JOHNSON of Georgia. Well, yes, that's what, again, the article reports. I don't think there is anything that would refute that at this time.

The bottom line, though, even in the 129,000 emails, or however many it was that could be verified as authentic on the Hunter Biden hard drive, not a scintilla of evidence of criminal wrongdoing has been talked about today by my friends on the other side of the aisle, isn't that correct?

Mr. TURLEY. I'm not too sure what has been discussed, but in terms of criminality—

Mr. JOHNSON of Georgia. Well, I—

Mr. TURLEY. —I think there are legitimate questions in the laptop.

Mr. JOHNSON of Georgia. So, the FBI has the laptop and is looking at those, including whether or not Hunter Biden should have registered as a foreign agent.

So, thank you, Professor Turley.

Mr. Robinson, FARA contains several exemptions to the registration for agents of a foreign principal engaged in certain activities which are specified under 22 U.S.C. 613, correct?

Mr. ROBINSON. That's correct.

Mr. JOHNSON of Georgia. What are some of the examples of these exempted activities?

Mr. ROBINSON. So, probably the most frequently cited exemption is for private and nonpolitical activities for bona fide trade or commerce. This is a really important exception, the commercial, because the act actually requires registration if you distribute anything of value in the United States on the behalf of a foreign principal. So, if there wasn't this exemption, it would stop almost all cross-border activity, commercial activity. There's not a similar exemption for nonprofits. So, there's a host of exemptions or a set of exemptions, but, unfortunately, they don't capture very common activity by both nonprofits and the public at large.

Mr. JOHNSON of Georgia. So, you believe that the exemptions are not adequate to address current realities?

Mr. ROBINSON. That's correct.

Mr. JOHNSON of Georgia. Have you seen any evidence that Hunter Biden unlawfully failed to register as a foreign agent in the laptop contents?

Mr. ROBINSON. I have not seen the laptop contents.

Mr. JOHNSON of Georgia. Just fishing, I guess.

[Laughter.]

Mr. JOHNSON of Louisiana. You're blessed.

Mr. JOHNSON of Georgia. Pardon me, I'm sorry.

How would you respond to those who may argue that the need to disclose foreign influence on U.S. policymaking outweighs the burdens to nonprofits that you have outlined here today?

Mr. ROBINSON. Well, I think you can have both, in the sense that the act needs to be better targeted, right? I don't think anyone is questioning that a lobbyist for the Saudi government or the Chinese government should need to register or have some sort of disclosure.

The problem is when it starts catching up congregants at churches who are printing out banners for March for Life rallies or for climate change rallies. That is the situation we are in right now.

So, the act needs to be much better targeted to develop the purpose.

Mr. JOHNSON of Georgia. Thank you.

Mr. HEDTLER-GAUDETTE, you stated in your written testimony that strengthening FARA helps to secure the rule of law. What do you mean by that?

Mr. HEDTLER-GAUDETTE. Thank you, Chair Johnson.

What I mean by that is, when we see so few FARA violations being—I don't want to say prosecuted because we have concerns about overuse of criminal prosecution—but, we see so few people who violate this law being held accountable in a meaningful way, what that does is it sends a message, and it not only sends a mes-

sage, but it actualizes the message that laws are not necessarily always laws and not everyone is held accountable to those laws in an evenhanded way. That fundamentally undermines the rule of law.

The rule of law is predicated on the idea that we are all subject to them, and we are all subject to them because, to use a term that is particularly applicable here, justice is supposed to be blind. If we are unevenly and selectively applying laws, including this law, then we are not delivering on the promise of the rule of law in a rule-of-law society.

Mr. JOHNSON of Georgia. Thank you. My time has expired.

We will now move to the gentlelady from Texas, Representative Jackson Lee, for five minutes.

Ms. JACKSON LEE. Mr. Chair, thank you.

To the Witnesses, I appreciate very much the testimony that you have given here today.

Let me thank and specifically pose questions to Professor Turley. First, I think we have been seeing each other any number of years, as you have come before this Committee, and your scholarship is well respected.

We have come to a point that is so different from when I came here—that the divide now is so intense, that we use laws to try to probe divisively. This seems to draw some moment of conclusion of the unity behind the fact that there is a purpose in trying to deal with the foreign agent's registration.

