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FARA Congressional Testimony

Enhancing the Foreign Agents Registration Act of 1938

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APRIL 5, 2022

Introduction

The Foreign Agents Registration Act (FARA) needs to be fixed. After the 2016 Presidential election, there was increased concern about Russian and Chinese influence in U.S. politics. In response, some policymakers, including the Justice Department, understandably turned to FARA as a potential answer. This increased focus on the Act has provided needed transparency around lobbying by foreign governments and political parties and has led to recent high-profile prosecutions. However, FARA's notoriously sweeping provisions have increasingly interfered with the operations of nonprofits, businesses, media, religious institutions, universities, and others with limited or no connection to foreign governments in a manner that Congress never intended and that raises clear First Amendment concerns.

As FARA enforcement has increased, civil society has been raising alarm bells about the Act. For example, a recent open letter to the Justice Department signed by the ACLU, Americans for Prosperity, the NRDC, the Institute for Free Speech, and other prominent nonprofits warned that "FARA's overbreadth and vagueness can undermine and chill First Amendment rights to speech and association and the statute has a history of being used to target undesirable expressive conduct."[1]

While the Justice Department historically prioritized enforcement of the Act against lobbyists for foreign governments, FARA's language is, in fact, dizzyingly broad.

[1] See, Open Letter to Jennifer Kennedy Gellie, Chief FARA Unit (Feb. 11, 2022), available at https://www.regulations.gov/comment/DOJ-LA-2021-0006-0016

Consider the following scenarios that arguably require registration under the Justice Department's current interpretation of FARA:

- A U.S. nonprofit helps set up a public talk in Chicago at the request of a visiting pro-democracy advocate from Ukraine who is speaking on the humanitarian and political situation in the country.
- A former member of the U.S. military responds to the request of an Afghan refugee with whom they served in Afghanistan asking them to call their member of Congress about the U.S.'s refugee policy.
- A U.S. journalist writes a story about U.S. COVID policy at the request of their Canadian newspaper that is accessible online by the U.S. public.
- A U.S. volunteer distributes a small amount of funds collected from Canadian citizens who asked that it be used to help with hurricane relief in Florida.

Despite the seeming absurdity of the broad range of covered activity, many concerned about foreign influence have viewed FARA's wide scope as an advantage, allowing the government a relatively free hand to choose who to require to register. However, a combination of increased FARA enforcement, the politicization of FARA, the Justice Department's own advisory opinion system, and disagreement about what should be the Department's enforcement priorities has cast a spotlight on how unsustainable this arrangement actually is. Congress should amend the Act so that it is better targeted to clearly defined goals. Otherwise, it will continue to needlessly burden the public and distract the Justice Department from its traditional enforcement priorities, ultimately undermining enforcement of the Act.

A Short History of FARA

To understand our current predicament it is useful to briefly examine the history of the Act. FARA was enacted in 1938 to combat Nazi and communist propaganda. While ostensibly a transparency statute, in actuality the Act was used to stigmatize and mire in red tape German propaganda outlets, essentially shutting them down.[2] After World War II, during the McCarthy era, the Justice Department used the statute to prosecute W.E.B. DuBois, the renowned civil rights activist, for disseminating anti-war literature from a French nonprofit. The Justice Department's prosecution was motivated by DuBois' perceived communist sympathies and, although ultimately the charges were dismissed, his reputation never recovered in his lifetime. Following the prosecution of DuBois, FARA prosecutions declined dramatically and by the 1980s FARA was primarily used against lobbyists of foreign governments and political parties, and even for this more limited goal, it was widely seen as being underenforced.

[2] For more on the history of FARA and its enforcement, see generally, Nick Robinson, *"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE LAW JOURNAL 1075 (2020).

With a rise in concern about foreign influence, the Act has been going through an identity crisis, with disagreement about whether enforcement should focus solely on foreign government lobbying, or also foreign media networks, Confucius Institutes at universities, foreign funded think tanks, or foreign election influence. The problem is that the Act is both a poor fit for some of these concerns and strikingly sweeping, capturing much other conduct that most people would not think should be registrable.

When there was broad understanding that the Justice Department would focus FARA enforcement on foreign government lobbyists, few of the broad array of Americans potentially affected by the Act gave it much attention. However, as the Department has applied FARA in new areas this has created both uncertainty and spreading consternation.

