

“FOREIGN AGENTS” IN AN INTERCONNECTED WORLD:  
FARA AND THE WEAPONIZATION OF TRANSPARENCY

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*The Foreign Agents Registration Act (FARA) is a sweeping and generally underenforced public disclosure statute. Enacted in 1938, FARA was used during World War II to target Fascist propaganda, but by the 1960s its enforcement had shifted to lobbyists and public relations’ firms for foreign governments. After the 2016 Presidential election, FARA has gained favor among policymakers and prosecutors as a central tool to respond to a range of foreign influence in U.S. politics, including foreign lobbying, electioneering, and disinformation.*

*This article argues that FARA’s breadth creates substantial risk that it will be used in a politicized manner. In the past decade, analogous transparency laws in other countries—often justified on FARA—have been weaponized to target dissenting voices with the stigma and burden of registering as a “foreign agent”. This article undertakes an analysis of FARA to show how its broad and unclear provisions make FARA susceptible to being similarly used in the United States, especially against nonprofits, the media, and public officials. It examines three cases in which FARA was arguably enforced in a politicized manner, explains why strengthening the Act’s enforcement would likely exacerbate this problem, and discusses the Act’s potential constitutional deficiencies under the Supreme Court’s recent First Amendment jurisprudence.*

*The article ends by weighing the merits of using FARA to address different types of foreign influence. It posits that transparency provisions like those in FARA are most appropriate, and on strongest ground, when applied to (1) those who clearly are acting at the direction or control of a foreign government or political party; and (2) when the covered activity involves core democratic processes, such as lobbying or electioneering. It warns that using FARA to target disinformation is generally unlikely to be effective and presents a high risk of politicized abuse. Based on these insights, it suggests three potential strategies for FARA reform.*

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INTRODUCTION.....	2
I. FARA’S GLOBAL INFLUENCE .....	8
A. <i>Russia and Hungary</i> .....	10
B. <i>Israel and Australia</i> .....	12
C. <i>The Weaponization of Transparency</i> .....	14
II. FARA’S BREADTH AND VAGUENESS .....	15
A. <i>Foreign Principal</i> .....	20
B. <i>Covered Activities</i> .....	20
C. <i>Principal-Agent Relationship</i> .....	22
1. “Request” .....	23
2. “Subsidized in whole or in major part” .....	24
D. <i>Exemptions</i> .....	25
1. Diplomatic or national security and commercial .....	26
2. Religious, academic, fine arts, or humanitarian .....	27
3. Lobbyists and lawyers.....	28
4. “Other activities not serving predominantly a foreign interest” .....	29
5. Bona fide domestic media .....	31
E. <i>Registration and Reporting Requirements</i> .....	32
F. <i>Actors Particularly Vulnerable to Politicized Enforcement</i> .....	33
1. Nonprofits .....	34
2. Media.....	35
3. Public Officials.....	37
III. THE POLITICIZED ENFORCEMENT OF FARA.....	38
A. <i>W.E.B. Du Bois and the Peace Information Center</i> .....	39
B. <i>House Committee Investigation of Environmental Nonprofits</i> .....	42
C. <i>RT TV America and Foreign Media</i> .....	44
D. <i>A Shifting Enforcement Landscape</i> .....	49
IV. FARA’S POTENTIAL CONSTITUTIONAL DEFECTS .....	51
V. BETTER TARGETING FARA.....	55
A. <i>Clarifying FARA’s Purpose</i> .....	55
1. Foreign Lobbying.....	55
2. Foreign Electioneering .....	57
3. Foreign Disinformation.....	60
B. <i>Reform Strategies</i> .....	66
CONCLUSION.....	68

## INTRODUCTION

The Foreign Agents Registration Act (FARA) is a public disclosure

statute enacted in 1938 to combat foreign propaganda.<sup>1</sup> It has a remarkably sweeping ambit, but until recently has existed in relative obscurity. One can easily make one's way through law school without its mention and there is relatively little academic scholarship on the Act itself.<sup>2</sup> There are perennial complaints by Members of Congress, transparency groups, and others about FARA's underenforcement.<sup>3</sup> Yet, there is also longstanding confusion about what is actually covered by the Act, or even its purpose. Today, many view FARA as primarily a tool to provide transparency for lobbyists of foreign governments,<sup>4</sup> while others continue to view it as a way to undermine propaganda or disinformation,<sup>5</sup> and still others see it as a way to combat foreign interference in U.S. elections.<sup>6</sup> As one member of Congress noted in a failed effort to reform the Act in the early 1990s, "FARA is either widely misunderstood, ignored, poorly written, not enforced, or all of the above."<sup>7</sup>

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<sup>1</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT (2016) [hereinafter IG FARA REPORT] ("From its passage in 1938 until amendments made in 1966, FARA primarily focused on propagandists." *Id.* at 2.)

<sup>2</sup> Legal scholarship on FARA is generally dated and has frequently been driven by student notes. *See, e.g.*, Jahad Atieh, *Foreign Agents: Updating FARA to Protect American Democracy* 31(4) U PEN INT'L L. REV. 1051 (2010) (student note arguing for increasing disclosure requirements of lobbying activities under FARA); Charles Lawson, *Shining the 'Spotlight of Pitiless Publicity' on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151 (1996) (student note on changes made to FARA in 1995 amendments); Michael Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Influence to the Highest Bidder*, 78 KENTUCKY L. J. (1990) (a proposal to reform FARA to better address lobbying by former public officials); Ava Marion Plakins, *Heat Not Light: The Foreign Agents Registration Act After Meese v. Keene*, 11(1) FORDHAM INT'L L. J. 184 (1987) (student note on FARA's legislative history and calling for the end of labeling covered material "political propaganda").

<sup>3</sup> *See, e.g.*, Lydia Dennett, *The 'foreign agents' law Paul Manafort is charged with breaking is wildly underenforced*, VOX, Nov. 3, 2017, <https://www.vox.com/the-big-idea/2017/11/3/16596484/fara-foreign-agents-registration-manafort-enforcement-scandal> (advocate from Project on Government Oversight calling for strengthened enforcement of FARA and noting both longstanding underenforcement of FARA and complaints about it).

<sup>4</sup> U.S. Department of Justice, *2062 Foreign Agents Registration Act Enforcement in CRIMINAL RESOURCE MANUAL*, available at <https://www.justice.gov/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement> [hereinafter DoJ FARA enforcement strategy] (noting that in 1966 FARA was "amended to focus on the integrity of the United States Government decision-making process" after the excesses of lobbyists attempting to secure sugar quotas for foreign interests). *See also* Part IV(C)(1).

<sup>5</sup> *See generally* Part IV(C)(3).

<sup>6</sup> *See generally* Part IV(C)(2).

<sup>7</sup> *Modification of the Foreign Agents Registration Act of 1938, Hearing on H.R. 1725, H.R. 1381, and H.R. 806 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 102<sup>nd</sup> Cong. 28 (1991) (statement of Representative Glickman).

Recent concern about foreign influence in U.S. democracy has thrust FARA into the spotlight of national politics. Special Counsel Robert Mueller, who is investigating Russian interference in the 2016 U.S. Presidential election, brought multiple charges, including failure to register under FARA, against Paul Manafort,<sup>8</sup> Richard Gates,<sup>9</sup> and members of Russia’s Internet Research Agency.<sup>10</sup> At the request of the Justice Department, in November 2017, *RT TV America* and *Sputnik*, the U.S. arms of Russian media, registered as “foreign agents” under the Act.<sup>11</sup> Members of Congress have written to the Justice Department asking them to also investigate whether Chinese media organizations,<sup>12</sup> *Al Jazeera*,<sup>13</sup> and former Secretary of State John Kerry (for meeting an Iranian delegation)<sup>14</sup> should have to register as well. After this Congressional prodding, in September 2018, the Justice Department asked two Chinese media organizations, *Xinhua News Agency* and *China Global Television Network*, to register.<sup>15</sup>

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<sup>8</sup> Paul Manafort was the Chairman of Donald Trump’s Presidential election campaign from June to August of 2016. Indictment in United States of America v. Paul J. Manafort Jr. and Richard W. Gates III, U.S. District Court of District of Columbia, Oct. 30<sup>th</sup>, 2017, at 27 available at <https://www.justice.gov/file/1007271/download>

<sup>9</sup> Richard Gates was a business associate of Paul Manafort and his deputy when Manafort was Chairman of Trump’s Presidential election campaign. *Id.* In January 2019, Skadden, Arps, Slate, Meagher, & Flom LLP settled with the Justice Department for \$4.6 million for failure to register under FARA for work they did for Paul Manafort in relation to Ukraine. The Podesta group and Mercury Public Affairs are also being investigated for failing register under FARA. Kenneth P. Vogel and Matthew Goldstein, *Law Firm to Pay \$4.6 Million in Case Tied to Manafort and Ukraine*, NY TIMES, Jan. 17, 2019, <https://www.nytimes.com/2019/01/17/us/politics/skadden-arps-ukraine-lobbying-settlement.html>

<sup>10</sup> Indictment in United States of America v. Internet Research Agency and others, U.S. District Court of District of Columbia, Feb. 16<sup>th</sup>, 2018, at 19-20, available at <https://www.justice.gov/file/1035477/download> [hereinafter IRA Indictment]

<sup>11</sup> Megan R. Wilson, *Russian news outlet Sputnik registers with DOJ as foreign agent*, THE HILL, Nov. 11, 2017, <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>

<sup>12</sup> Letter from Senator Patrick Leahy et al. to Attorney General Jeff Sessions, Jan. 16, 2018, available at [https://www.rubio.senate.gov/public/\\_cache/files/eccdcf1b-82d0-47f3-90a4-3d01635d1255/B457BF238E2795509242A4E24CDB54CF.011618-pjl-letter-to-doj.pdf](https://www.rubio.senate.gov/public/_cache/files/eccdcf1b-82d0-47f3-90a4-3d01635d1255/B457BF238E2795509242A4E24CDB54CF.011618-pjl-letter-to-doj.pdf)

<sup>13</sup> Letter from Representative Josh Gottheimer et al. to Attorney General Jeff Sessions, March 6, 2018, available at [https://zeldin.house.gov/sites/zeldin.house.gov/files/3.6\\_zeldin\\_gottheimer\\_cruz\\_letter\\_pdf.pdf](https://zeldin.house.gov/sites/zeldin.house.gov/files/3.6_zeldin_gottheimer_cruz_letter_pdf.pdf) [hereinafter Congressional letter to Al Jazeera].

<sup>14</sup> Letter from Senator Marco Rubio to Attorney General Jeff Sessions, Sept. 18, 2018, available at [https://www.rubio.senate.gov/public/\\_cache/files/0327b105-5a76-474d-9a62-f89764b149d6/98C4654552603811A4B6CE945ADF255F.9-18-18-letter-to-attorney-general-jeff-session-on-former-secstate-kerry....pdf](https://www.rubio.senate.gov/public/_cache/files/0327b105-5a76-474d-9a62-f89764b149d6/98C4654552603811A4B6CE945ADF255F.9-18-18-letter-to-attorney-general-jeff-session-on-former-secstate-kerry....pdf) [hereinafter Rubio Letter]

<sup>15</sup> Kate O’Keeffe & Aruna Viswanatha, *Justice Department Has Ordered Key Chinese Media Firms to Register as Foreign Agents*, WALL ST. J., Sept. 18, 2018,

Members of Congress, from both major political parties, have proposed strengthening enforcement and/or broadening the reach of FARA. In fact, in the 115<sup>th</sup> Congress (2017-2018) over a dozen FARA-related bills were introduced, with provisions ranging from strengthening the Justice Department’s power to investigate violations of the Act to narrowing the Act’s “academic exemption” so FARA would better capture perceived foreign influence at U.S. universities.<sup>16</sup>

While FARA has become one of the most prominent and central responses of policymakers to address a range of forms of foreign influence in U.S. politics, given historical confusion over the Act it is worth asking how it actually operates. Perhaps most simply stated, FARA is a transparency statute that requires “agents” of foreign principals engaged in covered activities to register with the Justice Department as “foreign agents” and comply with extensive reporting requirements, including making a “conspicuous statement” on informational materials that they are acting on behalf of a foreign principal.<sup>17</sup> Violations of the Act can result in fines or up to five years in jail.<sup>18</sup>

If read on its face, FARA is startlingly broad. The Act applies equally to “agents” of a foreign government, like Saudi Arabia, or a foreign person or entity, such as a Japanese company like Toyota, a nonprofit based abroad like Amnesty International, or a foreign-based media organization like the *Guardian*.<sup>19</sup> Covered activity under the Act includes attempts to influence U.S. public opinion on any foreign or domestic policy issue,<sup>20</sup> soliciting or disbursing anything of value,<sup>21</sup> or disseminating oral, visual, or written information of any kind for or in the interest of a foreign principal.<sup>22</sup> Unlike a traditional principal-agent relationship, an agency relationship under the Act does not require “direction” or “control” by the principal over the agent, or even the consent of either party. Instead, it can be created if someone in

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<https://www.wsj.com/articles/justice-department-has-ordered-key-chinese-state-media-firms-to-register-as-foreign-agents-1537296756>

<sup>16</sup> For a list of FARA-related bills introduced in the 115<sup>th</sup> Congress, see, ICNL, Foreign Agents Registration Act, <http://www.icnl.org/programs/US%20Programs/FARA%20home.html>. (For example, H.R. 5336 would limit the exemption for academic activity while H.R. 4170 would provide the Justice Department with civil demand authority to investigate FARA violations).

<sup>17</sup> 22 U.S.C. § 612(a) (requiring those covered under the Act to register as “an agent of a foreign principal”); 22 U.S.C. § 614(b) (detailing FARA’s labeling requirements); *See also* Part II(E).

<sup>18</sup> 22 U.S.C. § 618(a)(2).

<sup>19</sup> 22 U.S.C. § 611(a)(1); *See also* Part II(A).

<sup>20</sup> 22 U.S.C. § 611(c)(1)(i); *See also* Part II(B).

<sup>21</sup> 22 U.S.C. § 611(c)(1)(iii); *See also* Part II(B).

<sup>22</sup> 22 U.S.C. § 611(c)(1)(ii); *See also* Part II(B).

the U.S. acts at the mere “request” of a foreign principal.<sup>23</sup> So, for example, if a nonprofit in Chicago sets up a public meeting at the “request” of a Canadian nonprofit partner to discuss the best way to fight the opioid epidemic, the Chicago nonprofit would arguably need to register as a “foreign agent”. This is because by setting up a public meeting the Chicago nonprofit is attempting to influence U.S. public opinion on a domestic policy issue at the “request” of a foreign principal (i.e. the Canadian nonprofit).

There are important exemptions to registering under the Act, such as for much commercial, religious, or academic activity.<sup>24</sup> However, these exemptions still leave a broad swath of behavior covered by FARA, particularly for nonprofits, media organizations, and public officials.<sup>25</sup>

FARA’s sweeping, and generally underenforced, provisions could be understood as a benefit—allowing the Act to lie dormant and then, when necessary, providing wide latitude for the Justice Department to go after perceived “nefarious” foreign influence.

This article though makes a different argument. It claims that FARA’s broad language makes it particularly susceptible to politicized enforcement. While ostensibly a transparency statute, FARA can be “weaponized”, using the stigmatizing, and frequently misleading or inaccurate, label of “foreign agent” and the burdens of registration to punish dissenting or controversial views.

To see the insidious and widespread damage “foreign agent” type laws can do, one only needs to look abroad. In the past decade, analogous legislation has been adopted in a number of countries, including Russia and Hungary, where they have often been used to stigmatize and marginalize civil society.<sup>26</sup> This has forced many nonprofits in these countries to either shut down or dramatically alter their operations.<sup>27</sup> In defending their legislation, governments in these countries have frequently pointed to FARA in the United States for justification and legitimacy.<sup>28</sup> While there are important differences between FARA and these other acts,<sup>29</sup> these examples from abroad are troubling. They both show how FARA has had an outsized negative influence on democracy elsewhere and serve as a warning for how FARA could be used to target dissent in the U.S. in the future.

Indeed, history indicates that when enforcement of FARA has been strengthened it has been used to target voices with views different than those

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<sup>23</sup> 22 U.S.C. § 611(c)(1); *See also* Part II(C).

<sup>24</sup> *See* Part II(D).

<sup>25</sup> *See* Part II(F).

<sup>26</sup> *See* Part I(A).

<sup>27</sup> *See* Part I(A).

<sup>28</sup> *See generally* Part I.

<sup>29</sup> *See* Part I.

in power. For example, the noted early civil rights leader W.E.B. Du Bois was prosecuted for failing to register under FARA in 1951 for reprinting and circulating anti-nuclear literature and petitions that had originated from abroad and were viewed by some as undermining U.S. foreign policy.<sup>30</sup> More recently, in 2018, the Chairman of the House Natural Resources Committee investigated four prominent U.S. environmental groups, including the Natural Resources Defense Council (NRDC), as being potential “foreign agents” based on these organizations’ cross-borders connections and criticisms of U.S. environmental policy.<sup>31</sup> Meanwhile, the targeting of *RT TV America* and *Sputnik* under the Act by the Justice Department has raised questions why other media organizations also seemingly covered have not been asked to register.<sup>32</sup> It has also highlighted how registration under FARA can have secondary effects beyond transparency. *RT TV America*’s Capitol Hill press credentials were revoked after they registered and companies *Sputnik* did business with in the U.S. were asked to register under the Act as well, creating substantial barriers to even broadcast in the U.S.

FARA’s overbreadth not only can lead to politicized targeting, but also create confusion about who should register. This can chill transnational cooperation, as nonprofits, the media, and others avoid a broad range of relationships across borders that may make them vulnerable to potentially being tarred a “foreign agent”. FARA’s overbreadth arguably makes key provisions of the Act unconstitutional, particularly under the Supreme Court’s emerging First Amendment jurisprudence, casting even more uncertainty over FARA’s enforcement.

To address the negative consequences of the Act’s vague and sweeping provisions, this article argues that reforming FARA requires better defining what “foreign influence” the Act should target. Too often FARA is seen as a tool to combat, or make transparent, very different kinds of foreign influence, whether this is lobbying, electioneering activity, or disinformation. However, not all these different types of influence raise the same concerns, nor is the bluntness of FARA appropriate for or very effective at addressing them. At the same time, the Act treats a broad spectrum of foreign connections the same—for example, one is equally an “agent” under FARA if one is under contract with a foreign government or simply acting at the “request” of a small international nonprofit. In other words, the Act needs to be better tailored to specific types of “influence” and specific types of “foreign” connections.

To guide this reform, this article posits that FARA, and disclosure tools directed at foreign influence, are most appropriate, and on strongest ground,

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<sup>30</sup> See Part III(A).

<sup>31</sup> See generally Part III(B).

<sup>32</sup> See Part III(C).

when applied to (1) those who clearly are acting at the direction or control of a foreign government or political party; and (2) when the covered activity involves core democratic processes aimed at directly influencing government, such as lobbying or electioneering. It warns that using FARA to target disinformation is generally unlikely to be effective and presents substantial risk of its politicized abuse.

The article proceeds in five parts. Part I describes the spread of laws analogous to FARA in other countries that were justified, at least in part, on FARA, and how these supposed transparency measures can be weaponized to target civil society. Part II undertakes an analysis of the text of FARA to show how the Act’s broad and vague provisions can capture the activities of a broad set of nonprofits, media organizations, and public officials, creating confusion and a fertile environment for the politicized use of the Act. Part III uses three examples to show how FARA’s enforcement can become politicized: (1) the prosecution of W.E.B. Du Bois under FARA in the early 1950s; (2) the investigation of four prominent U.S. environmental organizations by the Chair of the House Natural Resources Committee in 2018; and (3) the Justice Department’s targeting of *RT TV America* under FARA in 2017. Part III ends by discussing why there is likely to be both continued efforts to increase enforcement of FARA and why such increased enforcement will likely lead to further politicization. Part IV explains how key provisions of FARA are so broad they arguably violate the First Amendment or are unconstitutionally vague. Part V turns to FARA reform, assessing the merits of using the Act to address foreign lobbying, electioneering activity, and disinformation, and suggesting three possible reform strategies.

### I. FARA’S GLOBAL INFLUENCE

According to Freedom House, over the past decade countries around the world, on average, have seen a decline in political and civil liberties.<sup>33</sup> This democratic downturn has also corresponded with increasing restrictions on civil society, including restrictive regulations on nonprofits.<sup>34</sup>

One of the most widespread types of restriction has been on foreign

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<sup>33</sup> From 2006 to 2018, the Freedom in the World survey has found more countries have seen declines in political and civil liberties than gains. FREEDOM HOUSE, FREEDOM IN THE WORLD: DEMOCRACY IN CRISIS 1 (2018), available at <https://freedomhouse.org/report/freedom-world/freedom-world-2018>

<sup>34</sup> Michael Schuman, *An Increasingly Uncivil World*, US NEWS, July 31, 2017, <https://www.usnews.com/news/best-countries/articles/2017-07-31/growing-number-of-countries-are-clamping-down-on-civil-society-groups> (discussing the rise in laws and regulations of nonprofits globally).



funding of nonprofits.<sup>35</sup> Governments have repeatedly used such restrictions on foreign funding as a tool to control, delegitimize, or undercut nonprofits.<sup>36</sup> These attacks by governments often paint nonprofits as elite actors who are accountable to foreign over domestic constituencies.<sup>37</sup>

Doug Rutzen documents at least ten different types of mechanisms governments have used to control foreign funding.<sup>38</sup> These include requiring prior government approval for an organization to receive international funding (such as in India), caps on international funding (such as in Ethiopia), or burdensome reporting requirements (like in Turkey).<sup>39</sup>

One of the most prominent mechanisms used though has been “foreign agent” type laws. These laws do not generally limit an organization from receiving foreign funding per se, but rather requires an organization that receives such funding to register as a “foreign agent” or under another label, and meet significant reporting or disclosure requirements.

Several of these “foreign agent” laws in other countries have been justified in part by citing to FARA for precedent, perhaps for the legitimacy that emulation of the law in the world’s hegemonic democracy can bring.<sup>40</sup> While in the 1990s and 2000s, the U.S. was well known for exporting the Freedom of Information Act to other countries, leading to many countries adopting similar type laws,<sup>41</sup> more recently the U.S. has inadvertently—and sometimes purposefully—exported FARA.<sup>42</sup>

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<sup>35</sup> Lloyd Hitoshi Mayer, *Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs*, 102 MINN. L. REV. 1205 (2018) (detailing how over 50 countries have increased restrictions on domestic non-government organizations receiving funding from outside their home country); Doug Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, 17(1) INT’L J. OF NOT-FOR-PROFIT LAW 1, 5-16 (2015) (describing rise of restrictions on foreign funding of non-profits globally).

