

RECOMMENDATIONS TO THE JUSTICE DEPARTMENT ON FARA CONCERNING ITS IMPACT ON CIVIL SOCIETY

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These comments are provided on behalf of the [International Center for Not-for-Profit Law](#) (ICNL) in response to the [Advance Notice of Proposed Rulemaking](#) (ANPRM) from the Justice Department’s National Security Division to solicit suggestions for potential amendments to implementing regulations of the [Foreign Agents Registration Act](#) (FARA).

ICNL works in the United States and around the world to create an appropriate legal environment for nonprofits and civil society. Our work has a particular focus on protecting the freedoms of association, assembly, and speech.

The U.S. government has a clear interest in regulating foreign government intervention in U.S. domestic politics, such as around electioneering and lobbying. However, the U.S. government must do so in a targeted manner that upholds First Amendment rights and does not place undue burdens on civil society. Currently FARA, originally enacted in 1938, takes an outdated and overbroad approach to this problem. The Act needlessly overregulates and creates confusion for the nonprofit sector while infringing on protected First Amendment speech and conduct.

FARA’s Overbreadth and Burden on U.S. Civil Society

[FARA](#) is an overbroad regulatory scheme, poorly tailored to addressing actual threats to U.S. national security. On its face, the Act makes no distinction between whether one is the agent of a foreign government, a foreign company, a foreign nonprofit, a foreign individual (such as one’s grandmother in Canada), or just an American domiciled abroad – treating all equally as a “[foreign principal](#)”.

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The definition of “[agent of a foreign principal](#)” is broad and vague, seemingly capturing those who merely act at the “request” of a foreign principal. And covered [activities](#) in the U.S. under the Act include a broad range of conduct from “solicit[ing]” or “dispers[ing]” funds for a foreign principal; “informing . . . any other person with reference to the domestic or foreign policies of the United States”; or attempting 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.”

As such, FARA would seemingly require a person in the U.S. to register under the Act for soliciting funding from Americans at the request of an Indian nonprofit building houses in a slum in Bombay; providing information at the request of an environmental nonprofit in another country about U.S. policy on preventing the extinction of the Humpback Whale; or setting up a public talk in Chicago at the request of a visiting human rights activist from Myanmar.

As a result of this overbreadth, the Act ends up using the same regulatory approach whether one is a paid lobbyist for the Saudi government attempting to influence Congress on the most sensitive aspects of U.S. military policy or one is a volunteer distributing a small amount of funds collected from Canadian citizens for Hurricane relief in Texas.

FARA’s broad language captures those engaged in beneficial nonprofit activity, causing confusion, infringing on First Amendment protected speech and associational rights, and requiring some nonprofits to register under the Act. For example, an environmental nonprofit recently [registered](#) for bringing over Greta Thunberg and other environmental youth activists to speak in the U.S., while another was required by the Justice Department to [register](#) for using funding from a Scandinavian government for a project that aimed to reduce deforestation by multi-national companies in tropical countries.

Many nonprofits are wary of registering under the Act because of the significant stigma it brings. Most nonprofits pride themselves on being independent and acting in furtherance of their mission. Registering under FARA implies that not only are they acting under the control of others, but that those they are acting for are some nefarious “foreign” hand that requires providing [details](#) of the nonprofit’s activities to the National Security Division of the U.S. Department of Justice.

Registration under the Act comes with significant burdens that can slow or stop nonprofits from engaging in beneficial activity. Registering under FARA requires that nonprofits, and impacted staff, [file](#) numerous forms and paperwork with the Justice Department, which require continuous updating, or both the organization and covered staff can face serious [criminal penalties](#). This information, which is then [posted](#) publicly, can frequently include sensitive information, including home addresses of the

nonprofit's staff. Many groups who have registered have had to retain outside legal counsel to guide them through the process and they have had to inform their board of directors and funders that they are planning to register. Senior management of organizations frequently have to negotiate with staff who are required to register who understandably fear that registering will bring stigma, an invasion of their privacy, and impact their future employment prospects. More recently, Congress has [linked](#) access to government benefits to not being registered under the Act, meaning that nonprofits that do register can potentially lose access to critical government programs and funding.¹

The Act also requires nonprofits to engage in compelled speech that is often inaccurate. Those engaged in covered activity under FARA must register as a “foreign agent” and [label](#) covered material with a “conspicuous statement” that the materials are distributed by the agent on behalf of a foreign principal. This registration and labeling requirement frequently mischaracterizes the relationship of a nonprofit with an international partner, which may be driven by the nonprofit's underlying social mission and not because it is controlled by a foreign party.