Can you go back again, just very briefly, to its origins of speech? Then, I would pose a question of, how do we protect against that now?

Second, my friends on the other side seem to be consumed with the son of the President. I would hope that you would respond that should not be the purpose of this legislation, to pull and condemn and indict individuals. That should not be the point of our reform because this is going to be a lasting legacy, if you will, of reform.

So, let me pose that question to you.

Mr. TURLEY. Thank you, Congresswoman. It's wonderful to see you again.

Yes, I believe that you framed the question exactly right in terms of the origins of FARA. It did begin as a tool to stigmatize speech that was deemed as un-American. That is a legacy of this act that I hope Congress will not return to.

As has been already noted, there is a public interest in transparency, and it is hard to argue against that. It is also important to remember that, since 1938, we have a lot of new laws—not particularly new. We have a lot of laws since that time that force transparency. You don't need FARA to get transparency in higher education or in elections. You don't need it in most proceedings. For example, when I came here today, I was asked to identify any foreign interest that I might represent.

So, I think that this is a really important time to reevaluate what we are trying to achieve in FARA, and possibly sort of reframe it to achieve whatever those purposes are.

I certainly agree with you, Congresswoman, that we should not be viewing this as a weapon to use against political opponents. This is a very powerful law, and it can do great harm.

You only have to look at what Russia has done, and they point to us; they point to our law and say that they modeled their FARA on what we do. We have to be aware of that, that this is something that can be easily used for the worst purposes.

Ms. JACKSON LEE. I like that framework.

My time is running, but let me, Dylan, Mr. Hedtler-Gaudette, let me try to suggest that we are in different times. We have social media. We are sometimes getting such politicizing of propaganda with Russia.

Let me put on every record that I am before of my disdain for Vladimir Putin in terms of the murderous behavior and terrorist behavior that he is engaging in, and, of course, perpetrating lies about Ukraine and what is going on to the Russian people, and really around the world.

With social media joining in, in some instances, who happen to support that, do we need additional definitions—because this is such an ancient law, if you will—to update, because some of that behavior may be the behavior of a foreign agent that is trying to impact the people in the United States?

Mr. HEDTLER-GAUDETTE. Thank you, Congresswoman.

I think, yes, we do need to update that. As has been pointed out many times today, this law dates back to 1938 and hasn't been substantially reformed since 1995. A lot of things have changed since then, including, as you point out, the advent of social media.

I would also want to pause to flag that there has been an effort right here in the House of Representatives. There is a bipartisan bill by Representative Spanberger and Representative Katko that would do just this. It would try to contemplate social media content and try to construct the sort of framework around it that we need to reflect modern-day realities, including that it needs to be conspicuously labeled as being on behalf of a foreign agent, if it is, in fact, that.

I think you are absolutely correct that we do need to update, yes, the Foreign Agents Registration Act framework around what kind of content is an informational material and if it should be reported and labeled as such.

Ms. JACKSON LEE. If anyone quickly wants to answer?

I note the gentleman's indulgence. He has just gaveled me.

I would like others to provide answers in writing. I appreciate that very much if they cannot provide it at this time.

I thank you, Mr. Chair, and I do yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady.

This concludes today's hearing. I want to thank all the Witnesses for appearing today.

Without objection, all Members will have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 11:30 a.m., the Subcommittee was adjourned.]

## **APPENDIX**

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April 4, 2022

The Honorable Steve Cohen  
Chair  
Committee on the Judiciary  
Subcommittee on the Constitution, Civil  
Rights, and Civil Liberties  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Mike Johnson  
Ranking Member  
Committee on the Judiciary  
Subcommittee on the Constitution, Civil  
Rights, and Civil Liberties  
U.S. House of Representatives  
Washington, D.C. 20515

Re: Hearing on Enhancing the Foreign Agents Registration Act of 1938, April 5, 2022

Dear Chairman Cohen and Ranking Member Johnson:

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 direct members, and tens of thousands more affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

Though well-intentioned, the Foreign Agents Registration Act (FARA) is a broad and vague statute and any efforts should be focused on narrowing and clarifying its nebulous rules. NACDL believes that existing Department of Justice (DOJ) enforcement authority is sufficient to enforce the statute, as recent high-profile cases have shown, and that granting additional enforcement tools is neither warranted nor worth the risk of overreach.