<sup>36</sup> *Id.* at 8-9 (describing how “foreign agent” laws in the former Soviet Union have been used to stigmatize non-profits).

<sup>37</sup> Saskia Brechenmacher and Thomas Carothers, *Examining Civil Society Legitimacy*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, May 2, 2018, <http://carnegieendowment.org/2018/05/02/examining-civil-society-legitimacy-pub-76211> (noting that “Attacks on civil society legitimacy are particularly appealing for populist leaders who draw on their nationalist, majoritarian, and anti-elite positioning to deride civil society groups as foreign, unrepresentative, and elitist.”)

<sup>38</sup> Rutzen, *supra* note 35 at 6-16.

<sup>39</sup> *Id.*

<sup>40</sup> See KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAW SPREAD ACROSS COUNTRIES* 14 (2013) (discussing different pathways documented in the literature by which foreign models influence domestic law, including via emulation of high status countries).

<sup>41</sup> David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. OF PENN. L. REV. 1097, 1106 (2017) (describing how FOIA “has become one of the United States’ leading legal exports abroad.” *Id.*)

<sup>42</sup> While the U.S. government did not actively export FARA to Russia or Hungary, it did

There are key differences between these “foreign agent” type laws in other countries (which are themselves varied) and FARA. FARA is in some ways broader. It is not targeted just at nonprofits, but instead any individual or entity engaged in covered activity. FARA is also not focused specifically on foreign funding (and as will be detailed more in Part II(C) it is unclear in what situations foreign funding may or may not trigger registration under FARA).<sup>43</sup> Importantly, the political context is significantly different between the United States and some of these other countries. In the United States, the enforcement of FARA has historically been much more limited than its text would allow and, in general, there is a supportive environment for civil society.<sup>44</sup>

This Part briefly examines the rise of analogous laws to FARA in other countries, focusing on the Russian and Hungarian laws as examples where they have been used to target nonprofits, and then the recent passage of similar laws in historical democracies, focusing on Israel and Australia. It then situates these “foreign agent” type laws as an example of a broader phenomenon in which transparency measures are being “weaponized” to target civil society.

#### A. Russia and Hungary

Russia and Hungary are prominent examples of how laws analogous to FARA have been used to restrict civil society. In Russia, the government passed a law in 2012 that required nonprofits that receive any foreign funding and engage in broadly defined “political activity” to register as “foreign agents.”<sup>45</sup> Failure to register can lead to fines, jail time, and other penalties.<sup>46</sup> In 2014, the law was amended to allow the Russian Justice Ministry to

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so to Australia. AUSTRALIAN PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY, ADVISORY REPORT ON THE FOREIGN INFLUENCE TRANSPARENCY SCHEME BILL 2017, 35 (June 2018), available at [http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024192/toc\\_pdf/AdvisoryReportontheForeignInfluenceTransparencySchemeBill2017.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024192/toc_pdf/AdvisoryReportontheForeignInfluenceTransparencySchemeBill2017.pdf;fileType=application%2Fpdf) (describing close consultations with the U.S. Justice Department in drafting the Australian bill).

<sup>43</sup> See Part II(B).

<sup>44</sup> NICK ROBINSON, LEGAL AND REGULATORY CHALLENGES FACING CIVIL SOCIETY CHALLENGES IN THE UNITED STATES 4 (2018), available at [http://www.icnl.org/programs/US%20Programs/Legal%20and%20Regulatory%20Change%20in%20U.S.%20\(2-20\).pdf](http://www.icnl.org/programs/US%20Programs/Legal%20and%20Regulatory%20Change%20in%20U.S.%20(2-20).pdf) (noting that the U.S. has vibrant civil society and a regulatory environment that has generally been open to international civil society organizations).

<sup>45</sup> AMNESTY INTERNATIONAL, AGENTS OF THE PEOPLE, FOUR YEARS OF ‘FOREIGN AGENTS’ LAW IN RUSSIA: CONSEQUENCES FOR SOCIETY 4 (2016), available at <https://www.amnesty.org/download/Documents/EUR4651472016ENGLISH.PDF>

<sup>46</sup> *Id.*

register groups without their consent.<sup>47</sup>

Registering as a “foreign agent” carries a stigmatizing label. In the Russian language “foreign agent” roughly translates to “spy”.<sup>48</sup> Human rights groups like Amnesty International and Human Rights Watch have detailed how many nonprofits have chosen to either shut down or stop receiving foreign funding, and so curtail their operations, instead of registering.<sup>49</sup> The Russian government has also prosecuted leaders of nonprofits, such as rights groups, for allegedly not complying with the “foreign agent” law.<sup>50</sup>

Notably, in responding to criticism of their law, Russia has repeatedly claimed that it is designed to achieve the same purposes of FARA.<sup>51</sup> Further, in 2017, after *RT TV America* and *Sputnik* were asked to register as “foreign agents” in the U.S. under FARA, the Russian government reciprocated by passing a law that allowed it to designate foreign funded media organizations in Russia as “foreign agents”.<sup>52</sup> Voice of America and Radio Free Europe, among others, have been so designated under the law (and in some cases fined for non-compliance).<sup>53</sup>

In Hungary, in 2017, Parliament passed a law entitled the “Law on the Transparency of Organizations Funded from Abroad” requiring organizations that receive over a certain threshold in foreign funding to register as “foreign supported” or face closure.<sup>54</sup> Hungary has responded to criticisms of its NGO law by the U.S. State Department by claiming it is similar to FARA and that the U.S. was applying a double standard.<sup>55</sup>

The Russian and Hungarian laws on foreign funding of nonprofits have

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<sup>47</sup> *Russia: Government versus Human Rights Groups*, Human Rights Watch, (June 18, 2018) <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle> [Hereinafter HRW].

<sup>48</sup> Michael Abromowitz and Nate Schenckan, *How Illiberal Leaders Attack Civil Society*, FOREIGN AFFAIRS, April 6, 2018.

<sup>49</sup> HRW *supra* note 47; AMNESTY INTERNATIONAL, *supra* note 45.

<sup>50</sup> HRW *supra* note 47.

<sup>51</sup> See, e.g., Charles Digges, *Russia to answer for its “foreign agent” law in European Court of Human Rights*, BELLONA, Oct. 5, 2017, <http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2017-10-russia-to-answer-for-its-foreign-agent-law-in-european-court-of-human-rights> (noting that FARA has been a favorite trope of the Russian Ministry of Justice in defending their law).

<sup>52</sup> *Russia declares 9 U.S. media outlets “foreign agents”*, BBC NEWS, Dec. 5, 2017, <https://www.bbc.com/news/world-europe-42234582>

<sup>53</sup> Max Greenwood, *Russian court fines U.S.-funded outlets for violating foreign agents law*, THE HILL, July 5, 2018, <http://thehill.com/homenews/media/395655-russia-court-fines-us-funded-outlets-for-violating-foreign-agents-laws>

<sup>54</sup> Yasmeen Serhan, *Hungary Anti-Foreign NGO Law*, THE ATLANTIC, June 13, 2017, <https://www.theatlantic.com/news/archive/2017/06/hungarys-anti-foreign-ngo-law/530121/>

<sup>55</sup> Pablo Gorondi, *Hungary Rejects US Criticism of Law on Foreign Funded NGOs*, US NEWS, June 20, 2017.

been found to violate both international and European law.<sup>56</sup> The Venice Commission, for instance, found the 2012 Russian NGO statute violated the freedom to association because labeling organizations “foreign agents” that received foreign funding stirred “suspicion and distrust” of these organizations that chilled their activity and was not necessary in a democracy to assure financial transparency.<sup>57</sup> Similarly, in June 2017, the Venice Commission found that Hungary’s draft law on foreign funding raised questions about whether it violated Article 14 of the ECHR because of the “virulent campaign” by some public officials to portray organizations that receive foreign funding “as against the interests of society.”<sup>58</sup> In December 2017, after the law had been enacted, the European Commission referred the Hungarian law to the European Court of Justice because it claimed it disproportionately restricts foreign funding sources by placing administrative burdens on the recipient that are also likely to have a stigmatizing effect.<sup>59</sup>

### B. Israel and Australia

“Foreign agent” type laws have also spread to historical democracies like Israel and Australia. In 2016, Israel enacted legislation that required groups that received more than half their funding from foreign governments to report that in their communications with the public.<sup>60</sup> According to Israel’s Justice Ministry at the time, the law would apply to 25 groups—most of them human rights organizations, organizations run by Palestinian citizens of Israel, or research and advocacy groups associated with the political opposition.<sup>61</sup> In

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<sup>56</sup> The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has noted that stigmatizing or delegitimizing work of foreign funded CSOs by requiring them to be labeled as “foreign agents” or another pejorative term is “problematic” under international law. REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION, 7 UN Doc A/HRC/23/39 (April 2013).

<sup>57</sup> Venice Commission, Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations (“Law of Foreign Agents”) on Federal Laws N. 18-FZ and N. 147-FZ and On Federal Law N. 190-FZ on Making Amendments to the Criminal Cod (“Law of Treason”) of the Russian Federation 14 (June 13-14 2014), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2014\)025-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2014)025-e)

<sup>58</sup> Venice Commission, Preliminary Opinion on the Draft Law on the Transparency of Organizations Receiving Support from Abroad 16 (June 2, 2017), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2017\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)002-e).

<sup>59</sup> European Commission, *European Commission refers Hungary to the Court of Justice for its NGO Law*, Dec. 7, 2017, [http://europa.eu/rapid/press-release\\_IP-17-5003\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5003_en.htm)

<sup>60</sup> Peter Beaumont, *Israel passes law to force NGOs to reveal foreign funding*, THE GUARDIAN, July 12, 2016, <https://www.theguardian.com/world/2016/jul/12/israel-passes-law-to-force-ngos-to-reveal-foreign-funding>

<sup>61</sup> Human Rights Watch, *Israel: Law Targets Human Rights Groups*, July 13, 2016, <https://www.hrw.org/news/2016/07/13/israel-law-targets-human-rights-groups>

discussing an earlier version of the bill, Foreign Minister Avigdor Lieberman argued that the bill was a “direct translation” from English of FARA.<sup>62</sup> Although this characterization is misleading the Israeli law was clearly in part inspired and justified by FARA.<sup>63</sup>

In 2018, Australia enacted the Foreign Influence Transparency Scheme Act.<sup>64</sup> The Australian government consulted heavily with the U.S. Department of Justice when drafting the bill<sup>65</sup> and the Australian Prime Minister referred to the bill an “improved version” of FARA.<sup>66</sup> In its advisory report in June 2018, the Parliamentary Joint Committee on Intelligence and Security frequently made provision-by-provision comparisons of the bill to FARA.<sup>67</sup> Like FARA, the Foreign Influence Transparency Scheme Act requires not just nonprofits, but a broad set of actors to potentially register under the law if they are engaged in covered activities.<sup>68</sup>

A wide cross-section of Australian non-profits, universities, and the bar saw the bill as a direct threat to civil society and came out strongly against the legislation, fearing it would limit civil society’s ability to engage across borders and significantly chill free speech in the country.<sup>69</sup> As a result of this and other criticism, the initial bill was ultimately significantly amended,

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<sup>62</sup> Association of Civil Rights in Israel, *ACRI to Foreign Minister: Description of Foreign Funding Bill Is Misleading*, Nov. 27, 2011 <http://www.acri.org.il/en/2011/11/27/acri-to-foreign-minister-description-of-foreign-funding-bill-is-misleading/>

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

<sup>64</sup> The Parliament of Australia, Foreign Influence Transparency Scheme Act 2018, available at <https://www.legislation.gov.au/Details/C2018A00063> [hereinafter Foreign Influence Transparency Scheme Act].

<sup>65</sup> AUSTRALIAN PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY, *supra* note 42 at 35 (describing close consultations with the U.S. Justice Department in drafting the Australian bill).

<sup>66</sup> Cat Barker, Deirdrfoe McKeown, & Jaan Murphy, *Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017*, PARLIAMENTARY LIBRARY BILLS DIGEST 9 (March 16, 2018), available at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1718a/18bd087#fn15](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1718a/18bd087#fn15)

<sup>67</sup> AUSTRALIAN PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY, *supra* note 42 at 39-40 (noting that the report makes provision by provision comparisons throughout to FARA).

<sup>68</sup> Foreign Influence Transparency Scheme Act, *supra* note 64 at Part 1.3 (explaining the bill required anyone engaged in covered activities to register).

<sup>69</sup> Paul Karp, *Fear “rushed” foreign influence bill will harm freedom of speech*, THE GUARDIAN, Jan. 22, 2018, <https://www.theguardian.com/australia-news/2018/jan/23/fear-rushed-foreign-influence-bill-will-harm-freedom-of-speech> (noting opposition of Australian universities and legal groups to draft foreign transparency bill); Wendy Williams, *How do Australia’s Foreign Interference Laws Compare to Draconian States?*, PRO BONO AUSTRALIA, March 29, 2018, <https://probonoaustralia.com.au/news/2018/03/australias-foreign-interference-laws-compare-draconian-states/> (describing opposition to foreign transparency bill from coalition of nonprofits called Hands Off Our Charities).

including adding an exemption for many activities of nonprofits and substantially narrowing who is a “foreign principal”.<sup>70</sup>

### C. *The Weaponization of Transparency*

Governments frequently invoke the need for transparency and accountability when passing “foreign agent” type laws. For example, both Hungary and Australia’s laws have “transparency” in their title, Prime Minister Netanyahu justified Israel’s “foreign agent” law because it will “increase transparency” and “strengthen democracy”,<sup>71</sup> and advocates for Russia’s 2012 “foreign agent” law justified it to the public by claiming “you have a right to know who is influencing your opinion.”<sup>72</sup> On its surface, such transparency arguments have logic, but as the examples in this Part demonstrate, particularly from Russia and Hungary, transparency measures can be weaponized against civil society—in other words, burdensome disclosure requirements and stigmatizing labels can be used to target dissent.

While transparency measures are frequently vital to good government, their use is ultimately a political tool that can empower certain actors over others. For example, there is a growing recognition in the literature that statutes aimed at creating more transparency in government can sometimes disproportionately assist those with more resources, like corporations, to undermine the functioning of government to their advantage.<sup>73</sup> Or transparency tools may inadvertently, but unfairly, cast more scrutiny, and derision, on civilian government than national security agencies or the military (which often do not face the same transparency requirements), empowering the latter in relation to the former.<sup>74</sup>

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<sup>70</sup> Foreign Influence Transparency Scheme Act, *supra* note 64 at Part 1.10 (limiting foreign principals to a foreign government, foreign government related entity, foreign political organization, or foreign government related individual); *Id* at Part 2. 29c (creating a limited exemption for charities).

<sup>71</sup> Beaumont, *supra* note 60.

<sup>72</sup> Miriam Elder, *Russia Plans to Register “Foreign Agent” NGOs*, GUARDIAN, July 2, 2012, <https://www.theguardian.com/world/2012/jul/02/russia-register-for-foreign-agent-ngos>

<sup>73</sup> David Pozen, *Transparency’s Ideological Drift*, 128 YALE L. J. 100 (2018) (describing how transparency has shifted to being seen as tool to make government smaller and less egregious, in part through corporate capture of freedom of information laws).

<sup>74</sup> David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. OF PENN. L. REV. 1097 (2017) (arguing that the Freedom of Information Act has contributed to a culture of derision surrounding domestic policy bureaucracy while insulating national security agencies and corporations from similar scrutiny). *See also* Nick Robinson and Nawreen Sattar, *When Corruption is an “Emergency”*: *Good Governance Coups in Bangladesh*, 35 FORDHAM INT’L LAW J. 737 (2012) (describing how anti-corruption campaigns directed at civilian government can inadvertently empower militaries in countries with histories of military coups such as Bangladesh, Pakistan, and Thailand).

These concerns about inadvertently empowering certain actors are particularly acute when transparency measures are not targeted at government, but civil society.<sup>75</sup> For example, in India legislation was passed in 2013 that requires those managing certain nonprofit organizations disclose their personal assets.<sup>76</sup> In Ukraine, a similar measure was passed in 2017 that requires not just management of certain nonprofits, but also some investigative journalists to disclose their personal assets.<sup>77</sup> Such measures create scrutiny and compliance burdens on civil society that can undermine its ability to hold government accountable. (The enforcement of these provisions in both laws is currently suspended.)<sup>78</sup>

“Foreign agent” type laws are similarly not aimed at government, but rather at nonprofits, the media, and others. As such, there is arguably increased danger that they will be used to undermine those who criticize the government or hold controversial views. Non-state actors generally have fewer resources to either comply with these regulations or combat political opponents who use these laws as a tool to create misleading narratives.

The next part of this article turns to the United States to examine the text of FARA itself. It shows how FARA’s broad provisions can be read to require a wide range of actors to register under the Act’s often burdensome and stigmatizing disclosure and labeling requirements. In particular, many nonprofits, media organizations, and public officials are likely to engage in activity covered by the Act and so be particularly vulnerable to selective and politicized enforcement.

## II. FARA’S BREADTH AND VAGUENESS

FARA<sup>79</sup> found its genesis in the recommendations of a special

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<sup>75</sup> HANS GUTBROD, *DISTRACT, DIVIDE, DETACH: USING TRANSPARENCY AND ACCOUNTABILITY TO JUSTIFY REGULATION OF CIVIL SOCIETY ORGANIZATIONS* 3 (2017) (describing how transparency measures can be used to restrict civil society).

<sup>76</sup> Liz Mathew and Manoj CJ, *Asset disclosure by govt staff, NGOs: Deadline extended indefinitely*, INDIAN EXPRESS, July 28, 2016, <https://indianexpress.com/article/india/india-news-india/asset-disclosure-government-staff-ngo-deadline-extended-modi-2939653/> (describing 2013 Lok Pal Act that requires senior management of nonprofits that receive government grants or foreign funding to disclose their assets).

<sup>77</sup> Melinda Harding, *Presidential Administration Says Law Requiring Activists to Disclose Assets Is Invalid and Unenforceable, but Ukraine’s Activists Aren’t Buying It*, KHARKIV HUMAN RIGHTS PROTECTION GROUP, April 17, 2018 <http://khpg.org/en/index.php?id=1523912040> (describing 2017 legislation that requires management of anti-corruption nonprofits and some investigative journalists to disclose assets).

<sup>78</sup> *Id.*; Mathew and Manoj, *supra* note 76.

<sup>79</sup> When referring to the “Foreign Agents Registration Act”, this article is referencing only 22 U.S.C. § 601. Another part of the federal code, 18 U.S.C. § 951, requires an “agent

committee to investigate Un-American activities appointed by the 73<sup>rd</sup> Congress (1933-1935). This committee was chaired by Representative John McCormack (D-MA), who would later become Speaker of the House.<sup>80</sup> It conducted an investigation and held hearings throughout 1934<sup>81</sup> and ultimately released a report in 1935 that found evidence of persons in the U.S. spreading Fascist and Communist propaganda on the behalf of foreign governments and political parties.<sup>82</sup> The report made a set of recommendations, including that Congress should enact a law requiring all “publicity, propaganda, or public relations agents . . . [of] any foreign government or foreign political party or foreign industrial or commercial organization” to register with the federal government.<sup>83</sup> The proposed Act would not ban any speech, but rather, as a report of the House Judiciary Committee claimed in 1937, “the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.”<sup>84</sup> In 1938, the Foreign Agents Registration Act was signed into law.<sup>85</sup>

Today, FARA’s provisions have a reputation for being notoriously vague and sweeping.<sup>86</sup> This perhaps should not be surprising. The law was initially

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of a foreign government” to notify the Attorney General if they act in the U.S. subject to the “direction or control of a foreign government or official” and do not fall under an exemption. Some recent prominent charges have also been brought under 18 U.S.C. § 951 against alleged Chinese and Russian agents. *See, e.g.,* Sophia Yan, *US arrests Chinese ‘spy recruit’ as ties deteriorate further between Beijing and Washington*, THE TELEGRAPH, Sept. 26, 2018, <https://www.telegraph.co.uk/news/2018/09/26/us-arrests-chinese-spy-recruit-ties-deteriorate-beijing-washington/> (describing the arrest of a Chinese “spy recruit” under “FARA”); Mathew Kahn, *Document: Justice Department Charges Russian National for Conspiracy to Act as a Foreign Agent*, LAWFARE, July 16, 2018, <https://www.lawfareblog.com/document-justice-department-charges-russian-national-conspiracy-act-foreign-agent> (Criminal complaint against Russian national, Mariia Butina for being unregistered “foreign agent”). The Justice Department also provides a list of “other federal statutes aimed at persons loosely called foreign agents”. DoJ FARA enforcement strategy, *supra* note 4.

<sup>80</sup> Richard L. Lyons, *Ex-House Speaker John McCormack Dies*, WASHINGTON POST, Nov. 23, 2018, [https://www.washingtonpost.com/archive/local/1980/11/23/ex-house-speaker-john-mccormack-dies/a866f94f-df9b-4719-b7af-6cad9717c1b3/?utm\\_term=.6a7753724335](https://www.washingtonpost.com/archive/local/1980/11/23/ex-house-speaker-john-mccormack-dies/a866f94f-df9b-4719-b7af-6cad9717c1b3/?utm_term=.6a7753724335)

<sup>81</sup> *See* H.R. Rep. No. 153 at 1-2 (1935) (describing authority of and work of the committee).

<sup>82</sup> *Id.* at 23.

<sup>83</sup> *Id.*

<sup>84</sup> H.R. Report No. 1381 at 2 (1937).

<sup>85</sup> 22 U.S.C. § 601 (noting that FARA was enacted on June 8, 1938).