Given all these consequences of registering under FARA many nonprofit groups have simply decided not to engage in beneficial conduct for society out of fear that it may impose a registration burden. If enforcement of the Act is increased in an untargeted manner this problem will likely only become worse.

The Risk of Politicized Abuse

FARA's striking breadth coupled with the stigma and administrative burdens that come with registering under the Act makes it ripe for being used to target expressive activity in a politicized manner. While the Justice Department prides itself in its apolitical enforcement of FARA, it should fully expect to be pressured to use the Act in a politicized manner in the future and draft its regulations so as to help guard against such abuse.

There has recently been significant pressure on the Justice Department to use FARA in a politicized manner. In 2018, the House Natural Resources Committee [launched](#) a [seemingly](#) partisan and politicized investigation into four U.S. environmental nonprofits, some of whom had explicitly criticized the U.S. environmental record of the Committee chairman, for allegedly violating FARA. The Committee chairman explicitly pointing to the broad language around an agency relationship being created under the Act at the “[request](#)” of a foreign principal to claim these groups had to register

¹ In December 2020 Congress enacted the [Economic Aid Act](#). Under the Act a person or entity was [ineligible](#) for the Paycheck Protection Program (PPP), a close to \$1 trillion government initiative, if they registered under FARA. This raises clear First Amendment concerns. Under the [unconstitutional conditions doctrine](#), the government cannot, in general, condition the availability of a government benefit on foregoing the exercise of a constitutional right.

for their activities in Japan and China. The investigation required impacted nonprofits to hire lawyers, respond to subpoenas, and distracted them from their mission of protecting the environment. Since that investigation, Members of Congress have [repeatedly written](#) to the Justice Department asking it to investigate whether different nonprofits, most of which they have political disagreements with, particularly environmental groups, need to register.

These more recent examples are just part of a much longer history of politicized abuse of the Act.² Perhaps the most famous and consequential prosecution under FARA was in the 1950s of W.E.B. DuBois, the noted U.S. civil rights leader. While the [prosecution of DuBois](#) was for allegedly distributing anti-nuclear propaganda at the “[request](#)” of a European anti-war group, it was part of a larger campaign to discredit DuBois because of his perceived Communist sympathies. The prosecution, while ultimately not resulting in a conviction, had the impact of effectively marginalizing DuBois in U.S. politics for the rest of his life.

FARA’s First Amendment Defects

Under the Court’s current jurisprudence, the application of FARA’s broad and vague provisions to U.S. civil society trigger at least three types of potential First Amendment issues:

1. **Compelled disclosure.** In *Americans for Prosperity Foundation v. Bonta* (2021), the U.S. Supreme Court found that when compelled disclosure laws impact the freedom of association of an organization that the underlying law must meet exacting scrutiny, and potentially strict scrutiny. FARA, like the law in question in *Bonta*, [compels](#) groups to disclose a wide variety of potentially sensitive information that can undermine their associational rights.
2. **Compelled speech.** In cases like *National Institute of Family & Life Advocates v. Becerra* (2018), the U.S. Supreme Court has struck down mandatory disclosure requirements that can chill protected speech. In the case of FARA many civil society organizations have refrained from engaging in protected speech covered by FARA because of the Act’s stigmatizing [labeling requirement](#) that frequently mischaracterizes the relationship between the registrant and the foreign principal.³

² As one prominent historian of FARA’s early use by the Justice Department describes, “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.” BRETT GARY, *THE NERVOUS LIBERALS: PROPAGANDA ANXIETIES FROM WORLD WAR ONE TO THE COLD WAR* 215-216 (1999).