The risk of overreach is not merely hypothetical. The regime's ambiguity, and the narrow interpretation of the exemptions, has led to unfortunate enforcement decisions that have placed burdens upon and threatened to chill the lawful and laudable activities of nonprofit organizations and think tanks. In one well-known case, a venerable and decades-old U.S.-based nonprofit was

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required to register under FARA after receiving a grant from a foreign government.<sup>1</sup> Such enforcement also seems to have little benefit for FARA's goal of educating the public about the political activities of certain actors.

### **FARA is Vague and Overbroad**

To begin, FARA's definition of who constitutes an "agent of a foreign principal" is both confusing and overbroad. FARA prohibits a "person" from acting as an "agent of a foreign principal" without first registering.<sup>2</sup> Under FARA, a "foreign principal" includes a foreign government or political party; any entity organized under the laws of a foreign country or having its principal place of business there; or any person outside the United States, unless they are a domiciled U.S. citizen.<sup>3</sup> Beyond that, the scope of covered activities under FARA's registration requirement is dangerously expansive. The statute contains no *de minimis* threshold—it can be triggered by even the slightest activity that meets any one of the statutory triggers. For instance, a single meeting with a U.S. official by an executive whose company is headquartered outside the United States, or by its U.S. subsidiary on behalf of the foreign parent, may trigger the requirement to register. This expansive definition means that a broad range of actors are subject to, and fall within the scope of, the definition of "foreign principal," including corporations, nonprofits, foundations, public-relations firms, tourism bureaus, economic-development organizations, and most persons based outside the United States.<sup>4</sup>

Moreover, the principal-agent relationship in FARA is much broader than how principal-agent relationships are defined under traditional principles of agency law, which adds another layer of confusion. For instance, under the Restatement (Third) of Agency, an agent and his or her principal must agree that the agent will act on behalf of, and be subject to the control of, the principal.<sup>5</sup> FARA's "agency" relationship, by contrast, is much wider and more ambiguous. An

<sup>1</sup> Axios, Nonprofits sound alarm on DOJ foreign agent rule (Feb. 20, 2022), <https://www.axios.com/the-foreign-agent-trap-04348a4a-b049-4741-a356-a4670a4f2eed.html>.

<sup>2</sup> 22 U.S.C. § 612(a) (2021).

<sup>3</sup> *Id.* § 611(b).

<sup>4</sup> For example, the mere act of hosting a conference, disseminating a policy report, requesting a meeting, or reaching out to opinion leaders on behalf of a foreign principal could presumably satisfy the "political activities" threshold.

<sup>5</sup> Restatement (Third) of Agency § 1.01 (Am. L. Inst. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall



“agent” is defined under the Act as “any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person [engages in covered activities in the Act].”<sup>6</sup>

While this definition may be sufficiently clear where it is consistent with traditional agency principles, it is significantly less clear at its margins. The statute differentiates between following a foreign principal’s “order” and following a foreign principal’s “request,” but the term “request” is not defined or otherwise explained. The U.S. Court of Appeals for the Second Circuit recognized this significant ambiguity and cautioned that “[t]he exact perimeters of a ‘request’ under the Act are difficult to locate, falling somewhere between a command and a plea,” but it “caution[ed] that this word is not to be understood in its most precatory sense. Such an interpretation would sweep within the statute’s scope many forms of conduct that Congress did not intend to regulate.”<sup>7</sup> The Second Circuit construed this word narrowly to avoid a situation where “[w]hen members of a large religious, racial, or ethnic group respond to pleas for contributions or generalized political support, they do not thereby become ‘agents’ under the Act. To so hold would make all Americans who sent money, food, and clothing to the Italian earthquake victims ‘agents’ of the Italian Government.”<sup>8</sup> Ultimately, the Department of Justice agreed with the Second Circuit that “request” “should be read to fall ‘somewhere between a command and a plea,’”<sup>9</sup> but there is no guidance or regulation that suggests where that line should be drawn. Without this guidance, there is insufficient notice to the public of precisely what separates innocent conduct from a potentially criminal failure to register under the Act.