<sup>86</sup> *See, e.g.,* Robert Kelner, *The Foreign Agents Registration Act: A Guide for the Perplexed*, THE NATIONAL LAW REVIEW, Jan. 11, 2018, <https://www.natlawreview.com/article/foreign-agents-registration-act-fara-guide-perplexed> (claiming that the triggers for registration under FARA are “extremely broad” and that as a result “FARA practitioners often assume that some of the triggers cannot mean what they



passed as the country was ramping up for war and so provided the government a wide net to capture the propaganda of adversaries. While FARA was celebrated at the time as a more “democratic” and civil liberties-protective method of fighting totalitarian propaganda than criminalizing such speech,<sup>87</sup> it still had a suppressive effect. In the run-up to and during World War II it was successfully used to help silence the most active Nazi voices in the country through prosecutions, investigations, and demanding registration requirements.<sup>88</sup> As Brett Gary has noted in his history of the federal government’s efforts to fight propaganda during this period, “FARA gave the Justice Department an effective and low-profile means for eliminating unwanted political ideas from the U.S. scene without drawing critical attention to its work.”<sup>89</sup>

The McCormack Committee Report also made recommendations that resulted in the creation of two other key internal security statutes: the Voorhis Act and the Smith Act (both passed in 1940). The Voorhis Act required registration of certain organizations subject to foreign control that advocated the violent overthrow of the U.S. government.<sup>90</sup> The Smith Act, among other measures, created criminal penalties for anyone who advocated the violent overthrow of the U.S. government (thus, unsurprisingly, few ended up registering under the Voorhis Act).<sup>91</sup> FARA, the Smith Act, and the Voorhis Act were critical statutes in creating an internal security apparatus that could

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say”); Perkins Coie, *Taking Stock of Newly Released FARA Advisory Opinions*, June 18, 2018, <https://www.perkinscoie.com/en/news-insights/taking-stock-of-newly-released-fara-advisory-opinions.html> (commenting that FARA has a “broad statutory sweep, notoriously ambiguous definitions, and [a] dearth of caselaw or other precedent available to help interpret its application.”)

<sup>87</sup> Institute of Living Law, *Combatting Totalitarian Propaganda*, 10(2) U. OF CHICAGO L. REV. 107 (1943) (describing disclosure laws like FARA as a “democratic way[] of defending democracy”, *Id.* at 107-108, and commenting that they have been administered so as not to “interfere with the civil liberties of any one” *Id.* at 138).

<sup>88</sup> BRETT GARY, *NERVOUS LIBERALS: PROPAGANDA ANXIETIES FROM WORLD WAR I TO THE COLD WAR* 210-211 (1999) (further describing that during the War period some 7600 individuals and organizations registered under the Act providing the Justice Department with vast amounts of information, *Id.* at 214-215). DoJ FARA enforcement strategy, *supra* note 4 (noting that FARA was used in the World War II-era to successfully prosecute 23 criminal cases).

<sup>89</sup> GARY, *supra* note 88 at 215-216; *See also* Seth F. Kreimer, *Sunlight, Secrets, and Scarlett Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140(1) U. OF PENNSYLVANIA L. REV. 1, 22 (1991) (describing how “In the years before World War II . . . [t]he ‘spotlight of pitiless publicity’ directed through the lenses of the Voorhis Anti-Propaganda Act and the Foreign Agents Registration Act was thought to provide a mechanism for suppressing antidemocratic propaganda without overstepping the bounds of the First Amendment.”)

<sup>90</sup> Act of Oct. 17, 1940, ch. 897, 54 Stat. 1201.

<sup>91</sup> Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

be used to police propoganda during World War II. In 1950, the McCarran Act was passed, adding to these internal security disclosure statutes, as it required Communist organizations to register with the Justice Department.<sup>92</sup> While the Supreme Court eventually struck, or read, down key uses of the Smith and McCarran Acts,<sup>93</sup> FARA has so far largely survived constitutional scrutiny.<sup>94</sup>

FARA has been amended a number of times, including major amendments in 1942, 1966, and 1995.<sup>95</sup> Particularly in recent years, the Justice Department has largely relied on voluntary compliance and has rarely prosecuted FARA cases. Between 1966 and 2015 the Justice Department only brought seven criminal prosecutions and seventeen civil cases.<sup>96</sup> As a result, the courts have not had the opportunity to flesh out the meaning of many of the Act’s provisions.

Indeed, the very purpose of FARA continues to be unsettled. The Act was initially designed to combat foreign propoganda,<sup>97</sup> but this goal fell out of favor in the 1950s amidst the abuses of the McCarthy era.<sup>98</sup> The 1966 amendments to FARA shifted the focus of the Act to shedding light on lobbyists and others attempting to influence U.S. government decision-making for foreign interests, particularly on economic matters.<sup>99</sup> The Act

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<sup>92</sup> Internal Security Act of 1950, ch. 1024, 64 Stat. 987.

<sup>93</sup> *Yates v. United States*, 354 U.S. 298 (1957) (finding that the First Amendment only allowed the Smith Act to applied when there was advocacy for action to overthrow the government and such cases would be “few and far between.” *Id.* at 327); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) (finding the McCarran Act’s requirement that members of the Communist party register with the government unconstitutional).

<sup>94</sup> *See, e.g.*, *Meese v. Keene*, 481 U.S. 465 (1987) (rejecting a First Amendment challenge to FARA of a person who wanted to circulate informational material that was classified as “political propoganda”); *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951) (finding Congress had the authority to enact FARA under its power to regulate foreign affairs in the Constitution and rejecting arguments that the Act violated either the right to free speech under the 1<sup>st</sup> amendment or the right against self-incrimination under the 5<sup>th</sup> amendment).

<sup>95</sup> *See, e.g.*, Dec. 19, 1995, Pub. L. 104–65, §9(2), (3), 109 Stat. 700; July 4, 1966, Pub. L. 89–486, §2, 80 Stat. 245; Apr. 29, 1942, ch. 263, §1, 56 Stat. 251.

<sup>96</sup> IG FARA REPORT, *supra* note 1 at 8 (“Between 1966 and 2015 the Department only brought seven criminal FARA cases – one resulted in a conviction at trial for conspiracy to violate FARA and other statutes, two pleaded guilty to violating FARA, two others pleaded guilty to non-FARA charges, and the remaining two cases were dismissed.”); DoJ enforcement strategy, *supra* note 4 (“[T]here have been 17 civil cases in that period, of which 10 were successfully litigated and 7 ended by consent decree. The number of administrative resolutions is much greater.”)

<sup>97</sup> IG FARA REPORT, *supra* note 1 at 2.

<sup>98</sup> *See* discussion of prosecution of Du Bois in Part III(A).

<sup>99</sup> *U.S. v. McGoff*, 831 F.2d 1071, 1073-1074 (1987) (noting that “Over the years, FARA’s focus has gradually shifted from Congress’ original concern about the political

though never lost key provisions that can be used to require registration of a much broader range of actors. The Justice Department's recent requests to Russian and Chinese media organizations to register under FARA may signal that enforcement of the Act is again turning again towards those attempting to influence U.S. public opinion more generally.

As of the end of 2017, there were 411 entities or persons registered under the Act representing 612 foreign principals.<sup>100</sup> Those registered were mostly providing lobbying, public relations, legal, consulting, or tourism-promotion services for foreign governments.<sup>101</sup> There were also groups registered that support political parties or candidates abroad<sup>102</sup> and a handful of media organizations linked closely to foreign governments.<sup>103</sup>

Under its current incarnation, the standard for coming under FARA follows a relatively simple, if broad and vaguely worded, formula: Agents of a "foreign principal" engaged in covered activities, who do not meet any of FARA's exemptions, must register as an agent of a foreign principal with the Justice Department.<sup>104</sup> Once registered, these "foreign agents" must meet a set of disclosure requirements, including making a conspicuous statement on covered informational material that they are acting on behalf of a foreign principal. Willful failure to register or making false statements or omissions in connection with registration carries a punishment of up to \$10,000 or five years in jail.<sup>105</sup>

To understand the breadth of FARA this Part examines in more detail the definitions of a "foreign principal", covered activity, and the agency relationship in the current version of the Act, as well as briefly discussing

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propagandist or subversive seeking to overthrow the Government to the now familiar situation of lobbyists, lawyers, and public relations consultants pursuing the less radical goal of 'influenc[ing] [Government] policies to the satisfaction [sic] of [their] particular client.'")

<sup>100</sup> U.S. DEPT. OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT 2 (2017), available at <https://www.justice.gov/nsd-fara/page/file/1085771/download>

<sup>101</sup> *Id.* See also Anna Massoglia & Geoff West, *Foreign interests have spent over \$530 million influencing US policy, public opinion since 2017*, OPENSECRETS.ORG, Aug. 8, 2018 <https://www.opensecrets.org/news/2018/08/foreign-interests-fara-lobby-watch-exclusive/> (providing a breakdown of the largest foreign principals and agents by money spent).

<sup>102</sup> See for example, U.S. Department of Justice, Registration Statement of All Pakistan Muslim League, Feb. 15, 2011 available at <https://www.fara.gov/docs/6019-Registration-Statement-20110215-1.pdf>

<sup>103</sup> Alexandra Ellerbeck and Avi Asher-Shapiro, *Everything to know about FARA, and why it shouldn't be used against the press*, COLUMBIA JOURNALISM REVIEW, June 11, 2018 (noting that a "few media outlets are registered" including China Daily, South Korea's KBS America, and Japan's NHK Cosmomedia).

<sup>104</sup> 22 U.S.C. § 601.

<sup>105</sup> 22 U.S.C. § 618(a). The Justice Department can also seek injunctive relief to stop someone from continuing to commit any activities that are violating FARA. 22 U.S.C. § 618(f).

FARA’s exemptions. Having this more nuanced understanding of what key provisions of the Act actually say makes clear why a broad swath of nonprofits, media organizations, and public officials, arguably need to register, and so why they are more vulnerable to enforcement, including politicized enforcement, than other actors, such as multi-national companies.

### A. Foreign Principal

Under FARA a “foreign principal” includes not just a foreign government or political party, but any entity organized under the laws of a foreign country (or having its principal place of business there) or a person outside the U.S. (unless they are a domiciled U.S. citizen).<sup>106</sup> This expansive definition means a broad range of actors are considered a “foreign principal”, including corporations, nonprofits, foundations, media organizations, and most persons based outside of the United States.

### B. Covered Activities

Covered activity under FARA includes an agent within the United States: (1) engaging in “political activities for or in the interests” of a foreign principal; (2) soliciting or disbursing “things of value” for or in the interests of a foreign principal; (3) acting as a publicity agent, public relations counsel, information service employee, or political consultant for or in the interests of a foreign principal; or (4) representing the interests of a foreign principal before any agency or official of the Government of the United States.<sup>107</sup>

Although there are a number of covered activities in FARA, “political activities” is the most famous. It is defined expansively as:

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>108</sup> (emphasis added)

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<sup>106</sup> 22 U.S.C. § 611(b).

<sup>107</sup> 22 U.S.C. § 611(c)(1)(i-iv).

<sup>108</sup> 22 U.S.C. § 611(o). The Justice Department’s regulations further define the term “domestic or foreign policies of the United States” as to “relate to existing and proposed legislation, or legislative action generally; treaties; executive agreements, proclamations, and orders; decisions relating to or affecting departmental or agency policy, and the like.” 28 C.F.R. § 5.100(f).

In other words, “political activities” includes not just lobbying U.S. government officials, but arguably most advocacy with the public by nonprofits or others. It also seemingly includes most reporting by journalists if the journalist engages in reporting to “influence” U.S. public opinion on a policy issue, even if just factual reporting to create a more informed debate.

While the breadth of “political activities” in FARA is striking, some of the other covered activities are also expansive. For instance, being a “political consultant” is defined to mean any person “informing or advising any other person with reference to the domestic or foreign policies of the United States” or the policies of a foreign country.<sup>109</sup>

Significantly, a number of covered activities do not have to be political in nature to trigger coverage under the Act.<sup>110</sup> For example, soliciting or disbursing anything of value is a covered activity under the Act.<sup>111</sup> Meanwhile, a “publicity agent” is defined as someone disseminating any oral, visual, or written information of any kind for or in the interest of a foreign principal.<sup>112</sup>

“Information service employee”, a covered activity, is defined with an almost humorously broad ambit as:

any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions, of any country other than the United States or of any government of a foreign country or of a foreign political party or of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country.<sup>113</sup>

In other words, providing someone in the United States a weather report from Bali on behalf of a foreign principal would seemingly make one an “information service employee” since the weather report involves the “conditions” of another country.

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<sup>109</sup> See 22 U.S.C. § 611(o) (providing the Act’s definition of “political consultant”).

<sup>110</sup> Kelner, *supra* note 86 (Noting that “DOJ has in the past sometimes read the definition of ‘political activities’ into other triggers; for example concluding that one could not be acting as a ‘political consultant’ for FARA purposes unless one was also engaging in political activities, as defined in the statute.” However, “[i]n recent interactions with the FARA Unit . . . staff have called into question the validity of such prior guidance . . .” *Id.*)

<sup>111</sup> 22 U.S.C. § 611(c)(1)(iii).

<sup>112</sup> 22 U.S.C. § 611(c)(1)(ii); 22 U.S.C. § 611(h) (“The term ‘publicity agent’ includes any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information of matter of any kind, including publication by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise”).

<sup>113</sup> 22 U.S.C. § 611(i).

To be clear, for any of these activities above to be considered a covered activity for the purposes of the Act they must be undertaken “for or in the interests” of a foreign principal.<sup>114</sup> However, the Act does not define this phrase. It could be interpreted narrowly—for instance, the activity has to be explicitly on behalf of the foreign principal—or liberally—such that the activity merely has to be indirectly beneficial to the foreign principal.

### *C. Principal-Agent Relationship*

The definition of who is an “agent of a foreign principal” is one of the most controversial and confusing aspects of FARA. The principal-agent relationship in FARA is much broader than how principal-agent relationships are traditionally defined. For instance, under the current Restatement of Agency an agent and their principal must agree that the agent will act on the behalf of, and be subject to the control of, the principal.<sup>115</sup> Under FARA though the “agency” relationship is much wider and more ambiguous. An 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>116</sup>

This is a convoluted definition and it is important to see that it is in fact defining both who is an “agent” and who is an intermediary of a foreign principal. An agent is a person who is an “agent, representative, employee, or servant” of a foreign principal or their intermediary, or a person who acts at the “order, request, or under the direction or control” of a foreign principal or their intermediary. An intermediary, in turn, is a person “whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal.”

Notably, under the text of the Act, someone can become an agent by simply acting at a foreign principal’s “request”. A person can become an

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<sup>114</sup> See 22 U.S.C. § 611(c)(1)(i-iii) (noting that each covered activity must be “for or in the interests of such foreign principal”).

<sup>115</sup> Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006) [hereinafter Restatement of Agency] (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests or otherwise consents so to act.”)

<sup>116</sup> 22 U.S.C. § 611(c)(1).

intermediary by merely being financed or subsidized in “major part” by a foreign principal. Neither “request” nor “major part” is defined further in the Act or its regulations. The implication of these provisions though is that a person can become an agent or an intermediary of a foreign principal without consent. Similarly, a foreign principal does not have to consent to someone acting as their “agent” and, in fact, may not even know that someone is their “agent”.

### 1. “Request”

A key question regarding FARA is how to interpret the word “request” in the Act’s definition of the agency relationship. The word “request” has seemingly only been directly interpreted once by the federal courts. In the case, the Justice Department claimed the Irish Northern Aid Committee was an “agent” of the Irish Republican Army.<sup>117</sup> The Irish Northern Aid Committee argued that the agency requirement in FARA should be interpreted to be the same as that of the Restatement of Agency definition. This approach though was rejected by both the Southern District of New York and on appeal by the second circuit. Both courts found it was sufficient to establish agency if an individual or entity acts simply at a foreign principal’s “request”.<sup>118</sup>

What “request” means though is ambiguous. The 2<sup>nd</sup> Circuit found that the “exact parameters of a ‘request’ under the Act are difficult to locate, falling somewhere between a command and a plea”<sup>119</sup> and should be interpreted through the lens of the “informative purposes of the Act.”<sup>120</sup> For example, the Court noted an unspecified plea by the Italian government to the Italian-American community to send aid to earthquake victims would not make individual Americans “agents” if they responded. However, if identifiable individuals are asked by a foreign principal to act they may be viewed to be “in some way authorized to act for or to represent the foreign principal.”<sup>121</sup> The Court continued, “Once a foreign principal establishes a

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<sup>117</sup> Attorney General v. Irish Northern Aid Committee, 530 F. Supp. 241, 247 (S.D.N.Y. 1981).

<sup>118</sup> Attorney General v. Irish Northern Aid Committee, 668 F.2d 159, 159 (2d Cir. 1982) (affirming district court decision and noting that FARA agency’s definition is not the same as the Restatement’s with its focus on “control”); Irish Northern Aid Committee, 530 F. Supp. at 257 (Noting that “[I]t is not necessary for plaintiff to prove that defendant is an ‘agent,’ in the Restatement sense, or a ‘person who acts in any other capacity ... under the direction or control’ of the IRA; it is sufficient to establish agency under the Act that defendant is a ‘representative’ of the IRA, or acts at its ‘request.’”)

<sup>119</sup> Irish Northern Aid Committee, 668 F.2d at 159.

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

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

particular course of conduct to be followed, those who respond to its ‘request’ for complying action may properly be found to be agents under the Act.”<sup>122</sup>

Yet, this interpretation by the Court is itself confusing and would allow a broad range of activity to create an agency relationship. For example, as absurd as it may sound, if a relative living abroad requested an American transport a birthday gift back to their sibling in the United States and they complied they would seemingly need to register under FARA as they would be engaged in covered activity—i.e. disbursing something of value for a foreign principal—and following through on a “particular course of conduct” requested by the foreign relative.<sup>123</sup>

The Supreme Court has not dealt with the interpretation of the word “request” in the Act directly leaving its interpretation unsettled. It is unclear if the Supreme Court would follow the 2<sup>nd</sup> circuit’s interpretation or adopt a different standard.

## 2. Subsidized in Whole or in Major Part

Another point of contention in defining the agency relationship in FARA has involved how to interpret when an intermediary is “subsidized in whole or in major part” by a foreign principal.

First, it is not clear what “major part” means. Perhaps over 50% of an entity’s funding? Over \$100,000? Members of Congress have proposed clarifying this definition. For example, in the 1990s legislation was introduced, but did not pass, that would have added a provision that a foreign principal would control a person in “major part” if they held “more than 50 percent equitable ownership in such a person”, or, subject to rebuttal evidence, if the foreign principal held at least 20 percent equitable ownership.<sup>124</sup>

Second, it is not settled whether funding by itself can lead to an agency relationship. In 1986, in *Attorney General of the United States v. Irish People, Inc.* the D.C. Circuit, drawing on legislative history, found that when Congress amended FARA in 1966 that they meant to make clear that the mere receipt of a subsidy should not require the recipient to register as a “foreign agent”.<sup>125</sup> Instead, the subsidy would have to be part of subjecting the

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<sup>122</sup> *Id.*

<sup>123</sup> In the 1940s the Institute of Living Law noted with concern how FARA might inadvertently capture cross-border loans within a family. Institute of Living Law, *supra* note 87 at 120. Congress has not rectified this problem.

<sup>124</sup> H.R. 1725, 102<sup>nd</sup> Cong. (1991).

<sup>125</sup> *Attorney General of the United States v. Irish People, Inc.*, 796 F.2d 520, 522 (D.C. Cir. 1986) (Judges Scalia, Bork, and Gesell noted in a per curiam decision that “In amending the definition of agent in 1966 Congress emphasized that the Act should not require the registration ‘of persons who are not, in fact, agents of foreign principals but whose acts may



recipient to the direction or control of the foreign principal.<sup>126</sup> However, such an interpretation would make the reference to “subsidized in whole or in major part” largely superfluous in defining agency. If “direction or control” is the true test of agency why bring up subsidization at all?

Further, the Act’s text seems to point to a different meaning. Under FARA while someone cannot become a foreign agent merely by receiving money from a foreign principal an intermediary can. So, for example, Person A becomes an intermediary if they are subsidized in “major part” by a foreign principal. If Person A then directs or requests that Person B engage in a covered activity in the interest of a foreign principal, and they do, then person B must register. Under FARA’s text, it would seem that the foreign principal would not even have to make a “request” of either Person B or Person A for this agency relationship to be created. They could simply finance Person A, who then requests Person B to engage in a covered activity.

The difference between the text of the Act and the D.C. Circuit’s interpretation, which draws on legislative history, is hard to explain. This lack of clarity further highlights the confusion around how an agency relationship is even created under FARA.

#### *D. Exemptions*

Given the broad definitions of foreign principal, covered activities, and who is an “agent” under FARA it would seem that an almost endless number of persons and entities would need to register. There are though a number of exemptions to registering.<sup>127</sup> These exemptions are significant, and help exclude many of the activities of business, the academy, religious institutions, lawyers, and others that might otherwise be covered. However, these exemptions are also not as broad as they might first appear, are frequently ambiguous, and, as well be shown, do far less to exempt activities of nonprofits, media organizations, and public officials.

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incidentally be of benefit to foreign interests, even though such acts are part of the normal course of those persons’ own rights of free speech, petition or assembly.’ H.R.Rep. No. 1470, 89th Cong.2d Sess. 5-6 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News. 2397, 2401. Moreover, ‘mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor.’ *Id.*” See also Michele Amoruso E. Figli v. Fisheries Development Corporation, 499 F. Supp. 1074, 1081-82 (S.D.N.Y. 1980) (holding that a corporation is not an agent under FARA despite receiving financial support from a foreign principal as it is not subject to its control even though its lobbying efforts benefit a foreign government).

<sup>126</sup> *Irish People, Inc.*, 796 F.2d at 522 (holding that mere financial subsidization of Irish People does not create an agency relationship).

<sup>127</sup> The primary exemptions to registration to FARA are provided in 22 U.S.C. § 613.

## 1. Diplomatic or national security and commercial

To address the need for foreign governments to have official representatives in the U.S., there are a set of “diplomatic” exemptions for diplomatic staff and officials of foreign governments recognized by the Department of State.<sup>128</sup> The President may also exempt an agent of a foreign government from registering whose defense is vital to the United States.<sup>129</sup>

A commercial exemption applies to agents of foreign principals engaged in “private and nonpolitical” activity that furthers “the bona fide trade or commerce of [a] foreign principal.”<sup>130</sup> This is a significant exemption for the business community as otherwise a broad swath of business activity would seemingly be caught under the Act, such as soliciting or disbursing things of value for or in the interest of a foreign company.