³ There has been relatively little caselaw on the constitutionality of FARA. The one significant Supreme Court judgment on the Act, *Meese v. Keene*, 481 US. 465 (1987), was a narrow ruling from a divided Court that held that a no longer present requirement that agents label their covered material “political propaganda” was not unconstitutional. However, the Supreme Court explicitly

3. **Discrimination against speakers.** In *Citizens United v. FEC* (2010), the U.S. Supreme Court found that in the context of political speech the government cannot “impose restrictions on certain disfavored speakers” and explicitly left open the question of whether the federal government could specifically regulate foreign speakers.⁴ Under FARA, the speech of “agents of foreign principals” are significantly burdened in an untailored manner, meaning that FARA would likely face significant scrutiny by the Court if challenged for discriminating against certain speakers.

The Justice Department must use the least restrictive means available when it regulates protected First Amendment speech and conduct. FARA itself is written in an overbroad manner and new regulation cannot cure all the Act’s constitutional defects, but when drafting regulation the Justice Department should adopt the least restrictive and most targeted means available to it.⁵ To help further this end, this submission responds to the first nine questions put forward by the Justice Department in its ANPRM.

Responses to Questions posed by Justice Department

1. Agency definition

Question 1: Should the Department incorporate into its regulations some or all of its guidance addressing the scope of agency, which is currently published as part of the FARA Unit’s FAQs on its website? See <https://www.justice.gov/nsd-fara/page/file/1279836/download>. If so, which aspects of that guidance should be incorporated? Should any additional guidance currently included in the FAQs, or any other guidance, be incorporated into the regulations?

did not address the constitutionality of the underlying scope of the Act. Further, First Amendment jurisprudence has shifted substantially since the ruling.

⁴ *Citizens United v. FEC*, 558 U.S. 310, 341 (2010). The Court held off on deciding “whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process”, and, if so, what standard of tailoring would apply. *Id.* at 362.

⁵ Notably, this comment does not address other potential serious constitutional challenges to FARA. For example, under 18 U.S.C. § 219 it is a crime for a federal public employee to engage in covered activity under the Act in their personal capacity. Under current Justice Department [interpretation](#) of FARA if a federal employee participated in the March for Life rally in Washington D.C. with their church and printed out a banner in advance at the request of a foreign member of a church coming to the U.S. the federal employee would need to register. As a result, the federal employee would be terminated from their employment and could face up to two years in prison. Such overly sweeping bans of expressive conduct of federal government employees outside of their employment are unconstitutional under established Supreme Court doctrine as expressed in cases like *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Question 2: Should the Department issue new regulations to clarify the meaning of the term “political consultant,” including, for example, by providing that this term is generally limited to those who conduct “political activities,” as defined in 22 U.S.C. 611(o)?

Currently the definition for “[agent of a foreign principal](#)” is one of the most confusing and vague within the Act. The Justice Department released a [memo](#) to interpret the scope of agency in 2020, but this has not significantly assisted the nonprofit community to better understand what is, and what is not, covered within the agency definition.

In the memo, the Justice Department laid out a six-part test of “relevant factors” in assessing an agency relationship, but many of the factors are themselves vague, as are how they would be applied. For example, one “factor” is that a potential registrant should consider the “specificity of the action requested”, but this does not make clear when registration is required. For instance, if the request is only moderately specific does this trigger enforcement or, alternatively, prevent enforcement of the Act against the person or entity? Or take another prong that asks potential registrants to ask “Whether the political activities align with the person’s own interests”. How does one judge if a U.S. nonprofit is acting according to their “own interests” if it helps organize a talk in the U.S. at the request of a longstanding partner overseas, which is clearly in the interests of the partner, but also furthers the interest of the nonprofit in a general manner? Further, it is not clear even if the activity is squarely in the interest of the nonprofit whether this would prevent enforcement of the Act against the nonprofit or how exactly it would be weighted.