Consider these registrations under FARA in the past few years:

- In response to a Justice Department advisory opinion, a U.S. church was required to register for printing out banners at the request of foreign congregants who came to Washington D.C. for the March for Life rally because the church was acting as a "publicity agent" under FARA.[3]
- On the basis of a Justice Department advisory opinion, the National Wildlife Federation was required to register because it accepted money from the Norwegian government to work with U.S. multinational corporations on improving sustainability of product supply chains in certain tropical countries and so the Department claimed engaged in "political activities" in the U.S.[4]
- Given increased political focus on FARA, EarthJustice registered for representing Greta Thunberg and other environmental youth activists for filing a petition on climate change before the U.N. Committee on the Rights of the Child, which involved issuing press releases and engaging in other media in the U.S.[5]

These and other registrations and advisory opinions have created uncertainty among many in the public about who needs to register under the Act. Further, with each advisory opinion, the Act, and its startling breadth, have become more widely known, triggering yet more requests for opinions, creating a spiral in which more and more Americans become ensnared in FARA's web.

[3] U.S. Justice Department Advisory Opinion (Nov. 19, 2019), available at https://www.justice.gov/nsd-fara/page/file/1232921/download
[4] U.S. Justice Department Advisory Opinion (March 13, 2020), available at https://www.justice.gov/nsd-fara/page/file/1287616/download. See also, National Wildlife Federation comment to Jennifer Kennedy Gellie, FARA Unit Chief (Feb. 10, 2022), available at https://www.regulations.gov/comment/DOJ-LA-2021-0006-0013
[5] All FARA filings are publicly searchable at www.fara.gov under "Browse Filings".

Understanding FARA's Breadth: Four Major Misperceptions

To appreciate FARA's breadth and vagueness it is useful to consider four common misperceptions about FARA. Under FARA, one must register if a person or organization within the U.S. engages in covered activity under the Act as an agent of a foreign principal. However, "covered activity", "agent", and "foreign principal" are all defined in broad terms, capturing a range of conduct that most who advocate for increased enforcement of the Act likely do not intend to capture.

1. WHO IS A FOREIGN PRINCIPAL?

Some observers believe that FARA is only targeted at the agents of foreign governments. However, a "foreign principal" under the Act includes not only foreign governments or political parties, but also foreign individuals, foundations, nonprofits, companies, and other entities. It even includes U.S. citizens domiciled abroad.[6] In other words, in defining foreign principal, the Act makes no distinction whether one is acting as an agent of the Chinese government or one's grandmother who lives in Canada.

2. COVERED ACTIVITY

Many believe FARA only applies to lobbying or electioneering activity. However, the Act covers a much broader array of activities, including:

- Attempting to influence "any section of the public within the United States" on U.S. domestic or foreign policy. "Any section of the public" includes two or more people.[7]
- Disseminating "information" in the U.S. with respect to "facts" of an organization or corporation based in another country.[8]
- Soliciting or disbursing anything of value within the United States.[9]
- "Informing" any other person about the domestic or foreign policies of the United States.[10]
- Disseminating written or visual information "of any kind".[11]

There are exemptions to registering under the Act. Most notably one does not have to register if one is engaged in "private and nonpolitical activities" in furtherance of "bona fide trade or commerce" or in activities in furtherance of "bona fide religious,

[6] See definition of "foreign principal" at 22 U.S.C. 611(b).
[7] See definition of "political activities" at 22 U.S.C. 611(o).
[8] See definition of "information service employee" at 22 U.S.C. 611(i).
[9] See 22 U.S.C. 611(c)(1)(iii).
[10] See definition of "political consultant" at 22 U.S.C. 611(p). The Justice Department has interpreted down the definition of political consultant in a July 19, 2021 advisory opinion, available at https://www.justice.gov/nsd-fara/page/file/1431306/download to also require an agent engage in "political activities", but this interpretation could be changed in the future.
[11] See definition of "publicity agent" at 22 U.S.C. 611(h).

scholastic, academic, or scientific pursuits or of the fine arts."[12] However, this still leaves a broad range of relatively uncontroversial activities as requiring registration under the Act.

Further, there is a longstanding debate about the meaning of "bona fide" for both the commercial exemption and the academic and religious exemption, leading to confusion for even these categories. For example, commercial actors are exempt from FARA for soliciting or disbursing funds for non-political activity in the United States, while the Justice Department provides no guidance exempting charities and other non-commercial actors for the same conduct.

3. FARA'S PRINCIPAL-AGENT RELATIONSHIP

FARA does not require a principal-agent relationship as commonly understood under caselaw or the Restatement of Agency. The relationship can be far more informal than many appreciate. An entity can be considered an "agent" even if the "agent" acts at the mere "request" of a foreign principal or is financed "in major part" by the foreign principal.[13] Both "request" and "major part" are undefined in the Act. This broad scope has made it difficult for the public to navigate. For example, the Justice Department has issued over 50 advisory opinions on the Act's "agency" definition alone.[14]

4. THE BURDEN IMPOSED BY FARA

While often thought of as simply a transparency statute, many are wary of registering under the Act because of the significant stigma that it brings. For example, most nonprofits pride themselves on being independent and acting in furtherance of their mission. Registering under FARA implies that not only are they acting under the control of others, but that those they are acting for are some nefarious "foreign" hand that requires providing details of the nonprofit's activities to the National Security Division of the U.S. Department of Justice.