The Justice Department’s regulations for the commercial exemption make clear that the exemption does not apply to agents of corporations engaged in political activities that “directly promote the public or political interest of [a] foreign government.”<sup>131</sup> This caveat, at times, has generated confusion, particularly in relation to the commercial transactions of a foreign government or state-owned company.<sup>132</sup>

In general, what is in the “public or political interest of [a] foreign government” has been interpreted relatively broadly. For example, the Justice

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<sup>128</sup> 22 U.S.C. § 613(a) to 22 U.S.C. § 613 (c).

<sup>129</sup> 22 U.S.C. § 613(f). This exemption has never been used since it was included in FARA in 1942. Letter from U.S. Department of Justice, National Security Division to [addressee deleted], May 18, 2012, *available at* <https://www.justice.gov/nsd-fara/page/file/1038216/download>

<sup>130</sup> 22 U.S.C. § 613(d)(1).

<sup>131</sup> 28 C.F.R. § 5.304(b) (“For the purpose of section 3 of the Act, activities of an agent of a foreign principal as defined in section 1(c) of the Act, in furtherance of the bona fide trade or commerce of such foreign principal, shall be considered ‘private,’ even though the foreign principal is owned or controlled by a foreign government, so long as the activities do not directly promote the public or political interest of the foreign government.”)

<sup>132</sup> For instance, the Justice Department found in an advisory opinion that a consulting firm for a foreign state-owned bank needed to register when undertaking educational outreach to U.S. financial institutions because doing so would promote the public interest of a foreign country. U.S. Dept. of Justice, National Security Division, FARA Advisory Opinion dated Feb. 9, 2018, *available at* <https://www.justice.gov/nsd-fara/page/file/1068636/download> However, another advisory opinion found that a public relations firm working for a foreign embassy did not have to register for introducing a foreign government official to private industry leaders in the “defense and cybersecurity markets” because these were “private and non-political activities”. U.S. Dept. of Justice, National Security Division, FARA Advisory Opinion dated Dec. 21, 2017 *available at* <https://www.justice.gov/nsd-fara/page/file/1036096/download> It is not obvious why being introduced to defense industry leaders is less in the political interest of a foreign government than a state owned bank doing outreach to U.S. financial institutions.

Department has found that a public relations firm hired by a government to promote tourism to a foreign country must register because they are promoting the interest of a foreign government by furthering economic development through tourism.<sup>133</sup>

## 2. Religious, academic, fine arts, or humanitarian

Of particular importance to nonprofits, FARA also provides an exemption for “bona fide religious, academic, scholastic, or scientific pursuits, or the fine arts.”<sup>134</sup> While seemingly providing broad exemptions for these categories of activities, this provision has been interpreted by the Justice Department in its regulations to not apply to persons engaged in “political activities” defined under the Act.<sup>135</sup> It is not obvious how the Justice Department generates this distinction from the text of FARA, but perhaps the Justice Department does not consider “political” religious or academic activity as “bona fide”. Under such a broad reading, a Catholic priest in the U.S. who, at the request of the Pope, calls for peace between all countries in their weekly sermon would seemingly be required to register as he would be attempting to influence U.S. public opinion on a policy issue at the request of a foreign principal. Similarly, a U.S. professor who arranges a public talk at a university at the request of a colleague from France wishing to discuss his new book on how to improve transatlantic trade relations may also be interpreted as having to register. In both these cases, the “foreign agent” —the priest or the professor—are arguably acting at the request of a foreign principal to engage in “political activities.”<sup>136</sup>

A “humanitarian” exemption in FARA applies to those “soliciting or collecting . . . contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering . . . .”<sup>137</sup> This exemption though does not include the solicitation of funds in the U.S. meant for other humanitarian purposes, such as for housing or education, or for the *disbursement* of any humanitarian funds in the U.S. As such, a nonprofit in the U.S. soliciting funds for building a school at the

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<sup>133</sup> U.S. Dept. of Justice, Criminal Division, FARA Advisory Opinion dated Jan. 20, 1984, available at <https://www.justice.gov/nsd-fara/page/file/1046156/download> [hereinafter Advisory Opinion 1984] (finding that “Promoting tourism on behalf of [foreign government] through advertisements cannot be construed as private and nonpolitical activities.”)

<sup>134</sup> 22 U.S.C. § 613(e).

<sup>135</sup> 28 C.F.R. § 5.304(d) (“The exemption provided by section 3(e) of the Act shall not be available to any person described therein if he engages in political activities [as defined by the Act] for or in the interests of his foreign principal.”)

<sup>136</sup> 22 U.S.C. § 611(c)(1)(i).

<sup>137</sup> 22 U.S.C. § 613(d)(3).

request of a partner organization in Central America would seem to fall under the text of the Act. Similarly, an employee of a foreign foundation disbursing funds in the U.S. for Hurricane relief would also come under the Act.

### 3. Lobbyists and Lawyers

There is a partial exemption for lobbyists under FARA. The Act was amended in 1995, when the Lobbying Disclosure Act (LDA) passed, so that agents of foreign individuals or entities who had registered under the LDA would be exempt from also having to register under FARA for the same lobbying activity.<sup>138</sup> However, lobbyists for foreign governments or political parties still have to register under the more extensive and burdensome requirements of FARA.<sup>139</sup> Justice Department regulations make clear that even if one’s client is not a foreign government or political party one must still register under the Act if the principal beneficiary of the lobbying is a foreign government or political party.<sup>140</sup>

Notably, while the LDA has a *de minimis* exemption,<sup>141</sup> FARA does not.<sup>142</sup> In other words, if one does *any* amount of lobbying for a foreign government or political party one needs to register with the Justice Department as a “foreign agent”.<sup>143</sup>

FARA also includes an exemption for lawyers representing a foreign principal before a court of law or agency of the U.S government (so long as they are part of an official proceeding or inquiry).<sup>144</sup> However, lawyers still must register if they attempt to “influence” officials outside an agency or

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<sup>138</sup> 22 U.S.C. § 613(h) (an exemption from registering under FARA for “Any agent [under the Act who is not an agent of a foreign government or political party] if the agent has engaged in lobbying activities and has registered under the Lobbying Disclosure Act of 1995 . . . in connection with the agent’s representation of such person or entity.”)

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

<sup>140</sup> 28 C.F.R. § 5.307 (stating that “[i]n no case where a foreign government or foreign political party is the principal beneficiary will the exemption” apply).

<sup>141</sup> 2 U.S.C. § 1602(10) (creating an exemption to being a “lobbyist” under the LDA if an individual’s lobbying activities constitute less than 20% of the services provided to a client over a three month period).

<sup>142</sup> 22 U.S.C. § 613 (defining exemptions under FARA, none of which is a *de minimis* exemption).

<sup>143</sup> Observers have noted that the LDA exemption creates a seeming loophole to escape registering under FARA. Registering under the LDA provides an exemption to register not just for lobbying activities, but seemingly any covered activities under FARA. In other words, even if one is an “information service employee” or “political consultant” for a foreign principal (both activities covered under the Act) one does not need to register under FARA if one is registered under the LDA. H.R. Report No. 104-339, 29 (1995) (Andrew Fois, Assistant Attorney General noting that 1995 LDA amendments would exempt many agents of foreign principals if they were registered under the LDA).

<sup>144</sup> 22 U.S.C. § 613(g).

judicial proceeding, or a legal investigation.<sup>145</sup>

4. “Other activities not serving predominantly a foreign interest”

Perhaps the least clear exemption in FARA is Section 613(d)(2). However, it potentially provides a significant exemption that could be applied to nonprofits, the media, and public officials, among others. Section 613(d) of FARA begins in Part 1 by providing the exemption for private and nonpolitical commercial activity. Part 2 of the same section, 613(d)(2), provides for an exemption that reads: “or in other activities not serving predominantly a foreign interest.”<sup>146</sup>

Although the Justice Department has provided little interpretation of this exemption,<sup>147</sup> there are at least three ways to interpret it. First, the provision could be read on its face. Under this interpretation, if any activity otherwise covered under the Act does not serve “predominantly a foreign interest” than one does not have to register. This plain reading still generates ambiguity. For example, consider a Canadian nonprofit that “requests” a Chicago nonprofit host a public event on the Canadian nonprofit’s report on how best to combat the opioid epidemic. In this scenario, who has the “predominant interest” in the Chicago nonprofit setting up the event? Certainly, the Canadian nonprofit has an interest, but is it “predominant”? The Chicago nonprofit might also want this public health information spread in the U.S. Is its interest “predominant”? As such, reading 613(d)(2) on its face could still lead to confusion, even if it limited who must register.

Second, 613(d)(2) could be interpreted to only apply to those engaged in commerce. 613(d)(2) states an exemption for “other activities not serving predominantly a foreign interest”, but what does the “other” refer to? As already mentioned, directly before this provision is the exemption for private and nonpolitical commercial activity. So perhaps 613(d)(2) should be read as an exemption for “other [commercial] activities not serving predominantly a foreign interest”. Under such a reading, commercial activities would not require registration even if they were “political” as long as they do not “serv[e] predominantly a foreign interest”.

This reading of the provision seems partially supported by legislative history. When 613(d)(2) was added in 1966, section 1(q) (now removed)<sup>148</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> 22 U.S.C. § 613(d)(2).

<sup>147</sup> The Justice Department’s FAQ page does not even mention the exemption in 613(d)(2). The United States Department of Justice, General FARA Frequently Asked Questions, <https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions>

<sup>148</sup> In 1995, when the Lobbying Disclosure Act was passed and amendments were made to FARA, the focus of Congress was primarily on the lobbying aspects of FARA. There had been complaints that having to determine whether a foreign company had a substantial

was also added to clarify the provision.<sup>149</sup> 1(q) stated that those with substantial U.S. commercial operations would not be deemed to be engaging in activities “serving predominantly a foreign interest” just because those activities benefited someone in another country as long as the entity in question was not controlled, supervised, or financed by a foreign government or political party.<sup>150</sup> This amendment was added to make sure that agents of multinational companies with substantial business in the U.S. would not have to register when contacting government officials just because such an interaction might benefit a foreign subsidiary or a foreign parent company.<sup>151</sup> As such, 613(d)(2) today could be interpreted to mean that commercial actors do not need to register if they engage in political activity as long as the political activity does not directly promote the interest of a foreign government or political party.<sup>152</sup> Under this interpretation though this exemption would presumably not apply to nonprofits, public officials, or other non-commercial actors.

Finally, there is a third way of interpreting 613(d)(2). Using the old 1(q) interpretation of 613(d)(2), today’s exemption could be read as “or other activities not predominantly serving [the interest of a foreign government or political party.]” Under this broader reading, the 613(d)(2) exemption, interpreted through the lens of 1(q) would apply not just to commercial actors, but any actor covered by the Act.<sup>153</sup> This would mean the Chicago

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business interest in the U.S. (and so whether they met the 1(q) exemption) was confusing. Congress decided it would be better to treat all lobbyists of foreign and domestic companies the same, whether or not they had a substantial business interest in the United States. 1993 Senate Committee Report, p. 10. As such, 1(q) was removed, as now a seemingly unnecessary exemption, and the LDA exemption was added, allowing all lobbyists, except those of foreign governments or political parties, to register under the LDA and not FARA.

<sup>149</sup> H.R. Report No. 1470, at 7 (1966) (noting that 1(q) “clarifies the meaning of “activities not serving predominantly a foreign interest”).

<sup>150</sup> Pub. L. 89-486, §4, July 4, 1966, 80 Stat. 246 (adding amendment (q) to section one of FARA).

<sup>151</sup> H.R. Report No. 1470, at 10-11 (1966) (House Judiciary Committee Report on amendments to FARA noting that section 1(q) was added to address concerns that the Act could otherwise be interpreted as requiring agents of international corporations to register for their routine activity with government).

<sup>152</sup> Today, the only Justice Department regulation related to 613(d)(2) reads very similar to 1(q) and only references the exemption applying to commercial actors. Like in 1(q) “foreign interest” is narrowed to mean an interest of a “foreign government or political party”. 28 C.F.R. § 5.304(c).

<sup>153</sup> Lending support to this interpretation, a House Judiciary Committee report explained that as a result of the 1995 amendments that “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.” H.R. Report No. 104-339, at 21 (1995). While the focus in these amendments was on lobbying, this first sentence still seems to imply that

nonprofit in the example above would likely not need to register as their action is not benefitting the Canadian government, even if it might be benefitting a Canadian nonprofit. This would substantially narrow what activity is covered under FARA, even if in some situations determining what activity is in the interest of a foreign government or political party would be ambiguous.

The courts have seemingly not yet interpreted the exemption in 613(d)(2) directly and it is unclear if they would follow one of the three interpretations above. Given this confusion, this exemption creates a wide band of uncertainty around what activity is actually exempted from FARA.

##### 5. “Bona Fide” Domestic Media

Finally, there is a long and confusingly written provision that exempts a news service or publication in the U.S. from registering if it is engaged in “bona fide news or journalistic activities” so long as “it is at least 80 per centum beneficially owned by, *and* its officers and directors, if any, are citizens of the United States *and* [such a news organization] is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal . . . or [their agent].”<sup>154</sup> (emphasis added)

Some have pointed to this “bona fide” journalistic activity exemption as a reason why some high-profile foreign-based media organizations like the BBC, or their employees, do not have to register.<sup>155</sup> However, even a cursory reading shows the exemption would apply in very limited contexts. Putting aside the unseemliness of having to determine what is “bona fide” journalistic activity, few media organizations that would otherwise be covered would have only U.S. officers or directors *and* not be directed, financed, or subsidized by a foreign principal. Consider, for instance, the *Wall Street Journal*. If it was determined that the *Wall Street Journal* needed to register because a journalist or editor acted at the request of a foreign principal, this exemption would likely not apply because NewsCorp, which owns the *Wall Street Journal*, is financed in part by foreigners and it has foreigners among its officers and directors.<sup>156</sup> The same would likely be true of many media

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Congress viewed the Act as applying only to agents of foreign governments or political parties.

<sup>154</sup> 22 U.S.C. § 611(d).

<sup>155</sup> See, e.g., David S. Cloud, Tracy Wilkinson, and Joseph Tanfani, *FBI investigates Russian government media organizations accused of spreading propaganda in the U.S.*, LA TIMES, Sept. 13, 2017, <https://www.latimes.com/nation/la-na-russia-propaganda-20170913-story.html> (claiming that FARA provides an exemption for “any news or press service” – the language of 22 U.S.C. § 611(d) – as long as it is not directed by a foreign government).

<sup>156</sup> Board of Directors, News Corp, <https://newscorp.com/corporate-governance/board->

organizations operating in the United States.

### *E. Reporting Requirements*

The reporting requirements under FARA are extensive.<sup>157</sup> Agents must provide a long list of information including home addresses of officers and directors of an entity, the organization’s bylaws, and the covered activities undertaken by the foreign agent.<sup>158</sup> Registration materials are available to the public on the Justice Department’s website.<sup>159</sup> Significantly, all covered informational materials under the Act distributed by the “foreign agent” must include 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. . . .”<sup>160</sup>

Elements of FARA’s labeling requirements have been found to be constitutional by the Supreme Court in *Meese v. Keene* in 1987. In the case, a member of the California State Senate had wanted to show three Canadian films on nuclear war and acid rain that were classified as “political propaganda” under FARA (a term previously used in the Act).<sup>161</sup> He claimed that the government classifying informational materials using this term undermined his speech violated his First Amendment rights.<sup>162</sup> In a five to three decision, Justice Stevens wrote an opinion upholding the requirement. He found that classifying these materials “political propaganda” did not place them “beyond the pale of legitimate discourse”<sup>163</sup> and that the public understood it is a “neutral” rather than “pejorative” term.<sup>164</sup>

In dissent, Justice Blackmun disagreed, writing that the term

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of-directors/ (one member of NewsCorp Board of Directors is the former President of Spain). NewsCorp is a publicly traded company that foreigners can buy shares in. NEWS CORP, ANNUAL REPORT (2018), available at <https://newscorpcorp.files.wordpress.com/2018/09/news-corp-2018-annual-report.pdf>.

<sup>157</sup> Individuals or entities covered by FARA must register with the Justice Department within ten days of undertaking covered activity and follow up with periodic reports on covered activity. 22 U.S.C. § 612(a). Individuals engaged in covered activity working for a registered entity must also complete a separate short form registration. However, the Attorney General may exempt individuals from short form registration if not necessary to carry out the purposes of the Act. 22 U.S.C. 612(f).

<sup>158</sup> 22 U.S.C. §§ 612(a)-(b).

<sup>159</sup> U.S. Dept. of Justice, FARA Quick Search, [https://efile.fara.gov/pls/apex/f?p=185:1:0:::P1\\_DISPLAY](https://efile.fara.gov/pls/apex/f?p=185:1:0:::P1_DISPLAY):

<sup>160</sup> 22 U.S.C. § 614(b).

<sup>161</sup> *Meese v. Keene*, 481 U.S. 465, 467-468 (1987).

<sup>162</sup> *Id.* at 467.

<sup>163</sup> *Id.* at 480.

<sup>164</sup> *Id.* at 483 (“We should presume that the people who have a sufficient understanding of the law to know that the term ‘political propaganda’ is used to describe the regulated category also know that the definition is a broad, neutral one rather than a pejorative one.”)



“propaganda” created the perception that anything classified as such was “unreliable” and “not to be trusted.”<sup>165</sup> As a result, he claimed that “By ignoring the practical effect of the Act's classification scheme, the Court unfortunately permits Congress to accomplish by indirect means what it could not impose directly -- a restriction of appellee's political speech.”<sup>166</sup> He found that there was no compelling interest to classify such material “political propaganda” and the classification should be struck down.<sup>167</sup>

In 1995, Congress amended the Act to remove the term “political propaganda”.<sup>168</sup> While this change may be an improvement, requiring a conspicuous statement that material is distributed on behalf of a foreign principal is still stigmatizing and implies that the registered “agent” is not acting independently, but on behalf of a foreign interest.<sup>169</sup>

While FARA’s reporting requirements are extensive there is a long history of complaints that both those who should register do not, and that those who do register do not follow the reporting requirements.<sup>170</sup> This has helped lead to the recent calls to strengthen enforcement of the Act.

#### *F. Actors Particularly Vulnerable to Politicized Enforcement*

Despite the hodge-podge of exemptions in FARA a large number of actors are still covered by the Act. There is also genuine ambiguity about whether some activity is covered by FARA: Depending, for example, on how one interprets the “not serving predominantly a foreign interest” exemption or the word “request” in the definition of “agent of a foreign principal”.

It is not possible in this article to detail all those that FARA may cover. This section though looks at three types of actors—(1) nonprofits; (2) media organizations; and (3) public officials—whose work may frequently be covered by the Act and, since these actors often take controversial stances, may also be particularly vulnerable to the Act’s politicized enforcement.

#### 1. Nonprofits

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<sup>165</sup> *Id.* at 489.

<sup>166</sup> *Id.* at 491.

<sup>167</sup> *Id.* at 495.

<sup>168</sup> 22 U.S.C. § 614(b).

<sup>169</sup> *See, e.g.*, Ellerbeck and Asher-Shapiro, *supra* note 103 (claiming that registration for media has a stigmatizing and punitive effect); Kate Ackley, *Companies, Nonprofits Put Brakes of Foreign Lobbying Bills*, ROLL CALL, March 2, 2018 (noting that companies want to avoid the stigma of registering).

<sup>170</sup> *See, e.g.*, IG FARA REPORT, *supra* note 1 at 8-21 (finding deficiencies in identifying FARA registrants and in their registration); *Id.* at 7 (noting earlier General Accountability Office Reports from 1974, 1980, and 1990 making similar complaints about enforcement of FARA).

Nonprofit organizations are especially susceptible to being required to register under FARA because, almost by definition, their work does not generally qualify for the Act’s commercial exemption.<sup>171</sup> Nonprofit or philanthropic work frequently involves covered activity, like “soliciting” or “disbursing” funds in the interest of a foreign principal,<sup>172</sup> “political activities” (such as advocacy) that may be in the interest of a foreign principal,<sup>173</sup> or publishing materials on information related to a foreign country that may be in the interest of a foreign principal.<sup>174</sup>

Some examples help illustrate how routine and beneficial work of many nonprofits might require registration. For instance, consider an international nonprofit headquartered in London that focuses on promoting transparency. The London transparency organization would be a “foreign principal” under FARA. As such, if the organization has employees in the United States engaged in advocating for stronger transparency laws in the U.S. those employees are arguably engaged in “political activity” for a foreign principal and so would need to register.<sup>175</sup> Similarly, if the London nonprofit had an affiliated U.S. branch that branch would arguably need to register, even if the U.S. branch is organized completely under U.S. law, because the U.S. branch may act at the “request” of the international headquarters in London in a manner that effects U.S. public opinion on a policy issue. By the same logic, a partner nonprofit, based entirely in the U.S. and not formally connected to the London organization, may still need to register if it attempts to influence U.S. public opinion at the “request” of the London nonprofit. For instance, if the U.S. nonprofit organized a public meeting in the U.S. where the London nonprofit released a report on the benefits of transparency.

As we have seen, the FARA exemptions for religious or academic institutions only apply to “bona fide” religious or academic activities, which do not include “political activities”.<sup>176</sup> As such, an aggressive FARA enforcement policy would also raise significant questions about whether many religious and academic institutions, and their employees, may need to register for activity that could be broadly construed as “political”. Similarly, the humanitarian exemption does not exempt foreign organizations

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<sup>171</sup> 22 U.S.C. § 613(d)(1) (creating an exemption for “private and nonpolitical activities in furtherance of the bona fide trade or commerce of [a] foreign principal.” Most non-profit activity cannot be considered in furtherance of “trade or commerce”).

<sup>172</sup> 22 U.S.C. § 611(c)(1)(iii).

<sup>173</sup> 22 U.S.C. § 611(c)(1)(i) (stating “political activities” is a covered activity under FARA).

<sup>174</sup> 22 U.S.C. § 611(c)(1)(ii) (stating “information service employee” is a covered activity under FARA).

<sup>175</sup> 22 U.S.C. § 611(c)(1)(i).