Instead of laying out a maze of vague factors that would require most organizations to hire a lawyer to understand,⁶ the Justice Department should interpret this provision in a tailored and clear manner. It should apply a traditional principal-agent relationship as [defined](#) in the Restatement of Agency and require that agents act at the control of a foreign principal with the consent of both parties. This more targeted approach builds on other Justice Department guidance cited to in the same [memo](#) that finds an agency relationship is created under the Act if the registrant is “acting as an agent or alter ego of the foreign principal”. Any broader reading of the agency provision would capture a wide swath of First Amendment protected speech and conduct as well as continue to generate confusion, chilling First Amendment rights.

The Justice Department has a history of reading down key parts of the Act so as to limit overbreadth and confusion. For example, in a July 2021 [Advisory Opinion](#) the Justice Department read down the term “political consultant” in the Act, limiting its reach to those who are also engaged in “political activities” (as defined in 22 U.S.C. 611(o)) on

⁶ As Justice Kennedy has written, “The First Amendment does not permit laws that force speakers to retain a[n] ... attorney ... or seek declaratory rulings before discussing the most salient political issues of our day.” *Citizens United v. Federal Election Com'n*, 558 US 310 (2010).

behalf of a foreign principal. It is important that the Justice Department make similar targeted readings of the Act going forward, particularly in relationship to the Act's notoriously vague agency definition.

2. Exemption for Activities Not Serving Predominantly a Foreign Interest

Question 3: Should the Department issue a regulation addressing how 22 U.S.C. 613(d)(2) applies to political activities on behalf of foreign principals other than state-owned enterprises? If so, how should the Department amend the regulation to address when such activities do not serve “predominantly a foreign interest”?

Question 4: Is the language in 28 CFR 5.304(b), (c), which provides that the exemptions in sections 613(d)(1) and (d)(2) do not apply to activities that “directly promote” the public or political interests of a foreign government or political party, sufficiently clear? And does that language appropriately describe the full range of activities that are outside the scope of the exemptions because they promote such interests, including indirectly? Should the language be clarified, and, if so, how?

Question 5: What other changes, if any, should the Department make to the current regulations at 28 CFR 5.304(b) and (c) relating to the exemptions in 22 U.S.C. 613(d)(1) and (2)?

The Justice Department should make clear that the exemption of [22 U.S.C. 613\(d\)\(2\)](#) for those who engage “in other activities not serving predominantly a foreign interest” applies to all potential registrants equally, including charitable organizations, not just those engaged in commercial activity. This interpretation is the clearest reading of the exemption which is listed in the middle of three separate exemptions: 1. For commercial activity [22 U.S.C. 613(d)(1)]; 2. For other activities not serving predominantly a foreign interest [22 U.S.C. 613(d)(2)]; and 3. For the collection of funds for certain charitable activity [22 U.S.C. 613(d)(3)].

Currently though the only regulation related to 22 U.S.C. 613(d)(2) is [28 CFR 5.304\(c\)](#), which only applies to foreign owned companies. This regulation should be amended to make clear that 22 U.S.C. 613(d)(2) applies to all potential registrants, including charitable organizations, and does not require commercial activity as a prerequisite. Activities that serve “predominantly a foreign interest” should continue to be interpreted to require acting at the direction of a foreign government or political party to promote their public or political interests as currently defined in 28 CFR 5.304(c). However, the additional qualifier that “the political activities do not directly promote the public or political interests of a foreign government or of a foreign political party” should be removed because it is too vague to be clearly interpreted and so can chill constitutionally protected speech and association. As such, applying the same exemption provided to those engaged in commercial activity, those not engaged in

commercial activity should not have to register unless they are engaged in political activities that are directed by a foreign government or political party.

3. Exemption for religious, scholastic, academic, scientific, and fine arts activities

Question 6: Should the Department issue additional or clarified regulations regarding this exemption to clarify the circumstances in which this exemption applies? If so, how should those additional regulations clarify the scope of the exemption?