Given that FARA places a regulatory burden, under pain of criminal penalty, on persons and groups exercising First Amendment-protected rights, it is understandable that the Act contains many exemptions: a legal exemption, a clerical exemption, a commercial exemption, and an exemption for religious, scholastic, scientific, or fine arts pursuits. But these exemptions do not

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act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

<sup>6</sup> 22 U.S.C. § 611(c)(1) (2021).

<sup>7</sup> *Att’y Gen. of United States v. Irish N. Aid. Comm.*, 668 F.2d 159, 161 (2d Cir. 1982).

<sup>8</sup> *Id.*

<sup>9</sup> Dept. of Justice, *The Scope of Agency under FARA*, at 3 (2020), <https://www.justice.gov/nsd-fara/page/file/1279836/download>.



apply if the speaker is engaged in “political activity” under the Act,<sup>10</sup> an odd exemption to the exemption given that much religious, scholastic, scientific, and artistic work is at least somewhat political in nature or at least cannot be separated from its political meaning and context. To avoid imposing potential criminal liability on these constitutionally protected activities, Congress should consider carving out a larger exemption and creating a *de minimis* threshold for criminal enforcement.

#### Existing Tools Are Sufficient to Enforce FARA

NACDL does not see efforts to enhance government authority to pursue FARA cases as warranted or necessary. It has been widely observed that enforcement of FARA has been extremely sparse until recently.<sup>11</sup> From the 1966 amendments to FARA until 2015, DOJ brought only seven criminal FARA cases.<sup>12</sup> Historically, if a failure to register was discovered, the consequence was minor; DOJ’s FARA Unit would simply send a letter of inquiry and then permit a late registration.<sup>13</sup>

Nevertheless, there is no evidence, nor has it seriously been argued, that DOJ’s relative lack of FARA enforcement for decades was caused by a lack of enforcement authority. In fact, recent years have seen a relative flurry of FARA enforcement, spurred on by both a DOJ Office of Inspector General report criticizing past lax enforcement and by the Special Counsel Investigation led by Robert Mueller which saw a number of high profile FARA convictions<sup>14</sup> as well as

<sup>10</sup> 28 C.F.R. § 5.304(d).

<sup>11</sup> Hearing on “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) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary) (“Ultimately, it appears that the Justice Department and FBI have been seriously lax in enforcing FARA for a long time.”). <https://www.judiciary.senate.gov/grassley-statement-at-hearing-on-enforcement-of-the-foreign-agents-registration-act>.

<sup>12</sup> Dept. of Justice, *Audit of the National Security Division’s Enforcement of the Foreign Agent’s Registration Act*, at 8 (Sept. 2016), <https://oig.justice.gov/reports/2016/a1624.pdf> [hereinafter *OIG Audit*].

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

<sup>14</sup> E.g., Dept. of Justice, Recent FARA Cases, <https://www.justice.gov/nsd-fara/recent-cases> (accessed March 30, 2022).



investigations of prominent lobbyists.<sup>15</sup> The fact that convictions were secured in these cases is an indication that existing tools are sufficient for DOJ to enforce the Act.

Given that existing tools have been sufficient, and particularly in light of the fact that FARA imposes burdens on constitutionally protected activities and that enforcement of FARA may be seen as increasingly politicized in recent years, we urge this Committee to avoid granting additional enforcement powers to the Department. In particular, because FARA includes both civil and criminal enforcement mechanisms, NACDL urges this Committee to be wary of granting even new civil enforcement tools as those may also assist the Government in eventual criminal cases but without the due process rights and protections that criminal inquiries confer. Moreover, the DOJ's past "voluntary compliance approach"<sup>16</sup> has been largely successful in achieving the primary aim of FARA, namely, providing public awareness of the advocacy and lobbying activities of foreign agents.

Respectfully,

Martin Antonio Sabelli  
President  
National Association of Criminal Defense Lawyers

cc: Members of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties

<sup>15</sup> NBC News, Justice Department ends investigation of Tony Podesta, Vin Weber without charges (Sept. 24, 2019), <https://www.nbcnews.com/politics/justice-department/justice-department-ends-investigation-tony-podesta-vin-weber-without-charges-n1058306>.

<sup>16</sup> OIG Audit, at 10.