<sup>176</sup> See generally, *supra* Part II(D)(3).

disbursing funds in the U.S. or domestic organizations soliciting funds for foreign partners working on issues like education or women's rights.<sup>177</sup>

The broad wording of FARA, and limited exemptions, risks limiting nonprofits' work in the United States. In 2016, the Inspector General's Report on FARA's implementation explicitly called for greater powers to investigate non-profits, the academy, and think tanks for FARA violations.<sup>178</sup> As we will see in Part III, some nonprofits have already been targeted using the Act for seemingly ideological or partisan reasons. Given this political environment, ramped up enforcement of FARA as currently written could have a chilling effect, leading some international nonprofits to stop engaging in the U.S. entirely and limiting the ability of some U.S. nonprofits to work with international partners out of fear of falling under the Act.

## 2. Media

It is perhaps not surprising that the provisions of FARA, if read on their face, would seem to require many media organizations and journalists to register given that the Act was originally drafted as an anti-propaganda measure. Further, today, many media actors are arguably more globalized than when the Act was written, and so more likely to fall under the Act.

The commercial exemption of FARA applies to "private and nonpolitical activities in furtherance of the bona fide trade or commerce of [a] foreign principal."<sup>179</sup> As such, the exemption seemingly does not apply to journalistic activities because coverage of or opinion about political events would likely be considered "political activity" under FARA.<sup>180</sup>

Further, many media organizations are arguably caught under the broad definition of "publicity agent", which is defined as disseminating any oral, visual, or written information of any kind for or in the interest of a foreign principal.<sup>181</sup> Similarly, media organizations, or their staff, would be considered "information service employee[s]" if they disseminate information on foreign countries or foreign corporations or organizations in the interest of a foreign principal.<sup>182</sup> Indeed, the as we will see in Part III(C),

<sup>177</sup> See generally, *supra* Part II(D)(3).

<sup>178</sup> IG FARA REPORT, *supra* note 1 at 18-19 (advocating for providing the Justice Department civil investigate demand authority to better to investigate non-profits, organizations at universities, think tanks, and others).

<sup>179</sup> 22 U.S.C. § 613(d)(1).

<sup>180</sup> See Letter from U.S. Department of Justice, National Security Division to [addressee deleted], Jan. 20, 1984, available at <https://www.justice.gov/nsd-fara/page/file/1046156/download> ("The dissemination of political propaganda automatically precludes a commercial exemption.")

<sup>181</sup> 22 U.S.C. § 611(h).

<sup>182</sup> 22 U.S.C. § 611(i).

the Justice Department asked *RT TV America* to register for engaging in all three of these covered activities.

Such a broad interpretation of covered activities arguably captures many news organizations that are based abroad that publish or broadcast in the United States, like the *BBC*<sup>183</sup> or the *Guardian*.<sup>184</sup> It would also capture some media organizations that are based in the U.S., but may have some foreign ownership, foreign offices, or foreign partners, and so may at times act at the “request” of or be financed in “major part” by a foreign principal.

Even non-news media outlets may be covered. For instance, if PBS or Netflix replays *Downtown Abby* or the *Great British Bakeoff* under a contract with the BBC it might be considered an “information service employee” because they are disseminating shows that describe the “conditions” of a “foreign country”<sup>185</sup> or a “publicity agent” because they are distributing visual information for or on in the interest of a foreign principal.<sup>186</sup> Similarly, a Hollywood distributor that distributes a Chinese-made film that casts China in a good light could potentially be viewed as a “publicity agent” or “information service employee”. The commercial exemption could potentially apply to these activities, but only if they are considered commercial and non-political. As noted earlier, the Justice Department has found even tourism promotion is “political”.<sup>187</sup> It is not clear if forms of soft power like the *Great British Bakeoff* or a film that showcases China in a positive light would be considered “political”. The lack of clarity about these definitional categories though only highlight how the Act can create confusion and be used in a politicized manner through selective enforcement.

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<sup>183</sup> BBC America broadcasts in the United States, but is majority owned by BBC Worldwide and must meet the BBC’s editorial standards. Katherine Rushton, *BBC America now almost half-owned by US cable company AMC*, THE TELEGRAPH, Oct. 24, 2014, <https://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/1118425/2/BBC-America-now-almost-half-owned-by-US-cable-company-AMC.html> The U.S. office of the BBC registered under FARA as late as 1986. It is not clear why it stopped. DEPT. OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT 259 (1986), available at <https://www.justice.gov/nsd-fara/page/file/991806/download> [hereinafter 1986 FARA REPORT]

<sup>184</sup> The *Guardian* has an online U.S. edition at <https://www.theguardian.com/us-news>, but Guardian News and Media is based in the United Kingdom. *Who owns the Guardian? Our unique independent structure*, THE GUARDIAN, Nov. 17, 2017, <https://www.theguardian.com/about/2017/nov/17/who-owns-the-guardian-our-unique-independent-structure>

<sup>185</sup> 22 U.S.C. § 611(i). Indeed, up to at least 1986 some national public radio stations registered under FARA for marketing BBC content. See, 1986 FARA REPORT, *supra* note 184 at 252 (registration of Minnesota Public Radio for marketing BBC programs).

<sup>186</sup> 22 U.S.C. § 611(h).

<sup>187</sup> Advisory Opinion 1984, *supra* note 133.

### 3. Public officials

Less noticed by most commentators, FARA seemingly requires many public officials, including Members of Congress and their staff, as well as members of the Executive, to register for relatively routine interactions with foreign individuals, companies, and governments. There is no explicit exemption from registering for U.S. public officials under any provision of FARA. Not only would registering as a “foreign agent” be embarrassing for U.S. public officials, but federal public officials are explicitly barred from being a “foreign agent” under FARA, an offense for which they can serve up to two years in jail.<sup>188</sup>

In 1970, Philip Heymann, then Assistant Attorney General, testified before Congress that part of the reason the Justice Department then read down the term “request” in FARA’s agency requirement was to avoid officials being ensnared in FARA. As Heymann noted, if “request” were to include simple forms of persuasion then if a member of Congress visited Turkey and Turkish government officials requested the member promote policies favorable to Turkey, if the member supported these policies when they returned to Congress they would then be an unregistered “foreign agent”.<sup>189</sup>

Similarly, consider if a Canadian corporation requested that a member of Congress arrange a meeting of policymakers in her constituency to discuss the local business climate in consideration of building a factory. If the member of Congress acted on this request they arguably would need to register as convening local policymakers is designed to influence a “section of the public” with reference to “formulating” the domestic policies of the U.S.<sup>190</sup>

Perhaps recognizing this problem of over-breadth, when Australia adopted its Foreign Influence Transparency Act in 2018, which was heavily modeled on FARA, one of the key changes the Australian Parliament made was to add an exemption for statutory office holders.<sup>191</sup>

While the Justice Department has traditionally interpreted FARA

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<sup>188</sup> 18 U.S.C. § 219.

<sup>189</sup> Inquiry Into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Foreign Governments of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 700, 701 (1970) (statement of Phillip B. Heymann, Assistant Attorney General) (explaining that “Because of possible results like this one, we do not read or apply the statute to instances of persuasion or the mere urging of a viewpoint. Instead, . . . [a]s we read the statute . . . a person is a foreign agent, and must register with the Department, if he engages in the activities specified in the statute and if he does so at the order of a foreign principal, or under the direction or control of a foreign principal.”)

<sup>190</sup> 22 U.S.C. § 611(o) (defining “political activities”).

<sup>191</sup> Foreign Influence Transparency Scheme Act, *supra* note 64 at Part 2.25A (providing a limited exemption for members of Parliament and statutory office holders).

narrowly as it applies to public officials, a future Justice Department might not, or FARA could be used by others in a politicized manner. For instance, in September 2018, President Donald Trump tweeted that former Secretary of State John Kerry may have violated FARA by meeting with the Iranian government and offering them advice related to the United States.<sup>192</sup> Senator Marco Rubio then sent a letter to the Justice Department asking it to investigate whether John Kerry violated either FARA or the Logan Act (the latter bars unauthorized U.S. citizens from negotiating with foreign governments over disputes with the U.S. government).<sup>193</sup>

In a climate of increased enforcement, U.S. politicians could start more regularly accusing each other of being “foreign agents” under the wide and malleable language of FARA and demanding that their political opponents be investigated for violating the Act.

### III. THE POLITICIZED ENFORCEMENT OF FARA

While there has long been criticism that FARA is underenforced, its actual use has been littered with accusations of politically motivated targeting. This Part examines three such examples: (1) the Justice Department’s prosecution of W.E.B. Du Bois and other officers of the Peace Information Center in the early 1950s; (2) the investigation by the Chairman of the House Natural Resources Committee in 2018 of four prominent U.S. environmental nonprofits; and (3) the Justice Department’s request that *RT TV America* register under FARA in 2017.

While such politicized uses of FARA have been relatively rare in recent decades, in large part because the Act is so rarely enforced, these examples show how FARA might be used more aggressively in the future. These examples are not meant to be exhaustive. For instance, the scholar Grant Smith has been critical that the American Israel Public Affairs Committee (AIPAC), and particularly its precursor organization the American Zionist Council, were not required by the Justice Department to register.<sup>194</sup> At the same time, the National Association of Arab Americans, an organization Smith claims had a similar relationship to a foreign government, was required to register and the Kashmiri American Council was criminally prosecuted

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<sup>192</sup> William Cummings, *Trump, Pompeo denounce ex-Secretary of State John Kerry for meetings with Iranians*, USA TODAY, Sept. 14, 2018, <https://www.usatoday.com/story/news/politics/2018/09/14/trump-pompeo-attack-kerry-iran-meetings/1306311002/>

<sup>193</sup> Rubio Letter, *supra* note 14.

<sup>194</sup> GRANT F. SMITH, *AMERICA’S DEFENSE LINE: THE JUSTICE DEPARTMENT’S BATTLE TO REGISTER THE ISRAEL LOBBY AS AGENTS OF A FOREIGN GOVERNMENT* (2008) (detailing efforts by some in the Justice Department to have the American Zionist Council register under FARA).

under the Act.<sup>195</sup> Smith complains that, “FARA enforcement was never intended to be ‘optional’ or used as a political cudgel against an administration’s perceived enemies.”<sup>196</sup>

FARA has also been used to justify other legal measures that have undercut legitimate cross-border exchange. Most notably, in the 1940s and 1950s FARA was a key part of the Justice Department’s dubious legal justification for a sweeping U.S. government program intended to combat Fascist, and then Communist, propaganda, that intercepted and destroyed thousands of publications sent to the U.S. from foreign countries.<sup>197</sup> The overbroad program ended up catching Russian novels, Soviet scientific journals, and even copies of the London-based *Economist* that were critical of U.S. government policy.<sup>198</sup> These interceptions of mail undercut academic and political exchange, arguably contributing to U.S. policymakers being blindsided by the launch of Sputnik and other Soviet advances.<sup>199</sup>

#### A. W.E.B. Du Bois and the Peace Information Center

Perhaps the most infamous prosecution under FARA was that of W.E.B. Du Bois and other officers of the Peace Information Center in 1951, during the height of McCarthyism. It came after the Justice Department had created an extensive bureaucracy during World War II to target Nazi voices using FARA and other internal security acts.<sup>200</sup> After the War, the Justice

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<sup>195</sup> Grant F. Smith, *Selective FARA Enforcement: Pakistan’s Alleged Agents Prosecuted, Israel’s Ignored*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS (Sept.-Oct. 2011) <https://www.wrmea.org/011-september-october/selective-fara-enforcement-pakistan-s-alleged-agents-prosecuted-israel-s-ignored.html>

<sup>196</sup> SMITH, *supra* note 194 at 60.

<sup>197</sup> Murray L. Schwartz and James C. N. Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. OF PENN. L. REV. 621, 626-627 (1959) (the Attorney General’s memo declared that if an unregistered foreign agent under FARA based outside the country used the U.S. mail service to disseminate “propaganda” the mail would become “unmailable” under the Espionage Act of 1907 as the mail was designed or intended to violate a penal statute – i.e. FARA – in the aid of a foreign government). Schwartz and Paul point out that under FARA foreign agents are defined as being inside the U.S. The memo extended FARA’s reach to those outside the U.S. It also turned what was explicitly a transparency statute into a justification for destroying informational material. *Id.* at 626-27. Later, a different version of this mail interception program, which had been given legislative grounding in the Postal Service and Federal Employees Salary Act of 1962, was struck down by the Supreme Court in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) as violating the First Amendment. *Id.*

<sup>198</sup> Schwartz and Paul, *supra* note 197 at 622.

<sup>199</sup> *Id.* at 626 (noting that, “[t]he American people were soon to be sputniked into recognition that they had a lot at stake in maintaining . . . the most liberal kind of access to information about the Communist world.”)

<sup>200</sup> GARY, *supra* note 88 at 197 (discussing development of bureaucracy to implement

Department then turned this bureaucracy towards the threat of Communist infiltration in the United States.<sup>201</sup>

Du Bois was one of the original co-founders of the NAACP and a leading civil rights leader of his generation.<sup>202</sup> Throughout his life he was connected with international social movements related to race and peace.<sup>203</sup> In April 1949, along with several other U.S. activists, he started the Peace Information Center (PIC).<sup>204</sup> The organization’s goal was to promote the peaceful resolution of international disputes and ban the first use of nuclear weapons. To achieve this end, the organization published in the U.S. information from across the world about international peace activities.<sup>205</sup> It also circulated copies of the Stockholm Appeal, which called for a ban on nuclear weapons, successfully soliciting over two million signatures.<sup>206</sup>

In August 1950, PIC received a letter from the Justice Department claiming it was engaged in activities that required registration under FARA.<sup>207</sup> PIC responded that their organization was comprised entirely of Americans and that they acted for no one but themselves.<sup>208</sup> They did though shut down the organization in October 1950 to avoid having to register.<sup>209</sup>

Nonetheless, in February 1951, five officers of the PIC, including Du Bois, were indicted for their past failure to register under FARA. The Justice Department did not allege PIC had acted as an “agent” of any foreign government, but rather of a group based in Paris called the Committee of the Congress of the World Defenders of Peace.<sup>210</sup> The indictment claimed that PIC had published and disseminated the Stockholm Peace Appeal and other anti-nuclear information at the “request” of this French-based group.<sup>211</sup>

The officers of PIC, including Du Bois, faced five years in jail. The indictment alone inflicted a heavy cost. As Du Bois wrote in a memoir about

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FARA and other internal security acts during World War II).

<sup>201</sup> *Id.* at 245-246 (discussing how the Second Red Scare allowed those in Justice Department to direct internal security acts towards the new threat of Communism).

<sup>202</sup> NAACP, NAACP History: W.E.B. Du Bois, <https://www.naacp.org/naacp-history-w-e-b-dubois/>

<sup>203</sup> W.E.B. Du Bois, Speech at Philadelphia 3 (April 29, 1951), available at <http://credo.library.umass.edu/view/pageturn/mums312-b201-i063/#page/2/mode/1up>

<sup>204</sup> *Id.* at 5.

<sup>205</sup> *Id.* at 5.

<sup>206</sup> *Id.* at 5; Andrew Lanham, *When W.E.B. Du Bois was Un-American*, BOSTON REVIEW OF BOOKS, Jan. 13, 2017, <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american>

<sup>207</sup> W.E.B. DU BOIS, IN BATTLE FOR PEACE: THE STORY OF MY 83<sup>RD</sup> BIRTHDAY, 34 (2007).

<sup>208</sup> *Id.* at 25.

<sup>209</sup> *Id.* at 37.

<sup>210</sup> *Id.* at 36-37, 89-90 (2007).

<sup>211</sup> *Id.* at 37.



the experience, “Although the charge was not treason, it was widely understood and said that the Peace Information Center had been discovered to be an agent of Russia.”<sup>212</sup>

Some newspapers, including many in the African American community, criticized the government’s charges against Du Bois.<sup>213</sup> For example, Langston Hughes wrote a stirring essay in defense of Du Bois in the *Chicago Defender* in which he compared Du Bois to great intellectual martyrs such as Voltaire and Socrates.<sup>214</sup> Albert Einstein, a proponent of international peace, volunteered to be a character witness at his trial.<sup>215</sup> However, other newspapers wrote stories that implied that Du Bois was a Soviet sympathizer.<sup>216</sup> Du Bois himself was frustrated that many in the African American elite did not defend him more vigorously.<sup>217</sup>

During the trial of Du Bois and his co-defendants in November 1951, the defense had planned to introduce an affidavit that showed the Congress of the World Defenders of Peace never made any “request” of PIC to distribute information. Rather, the Committee simply sent PIC peace material, as they did to any of their members, which PIC independently decided to distribute.<sup>218</sup> However, ultimately the government did not argue that PIC had ever acted even at the “request” of the Committee.<sup>219</sup>

Instead, the government claimed that to be a “publicity agent” under FARA the foreign principal did not even have to be aware of the agent. It only had to show that “it was the subjective intent of [PIC] . . . to disseminate information in the United States, propaganda for and on behalf of, and [to] further the propaganda objectives of the European organization.”<sup>220</sup> Du Bois would later write that the government essentially argued that an agency relationship could be created under FARA when a domestic organization

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<sup>212</sup> *Id.* at 48.

<sup>213</sup> DU BOIS, *supra* note 207 at 50-51 (noting some newspapers that defended Du Bois)

<sup>214</sup> Langston Hughes, *The Accusers’ Names Nobody Will Remember, but History Records DuBois*, CHICAGO DEFENDER, Oct. 6, 1951, available at <http://credo.library.umass.edu/view/pageturn/mums312-b286-i046/#page/1/mode/1up>

<sup>215</sup> Lanham, *supra* note 206.

<sup>216</sup> DU BOIS, *supra* note 207 at 49-50 (noting that the New York Herald wrote that “. . . the Du Bois outfit was set up to promote a tricky appeal of Soviet origin. . . .”)

<sup>217</sup> *Id.* at 52 (stating that many “educated and well-to-do Negro friends” did not speak out in his defense).

<sup>218</sup> DU BOIS, *supra* note 207 at 94-96 (Du Bois recounting a deposition in which Jean Laffitte, the Secretary of the World Defenders of Peace, said “that the committee had not appointed the Peace Information Center as its agent for the circulation of the Stockholm Appeal . . . and [h]e denied that he had ever requested the Peace Information Center to disseminate the Stockholm Appeal. . . .”)

<sup>219</sup> DU BOIS, *supra* note 207 at 99.

<sup>220</sup> DU BOIS, *supra* note 207 at 99.

simply held a parallel view as that of a foreign organization.<sup>221</sup> Although the government’s theory of “parallelism” of speech may seem outlandish, it was similar to the argument the Justice Department had made when successfully prosecuting Nazi media outlets in the U.S. during World War II.<sup>222</sup> Ultimately, the district court judge rejected the government’s theory of agency and found that the government had not presented sufficient evidence for a jury to convict the officers of PIC and dismissed the case.<sup>223</sup>

While Du Bois and his co-defendants may have won in court the costs were substantial. They had spent substantial time and resources for their legal defense, forcing Du Bois to fundraise across the country.<sup>224</sup> Du Bois reputation never recovered and he continued to face persecution from the U.S. government.<sup>225</sup> And, of course, the prosecution of Du Bois and his co-defendants by the Justice Department successfully led to the closure of PIC, signaling that the U.S. government would target organizations that took too strong a stance, or were too successful mobilizing, against nuclear militarism.

### B. House Committee Investigation of Environmental Nonprofits

While the Justice Department is the only entity with the power to prosecute someone for failing to comply with FARA, Congress may also investigate alleged violations. This can lead to politicized use of the Act.

In 2018, the House Committee on Natural Resources began investigating the potential manipulation of tax-exempt 501(c) organizations by foreign entities to influence U.S. environmental and natural resource policy. As part of that investigation, the Chairman of the Committee, Representative Rob Bishop (UT-R), and Chairman of the Subcommittee on Oversight and Investigations, Rep. Bruce Westerman (AR-R), sent letters to four prominent U.S. environmental organizations—the Natural Resources Defense Council (NRDC), Center for Biological Diversity (CBD), the World Research Institute (WRI), and Earthjustice—asserting that they had failed to register as

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<sup>221</sup> *Id.* at 99.

<sup>222</sup> During the War, Harold Laswell had created a “parallels test” to demonstrate the connections between defendants in FARA prosecutions and the official German propaganda line. GARY, *supra* note 88 at 215.

<sup>223</sup> The judge seemed to accept the more stringent test for agency, based on the Restatement of agency, followed in *United States v. German-American Vocational League*, 155 F. 2d 860 (3d Cir. 1946) even though that case was interpreting the 1938 Act, not the expanded 1942 Act. DU BOIS, *supra* note 207 at 101. *See also* 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 PERIOD OF JANUARY 1, 1950 TO DECEMBER 31, 1954 18-19 (1955) (noting the judge in the PIC judgment followed a case which was based on FARA prior to the 1942 amendments).

<sup>224</sup> DU BOIS, *supra* note 207 at 104.