Registration under the Act comes with significant burdens that can slow or stop nonprofits and others from engaging in beneficial activity. Registering under FARA requires that organizations, and impacted staff, file numerous forms and paperwork with the Justice Department, which require continuous updating. Willful failure to comply can lead to criminal penalties of up to five years in jail. The information filed with the Justice Department is then posted publicly and can frequently include sensitive information, including home addresses of the nonprofit's staff.

Many groups who have registered have had to retain outside legal counsel to guide them through the process and they have had to inform their board of directors and

[12] See 22 U.S.C. 613(d).
[13] See 22 U.S.C. 613(c)(1).
[14] See Justice Department, Advisory Opinions, available at https://www.justice.gov/nsd-fara/advisory-opinions

funders that they are planning to register. Senior management of organizations frequently have to negotiate with staff who are required to register who understandably fear that registering will bring stigma, an invasion of their privacy, and impact their future employment prospects.

More recently, Congress has linked access to government benefits to not being registered under the Act, meaning that those that do register can potentially lose access to critical government programs and funding.[15] Finally, those engaged in covered activity under FARA must label covered material with a "conspicuous statement" that the materials are distributed by the agent on behalf of a foreign principal.[16]

Given all these consequences of registering under FARA many nonprofit groups and others have simply decided not to engage in beneficial conduct for society out of fear that it may impose a registration burden. If enforcement of the Act is increased without at the same time better targeting the Act this problem will likely only become worse.

First Amendment Concerns Raised by FARA

FARA's overbreadth does not just create substantial burdens and confusion for a wide range of Americans, but it raises significant First Amendment concerns. Given the Act's striking breadth, the Justice Department can potentially pick and choose which of a wide range of Americans potentially ensnared in the Act that it will target for being a "foreign agent".

Besides concerns about selective enforcement, under the Court's current jurisprudence, the application of FARA's broad and vague provisions trigger at least three types of potential First Amendment issues:

1. **Compelled disclosure:** In *Americans for Prosperity Foundation v. Bonta* (2021), the U.S. Supreme Court found that when compelled disclosure laws impact the freedom of association of an organization that the underlying law must meet exacting scrutiny, and potentially strict scrutiny. FARA, like the law in question in *Bonta*, compels groups to disclose a wide variety of potentially sensitive information that can undermine their associational rights.
2. **Compelled speech**: In cases like *National Institute of Family & Life Advocates v. Becerra* (2018), the U.S. Supreme Court has struck down mandatory disclosure

[15] 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.
[16] See 22 U.S.C. 614(b).

requirements that can chill protected speech. In the case of FARA many civil society organizations have refrained from engaging in protected speech covered by FARA because of the Act's stigmatizing labeling requirement that frequently can mischaracterize the relationship between the registrant and the foreign principal.

3. **Discrimination against speakers:** In *Citizens United v. FEC* (2010), the U.S. Supreme Court found that in the context of political speech the government cannot "impose restrictions on certain disfavored speakers" and explicitly left open the question of whether the federal government could specifically regulate foreign speakers.[17] Under FARA, the speech of "agents of foreign principals" are significantly burdened in an untailored manner, meaning that FARA would likely face significant scrutiny by the Court if challenged for discriminating against certain speakers.

Without a course correction, FARA faces the very real prospect of being challenged for violating the First Amendment's protections for speech and association. While it is unlikely a court would rule the entire Act unconstitutional, the specter of ongoing litigation, which could strike down key parts of the Act, would both create confusion for those trying to comply and hamper the Justice Department's enforcement priorities. A much better path is for Congress to address this brewing crisis now by reforming FARA so as to use the least restrictive means available when it regulates protected First Amendment speech and conduct.[18]

Creating Negative Global Precedent

FARA not only has had adverse impacts for civil society in the United States, it also has had significant negative consequences for U.S. foreign policy interests abroad.