Under FARA in 22 U.S.C. 613(d)(3) there is an exemption for “[a]ny person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts.” The Justice Department’s interpreting regulation [28 CFR 5.304\(d\)](#) claims that this exemption “shall not be available to any person described therein if he engages in political activities as defined in [22 U.S.C. 611(o)] for or in the interests of his foreign principal.”

Yet, it is not clear what the Justice Department’s textual basis in FARA is for excluding from this exemption a broad swath of “political activities”, which is [defined](#) under FARA to include attempting to influence any section of the U.S. public on a domestic or foreign policy of the United States. Many academic, artistic, and religious activities inherently involve attempting to influence members of the public on political issues.

Under the Justice Department’s current regulation, the thousands of Americans involved in helping fundraise and build the Statue of Liberty in partnership with the French government and civil society arguably would have been required to register as foreign agents because the Statue, while arguably “fine art”, was [designed](#) to celebrate the ideals of freedom to the world, including the U.S. public (and so arguably constitutes “political activities”). Or alternatively, a U.S. college professor would seem to need to register if they organized a talk at the request of a colleague from overseas on a topic like the policy a country should adopt to best further cancer research. It seems highly unlikely that Congress intended to include such a broad swath of conduct when enacting FARA.

Instead, a more targeted approach, which would also be in line with the historical discretion the Justice Department has used in enforcing the Act, would be for the Justice Department to interpret this exemption to include all religious, scholastic, academic, or scientific pursuits, as well as the fine arts (such as the construction of the Statue of Liberty), unless they involve explicit electioneering or lobbying activity on behalf of a foreign government or political party. Similarly, the Justice Department should interpret this exemption to also include other charitable pursuits, including all those eligible for tax deduction under 26 U.S. Code 501(c)(3). For example, it is not clear why a nonprofit combatting child trafficking should not receive this exemption

as these activities are of a similar overall character to those listed in 22 U.S.C. 613(d)(3). This more tailored approach towards enforcement of the Act would be more in line with the spirit and goals of the Act, historical Justice Department Justice prosecutorial practice, and be more likely to survive First Amendment challenge.

4. Exemptions for persons qualified to practice law

Question 7: Should the Department amend 28 CFR 5.306(a) to clarify when activities that relate to criminal, civil, or agency proceedings are “in the course of” such proceedings because they are within the bounds of normal legal representation of a client in the matter for purposes of the exemption in 22 U.S.C. 613(g)? If so, how should the Department amend the regulation to address that issue?

Question 8: What other changes, if any, should the Department make to 28 CFR 5.306 to clarify the scope of the exemption in 22 U.S.C. 613(g)?

FARA provides an exemption in [22 U.S.C. 613\(g\)](#) for a person qualified to practice law that agrees to engage in legal representation of a disclosed foreign principal before a court of law or U.S. Government agency. This provision has, at times, been read narrowly by the Justice Department. For example, in a Jan. 5, 2021 [advisory opinion](#), the Justice Department found a law firm needed to register for engaging in conduct such as press conferences or press releases surrounding litigation they were conducting on behalf of a foreign client.

The Justice Department should issue a regulation clarifying that such routine conduct surrounding legal representation in U.S. courts or before a U.S. government agency does not require registration. If the goal of FARA is, in fact, transparency, having lawyers already representing foreign clients before U.S. courts register for conduct they undertake in the course of such litigation is unnecessary. For example, if a lawyer of a U.S. nonprofit is representing a foreign dissident in U.S. court against a foreign government that tortured the dissident, the lawyer and nonprofit should not have to register for holding a press conference in which they make clear the claims of their client. It should be obvious to the public and others who the nonprofit lawyer is speaking on behalf of as they are representing their client in court. Having these FARA registration requirements are not only burdensome, but can potentially disclose privileged information or strategy surrounding litigation. In other words, in many cases there are high potential costs to registration and no significant benefits to the public.

Additional Clarifications of Statutory Exemptions

Question 9: Are there other aspects of the statutory exemptions that the Department should clarify, whether to make clear additional circumstances in which registration is, or is not, required?