<sup>225</sup> The U.S. government revoked Du Bois’ passport in 1952. Lanham, *supra* note 206.

a “foreign agent” under FARA.<sup>226</sup> The letters demanded that the organizations explain why they had not registered and called on them to provide a litany of information. The ranking Democratic minority member of the Committee condemned the investigation as a “witch hunt”.<sup>227</sup>

The letters implied that organizations that were critical of the U.S. government were suspicious. For example, perhaps the primary piece of evidence against the NRDC about why they would need to register is that they had been more critical of U.S. than Chinese environmental policy. As the Committee Chairman wrote, “When engaging on environmental issues concerning China, the NRDC appears to practice self-censorship, issue selection bias, and generally refrains from criticizing Chinese officials. . . .”<sup>228</sup> The Committee Chairman continued, “By contrast, the NRDC takes an adversarial approach to its advocacy practices in the United States. . . . The Committee is concerned that the NRDC’s need to maintain access to Chinese officials has influenced its political activities in the United States and may require compliance with the Foreign Agents Registration Act (FARA).”<sup>229</sup> The letter provided several examples where the Committee argued the NRDC has been too lenient on Chinese environmental policy, but provided no examples of the Chinese government directing or requesting NRDC to take any action, or NRDC complying. Instead, seemingly in an attempt to create an agency relationship, the letter simply made note that “NRDC leadership regularly meets with senior Chinese and Communist Party officials.”<sup>230</sup>

The letter to CBD focused on its advocacy, including litigation, opposing

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<sup>226</sup> See generally, Letter from Chairman Rob Bishop and Chairman Bruce Westerman to Abigail Dillen, President of Earthjustice, Oct. 1, 2018, available at [https://naturalresources.house.gov/uploadedfiles/2018-10-01\\_bishop\\_westerman\\_to\\_dillen\\_earthjustice\\_re\\_fara.pdf](https://naturalresources.house.gov/uploadedfiles/2018-10-01_bishop_westerman_to_dillen_earthjustice_re_fara.pdf) [hereinafter Earthjustice letter]; Letter from Chairman Rob Bishop and Chairman Bruce Westerman to Andrew Steer, President & CEO of World Resources Institute, & Sept. 5, 2018, available at [https://naturalresources.house.gov/uploadedfiles/bishop-westerman\\_to\\_steer\\_wri\\_re\\_fara\\_09.05.2018.pdf](https://naturalresources.house.gov/uploadedfiles/bishop-westerman_to_steer_wri_re_fara_09.05.2018.pdf) [hereinafter WRI letter]; Letter from Chairman Rob Bishop and Chairman Bruce Westerman to Kieran Suckling, Executive Director of Center for Biological Diversity, June 20, 2018, available at [https://naturalresources.house.gov/uploadedfiles/letter\\_to\\_center\\_bio\\_diversity\\_06.20.18.pdf](https://naturalresources.house.gov/uploadedfiles/letter_to_center_bio_diversity_06.20.18.pdf) [hereinafter CBD letter]; Letter from Chairman Rob Bishop and Chairman Bruce Westerman to Rhea Suh, June 5, 2018, available at [https://naturalresources.house.gov/uploadedfiles/bishop-westerman\\_to\\_nrdc\\_06.05.18.pdf](https://naturalresources.house.gov/uploadedfiles/bishop-westerman_to_nrdc_06.05.18.pdf) [hereinafter NRDC letter].

<sup>227</sup> Mark Hand, *Incoming house committee leader to call off ‘witch hunt’ against environmental groups*, THINKPROGRESS, Dec. 3, 2018, <https://thinkprogress.org/house-democratic-leader-pledges-end-to-witch-hunt-against-environmental-groups-e011e256bd90/>

<sup>228</sup> NRDC letter, *supra* note 226 at 3.

<sup>229</sup> *Id.* at 4.

<sup>230</sup> *Id.* at 2-3.

the planned relocation of the Marine Base on Okinawa in Japan on environmental grounds.<sup>231</sup> The Chairman wrote that CBD engaged in political activities covered under the Act by arranging meetings with U.S. politicians and holding press conferences in support of Japanese activists and the Okinawa government.<sup>232</sup>

The letters to all four organizations interpreted FARA broadly. For example, they noted that the organizations must register if they engage in covered activities “at the . . . request . . . 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 . . .” (emphasis in the original letters).<sup>233</sup> In other words, the Chairman invoked, and emphasized, the broadest language in the agency definition of FARA when describing why these groups may need to register.

Notably, both CBD and the NRDC had openly criticized the Chairman in their advocacy before they were investigated for failing to register under FARA. For instance, in 2017, CBD had given Rob Bishop its annual Rubber Dodo award for the person that most aggressively sought to destroy the natural heritage of the United States or drive a species extinct.<sup>234</sup> NRDC had also been publicly critical of Rob Bishop’s environmental record.<sup>235</sup>

The investigation of these four environmental organizations ended with the Democrats taking control of the House of Representatives in 2019. However, these organizations had to expend resources defending themselves from charges of being “foreign agents”. It also sent a chilling message about how members of Congress can use FARA in a political manner to target nonprofits who might criticize them or with which they might disagree.

### C. RT TV America and Foreign Media

At the request of the Justice Department, in November 2017, *RT TV America* and *Sputnik* registered under FARA.<sup>236</sup> The targeting of Russian, but

<sup>231</sup> CBD letter, *supra* note 226.

<sup>232</sup> *Id.* at 1-2.

<sup>233</sup> WRI letter, *supra* note 226 at 5-6; Earthjustice letter, *supra* note 226 at 3; NRDC letter, *supra* note 226 at 4; CBD letter, *supra* note 226 at 5.

<sup>234</sup> *Utah Congressman Rob Bishop Wins Rubber Dodo Award*, Center for Biological Diversity, Jan. 5, 2017, [https://www.biologicaldiversity.org/news/press\\_releases/2017/rubber-dodo-01-05-2017.php](https://www.biologicaldiversity.org/news/press_releases/2017/rubber-dodo-01-05-2017.php) (announcing Rep. Rob Bishop awarded the Rubber Dodo Award).

<sup>235</sup> *The Real Lowdown: The Trump and Congressional Republican Assault on Our Environment*, NRDC, Oct. 13, 2017, <https://www.nrdc.org/experts/nrdc/real-lowdown-trump-and-congressional-republican-assault-our-environment-vol-28> (calling Rep. Rob Bishop’s proposal to require local signoff on any national monument bigger than 640 acres “radical”).

<sup>236</sup> Wilson, *supra* note 11; Letter from U.S. Dept. of Justice National Security Division

not other media organizations seemingly covered under the Act, has raised the prospect of this being politicized enforcement. It also demonstrated how registering can have serious secondary effects beyond the stigma or administrative burden of registering.

*RT TV America* was founded in 2010, as the U.S. arm of *RT*, formerly known as *Russia Today*. *RT* is owned by TV-Novosti, a nonprofit news organization based in Russia.<sup>237</sup> The Russian government is the primary funder of both *RT* and *RT America*.<sup>238</sup> *RT TV America* hires many U.S. journalists and has been nominated for several Emmys.<sup>239</sup>

The Office of the Director of National Intelligence (DNI) released a report in January 2017 finding that *RT TV America* was a central part of the Russian effort to influence the 2016 election.<sup>240</sup> There is disagreement about how much of an audience *RT TV America* actually had during the election, whether their programming was designed to influence the election (or was biased towards either candidate), and whether it had any actual influence.<sup>241</sup>

In its letter to *RT TV America* asking it to register under FARA, the Justice Department claimed that *RT TV America* operated as an agent of both TV-Novosti and *RT*, who were themselves “alter egos” of “the Kremlin”.<sup>242</sup> It claimed *RT TV America* needed to register because it engaged in political activities in the interests of a foreign principal, and acted as both a publicity agent and an information service employee of a foreign principal.

Citing to the DNI report, the Justice Department letter stated that “the Intelligence Community has concluded that RT is ‘a messaging tool . . .

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to RTTV America, Aug. 17, 2017, available at <https://www.politico.com/f/?id=00000160-79a9-d762-a374-7dfbebe30001> [hereinafter RT TV America Letter].

<sup>237</sup> RT TV America letter, *supra* note 236 at 3.

<sup>238</sup> RT TV America letter, *supra* note 236 at 2-3.

<sup>239</sup> *RT America Nominated for National Emmy News Award in US – Chief Editor*, SPUTNIK, March 23, 2017, [https://sputniknews.com/art\\_living/201703231051889022-rt-emmy-award/](https://sputniknews.com/art_living/201703231051889022-rt-emmy-award/) (announcing that RT TV America had been nominated for one national Emmy and noting it had previously been nominated for four international Emmys).

<sup>240</sup> OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, BACKGROUND TO “ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS: THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION 6-8 (Jan. 6, 2017), available at [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf) (claiming that RT sought to cast doubt on the integrity of the election process and conducted strategic messaging for the Russian government).

<sup>241</sup> Steven Erlanger, *Russia’s RT Network: Is it More BBC or K.G.B?*, NY TIMES, March 8, 2017 <https://www.nytimes.com/2017/03/08/world/europe/russias-rt-network-is-it-more-bbc-or-kgb.html> (interviewing commentators with differing views on *RT TV America’s* reach and influence); Danielle Ryan, *RT America Was Not ‘Pro-Trump’*, THE NATION, Jan. 10, 2017, <https://www.thenation.com/article/rt-america-was-not-pro-trump/> (noting that many contributors to RT took positions against Presidential candidate Donald Trump).

<sup>242</sup> RT TV America letter, *supra* note 236 at 6.

[used] to undermine faith in the US Government and fuel political protest.”<sup>243</sup> The letter went on to find that “RT’s broadcasts consistently mirror the opinions of the Kremlin.”<sup>244</sup> The letter provides a handful of examples to show how its programming paralleled the opinions of the Russian government as related to its reporting on Iran ballistic missile testing, criticism of NATO, and criticism of claims that the Russian government had interfered in the Presidential election.<sup>245</sup> Based on these examples and quoting from FARA, the Justice Department wrote that *RT TV America* sought to “influence . . . 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 Russia, for or in the interests of Russia and is therefore engaged in ‘political activities’ [under FARA].”<sup>246</sup> The Justice Department explained it did not matter whether *RT TV America* exercised editorial independence, as the outlet claimed, but would be a foreign agent under FARA if they acted at the order or request of TV-Novosti.<sup>247</sup>

The Justice Department also separately found that *RT TV America* acted as a “publicity agent” under FARA for TV-Novosti and *RT* because it had secured channels in the US that TV-Novosti used to distribute *RT* programming.<sup>248</sup> Further, it claimed that *RT TV America* was an “information service employee” because (again quoting from FARA) on behalf of TV-Novosti it was involved in “furnishing, disseminating, or publishing” programming that “concerned ‘conditions’ of a foreign government or ‘foreign country’, including but not limited to Russia.”<sup>249</sup>

When *RT TV America* registered as a “foreign agent” it protested that it was “informing” not “influencing” the U.S. public.<sup>250</sup> Others also criticized the Justice Department’s use of FARA. As the Committee to Protect Journalists pointed out, “In invoking FARA, Congress is relying on a notoriously opaque unit within the Department of Justice to draw an impossible line between propaganda and journalism. Source protection, media access, and the US promotion of press freedom abroad may all be

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<sup>243</sup> *Id.* at 5.

<sup>244</sup> *Id.* at 6.

<sup>245</sup> *Id.* at 6-7.

<sup>246</sup> *Id.* at 7.

<sup>247</sup> *Id.* at 8.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> FARA Registration Statement of T&R Productions, Nov. 10, 2017, available at <https://www.fara.gov/docs/6485-Exhibit-AB-20171110-2.pdf> (claiming that programming is intended to inform, not influence, and not primarily benefit any foreign government or political party. *Id.* at 4).

compromised.”<sup>251</sup>

Shortly after *RT TV America* registered under FARA, the Executive Committee of the Congressional Radio & Television Correspondents’ Gallery revoked *RT TV America*’s Capitol Hill Press credentials because it was a “foreign agent”.<sup>252</sup> The incident not only limited the ability of *RT TV America* to report on affairs in the U.S. Congress, but raised the prospect of other secondary effects of registering. For example, some have noted that journalists may now decide not to work for *RT TV America*, may avoid sharing *RT TV America*’s articles or videos on social media, and might even think twice before voicing opinions similar to *RT TV America*’s content.<sup>253</sup> Some public officials may also stop conducting interviews with those registered under FARA.<sup>254</sup> One could similarly imagine Twitter, Facebook, or other social media publishers creating separate rules for how content is labeled or shared from news organizations registered as “foreign agents”.<sup>255</sup>

Those who provide services to media organizations who register under FARA have also faced consequences. In October 2018, RM Broadcasting filed a lawsuit against the Justice Department after the Justice Department claimed that RM Broadcasting had to register under FARA for leasing broadcast airtime to *Sputnik*.<sup>256</sup> RM Broadcasting responded that it did not act as an “agent” of any “foreign principal” and that registering would be burdensome and allow competitors to view confidential business information.<sup>257</sup>

It is not clear if the Justice Department has asked other providers of spectrum to *RT TV America* or *Sputnik* to register. However, in February 2018 *RT TV America* was dropped by a Washington D.C. area TV station, which *RT TV America* claimed was related to it being to registering under FARA.<sup>258</sup>

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<sup>251</sup> Ellerbeck and Asher-Shapiro, *supra* note 103.

<sup>252</sup> Hadas Gold, *Congressional press office yanks RT credentials*, CNN MONEY, Nov. 30, 2017, <http://money.cnn.com/2017/11/29/media/rt-capitol-credentials-revoked/index.html>

<sup>253</sup> For instance, a staffer was reportedly fired in a Georgia gubernatorial campaign for giving an interview to *Sputnik*. Aaron Mate, *RT Was Forced to Register as a Foreign Agent*, THE NATION, Nov. 16, 2017, <https://www.thenation.com/article/rt-was-forced-to-register-as-a-foreign-agent/>

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* (explaining that Twitter recently barred *RT TV* and *Sputnik* from advertising).

<sup>256</sup> Casey Michel, *A new lawsuit claims that companies helping Russian propaganda in the U.S. aren’t all foreign agents*, THINKPROGRESS, Oct. 31, 2018, <https://thinkprogress.org/u-s-company-working-with-russian-propaganda-outlet-fights-foreign-agent-status-in-new-lawsuit-c5ea15f642c4/>

<sup>257</sup> *Id.*

<sup>258</sup> *Russia-backed TV channel is gone from DC-area broadcasts*, ASSOCIATED PRESS, April 2, 2018, <https://wtop.com/local/2018/04/russia-backed-tv-channel-rt-is-gone-from-dc-area-broadcasts/>

As such, requiring *RT TV* and *Sputnik* to register under FARA may have resulted in far more than “transparency”, but undermined their ability to have their broadcasts heard.

At the same time, there is a question why Russian media organizations were targeted under the Act. Under the broad logic of the Justice Department letter to *RT TV America* a range of other media outlets should also register. For example, *BBC America* is the U.S. arm of a foreign government-run news network and seemingly engages in “political activities” in the interest of a foreign principal. At the very least, it is difficult to imagine that perspectives aired on the *BBC* do not at times “mirror” the views of the British government (to use the language in the Justice Department’s letter to *RT TV America*). *BBC America* also seemingly acts as a “publicity agent” and “information service employee”, which were invoked by the Justice Department in their letter to *RT TV America*. As was discussed in the previous section, many other media organizations are also arguably covered whether it is PBS or Netflix.<sup>259</sup>

Fears of the Act’s politicized use were amplified when in September 2018, the Justice Department asked *Xinhua News Agency* and *China Global Television Network* to register. This request came amidst, and may have been partially motivated by, rising trade and political tensions with China.<sup>260</sup>

Members of Congress have also called for other media organizations to register when they have connections to certain countries or controversial views. For example, U.S. Senator Marco Rubio, a frequent critic of China, tweeted that a partnership between *Politico* and the *South China Morning Post* could potentially require *Politico* to register under FARA.<sup>261</sup> In March 2018, members of Congress sent a letter to the Justice Department requesting they investigate whether *Al Jazeera* should register.<sup>262</sup> In justifying their request they noted that *Al Jazeera* has a record of “radical anti-American, anti-Semitic, and anti-Israel” broadcasts.<sup>263</sup>

The recent experience of Russian media organizations being required to register, raises the prospect of FARA being used in a selective and politicized manner. This might be against media organizations based in countries with which the U.S. has tensions or simply because of their views.

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<sup>259</sup> See Part II(F)(2).

<sup>260</sup> John Bowden, *DOJ orders two Chinese state-run media organizations to register as foreign agents*, THE HILL, Sept. 8, 2018, <https://thehill.com/policy/national-security/407274-doj-orders-two-chinese-state-run-media-organizations-to-register-as> (noting that release of news of the move by the Justice Department came a day after the U.S. announced major new trade measures against China).

<sup>261</sup> Ellerbeck and Asher-Shapiro, *supra* note 103.

<sup>262</sup> Congress letter to *Al Jazeera*, *supra* note 13.

<sup>263</sup> *Id.* at 1.



*D. A Shifting Enforcement Landscape*

These three case examples show that the politicized use of FARA can come not only from the Justice Department (as in the case of Du Bois or *RT TV America*), but also from other political actors like Congress (as with the recent House Natural Resources Committee investigation). Similarly, the effects of the use of the Act can be diverse, from the Peace Information Center being forced to shut down, to U.S. environmental non-profits having to expend resources in defending themselves, to *RT TV America* losing its capitol hill press credentials. Notably, none of these examples was about the Act being applied to lobbying activities, but rather to attempts to influence the U.S. public more generally, whether by nonprofits or the media.

The examples of the recent selective use of FARA though are relatively rare, in large part because the Act is not frequently enforced, particularly outside the lobbying context. Going forward though this could change.

A set of laws in the U.S., particularly those, such as FARA, related to national security, are relatively broad, but historically underenforced.<sup>264</sup> Scholars like David Pozen have argued that the enforcement of such laws are driven by the incentives or political imperatives of the actors who enforce them.<sup>265</sup> As such, as these political calculations change so can enforcement.

After the 2016 Presidential election, there has been new attention to how in an increasingly interconnected world U.S. democracy may be susceptible to foreign influence, particularly when authoritarianism and illiberal democracy is enjoying political ascendance globally.<sup>266</sup> Such a political environment arguably creates new political will to increase enforcement of FARA to not only target foreign lobbyists, but also foreign disinformation

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<sup>264</sup> See David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARVARD L. REV. 512, 515 (2013) (finding that the courts have indicated that the U.S. government has extensive authority to prosecute employees who leak information, but that it has a longstanding practice of failing to enforce these laws); Daniel Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 HARVARD J. ON LEGISLATION 443 (2018) (claiming that while there have been many opportunities to enforce the Logan Act, it has seemingly ceased to function as a criminal Act); Kelner, *supra* note 86 (explaining how prosecutors “revived from hibernation” the Foreign Corrupt Practices Act “a decade ago”). For an overview and analysis of executive discretion in the enforcement of law, *see generally*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67(3) VANDERBILT L. REV. 671 (2014) (arguing that Presidents do have discretion in enforcing the law, but that discretion does not allow the President to license conduct prohibited under law).

<sup>265</sup> Pozen, *supra* note 264 at 519 (arguing that enforcement of anti-leaking laws vary based on personal incentives, bureaucratic politics, and functional system imperatives).

<sup>266</sup> See, e.g., Henry Farrell, *American Democracy is an Easy Target*, FOREIGN POLICY, Jan. 17, 2018 (discussing how Americans have become paranoid about foreign influence in their politics, particularly through the internet).

and electioneering activities.

The last time FARA was used as a tool to broadly target “nefarious” foreign influence aimed at the public was World War II. As was discussed in Part II it was then arguably used in a politicized manner to target prominent fascist and communist voices in the United States. Few were critical of this selective approach at the time because the country was at war.

Today, while there may be increased pressure to ramp up enforcement of FARA there are at least three major reasons to believe that compared to World War II FARA might be susceptible to being used to go after political opponents through other means.

First, it is not as clear as during World War II who is an enemy of the United States, and so whose political message should be targeted by FARA. In U.S. politics, there are claims that very different kinds of forces are undermining U.S. interests, including major trading partners like China,<sup>267</sup> significant allies like Saudi Arabia or Israel,<sup>268</sup> countries the U.S. has had longstanding tensions with, such as Russia,<sup>269</sup> or major multi-national corporations.<sup>270</sup> Yet, there is not consensus on which of these might be the most concerning threat, or whether some are threats at all.

Second, while “nefarious” foreign propaganda does exist—such as Russia’s attempts to undermine the U.S. political process—this propaganda often accentuates existing voices in U.S. politics whether it is advocates for greater immigration control, black lives matter groups, or the pro-gun

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<sup>267</sup> Josh Rogin, *China’s interference in U.S. politics is just beginning*, WASHINGTON POST, Sept. 20, 2018 [https://www.washingtonpost.com/opinions/global-opinions/chinas-interference-in-us-politics-is-just-beginning/2018/09/20/2b462558-bd0f-11e8-8792-78719177250f\\_story.html?utm\\_term=.57b207d7c5f2](https://www.washingtonpost.com/opinions/global-opinions/chinas-interference-in-us-politics-is-just-beginning/2018/09/20/2b462558-bd0f-11e8-8792-78719177250f_story.html?utm_term=.57b207d7c5f2) (describing tactics the Chinese government uses to influence U.S. politics).

<sup>268</sup> See, e.g., Aaron David Miller and Richard Sokolosky, *The U.S.-Saudi relationship is worth preserving – but not under the current terms*, WASHINGTON POST, Oct. 25, 2018, [https://www.washingtonpost.com/news/global-opinions/wp/2018/10/25/the-u-s-saudi-relationship-is-worth-preserving-but-not-under-the-current-terms/?utm\\_term=.a4ff013dd17b](https://www.washingtonpost.com/news/global-opinions/wp/2018/10/25/the-u-s-saudi-relationship-is-worth-preserving-but-not-under-the-current-terms/?utm_term=.a4ff013dd17b) (claiming that Saudi Arabia undermines U.S. interests); Rashid Khalidi, *Unwavering Support of Israel Harms U.S. Interests, Encourages Extremism*, NY TIMES, Aug. 6, 2014, <https://www.nytimes.com/roomfordebate/2014/08/05/can-the-us-still-be-a-leader-in-the-middle-east/unwavering-support-of-israel-harms-us-interests-encourages-extremism> (claiming overly strong support of Israel harms U.S. interests).

<sup>269</sup> Joshua Berlinger, *Pompeo: Russia ‘will try to undermine Western democracy’ in 2018, 2020*, CNN, July 20, 2018, <https://www.cnn.com/2018/07/20/politics/pompeo-russia-fox-intl/index.html>

<sup>270</sup> See, e.g., Gary Younge, *Who’s in control – nation-states or global corporations*, THE GUARDIAN, June 2, 2014 <https://www.theguardian.com/commentisfree/2014/jun/02/control-nation-states-corporations-autonomy-neoliberalism> (arguing that global corporations are stripping away sovereignty from national governments and leading to populist backlash, including in the United States).

lobby.<sup>271</sup> This makes it particularly dangerous to claim certain types of messaging are in the interest of a “foreign principal” as the themes of such “disinformation” are already a significant part of U.S. domestic discourse.

Third, while there is less consensus on who is an “enemy” of the U.S. or what is a genuinely “nefarious” message, the U.S. is currently experiencing historically strong political polarization.<sup>272</sup> A polarized political environment arguably increases the chance of FARA being used to label domestic political antagonists as “foreign agents”.

As such, while there are good reasons to believe that FARA enforcement will continue to increase, such increased enforcement is likely to bring more politicized, and controversial, uses of the Act.