The Act has repeatedly been used to justify similar "foreign agent" type laws in other countries that have been used to target human rights, pro-democracy, and other local activists, as well as limit the ability of U.S. nonprofits to operate in these countries. For example, in 2020 Nicaragua enacted a "foreign agent" law that was in critical parts a verbatim copy of FARA and Sandinista lawmakers pointed directly to FARA when the U.S. State Department and others criticized this law as an attempt to silence voices in

[17] Citizens United v. FEC, 558 U.S. 310, 341 (2010).
[18] Notably, this submission does not address other potential serious constitutional challenges to FARA. For example, under 18 U.S.C. 219 it is a crime for a federal public employee to engage in covered activity under the Act in their personal capacity. Under current Justice Department interpretation of FARA if a federal employee printed out a banner at the request of a foreign member of their church coming to Washington D.C. for the March for Life rally the federal employee would need to register. As a result, the federal employee would be terminated from their employment and could face up to two years in prison. Such overly sweeping bans of expressive 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).

civil society.[19] 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.[20]

These more recent examples are part of a larger pattern. For instance, the Russian government has repeatedly claimed that its notorious "foreign agent" law, also purportedly simply a transparency law, is designed to achieve the same purpose as FARA in the U.S.[21]

In a global battle for democracy, the United States needs to provide a model of how to address foreign influence in a targeted manner. Instead, FARA's sweeping provisions are providing cover to autocrats to crack down on dissent.

Needed Reform

There is a growing chorus of voices calling on Congress to reform the Act, including a recent ABA taskforce report on FARA.[22] These proposed reforms include not only strengthening enforcement, but also at the same time better targeting the Act.

In considering reform, Congress should ask what types of foreign influence should be targeted by FARA and how the Act can be better tailored so as to achieve that purpose, while minimizing negative impacts on the U.S. public as well as speech and associational rights.

While FARA has provided needed transparency around foreign government lobbying, its other benefits have been far from clear. Congress should learn from this experience and consider targeting the Act so that it is aimed squarely at lobbyists for foreign governments and political parties. In particular, it should consider amending the Act so that:

- Only those who are acting as agents of foreign governments or political parties, or those operating on their behalf, must register under the Act.
- Only those who are in an actual agency relationship, as defined by the Restatement of Agency, must register under the Act.

[19] See, ICNL, FARA's DOUBLE LIFE ABROAD: HOW FARA IS USED TO JUSTIFY LAWS THAT TARGET CIVIL SOCIETY AROUND THE WORLD (2021), available at https://www.icnl.org/wp-content/uploads/FARA-Abroad-05.26.2021.pdf
[20] Tweet from President Nayib Bukele, Nov. 9, 2021, available at https://twitter.com/nayibbukele/status/1458254648595386372
[21] See, FARA's DOUBLE LIFE ABROAD, *supra* note 19.
[22] ABA, REPORT OF THE TASKFORCE ON THE FOREIGN AGENTS REGISTRATION ACT (July 16, 2021), available at https://www.politico.com/f/?id=0000017c-33cf-dddc-a77e-37df03770000

- Covered activity is limited to lobbying activity of policymakers or other discrete, narrowly tailored, activity that FARA is well designed to target.

If Congress wants to address other foreign influence problems, it should consider targeting those separately. For example, another part of the criminal code, which has been used to prosecute alleged spies, already makes it illegal to act as an undeclared "agent" of a foreign government.[23] Meanwhile, an array of statutes prohibit foreign funding or interference with electioneering activity in the U.S.,[24] the Higher Education Act requires higher educational institutions report gifts or contracts from a foreign source over $250,000,[25] and the FCC recently required that broadcasters disclose when foreign governments or their representatives lease time on their airwaves.[26] This is not to endorse all these alternative measures or claim they cannot be improved, but rather that addressing foreign influence in U.S. politics requires a nuanced, multi-faceted response.

In the end, Congress should target FARA to better tackle concrete problems of foreign influence in U.S. politics that it is well equipped to address compared to alternative measures.

Additional Resources:

- The text of the Foreign Agents Registration Act (FARA) and accompanying regulations is available on the Justice Department's FARA webpage
- Open Letter signed by ACLU, Americans for Prosperity, NRDC, and other prominent nonprofits warning about First Amendment concerns with FARA (Feb. 2022)
- Nick Robinson, *"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE LAW JOURNAL 1075 (2020)
- Nick Robinson, *Fixing the FARA Mess*, JUST SECURITY (March 16, 2022)
- ICNL, FARA'S DOUBLE LIFE ABROAD: HOW FARA IS USED TO JUSTIFY LAWS THAT TARGET CIVIL SOCIETY AROUND THE WORLD (2021)
- ICNL Foreign Agents Registration Act resource page.

[23] See 18 U.S.C. 951.
[24] Such bans include 52 U.S.C. § 30121(a) (2018); Federal Election Campaign Act of 1971, Pub. L. 94-283, 90 Stat. 496. 11 C.F.R. § 110.20(h) (2018).
[25] See Sec. 117 of Higher Education Act of 1965.
[26] https://www.fcc.gov/document/fccs-foreign-sponsorship-identification-rules-go-effect