

FARA Congressional Testimony

Enhancing the Foreign Agents Registration Act of 1938

ORAL TESTIMONY OF

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PRESENTED TO

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CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**
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Good morning, Chairman Nadler, Ranking Member Jordan, and Members of the Subcommittee. My name is Nick Robinson. I am a Senior Legal Advisor at the International Center for Not-for-Profit Law (ICNL) where we work to create an appropriate legal environment for nonprofits in the U.S. and around the world.

Today, I want to highlight why the Foreign Agents Registration Act (FARA) needs to be better targeted. After the 2016 Presidential election, there was an understandable increase in concern about Russian and Chinese influence in U.S. politics. In response, some policymakers, including the Justice Department, turned to FARA as a potential answer. And to be clear, renewed focus on the Act has provided needed transparency around lobbying by foreign governments and has led to important prosecutions. However, as enforcement has ramped up, FARA's notoriously sweeping provisions have also increasingly interfered with the operations of nonprofits, businesses, religious institutions, and others with limited or no connection to a foreign government and in a manner that Congress never intended.

Civil society has been raising the alarm. Consider a recent open letter to the Justice Department signed by the ACLU, Americans for Prosperity, the NRDC, and other prominent nonprofits. It warns that "FARA's overbreadth and vagueness can undermine and chill First Amendment rights to speech and association and the statute has a history of being used to target undesirable expressive conduct."

While the Justice Department has in recent decades prioritized enforcement of the Act against lobbyists of foreign governments, the Act's provisions capture a dizzying array

of other Americans. For example, a U.S. nonprofit that arranges a public speaking event in Chicago at the request of a visiting Ukrainian pro-democracy advocate would arguably be required to register under the Act.

Nor are these concerns merely hypothetical. As the Justice Department has ramped up enforcement, it has demanded that a U.S. church register for printing out banners at the request of foreign congregants who came to Washington D.C. for the March for Life rally. Or the Justice Department required the National Wildlife Federation to register because it accepted money from the Norwegian government to work with U.S. multinational corporations on improving sustainability of product supply chains in certain tropical countries.

FARA's overbreadth provides the Justice Department the power to decide who will and will not be a "foreign agent" – a stigmatizing label that carries extensive reporting requirements and other burdens. Such power is ripe for abuse. For example, during the McCarthy era the Justice Department used FARA to prosecute W.E.B. DuBois, the renowned civil rights leader, for disseminating anti-war literature from a French nonprofit.

This overbreadth and vagueness also creates confusion about who needs to register. As I sometimes joke with colleagues, FARA has become a job creation scheme for high end DC law firms. While some can afford such expert counsel, most cannot.

Importantly, having such a broadly worded Act undercuts the Justice Department's ability to enforce it. Currently, the Department is distracted by registrants who are not their enforcement priority and they face the real prospect of the Act being challenged on First Amendment grounds, undermining their ability to enforce it against anyone.

I would respectfully urge Congress to take action. While there are many proposals to strengthen enforcement of the Act, the Act also needs to be better targeted. This should include three key pillars. First, fix the foreign principal definition. Currently, the Act's "foreign principal" definition makes no distinction whether one is an agent of the Chinese government or one's grandmother in Canada. This simply does not make sense. Second, clarify the agency definition. One can currently become an agent under the Act by acting at the "request" of a foreign principal. However, if I asked ten FARA experts what "request" means they would give me ten different answers. Third, better target the Act's covered activities. FARA has had success in making visible the lobbying of foreign governments, but its other benefits have been far less clear. Congress should review the broad, often outdated, set of activities that FARA currently covers to make sure that they are tailored to the purpose Congress is trying to accomplish with the Act.

Thank you for inviting me today and I'd be happy to answer any questions.