#### IV. FARA’S POTENTIAL CONSTITUTIONAL DEFECTS

Part III of this article showed that FARA has a history of politicized use. Part II described how this politicization is made easier by the overly broad and, at times, ambiguous language used in the Act, particularly in relation to nonprofits, media organizations, and public officials. While Part I showed that FARA has been used to justify similar laws in other countries that are frequently invoked to restrict civil society, undercutting democracy.

This Part examines how FARA’s breadth arguably violates the First Amendment’s right to free speech and may be unconstitutionally vague. While this article focuses on how FARA can be used in a politicized manner to target controversial or dissenting speech, it is important to recognize that FARA can also more broadly chill speech. Even when the Act’s use is not politicized, FARA’s current language can create confusion for nonprofits, media organizations, and others about whether they need to register. As a result, nonprofits based outside the U.S. may not engage in advocacy in the U.S. Similarly, U.S. nonprofits or media organizations may limit their international interactions and partnerships out of fear that doing otherwise may require registration. When nonprofits and media organizations limit global connections this can have the effect of nationalizing civil society by rendering suspect relationships across borders. In this way, the broad provisions of FARA can curtail speech and undermine civil society’s ability

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<sup>271</sup> See, e.g., Tom Huddleston Jr., *Russian Facebook Ads Target Muslims, Gun Owners, Black Lives Matter*, FORTUNE, Oct. 2, 2017, <http://fortune.com/2017/10/02/facebook-russian-ads-congress/> (noting that Russian-linked ads that targeted the 2016 U.S. Presidential election were aimed at gun owners, black lives matter groups, and those favoring stricter immigration control, among others).

<sup>272</sup> See, e.g., *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CENTER, Oct. 5, 2017, <http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> (documenting increasing partisan divisions in U.S. on political values between 1994 and 2007).

to address pressing national and global challenges.

As discussed earlier, in *Meese v. Keene* (1987) the Supreme Court in a five to three decision rejected a First Amendment challenge of a person who wanted to circulate informational material that was classified as “political propaganda” under an earlier version of FARA.<sup>273</sup> In that decision, however, the majority explicitly said that the constitutionality of the underlying registration, filing, and disclosure requirements were not at issue nor were “the validity of the characteristics used to define the regulated category of expressive materials.”<sup>274</sup>

Since *Meese v. Keene*, commentators have noted that the Supreme Court’s First Amendment jurisprudence has become more robust, and some have suggested this might mean that the Court today would be skeptical of the constitutionality of key provisions of FARA.<sup>275</sup> Two characteristics of FARA make it particularly vulnerable to First Amendment challenge: (1) FARA compels speech; (2) FARA burdens not types of speech, but a category of speakers.

First, FARA requires registrant’s engage in compelled speech. FARA registrants must place a conspicuous statement on informational material “for or in the interests” of a foreign principal that the materials are distributed by the agent on behalf of the foreign principal and that more information is available at the Justice Department.<sup>276</sup> For many Americans who may be covered under FARA this labeling requirement is stigmatizing, controversial, and undercuts their speech because it implies that the “agent” is not acting independently, but instead on behalf of a foreign principal, which may frequently be a misleading characterization. Indeed, simply being required to register as an “agent” under FARA could itself be considered a form of compelled speech given how controversial the label is.<sup>277</sup>

Compelled speech has been particularly disfavored by the federal courts in recent years.<sup>278</sup> For instance, in 2018 in *National Institute of Family and*

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<sup>273</sup> *Meese v. Keene*, 481 U.S. 465 (1987).

<sup>274</sup> *Meese*, 481 U.S. at 467. *See also* Nat’l Ass’n of Mfrs. v. SEC, 900 F.3d 518, 529 (2015) (claiming *Meese* did not consider the constitutionality of compelled speech in FARA).

<sup>275</sup> *See, e.g.*, Toni M. Massaro, *Foreign Nationals, Election Spending, and the First Amendment*, 34(2) HARVARD J. OF LAW & PUBLIC POLICY 663, 686 (2011) (suggesting that restrictions that chill the speech of certain categories of speakers, like FARA, would face significant scrutiny post-*Citizen United*).

<sup>276</sup> 22 U.S.C. § 614(b).

<sup>277</sup> The Supreme Court has struck down registration requirements for political speech in other contexts. *See* *Thomas v. Collins*, 323 U.S. 516, 539 (1945) (striking down a registration requirement for labor organizers to make a public speech because the government could not identify an adequate justification for the requirement).

<sup>278</sup> *See, e.g.*, Nat’l Ass’n of Mfrs., 900 F.3d 518, 530 (2015) (striking down as unconstitutional and stigmatizing a requirement that companies disclose on their websites and in SEC filings whether they used conflict minerals); *See also* Charlotte Garden, *The*

*Life Advocates (NILFA) et al v Becerra* the Supreme Court struck down a California mandate that certain pregnancy centers disclose that one could obtain a set of services, including abortion, from state-sponsored clinics. Justice Thomas, writing for the majority, held that the disclosure requirement violated the First Amendment because it “. . . targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech.”<sup>279</sup> Of course, many disclosure requirements are clearly constitutional, and *Citizens United* explicitly upheld a disclosure requirement for corporate political speech.<sup>280</sup> However, when a disclosure requirement may chill, or undercut, speech, like FARA, it seems likely it will draw the Court’s scrutiny.

Second, FARA does not regulate types of speech, but rather categories of speakers—applying different regulations to the speech of “agents of foreign principals”. In 2010, in *Citizens United v. FEC* Justice Kennedy, writing for the majority, held that, “We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”<sup>281</sup> As Justice Stevens pointed out in dissent though, such reasoning would seem to imply that foreign speakers should enjoy the same political speech rights as domestic speakers.<sup>282</sup> The majority did not refute Justice Stevens’ contention and instead held off from deciding “whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”<sup>283</sup> Therefore, at the very least, the majority’s reasoning in *Citizen United* would seem to indicate that the Supreme Court would closely scrutinize the broad categorization of certain speakers, many of whom are

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*Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 339-251 (2016) (describing how claims of “compelled speech” have become a key tool for advocates of a deregulatory First Amendment).

<sup>279</sup> *National Institute of Family and Life Advocates (NILFA) et al v Becerra* 138 S. Ct. 2361, 2378 (2018).

<sup>280</sup> *Citizens United v. FEC*, 558 US 310, 319 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” (J. Kennedy)).

<sup>281</sup> 558 U.S. at 341 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”); *See also* 138 S. Ct. at 2378 (“This Court’s precedents are deeply skeptical of laws that ‘distinguis[h] among different speakers, allowing speech by some but not others.’ . . . Speaker-based laws run the risk that ‘the State has left unburdened those speakers whose messages are in accord with its own views.’ *Sorrell*, 564 U. S., at 580.”)

<sup>282</sup> 558 U.S. at 424 (“If taken seriously, our colleagues’ assumption that the identity of a speaker has no relevance to the Government’s ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by ‘Tokyo Rose’ during World War II the same protection as speech by Allied commanders. . . .”)

<sup>283</sup> 558 U.S. at 362.

U.S. citizens, as “foreign agents” under FARA.

Since FARA frequently burdens, or stigmatizes, political speech there is a high likelihood its relevant provisions would be subject to “strict scrutiny”, which requires the government prove any restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>284</sup> FARA may often further a “compelling interest” of the government, although, as Part V explains, the goals of the Act can sometimes be unclear.<sup>285</sup> However, it is hard to call “narrowly tailored” an Act that can capture a wide-range of actors, including media organizations, non-profits, and public officials, and that often imposes significant burdens on their speech. If FARA was not subject to strict scrutiny it would likely face some variant of intermediate scrutiny, which also would likely require the Act to be better targeted and has been used to strike down disclosure requirements in other contexts.<sup>286</sup>

Significantly, even if the Justice Department only enforces FARA in cases where its use would likely not violate the First Amendment (such as in the case of paid lobbyists for foreign governments), the Act, or provisions of it, could still be struck down as unconstitutional. As Justice Thomas wrote in 2008 in *Washington State Grange v. Washington State Republican Party*, “[i]n the First Amendment context . . . a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”<sup>287</sup> As the Ninth Circuit recently concluded this outcome, “is based on the idea that speakers may be chilled from expressing themselves if overbroad criminal laws are on the books.”<sup>288</sup>

Finally, and related to, but separate from the First Amendment argument, several of FARA’s key provisions are unclear, leading some commentators to suggest that they may be unconstitutionally vague.<sup>289</sup> The U.S Supreme Court has held that a law is unconstitutionally vague when it does not “give a person of ordinary intelligence a reasonable opportunity to know what is

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<sup>284</sup> Federal Election Comm’n v. Wisconsin Right to Life, Inc., 551 U. S. 449, 464 (opinion of C.J. Roberts).

<sup>285</sup> See Part IV(C).

<sup>286</sup> See, e.g., 138 S. Ct. at 2375 (2018); 900 F.3d at 524.

<sup>287</sup> Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, n. 6 (2008). Also cited in U.S. v. Stevens, 559 U.S. 460, 473 (2010).

<sup>288</sup> U.S. v. Sineneng-Smith, 15-10614, U.S. Court of Appeals for the Ninth Circuit, at 12. As the Court continued, “To combat that chilling effect, even a person whose activity is clearly not protected [under the First Amendment] may challenge a law as overbroad under the First Amendment.” *Id.*

<sup>289</sup> See, e.g., Ryan Lovelace, *Washington’s Frenzy Spurs New Legal Business*, THE NATIONAL LAW JOURNAL, Sept. 27, 2018, <https://www.law.com/nationallawjournal/2018/09/27/washingtons-fara-frenzy-fomenting-new-legal-business/?slreturn=20180828113556> (quoting law firm partner Robert Kelner stating that FARA might be unconstitutionally vague).

prohibited, so that he may act accordingly.”<sup>290</sup> Given FARA’s ambiguous and convoluted provisions it is frequently difficult for persons or entities to know whether they must register.

## V. TARGETING FARA

To address the dangers of politicization and the Act’s constitutional vulnerabilities, FARA needs to be better tailored. This last Part argues that to successfully do so requires clarifying the purpose of the Act. Based on insights gained from a discussion of what appropriate goals are for a transparency statute like FARA, it ends by proposing three reform strategies.

### A. Clarifying FARA’s Purpose

Too often FARA is seen as a tool to combat, or make transparent, very different kinds of foreign influence. However, not all these different types of foreign influence raise the same concerns, nor is the bluntness of FARA appropriate to address them. Further, not all actors that the current Act requires to register should be considered as acting on behalf of a foreign interest. This section examines three of the most prominent justifications for FARA, which are creating transparency around: (1) foreign lobbying; (2) foreign electioneering activity; and (3) foreign disinformation.

It makes the claim that FARA, and transparency tools like it, are most appropriate, and on strongest ground, when applied to (1) those who clearly are acting at the direction or control of a foreign government or political party; and (2) when the covered activity involves core democratic processes aimed at directly influencing government, such as lobbying or electioneering (although, as will be discussed, U.S. law bars much electioneering activity on behalf of foreigners anyway).

As such, this section claims that certain types of lobbying or electioneering activity by agents of foreign principals may beneficially fall under the disclosure requirements of the Act. However, FARA’s attempts to require disclosure around foreign propaganda both captures a wide range of legitimate and beneficial media and nonprofit advocacy activity and generates a high likelihood of politicized abuse. Further, as this section will show, FARA is frequently a poor tool for countering genuine disinformation.

#### 1. Foreign Lobbying

FARA is sometimes viewed as one of the U.S.’s earliest lobbying laws,

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<sup>290</sup> Grayned v City of Rockford U.S. 104, 108 (1972).

enacted before the Regulation of Lobbying Act of 1946 (since repealed), the Lobbying Disclosure Act of 1995, and the Honest Leadership and Open Government Act of 2007.<sup>291</sup> While FARA initially focused squarely on the challenge of foreign propaganda, by the 1960s perhaps the most prominent justification of FARA was to provide transparency around foreign lobbying, particularly that of foreign governments and political parties.<sup>292</sup>

There are good reasons for applying additional scrutiny to lobbyists of foreign governments and political parties. Lobbying in the U.S. is core to the democratic process—involving concrete attempts to change legislation or policy, often with outsize effect, and is frequently undertaken outside the public eye.<sup>293</sup> Moreover, the burden or stigma of registering under FARA is seemingly not as high for a lobbyist of a foreign government or political party. Public officials are sophisticated actors who are arguably more likely to understand what being a “foreign agent” under FARA actually means, and for many lobbyists the label is seemingly accurate. Importantly, foreign governments already have diplomatic staff who can engage with policymakers in the U.S. without having to register under the LDA or FARA, making it less clear foreign governments, in particular, need lobbyists at all. Foreign political parties, which lack an official diplomatic staff, arguably have a greater need for lobbyists, but since they may later come to power it seems appropriate to treat them similarly to lobbyists of foreign governments.

While creating additional transparency requirements for lobbyists of foreign governments and political parties seems justifiable, this is not to say FARA is appropriately tailored to address this goal. In particular, FARA’s broad agency definition can require those who are not actually lobbyists for a foreign government or political party to register. Consider, for instance, the example of the Center for Biological Diversity’s work in Okinawa, Japan, opposing moving a US military base there. If the Okinawa government ever made a “request” to CBD for assistance in helping inform U.S. policymakers about the issue, an aggressive prosecutor might interpret this “request” as creating an agency relationship under FARA between CBD and the Okinawa government, even though CBD would likely have reached out to U.S. policymakers on the issue anyway. In this scenario, requiring CBD to register as a “foreign agent” of the Okinawa government would seem to be both descriptively inaccurate and stigmatizing by implying that CBD was not

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<sup>291</sup> JACOB R. STRAUS, *THE LOBBYING DISCLOSURE ACT AT 20: ANALYSIS AND ISSUES FOR CONGRESS* 7, 6-12 (CRS, Dec. 2015) (recounting the history of U.S. lobbying laws).

<sup>292</sup> DOJ FARA enforcement strategy, *supra* note 4.

<sup>293</sup> See, for example, Ben Freeman, *How Much It Costs to Buy US Foreign Policy*, *THE NATION*, Oct. 4, 2018, <https://www.thenation.com/article/how-much-it-costs-to-buy-us-foreign-policy/> (using disclosures from FARA to show how Saudi Arabia has used lobbyists to attempt to influence members of Congress on key foreign policy issues).



acting independently.

In the 115<sup>th</sup> Congress, several members introduced bills that would eliminate the LDA exemption in FARA and require those engaging in lobbying activity for any foreign principal, such as a foreign company or nonprofit, to register under FARA even if they are already registered under the LDA.<sup>294</sup> Eliminating the LDA exemption in FARA could be appropriate in some situations, but raises difficult challenges about what is “foreign” in an interconnected world. For instance, it is not clear why lobbyists for a Japanese carmaker should be treated differently than an American one if both companies have substantial U.S. and foreign operations. Disclosing their lobbying materials under FARA could put foreign companies at a disadvantage compared to their domestic counterparts.

The foreign agent label can also be stigmatizing. For example, if an employee of a human rights organization based abroad met with a member of Congress in the United States to advocate for a response to a human rights crisis they may need to register under FARA if the LDA exemption was removed. Labeling the employee a “foreign agent” could potentially discredit their message and create an undue administrative burden, making it less likely they would contact the member of Congress in the first place.

There are long-standing complaints in the United States that current disclosure requirements around lobbying are insufficient.<sup>295</sup> While this may be true, proponents of strengthening FARA should be careful not to use the Act’s breadth to unfairly stigmatize or create additional burdens on those it would be inappropriate to cover under the Act.

## 2. Foreign Electioneering

Most types of electioneering by foreigners today is illegal under U.S. law.<sup>296</sup> In 1966, FARA was amended to prohibit foreign agents from donating to U.S. election campaigns on behalf of a foreign principal.<sup>297</sup> This provision

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<sup>294</sup> See, e.g., Disclosing Foreign Influence Act, H.R. 4170, 115<sup>th</sup> Cong. § 2 (2017); Foreign Agents Registration Act of 2018, S. 2482, 115<sup>th</sup> Cong. §5 (2018).

<sup>295</sup> See, e.g., TASK FORCE ON FEDERAL LOBBYING LAWS SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE AMERICAN BAR ASSOCIATION, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS vii-viii (2011) (summarizing major complaints about the disclosure requirements in the LDA, including that there is no requirement to report if one spends less than 20% of one’s time lobbying and historical problems with enforcement of the Act).

<sup>296</sup> Foreign Nationals, Federal Election Commission, June 23, 2017, <https://www.fec.gov/updates/foreign-nationals/> (however, a foreigner may generally volunteer for a campaign as long as they are not compensated. *Id.*)

<sup>297</sup> July 4, 1966, Pub. L. 89–486, §613, 80 Stat. 245; Josh Gerstein, *The legal battle that could undermine law at center of Mueller probe*, POLITICO, Dec. 8, 2018, <https://www.politico.com/story/2018/12/08/the-legal-battle-that-could-undermine-law-at->

of FARA though was removed after the Federal Election Campaign Act (FECA) of 1971 was enacted, which bans campaign donations of money or other things of value by foreigners to election campaigns or political parties.<sup>298</sup> Federal regulations also make it illegal for someone, a US citizen or otherwise, to provide “substantial assistance” to a foreigner to either contribute or disperse money for a campaign purpose.<sup>299</sup> As such, FARA is generally a poor tool to combat foreign influence in U.S. elections as much of this activity is already illegal under U.S. election law.

There are weaknesses in U.S. law that makes it easier for foreign individuals or governments to potentially bypass election law restrictions. For example, there are concerns that foreigners can illegally route funds for election purposes through domestic subsidiaries of foreign companies<sup>300</sup> or through “dark money” groups that do not have to report the source of their funds.<sup>301</sup> Yet, these actors are unlikely to register under FARA given these actions are illegal.

There is also concern that some electioneering laws aren’t broad enough. Notably, the 2002 McCain-Fiengold Act requires disclosure for a set of “electioneering communications” where a candidate’s name is mentioned in an ad within a certain period of an election, whether or not the ad explicitly calls for support or opposition of the candidate.<sup>302</sup> However, the Act does not apply to ads on the internet.<sup>303</sup> This has raised the prospect that foreign or domestic actors could legally use such ads in an undetected way in an attempt to sway a US election. To remedy this, the Honest Ads Act was introduced to bring online communications under the McCain-Feingold requirements.<sup>304</sup> Social media companies like Facebook have also taken independent steps to block foreigners from purchasing a wide swath of political ads.<sup>305</sup>

Special Prosecutor Robert Mueller did bring two FARA-related charges in his indictment against members of Russia’s Internet Research Agency

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<sup>298</sup> 52 U.S.C. § 30121.

<sup>299</sup> 11 C.F.R. 110.20(h).

<sup>300</sup> IAN VANDEWALKER AND LAWRENCE NORDEN, GETTING FOREIGN FUNDS OUT OF AMERICA’S ELECTIONS 18 (2018), *available at* [https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final\\_April9.pdf](https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final_April9.pdf)

<sup>301</sup> *Id.* at 15; *See also*, Lee Fang, *Saudi-Led Oil Lobby Group Financed 2012 Dark Money Attack Ads*, THE NATION, November 29, 2012, <https://www.thenation.com/article/saudi-led-oil-lobby-group-financed-2012-dark-money-attack-ads/>.

<sup>302</sup> VANDEWALKER AND NORDEN, *supra* note 300 at 8.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 11-12; *See also*, H.R. 1, 116<sup>th</sup> Cong. Div. B, Part 3, Subtitle C (2019).

<sup>305</sup> Russell Brandom, *Facebook’s new political ad policy already sweeping up non-campaign posts*, THE VERGE, May 19, 2018 (stopped Russian from buying ad promoting his podcast that analyzed Russia-US relations).

(IRA) for interfering in the 2016 US Presidential election.<sup>306</sup> First, the Special Prosecutor indicted IRA members for failing to report expenditures to the FEC or registering under FARA for producing, posting, and paying for online political advertisements.<sup>307</sup> Second, the Special Prosecutor indicted IRA members for using false personas and failing to register under FARA for organizing and coordinating political rallies in the United States through social media (they never attended the rallies).<sup>308</sup> Neither charge though hinged alone on a violation of FARA, but also involved either violations of FECA or using a false persona.

Since most electioneering by foreigners is already illegal under U.S. law, FARA has only a minimal potential role in combatting foreign interference in U.S. elections. This is not to say though that FARA should have no role. For example, FARA's requirement that those registered under it report all their campaign contributions can be appropriate in some situations.<sup>309</sup> If a lobbyist has a contract from a foreign government it would be useful to have the lobbyist report their campaign contributions to help monitor whether they may be illicitly routing money to political campaigns.

FARA may at times also act as a backstop to current holes in U.S. election law regarding foreign electioneering. This can be appropriate as long as it is targeted so as not to capture either U.S. citizens who are not actually acting as "agents" of foreign principals or undermine healthy and lawful political engagement in the U.S. by foreigners.<sup>310</sup> The better tactic though would be to amend current laws to actually ban, not make transparent, inappropriate activity—such as expanding the McCain-Feingold Act to cover online electioneering communications.<sup>311</sup>

This is particularly true because it is not clear FARA even covers many of the most prominent or concerning examples of foreign interference in U.S. elections. For instance, consider the Special Prosecutor's charges against IRA members for interfering in the 2016 U.S. Presidential election. There is an

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<sup>306</sup> IRA Indictment, *supra* note 10 at 19.

<sup>307</sup> *Id.* at 19.

<sup>308</sup> *Id.* at 20-23.

<sup>309</sup> 22 U.S.C. § 612(a)(8).

<sup>310</sup> In a decision later affirmed by the U.S. Supreme Court, a D.C. District Court made clear that FECA's ban on foreign national campaign contributions "does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate." *Bluman v. FEC*, 800 F. Supp. 2d 281, 290 (D.D.C. 2011), *aff'd* *Bluman v. FEC*, 132 S. Ct. 1087 (2012).

<sup>311</sup> For example, H.R. 1, 116<sup>th</sup> Congress, Title IV, Subtitle B, § 4101 (2019), would ban a firm from election spending if a foreign national owns or controls 20 percent or more of the corporation's voting shares, or if a foreign government owns or controls five percent or more of the voting shares.

argument that FARA does not apply to these Russian nationals because they engaged in these activities from Russia and FARA applies only to an “agent” who acts or engages “within the United States” in covered activities.<sup>312</sup> Although the Justice Department has suggested that covered activity outside the country with a nexus to the United States could require registration,<sup>313</sup> it is not clear a court would agree. This uncertainty severely limits the utility of FARA for addressing digital attempts to influence a U.S. election where all the relevant actors may be located outside the country.