The humanitarian exemption in [22 U.S.C. 613\(d\)3](#) of FARA should be read broadly to include not just soliciting or collecting funds for medical aid, food, or clothing, but a broader array of charitable activities. When FARA was written there was far less charitable activity across borders. Today, it is common for charities to solicit funds for operations abroad for everything from constructing houses after a flood in India to vocational training for unemployed youth in Nicaragua to rebuilding the Notre Dame cathedral in France. These types of charitable activities are also within the spirit of 22 U.S.C. 613(d)(3) and should be exempted. Doing otherwise imposes an undue hardship on this type of charitable activity that will unnecessarily adversely impact the ability of Americans to give to causes they care about around the world.

FARA's Negative Impact for Civil Society and U.S. Foreign Policy Interests Abroad

FARA not only has had adverse impacts for civil society in the United States, but also has had significant negative consequences for U.S. foreign policy interests abroad. The Act has [repeatedly been used](#) to justify similar “foreign agent” type laws in other countries that have been used to target human rights, pro-democracy, and other local activists, as well as limit the ability of U.S. nonprofits to operate in these countries. For example, the Russian government has [claimed](#) that its notorious “foreign agent” law, also purportedly simply a transparency law, is designed to achieve the same purpose as FARA in the U.S. In 2020 Nicaragua [enacted](#) a “foreign agent” law that was in critical parts a verbatim copy of FARA and Sandinista lawmakers [pointed](#) directly to FARA when the U.S. State Department and others criticized this law as an attempt to silence voices in civil society. Similarly, when El Salvador’s President introduced a bill modeled on FARA in 2021 to target critics of the government he [tweeted](#) that the El Salvadorian bill “is basically the same law that they have in the United States. There it is called: Foreign Agents Registration Act” and he linked directly to the Justice Department’s FARA [webpage](#) as a rebuttal to opponents of the proposed law.

The State Department was [initially tasked](#) with implementing FARA because of the Act’s significant foreign policy implications. In 1942, Congress transferred this authority to the Justice Department because it was judged it would be in a better position to actually enforce the Act in the United States. Still, even today, the Senate Foreign Relations Committee exercises jurisdiction over FARA in the Senate and several of the exemptions in the Act, including the diplomatic exemptions, are triggered by the State Department. **In considering these new regulations the Justice Department should ensure it adequately consults with the State Department’s Bureau of Democracy, Human Rights, and Labor, which has extensive experience with addressing these types of laws abroad. Such consultation will help ensure that the Justice Department properly internalizes the varied and nuanced U.S. foreign policy implications of FARA enforcement.**

Conclusion

The recommendations for regulations for FARA presented here will not address all the First Amendment defects with the Act. FARA suffers from a more fundamental problem of not being properly targeted, placing the same stigma and regulatory burdens on nonprofits trying to further human rights, humanitarian, or environmental goals by partnering with civil society abroad as paid lobbyists for foreign governments attempting to influence U.S. policymakers on sensitive U.S. national security issues. If enforced in this overbroad manner, this heavy-handed approach is not only bad policy, potentially doing significant unneeded harm to U.S. civil society, but also unconstitutional.

The Justice Department should adopt regulations to clarify vague provisions of the Act in a manner that better protects civil society and does not infringe the First Amendment. However, it should also use this opportunity to proactively engage in broader reform of the Act with both the White House and Congress so that going forward the Justice Department can enforce an Act that is better targeted to its goals and on more solid constitutional footing.

For any questions regarding this submission contact Nick Robinson at nrobinson@icnl.org. For more detailed analysis of FARA and its impact on civil society in the U.S. and globally see:

- International Center for Not-for-Profit Law, [Foreign Agents Registration Act resource page](#)
- Nick Robinson, [“Foreign Agents” in an Interconnected World: FARA and the Weaponization of Transparency](#), 69 DUKE LAW JOURNAL 175 (2020)
- International Center for Not-for-Profit Law, [FARA’s Double Life Abroad: How FARA is Used to Justify Laws that Target Civil Society around the World](#) (2021)