### 3. Foreign Disinformation

Today, while there is “nefarious” foreign disinformation that has the goal of disrupting U.S. democracy,<sup>314</sup> most foreign attempts to influence the opinion or ideas of those in the U.S. are beneficial or benign. Indeed, the United States has historically greatly benefited from the free exchange of ideas and opinions across borders, whether related to the abolition<sup>315</sup> or suffrage<sup>316</sup> movements, or the writing of the U.S. Constitution.<sup>317</sup>

FARA applies to “agents” who engage in covered activities, such as “political activities” or acting as an “information service employee”, for or in the interests of a foreign principal. As this article has detailed, these provisions are sweeping—arguably too sweeping to ever be enforced effectively. Instead, the Justice Department has periodically focused on “nefarious” foreign propaganda, such as fascist or communist propaganda. Determining what is “nefarious” though creates tremendous ambiguity and a ripe environment for politicized enforcement.

Some additional background is helpful to understand why FARA was initially adopted as a tool to combat propaganda and why this approach ultimately has proved more dangerous than initially understood. The 1920s and 1930s saw immense debate among U.S. academics and policymakers about what to do about propaganda in a democracy. Many felt the public was

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<sup>312</sup> 22 U.S.C. § 611(c)(1).

<sup>313</sup> Kelner, *supra* note 86.

<sup>314</sup> See examples of alleged interference in IRA Indictment, *supra* note 10.

<sup>315</sup> See, e.g., Louis Billington, *British Humanitarians and American Cotton, 1840-1860* 11(3) J. OF AMERICAN STUDIES 313 (1977) (describing how trans-Atlantic Quaker networks were vital to the early abolition movement in the United States).

<sup>316</sup> See, e.g., Eliza Gray, *How British Suffragettes Radicalized American Women*, TIME, Oct. 23, 2015 (describing the role of the British Suffrage movement and the International Women’s Suffrage Alliance in influencing the tactics of women in the U.S. suffrage movement).

<sup>317</sup> See, e.g., Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78(1) AMERICAN POL. SCI. REV. 189 (1984) (tracking the citation count of different European writers in American political writings between 1760 and 1805).

likely to be led astray by the emergence of new forms of mass media.<sup>318</sup> Significantly, much of the discussion in the period focused on concern about propaganda not from foreign sources, but from domestic media outlets, such as those backed by industrialists, who sought to skew public opinion towards their private interests. In 1922, Walter Lippmann in *Public Opinion* claimed that “the economic basis of journalism seems to show that the newspapers necessarily and inevitably reflect, and therefore, in greater or lesser measure, intensify, the defective organization of public opinion.”<sup>319</sup> In response to the problem of propaganda, as well as the public’s more general ignorance and bias, Lippman famously argued for a technocratic army of experts to filter information for both the public and their representatives and that government should make clear the interests behind propaganda.<sup>320</sup>

John Dewey in *The Public and Its Problems*, published in 1927, agreed with Lippmann that there had been an “unprecedented” increase in the use of propaganda.<sup>321</sup> However, he disagreed that the answer lay in what Dewey termed a state-sanctioned “intellectual aristocracy” to manage national debate.<sup>322</sup> Instead, he argued the proper response was citizens debating issues at a local level and that experts should focus on uncovering facts for the public to help them navigate the new media landscape.<sup>323</sup>

While Dewey and Lippman focused on domestic propaganda, the challenge of foreign propaganda came acutely into light in this period. The use of propaganda by governments during World War I and to help facilitate the rise of fascism and communism abroad seemed to confirm fears of how the media could be used to undermine U.S. democracy.<sup>324</sup> As has been discussed, the 1935 McCormack Committee Report was written to

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<sup>318</sup> GARTH S JOWETT AND VICTORIA O’DONNELL, PROPAGANDA & PERSUASION 180-182 (6<sup>th</sup> ed 2015) (a historical overview of fears about how propaganda might undermine democracy that developed after multiple governments started using it to influence mass society during World War I).

<sup>319</sup> WALTER LIPPMANN, PUBLIC OPINION 32 (1922).

<sup>320</sup> WALTER LIPPMANN, THE PHANTOM PUBLIC (1993) (“No ordinary bystander is equipped to analyze the propaganda by which a private interest seeks to associate itself with a disinterested public.” *Id.* at 103 “Thus the genius of any illuminating public discussion is not to obscure and censor private interest but to help it to sail and to make it sail under its own colors.” *Id.* at 102.)

<sup>321</sup> JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 140 (1927) (He also wrote that “We seem to be approaching a state of government by hired promoters of opinion called publicity agents.” *Id.* at 133.)

<sup>322</sup> *Id.* at 152.

<sup>323</sup> *Id.* at 29 (“Unless local communal life can be restored, the public cannot adequately resolve its most urgent problem: to find and identify itself.”); *Id.* at 155 (noting that the role of experts is “not shown in framing and executing policies, but in discovering and making known the facts upon which the former depend.”)

<sup>324</sup> JOWETT AND O’DONNELL, *supra* note 318 at 180-182.

investigate and find responses to fascist and communist propaganda in the United States.<sup>325</sup>

Brett Gary notes in *Nervous Liberals* that when FARA and the Voorhis Act were adopted they were viewed by liberal constitutionalists as a preferred alternative to the harsh crackdown on speech seen during World War I when anti-sedition laws were used to censor opinion.<sup>326</sup> Instead of banning speech, these laws would only require registration and transparency to the public. Zechariah Chafee, the noted Harvard Law Professor, did not even mention the potential for the abuse of FARA in his seminal book *Free Speech in the United States*, published in 1941, which was a warning about the costs of censorship even during wartime.<sup>327</sup>

In a similar vein to Lippman's call to expose the financial interests behind domestic propaganda, FARA was viewed as a tool for the government to make clear to the public the foreign interests behind the information they consumed. In 1943 in *Viereck v. United States* Justice Black in a dissenting opinion noted that the purpose of FARA, "Rest[ed] on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and false, the [Act] is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source."<sup>328</sup>

Yet, even at its genesis, some understood FARA, albeit with a wink and a nod, not as a transparency statute, but as a way to ban, or at least severely stigmatize, undesirable speech in a way that did not raise the same constitutional questions as outright censorship. Harvard Law Professor Milton Katz, an advisor to the Justice Department in its FARA enforcement, noted how the Voorhis Act's transparency requirements would work in practice: "In the first place, propaganda which is thus identified as foreign and hostile in source would presumably be ineffectual [because the public would discount it]." He continued, "In the second place, failure to disclose . . . would make possible prosecution on a basis which involved no embarrassment arising out of constitutional traditions."<sup>329</sup>

Indeed, Katz's analysis proved prescient. FARA was used as a way to shut down fascist speech in the U.S. during World War II through either

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<sup>325</sup> See, *supra* notes 79 to 85 and accompanying text.

<sup>326</sup> See GARY, *supra* note 88 at 195 (discussing how registration and disclosure were seen as democracy-enhancing techniques and led speech-protective liberals to support this form of propaganda control). For an in-depth overview and discussion of restrictions on speech imposed by the U.S. government during wartime see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

<sup>327</sup> See ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941) (the book's extensive index does not mention FARA).

<sup>328</sup> *Viereck v. United States*, 318 U.S. 236, 251 (1943).

<sup>329</sup> GARY, *supra* note 88 at 197.

stigmatizing labeling requirements or harassing criminal investigations and prosecutions for failure to comply with the Act.<sup>330</sup>

Part of the challenge the Justice Department faced during World War II was how to identify “nefarious” propaganda and show that those promoting it were doing so on behalf of a foreign source.<sup>331</sup> Harold Laswell, who would become one of the great political scientists of his generation, helped the government enforce FARA during World War II.<sup>332</sup> He developed what he termed a scientific method to detect “foreign” propaganda that was used in FARA prosecutions in at least four cases.<sup>333</sup> Laswell created a set of 8 tests to detect propaganda. These included the parallel test (comparing themes in suspected propaganda with declared propaganda); presentation test (whether the balance given to issues is similar to that in declared propaganda); distinctiveness test (using vocabulary distinctive to one side of a controversy); and distortion test (consistently distorting material to favor one side).<sup>334</sup>

Laswell developed each of these tests in further detail. For example, to use the parallel test he identified fourteen common themes of Nazi propaganda.<sup>335</sup> He then compared these themes to the speech of alleged “agents” of Nazi Germany to find parallels. These fourteen themes included some obvious fascist tropes of the period like “Nazi Germany is just and

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<sup>330</sup> *Id.*

<sup>331</sup> By 1942, “publicity agent” and “information service employee” were already broadly defined in the Act. “Political activities” was not yet a covered activity, but “political propaganda” was, which was defined as “any oral, visual, graphic, written, pictorial, or other communication or expression . . . which the person disseminating the same believes will . . . prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of 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 or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions . . .” as well as instigating violence in any other American Republic. Apr. 29, 1942, ch. 263, §1(j), 56 Stat. 251.

<sup>332</sup> Thomas W. Ennis, *Harold D. Laswell, Dead at 76; Was Top US Political Scientist*, NY TIMES, Dec. 20, 1978, <https://www.nytimes.com/1978/12/20/archives/harold-d-lasswell-dead-at-76-was-top-us-political-scientist.html>

<sup>333</sup> Harold Laswell, *Propaganda Detection and the Courts* in LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS (175-178) (Harold Laswell & Nathan Leites eds., 1949) (noting that Laswell’s methods were used during the *Bookniga*, *Transocean*, *Auhegan*, and *Pelly* cases during World War II).

<sup>334</sup> *Id.* at 177-178 (describing eight tests to detect propaganda. The other four tests were the avowal test (explicit identification with one party in a controversy); concealed source test (not disclosing that one is relying on one source in a controversy); consistency test (consistency with declared propaganda); and source test (whether one source in a controversy is over-relied on)). *Id.*

<sup>335</sup> *Id.* at 180-185.

virtuous.”<sup>336</sup> However, the themes included many ideas that non-fascists might also share: For instance, that the U.S. and UK are “internally corrupt” (including characterizing the countries as having “political and economic injustice” or “spiritual decay”);<sup>337</sup> that the foreign policy of the United States or the United Kingdom is “morally unjustifiable” (including characterizing their foreign policies as “imperialistic” or “hypocritical”);<sup>338</sup> or that the President of the United States or Prime Minister of the UK is “reprehensible” (including characterizing either leader as “responsible for suffering”).<sup>339</sup>

After World War II, a similar type of parallel test was used by the Justice Department in its prosecution of W.E.B. Du Bois—claiming that the Peace Information Center paralleled the messaging of anti-nuclear propaganda abroad.<sup>340</sup> Even today, the Justice Department has argued that *RT TV America* parallels the messaging of the Kremlin. In their letter to *RT TV America* the Justice Department states that “RT’s broadcasts consistently mirror the opinion of the Kremlin . . .”<sup>341</sup> The Justice Department then used this claim to argue that the Russian government itself should be considered a “foreign principal” for which *RT TV America* is a “foreign agent”.<sup>342</sup> Similarly, the Chairman of the House Natural Resources made parallelism claims in his 2018 investigation of U.S. environmental nonprofits for violating FARA: arguing, for instance, that “On important issues for Chinese leadership, WRI’s position appears to closely reflect China’s goals and objectives.”<sup>343</sup>

While parallelism of message by itself is not enough for one to need to register under FARA it can play an important role. In order for an agency relationship to be created under the current drafting of FARA, one needs to act “for or in the interests” of a foreign principal, so parallelism of message can become evidence that one is acting in a foreign principal’s interest.<sup>344</sup>

Going forward, FARA’s broad provisions are likely to continue to be used selectively on actors who are seen to be promoting “nefarious” speech. As discussed in Part III(D), there are reasons to be concerned that in a new era of heightened use of FARA that such enforcement will only become more

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<sup>336</sup> *Id.* at 182.

<sup>337</sup> *Id.* at 180-181.

<sup>338</sup> *Id.* at 181-182.

<sup>339</sup> *Id.* at 181-182.

<sup>340</sup> DU BOIS, *supra* note 207 at 99 (Du Bois claiming the government argued that an agency relationship could be created under FARA when a domestic organization simply held a parallel view as that of a foreign organization).

<sup>341</sup> RT TV America letter, *supra* note 236 at 6.

<sup>342</sup> *Id.*

<sup>343</sup> WRI letter, *supra* note 226 at 4; Similarly, the Chairman of the House Natural Resources Committee claimed that the “NRDC . . . consistently praise[s] the Chinese government’s environmental initiatives and promote[s] the image of China as a global environmental leader”. NRDC letter, *supra* note 226 at 3.

<sup>344</sup> 22 U.S.C. § 611(c)(1)(i-iii).



politicized. Compared to World War II, the last time FARA was used significantly as an anti-propaganda measure, today it is less clear who are the enemies of the United States; the “propaganda” that is used by foreign countries often simply amplifies the views of domestic actors; and increased domestic political polarization leads to a greater chance of FARA’s weaponization.<sup>345</sup>

While FARA can be easily politicized, the Act seems ill-suited, particularly in a globalized world, to fighting foreign propaganda. Those perpetrating genuine disinformation campaigns are unlikely to register under the Act, and because they can undertake these campaigns through the internet, those involved are often unlikely to even be in the country—making it difficult to successfully prosecute them in the U.S. and creating ambiguity about whether they are even required to register under FARA.<sup>346</sup>

To address these concerns, FARA’s broad provisions should be either eliminated as related to propaganda or much better targeted—for example, requiring only media clearly produced by foreign governments to register. Otherwise, there is a high risk of media organizations, nonprofits, or individuals with foreign connections being mislabeled as “foreign agents” because they undertake speech that is deemed “nefarious”. In a period of uncertain enforcement, FARA’s provisions can also lead to unhealthy self-censorship by media organizations and nonprofits avoid beneficial cross-border partnerships or stop engaging in controversial speech to reduce the risk they are labeled a foreign agent.

Just because FARA is a poor tool to address foreign disinformation does not mean the government should not take other actions. Sensible interventions could include limitations on foreign ownership of broadcast television networks,<sup>347</sup> efforts to improve the public’s media literacy,<sup>348</sup> appropriate regulation of social media, or broader efforts to improve

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<sup>345</sup> See *supra* Part 3(D) (for a discussion of these points of how the contemporary political environment is different from that during World War II).

<sup>346</sup> FARA only applies to agents who act “within the United States” 22 U.S.C. § 611(c)(1)(i-iv). That said, the Justice Department has at times indicated that even a limited nexus to the United States could trigger registration. Kelner, *supra* note 86.

<sup>347</sup> The Communications Act of 1934 allows only 25% foreign investment in a U.S. broadcast, common carrier, or aeronautical fixed or en route radio licensee. FCC approval is required for more than 25% foreign investment. Brian Weimer and Drew Svor, *FCC Liberalizes Rules for Foreign Investment in U.S. Broadcast Licensees*, FCC LAW BLOG, Oct. 10, 2016, <https://www.fcclawblog.com/2016/10/articles/fcc/fcc-liberalizes-rules-for-foreign-investment-in-u-s-broadcast-licensees/>

<sup>348</sup> IREX, for example, developed a model called “Learn to Discern” to counter Russian influence in Ukraine and is now piloting the program in the United States. IREX, Learn to Discern (L2D) – Media Literacy Training, <https://www.irex.org/project/learn-discern-l2d-media-literacy-training>.

transparency in all online news.<sup>349</sup> However, a law, like FARA, that can cast wide swaths of the media and nonprofit sector as “foreign agents”, is too likely to be used to simply attack controversial speech or critics of the government.

### B. Reform Strategies

There is not space here to detail all the ways to address the defects in FARA. However, there are at least three potential reform strategies that Congress could pursue to reduce the risk that FARA will be weaponized. These would refocus the Act on regulating foreign influence in core democratic activities, like lobbying or electioneering, and reduce the risk of stigmatizing entities or individuals as “foreign agents” when such a label would be inappropriate.

First, Congress could repeal FARA entirely. Most advanced democracies do not have an equivalent to FARA<sup>350</sup> and those that do, like Australia and Israel, adopted laws that are significantly narrower.<sup>351</sup> FARA was a wartime statute that is a poor fit for a democracy that now has many other tools available to it to regulate foreign influence. For example, the Lobbying Disclosure Act could be amended to ensure that lobbyists of foreign governments and political parties or those operating on their behalf have to report under more stringent requirements than other lobbyists (thus fulfilling through other means one of the major current uses of FARA).<sup>352</sup> Similarly, Congress could take additional steps to ensure that FECA’s bans on electioneering activities by foreigners are fully enforced and close pertinent loopholes.<sup>353</sup> Having more specific pieces of legislation to address different types of foreign influence may ultimately be a more effective response than using the blunt, one-size-fits all, labeling and disclosure regime of FARA.

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<sup>349</sup> See, e.g., EUROPEAN COMMISSION, INDEPENDENT HIGH LEVEL GROUP ON FAKE NEWS AND ONLINE DISINFORMATION, A MULTI-DIMENSIONAL APPROACH TO DISINFORMATION (2018) (advocating reforms such as promoting transparency of online news, empowering journalists to tackle disinformation, and safeguarding the diversity and sustainability of the news media ecosystem).

<sup>350</sup> Australians AUSTRALIAN PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY, *supra* note 42 at 39-40 (noting that FARA was the only comparable transparency scheme in operation to the Foreign Influence Transparency Scheme Act).

<sup>351</sup> See discussion of Australian and Israeli “Foreign agent” laws in Part I(B).

<sup>352</sup> See Thomas Spulak, *America’s lobbying laws are too complex – fixing FARA won’t be easy*, THE HILL, Nov. 7, 2017, <https://thehill.com/opinion/white-house/359131-americas-lobbying-laws-are-too-complex-fixing-fara-wont-be-easy> (arguing for changing the LDA to require lobbyists of foreign entities to disclose more information).

<sup>353</sup> See, e.g., DISCLOSE Act of 2017, S.1585, 115<sup>th</sup> Cong. (2017) (would have amended FECA to ban campaign contributions and expenditures by corporations that are controlled, influenced, or owned by foreign nationals).

Second, Congress could clarify, better target, and, in some cases, eliminate FARA's vague or overbroad provisions. For example, "foreign principals" could be narrowed to include only foreign governments or political parties, or those acting on their behalf, since these are the foreign actors whose influence seems to generate the most concern.<sup>354</sup> Similarly, the principal-agent relationship in FARA could be narrowed to more closely reflect the Restatement of Agency definition, which requires a principal actually direct and control an agent and that both parties agree to the relationship.<sup>355</sup> Additionally, the laundry list of covered activities in the current Act, including "soliciting" or "disbursing" funds or acting as an "information service employee",<sup>356</sup> could either be removed or more narrowly defined, leaving only activities directly related to either lobbying or electioneering. FARA could also be amended to both change the name of the Act, and the label for registering under it, to something less stigmatizing than "foreign agent".<sup>357</sup>

Third, and finally, instead of, or in addition to, better targeting key definitions in the Act, one could create additional or broader exemptions. For example, when Australia drew on FARA to draft its Foreign Influence Transparency Scheme Act, the Australian Parliament created a new limited exemption for charities (i.e. nonprofits), as well as a broad exemption for humanitarian activity and for public officials.<sup>358</sup> Similarly, in the U.S., FARA could be amended to exempt nonprofits that are not engaged in lobbying on behalf of a foreign government or political party or in any electioneering activities. The Act could also be amended to exempt media organizations that

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<sup>354</sup> When FARA was amended in the early 1990s, the Senate version of the amendment originally would have narrowed the definition of "foreign principals". See S. Rep. No. 103-37 52, 73 (1993) (describing how S. 349 would have redefined the term "foreign principal" to exclude entities other than foreign governments and political parties).

<sup>355</sup> Restatement of Agency, *supra* note 115 at § 1.01; 18 U.S.C. § 951, which requires agents of foreign governments to notify the Attorney General, defines "agent of a foreign government" as "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official."

<sup>356</sup> See generally Part II(B).

<sup>357</sup> For example, in 1991 a bill was introduced in Congress try "to remove the stigma of being labeled a foreign agent by changing the name of the law to the Foreign Interests Representation Act." *To Strengthen the Foreign Agents Registration Act of 1938, Hearing on H.R. 1725, H.R. 1381, H.R. 806 Before the H. Subcom. On Admin. L. and Gov't Relations of the H. Judiciary Comm.*, 102<sup>nd</sup> Cong. 29 (1991) (Statement of Rep. Glickman, Representative from Kansas).

<sup>358</sup> Foreign Influence Transparency Scheme Act, *supra* note 64 at Part 2.24, 2.25A, and 2.29C. A limited nonprofit exemption for nonprofits under FARA has been introduced into the U.S. Congress in the past, but never passed. For example, Rep. Glickman proposed adding an exemption for 501(c) organizations registered under lobbying regulations and "whose activities are directly supervised, directed, controlled, financed, or subsidized in whole by citizens of the United States." H.R. 1725, 102<sup>nd</sup> Cong. (1991).

are not controlled by foreign governments or to exempt public officials if they are not acting as an “agent” as defined under the Restatement of Agency.

Arguably reforms like these would not only make FARA less likely to be abused, but also reduce confusion and uncertainty and so increase the chance that U.S. law will be enforced in a systematic way against types of foreign influence that do require attention. While Congress may adopt different paths to better target FARA, whatever approach should recognize the high costs of FARA’s current broad language, have clearly defined goals, and be tailored to a legitimate problem. Otherwise, there is too great a risk of abuse.

#### CONCLUSION

FARA threatens to chill large amounts of useful speech. In a globalized world, the Act’s definition of who is a “foreign agent” can capture numerous nonprofits, media organizations, and public officials. This gives too much discretion to government to impose burdensome reporting requirements and label certain actors a “foreign agent”, and by implication less trustworthy, independent, or legitimate.

When there is evidence of foreign interference in U.S. democratic processes it is easy to overreact, but the country should not abandon its values or self-inflict harm. In an interconnected world, U.S. law should encourage, not discourage, civil society, public officials, and others to create partnerships and ties across borders to help address the world’s many global challenges. Amidst concern about “foreign influence” in the United States it is important to better target FARA: Both to protect U.S. civil society and public officials from politicized attack and to set a positive example in a world where similar laws are being used to undermine democracy.